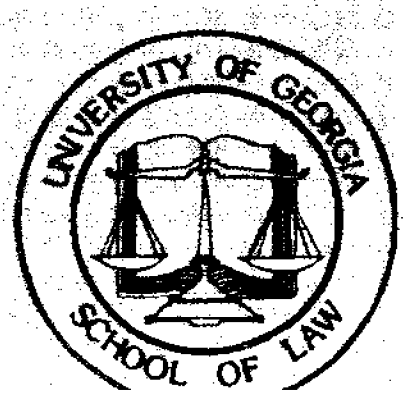
monograph
no. 1

The Dean Rusk Center

LAW OF THE SEA:
Federal-State Relations



This work was supported partially by Office of Sea Grant, NOAA, Department of Commerce, under Grant #04-7-158-44126.

THE LAW OF THE SEA, FEDERAL-STATE RELATIONS AND THE EXTENSION OF THE TERRITORIAL SEA

* * *

Prolegomena to an Experimental Politics

By
Milner S. Ball

This monograph is published as an occasional paper of the Dean Rusk Center for International and Comparative Law, located at the School of Law, University of Georgia, Athens, Georgia 30602. Through a unique integration of interdisciplinary expertise, the Center seeks to develop new knowledge on how laws and related institutions affect international trade, marine, and development activities, thereby promoting the efficiency of government action having international consequence.

(404) 542 7875

Preface

It seems apparent that the world community is in the early stages of major changes in the Law of the Sea. Hopefully, these changes will come about through multilateral treaties representing a broad consensus among nations. Failing that, one can expect a considerable variety of unilateral actions by individual states. We know further actions of this type are being contemplated by the United States in the absence of a general international treaty. These changes will raise many questions about federal-state relationships within our federal union. This monograph is designed to expose a range of such problems, with special attention to a prospective move from a three to a twelve mile territorial sea. It does not attempt to answer all the questions but to alert the reader to the scope and complexity of the issues soon to confront the American body politic.

Dean Rusk

August 24, 1978

Acknowledgements

One is always dependent upon others. In this instance Mr. Richard Carlson has made invaluable contributions in research and editing. Ms. Ann Dunn has gracefully provided necessary logistical support while Ms. Kristen Gustafson has brought the manuscript under control with great artistry. The Director of the Rusk Center, Professor Fredrick Huszagh, has shared freely his seemingly boundless energy and imagination.

This acknowledgement of dependencies fittingly includes a trio of Deans: Dean Ralph Beaird of the University of Georgia School of Law, who had the courage and vision requisite to the founding of the Center; Dean Russell Fairbanks and the faculty of the Rutgers-Camden Law School whose elegant exercise of good will made time for research available; and Dean Rusk whose intellect, openness and humanity are justly celebrated in new beginnings.

M.S.B.
August 24, 1978

The territorial sea of the United States is a political, legal and ecological phenomenon, absorbing in and of itself. It is also of immense interest for reasons which reach well beyond its geographical limits.

What follows may be taken as an argument that the territorial sea ought now formally to be expanded from three to twelve miles.

There is more at stake, however, than just an extension of boundaries, important though that is. This is so because the territorial sea is pivotal to other marine and coastal areas, potentially a model for other natural resources, a paradigm of the complexities of Federal-State relationships, and the occasion for an experiment in citizen involvement in hard governmental choices, including those related to energy and foreign affairs. Therefore, to the degree that these pages make an argument for expansion of the territorial sea, they do so en route, hopefully, to stimulating exploration of these other, implicated possibilities.

I. BACKGROUND[1]

The world community's interest in marine resources has increased in tandem with increasing needs and competition for food, oil and minerals. The United Nations Conference on the Law of the Sea (UNCLOS) has been meeting in formal sessions since 1973 in order to frame an international

---

[1] See generally, e.g., S. Brown, N. Cornell, L. Fabian, E. Weis, Regimes for the Ocean, Outer Space and Weather (1977); J. Colombos, The International Law of the Sea (6th ed. 1967); W. Friedmann, The Future of the Oceans (1971); Galey, Marine Environmental Affairs Bibliography (Law of the Sea Institute Special Publication No. 6, February 1977); H. Knight, The Law of the Sea (1975); P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927); M. McDougal & W. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (1962); T. Suher and K. Hennessy, State and Federal Jurisdictional Conflicts in the Regulation of United States Coastal Waters (University of North Carolina Sea Grant Program Publication UNC-S6-74-05, April 1974); Woodrow Wilson International Center for Scholars, Ocean Affairs Bibliography, Oceans Series 302 (1971); S. Swarztrauber, The Three-Mile Limit of Territorial Seas (1972); M. Whiteman, Digest of International Law (1965); E. Wenk, The Politics of the Ocean (1972); Freeman, "Law of the Continental Shelf and Ocean Resources--An Overview," 3 Cornell Int'l L. J. 105 (1974).

maritime regime.[2] The intractable problems of exploitation of the resources of the deep seabed have been the principal obstacles to success.[3]

Although completion of a comprehensive treaty still awaits satisfactory resolution of the seabeds matter, many items have already been tentatively agreed.[4] Numbered among the latter and embodied in the Conference's Informal Composite Negotiating Text (I.C.N.T.) are provisions for geographical limits on national jurisdiction in marine areas, including a twelve-mile territorial sea,[5] a 200-mile exclusive economic zone,[6]

---

[2] On December 21, 1968, the U.N. General Assembly created the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction. G.A. Res. 2467 A, 23 U.N. GAOR, Supp. (no.18)15. At the instance of Ambassador Arvid Pardo of Malta, see Knight, "The Draft United Nations Convention on the International Seabed Area: Background, Description and Some Preliminary Thoughts," 8 San Diego L. Rev. 459, 477-79 (1971), and in 1971, on the basis of the Committee's work, the General Assembly adopted a Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction. G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28). The first paragraph of this Declaration denominated the deep seabed and its resources as "the common heritage of mankind." At the same time, the General Assembly called for the convening of a Conference on the Law of the Sea in 1973. G.A. Res. 2750 C, 25 U.N. GAOR, Supp. (No. 28). Preparatory meetings for the Conference then began in 1971 under the direction of the Commttee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction.

[3] See Mink, Foreword to "Law of the Sea X," 15 San Diego L. Rev. 357 (1978).

[4] See, e.g., Id.; Charney, "Law of the Sea: Breaking the Deadlock," 55 Foreign Affairs 598 (1977); Darmen, "The Law of the Sea: Rethinking U.S. Interests," 56 Foreign Affairs 373 (1978); "Law of the Sea X," 15 San Diego L. Rev. 357 (1978); "Law of the Sea IX," 14 San Diego L. Rev. 507 (1977); "Law of the Sea VIII," 13 San Diego L. Rev. 483 (1976); Swing, "Who Will Own the Oceans?" 54 Foreign Affairs 527 (1976).

[5] Informal Composite Negotiating Text, Art. 3, U.N. Doc. A/CONF. 62/WP.10 (1977) [hereinafter cited as I.C.N.T.]. The legal and geographical zonation of the sea appears as illustrated in the appendix at p. 76 infra.

[6] Id., Art. 57.

and a continental shelf to the outer edge of the continental margin or a distance of 200 miles where the margin does not extend that far.[7]

The United States already claims a continental shelf,[8] and a 200-mile zone for certain fishery[9] and environmental purposes.[10] But it continues to claim a territorial sea of only three nautical miles.[11] A brief look at the history of legal zones in the sea will help to illuminate the fact that this three-mile limit is not and never has been the only possibility.

A. International

In Roman law, the sea and fish within it were common to all.[12] But the Romans were primarily interested in the Mediterranean Sea and, since their sovereignty extended over the whole of it, legally differentiated zones were not an issue.[13] During the Middle Ages, expanded

---

[7] Id., Art. 76.

[8] See pp. 8-9 infra.

[9] See note 49 infra.

[10] See note 69 infra.

[11] A nautical mile is about 1.15 statute miles and is a measurement of arc on the surface of the earth. It equals one minute of latitude or one-sixteenth of a degree. A marine league is three nautical miles.

[12] "Et quidem naturali jure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris." ("By the law of nature these things are common to mankind--the air, running water, the sea, and consequently the shores of the sea.") Justinian, Institutes, Lib. II, tit. I, at 90 (Sandars transl. 7th ed. 1962). See also, e.g., R.W. Lee, An Introduction to Roman-Dutch Law 125 (5th ed. 1961); Fenn, "Justinian and the Freedom of the Sea," 19 Am. J. Int'l L. 716 (1925); Gormley, "The Development and Subsequent Influence of the Roman Legal Norms of Freedom of the Seas," 40 U. Det. L. J. 561 (1962).

[13] See Freeman, "Law of the Continental Shelf and Ocean Resources--An Overview," 3 Cornell Int'l L. J. 105, 107 (1970).

horizons in combination with the growing naval interest and power of rival sovereigns led some nations to claim vast areas of the sea and finally produced the 1493 Papal Bull Inter Caetero and the Treaty of Tordecillas in 1494 which partitioned both land and sea in the new world between Portugal and Spain along a dividing line one hundred leagues west of the Cape Verde Islands.[14] The notion that the seas could be so appropriated was eventually abandoned, however, with the entry of Holland and England as naval, commercial powers and with the emergence of the concept of the freedom of the seas advanced by Hugo Grotius in Mare Liberum in 1609.[15]

The idea that adjacent waters are the territory of littoral nations may be viewed as either an exception to the freedom of the seas or as a confirmation of it (since the waters beyond the limited adjacent area are agreed as beyond national sovereignty and as free to navigation and fishing). In any event, a division between controlled territorial waters and open high seas was allowed even by Grotius' followers and early became a fixture in the law of the sea.[16]

What was not fixed was the breadth of the territorial sea. Included among the standards of measurement was the cannon shot rule, i.e., that the marginal sea was as broad as a cannon ball could be fired. This distance became equated with the three-mile limit before artillery actually had a range that great.[17] Another standard was line of sight,

---

[14] F. Davenport, European Treaties Bearing on the History of the United States and Its Dependencies to 1648, 56-63, 71-83 (papal bulls); 86-100 (Treaty of Tordecillas) (1967).

[15] See H. Grotius, Mare Liberium (1609). Grotius' position had initially been attacked on behalf of the English by John Selden. J. Selden, Mare Clausum (1635). The views of Grotius eventually prevailed. See, e.g., 1 Oppenheim, International Law, 584-86 (Lauterpacht 8th ed. 1955); Colombos, The International Law of the Sea, 49-51 (6th ed. 1967).

[16] See Freeman, supra note 12 at 109-10.

[17] S. Swarztrauber, supra note 1 at 23-35; Kent, "Historical Origins of the Three-Mile Limit," 48 Am. J. Int'l L. 537 (1954); Walker, "Territorial Waters: The Cannon Shot Rule," 22 Brit. Y. B. Int'l L. 210 (1945).

which patently varied with the height of the point of observation.[18] A third was the marine league.[19] The three-mile limit, whatever its origin, was preferred by the British who desired maximum naval mobility. The three-mile rule thus reached its zenith during the nineteenth century and virtual British naval hegemony.[20]

Three miles was never the sole rule, and as one commentator has correctly observed, "generally, prior to World War II there were no clear government positions on territorial waters, no attention to the 'continental shelf,' no authoritative international cases, no uniformity as to fishing claims, and no realization of the importance of a law of the sea to cover all these issues."[21] Since World War II, the development of the law of the sea has accelerated, spurred by the unilateral declarations of littoral nations following the 1945 Truman Proclamations on the continental shelf and on fisheries.[22]

B. United States

For the century and a half prior to the Truman Proclamations and the developments which they set in motion, the United States generally favored a three-mile territorial sea. The United States first applied the three-mile limit in 1793 when Secretary of State Thomas Jefferson delivered to the British and French Ministers notes claiming a three-

---

[18] S. Swarztrauber, supra note 1 at 36-43. The line of sight rule produced a measurement of 21 miles in England and France, 15 miles in Holland, and 14 miles in Scotland. Inter-American Judicial Committee, Opinion on the Breadth of the Sea, OAS/Official Doc., OEA/Ser.I/VI. 2, CIJ-80, at 5 (March 1966).

[19] Id. at 44-50.

[20] Id. at 64-88. The Scandinavian nations, the Mediterranean nations, Russia, and several Latin American nations rejected the three-mile rule. Inter-American Judicial Committee, supra note 18 at 6.

[21] Freeman, supra note 1 at 111.

[22] See p. 8 infra.

mile zone.[23] The following year Congress enacted a statute providing for federal district court jurisdiction of certain cases "within a marine league of the coast. . . ."[24] Then in an early circuit court case, Justice Story remarked that, as a matter of established international law, every nation had exclusive jurisdiction over adjacent waters for a marine league.[25] Later, during the Civil War, Secretary of State Seward argued, in opposition to Spanish insistence upon a six-mile limit off Cuba, that a three-mile limit was generally recognized by nations.[26]

In spite of its dominance, however, the three-mile limit was never an exclusive or inflexible boundary for the United States. According to one federal court, "[t]he line between territorial waters and the high seas is not like the boundary between us and a foreign power. There must be, it seems to me, a certain width of debatable waters adjacent to our coasts...."[27] They had been debatable from the start. Thus, in the notes first laying claim to a three-mile zone, Jefferson was careful to qualify it as "for the present," reserving the ultimate extent for future deliberation.[28] Moreover, John Quincy Adams reported that, as President, Jefferson had informally maintained, "the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary. . . ."[29]

---

[23] 1 Wait's State Papers 195-96 (1817); 1 Moore, International Law Digest 702-03 (1906); P. Jessup, supra note 1 at 7.

[24] Act of June 5, 1774, Ch. 50, 1 Stat. 381.

[25] The Brig Ann, 1 F. Cas. 926, 926 (C.C. Mass. 1812) (No. 397). See also Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804); Commonwealth v. Manchester, 152 Mass. 230, 240 (1890), aff'd sub. nom., Manchester v. Massachusetts, 139 U.S. 240, 258 (1891); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923).

[26] See 1 Moore, International Law Digest 706-13 (1906).

[27] The Grace and Ruby, 283 F. 475, 478 (D. Mass. 1922).

[28] See note 23 supra.

[29] 1 J.Q. Adams, Memoirs of John Quincy Adams, 375-76 (C.F. Adams ed. 1874). James Madison also thought a neutrality zone might be as wide as the Gulf Stream. 1 Kent, Commentaries on American Law 31 (11th ed. 1967).

It is to be noted that Jefferson spoke in terms of boundaries for a neutrality zone. He left open the possibility that for other purposes there might be other boundaries. That possibility has become reality.

A limit for fisheries was set at three miles in the Convention of 1818 between Great Britain and the United States.[30] More recently, however, the United States has extended fishery jurisdiction first to twelve and then to two hundred miles.[31] Jurisdiction for certain customs purposes was established in 1799 at a distance of four leagues,[32] and in 1935 at sixty-two miles.[33] With the passage of the eighteenth amendment and the resulting concern over liquor smuggling along the coasts, Congress provided for the enforcement of prohibition legislation also to the four-league mark.[34] Subsequent negotiations with Great Britain produced the "Liquor Treaty" of 1924 which provided for the boarding, search and seizure of offending vessels at a distance no greater than the suspected vessel could travel in one hour, a variable limit which might range from one to twenty or thirty miles depending upon vessel speed.[35] At the beginning of World War II, the American Republics issued the Declaration of Panama establishing a security zone which reached several hundred miles into the Atlantic and Pacific.[36] Following the war, the United States created Air

---

[30] Convention Respecting Fisheries, Boundary, and the Restoration of Slaves, October 20, 1818, United States-United Kingdom 8 Stats. 248, T.S. 112.

[31] See notes 48 and 49 infra.

[32] Act of March 2, 1799, Ch. 22 §§ 27, 54, 1 Stat. 627, 668.

[33] Anti-Smuggling Act of 1935, Pub. L. 74-238, 49 Stat. 517 (codified at 19 U.S.C. § 1701-1711 (1970)).

[34] Tariff Act of 1922, Pub. L. 67-318, 42 Stat. 858.

[35] Convention on Smuggling of Intoxicating Liquors, Jan. 23, 1924, United States-United Kingdom 43 Stat. 1761, T.S. 685.

[36] 1 Dept. State Bull. 331 (1939). See 7 Hackworth, Digest of International Law 702 (1943).

Defense Identification Zones whereby incoming aircraft receive clearance and make position reports when they are within two hours cruising distance of the coast.[37]

The point is that, notwithstanding the three-mile limit as a designation of territorial sea, the United States' seaward jurisdiction has actually expanded and contracted according to the purpose served. In a sense, certain purposes stretch American jurisdiction even into foreign waters. For example, Federal statutes may apply to crimes on American vessels on the high seas or foreign waters.[38] In United States v. Flores,[39] the Supreme Court allowed for an indictment charging one American with the murder of another on an American merchant vessel anchored in the Congo River two hundred and fifty miles up river from the sea.

C. Recent Past

The modern history of the law of the sea may be dated from the two Truman Proclamations of 1945. The first proclamation concerned "Natural Resources of the Subsoil and Sea Bed of the Continental Shelf."[40] It declared that the United States regards the continental shelf contiguous to its coasts "as appertaining to the United States, subject to its jurisdiction and control."[41] The high seas character of the superjacent

---

[37] 15 Fed. Reg. 9319 (1950). See Note, "Air Defense Identification Zones," 4 N.Y.L.F. 365 (1958).

[38] 18 U.S.C. § 7 (1976).

[39] 289 U.S. 137 (1933).

[40] Presidential Proclamation 2667, 3 C.F.R. 67 (1943-48 Comp.), reprinted in 59 Stat. 884 (1945). See generally, e.g., 4 Whiteman, International Law 740-931 (1965); Hollick, "U.S. Oceans Policy: The Truman Proclamations," 17 Va. J. Int'l L. 23 (1976).

[41] "[T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Presidential Proclamation 2667, supra note 40.

waters was specifically noted as unaffected by the proclamation.[42] Navigation of these waters was thus to continue free and unimpeded. No definition was given for the continental shelf and its seaward bounds, but an accompanying press release set the outer limit at the 100-fathom (600-foot) depth.[43] The Secretary of the Interior put the breadth of the shelf so understood at varying distances of from 20 to 250 miles on the east coast and from 1 to 50 on the west.[44]

The other Truman Proclamation dealt with "Coastal Fisheries in Certain Areas of the High Seas."[45] This proclamation stated that the United States regarded it as proper to establish fishery conservation zones off its shores, and again the proviso was added that free navigation of the included waters would not be affected. Although reference was made to the creation of "explicitly bounded" areas in the contiguous high seas, no specific limits were set.[46] (Fishery limits were created

---

[42] "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." Id.

[43] White House Press Release, Sept. 28, 1945, 13 Dept. State Bull. 484 (1945).

[44] Annual Report of the Secretary of the Interior, Fiscal Year Ended June 30, 1945, pp. ix-x, quoted in 4 Whiteman, International Law 760 (1965). The Proclamation was later "ratified" by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970). See notes 100 and 101 infra and accompanying text.

[45] Presidential Proclamation 2668, 3 C.F.R. 68 (1943-48 Comp.), reprinted in 59 Stat. 885 (1945). See generally, e.g., 4 Whiteman, International Law 945-62 (1965); Allen, "Fishery Proclamation of 1945," 45 Am. J. Int'l L. 177 (1951).

[46] "[T]he Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." Presidential Proclamation 2668, 10 Fed. Reg. 12304, reprinted in 59 Stat. 885 (1945).

some years later but not in implementation of the proclamation on fishing. The Bartlett Act of 1964[47] prohibited foreign vessels from taking the sedentary living resources of the continental shelf out to a depth of 200 meters. In 1966 a twelve-mile fishery zone was created.[48] And in 1976 Congress extended the fishery conservation zone out to 200 miles.[49])

The Truman Proclamations initiated a period of expansionist seaward claims by other nations. Some Latin American countries, for example, declared that their control extended to the 200-mile limit.[50]

The United Nations convened a conference in Geneva in 1958 to examine the law of the sea. This conference adopted a series of four conventions: on the Territorial Sea and the Contiguous Zone,[51] the

---

[47] Pub. L. 88-308, 78 Stat. 194 (repealed 1976). Conservation of continental shelf fisheries is continued under the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1812 (1976).

[48] Act of October 14, 1966, Pub. L. 89-658, 80 Stat. 908 (repealed 1976).

[49] Fishery Conservation and Management Act of 1976, tit.I, § 101, Pub. L. 94-265, 90 Stat. 336 (codified at 16 U.S.C. § 1811 (1976)).

[50] See 51 U.S. Naval War College, International Law Situations and Documents 1956, 265 (1957); K. Hjertonsson, The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea 20-24 (1973).

The American delegation to the Santiago Negotiations in 1955 argued that the Truman Proclamation (on conservation) was not intended to serve as a unilateral assertion of exclusive jurisdiction, but was preliminary to future bilateral agreements, and was thus not a precedent for the declarations of Peru, Chile and Ecuador. 33 Dept. State Bull. 1025 (1939).

[51] Convention on the Territorial Sea and Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964). Although the breadth of the territorial sea is not specified, this convention established the sovereign rights of nations to belts of adjacent waters and the airspace above along with the soil beneath; the baseline from which it could be measured; and the right of innocent passage.

The convention also provided for "contiguous zones." Article 24 provides in part:

> (1) In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

High Seas,[52] Fishing and Conservation of the Living Resources of the High Seas,[53] and the Continental Shelf.[54] These conventions restated existing law, but the conferees were unable to resolve a number of contested points even after a second Geneva Conference in 1960.[55] Among the

---

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

(2) The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

Id. The idea of a contiguous zone gives legal expression to the long-standing practice of nations in the exercise of extraterritorial jurisdiction for some purposes. See p. 7 supra. The term "contiguous zone" came into official use with the Hague Conference of 1930, a conference convened under the auspices of the League of Nations to codify the law of the sea. See generally, Swarztrauber supra note 1 at 132-40.

[52] Convention on the High Seas, done April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962). The preamble of this convention states that it was adopted "as generally declaratory of established principles of international law." Under Article 2, the freedom of the high seas comprises freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas. The high seas are defined to be those waters beyond the territorial and internal waters of nations. The freedoms of the high seas are to be exercised with reasonable regard for the rights of other nations.

[53] Convention on Fishing and Conservation of the Living Resources of the High Seas, done April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (effective March 20, 1966). High seas fishing is typically regulated by agreements.

[54] Convention on the Continental Shelf, done April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964). The convention provides for coastal national sovereignty over the continental shelf for the purpose of exploring it and exploiting its resources, but this sovereignty over the bed does not affect the legal status of the superjacent waters.

In the course of its decision in the North Sea Continental Shelf Cases, the International Court of Justice observed the doctrine of the continental shelf as a rule of customary law. [1969] I.C.J. 3, 22.

[55] See G.A. Res. 1307, 13 U.N. GAOR, Supp. (No. 18) 54, U.N. Doc. A/L. 253 (1958); Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas," 54 Am. J. Int'l L. 751 (1960).

unanswered questions were those of boundaries.

There was no agreement on the limits of the territorial sea, and the Convention on the Territorial Sea designates none.[56] The Convention on the Continental Shelf, on the other hand, did define the areas of national jurisdiction as the:

> seabed and subsoil of the submarine areas adjacent to the coast but outside the areas of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.[57]

The 200-meter isobath is a fixed measure, but the concept of exploitability, also allowed by this definition, is not. It could be argued that increasing technological capability to exploit the resources of the ocean floor at ever greater depths could mean the expansion of national sovereignty over the entire sea bed.[58] The Convention on Fishing called for negotiated agreements on conservation among nations fishing the same stocks in the same areas of the high seas and recognized the special fisheries interest of coastal nations to areas of the high seas adjacent to their territorial waters.[59] But, like the Truman Proclamation, it did not designate specific boundaries for such areas.[60]

---

[56] Convention on the Territorial Sea, supra note 51. Articles 3 and 4 provide for the baseline from which a territorial sea may be measured. All that Article 6 specifies for the seaward distance of the territorial sea is that "[t]he outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea." Id.

[57] Convention on the Continental Shelf, supra note 54, Art. 1.

[58] See, e.g., Oda, International Control of Sea Resources 167 (1963). See also Brown, "The Outer Limit of the Continental Shelf," 1968 Jurid. Rev. 111 (1968).

[59] Convention on Fishing and Conservation of the Living Resources of the High Seas, supra note 53, Art. 4, 6.

[60] Id.

The growing pressure to find answers to the questions left open at Geneva and potential exploitation of the resources of the seabed beyond national jurisdiction precipitated the current United Nations Conference on the Law of the Sea. As previously noted,[61] the present conference Negotiating Text reflects considerable consensus on some clarifying points.

With respect to the continental shelf, the Negotiating Text replaces the 200-meter isobath and exploitability tests of limitation. Article 76 defines the continental shelf as the seabed extending "throughout the natural prolongation of [a coastal nation's] land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles. . . where the outer edge of the continental margin does not extend up to that distance."[62] The 200-mile limit, like the former 200-meter isobath standard, is fixed. But the "outer edge of the continental margin" is not a geologically certain measure except that its outermost reach is short of the deep seabed.[63] The 200-mile rule would allow the United States to extend its continental shelf, especially off the west coast, where the present 200-meter isobath or 100-fathom standard demarcate a continental shelf short of 200 miles.

In addition to the revised rules for the continental shelf, the text also provides for an "Exclusive Economic Zone," which, in conformity with the rules for the continental shelf, extends from the territorial sea out to the 200-mile limit.[64] Within this area, all nations enjoy the freedoms of the high seas, including navigation,overflight and

---

[61] See notes 4-7 and accompanying text supra.

[62] I.C.N.T., supra note 5, Art. 76.

[63] See, e.g., Hedberg, "Relations of Political Boundaries on the Ocean Floor to the Continental Margin," 17 Va. J. Int'l L. 57 (1976). It would seem to be clear that national sovereignty is not to be extended to the bed of the high seas area. Not only has Resolution 2749, supra note 2, declared the seabed beyond national jurisdiction to be the common heritage of mankind, but also the I.C.N.T. speaks of the "Area" defined as "the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction." I.C.N.T., supra note 5, Art. 1(1).

[64] Id., Art. 57.

laying submarine cable and pipelines,[65] and the adjacent coastal nation is to have due regard for these rights.[66] The adjacent coastal nation retains:

> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction. . . with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the preservation of the marine environment. . . .[67]

There is no basic conflict between these rights and jurisdiction and present American claims to a 200-mile fishery zone. If anything, the UNCLOS text, if it becomes law, would appear to give more than the United States now claims. Thus, the exclusive economic zone rights would seem to support current American practices in fishery conservation[68] and environmental

---

[65] Id., Art. 58.

[66] Id., Art. 56(2).

[67] Id., Art. 56.

[68] The I.C.N.T. spells out the permissible measures as follows:

> Article 61
>
> (1) The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
>
> (2) The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.

Article 62

(2) Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements . . . give other States access to the surplus of the allowable catch.

. . . .

(4) Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the regulations of the coastal State. . . . I.C.N.T., supra note 5.

In 1976 the Congress enacted the Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1976) which created a fishery conservation zone with a seaward limit of 200 miles. 16 U.S.C. § 1811 (1976). Within this zone fisheries are to be conserved and managed to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1851(a)(1)(1976). Foreign fishing in the zone may be conducted pursuant to international fishery agreements. 16 U.S.C. §§ 1821-1824 (1976). The total allowable level of foreign fishing is "that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States . . . ." 16 U.S.C. § 1821(d) (1976).

There may be some discrepancy between the I.C.N.T. and the F.C.M.A. regarding management of anadromous species. The F.C.M.A. provides for the United States to exercise "exclusive fishery management authority" over "[a]ll anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone. . . ." 16 U.S.C. § 1812(2)(1976). Article 66 of the I.C.N.T. provides:

(1) States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

(2) The State or origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landwards of the outer limits of its exclusive economic zone and for fishing provided for in sub-paragraph (b) of paragraph 3. The State of origin may, after consultation with other States fishing these stocks, establish total allowable catches for stocks originating in its rivers.

(3)(a) Fisheries for anadromous stocks shall be conducted only in the waters landwards of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin.

(b) The State of origin shall cooperate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

(c) States referred to in subparagraph (b), participating

protection[69] and they would seem to grant authority for additional activities such as energy production from the water and construction of artificial islands not connected with exploitation of the continental shelf.[70]

---

by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

(4) In cases where anadromous stocks migrate into or through the waters landwards of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall cooperate with the State of origin with regard to the conservation and management of such stocks.

(5) The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations. I.C.N.T., supra note 5 (emphasis added).

On the international implications of the F.C.M.A., see Note, "International Ramifications of the Fisheries Conservation and Management Act of 1976," 7 Ga. J. Int'l & Comp. L. 133 (1977). On the provisions for anadromous species, see Alaska Position on International Fisheries Management with Special Reference to the Revised Single Negotiating Text of the United Nations Conference on the Law of the Sea 51-55 (1977). For discussion of the conflict between F.C.M.A. and the Law of the Sea Convention, see Jacobson and Cameron, "Potential Conflicts Between a Future Law of the Sea Treaty and the Fishery Conservation and Management Act of 1976," 52 Wash. L. Rev. 451 (1977).

[69] The 1977 amendments to the Federal Water Pollution Control Act extended certain of that Act's oil and hazardous spill provisions from the 12 to the 200-mile limit. Act of Dec. 27, 1977, Pub. L. No. 95-217 §58(a)-(c), 91 Stat. 1593.

In addition, the Environmental Protection Agency has announced its intention of enforcing regulations under the Clean Air Act to activities related to exploitation of the resources of the continental shelf. Notice of Final Determination of Applicability of the Clean Air Act to Exxon Corporation's Platform Hondo, 43 Fed. Reg. 16393 (1978).

The proposed 1978 amendments to the Outer Continental Shelf Lands Act have spawned considerable debate over the desirability and proper scope of Federal or State environmental regulation on the continental shelf. See, e.g., [1978] 8 Envir. Rep. (BNA) 54, 323, 799, 1465.

[70] "Offshore islands and other man-made coastal installations are proving to be very much in demand, if not necessary, in urbanized coastal

A twelve-mile territorial sea in addition to the 200-mile continental shelf and economic zone, of course, would expand the present United States three-mile sea. At the 1958 and 1960 Geneva Conferences, the United States had proposed a six-mile territorial sea with a six-mile contiguous zone.[71] Upon the failure of the proposal, the United States announced that it had been no more than a compromise which did not alter the United States' view of three miles as the international rule.[72]

Notwithstanding the fact that the United States claims a three-mile territorial sea and has defended it as international law, the twelve-mile figure does have American precedent. As previously noted, for example, in the eighteenth century, customs jurisdiction was set out to twelve miles.[73] The American activity in the context of enforcing prohibition legislation against foreign ships which has also been noted previously led to the belief, among the British in any event, that such activity was prefatory to the adoption of a twelve-mile territorial sea.[74]

Although the 1958 Geneva Conference failed to agree on a territorial sea breadth, it did establish a twelve-mile contiguous zone.[75] The

---

areas. There have been a vast variety of such structures and installations proposed for continental shelf areas, including airports, floating cities and hotels." Krueger, "An Evaluation of United States Oceans Policy," 17 McGill L.J. 603, 668 n.219 (1970). Should the UNCLOS provisions be adopted, "it would be the first time that such structures were clearly authorized under international law when used for purposes other than the exploitation of seabed resources." Krueger, "An Overview of Changes Occurring in the Law of the Sea--Implications for Federal-State Relations," 10 Nat. Resources L. 225, 233 (1977).

[71] Dean, "The Geneva Conference on the Law of the Sea: What Was Accomplished," 52 Am. J. Int'l L. 607 (1958); Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas," 54 Am. J. Int'l L. 751 (1960).

[72] S. Swarztrauber, supra note 1 at 217.

[73] Supra note 32.

[74] S. Swarztrauber, supra note 1 at 143.

[75] See note 49 supra.

United States has exercised jurisdiction for some purposes within this belt: oil and hazardous spill regulations under water pollution control legislation;[76] and the already noted twelve-mile fishery zone.[77]

Subject to suitable arrangements for passage of straits, the Navy began in 1966 to withdraw its traditional objections to the expanded territorial limits.[78] Moreover, the United States, by a kind of self-denying ordinance whereby it grants to others what it denies to itself, has observed the twelve-mile limit claimed by other sovereigns.[79] And in anticipation of the present Conference on the Law of the Sea, this country turned to support of the twelve-mile limit so long as it was accompanied by unimpeded passage through straits.[80]

II. CONSEQUENCES OF A SEA CHANGE

A. International

If the United States were to extend its territorial sea from three to twelve miles, there would not likely be significant international

---

[76] 33 U.S.C. § 1321(a)(9), (b)(1) and (2) (Supp. 1972).

[77] See note 48 supra.

[78] Carlisle, "The Three-Mile Limit: Obsolete Concept?" 93 U.S. Naval Inst. Proc. 24, (1967). See S. Swarztrauber, supra note 1 at 242; Hedman, "The U.S. Position on the Breadth of the Territorial Sea: National Security and Beyond," Some Current Sea Law Problems 14, 17 (Wurfel ed. 1975).

[79] The United States has observed the 12-mile limits claimed by both Russia and China. See S. Swarztrauber, supra note 1 at 237. And the Pueblo had been instructed to sail no closer than 13 miles to the coast of North Korea before it was seized in 1968. L. Bucher, Bucher: My Story 180-81, 420-21 (1970).

[80] Statement by the President on Oceans Policy, White House Press Release, May 23, 1970; "U.S. Foreign Policy for the 1970's: Shaping a Durable Peace," 68 Dep't State Bull. 826 (1973); Speech of Ambassador John R. Stevenson before the Plenary Session of the Law of the Sea Conference, July 11, 1974, 120 Cong. Rec. S24003 (1974); 65 Dep't State Bull. 261 (1971).

repercussions. The three-mile limit has spent its force as an international rule. The twelve-mile margin is embodied in the UNCLOS Negotiating Text, and in the event this distance did not become fixed in a treaty it might become the rule nonetheless.[81] Some ninety of one hundred nineteen coastal nations already claim territorial seas broader than three miles.[82] Of these, fifty claim twelve miles, thirty claim more, and the rest between three and twelve.[83]

If American action or simply growing practice did lead all coastal nations to move territorial boundaries to the twelve-mile limit, then the chief problem would be that of military and commercial passage of straits. There are one hundred forty straits in use by shipping. One hundred sixteen would be overlapped by a twelve-mile territorial sea.[84] Among them would be most of the thirty-five straits used by American ships, including Dover and Gibraltar, which account for a considerable proportion in trade dollars.[85]

The UNCLOS has developed a new and satisfactory rule for straits embraced by territorial seas. Its solution, embodied in the Negotiating Text, is to provide for "transit passage" through straits "which are used for international navigation between one area of the high seas

---

[81] Arthur Dean had noted: "There is opinion . . . to the effect that, if agreement is not achieved at the next conference . . ., the individual practice of states may in time, tend to establish a territorial sea of twelve miles." 42 Dep't State Bull. 251, 259 (1947). See also M. McDougal and W. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea 558 (1962). One observer suggests that, even without a final agreement by the UNCLOS, the Negotiating Text may survive as an authoritative expression of international law. H. Knight, Consequences of Non-Agreement at the Third U.N. Law of the Sea Conference 23-24 (1976).

[82] Interview, Office of Geographer, U.S. Dept. of State, June 13, 1978.

[83] Id.

[84] Brown, "Maritime Zones: A Survey of Claims," in 3 New Directions in the Law of the Sea 157, 162 (R. Churchill, K. Simmonds, J. Welch, eds., 1973); U.S. Dep't State, Geographic Bull. No. 3, Sovereignty of the Sea 22-27 (1969).

[85] D. Logue and R. Sweeney, Economics and the Law of the Sea Negotiations 20 (IIER Original Paper 6, 1977).

or an exclusive economic zone and another area of the high seas or an exclusive economic zone."[86] "Transit passage" is defined as the exercise "of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit."[87]

Nations bordering straits may make laws and regulations relating to transit passage which may include safety and traffic regulations, pollution control, prevention of fishing, and enforcement of customs and immigration regulations.[88] But the Negotiating Text also provides that the adjacent nation's measures "shall not discriminate in form or in fact amongst foreign ships" or "have the practical effect of denying, hampering or impairing the right of transit passage."[89]

Should the transit passage rule for straits not become fixed in a comprehensive UN treaty, the United States could announce it as nevertheless applying to those straits which would be affected by an American extension of territorial waters. (Of the several straits which would be affected and which are used by shipping, the principal ones are the Bering Strait, the Kaiwi Channel in Hawaii, and the Unimak Pass in the Aleutians. The Strait of Juan de Fuca connects Puget Sound and the Pacific Ocean. There are some ten other affected straits which do not fall along major shipping lanes.[90]) Reciprocal treatment of their own straits by other nations would not be unexpected, and American shipping would then be largely unaffected.

Even the total failure of the "transit passage" rule might not be a fatal blow. Under the practices which are presently possible in territorial seas and which would apply to straits overlapped by extended

---

[86] I.C.N.T., supra note 5, Art. 37.

[87] Id., Art. 38.

[88] Id., Art. 42.

[89] Id., Art. 42.

[90] Office of the Geographer, Dept. of State, World Straits Affected by a 12 Mile Territorial Sea (Map 510376 2-71); Id., World Shipping Lanes (Map 562102 12-73). See also 3 New Directions in the Law of the Sea 162 (Lay, Churchill and Nordquist, eds. 1969).

limits, shipping would be subject to one of four choices by the nations adjacent to straits. One option would simply be to allow free transit. This might even be the generally followed alternative since it would ultimately serve the interests of the bordering nations. Another choice would be to allow innocent passage, the rule adopted by the 1958 Geneva Conference.[91] Although Russia and China have refused to recognize the

---

[91] The Convention on the Territorial Sea and Contiguous Zone provides:

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea. . . .

. . . .

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

. . . .

Article 16

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent. . . .

. . . .

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

. . . .

Article 23

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.

Convention on the Territorial Sea, supra note 51.

right of warships to innocent passage of their territorial waters, both already claim twelve-mile territorial seas. Because the United States has observed their proclaimed limits,[93] an extension of territorial waters from three to twelve miles would not alter present practice. Where there is no absolute prohibition against warships, a particular attempt to navigate territorial waters may nevertheless be deemed not innocent and so not permitted by the bordering nation.[94] Also, submarines in territorial waters must surface and show their flag.[95]

The third and fourth choices, at least hypothetically possible, are charging tolls for passage and closure--the denial of passage. Bilateral

---

Prior to the Geneva convention, the International Court of Justice had decided the Corfu Channel case and held

> that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent.

(1949) I.C.J. 4, 28, reprinted in 43 Am. J. Int'l L. 558, 576 (1949). See generally, e.g., Note, "Passage through International Straits: Free or Innocent? The Interests at Stake," 11 San Diego L. Rev. 815 (1974).

The I.C.N.T. continues the innocent passage rule. I.C.N.T., supra note 5, Art. 38.

[92] M. McDougal and W. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea 1180 (1962) (Russia). 3 Int'l Legal Materials 926 (1964) (China). The question generally of whether warships are by definition not innocent remains open as a matter of international law.

[93] See note 79 supra.

[94] See note 91 supra.

[95] See note 91 supra. This requirement has caused concern among some military strategists. If strategic straits are overlapped by territorial sea, secret submarine movements would become increasingly difficult. However, one commentator has noted that few critical straits are likely to be affected (many straits being held by allies) and that modern military technology has lessened the importance of submerged passage through traditional submarine routes. R. Osgood, "U.S. Security Interests in Ocean Law," 2 Ocean Development and International Law, 1, 11-15 (1974); Janis, Sea Power and the Law of the Sea, 7 (1976).

agreements for transit are always possible.[96] In a word, no foreseeable consequence of general expansion of territorial seas to twelve miles would cripple American shipping.

B. Domestic

The immediate effects of a change in boundaries would be domestic rather than international. A series of choices would be precipitated. These may be briefly summarized as follows:

1. Jurisdiction. One decision that would have to be made is that about jurisdiction. Would the new nine-mile stretch of water and the underlying bed belong to the Federal government or the adjacent coastal States or both?

If it is assumed that past and existing commitments (leases, for example) within the three to twelve mile area ought not to be disturbed, there still remains the question of exploitation and preservation of resources in the future. There is theoretical as well as practical support for either Federal or State prerogative in the power of disposition.

On the Federal side arguments could be advanced that the interest of inland States and of all citizens, the history of the sea as of national strategic importance, as well as greater naval and administrative capacity, weigh in favor of Federal control.

On behalf of the States, it could be maintained that leaner, more responsive agencies, closer familiarity with daily, mundane marine-

---

[96] It has been argued that the value of free transit of straits is not so great to American shipping as to warrant making concessions in negotiations on revenue sharing or an international regulatory authority for the oceans. D. Logue and R. Sweeney, Economics and the Law of the Sea 19-22, 31-33 (International Institute for Economic Research Original Paper no. 6, 1975). See generally, Cundick, "International Straits: The Right of Access," 5 Ga. J. Int'l & Comp. L. 107 (1975).

During the course of the UNCLOS the United States has engaged in discussions with straits states in search of a workable compromise. Absent a final agreement on the status of the straits, these discussions could serve as a basis for bilateral agreements. H. Knight, Consequences of Non-Agreement at the Third UN Law of the Sea Conference 50 (1976).

related affairs, and a diversity of local concerns render the States the preferred government to exercise authority over an expanded territorial sea.

2. Distribution of Revenue. Another basic decision analytically separate from the jurisdictional issue is that of distribution of income generated by exploitation of the resources of the territorial sea: who gets how much for what purpose. The division of revenue from activities on the outer continental shelf has been a matter of contention.

If a satisfactory formula for distribution is fashioned, should the monies be earmarked for designated purposes? Such funds could be restricted in a variety of ways. They might, for example, be limited to marine and environmental ends. Or, the funds could be deposited in the treasury to meet general obligations.

3. Legal and Managerial Problems. Policing and regulation of an expanded territorial sea is another subject of minimally necessary action. Enforcement might pose considerable difficulties for those States which lack the equipment and personnel for it. But this incapacity ought not in itself preclude State jurisdiction if other factors weighed in favor of it. For example, there is no reason in theory why each coastal State could not contract with the Federal government for such policing and administrative needs as it finds necessary (the converse of those arrangements whereby the United States contracts with the States for the policing of certain Federal lands). Or, management might be made a function of interstate agreements. The point is that this is a matter for planning and decision.

III. THE LEGAL CONTEXT FOR DECISION

The foregoing brief summary of questions indicates the kind of domestic decision-making which would be necessary in consequence of a change in the boundaries of the territorial sea. There is a given legal setting for the choices to be made.

A. Jurisdiction

The 1945 Truman Proclamation was accompanied by a press release which explained that the declared policy "does not touch upon the question of Federal versus State control."[97] Two years later the Supreme Court did touch upon this question and held in United States v. California[98] that the Federal government had "paramount rights" in the territorial sea, a decision which the Court was shortly to confirm.[99] However, in 1953 Congress passed the Submerged Lands Act which established coastal States' boundaries at the three-mile limit, and ceded to the States title to the corresponding lands beneath these waters.[100] Later the same year, it

---

[97] White House Press Release, Sept. 28, 1945, 13 Dept. State Bull. 484. The statement was not incidental. It had been the subject of explicit attention. See Memorandum from Sec. of Interior Ickes to Pres. Roosevelt, 1945 vol. 2 Foreign Relations 1481; Memorandum from Sec. of Interior Ickes to Pres. Truman, 1945 vol. 2 Foreign Relations 1504 n. 45 (queries and opinions of, apparently, Pres. Truman); Memorandum from Eugene Dooman to Assistant Sec. of State Acheson, 1945 vol. 2 Foreign Relations 1509 n. 50; Memorandum from Sec. of Interior Fortas to Sec. of State Acheson.

[98] 332 U.S. 19 (1947).

[99] See United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). In United States v. Maine, 420 U.S. 515 (1975), the Court observed that, in the Submerged Lands Act, "Congress transferred to the States the rights to the seabed underlying the marginal sea; however, this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority." Id. at 515, 524.

[100] Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1303, 1311-1315 (1970). Section 1312, after providing for the three-mile boundary, added:

> nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it had been heretofore approved by Congress.

The Supreme Court held that, for the domestic purposes of the Submerged Lands Act, Texas and Florida are entitled to a territorial sea of three

passed a companion act, the Outer Continental Shelf Lands Act which codified United States jurisdiction over the continental shelf and established the submerged lands of the shelf seaward of the territorial sea limit as

---

leagues along the Gulf of Mexico. United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960). Texas is entitled to a three-league boundary because of an historical claim recognized upon its admission to the Union in 1845. United States v. Louisiana, 363 U.S. 1, 36-65 (1960). Florida was found entitled to a three-league boundary in the Gulf by virtue of Article 1 of Florida's Constitution of 1868, approved by Congress upon the State's readmission during the Reconstruction. United States v. Florida, 363 U.S. 121 (1960).

One of the problems in the measurement of the territorial sea is that of the location of the shoreward baseline from which the seaward extent is to be measured. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, supra note 51, provides that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast. . . ." Id., Art. 3. Where, however, the coastline is deeply indented, the Convention provides for "the method of straight baselines joining appropriate points. . ." Id., Art. 4(1). Such baselines "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." Id., Art. 4(2). "Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." Id., Art. 5(1).

The Submerged Lands Act defined "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. . . ." 43 U.S.C. § 1301(c). The question of what constitutes inland waters was addressed in United States v. California, 381 U.S. 139 (1965). There the Court adopted the provisions of the Geneva Convention for the purposes of the Submerged Lands Act. Id. at 165. It did not, however, apply the straight baseline form of measurement permitted by the Convention since the Federal government had not employed it. Id. at 167-69.

The I.C.N.T., supra note 5, follows the Geneva Convention with respect to normal baselines, Id., Art. 5, and straight baselines, Id., Art. 7. With respect to the latter, it adds:

> [w]here because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, such baselines shall remain effective until changed by the coastal State. . . .

an area of exclusive Federal jurisdiction.[101]

This division of authority, whereby the States "own" the submerged lands of the territorial sea and the Federal government has control over the outer continental shelf is but a tidy introduction to ensuing complexity. The parsing of Federal/State interests has actually been carried out according to no neat formula.

In 1969, the United States filed in the Supreme Court a complaint against thirteen Atlantic coastal States, asserting exclusive Federal right to explore and exploit the natural resources of the outer continental shelf and alleging that the States were claiming rights to the area and interfering with the rights of the United States. The Court

---

Id., Art. 7(2).

The drawing of baselines and the determination of inland waters further requires the identification of bays. The Geneva Convention defines a bay as:

> a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

Id., Art. 7(2).

It then adds that where a natural entrance to a bay is no more than 24 miles wide, "a closing line may be drawn . . . and the waters enclosed thereby shall be considered as internal waters." Id., Art. 7(4). Where the entrance is greater than 24 miles in width, a 24-mile line is to be drawn within the bay to mark internal waters. Id., Art. 7(5). However, none of these provisions applies to "historic" bays. Id., Art. 7(6). Accord, I.C.N.T. supra note 5, Art. 10(6).

In United States v. Alaska, 422 U.S. 184 (1975), the Supreme Court was called upon to decide whether Cook Inlet was an historic bay. The Court found that the history of Cook Inlet lacked the significant factors required for determination of historic bay status: (1) exercise of authority over the area by the claiming nation; (2) continuity in the exercise of such authority; and (3) acquiesence in the exercise of such authority by other nations. Id. at 189.

[101] Outer Continental Shelf Lands Act of 1953, Pub.L. 67-212, 67 Stat. 462, 43 U.S.C. §§1331-1343 (1970 & Supp. V 1975).

appointed a Special Master who returned a report favorable to the United States. And in 1975 in United States v. Maine[102] the Court entered judgment for the United States and reaffirmed its earlier decisions, notably California, holding that the Federal government had paramount rights in the marginal sea. It interpreted the Submerged Lands Act as not inconsistent with paramount national power and as indeed "merely an exercise of that authority."[103] It also noted that the act had granted to the States dominion over the offshore seabed, but only to the defined limit and with the express declaration that the grant to the States was not to be deemed as affecting "'the rights of the United States to the natural resources of that portion of the subsoil and seabed of the continental shelf lying seaward and outside of [the marginal sea] all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.'"[104]

In the process of reaffirming its earlier decisions, the Court viewed the California case as resting on the dual basis of both history and "purely legal principle."[105] On the one hand, the Court had found that history indicated that "dominion over the marginal sea was first accomplished by the National Government rather than by the Colonies or by the States."[106] But the historical point, which the States continued to challenge, was not dispositive, the Court said, for the California decision had also found control and protection of the marginal sea to be a function of "national external sovereignty."[107] Therefore, the Court approved the Special Master's interpretation of the precedents as holding:

> . . .that as a matter of "purely legal principle. . . the Constitution. . . allotted to the federal Government jurisdiction over

---

[102] 420 U.S. 515 (1975).

[103] Id. at 524.

[104] Id. at 526 (quoting 43 U.S.C. § 1302 (1970)).

[105] Id. at 522.

[106] Id. at 520.

[107] Id. at 522.

foreign commerce, foreign affairs and national defense" and that "it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea."[108]

It is intriguing to observe that this latter, "purely legal" ground leaves open two possibilities. One is that the States may play some role in the Federally "owned" area beyond the territorial sea. The other is that the Federal government has continuing interests in the State "owned" territorial sea.

1. State Interests Seaward of the Territorial Sea. With respect to the first possibility, the "paramount rights" which flow from Federal power over foreign commerce, foreign affairs and national defense are neither in themselves absolutely exclusive as against the States nor exhaustive of all the rights which may be claimed. Thus, the Court has determined that the Federal "paramount rights" in the marginal sea did not constitutionally prohibit Congress from ceding title to the States in the Submerged Lands Act.[109] Nor would these rights prohibit Congress from ceding to the States a greater expanse of marine territory. Alternatively Congress might grant to the States something less than title, such as a voice in fisheries' regulation[110] or in regulation of oil production and transportation in the area seaward of the territorial zone.[111]

Also, Congress may provide for State law to apply extraterritorially in certain situations. Thus, the Outer Continental Shelf Lands Act states that, to the extent they apply and are not inconsistent with Federal law,

> . . .the civil and criminal laws of each adjacent State. . . are declared to be the law of the United States for that por-

---

[108] Id. at 522-23 (quoting from the Report of the Special Master).

[109] Alabama v. Texas, 347 U.S. 272 (1954).

[110] See infra at pp. 47-48.

[111] See infra at p. 39.

> tion of the subsoil and seabed of the outer continental shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer continental shelf. . .[112]

In Rodrigue v. Aetna Casualty & Surety Co.,[113] actions were brought for wrongful death when two men were killed while working on artificial island drilling rigs located on the continental shelf. Recovery was sought under the Federal Death on the High Seas Act and under a Louisiana law which allowed additional elements of damage. The Court found that the High Seas Act provided the exclusive rules of recovery where it applied, but held that it did not apply because the drilling rigs were to be treated as "islands" or "federal enclaves," and that the remedy was thus to be found under Louisiana law "as surrogate federal law."[114]

Moreover and in the absence of express congressional grants of power to the States, State laws and regulations operative within State boundaries may have incidental effects beyond the territorial sea. Such extraterritorial effects may either constitute no interference with foreign or interstate commerce, foreign affairs and national defense, or constitute no interference so burdensome as to be unconstitutional. For example, in State v. Bundrant,[115] the Supreme Court of Alaska upheld that State's conservation measures restricting the king crab season in the Bering Strait beyond State waters. The Court focused upon the conservation purposes of the extraterritorial exercise of police power and upon the necessity of regulating extraterritorial activity in order to preserve the king crab fishery within State waters but limited extraterritorial enforcement of the act to citizens of Alaska or non-citizens with a sufficient "nexus" with the State.[116]

---

[112] 43 U.S.C. § 1333(a)(2) (1970).

[113] 395 U.S. 352 (1969).

[114] Id. at 357.

[115] 546 P.2d 530 (Alaska 1976).

[116] Compare Hjelle v. Brooks, 377 F. Supp. 430 (D. Alas. 1974) (preliminary injunction giving crabbers privilege of taking king crab

Or, to take another example, State regulation of territorial sea or onshore support facilities might affect outer continental shelf developmental activities. Thus, a State might seek to impose a duty on oil transported by pipeline from a deepwater port on the continental shelf. It is possible that such a fee might be found valid under the rationale of Portland Pipe Line Corp. v. Environmental Improvement Comm'n[117] in which the Maine Supreme Judicial Court upheld the constitutionality of that State's Coastal Conveyance of Oil Act, which, among other things, included a one-half cent per barrel license fee on petroleum products transferred over water.[118] The fee was imposed on "oil terminal facilities" defined to include onshore and offshore facilities for offloading or onloading petroleum, and certain ships involved in vessel to vessel transfers taking place within a zone extending twelve miles from shore.[119] The court found that the fee was not a tax but an adjunct to a regulatory scheme (the monies were for a fund to be used for clean-up costs

---

during remainder of 1973 season; no trial on the merits). In Bundrant, the majority opinion expressed the view of only one justice; a second justice wrote a separate concurring opinion, while one justice dissented and two did not participate. The Bundrant principles were subsequently adopted in a four to one decision in State v. Sieminski, 556 P.2d 929, 934 (Alaska 1976).

One commentator believes that the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1976), has abrogated Alaska's extraterritorial authority over the king crab fishery. Curtis, "Alaska's Regulation of King Crab on the Outer Continental Shelf," 6 UCLA-Alas. L. Rev. 375, 407 (1977). This is not necessarily so. The F.C.M.A. may have only placed the extraterritorial exercise of jurisdiction upon a different footing. Ostensibly, 16 U.S.C. § 1856(a) (1976) allows extraterritorial regulation of "registered" vessels and of fishing engaged in by "registered" vessels. See pp.47-8 infra. It would appear that the Alaska statute attacked in Bundrant might well be upheld under the F.C.M.A. Thus, while the facts concerning the matter are not clear with respect to the other defendants in that case, Bundrant himself, a resident of Washington, was fishing with a vessel which was "registered" in Alaska. 546 P.2d at 534-35.

[117] 307 A.2d 1 (Me. 1973), appeal dismissed, 414 U.S. 1035 (1973).

[118] Me. Rev. Stat. tit. 38 § 551 (Cum. Supp. 1977).

[119] Me. Rev. Stat. tit. 38 § 542 (Cum. Supp. 1977).

and compensation for injuries resulting from oil spills). Because it was such a fee imposed on "the act of transferring oil over water," it could not be a tax on goods in commerce or a tax on imports.[120] Moreover, because it afforded benefits to those upon whom it was levied, it was not a burden on the importers.[121]

All of this is simply to say that Federal "paramount rights" in the sea and "external sovereignty" are legal concepts which are not unyielding to other legal concepts and felt necessities favoring the States.

2. Federal Interests in the Territorial Sea. If the "pure legal principle" of Supreme Court precedent leaves open the possibility for some State role in the Federally "owned" area seaward of the territorial sea, it also allows for Federal interests in the State "owned" territorial sea. The "paramount rights" which the Court found reposed in the Federal government are rights "in the marginal sea," including the territorial sea. To be sure, Congress ceded the territorial sea to the States by the Submerged Lands Act. But the Court described that act as "merely an exercise" of the Federal paramount rights. The act itself and judicial interpretation of it raise questions about what was ceded and what was not.

In granting title to the States, the Submerged Lands Act also provided that such cession shall not "affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power. . . ."[122] Further, it retained for the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and

---

[120] 307 A.2d at 36-37.

[121] Id. at 35-36.

[122] 43 U.S.C. § 1311(d) (1970).

international affairs. . . ."[123] Certain Federal rights in the territorial sea were thereby excepted and reserved.[124] They attach (i) to the bed and subsoil underlying the territorial sea, (ii) to the superjacent waters and their resources, as well as (iii) to the surface.

The extent of Federal interests in the submerged lands was put in issue in the Fifth Circuit case of Zabel v. Tabb[125] which established the power of the Corps of Engineers to deny, for ecological reasons, permits for dredging and filling in navigable waters within the area ceded to the States. In that case, landholders argued that Congress had, in the Submerged Lands Act, abandoned its power to regulate tidelands property to the States, save for the specific purposes of navigation, flood control and hydroelectric power. The court disagreed. The Congress had expressly reserved rights with respect to the three specified purposes. But other language of the Act, the court went on to note, "makes it clear that Congress intended to and did retain all its constitutional powers over commerce and did not relinquish certain portions of the power by specifically reserving others."[126] A consi-

---

[123] 43 U.S.C. § 1314(a) (1970).

[124] Justice Rehnquist, in a separate opinion in Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), concurring in part and dissenting in part, observed:

> It seems to me a difficult issue . . . whether the States take only a statutory title and right of control subject to those encumbrances previously created by exercise of the commerce, navigation, national defense, and international affairs powers. An alternative reading would be that the reservation-of-powers clause only gives fair warning of the possibility that the Government may, at some future time and in furtherance of these specified powers, find it necessary to intrude upon state ownership and management of the coastal submerged lands and natural resources.

Id. at 289.

[125] 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

[126] Id. at 206.

derable range of Federal interests, that is to say, continue in the bed of the territorial sea.

There are also continuing Federal interests in the superjacent waters and their resources. For example, when Virginia sought to prohibit nonresidents from catching menhaden in its portion of Chesapeake Bay and to bar noncitizens, notwithstanding their residence, from obtaining commercial fishing licenses for any kind of fish in its territorial waters, the Supreme Court held, in Douglas v. Seacoast Products, Inc.[127] that the Virginia statutes were pre-empted by the Federal Enrollment and Licensing Act.[128] It was the Court's view that the Federal fishery license law had not been impliedly repealed by the Submerged Lands Act and that, accordingly, Federal licenses could not be excluded from the State's territorial waters. The Court said:

> The Submerged Lands Act does give the States "title," "ownership," and "the right and power to manage, administer, lease, develop, and use" the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction. . . But when Congress made this grant. . ., it expressly retained for the United States "all constitutional powers of regulation and control" over these lands and waters "for purposes of commerce, navigation, national defense, and international affairs." . . . Since the grant of the fisheries license is made pursuant to the commerce power,. . . the Submerged Lands Act did not alter its preemptive effect.[129]

---

[127] 431 U.S. 265 (1977).

[128] The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since. Ships engaged in trade with foreign lands are "registered," a documentation procedure set up by the Second Congress in the Act of December 31, 1792, 1 Stat. 287, and now codified in 46 U.S.C. c.2. . . . Vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" under procedures established by the Enrollment and Licensing Act of February 18, 1793, 1 Stat. 305, [c. 8], codified in 46 U.S.C. c.12.

431 U.S. at 272-73.

[129] 431 U.S. at 283-84.

The Federal interest in the resources of the territorial waters, at least as given expression in the licensing law, thus continues.[130]

What is true of the submerged lands and superjacent waters of the territorial sea is true as well of the surface: there is an ongoing Federal interest in the regulation of surface uses. Indeed there had been some basis in Supreme Court precedents for the view that the need for uniformity in maritime affairs meant that the Federal government alone could legislate remedies in the admiralty area.[131] However, in Askew v. American Waterways Operators, Inc.,[132] the Supreme Court did reverse a lower court's injunction against enforcement of the Florida Oil Spill Prevention and Pollution Control Act of 1970, which imposed strict liability for damage resulting from oil spills in the State's territorial waters. Earlier precedent was limited so as not to oust altogether States' law from all situations involving shoreside injuries by ships plying their waters.[133]

A not dissimilar affirmation of the primacy of Federal interest in surface activity in State "owned" waters but with allowance for some State regulation was given in Ray v. Atlantic Richfield Co.[134] Washing-

---

[130] See p. 47 infra.

[131] Compare Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), with Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). See also G. Gilmore and C. Black, The Law of Admiralty 48 (2d ed. 1975).

Article III, section 2 of the Constitution provides that the "judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction. . . ." This section, distinct from the grant to Congress of power to control and improve the navigable waters under the Commerce Clause, speaks only of the judicial and not the legislative branch. However, it has been construed as conferring a parallel, like power upon the Congress. See, e.g., Panama R.R. v. Johnson, 264 U.S. 375 (1924); In re Garrett, 141 U.S. 1, 12-14 (1890); G. Gilmore and C. Black, The Law of Admiralty 47 (2d ed. 1975); Note, "From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century," 67 Harv. L. Rev. 1214 (1954).

[132] 411 U.S. 325 (1973).

[133] Id. at 344.

[134] 98 S.Ct. 989 (1978).

ton's Tanker Law, which sought to regulate the design, size and movement of oil tankers in Puget Sound, had been struck down in its entirety by a three-judge district court on the ground that it was pre-empted by Federal law,[135] in particular by the Ports and Waterways Safety Act of 1972. The Supreme Court, although it reversed part of the lower court's ruling and allowed certain portions of the Washington law to stand, did agree that much of the Washington statute was pre-empted by Federal law, i.e., that it intruded impermissibly upon paramount Federal needs and concerns.[137]

In a summary word, just as the States have legally acknowledged interests in the area "owned" by the Federal government, so does the Federal government continue to have legitimate interests in the territorial waters of the States.

B. Federal Statutes

The recognition of mutual transfrontier interests is evident in the Federal statutes which bear upon marine areas and activities. While it is true that some Federal legislation may be construed to exclude or not recognize a State role,[138] the bulk of it points toward involvement of the States in one mode or another.[139]

---

[135] Id. at 991-92.

[137] Id. at 995.

[138] The Supreme Court so interpreted the Federal Ports and Waterways Safety Act in Ray v. Atlantic Richfield Co., 98 S.Ct. 988, 1004-05 and n. 28 (1978).

[139] See Breeden, "Federalism and the Development of Outer Continental Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1146-47 (1976). The statutory attitude toward State involvement appears to run the gamut from bare toleration to active encouragement. Conversations with State officials indicate that some are suspicious of any Federal invitation to cooperative action and view it as a form of seduction the end of which is loss of autonomy. The author does not herein offer any assessment, positive or negative, of the validity or invalidity of such statements. The survey of Federal legislation which follows takes the statutes at face value.

1. National Environmental Policy Act. In the context of maritime affairs as in most others, proposals and recommendations by Federal agencies for actions significantly affecting the human environment are subject to the requirements of the National Environmental Policy Act (NEPA).[140] NEPA requires, among other things, the filing of environmental impact statements.[141] States, along with interested citizens, may be consulted in the preparation of these statements.[142] This consultation affords the States opportunity to influence Federal agency decision-making.

After an impact statement has been filed, States, like citizens, may challenge or threaten to challenge its sufficiency through judicial proceedings. Such challenges have served as a major avenue for State and citizen influence upon Federal activity undertaken or proposed for areas beyond the territorial sea, and attacks premised upon a failure to comply with NEPA have resulted in the halt and delay of lease sales on the continental shelf.[143] Although NEPA does not by its terms provide for State influence upon the substance of Federal decisions, the possibility of suits does give the States leverage in attempts to have their interests taken into account. One commentator has correctly observed that Federal agencies proposing outer continental shelf actions will eventually succeed in completing adequate impact statements which allow the project to go forward but that the continental shelf "issue is intensely political, and the chief effect of NEPA may be to give [a State] time to build political opposition to block the leasing."[144]

---

[140] 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975). See generally R. Liroff, A National Policy for the Government: NEPA and its Aftermath (1976).

[141] 42 U.S.C. § 4332(2)(c) (1970); 43 C.F.R. § 3301.3 (1976).

[142] See generally 40 C.F.R. § 6 (1977).

[143] See, e.g., County of Suffolk v. Secretary of the Interior, 562 F.2d 1369 (2d Cir. 1977); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Massachusetts v. Andrus, [1978] 8 Envir. L. Rep. 20187 (D. Mass. 1978); California v. Morton, 404 F. Supp. 26 (C.D. Cal. 1975).

[144] Breeden, "Federalism and the Development of Outer Continental

2. Coastal Zone Management Act. The express purpose of the Coastal Zone Management Act [145] (CZMA) is to protect coastal resources by encouraging States to manage their coastal areas. To this end the act employs the inducements for States of economic assistance[146] and a share of power. The latter takes the form of a "consistency" provision which mandates that any Federally conducted or supported activity within or directly affecting the coastal zone must be carried out "in a manner which is, to the maximum extent practicable, consistent with approved State management programs."[147]

Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1130 (1976).

[145] 16 U.S.C. §§ 1451-1464 (1976). See generally Hildreth, "The Operation of the Federal Coastal Zone Management Act," 10 Nat. Resources L. 211 (1977); Note, "Toward Better Use of Coastal Resources: Coordinated State and Federal Planning Under the Coastal Zone Management Act," 65 Geo. L. Rev. 1057 (1977).

[146] See p. 51 infra.

[147] 16 U.S.C. §§ 1456(c)(1), (2). The qualifying phrase "to the maximum extent practicable" has been construed as an expansive rather than as a limiting term in the National Oceanic and Atmospheric Administration (NOAA) consistency regulations. 43 Fed. Reg. 10510 (1978) (to be codified in 15 C.F.R. pt. 930). According to the regulations, "[t]he Act was intended to cause substantive changes in Federal agency decision-making. . . ." Consequently, Federal agencies are required "whenever legally permissible, to consider State management programs as supplemental requirements to be adhered to in addition to existing agency mandates." Id. § 930.32(a).

In order to have the force and effect of requiring activities to be consistent with its provisions, a State coastal zone management plan must be approved by the Secretary of Commerce. To date only six States, Washington, Oregon, California, Massachusetts, Rhode Island and Wisconsin, and the Culebra section of Puerto Rico, have approved plans. The statutory findings required to be made by the Secretary before approval is granted are set out in section 1455(c) to (e) of the Act. Section 1456(b) also states that the Secretary shall not approve a submitted plan "unless the views of Federal agencies principally affected by such program have been adequately considered." It is always possible that this last requirement could be used as the occasion for Federal agency intrusion upon or evisceration of State management programs.

It is not only Federally conducted or supported activity which is subject to the consistency provision. Federal licensees and permittees

Although outer continental shelf developmental activity does not take place within State territory, it is made specifically subject to compliance with the consistency requirement.[148] There is one exception. Shelf activity which is inconsistent with a State plan, may nonetheless be allowed to proceed if the Secretary of Commerce finds it to be "neces-

---

must supply with their applications for license or permits "a certification that the proposed activity complies with the State's approved program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A).

The consistency provisions apply only to activity within or "directly affecting" the coastal zone. Id. §§ 1456(c)(1), (2). The regulations employ the phrase "significantly affecting the coastal zone" as the effect which triggers compliance with the consistency provision. 43 Fed. Reg. 10518-19 (1978) (to be codified at 15 C.F.R. § 930.21(a)). The actions involved are defined as those which cause significant:

> (1) Changes in the manner in which land, water, or other coastal zone natural resources are used;
>
> (2) Limitations on the range of uses of coastal zone natural resources; or
>
> (3) Changes in the quality of coastal zone natural resources.

Id. at 10519 (to be codified at 15 C.F.R. § 930.21(b)).

The area which may be affected in such a way as to engage the consistency requirement is the "coastal zone" which the Statute defines expansively as including:

> . . .the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

16 U.S.C. § 1453(1).

[148] Id. §§ 1453(4), 1456(c)(3)(B).

sary in the interest of national security."[149] Activity which is "necessary" has been defined by regulation as activity which is "permissible," and it is "permissible" when "a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed."[150]

Even granting this exception, however, and even granting the possibility of a broad reading of what national security may permit and a correspondingly narrow reading of a State's role, it would appear that the CZMA does give the States considerable potential control over what takes place on the continental shelf.

Traditionally, the Federal government has encouraged State action on given programs by predicating dispersal of funds upon State response. And the CZMA does make use of this device. But it also offers power as well as money through the consistency provision. It may be objected that this provision, like NEPA's requirement of an impact statement, "allows the States to block plans in the courts instead of joining in the original development of plans in the Federal agencies."[151] On the other hand, it would appear that there is, if only in statutory concept, an important shift of initiative in continental shelf planning. Under the CZMA Federal agencies and licensees are henceforth to bring their activities into compliance with State policies given prior expression in approved coastal zone management plans. The most efficient means for doing so would be to insure that State perspectives are brought to bear upon the planning of continental shelf development from the earliest

---

[149] Id. § 1456(c)(3)(B)(iii).

[150] 43 Fed. Reg. 10531 (to be codified at 15 C.F.R. § 930.122).

[151] Breeden, "Federalism and the Development of Outer Continental Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1151 (1976). Cf. Note, "Coastal Zone Impacts of Offshore Oil and Gas Development: An Accomodation through the California Coastal Act of 1976," 8 Pac. L. J. 783, 798 (1977). See generally Hildreth, "The Operation of the Federal Coastal Zone Management Act, as Amended," 10 Nat. Resources Law. 211 (1977); Brewer, "Federal Consistency and State Expectations," 2 Coastal Zone Management J. 315 (1976).

stages.[152]

3. Outer Continental Shelf Lands Act. The Outer Continental Shelf Lands Act (OCSLA)[153] became law shortly after the Submerged Lands Act.[154] It was in effect a statutory ratification of the Truman Proclamation and declared that the continental shelf "appertains" to the United States. The Act extended the constitution, law and jurisdiction of the United States to the subsoil and seabed of the shelf and to artificial islands or structures erected on it for the purpose of resource exploitation.[155] The OCSLA established the outer continental shelf, i.e., the area seaward of the submerged lands ceded to the States, as an area of exclusive Federal jurisdiction to the same extent as if it were such an area located within a State.[156] State law was then adopted to the extent that it is applicable and not inconsistent with Federal law.[157] The result is to adopt State law as surrogate Federal law to the degree that it applies interstitially.

The States are given no role in the leasing of continental shelf lands for mineral exploitation which is patently the chief interest of the legislation. However, the Act does allot to the Secretary of the

---

[152] This is certainly the import of the NOAA regulations on consistency and is in keeping with the tenor of the Stratton Commission report which was something of a spur to the writing of the Coastal Zone Management Act. See Commission on Marine Science, Engineering and Resources, Our Nation and the Sea: A Plan for National Action (1969) (Stratton Commission report); Hershman and Folkenroth, "Coastal Zone Management and Intergovernmental Coordination," 54 Ore. L. Rev. 13, 16 & nn. 14 & 15 (1975).

[153] 43 U.S.C. §§ 1331-1343 (1970 & Supp. V 1975). See generally, Christopher, "The Outer Continental Shelf Lands Act: Key to a New Frontier," 6 Stan. L. Rev. 23 (1953).

[154] The OCSLA had originally been part of the Submerged Lands Act, but was removed for separate consideration. The Submerged Lands Act was signed into law on May 22, 1953. The OCSLA passed on August 7 of the same year.

[155] 43 U.S.C. § 1332(a) (1970).

[156] Id. § 1333(a)(1).

[157] Id. § 1333(a)(2). See p. 30 supra.

Interior the general power to prescribe rules and regulations for leasing.[158] The Department of the Interior has recently construed this power as allowing it to create, by regulation, regional outer continental shelf advisory boards, which include State representatives,[159] and a system for sharing with the States information on lease tracts.[160] The availability of this information in conjunction with the consistency requirements of the Coastal Zone Management Act provide the States with the means for extensive control over outer continental shelf activity.

The Senate and the House have passed different versions of amendments to the OCSLA.[161] As of this writing, the conference version of the amendments has been passed by the House but awaits Senate approval. The amendments would, among other things, confirm a prominant role for the States in leasing and create a new framework for oil spill liability. Earlier differing versions of OCSLA amendments, passed by the 94th Congress, could not be successfully reconciled and never become law.[162]

---

[158] Id. § 1334.

[159] The Outer Continental Shelf Advisory Board advises the Secretary of the Interior on matters of discretionary authority under the Outer Continental Shelf Lands Act. The Board includes the Secretary or his designee, members of each coastal State government, six representatives from the general public, and nonvoting members from the EPA, Council on Environmental Quality, Federal Energy Administration, and the Departments of Defense, State, Commerce and Transportation. The entire board meets at least twice a year, and divides into five regional boards for meetings three times a year. Department of the Interior, Geological Survey, Policies, Practicles, and Responsibilities for Safety and Environmental Protection in Oil and Gas Operations on the Outer Continental Shelf 5 (1977).

[160] 43 Fed. Reg. 3883 (1978) (to be codified at 30 C.F.R. § 250.34); 43 Fed. Reg. 3889 (1978) (to be codified at 30 C.F.R. pt. 250); 43 Fed. Reg. 3895 (1978) (to be codified at 43 C.F.R. § 3301.8).

[161] The Senate approved one version on July 14, 1977, S. 9, 95th Cong., 1st Sess., 123 Cong. Rec. S11, 984 (daily ed. July 15, 1977), the House another on February 2, 1978, S. 9, passed in lieu of H.R. 1614, 95th Cong., 1st Sess., 124 Cong. Rec. H602 (daily ed. Feb. 2, 1978). S. 9 was reported out of the conference committee and approved by the House on August 18, 1978. The Senate has not yet acted on the conference bill.

[162] The Senate approved S. 521, 94th Cong., 1st Sess., 121 Cong.

4. The Federal Water Pollution Control Act. The Federal Water Pollution Control Act[163] (FWPCA) is predicated upon Federal standards and initiative, but it is directed toward Federal-State cooperative efforts.[164] The Act prohibits discharges of pollutants into the waters of the United States, including the territorial sea, except as allowed by permit.[165] The States may be authorized to administer permit programs when compliance with Federal requirements is assured,[166] and they may also adopt and enforce measures more rigorous than those of the Federal act.[167] In addition, applicants for Federal licenses or permits must provide State certification of compliance with the act,[168] and

---

Rec. S.14362 (daily ed. July 30, 1975), and one year later the House approved H.R. 6218, 94th Cong., 2d Sess., 122 Cong. Rec. H8021 (daily ed. July 30, 1976). The bill reported by the conference committee was recommitted to the conference and thus killed. 122 Cong. Rec. H11,340 (daily ed. Sept. 28, 1976).

[163] 33 U.S.C. §§ 1251-1376 (Supp. V 1975), as amended by The Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1567. See generally Smith, "Highlights of the Federal Water Pollution Control Act of 1972," 77 Dick. L. Rev. 459 (1973).

[164] See, e.g., 33 U.S.C. §§ 1251(b), 1311(g), 1313(a), 1316(c), 1342 (Supp. V 1975) as amended by The Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1567.

> Now, instead of a crude geographical division of waters between two systems of regulation, essentially all significant waters have been brought under a single system, with the state and federal governments playing complementary functions in the operation of the single system. Thus a new and more sophisticated concept of federal-state relations in the pollution control field has emerged in the 1972 [act].

Zener, "The Federal Law of Water Pollution Control," in Federal Environmental Law 682, 692-93 (E. Dolgin & T. Guilbert eds. 1974).

[165] 33 U.S.C. §§ 1311, 1362(7), (8), (12), (14), 1342 (Supp. V 1975), as amended by The Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1567.

[166] Id. § 1342(b).

[167] Id. § 1370.

[168] Id. § 1341(a).

Federal facilities are to comply with State requirements.[169]

There are specific provisions governing marine discharge criteria.[170] In addition to establishing a Federal law of liability, penalties and clean-up costs for oil spills,[171] the Act expressly allows for States to impose their own requirements and liability for discharges into State waters.[172] The disposal of sewage sludge, another subject of specific attention, may be permitted by the Environmental Protection Agency, or, again, by a State with a program approved as adequate.[173] On the other hand, dredged or fill material, as distinguished from sludge, may be discharged only at designated sites and only as permitted by the Corps of Engineers.[174]

With the exception of dredge and fill material, the permit system does allow States to control dumping activities within their territorial seas. However, insofar as this system of the FWPCA relates to dumping

---

[169] Id. § 1323. In California v. EPA, 426 U.S. 200 (1976), the Supreme Court held that the required compliance under section 1323 does not include acquisition of a permit from States with approved permit plans.

[170] See 33 U.S.C. § 1343. Section 1322 governs the promulgation of standards for marine sanitation devices.

[171] Id. § 1321.

[172] Id. § 1321(o)(2). The Federal Water Pollution Control Act of 1972 amended the Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91. The oil spill provisions as they appeared in the 1970 Act were at issue in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), discussed supra note 132. Further amendments, "mid-course corrections," to the Act were passed in 1977 as the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1567, 1575 (to be codified at 33 U.S.C. §§ 125-1376).

[173] 33 U.S.C. § 1345. The 1977 Amendments to the Ocean Dumping Act, 95-153, § 4, 91 Stat. 1255, set 1981 as the deadline for termination of the practice of dumping sewage sludge. The amendments codified the deadline set earlier by EPA regulation. 40 C.F.R. § 220.3(d) (1977).

[174] 33 U.S.C. § 1344. On the relationship between the provisions of the FWPCA and the Rivers and Harbors Act of 1899, see generally Zener, "The Federal Law of Water Pollution Control," in Federal Environmental Law 683, 784-87 (E. Dolgin & T. Guilbert eds. 1974).

of pollutants from vessels within the territorial sea, it is countermanded by the Ocean Dumping Act,[175] which was passed shortly after the FWPCA. Section 1416 of the Ocean Dumping Act provides that "no State shall adopt or enforce any rule or regulation relating to any ocean dumping activity regulated by the Dumping Act."[176] Although the Dumping Act allows States to propose criteria for dumping regulations to the EPA,[177] it denies the States the same privilege of active regulation which was granted in the FWPCA. The EPA has followed the mandate of the Dumping Act, issuing ocean dumping permits for vessels within the territorial sea under the Ocean Dumping Act regulatory system rather than the scheme of the FWPCA.[178]

5. The Deepwater Ports Act. Superports are regulated under the Deepwater Ports Act.[179] This act allows coastal States to have a voice,

---

[175] 33 U.S.C. §§ 1401-1440 (Supp. V 1975).

[176] Id. § 1416(d).

[177] Id.

[178] 40 C.F.R. § 125.1(l) (1977) (discharges from vessels within the territorial sea not included in FWPA permit system; 40 C.F.R. § 220.1(a) (1977) (Ocean Dumping Act permits required for dumping from vessels within the territorial sea). See Lettow, "The Control of Marine Pollution," in Federal Environmental Law 596, 655-58 (E. Dolgin & T. Guilbert eds. 1974). The precedence of the Ocean Dumping Act over the FWPA is open to question, since the two acts were passed nearly simultaneously. Zener, supra note 164 at 740.

[179] 33 U.S.C. §§ 1501-1524 (Supp. V 1975). See generally T. Winters, Deepwater Ports in the United States (1977); L. Bragaw, The Challenge of Deepwater Terminals (1975); H. Marcus, Federal Port Policy in the United States (1976).

The Department of Transportation has approved construction of only one superport, LOOP off the Louisiana coast. After approval of plans for a second port, Seadock off the coast of Texas, the conditions required by the Department were found to be unacceptable to the contractors, and the project was scrapped. Telephone interview, Office of Deepwater Ports, Department of Transportation, August 15, 1978.

It appears that liquefied natural gas terminals and floating nuclear power plants would fall under other legislation, the Natural Gas Act of

if only a negative one, in the siting of superports on the continental shelf beyond the boundaries of the territorial sea. An adjacent coastal State[180] may exercise veto power over a deepwater port.[181] No Federal license for construction or operation of a deepwater port may be issued without the approval of the Governor of the applicable State.

As is the case in the FWPCA, the Deepwater Ports Act expressly does not pre-empt State imposition of liability or other requirements[182] and, like the OCSLA, adopts State law as surrogate Federal law to the extent that it is applicable and not in conflict with Federal law.[183] Interestingly, the Deepwater Ports Act takes an additional step and allows an adjacent coastal State to impose fees, subject to approval of the Secretary of Transportation, for the use of a deepwater port as compensation for any economic, environmental and administrative costs attributable to the port.[184]

6. The Fishery Conservation and Management Act. The Fishery Conservation and Management Act[185] (FCMA) extended United States fish-

---

1938, 15 U.S.C. § 717 (1976), in the former instance and the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975), in the latter. See generally Office of Technology Assessment, Transportation of Liquified Natural Gas 24-26 (1977); Office of Technology Assessment, Coastal Effects of Offshore Energy Systems 106-11 (1976).

[180] An adjacent coastal State is defined as one which would be directly connected by pipeline to a deepwater port, would be within fifteen miles of one, or would risk environmental damage to its coast if the risk is equal to or greater than that posed to a State directly connected by pipeline to the port. 33 U.S.C. §§ 1502(1), 1508(a).

[181] Id. §§ 1503(c)(9), 1508(b).

[182] Id. § 1517(k).

[183] Id. § 1518.

[184] Id. § 1504(h). The statute would thus seem to endorse the rationale of Portland Pipe Line Corp. v. Environmental Improvement Comm'n, 307 A.2d 1 (Me. 1973), appeal dismissed, 414 U.S. 1035 (1973). See p. 31 supra.

[185] Pub. L. 94-265, 90 Stat. 331 (codified in scattered sections of 16, 22 U.S.C.). See generally Comment, "The Fishery Conservation and

ery jurisdiction to the 200-mile limit.[186] (Section 58 of the Clean Water Act of 1977 subsequently extended jurisdiction to the 200-mile limit for enforcement of the oil spill provisions of the Federal Water Pollution Control Act.[187])

The FCMA also provides for establishment of regional fisheries councils composed of representatives of the various coastal States.[188] These councils are to prepare fishery management plans for submittal to the Secretary of Commerce for review and approval.[189] The Secretary may prepare a fishery management plan in the event a council fails to submit one or fails to amend a plan so that it meets the Secretary's approval.[190]

It is possible under the act for the Secretary to promulgate a fishery management plan for waters within the territorial sea. This intervention in State waters could occur if two statutory conditions are met: if the fishing in a fishery covered by a plan "is engaged in predominately within the fishery conservation zone and beyond. . .;" and if the State "has taken any act on or omitted to take any action, the results of which will substantially and adversely affect the carrying out" of the management plan.[191]

In addition to this Federal involvement in State waters, the Act may provide a reverse extension of State authority beyond the territorial sea. The FCMA prohibits States from regulating fishing "engaged in by any fishing vessel outside its boundaries. . . ."[192] But this prohi-

---

Management Act of 1976: Structure and Function of a Contiguous Economic Zone," 12 Tex. Int'l L. Rev. 331 (1977).

[186] 16 U.S.C. § 1811 (1976).

[187] Pub. L. 95-217, § 58, 91 Stat. 1596, 1 Envir. Rep. (BNA) 5101 (to be codified at 16 U.S.C. § 1321(b)(3)).

[188] 16 U.S.C. § 1852 (1976).

[189] Id. §§ 1853-1854.

[190] Id. § 1854(c).

[191] Id. § 1856(b).

[192] Id. § 1856(a).

bition is subject to a qualification. A State may not impose extraterritorial regulations "unless such vessel is registered under the laws of such State"[193] (emphasis added). The Act does not specify what is meant by registration. Presumably a State can regulate fishing seaward of its boundaries if it can predicate jurisdiction upon registration of the vessel.[194]

7. Marine Sanctuaries. Title III of the Marine Protection, Research and Sanctuaries Act established a marine sanctuaries program.[195] (Title I of the Act is the "Ocean Dumping Act,"[196] and Title II deals with marine research programs.[197]) Under this program, the Secretary of Commerce may set aside areas of the ocean to be managed for "their conservation, recreational, ecological or esthetic values."[198] If a designated sanctuary is to include waters within State boundaries, the State is to be consulted.[199] Subsequently, the designation becomes effective sixty days after it is published "unless the Governor of any State involved" certifies that it is unacceptable to the State.[200]

---

[193] Id.

[194] See p. 30 & note 116 supra.

[195] 16 U.S.C. §§ 1431-1434 (1976).

[196] 33 U.S.C. §§ 1401-1440 (Supp. V 1975).

[197] 33 U.S.C. §§ 1441-1444 (Supp. V 1975).

[198] 16 U.S.C. § 1432(a).

One recent study found that the marine sanctuaries program had great potential for the management of oceans resources generally because, among other things, of its multiple-use approach. Blumm and Blumstein, "The Marine Sanctuaries Program: A Framework for Critical Areas Management in the Sea," 8 Envir. L. Rev. 50016 (1978). Only two areas are presently included in the program--a one-square mile area around the sunken U.S.S. Monitor off Cape Hatteras and the 100-square mile Key Largo Coral Reef off Florida.

[199] 16 U.S.C. § 1432(b).

[200] Id.

8. Marine Mammal Protection. The Marine Mammal Protection Act[201] was passed as an attempt to protect and restore the populations of marine mammals. It includes a provision whereby State officers may be designated to enforce the Federal provisions and may function in this capacity as Federal law enforcement agents.[202]

9. National Flood Insurance. The National Flood Insurance Act[203] created a nationwide program for flood insurance. The availability of this insurance depends upon the adequacy of a State's land use controls.[204] Adequacy is measured according to Federal criteria.[205]

10. Other. There is a considerable number of other statutes which bear upon Federal-State interests in marine areas. Some of them warrant mention.

The Estuarine Areas Act[206] provides for Federal-State cooperation in the acquisition and management of estuarine areas.

The Endangered Species Act[207] provides for joint Federal-State action for the conservation of endangered and threatened species, including marine flora and fauna.

---

201 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1976).

202 Id. § 1377(b).

The Act also provides that States may enact and enforce laws which are approved as consistent with the Federal statute. Id. § 1379(a).

203 42 U.S.C. §§ 4001-4127 (1970 & Supp. V 1975).

204 Id. §§ 4012(c), 4022.

205 Id. § 4102(c).

206 Estuarine Areas Act of 1968, 16 U.S.C. §§ 1221-1226 (1976). See also 16 U.S.C. §§ 715k-3 to 5 (providing for the acquisition of wetlands for conservation purposes, subject to State approval).

207 16 U.S.C. §§ 1531-1543 (1976).

The Fish and Wildlife Coordination Act promotes interagency and intergovernmental cooperation and consultation in the preservation of wildlife resources.[208]

The Internal Revenue Code allows deductions with respect to amortization of State-certified water pollution control facilities.[209]

The Sea Grant Program Improvement Act of 1976[210] is designed to provide funding for programs and colleges which, among other things, undertake projects responsive to the needs of States in marine resource research, assessment and management.

What these statutes reflect is recognition of mutual transfrontier interests--of Federal interests in the territorial sea and of State interests in the area seaward of the territorial sea. The recognition takes a variety of statutory shapes. The variety exhibits no coherence.

C. Revenue

From the period 1953 to 1976 Federal receipts from outer continental shelf leasing totalled $22.9 billion.[211] Whether there should be a State share in these funds and, if so, how much it should be have been subjects of contention.

Revenue from mineral leases on Federal lands located within States, i.e., Federal lands other than the outer continental shelf, is divided with the States within which the lands are located on a 50-50 basis.[212] The division of revenues from mineral leases of outer continental shelf

---

208 16 U.S.C. §§ 661-668ee (1976).

209 I R.C. § 169.

210 Pub. L. 94-461, 90 Stat. 1961 (to be codified at 5 U.S.C. §§ 5314-5315, 33 U.S.C. §§ 1121-1131).

211 U.S. Dept. of the Interior, U.S. Geol. Survey, Conservation Division, Outer Continental Shelf Statistics, Oil, Gas, Sulphur, Salt, Leasing, Drilling, Production, Income, 1976 at 52 (1977).

212 30 U.S.C. § 191 (1970), as amended by Act of Oct. 21, 1976, Pub. L. 94-579, § 317(a), 90 Stat. 2770. An exception is made for Alaska, which receives a 90 percent share. Id.

lands is not settled.

As it now stands outer continental shelf lease revenues are deposited into the Federal treasury and credited to be miscellaneous receipts and they are not divided with the States,[213] save for one exception.[214] A number of changes in the OCSLA have been proposed.

The Coastal Zone Management Act Amendments of 1976 did create a Coastal Energy Impact Program (CEIP) which includes a $400 million fund for formula grants to the States.[215] The formula includes as factors the outer continental shelf acreage adjacent to the coastal State, the amount of acreage leased, the volume of oil and gas produced, the amount landed, and the amount of new employment as a consequence of

---

[213] 43 U.S.C. §§ 1337(g), 1338 (1970).

[214] The Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460L-4 to 460L-11 (1976), provides that, to the extent appropriations are not sufficient to bring the created fund to the authorized annual level, "an amount sufficient to cover the remainder thereof shall be credited to the fund from revenues due and payable to the United States for deposit in the Treasury as miscellaneous receipts under the Outer Continental Shelf Lands Act. . . ." Id. § 460L-5(c)(2).

[215] 16 U.S.C. § 1456a (1976).

The formula grants are covered in section 1456a(b). Appropriations for the grants are authorized in section 1464(a)(3), which calls for not more than $50 million for each of eight fiscal years beginning in 1976.

An additional $800 million is authorized for other aspects of the CEIP. Id. § 1464(b). These include planning for energy facilities, provision of public facilities, and compensation for environmental and resource losses. The funds are available through a scheme of loans, guarantees and grants. Id. §§ 1456a(a), (c), (d).

Actual appropriations for these funds have been considerably less than the amount authorized. For example, only $12.1 million was appropriated for energy impact formula grants for fiscal year 1978. See The Budget of the United States Government, Fiscal Year 1979, Appendix 214 (1978).

See generally, Hildreth, "The Operation of the Federal Coastal Zone Management Act as Amended," 10 Nat. Resources Law. 211 (1977).

In addition to the CEIP funds authorized in 1976, the CZMA as originally enacted in 1972 provides grants for the development and implementation of coastal zone management plans. Pub. L. 92-583, §§ 305, 306, 86 Stat. 1282 (amended 1976). Over $16 million was disbursed under those provisions in 1974 and 1975. S. Rep. No. 277, 94th Cong., 2d Sess. 8 (1976).

continental shelf energy activities.[216]

Both Houses of Congress have passed bills which would provide additional monies to the States.[217] As of this writing, as noted, the House has passed the conference committee version but the Senate has not yet acted.[218] The ninety-fourth Congress, it should be repeated, also passed bills amending the OCSLA but recommitted them to conference and thus effectively killed them for a further period.[219]

There are three rationales for allotting money to the States. One is to provide money which will induce and enable the State to develop and then put into effect management plans for their coastal resources. The bulk of the funds available to the States under the Coastal Zone Management Act is for this purpose.[220]

The second rationale is that of compensation for loss. Coastal States argue that development of outer continental shelf mineral resources has a variety of negative effects upon the adjacent States and that they suffer a net loss from such activity.[221] The CEIP formula

---

[216] 16 U.S.C. §§ 1456a(b)(2)(A)-(D) (1976).

[217] See note 161 supra.

The Senate had passed amendments to the OCSLA in 1975. These included a measure which would have provided $100 million per year for three years out of leasing revenues to adjacent coastal States allowing outer continental shelf lands oil to be brought ashore. A House version did not include the grant program. The conference committee version followed that of the House in omitting the $100 million provision. The House voted to recommit the bill. See note 162 supra.

[218] See note 161 supra.

[219] See note 162 supra.

[220] See note 215 supra.

[221] For example, it was reported during consideration of the 1975 OCSLA amendments that the "Texas Input-Output Model" had determined that the net cost to State and local government in excess of benefits of development of outer continental shelf lands amounted to $62.1 million per year. "Outer Continental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments: Joint Hearings Before the Senate Committees on Interior and Insular Affairs and Commerce, 94th Cong., 1st Sess. Pt. 1, at 1329, 1338-39 (1975) (Statement of A.R. Schwartz).

grants may be viewed as, in part, a response to these arguments.[222]

The third rationale is that of straight revenue sharing, i.e., a division of money not intended to stimulate planning or to compensate for loss but only on the basis of some State right to a portion. The CEIP formula grants may also be viewed as partially responsive to these claims.[223]

The second and third grounds--compensation and sharing--are not entirely separable. The 50-50 division of revenues from Federal lands located within States seems to be predicated upon both, as does the CEIP scheme.[224] One of the reasons for failing to separate the two is the uncertainty inherent in each. It is factually and theoretically easier to combine them. Thus, on the one hand, if payments are viewed as compensation, then the losses sought to be covered are not always easy to identify or quantify.[225] On the other hand, if payments are viewed as sharing, then it is difficult to justify sharing with only

---

[222] See generally Coastal Zone Management Act Amendments of 1976, S. Rep. No. 277, 94th Cong., 2d Sess. 11-19 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 1768.

[223] Since the Truman Proclamation of 1945, the States have repeatedly, though often unsuccessfully, asserted ownership rights in the continental shelf and coastal waters. See p. 25 supra. The pressure for revenue sharing of right continues. See n. 222 supra.

[224] For example, the State's share of Mineral Leasing Act funds are to be expended giving priority "to those subdivisions of the State socially or economically impacted by development of minerals leased" under the Act. 30 U.S.C. § 191 (1970) as amended by Act of Oct. 21, 1976, Pub. L. 94-579, 90 Stat. 2770. There seems to be a closer relationship between CEIP payments and costs to the coastal States both in the formula by which the funds are paid and the limitations on purposes for which they may be spent.

See notes 215 & 216 and accompanying text supra. See generally The Library of Congress, Congressional Research Service, Effects of Offshore Oil and Natural Gas Development on the Coastal Zone 249-57 (1976) [hereinafter cited as Effects of Offshore Oil and Natural Gas Development].

On the subject of the joining of the two notions of compensation and sharing, see "Outer Continental Shelf Lands Act Amendments, Hearings on H.R. 1614 Before the House Ad Hoc Comm. on Outer Continental Shelf," 95th Cong., 1st Sess., pt. 1, at 430-31, 179-83, pt. 2, at 1183-87, 1580-82, 1588-89 (1977) [hereinafter cited as 1977 House Hearings].

[225] See 1977 House Hearings, supra note 224, at 1585.

the coastal States so long as the outer continental shelf is considered to be a national resource.[226]

One of the formulae for distribution of revenues from outer continental shelf development submitted to Congress in 1975 sought to take account of both compensation and sharing. It would have split revenues 50/25/25 as between, respectively, the Federal government, the adjacent coastal States and the several States other than such adjacent States.[227]

The methods and formulae for and debate about revenue division testify to awareness of transfrontier effects and interests. But they also reflect a lack of agreement or understanding about their nature and extent.

D. Administrative Structure

The statutory mandates directed at marine areas and resources are extensive and sometimes overlapping and conflicting. The administrative agencies which implement the statutory programs are no less extensive, overlapping and conflicting.

It was observed in 1977 that twenty-one marine activities at the Federal level were carried out through six departments and five agencies.[228] With the creation of the Department of Energy,[229] there are now seven departments involved.

The agency complications surrounding the regulation of ocean dumping

---

[226] "Outer Continental Shelf Lands Act Amendments of 1977: Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 557-59 (1977).

[227] S. 130, 94th Cong., 1st Sess., reprinted in "Outer Continental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments: Hearings Before the Joint Senate Comm. on Int. & Insular Aff. and Commerce, 94th Cong., 1st Sess., pt.1 at 305 (1975).

[228] Hollings, "First Annual Doherty Lecture in Oceans Policy," 11 Marine Technology Society J., July-August 1977, at 30, 31 (1977).

[229] Department of Energy Organization Act of 1977, Pub. L. 95-91, 91 Stat. 567 (codified in scattered sections of 3, 5, 7, 12, 42, 45 U.S.C.).

have already been noted.[230] They are one example of the problem of fractionalized management. A further, graphic illustration is provided in a Congressional Research Service Study which includes a draft "Procedural Leasing Flow Chart for OCS Oil and Gas Production."[231] It depicts, in condensed form, the steps through agency processes which must be taken on the way to oil and gas production.[232] Digested though it is, it unfolds in sixteen panels to a length of five and one-half feet.

There are smaller examples: fire-fighting equipment on drill platforms, for instance, is the subject of separate requirements set by both the Coast Guard and the U.S. Geological Survey.[233]

The agencies have different constituencies, different interests, different objectives. They may come into conflict.[234] The problems of coordinating their efforts, even in the absence of conflict, are considerable.

---

[230] See pp. 44-45 supra.

[231] Effects of Offshore Oil and Natural Gas Development, supra note 224, interleaved between pp. 98 & 99.

[232] The chart was prepared by petroleum industry representatives T.D. Hewitt of CONOCO and L.E. Mack of the American Petroleum Institute. It is designed to show the additional reviews and procedural steps caused by H.R. 6218.

[233] Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, supra note 224, at 98.

[234] The Council on Environmental Quality noted:

> As significant new activities commence on the OCS, competing agency objectives may well increase. Within certain geographic limits, deepwater port operation, nuclear powerplants, and oil and gas development and associated pipelines are obviously incompatible. The same is true with respect to those activities and more traditional uses of OCS areas, such as commercial fishing and recreation. Moreover, there are potential conflicts between many of these uses and environmental objectives.

1 Council on Environmental Quality, OCS Oil and Gas--An Environmental Assessment: A Report to the President 179 (1974).

The present administration has brought forth proposals for reorganization.[235] However, if a reorganization were to be mounted and it followed the State reorganization pattern, then it might only consolidate disparate functions under one department but not issue in coordinated agency action or a comprehensive policy.[236]

In addition to the interagency complications at the Federal level, there are the further difficulties of Federal-State as well as inter- and intrastate agency relations.[237] And then there are the further complexities of the relationships between State and local governmental bodies.[238]

The need to provide for comprehensive, fruitful management of marine resources in the face of the existing realities has led to a variety of proposals for alternatives. One calls for regional outer continental shelf advisory boards with State representation, a form of which has already been created by the Department of Interior[239] and another form of which is embodied in the proposed 1977 amendments to the OCSLA.[240] Others include types of public corporations like COMSAT[241]

---

[235] See, e.g., Coastal Zone Management, March 1, 1978, at 5-6; Ocean Science News, July 24, 1978, at 1-4.

[236] Cf., e.g., E. Haskell, State Environmental Management: Case Studies of Nine States (1973). Many States have taken the occasion of developing coastal zone management plans to reorganize their marine resource agencies. For a compilation of sources on this subject, see Hershman & Folkenroth, "Coastal Zone Management and Intergovernmental Coordination," 54 Ore. L. Rev. 13, 14 n.2 (1975).

[237] See, e.g., Hershman, "Achieving Federal-State Coordination in Coastal Resources Management," 16 Wm. & Mary L. Rev. 747 (1975). Student studies of the Georgia and New Jersey agency structures are on file with The Rusk Center.

[238] See, e.g., id.; Brewer, "The Concept of State and Local Relations under the CZMA," 16 Wm. & Mary L. Rev. 717 (1975); Comment, "Coastal Controls in California: Wave of the Future?" 11 Harv. J. Legis. 463 (1974).

[239] See note 159 supra.

[240] H.R. 1614, 95th Cong., 1st Sess., 124 Cong. Rec. H602 (daily ed. Feb. 2, 1978) § 210(19). Governors of five mid-Atlantic States

or the formerly proposed Federal Oil and Gas Corporation;[242] or public authorities on the model of the New York Port Authority,[243] the Tennessee Valley Authority,[244] or the Delaware River Basin Commission.[245] There have also been proposals for an authority more like a fifty-first State[246] and for a Federal Oceania.[247]

More so than the jurisdictional issue or the body of Federal statutes or the division of revenue, the administrative structure for management of marine resources--existing and proposed--gives evidence that mutual transfrontier Federal-State interests have been discovered but neither classified nor ordered nor fully understood.

In sum the unseen boundary which divides what the States "own" from what the Federal government "owns" of the sea is no barrier to perception and pursuit of the interests of one sovereign in the area allotted to the other. State interests in Federal areas have, for the most part,

---

have formed the Middle Atlantic Governors' Coastal Resources Council to influence OCS decision-making.

[241] The COMSAT model was suggested by Governor Brendan Byrne of New Jersey. Outer Continental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments: Joint Hearings Before the Senate Comms. on Interior and Insular Affairs and Commerce, 94th Cong., 1st Sess., pt. I at 124 (1975) (statement of Governor Brendan Byrne). The structure and function of COMSAT is governed by 47 U.S.C. §§ 731-744 (1970).

[242] See Library of Congress, Congressional Research Service, Federal Leasing of Petroleum on the Outer Continental Shelf 43 (1976).

[243] For a discussion of the New York Port Authority and other port authorities, see Goldstein, "An Authority In Action--An Account of the New York Port Authority and its Recent Activities," 26 Law & Contemp. Prob. 666 (1961); Flair, "Port Authorities in the United States," 26 Law & Contemp. Prob. 703 (1961).

[244] The merits of the TVA are evaluated in Wirtz, "The Legal Framework of the Tennessee Valley Authority," 43 Tenn. L. Rev. 1573 (1976).

[245] See Delaware-New Jersey Compact, H. J. Res. 783, approved Sept. 20, 1962, Pub. L. 87-678, 76 Stat. 560. The Delaware River Basin Commission could serve as a model for interstate cooperative ventures.

[246] Gaither, "A Public Authority to Manage the Atlantic Outer Continental Shelf," 2 Coastal Zone Management J. 59 (1975).

[247] 99 Cong. Rec. 2578 (1953) (remarks of Rep. Boggs).

been associated with two situations: those involving some State voice in extraterritorial activities such as outer continental shelf oil exploration and production which may have environmental effects in State lands and waters,[248] and those where State regulation of such activities as fishing or oil transfer within their waters may have extraterritorial effects.[249] By and large, the Federal interests in State waters is said to be that of national uniformity: tanker equipment, design and movement specifications; fishery licenses; regulation of submerged lands for conservation purposes.[250]

Recognition of these transfrontier interests is reflected

--in extraterritorial jurisdiction;

--in the roles set aside for States in Federal legislation (e.g., in the "consistency" requirements of the CZMA and the "veto" of the Deepwater Ports Act), as well as the assertion of potential Federal roles in State waters (e.g., regulation of fish under the FCMA);

--in the congressional allotment of funds to States (e.g., the CEIP payments); and

--in the administrative practice of consultation with States (in outer continental shelf leasing).

The forms taken by this recognition, however, have no internal logic or external consistency. They have been brought about by ad hoc response to shifting, external pressure. They are not the outgrowth of reflection, understanding and choice at the core.

---

[248] See pp. 38-40 supra. While oil spills which intrude upon State lands and waters are the most immediately dramatic possibility, there are other ecological, social and economic effects which are actually greater. See generally Council on Environmental Quality, supra note 234; Council on Environmental Quality, Oil and Gas in Coastal Lands and Waters (1977); Office of Technology Assessment, Coastal Effects of Offshore Energy Systems (1976); Effects of Offshore Oil and Natural Gas Development, supra note 224.

[249] See pp. 29-32 supra.

[250] See pp. 32-36 supra.

IV. BALANCING FEDERAL-STATE INTERESTS

"A land boundary between two States is an easily understood concept," Justice Harlan was led to remark. "It marks the place where the full sovereignty of one State ends and that of the other begins. The concept of a boundary in the sea, however, is a more elusive one."[251] Sea boundaries are elusive in part because, more than land, water resists demarcation. The boundary of the territorial sea of the United States has proved elusive for another reason, the one Justice Harlan had in mind, and that is sovereignty. The boundaries of federalism are not easy to draw.

An ordering of Federal-State relations in marine affairs has been due but not forthcoming at least since the Truman Proclamations of 1945. But how are they to be ordered and bounded? No fully satisfactory standard is at hand for locating the divide where the full sovereignty of a State ends and that of the United States begins.

As projected onto the oceans, a Federal-State balance has been sought on one or both of two scales. By one, the further seaward the marine area lies, the more preponderant the Federal interest; the further landward the area, the greater the State interest. According to the other, where there is need for national uniformity, Federal interests prevail. Where there is need for a local approach, then the States are to dominate.

Both scales have tradition, utility and a measure of accuracy. But both are ultimately inadequate to the reality which they are employed to determine.

The weight-of-interest seaward distance measure does not always hold up. The national interest in defense, for example, is not less weighty at the landward than at the seaward extreme. The reasoning of the majority in United States v. California[252] was faulty on exactly this score. In refusing in that case to find State ownership of the

---

[251] United States v. Louisiana, 363 U.S. 1, 33 (1960).

[252] 332 U.S. 19 (1947). See pp. 28-29 supra.

territorial sea, the Court noted that offshore oil might become the subject of international dispute and it then went on to maintain that

> if wars come, they must be fought by the nation. The State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion [over the territorial sea] which it seeks. . . . [W]e are not persuaded to transplant the Pollard rule [of State ownership of the shore between high and low water] out into the soil beneath the ocean, so much more a matter of national concern.[253]

But California is as ill-equipped to defend against foreign attack landward of the shore as it is to seaward, and there is surely no less national concern for defense of the dry land of California than for the marine belt along it, for defense of onshore than for offshore oil.[254]

---

[253] Id. at 35-36 (emphasis added)

In England, the Crown owned, subject to the jus publicum, the lands beneath navigable waters (defined as those where the ebb and flow of the tide is felt). The Supreme Court held, in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), "in effect, that the original states owned in trust for their people the navigable tide waters between high and low water mark within each state's boundaries, and the soil under them . . . ." U.S. v. California, 332 U.S. 19, 30 (1947). See also, Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935); Shively v. Bowlby, 152 U.S. 1 (1893).

[254] This was substantially the point of comments made by dissenting Justices Reed and Frankfurter in the California case. Justice Reed observed that the "power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation." Id. at 42-43. Justice Frankfurter wrote:

> It is beside the point to say that 'if wars come, they must be fought by the nation.' Nor is it relevant that 'The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.' It is common knowledge that uranium has become 'the subject of international dispute'. . . .

Id. at 44-45.

Justice Frankfurter had discerned the majority to have erred in its use of the notion of dominion, which relates to property, rather than to political authority. For the Romans, imperium designated political sovereignty; dominium was concerned with property ownership. The majority, had found Federal imperium in the territorial sea and had erred by

If the Federal defense interest does not grow weightier as the focus moves to seaward, neither does a State's conservation interest grow less weighty. Thus, however Alaska's interest in preserving king crab may be described, it does not wane with distance against a waxing Federal interest.[255] Nor would Washington's interest in preserving salmon vary in weight in comparison with a Federal interest depending upon whether the fish were at the further extreme of their migratory pattern or spawning in State inland waters.[256] The degree of Federal as against State interest cannot always be determined according to nautical distance.

The other test, that of uniformity/diversity, has its own shortcomings. It can be traced back at least to Cooley v. Board of Wardens of the Port of Philadelphia in 1851.[257] That case established an iden-

---

changing that imperium into Federal dominium as well. Id. at 43-44. Cf. also United States v. Louisiana, 363 U.S. 1, 33-35 (1960).

255 Cf. State v. Bundrant, 546 P.2d 530 (Alaska 1976) discussed at p. 30 supra.

256 At the international level, the UNCLOS Negotiating Text recognizes a nation's interest in anadromous species as continuing into the high seas. See note 68 supra.

257 53 U.S. (12 How.) 299 (1851).

The textual discussion collapses three areas into one. There is analytical validity in doing so although, admittedly, violence is thereby done to the complexity and nuance of the separate areas.

Adjustment of Federal-State interests in marine areas will be carried out, for the most part, under the rubrics of the Commerce, Admiralty or Supremacy Clauses. The uniformity/diversity measure may be said to serve as a standard common to analysis under all three. As regards the first two clauses, one commentator correctly observed about the Court's decision in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), that its

> . . . effect is to place the constitutional question in the case of state regulations that overlap the admiralty power on a par with the question that arises when the overlap is with the Commerce Clause power: except where there is need for uniformity (i.e. an unreasonable interference with the federal interest), concurrent state jurisdiction should be upheld.

tity of exclusive Federal concern with situations where "a single uniform rule" or "one uniform system" is required, and of State power with situations where "diversity," or "different systems of regulation, drawn from local knowledge and experience," are requisite.[258] As that test has been more recently defined and employed, when Congress has not acted,

---

Soper, "The Constitutional Framework of Environmental Law," in Federal Environmental Law 20, 87-88 (E. Dolgin & T. Guilbert eds. 1974).

> With respect to pre-emption, it has been noted that
>
> [T]he Court has relied increasingly on the pre-emption doctrine in cases which would have been decided under the commerce clause only a short time ago. It is now frequently argued (1) that the states lack concurrent power under the doctrine of Cooley v. Board of Wardens, and (2) that if the states possess such power, the field has been pre-empted by federal legislation. Almost all of the cases so argued which result in the preclusion of state action have rested on the pre-emption ground without reaching the commerce clause issue. The Court, however, appears to use essentially the same reasoning process in a case nominally hanging on pre-emption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce.
>
> . . . .
>
> . . . [T]he Court has adopted the same weighing of interests approach in pre-emption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the pre-emption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the pre-emption argument and allowed state regulation to stand.

Note, "Pre-emption as a Preferential Ground: A New Canon of Construction," 12 Stan. L. Rev. 208, 219-20 (1959). Pre-emption analysis turns upon construction of congressional legislation rather than upon construction of the constitution. It is thus more flexible because it allows for "legislative overruling." See, e.g., Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271-72 (1977); Massachusetts v. Westcott, 431 U.S. 322 (1977).

[258] 53 U.S. (12 How.) at 319-20.

> the familiar test is that of uniformity versus locality; if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominately local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.[259]

The test of uniformity or of "unhampered operation" does allow situational flexibility from one factual setting to another. But firm ground, if not an inflexible rule is needed, and as one State court has noted, the "language of the United States Supreme Court is not always consistent in analyzing the application of the Commerce Clause to varying facts and it is difficult to rationalize it into one harmonious jurisprudential whole."[260]

Indeed one recent Supreme Court decision which employed the language of uniformity in fact struck a balance on a totally different--even reverse--basis and thereby exposed the inadequacy of the uniformity/diversity scale. That case was Ray v. Atlantic Richfield Company[261] which placed in issue Washington's Tanker Law regulating tankers in Puget Sound as in conflict with the Ports and Waterways Safety Act of 1972 (PWSA) [262] and the Constitution.

One provision of the Tanker Law required certain safety features in the design and equipment of tankers.[263] The Court found these design requirements invalid in the face of the pre-empting requirements set by the PWSA.[264] The Court made reference to the need for uniformity of safety design requirements, a need predicated upon the fact that such requirements are a problem for solution at the international level where

---

[259] California v. Zook, 336 U.S. 725, 728 (1949).

[260] American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691, 697, 15 Or. App. 618, 229-30 (1973).

[261] 98 S. Ct. 989 (1978).

[262] 33 U.S.C. §§ 1221-1227, 46 U.S.C. 391a (Supp. V 1975).

[263] Wash. Rev. Code § 88.16.190(2) (Supp. 1977).

[264] 98 S. Ct. at 996-1000.

the nation has to speak with one voice.[265]

A second provision of the Tanker Law required that tankers over a certain size have tug escorts.[266] Because this provision was more of an operating rule for local waters, the Court said, it was valid.[267]

This same uniformity/diversity test was applied to a third provision, that excluding from Puget Sound tankers in excess of 125,000 DWT.[268] It was struck down.[269] The invalidation of this third provision requires a closer look. One may disagree with the outcome of the application of the uniformity/diversity standard in the first two instances without challenging the legitimacy of the application. The legitimacy of the application of the standard is subject to challenge in the context of its third application.

The section of the PWSA which was found to pre-empt the third provision of the Washington law reads:

> In order to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harms resulting from vessel or structure damage, destruction, or loss, the Secretary of the department in which the Coast Guard is operating may--
>
> . . . .
>
> (3) control vessel traffic in areas which he determines to be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by--
>
> . . . .
>
> (iii) establishing vessel size and speed limitations and vessel operating conditions. . . .[270]

---

265 Id. at 999.

266 Wash. Rev. Code § 88.16.180 (Supp. 1977).

267 98 S. Ct. at 1000-02.

268 Wash. Rev. Code § 88.16.190(1) (Supp. 1977).

269 98 S. Ct. at 1002-05.

270 33 U.S.C. § 1221 (Supp. V 1975).

The Secretary of Transportation has delegated his authority under this section to the Coast Guard.[271] In this instance, the local Coast Guard had made it a practice only to prohibit the passage through the Rosario Strait of more than one 70,000 DWT tanker at any given time and to reduce the size limit to 40,000 DWT in bad weather.[272] This practice was just that; the size limit was not in any written rule or regulation.[273]

The higher standard of absolute prohibition of supertankers by Washington was in conflict with Coast Guard practices, which led the Court to conclude that

> if Washington's exclusion of large tankers from Puget Sound is in reality based on water depth in Puget Sound or on other local peculiarities, the Tanker Law in this respect would appear to be within the scope of Title I, in which event also state and federal law would represent contrary judgments, and the state limitation would have to give way.[274]

In this case, State judgment about a local matter is made to give way to the local Coast Guard's local navigation practice in local waters. Notwithstanding this evisceration of it, the Court continued to pay lip service to the uniformity/diversity test. However, the pre-emption of State law by Federal legislation could not be placed upon the need for a uniform rule or system, so it was placed upon the need for "someone with an overview:"[275] "[w]hile it was not anticipated that the final product . . .would be the promulgation of traffic safety systems applicable across-the-board to all United States ports, it was anticipated that there would be a single decision maker, rather than a different one in each State."[276]

---

[271] 33 C.F.R. § 160.35 (1977).

[272] 98 S. Ct. at 1003.

[273] Id. at 1007 (Marshall, J., dissenting).

[274] Id. at 1003.

[275] Id. at 1004.

[276] Id.

The notion of uniformity has been overtaken by the notion of "someone with an overview." It is not to be thought that the Supreme Court will really choose to pursuade the Federal "someone with an overview" (as opposed to a State "someone with an underview?") test further as a mode of ordering Federal-State relations. (Aside from its other weaknesses and unfortunate, big-brother-knows-best overtones, the "overview" test fails to clarify how the local Coast Guard unit--or any Federal agency representative--can be thought to have more "overview" than the State legislature. Although the Coast Guard may not, other Federal agencies may have taken as their mission, the protection of interests far more parochial, bureaucratic or provincial than any which the States might wish to pursue, in which case they are not capable of "overviewing.")

In any event, the uniformity/diversity device, seaward-distance scale, is not fully adequate to determine Federal-State relationships. Factually, it fails to take account of the possibility that Federal agencies may lack capacity for disinterested uniformity. Theoretically, it fails to take account of the possibility that national interest warranting Federal priority may sometimes lie in diversity rather than in uniformity. Nor does it make way for the possibility that States may best protect the national interest in uniformity, especially where the uniformity propounded by a Federal agency is either a narrow interest writ large or a surrender to the lowest common standard of regulation.

As Ray demonstrates, contrary protestations notwithstanding, the uniformity/diversity standard cannot be stretched to cover some situations and will be set aside by the Court when occasion demands. But if this standard is not sufficient, "overview"/"underview" is no solution either. A meaningful, comprehensive measure for the bounds of federalism has yet to be stated. One is left to conclude that there is fundamental uncertainty about the appropriate roles of Federal and State governments.

V. THE OCCASIONS OF A TERRITORIAL SEA CHANGE

The obvious arguments for an extension of the territorial sea to the twelve-mile limit are that growing international practice would allow and encourage it, the UNCLOS Negotiating Text permits it, it may soon become the international rule, the United States acknowledges the twelve-mile claims of others, and no serious international repercussions are likely to eventuate from it.

The simple domestic consequences of an extension would be some administrative adjustments and a laundering of the applicable statutes to conform them to the new limits. (An increase in State marine territory would undoubtedly also make for an increase in State influence upon marine activity.)

The more important arguments for and consequences of a boundary change depend upon seizing it as an opportunity. It could be taken as occasion for an experiment in federalism, in deployment of marine and other natural resources, and in citizen involvement in governmental choice. The most forceful, albeit aspirational, case for an extension of the territorial sea, then, is that it could serve for advance exploration of thoughtful, deliberate responses to major challenges whose momentum gathers geometrically with time.

A. Federalism

The Civil War, the Constitutional amendments which followed it, and the New Deal settled many questions about the necessity of the Union to civil rights, the economic system, social welfare, and planning.[277] But in a different age and context, there remain unsettled questions about the relationship of the States to the Federal government.

Perhaps present prerogatives cannot or should not be altered and ought to be left undisturbed. To continue to muddle through has prece-

---

[277] For a useful, recent comment on the subject, see Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977).

dent. But muddling also invites reexamination.

I have dwelt at length upon federalism and mutual Federal-State interests in the context of marine affairs, the territorial sea in particular: the recognition of transfrontier interests in law and administrative practice accompanied by a failure of ordering and ordering principle. The hierarchical burdens of the existing law and bureaucracy and the present conceptual confusion are not restricted to the marginal sea. They are more pervasive. Indeed, the sea no more than mirrors them.

Recent Supreme Court decisions on various issues exhibit the symptoms of "half-explored assumptions as to the definition and extent of the States' role in our governmental system."[278] The Court speaks in its confusion for us all. Its opinions have provoked scholarly diagnosis and hopeful as well as helpful prescriptions for treatment.[279] But no one presumes to a final answer. We are still in the early stages of learning the questions.

One discerning student of constitutional law asks:

> What are the values, historical and contemporary, of federalism? Can it still be said that federalism increases liberty, encourages diversity, promotes creative experimentation and responsive self-government? Or is it a legalistic obstruction, a harmful brake on governmental responses to pressing social issues, a shield for selfish vested interests? Is federalism a theme that constitutional law must grapple with simply because it is <u>there</u>, in the Consti-

---

[278] Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 Yale L. J. 1196, 1224 (1977). The comment is directed particularly to National League of Cities v. Usery, 426 U.S. 833 (1976), which denied congressional authority to impose Federal wage and hour requirements upon State and local governments.

[279] Among the best analyses are Stewart, <u>supra</u> note 268; Fiss, "Dombrowski," 86 Yale L. J. 1103 (1977); Michelman, "States' Rights and States' Roles: Permutations of 'Sovereignty' in <u>National League of Cities v. Usery</u>," 86 Yale L. J. 1165 (1977); Tribe, "Unraveling <u>National League of Cities</u>: The New Federalism and Affirmative Rights to Essential Government Services," 90 Harv. L. Rev. 1065 (1977); Weinberg, "The New Judicial Federalism," 29 Stan. L. Rev. 1191 (1977).

tution? Is the prime challenge it poses that of minimizing the obstacles that the complexities of federalism put in the way of meeting modern needs? Or does federalism embody more appealing values that deserve some of the imaginative enthusiasm with which modern constitutional law embraces the promotion of such values as equality and freedom of speech?[280]

He then goes on to remind us:

> Federalism has been not only the American response for governing large geographical areas with diverse local needs. The federal model has also provided a mechanism for governments of other nations, as well as for international cooperation. . . . The friction and accomodations during nearly two centuries of American experience. . . deserve consideration not only for their own sake but also for the light they shed on federalism's capacity to adapt to future needs, here and elsewhere.[281]

---

[280] G. Gunther, Constitutional Law 82-83 (9th ed. 1975).

[281] Id. at 83. Federalism is a major theme of Gunther's book, where it is definitively as well as suggestively addressed. Laurence Tribe has concluded that

> the federal and state governments will have to depend upon one another in virtually every significant area of endeavor, and . . . such mutual dependence must continue to provide the primary assurance that neither level of government will achieve a threatening hegemony over all of our public life. . . .[A]long both dimensions, that of federalism as well as that of separation of powers, it is institutional interdependence rather than functional independence that best summarizes the American idea of protecting liberty by fragmenting power.

L. Tribe, American Constitutional Law 17 (1978). Federalism is a major subject of Tribe's book also. His treatment of it is singularly complete and imaginative.

Because the substantive factors taken into account are roughly the same in judicial analysis under the Commerce, Admiralty and Supremacy Clause in deciding whether a State law is to be allowed to stand in the face of the constitution or Federal legislation, the text treats the uniformity test as though it were one standard.

An excellent, thorough discussion of these issues may be found in G. Gunther, Constitutional Law 356-67 (9th ed. 1975) and L. Tribe, American Constitutional Law 376-91 (1978).

Much has ridden and will continue to ride on the American experiment in federalism. My argument is that an expansion of the territorial sea is a medium for continuation of the experiment. It is a medium unique in that the problems of Federal-State relations can be isolated with relative purity and their solutions manageably tested. Also, the results from it will be readily transferable to the coming massive challenges posed by shortages of energy, natural resources and food. Finally, to argue from impoverishment: if not in the territorial sea, then where? Where better, and how?

B. Natural Resources

Questions about federalism have been exposed in contexts other than that of the conservation and use of natural resources but in no other have they become more acute. To begin discovering answers to the Federal-State dilemmas of the territorial sea would serve as a start to resolving the problems of federalism in deployment of natural resources generally. At the least, expansion of the territorial sea would stimulate development of an oceans policy, the lack of which is now papered over with a congeries of administrative regulations.

Practically as well as theoretically, decisions precipitated by a change in territorial sea boundaries could not be made in isolation from decisions involving the areas both landward and seaward. An extension of the territorial sea to twelve miles would act as a catalyst to a more comprehensive reckoning inclusive of all marine areas.

Landward of the territorial sea there are the issues, already touched upon, of the siting of support facilities, pipelines, storage tanks, and oil, gas and hard mineral processing works. Federal priority over and pre-emption of State action on such matters is far from settled in law or in political fact.

Seaward of the territorial sea lies the outer continental shelf and then the high seas and deep seabed beyond national jurisdiction. The States, as noted, have interests in these politically and ecologically interdependent zones.

If a 200-mile "exclusive economic zone" is embodied in a compre-

hensive treaty or, failing that, becomes accepted international practice, then the United States would have to decide whether to claim the full rights of such a zone and to plan for one if it did. Such planning would have to take account of administrative and enforcement needs as well as of State interests. It would repeat and recur to the solutions for these matters arrived at in the context of an extended territorial sea.

In regard to deep seabed mining, interest is presently directed to manganese nodules, the most sought after of which lie in areas of the Pacific floor. These nodules contain cobalt, copper, manganese and nickel. American industry imports all four. Transnational consortia have the potential for commercial ocean mining of nodules, perhaps by the mid-1980's.

Bills before Congress would allow the United States to license such mining of the deep seabed.[282] It has been argued that unilateral licensing ought to proceed in order to protect American strategic interests against the possibilities of cartelization and mineral shortages, to help overcome growing deficits in the balance of payments, to encourage and protect the ocean mining industry's investment, and to capitalize on the American lead in the technology of ocean mining and processing.[283]

Opponents to the licensing bills maintain that such action would constitute a symbolic and economic threat to Third World Nations, that it might invite direct or indirect reprisal, that American strategic interests are in no immediate danger of cartelization of the minerals contained in nodules, that it would violate the notion of deep seabed

---

[282] H.R. 3350, 95th Cong., 2d Sess., 124 Cong. Rec. H7341 (daily ed. July 26, 1978), passed as amended by House, 124 Cong. Rec. H7382-83 (daily ed. July 26, 1978). S. 2053, 95th Cong., 1st Sess., 123 Cong. Rec. S14692 (daily ed. Sept. 12, 1977).

[283] See generally Discovery II, Fall 1977, at 1, 3 (publication of the United Methodist Joint Law of Sea Project); Soundings, January 1977, at 2 (publication of Ocean Education Project); House debates on H.R. 3350, 124 Cong. Rec. H7341 (daily ed. July 26, 1978).

resources as the "common heritage of mankind," and that it would actually jeopardize the long-range interest of the United States in a stable world order.[284]

Whether it is undertaken unilaterally or in a manner finally prescribed by treaty, seabed mining will likely begin sooner or later. It may affect State interests in a variety of possible ways: environmental disruption, on-shore processing, transportation, altered resource and job markets, and revenue gains and losses. Little attention has been devoted to these strictly domestic effects of deep seabed mining. Before they become critical, a fruitful response to them could be fashioned in advance out of precedents drawn from the experience of expanding the territorial sea. That experience would provide the framework within which to take up the question of deep seabed mining as a component in an oceans policy.

Besides its contribution to oceans policy, working the Federal model cleaner in the territorial sea would also instruct the American approach to other natural resources. The protection and the use of fresh water,[285] air,[286] and minerals,[287] a common denominator of which

---

[284] See generally Raymond, "Seabed Minerals and the U.S. Economy," 123 Cong. Rec. E733 (dily ed. Feb. 10, 1977); Discovery II, Fall 1977, at 1, 3 (publication of the United Methodist Joint Law of Sea Project); Soundings, January 1977 at 2 (publication of Ocean Education Project); House debates on H.R. 3350, 124 Cong. Rec. H7341 (daily ed. July 26, 1978).

[285] See e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. V 1975) as amended by The Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1567, 1 Envir. Rep. (BNA) 5101. See generally p. 43 supra; Tripp, "Tensions and Conflicts in Federal Pollution Control and Water Resource Policy," 14 Harv. J. Legis. 225 (1977); Comment, "Areawide Planning Under the Federal Water Pollution Control Act Amendments of 1972: Intergovernmental and Land Use Implications," 54 Tex. L. Rev. 1047 (1976).

[286] See, e.g., Clean Air Act, 42 U.S.C. §§ 1857-1858a (1970 & Supp. V 1975); EPA v. Brown, 431 U.S. 99 (1977). See generally Gordon, "When Push Comes to Infringement of State Sovereignty: Implementation of EPA's Transportation Control Plans," 1976 Wis. L. Rev. 111; Note, "The Clean Air Act Amendments of 1970: A Threat to Federalism," 76 Colum. L. Rev. 990 (1976).

is land[288] and energy[289] use, also depend upon the structures of Federal-State relationships. Thus,

> the lessons of environmental policy refute Harold Laski's conclusion that "the federal form. . .is unsuitable to the state of economic and social development that America has reached." The sobering fact is that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington. Substantial reliance on state and local action and judgment is inevitable. But the need for central stimulus and direction is equally clear.[290]

It turns out that the Federal-State problems exposed in the territorial sea are prototypical. One can only suppose that Federal-State solutions discovered in the territorial sea would also prove prototypical.

One of the presuppositions of federalism is "the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy. . . ."[291] For that reason federalism was the product of a regard for the connection between governmental structure and the politics of freedom.[292] The Federal-State arrangement is at heart a matter of politics. So are marine resources.

---

287 See, e.g., Staff of Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess., Revision of the Mining Law of 1872, (Comm. Print 1977).

288 See F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1972).

289 See Note, "Federal-State Conflict in Energy Development: An Illustration," 53 Den. L. J. 521 (1976).

290 Stewart, supra note 278, at 1266 (footnote omitted).

291 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

292 Tribe speaks of the intertwining "in a single, grand fabric of law and politics" of the two strands of "intensely human and humane aspirations of personality, conscience, and freedom," and "more mundane and mechanical matters like geography, territorial boundaries, and institutional arrangements." Tribe, supra note 281, at 15.

The UNCLOS has succeeded significantly in discovering to the world the fact that the sea is primarily a political subject and only secondarily environmental, technological, scientific, economic and legal. The use of marine resources depends upon prior political judgment: who makes the decision about ends, and how? In the United States these judgments belong to the people.

The ocean is a particularly fit subject for our politics for it is essentially popular. From the beginning, the sea has had purchase in the romantic imagination. It will have a future hold upon the public fisc. And it has determinative, present bearing upon the stability of our environment and our energy consumption.

Moreover, ocean affairs are singularly in the public domain. Anciently and modernly, the sea has been viewed in terms which distinguish it in this regard. Different marine areas and resources have been recognized variously as res communis,[293] as the subject of public trust,[294] or as the common heritage of mankind.[295] It is a resource of and for the people. The more interesting and nettlesome question is whether it can be a resource governable by the people.

The questions about the boundaries and uses of the territorial sea, about oceans policy and about federalism can always be removed from public judgment so that we may have decision-making not of and for

---

[293] See note 12 supra.

[294] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1893); Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Marks v. Whitney, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971); Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972); C. Leavell, Legal Aspects of Ownership and Use of Estuarine Areas in Georgia and South Carolina 17 (1971); Nanda & Ris, "The Public Trust Doctrine: A Viable Approach to International Environmental Protection," 5 Ecology L. Q. 291 (1976); Sax, "The Public Trust Doctrine in Natural Resources Law," 68 Mich. L. Rev. 471 (1970); Smith & Sammons, "Public Rights in Georgia's Tidelands," 9 Ga. L. Rev. 79 (1974).

[295] See note 2 supra.

the people, but by, at best, an elite.[296] This will be the result if the questions are not discerned, or if discerned are abandoned to experts, managers, time or market forces.

Not the least of the advantages which commend the territorial sea issue to the citizenry is the absence of pre-emptive claim to it. It is still open to meaningful public discussion and action, and is timely arrived if timely seized.

Expansion of the territorial sea could be made into an exemplary demonstration of popular participation in governmental choice. Even the process of informing and making the requisite public decisions about boundaries, uses and ends could itself be momentous.

Perhaps, as individuals, we have not completely reconciled or recently reflected upon the responsibility of our simultaneous Federal and State citizenship. "Our dual form of government has its perplexities," the Supreme Court has said, ". . . but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised. . . to promote the general welfare, material and moral."[297]

The success of federalism, of oceans policy and of resource management depends upon citizens who exercise political power, i.e., who acknowledge, then meet the freeing, public duties of dual citizenship. An experiment of citizen engagement in the dialogic process of governing the affairs of the territorial sea would constitute a beginning toward the fresh wresting of political control from the principalities and powers.

---

[296] The most luminous reflection on the origin and present shape of the role of the people in American government remains Hannah Arendt's On Revolution (1964).

[297] Hoke and Economides v. United States, 227 U.S. 308, 332 (1913).

OCEAN SPACE DEFINITIONS

I.C.N.T. Definitions