UNIVERSITY OF NORTH CAROLINA SEA GRANT PROGRAM

STATE AND FEDERAL JURISDICTIONAL CONFLICTS IN THE REGULATION OF UNITED STATES COASTAL WATERS

by
Thomas Suher and Keith Hennessee

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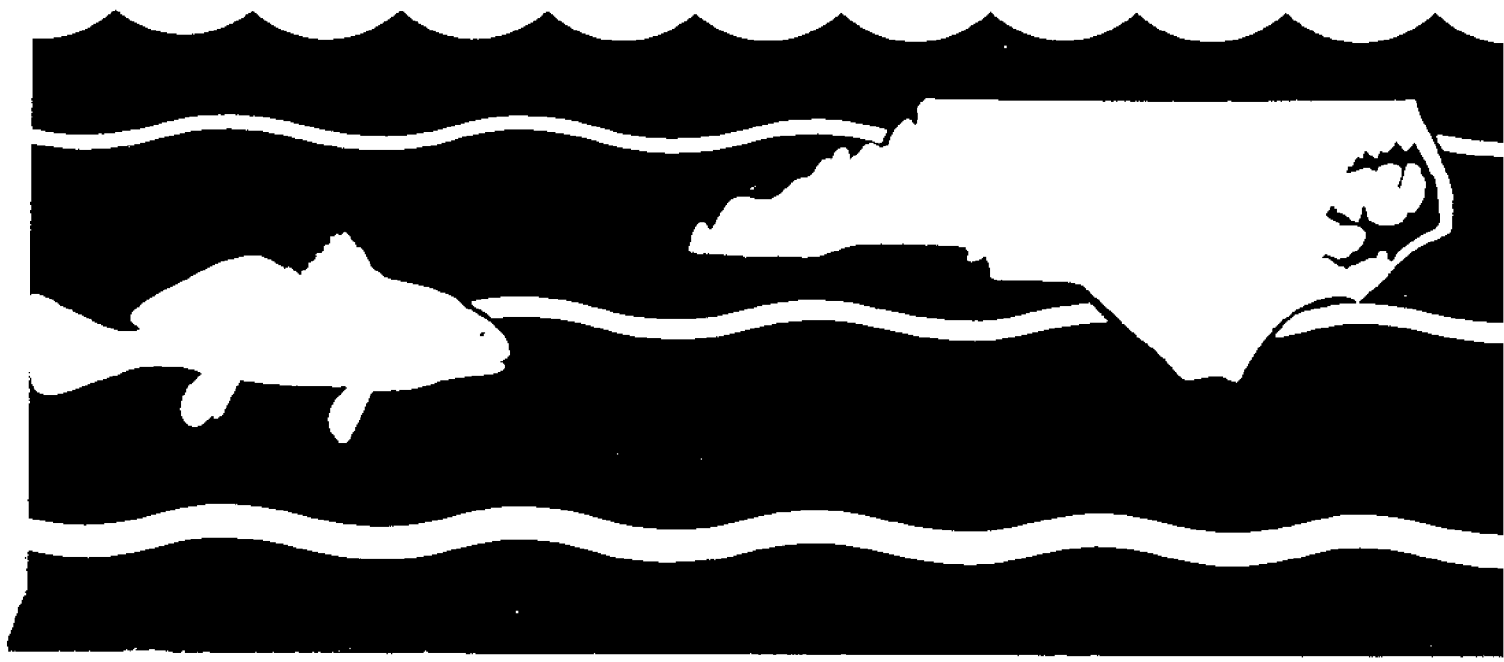

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Foreword

The co-authors of this important legal research paper, Thomas Suher and Keith Hennessee, are both third year students in the Law School of the University of North Carolina. Each has had two years of intensive exposure in the law school Sea Grant program and to the turbulent developments of the law of the sea. Both contributed significant articles to the 1972 publication, "The Surge of Sea Law," UNC-SG-73-01. They have assisted in editing the earlier 1973 publications, "Current Problems of Sea Law," UNC-SG-74-03, and "Emerging Ocean Oil and Mining Law," UNC-SG-73-02.

This present work of theirs takes its place as the eighth official Sea Grant legal publication to come from the North Carolina Law of the Sea Program in the last two years.

One is likely to assume that legal problems of the sea, once one leaves the beach, fall primarily within the orbit of international law. This article carefully documents the fact that, at least in a federal union such as the United States, the conflict of laws arising between the federal government and component coastal states may present problems fully as complicated as those existing between conflicting national and international concepts of sea law.

This endless federal-state torsion is undoubtedly a source of frustration and dismay to the marine biologist and other men learned in the physical sciences; it is a commonplace, and largely unresolved, phenomenon to constitutional lawyers; and a troublesome fact of life to people as diverse as laboring seamen and cloistered ecologists. It is an area in which legal and scientific specialists as well as concerned laymen find adequate guidelines wanting, and certainly most elusive. To state this quandary is not to impugn the intelligence nor good faith of any group of society; it simply recognizes the great complexity of conflict resolution in this vital field of human marine enterprise, involving both federal and state interests. The genius of the common law system is to provide ultimately a solution for such societal enigmas by a combination of legislation and judicial decision. The interim period of formulating such regulation may be painful to all concerned.

These authors, though recent initiates to this process of legal adjustment and decision of pressing human problems, have here captured the essence of this difficult procedure. They offer not definitive solutions, but documented factual data and thoughtful suggestions pointing to simplified, reasoned and coordinated controls. While they carefully delineate what the law now is, they do not shrink from stating what they believe the law should be. In this they are faithful to the highest principles of both the bench and bar.

This effort here emphasizes that the law is, as is the ocean itself, a living, changing organism. This volume provides food for thought for the lawyer, judge, and legislator, the marine scientist, the ecologist, the student and the thinking citizen.

Thanks are due to Dr. B. J. Copeland, North Carolina Sea Grant Director, and to Dr. William Rickards, Assistant Sea Grant Director, for their understanding support of the importance of legal research to the unified Sea Grant effort to improve the marine environment. This work is a result of research jointly sponsored by NOAA Office of Sea Grant, Department of Commerce, and the State of North Carolina, Department of Administration.

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Professor of Law
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Introduction

The purpose of this study is to examine the problems involved in regulating the use and conservation of our coastal waters and the resources therein. Specifically, the focus will be on the interaction and conflict between the federal government and the states with respect to jurisdiction over the coastal waters. Emphasis will be placed on both the legal and practical considerations involved in the jurisdictional conflicts and how the respective interests of the two entities have been and can be reconciled by an equitable division of authority. Of necessity, this discussion of regulation of our coastal waters raises questions of international law and these will be discussed when relevant.

The format of the study is simple. Jurisdiction over our coastal waters is studied from four basic areas of inquiry--fishing resources, the continental shelf, tort jurisdiction and environmental regulation. The analysis will entail a review of the present state, federal and international law in each area with concentration on the most recent legislation, the conflicts engendered by the overlapping regulatory schemes and recommendations for possible resolution of these conflicts.

Conflicts exist between the state and federal governments in each of these vital segments of coastal waters management. Recent unilateral declarations of extended fishing zones out beyond any recognized national limit by certain of our states, a pending Supreme Court case on whether the outer continental shelf lands are owned by the states or the federal government and the proliferation of state pollution control legislation in an area already highly regulated by the federal government manifest the nature of the jurisdictional problems involved.

Adding urgency to the unsettled situation is the immediate necessity of a stable legal structure for regulation of our coastal waters. The balancing of the critical world-wide need for recovering oil and gas from the continental shelf and the almost equal importance of developing and preserving vital fishing resources as a food supply while maintaining the quality of the coastal water environment and ecology is a challenging task to even the most developed, sophisticated legal structure.

In many ways, the problem of how to regulate the coastal waters and the division of state-federal authority in this area is parallel to the problem faced on the international level in reconciling competing national interests in order to realize an effective legal structure to manage the world's oceans and their resources. The nature of the problem and the stakes involved in the coastal waters conflicts are identical to those set forth in President Nixon's admonition with respect to the world's oceans made in a May 23, 1970, statement, United States Ocean Policy:

> [T]he issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged...will be losers.

The exigency and complexity involved in reaching a solution is likewise similar at both the national and international levels. The observations by John Stevenson, head of the United States delegation to the United Nations Seabeds Committee, made at its March 18, 1971, Geneva meeting are most pertinent to coastal waters problems:

> Time is not on our side. We all know from experience in our... country's political and private affairs that problems unattended do not go away--rather, they have a way of compounding themselves until they defy solutions.... There are no simple solutions to complex problems. Indeed, one of the greatest problems of the Law of the Sea today is that it attempts to deal in absolute terms with the distribution of rights in the coastal waters. In each case, we must now examine the relative interests and find a legal formula which accommodates them. This is not a mere matter of compromise or "splitting the difference," but rather of building a legal structure which is simultaneously responsive to the different needs and interests.

We have, in this study, primarily attempted to delineate the problems and conflicts which exist in the regulation of the coastal waters and their most vital resources and to analyze these problems from a legal perspective. We have also endeavored to examine the respective interests of the states and federal government and to pose a few modest suggestions for their reconciliation. Harmonizing these interests and the ultimate resolution of the jurisdictional conflicts are necessary so that the fundamental legal structure "responsive to the different needs and interests" can be built.

We wish to thank Professor Seymour W. Wurfel for his assistance, encouragement and, particularly, his patience in this undertaking.

T.S. and K.H.

CONTENTS

CHAPTER I

FISHING RESOURCES

In discussing the nature of the state interest in the fishing resources of its coastal waters, it is essential to comprehend the comparatively inferior fishing effort of the United States as a nation. Basically, there are two causes for this unfavorable situation, both of which vividly reveal the need for an accommodation among the diverse elements which compose our national fishing effort. The first is the fractionalization of our fishing industry,[1] a product of sharply contrasting regional diversity in fishing practice and conflicting attitudes toward the use of our coastal waters.[2] The second, probably a consequence of this failure of common effort, is the obsolescence of our fishing fleet which is unable to compete with the much better equipped, state supported foreign fishing fleets.[3] Of course, our unimpressive fishing effort is partially attributable to our comparative lack of dependence on fish for animal protein and the presence of bountiful fish stocks in our coastal waters, but the continued decline of the industry and catch combined with the increased foreign fishing effort depleting our precious coastal fisheries resources manifest the danger of an inefficient and discordant national fishing effort.

> Nowhere is this plundering of the oceans more visible than off the U.S. coast, where the foreign fleets give all the appearance of slowly pushing U.S. fishermen off the high seas. As the number of American fishing boats and fishermen has declined over the last 20 years, so has the catch. Last year's U.S. haul of 2.3 billion pounds of edible fish was a billion pounds lower than the 1950's catch.[4]

In delineating the state position and interest in its coastal fishing resources and the conflict of that position with federal policy and international law, not only fisheries regulation but also the breadth of the territorial sea, the limits of national jurisdiction on the continental shelf and the appropriate regime for the governance of the sea beyond national jurisdiction must be considered.[5] Thus, all these issues will be discussed as they are relevant to the question of state-federal jurisdictional conflict

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[1]Clingan, A Second Look at United States Fisheries Management, 9 San Diego L. Rev. 432 (1972) [hereinafter cited as Clingan].

[2]Regional diversity refers to differences between a historic, commercial fishing practice in some of our coastal waters (for instance, New England and Florida) and the less commercial and more recreational nature of fishing in other states, and the vastly different types of fish caught in our states. The conflicting attitudes refer to our approaches to the territorial waters question; that is, whether military and free navigation interests should take precedence in determining national policy with respect to our coastal waters.

[3]"U.S. Fishermen Fret as Others Overfish Seas off U.S. Coast," The Wall St. J., Sept. 27, 1973 at 1, col. 6.

[4]The Wall St. J., Sept. 27, 1973, at 1, col. 6.

[5]Clingan, supra note 1, at 432.

over fishing rights and conservation and management of fisheries resources.

Probably the most consistent thread running through the history of fishery regulation in the United States is that under the Commerce Clause of the Constitution, provided there is no conflict with federal law, the regulation of fishing in territorial waters is within the police power of the individual state.[6] Early cases repeatedly upheld state statutes regulating fishing by vessels engaged in interstate commerce as a valid exercise of the police power as long as they were applicable to residents and nonresidents alike.[7] "[T]here appears to be a fairly strong history in this country of leaving the regulation of fisheries to the individual states.... In numerous judicial statements on this subject, courts have noted that states may regulate fisheries provided that...Congress has chosen not to do so."[8] The Submerged Lands Act[9] corroborates this historical trend by encouraging coastal states to take necessary measures for the protection and conservation of natural resources implying that Congress intended to leave the matter of domestic jurisdiction over marginal sea areas to the individual states and indicating it to be in the public interest for the states to manage and conserve their own natural resources.[10]

A survey of the various state laws and regulations reveals the comprehensiveness of state regulation in their territorial waters. Florida's Salt Water Fisheries and Conservation[11] laws are illustrative of this point; virtually all species of salt water fish are provided for therein including the regulation of the size of the fish caught, the length of the season and special protectionary measures during spawning season.[12] Shellfish such as shrimp, crawfish, oysters, sponges and crabs are similarly regulated as are marine animals.[13] As in most coastal states,[14] the equipment used by fishermen is extensively regulated[15] and licenses are required for all boats engaged in commercial fishing.[16]

Another example of typically comprehensive fisheries regulation is

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[6]Cowan, Era of Militant Fishing Jurisdiction--A Study of the Florida Territorial Waters Act of 1963, 23 U. Miami L. Rev. 160, 171 (1968) [hereinafter cited as Cowan]. See Cotsa v. Tawes, 149 F. Supp. 771, 773 (D. Md. 1957), aff'd, 355 U.S. 37 (1957).

[7]Skiriotes v. Florida 313 U.S. 69, 75 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1890); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851).

[8]Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, THE LAW OF THE SEA, 141 (1968) [hereinafter cited as Browning]. See Cerritos Gun Club. v. Mall, 96 F.2d 620 (9th Cir. 1938) and Brown v. Anderson 202 F. Supp. 96 (D. Alaska 1962).

[9]Submerged Lands Act, 43 U.S.C. §§, 1301-1315 (1971). See Browning, supra note 8, at 139 for a corroborative interpretation of this Act.

[10]Cowan, supra note 6, at 172.

[11]Fla. Stat. Ann., §§ 370.01 to 370.20 (1967) (Supp. 1971).

[12]Id. §§ 370.101 to 370.112 (1967).

[13]Id. §§ 370.12 to 370.177 (1967).

[14]Alabama's regulatory system is very similar comprising comprehensive laws on fishing equipment, licenses and the protection of all important species in Alabama coastal waters. Code of Ala., Tit. 8, §§ 15 to 171(21) (1958). See also N.C. Gen. Stat.. §§ 113-127 to 113-265 (1966).

[15]Fla. Stat. Ann., § 370.08, § 370.172 (1967).

[16]Id. § 370.06.

Chapter 130 of the Massachusetts General Statutes.[17] Provisons exist therein for licensing and permits to fish, the search and seizure for illegally caught fish, penalties for such violations, the regulation of fishing equipment and special licensing for commercial fishing. More exceptional legislation concerns the pollution of coastal waters[18] and the provision for any interested party or the Director of Marine Fisheries to propose regulations for approval by the marine fishery advisory commission on the "(1) manner of taking fish; (2) the legal size limits of fish to be taken; (3) the seasons and hours during which fish may be taken; (4) the numbers or quantities of fish which may be taken and (5) the opening and closing of areas within the coastal waters to the taking of any and all fish."[19]

Maine[20] and North Carolina[21] likewise provide, among their extensive laws and provisions on fisheries regulation, for the limitation of the taking of marine species with respect to the time taken, the method and equipment used in the taking, the size, the maximum quantities and the opening and closing of coastal fishing waters.[22] An examination of the fisheries regulatory legislation of virtually any coastal state will manifest a similar jurisdictional scheme with special emphasis on the fish species most commonly found in the particular state's coastal waters.

Many of the coastal states have formed regional fisheries commissions to effectuate "the wise management, development and utilization of marine, shell and anadromous fisheries which are of mutual concern, and to develop a joint program of protection, enhancement and prevention of physical waste of such fisheries."[23] The three major commissions comprise practically all the states with a substantial fishing interest; they are the Atlantic States Marine Fisheries Compact,[24] the Gulf States Marine Fisheries Compact[25] and the Pacific Marine Fisheries Compact.[26]

The language of the respective Compacts is very similar and the significant provisions practically identical. The purpose is to promote effective exploitation and conservation of fisheries resources by joint action in "the adjacent waters over which the compacting states jointly or separately now have or may hereafter acquire jurisdiction."[27] The duties and powers

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[17]Mass. Ann. Laws, ch. 130, §§ 1-80 (1972) (Marine Fish and Fisheries).
[18]Id. §§ 22-27A. Chapter III of this paper will deal at length with the state interest in pollution of its coastal waters.
[19]Id. § 17A. With the unilateral extension of fisheries jurisdiction by the Massachusetts legislature, to be discussed later, the provisions of § 17A will have their application extended accordingly.
[20]Maine Rev. Stat. Ann., Tit. 12, §§ 3401 to 4601 (1964).
[21]N.C. Gen. Stat. §§ 113-127 to 113-265 (1966) (Conservation of Fisheries Resources).
[22]Maine Rev. Stat. Ann., Tit. 12, § 3504 (1964); N.C. Gen. Stat. § 113-182 (1966).
[23]Pacific Marine Fisheries Commission Goal and Objectives as reprinted from the 23rd Annual Report, May, 1972, at 9.
[24]Member states include: Maine, Massachusetts, New Hampshire, Rhode Island, Virginia, Maryland, North Carolina, South Carolina, Georgia, Florida, Delaware, New York, New Jersey and Connecticut.
[25]Member states include Alabama, Florida, Mississippi, Louisiana and Texas.
[26]Member states include Alaska, California, Idaho, Oregon and Washington.
[27]Art. I. Cites are to the Pacific Marine Fisheries Compact but the important provisions discussed can be found in the other compacts, unless otherwise mentioned.

of the Marine Fisheries Commission, formed by the states, comprise research into methods of conservation and prevention of physical waste, the recommendation of the coordinated exercise of state regulatory authority within their respective jurisdictions to promote the preservation of endangered fishing stocks and the drafting and adoption of legislation and regulations concerning conservation of the fisheries resources to be presented to the respective state legislatures.[28] The Compact specifically refrains from considerations of the extent of state jurisdiction over its coastal waters and in no way limits the powers of any member state to enact legislation imposing additional conditions and restrictions to conserve its fisheries.[29]

In practice, the regional commission serves as a forum for settling interstate conflicts and encouraging cooperation particularly in the area of research. It also operates in the realm of the states' relationship with the federal government both where their respective rights and interests conflict and where common interests warrant mutual cooperation. Examples of the Pacific Commission's work at this federal-state level are the negotiations in opposition to the preemptive provisions of the Federal Marine Mammal Act and participation in the State-Federal Fisheries Management Program as it relates to the Dungeness crab fishery where federal-state interaction in research and management could be tested and perfected. Finally the Commission is involved in developing interaction and joint efforts at the international level.[30]

Probably the most unusual and, in a sense, the most sweeping type of fisheries regulation practiced by a state in its coastal waters is found in the licensing provisions of the Florida Territorial Waters Act of 1963.[31] Apparently prompted by the intrusion of Cuban fishermen into Florida territorial waters, section 370.21 provides that no fishing licenses will be issued to vessels of communist nations, fishermen subscribing to communism and vessels or fishermen who have signed a treaty of trade or friendship with a communist power. The authority asserted to justify this exclusion is the state's right "to exercise full sovereignty and control of the territorial waters of the State of Florida."[32] The rationale set forth is the protection of state resources, the securing of such resources for the citizens of Florida and the denial to nationals of alien or hostile powers to draw upon the resources of Florida's coastal waters.

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[28]Art. 4. Language identical to Article 4 can be found in all the compacts. Other pertinent provisions include the collaboration of the fishing research agencies of the signatory states as the official research agency of the Pacific Marine Fisheries Commission (Article VII of the Pacific Compact only) and the provision for representatives of the commercial fishing industry, commercial fishermen, and the state conservation agency on important commissions. See Article VII of the Pacific Compact and Article III of the Gulf States Compact.

[29]See Art. I of all Compacts and Art. VIII of the Pacific Compact.

[30]The information for this discussion of the practices of the Pacific Marine Fisheries Commission was supplied by Mr. John P. Harville, Executive Director of the Pacific Commission, whose assistance is greatly appreciated.

[31]Fla. Stat. Ann., § 370.21 (Supp. 1973-74). The term is used not in the sense of extensive spatial jurisdiction but in the sense of the authority asserted by Florida in order to regulate its coastal waters so intensively and exclusively. See Cowan, supra note 6 for an excellent discussion of this legislation.

[32]Fla. Stat. Ann., § 370.21 (Supp. 1973-74).

All of the state fisheries regulation legislation discussed so far is limited to the territorial waters of the coastal states. Traditionally, the states have only exercised jurisdiction over coastal water fisheries within their territorial waters and the cases and statutory law supporting this authority have thus delimited the state's jurisdiction.[33] The breadth of the territorial waters is determined by the United States and the three mile limit adhered to by the federal government has thus defined the limits of the states territorial waters.[34] Almost, without exception, the states have never claimed a wider territorial sea although they have vigorously contested the limits of their continental shelf and, more recently, their fisheries jurisdiction.

One exception is Rhode Island which has claimed, pursuant to grants of administration and dominion to the Rhode Island colonies and the "independent country of Rhode Island" prior to its entry into the United States, that their baselines from which the territorial waters extend should be altered.[35] While this would increase Rhode Island's territorial jurisdiction as a whole, it is not an attempt to claim a territorial sea wider than three miles. New Hampshire has extended its territorial limits and jurisdiction to waters off the coast to a distance of 200 nautical miles.[36]

Finally the coastal baseline from which the breadth of the territorial sea is measured is generally drawn by the coastal states in conformity with the treaties to which the United States is a party.[37] It is clear, then, that with respect to territorial sea claims, which entail assertions of sovereignty and issues of military security and foreign relations,[38] the states are generally not in conflict with federal law and policy.

However, this is not to say that the external limit of the territorial sea has been the limit of all state power and jurisdiction for all

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[33] See Cowan, supra note 6 and Browning, supra note 8 and the Submerged Lands Act. The state laws themselves, as a rule, explicitly declare that their laws and regulations will apply only to their territorial waters.

[34] There is presently substantial litigation, to be discussed later, as to the actual seaward boundaries of the coastal states and the United States v. Louisiana case has recognized that Texas has a seaward boundary in the Gulf of Mexico out to three marine leagues. However, all of these claims would only affect state ownership of the seabed and subsoil underlying the seas beyond three miles and do not refer to the superjacent waters and, thus, do not amount to an assertion of a wider territorial sea. The impact of these claims to ownership of the outer continental shelf will be investigated later.

[35] R.I. Gen. Laws Ann., § 42-1.1 (1972).

[36] N.H. House Bill No. 714, § 1.11 (1973). It may be argued that even this is only a claim to an extended lateral boundary and not the assertion of a wider territorial sea, but the New Hampshire legislation seems to differ from other boundary claims limited to the seabed in that it refers explicitly to territorial limits and jurisdiction over the waters.

[37] Mass. Ann. Laws, ch. 1, § 3 (1973) (Marine boundaries of Commonwealth). Massachusetts was selected to show that even states in dispute with the federal government on fishery jurisdiction and ownership of the continental shelf adhere to federal law in defining and delimiting their territorial sea.

[38] It is the assertion of sovereignty inherent in a territorial sea claim which brings into play questions of innocent passage, right of overflight and submarine passage. See the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.

purposes in its adjacent waters. Both past cases and recent state legislation evince the exercise of state authority beyond the three mile limit. The case of Skiriotes v. Florida[39] involved the conviction of a fisherman under a Florida state statute for using illegal diving equipment in the taking of sponges from the Gulf of Mexico two marine leagues (6 miles) off the Florida coast. The Supreme Court affirmed the conviction holding that despite the fact that the offence might have been outside Florida's territorial waters, "it would not follow that the State could not prohibit its own citizens from the use of the diver's equipment at that place."[40] The rationale was that the application of the statute involved no question of international law or relations and the conviction raised only questions of domestic rights and duties, that is the power of a state over its citizens, since international law in no way debarred a country from governing the conduct of its citizens beyond its territorial borders.[41] Furthermore, as there was no conflicting federal legislation and Florida had a legitimate interest in the matter, Florida could regulate the rights of its own citizens beyond its territorial limits.[42]

State jurisdiction was further expanded in United States v. Louisiana[43] in which the Supreme Court determined that Congress had the power to grant submerged lands beyond the three mile limit to Texas and Florida "as a domestic matter which did not necessarily affect United States claims regarding the territorial sea for international purposes"[44] because of the "special and limited character" of the jurisdiction to exploit submerged lands.

More likely to engender conflict is the recent legislation of certain coastal states extending their fisheries jurisdiction beyond the three mile limit and even beyond the federally created twelve mile limit.[45] Most notable is Section 17(10) of the Massachusetts General Statutes.[46] "So as to avert an ecological crisis and prevent the possible annihilation of such (marine) resources of the Commonwealth...(and) for the immediate preservation of the public health, welfare and convenience,"[47] the Director of Marine Fisheries is vested with all powers to adopt rules and regulations "necessary for the maintenance, preservation and protection of all Marine Fisheries Resources" out to 200 miles or to where the water reaches 100 fathoms, whichever is greater.[48]

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[39] 313 U.S. 69 (1941).
[40] Id. at 76.
[41] Id. The Court cited the case of The Hamilton, 207 U.S. 398 (1907) in which it was stated that "the mere fact of the parties being outside state territory in a place belonging to no other sovereign could not limit the authority of the State, as accepted by civilized theory."
[42] 313 U.S. at 77.
[43] 363 U.S. 1 (1960).
[44] Id. at 37; United States v. Florida, 363 U.S. 121 (1961).
[45] Federal Extra-Territorial Waters Act of 1966, 16 U.S.C. §§ 1091-94 (1966).
[46] Mass. Ann. Laws, ch. 130, §§ 17-17A (Supp. 1972).
[47] Id. preamble to § 17(10) (Supp. 1972).
[48] Id. § 17(10).

The necessity for this legislation was provided by the state of impending ecological disaster involving all of the important commercial fishing species due to "pulse fishing" (intense efforts in a particular fishery), massive Soviet and European fishing beyond the 12 mile limit, inadequate scientific knowledge of the danger created by such fishing and inadequate preventive regulation by the International Commission for the Northwest Atlantic Fisheries.[49]

Pursuant to this legislation, the Director promulgated regulations, known as the 200 Mile Lobster Control Act, to protect the lobster population out to 200 miles by the (1) licensing of all lobster fishermen, (2) the recording of catch statistics, (3) a minimum size limit, and (4) the protection of egg-bearing female lobsters. The regulations apply to Massachusetts lobstermen and lobstermen from other states and foreign nations and were created in response to the federal government's decision not to declare the lobster a creature of the continental shelf thus exposing the lobster resources to overexploitation by foreign fleets.

Maine has also extended their jurisdiction over the living resources of the sea out to a distance of 200 miles. "The State of Maine declares that it owns and shall control the harvesting of the living resources of the seas adjoining the coastline for a distance of 200 miles or to the furthest edge of the Continental Shelf, whichever is the greatest .... Control over the harvesting of these living resources shall be by licenses or permits issued by the Department of Sea and Shore Fisheries."[50] The rationale is clearly identical to that of an earlier petition by the Maine legislature to Congress to make the United States the custodian of all living resources in the water above the continental shelf. The danger to fishing resources from unrestrained fishing, the lack of existing machinery for the protection and conservation of these resources, the risk of depletion from foreign fishing and the dependence of Maine on its commercial fishing industry for its income and seafood needs necessitated this extension of jurisdiction.

Federal legislation and policy with respect to fishery regulations, while initially not concerned with the regulation of coastal fisheries,[51] has, at least since 1945, been characterized by a marked trend toward increasing federal regulation. The Truman Proclamation of 1945[52] gave official support to the establishment of "conservation zones in the 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." The Federal Territorial Waters Act of 1964[53] made it unlawful for a foreign vessel to fish in our territorial waters or to take any continental shelf fishery resource which appertains to the United States subject to two

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[49]Note, Territorial Jurisdiction--Massachusetts Judicial Extension Act--State Legislature Extends Jurisdiction of State Courts to 200 Miles at Sea, 5 Vand. J. Trans. L. 490 (1971).

[50]Maine Gen. Stat., Tit. 1, § 2-A, amending § 2. H.P. 904-L.O. 1192 (June 19, 1973).

[51]See Browning, supra note 8.

[52]Presidential Proclamation No. 2668, 10 Fed. Reg. 12304 (1945).

[53]16 U.S.C. §§ 1081-86 (1971).

exceptions: an international agreement which permits such activity and the taking of a designated particular species of fish subject to specific conditions and approval by the federal government.[54]

By far the most extensive entry into the fisheries regulation field by the federal government is the Federal Extra-Territorial Waters Act of 1966[55] (known as the 12-Mile Act) which established a fisheries zone contiguous to the territorial sea wherein the United States will exercise the same exclusive rights with respect to fisheries as it has in the territorial sea subject to the continuation of traditional fishing by foreign states as recognized by the United States. Section four of the Act is particularly significant: "Nothing in this Act shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the water within the fisheries zone established by this Act or as diminishing their jurisdiction to such resources beneath and in the territorial seas of the United States." Presumably, the failure to extend state jurisdiction to an area whose regulation is normally left to the states was in the interest of uniformity and ease of enforcement and administration.[56] The trend in international practice toward unilateral establishment of fishing zones provided justification for enactment of the legislation and this apparent conformity with international custom convinced the State Department that there was no objection to the bill from the standpoint of foreign relations.[57] The military did not oppose the bill since it did not in any way impair or affect adversely the right of free navigation on the high seas for warships and aircraft and was, therefore, no threat to our security.[58] Finally, bills that would declare a 200-mile fishing zone have been introduced in both Houses of Congress but the administration is firmly opposed to giving U.S. fishermen exclusive rights out to 200 miles fearing that such action would disrupt the 1974 Law of the Sea Conference where global arrangements on fishing will hopefully be reached.[59]

Relevant international law and custom on the subject of fishery regulation is somewhat confusing and, consequently, begets conflict. The Geneva Convention of 1958 on the law of the sea resulted in four multilateral treaties which, taken together, leave the issue of a nation's fisheries jurisdiction ambiguous. The Convention on the Territorial Sea and the Contiguous Zone makes it clear that a nation may exclusively exploit and regulate the fishing resources in its own territorial waters.[60] The Convention on the High Seas[61] incorporates the freedom to fish as one of the freedoms granted to each nation on the high seas, the high seas presumably encompassing all waters not a part of a particular country's territorial sea. Finally, the

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[54] Id. § 1081. The Act also provided that the Secretary of State could permit research vessels to fish in territorial waters where the research vessel is operated by an international organization of which the U.S. is a member.
[55] 16 U.S.C. §§ 1091-94 (1971).
[56] Comment, Fisheries Jurisdiction Beyond the Territorial Sea--With Special Reference to the Policy of the United States, 44 Wash. L. Rev. 307, 319 (1968) [hereinafter cited as Fisheries Jurisdiction].
[57] Id. at 315.
[58] Id. at 316.
[59] The Wall St. Jr., Sept. 27, 1973, at 1, col. 6.
[60] 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.
[61] 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82.

contiguous zone as defined in the Territorial Sea Convention, does not include the right to regulate fishing.[62] Thus, it appears that any nation or person has the right to fish in waters beyond the territorial sea, including those above the continental shelf.

This ostensible limitation on a nation's right to exercise jurisdiction over high seas fishing resources is somewhat obscured by Article Six of the Convention on Fishing and Conservation of the Living Resources of the High Seas[63] which provides that a State has a special interest in the maintenance of the productivity of the living resources in any areas of the high seas adjacent to its territorial sea. Article 7 goes on to sanction the adoption of unilateral measures of conservation by the coastal state appropriate to any stock of fish or other marine resources in its adjacent high seas provided negotiation with other concerned States has not led to agreement. Qualifying the adoption of these unilateral measures are three requirements:[64] (1) that there is need for such urgent conservation meausres in light of the existing knowledge of the fishery; (2) that the measures adopted are based on scientific findings; and (3) that such meausres do not discriminate in fact or in form against foreign fishermen.

Further obfuscating the definition of an internationally recognized standard on coastal fisheries jurisdiction is the failure of any of the Geneva conventions or any other multilateral convention to define an external limit on the breadth of the territorial sea. While the majority of the world community still adheres to a twelve mile or less limit, the assertions of wider territorial seas is increasingly[65] rendering the freedom to fish on the high seas precariously dependent on the width of a state's territorial sea assertions.

Customary practices in international law with respect to coastal fisheries are also varied:

> But whatever the status of exclusive fishery zones in codified international law, and indeed perhaps due to this uncertain status, the coastal nations of the world have in increasing numbers unilaterally asserted fisheries jurisdiction beyond their territorial seas subject only to their power to hold and exploit.[66]

Indeed, it has become widely accepted that various zones in the high seas should be under the control of coastal states for certain limited purposes including customs, safety and fishing.[67] What remains unfortunately unclear

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[62] 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.
[63] 17 U.S.T. 138, T.I.A.S. 5969, 559 U.N.T.S. 285.
[64] Id. Art. 7, para. 2.
[65] FAO Table in 10 Int'l Legal Materials 1258 (1971). Statistical data is therein set forth on the present positions of states on the limit of their territorial seas. The basis of the statistical assertions made here are this table as updated by the United States Department of State in March, 1973.
[66] Fisheries Jurisdiction, supra note 56, at 313-14. See the FAO Table, supra note 65 for the number of states asserting fisheries jurisdiction beyond their territorial sea and the varying widths of such claims.
[67] Cowan, supra note 6, at 178.

is the permissible extent of unilateral fisheries jurisdiction claims,[68] if any, and the degree of control over these areas which such claims give the coastal nation vis-a-vis other nations.[69]

The existence of these three regulatory schemes (state, federal and international), all of which are somewhat ambiguously defined and constantly in a state of change in both scope and importance, has inevitably generated some pressing conflicts of jurisdiction over fisheries resources. Particularly conducive to conflict is the dilemma of the coastal states faced with overexploitation or depletion of their vitally needed fisheries resources because of foreign fishing close to their coasts and inadequate conservation measures. These coastal states view unilaterally expanded regulatory jurisdiction as a possible solution, but one fraught with conflicts with federal and international law and policy. They see the other choice of prodding the federal government to take measures to protect the fishing resources off their coasts by either federal law or international conventions as involving intolerable delay and consequent danger to their valuable fishing resources.[70]

The conflict between state law and policy on fisheries jurisdiction in offshore waters and federal law and policy essentially lies in two areas. The first is whether the state statute or policy conflicts with positive federal law and is therefore unconstitutional as violative of the supremacy clause. The second is whether the state statute amounts to an improper interference with the exclusively federal foreign relations power or national security apparatus.[71] Inherent in the interaction of two regulatory entities (the state and federal government) exercising control over the same areas and, more significantly, the same resources is this constitutional conflict:

> There can be no doubt that under the Constitution, the federal government and the individual states share concurrent jurisdiction over coastal waters. It is equally established that the coastal states may take appropriate action for the protection of natural resources in such areas. Even so, it is unrealistic to ignore

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[68]While most states claim exclusive fisheries jurisdiction out to twelve miles or less, there is a marked trend, particularly among underdeveloped countries, toward asserting more extensive fisheries jurisdiction, often out to 200 miles; and a growing acceptance, with reservations, by developed nations of such extended claims. See Stevenson, U.S. Draft Articles on Territorial Sea, Straits and Fisheries, 10 Int'l Legal Materials 1016 (1971) and the recent recognition by Great Britain of Iceland's fifty mile claim.

[69]It is clear that a claim to extended fisheries jurisdiction, even exclusive control, does not embrace the assertion of sovereignty inherent in a territorial sea claim. However, some claims to fisheries jurisdictions totally exclude foreign fishing while others allow it on a limited scale subject to the regulation and approval of the coastal state.

[70]Massachusetts Governor Frances Sargent in announcing the 200 mile Lobster Control Act succinctly pointed out this dilemma faced by Massachusetts in the absence of adequate conservation controls of lobsters in offshore areas, saying: "I realize also that it [the Lobster Control Act] raises certain constitutional questions. However, there is no time for delay."

[71]Vand. J. Trans. L., supra note 49, at 491.

> the fact that federal and state interests are not co-equal. In testing the viability of state fishing regulation, not only are superior federal rights involved, but it is clear that such [state] legislation must meet Constitutional standards.[72]

Thus, the conflict between state law and positive federal law is two-fold. It involves measuring the state law not only against the standard of the supremacy clause in those instances where the state law and the federal law attempt to regulate the same area but also in measuring whether the state law by itself violates other federal constitutional commands. An example of the latter test was illustrated by the case of Toomer v. Witsell[73] in which a South Carolina fishing law which required nonresidents to pay a license fee of $2500 and residents a $25 fee was found unconstitutionally discriminatory as a violation of the Privileges and Immunity Clause of the Constitution.

In ascertaining the presence of a conflict between state regulation of coastal fishing resources and the federal foreign relations powers, the standard to be applied is more ambiguous. The underlying rationale for an exclusive federal power over foreign relations is the perception that adoption of separate foreign policies by the states would be inimical to an effective federal foreign policy.[74] The necessity of a nation speaking with one voice to other nations in discussions concerning treaty-making and international military commitments is indisputable. But the problem is when does state action or law interfere with this foreign relations power. A three-pronged standard for ascertaining state interference has been set forth in Supreme Court decisions: (1) whether threr is an improper purpose of interference with foreign relations; (2) whether a direct impact upon international relations has been shown; or (3) where the state law has a possible adverse effect upon the power of the government to carry out existing foreign policy.[75]

It must be reiterated at this point that the federal government has chosen, in large part, not to regulate fishing resources in the seas adjacent to the coastal states. There seems little question that, similar to the manner in which it asserted jurisdiction over navigation, the federal government could assert jurisdiction over fisheries even within the three mile territorial waters.[76] Because the resources (the fish) move from the waters of one state to another and from national to international waters and the exploitation, distribution and marketing of such resources ordinarily involves movement among the states, these resources wherever found could be subjected to the foreign and interstate commerce provisions of the Constitution giving Congress sole regulatory authority over everything from the catch to the sale of these resources if it desired.[77] Nevertheless, the strong historical

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[72] Cowan, supra note 6, at 174.

[73] 334 U.S. 365 (1948).

[74] Hines v. Davidowitz, 312 U.S. 52 (1941). This theory with regard to foreign relations applies equally to national security where it is vital that the federal government be the sole body to coordinate and maintain our national defense.

[75] See Clark v. Allen 331 U.S. 503, 516-17 (1947) and Zschernig v. Miller 389 U.S. 441 (1968).

[76] Browning, supra note 8, at 139-40.

[77] Id. The federal government could also extend its international treaty obligations with regard to the conservation of these resources since the resources often move from national or state to international waters and, of course, such treaties would be the supreme law of the land excluding any conflicting state regulations. Id. at 140.

practice has been to leave the regulation of fisheries to the coastal states.[78]

As far as the conflict between state regulation and international law or policy, there are several problem areas, most of which are by-products of the deference the states must show to the federal government in the area of international relations. It is well established that state law must yield when it is inconsistent with a treaty or international convention to which the United States is a party.[79] Furthermore, state laws such as the Florida Territorial Waters Act, which embody ideological distinctions may well contradict the policy behind our international commitments if not the treaties themselves.

The more important area of conflict which exists in extensive state regulation is that such unilateral regulation over fisheries resources may be inconsistent with and destructive of larger international efforts to deal with all the problems of the seas. The problems of fisheries jurisdiction and the effective conservation of fishing resources cannot be dealt with in a vacuum; they are intertwined with problems of the breadth of the territorial sea, the external delimitation of the continental shelf and the governance of the seabeds beyond national jurisdiction[80] which are all subjects of intense international concern. Even more significant as an argument against state regulation is the contention that real success in the conservation and exploitation of fishing resources everywhere in the world can ultimately be achieved only through international regulation, and that unilateral action is therefore more harmful than beneficial.[81]

The case for the state interest in regulating the fishing resources in its coastal waters must be advocated in the setting of these federal and international conflicts and countervailing arguments. The particular legislation of the states, especially the assertion of extended regulatory jurisdiction must likewise be tested against the federal and international standards just discussed.

A basic assumption about fisheries regulation is that the substantial differences in both the kinds of fish caught and the fishing effort itself among the several states render a uniform approach to fisheries regulation throughout the United States inadvisable and self-defeating. The history of leaving fisheries regulation to the coastal states and the continued abstention from federal regulation of fishing in territorial waters, despite the power to do so,[82] is recognition that a uniform national policy on fishing is unwise. Indeed, the Federal Extra-Territorial Waters Act in establishing a coastal fishing zone of 12 miles made it clear that the Act was not designed to extend or diminish in any way the domestic jurisdiction of individual states with respect to territorial waters.[83]

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[78] See Cowan, supra note 6 and Browning, supra note 8.
[79] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Missouri v. Holland, 252 U.S. 416 (1920).
[80] Clingan, supra note 1, at 432.
[81] See Note 5 Vand. J. Trans. L. at 490, 496 and Fisheries Jurisdiction, supra note 56, at 307, 327.
[82] See supra notes 76 and 77.
[83] See supra note 55.

> In a sense this is tacit recognition by the United States of the complexity and lack of uniformity of coastal fishing jurisdiction. Any attempt by the United States to establish uniformity would, of course, be resisted by the States as a violation of powers vested in them by the Constitution.[84]

However, the establishment by the Extra-Territorial Waters Act of federal jurisdiction over the nine-mile contiguous fishing zone runs counter to the theory that the diversity in coastal fishing warrants state or regional control, which theory served to perpetuate the localized approach to the three-mile territorial sea area in the same Act. The resulting bifurcated jurisdiction and regulation produces an undesirable situation:

> However, problems are created by this scheme and, in one sense, the administration and enforcement of laws and regulations are made more complex.... With the introduction of federal jurisdiction into the nine-mile contiguous zone, the likelihood of conflict in the regulation, control and management of fishing is increased since a third source of authority is added to the existing differences among the states. Thus when the entire twelve-mile fishing zone is considered, the interests of uniformity may be adversely affected.[85]

It is in this 12 mile fishing zone that uniformity is essential. The fish of course move back and forth from the three-mile territorial area to the nine-mile contiguous zone and the fishing effort in one area is primarily the same as in the other. Thus, a single regulatory body with jurisdiction over the whole 12 mile area would provide the most efficient and effective regulation and management of the fisheries resources of the area. It is submitted that either the states or regional commissions, with their substantial experience in regulating coastal fishing in virtually all its aspects and with their superior knowledge of the problems peculiar to fisheries resources off their own coasts, should be that single regulatory body.

While less compelling than the argument based on considerations of effective fisheries conservation and management, there is a legal argument for extended state jurisdiction. The basis for the argument is the concept that state jurisdiction for a limited or special purpose can be extended beyond the three-mile territorial limit without contravening either positive federal law or interfering with the federal government's foreign policy.

In United States v. Louisiana,[86] the Supreme Court held that Congress could grant submerged lands beyond the three-mile limit of the territorial sea to Texas and Florida. The rationale was that the limited character of the jurisdiction to exploit submerged lands would not affect the superjacent waters and, therefore, would not necessarily affect federal territorial sea claims for international purposes.[87] Since the Submerged Lands Act[88] defines as natural

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[84]Cowan, supra note 6, at 178.
[85]Fishing Jurisdiction, supra note 56, at 319-20.
[86]363 U.S. 1 (1960).
[87]363 U.S. at 34.
[88]43 U.S.C. §§ 1301-1315 (1971).

resources of the seabed certain marine life in the water itself (fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp and other marine animal and plant life...),[89] it appears that certain regulatory powers over activities on the high seas beyond the territorial sea were granted to Texas and Florida.[90] "It is not clear whether the Louisiana Court considered the possible application of the holding to state jurisdictional claims to regulate fishing and related activities [beyond the territorial sea]."[91] Additionally, it has been widely accepted that various zones in the high seas should be under the control of coastal states for certain limited purposes including customs, safety and fishing.[92] And the Skiriotes[93] litigation makes it clear that the application and enforcement by a state of its fishing laws beyond the three-mile territorial limit is not necessarily an interference with the federal government's posture in the international community.

The issue as to who has jurisdiction over fishing resources in the waters adjacent to the territorial sea cannot be described as well settled. The Louisiana case did not resolve the question, but did provide a basis, in its acceptance of "limited and special" state jurisdiction beyond the territorial sea, for the constitutionality and legality of extended fisheries jurisdiction as long as such jurisdiction does not affect our international relations. The Extra-Territorial Waters Act of 1966 did not preclude the possibility of extended state regulation either. While it explicitly refused to extend state jurisdiction, it did not go on to comprehensively regulate fishing in any specific manner. Thus, the long-standing concept that state fishing regulations are not foreclosed by contradictory federal authority if the United States declines to exercise its authority[94] which has substantiated regulation of fisheries resources by the states within three miles, would seem to apply to the nine-mile contiguous fisheries zone.[95]

It is contended that the exercise of state regulatory jurisdiction over fishing out to twelve miles is not inconsistent with either positive federal law or considerations of foreign relations[96] and international commitments.

It must be admitted that the more extensive 200 mile fisheries jurisdiction claims of Massachusetts, Maine and New Hampshire are hardly defensible on a legal basis. Even the Attorney General and Governor of Massachusetts recognize that such legislation is virtually untenable on legal grounds. The Report of the Massachusetts Attorney General[97] cites Skiriotes as support for the validity of the legislation with respect to Massachusetts citizens and asserts the constitutionality of rules and regulations enforced only within

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[89] 43 U.S.C. § 1301(e).

[90] Browning, supra note 8, at 139.

[91] Id.

[92] Cowan, supra note 6, at 178.

[93] See supra notes 39-41.

[94] Cowan, supra note 6, at 180.

[95] It seems that since the federal government has not explicitly excluded the states from fisheries regulation in the nine-mile contiguous zone and has certainly not preempted the field that the states can regulate concurrently with the federal government in this area.

[96] In light of the fact that the United States has declared a nine mile fishing zone adjacent to its territorial sea, the question of by whom it is to be regulated is a purely domestic matter with no bearing on our international obligations and duties.

[97] See Report of Attorney General Robert Quinn on the Massachusetts Judicial Extension Act.

the territorial waters which have the effect of preserving and protecting marine fisheries resources out to 200 miles, but refuses to give an opinion as to whether Massachusetts could enforce the rules against nonresidents out to 200 miles. As long as the United States asserts fisheries jurisdiction to only 12 miles, a more extensive state claim could well have an adverse impact upon international relations[98] and would amount to an unconstitutional interference with the federal foreign relations power.[99] Such legislation as the Florida Territorial Waters Act is likewise not sustainable on legal grounds. The ideological distinction made with respect to the licensing of vessels and fishermen of communist states involves the state directly in a foreign policy decision which is beyond its jurisdiction.[100]

But the purposes behind the unilateral extension of both the area and scope of state fisheries regulation presents the real rationale and the most effective defense of the state position. Obviously, one objective of the Massachusetts or Maine legislation is to prod the United States government to prevent the destruction of the adjoining marine fisheries by extending the coastal fisheries jurisdiction beyond twelve miles. Indeed, numerous bills have been introduced in both Houses of Congress to extend our fishing jurisdiction to a distance of 200 miles or, alternatively, to take steps to protect and conserve commercial species which would entail a moratorium on foreign fishing of these species.[101]

However, the political objective sought is secondary; the paramount purpose for such extensive legislation is the imminence of economic devastation of the coastal fishing industry due to depletion of vital fishing resources. The fact is that the rich stocks of fish essential to the United States economy are found up to 200 miles from the coast[102] and, presently, foreign fleets fish freely outside the twelve mile limit.

> However, a twelve-mile zone is not the final answer to the problems facing United States coastal fisheries. United States coastal fishermen are seeking protection from what they consider to be unfair and unwarranted foreign competition for a limited catch within a limited area. The twelve-mile limit is not adequate to ensure this protection. And it does not improve the situation of Atlantic Coast fisheries whose foreign competitors fish on grounds 40 to 100 miles offshore. While...the fishermen of the Pacific Coast and Alaska have been protected to some extent, even here the twelve-mile limit is only a palliative.... It is no

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[98]With the United States actively involved in challenging other nations' unilateral assertions of fisheries jurisdiction out to 200 miles and preparing for the 1974 Law of the Sea Conference where important negotiations on this issue will take place, state assertions of 200 mile jurisdiction severely undercut any U.S. position pressing for less expansive jurisdiction.

[99]See Zschernig v. Miller, 389 U.S. 441 (1968).

[100]The Florida statute also conflicts with the exceptions stipulated in § 1 of The Territorial Waters Act of 1964. These provide that a foreign vessel may fish in United States territorial waters if the federal government permits such activity through an international agreement or otherwise grants conditional permission.

[101]See, e.g., H.R. 8320 (May 31, 1973); H.R. 7789 (May 15, 1973); S. 2338 (August 3, 1973); S. 1366 (March 26, 1973); S. Con. Res. 11 (June 4, 1973).

[102]The Wall St. Jr., Sept. 27, 1973, at 1, col. 6.

answer to the large foreign fleets that are both catching the fish formerly taken only by United States coastal fishermen and physically interfering with the small United States coastal fishing vessels.[103]

Stern trawlers, six times as effective as the side-net trawlers used by American fishermen, from Russia, Poland, West Germany, Japan and several other nations are positioned beyond the twelve mile limit "scooping up everything in sight like vacuum cleaners."[104]

The inability of present federal government fishing limits, conservation regulations or treaties to stem this overexploitation of fishing resources by foreign fleets compels the extension of our coastal fisheries jurisdiction. Considerations of international law and policy do not preclude such extension.

There presently exists no positive international law which restricts fishery jurisdiction to twelve miles or less. The Geneva Convention on the Territorial Sea and Contiguous Zone[105] failed to delimit the outer boundary of the territorial sea or any other zone of jurisdiction. While the High Seas Convention ensured the freedom to fish on the high seas, it is ambiguous as to what that freedom entails.[106] This is so particularly in light of the Convention on Fishing and Conservation of the Living Resources of the High Seas which contemplates a "special interest" of the coastal state in the fisheries resources of the high seas adjacent to its territorial sea.[107] Moreover, the last decade has witnessed the practice of unilateral extension of fishing jurisdiction beyond twelve miles by many nations. It is most probable that at the 1974 Law of the Sea Conference, the nations of the world will recognize some form of coastal state jurisdiction over fishing resources beyond twelve miles.

Even more significant is the fact that present bilateral and multilateral treaties and efforts with respect to fishing resources conservation are inadequate to solve the immediate problem of resource depletion. The United States has, in the past few years, signed several international agreements to conserve or limit the fishing of certain species off its shores. But such agreements are largely ineffective because fishermen will not haul in their nets once they have reached their quota and enforcement of the quotas is virtually impossible.[108] The situation in the Northwest Atlantic is illustrative. The United States and fourteen other nations after twenty years of negotiation set restrictions on the catch of haddock, flounder and herring but "these quotas are regularly exceeded...because it's impossible for fishermen to select the fish they will catch."[109] Subsequent efforts by the United States

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[103]Fisheries Jurisdiction, supra note 56, at 324-25. See also D. McKERNAN, INTERNATIONAL FISHERY POLICY AND THE UNITED STATES FISHING INDUSTRY.

[104]Description by New Bedford, Mass. fishermen of sophisticated foreign fishing trawlers in The Wall St. Jr., Sept. 27, 1973, at 1, col. 6. See The New York Times, Jan. 27, 1974, § 1 at 1, col. 4.

[105]15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.

[106]See supra note 60.

[107]See supra notes 63 and 64 and accompanying text.

[108]The Wall St. Jr., Sept. 27, 1973, at 26, col. 1.

[109]Finding of marine biologist Richard Hennemuth, discussed in The Wall St. Jr., Sept. 27, 1973, at 26, col. 1.

to restrict the total amount of fish that can be caught annually in the Northwestern Atlantic were rejected by the other nations.[110]

The underlying problem is not with the lack of success of multilateral agreements, however. What is necessary is a new approach to jurisidction and regulation of coastal fisheries, one which embodies extensive state regulation since it is submitted that the effectuation of the state interest in conserving their fishing resources and fishing industries requires such a solution. It is further contended that the state interest in extended jurisdiction is consistent with the best interests of the nation as a whole.

"The logical step is to move in the direction of making living resources of the sea in the water column above the continental shelf also appertain to the coastal state."[111] While some bilateral and multilateral agreements have been successful in rebuilding and conserving stocks, the ease with which any of several nations can destroy the agreements, the difficulty of reaching agreements on all endangered stocks, and the aforementioned problems of enforcement necessitate the extension of coastal jurisdiction to save our fishing resources from destruction.[112] The jurisidction need not be exclusive; foreign fishermen should be permitted to fish subject to certain qualifications such as the payment of a management fee, but the coastal state must have exclusive control sufficient to conserve and regulate fishing resources and enforce those conservation efforts and regulations.

Within the extended jurisdiction, the coastal states or regional bodies[113] of coastal states with common interests, working in conjunction with the federal government, should bear the burden of regulating the fishing resources. The federal government should of course be responsible for establishing the extended jurisdiction since that is an act of significant consequence in foreign relations, and for its enforcement since it has the necessary enforcement machinery.[114] The federal government should also urge international efforts in the areas of research and the gathering of relevant statistics on fishing resources and spearhead the national effort because of superior technical and monetary resources.

However, the complexities and wide diversities involved in the exploitation and conservation of fishery resources within the United States require that the main thrust in resource management be provided at regional or sub-regional levels.[115] A comment on the best approach to management of the fishing grounds of the world is equally applicable to fisheries jurisdiction in the United States:

> A regional management system would minimize diversities in the process of fishery use by focusing on limited areas or on specific stocks or species. Such a system would be readily able to resolve and accommodate the particular problems and interests involved in a given region by adopting policies based on the region's needs and opportunities.[116]

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[110] Id.

[111] L. WAKEFIELD, LAW OF THE SEA, Fishing Interests on the Shelf, 233.

[112] Id.

[113] See supra notes 23-30.

[114] The federal government has both the practical tools of enforcement (Coast Guard, radar, communications etc.) and also the voice in the international community to make the U.S. position known.

[115] Johnson, New Uses of International Law in the North Pacific, 43 Wash. L. Rev. 77, 95 (1967).

[116] Fisheries Jurisdiction, supra note 56, at 332.

CHAPTER II

NON-FISHING RESOURCES OF THE CONTINENTAL SHELF

Interestingly, the exploitation of offshore mineral resources began over seventy years ago when long piers were constructed out from the California coastline to permit drilling for oil deposits beneath the coastal waters. Leases for these operations were granted by coastal landowners,[1] but the practice went unregulated by either the state or the federal government until 1921 when California adopted its Mineral Exploration and Leasing Act.[2] Today, oil deposits are being exploited out to a depth of 360 meters, operations are being conducted in numerous areas, and the industry is subject to substantial state and federal regulation. As well, oil is no longer the only resource being tapped; sulphur wells are producing in the Gulf of Mexico, natural gas wells are drilled in both the Gulf and the Pacific, and ever increasing explorations are underway to mine such minerals of the seabed as manganese nodules. With the present pinch on the supply of almost every kind of resource, it would seem that this type of activity can only increase.[3]

California continued until 1945 to assert ownership of its submerged lands out to a distance of three miles; leases and permits were issued for operations on the submerged lands; and rentals, royalties, and bonus payments were collected. The federal government made no objection during this period.[4] The assertion of jurisdiction by California had at least the implicit sanction of the two prior decisions by the Supreme Court dealing with the ownership of submerged lands--Martin v. Waddell[5] and Pollard's Lessee v. Hagan.[6]

Martin v. Waddell involved the ownership of an oyster bed in Raritan Bay, New Jersey. It was decided in that case that upon the attainment of independence, New Jersey, one of the original states, had acquired ownership of the bed of the bay and the river and therefore had the right to issue an exclusive license for the taking of oysters therefrom. Later, the Pollard case went further and established the general rule that a state owned all of the lands beneath its navigable waters. The controversy there involved a tideland area on the Mobile River in Alabama, a subsequently admitted state. When

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[1]Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, in THE LAW OF THE SEA, vol. 3, 89, (1968) [hereinafter cited as Browning].

[2]Id. California Statutes 1921, ch. 303 § 1, p. 404.

[3]Note, Exploitation of Seabed Mineral Resources--Chaos or Legal Order?, 58 Corn. L. Rev. 575 (1973).

[4]Browning, supra note 1, at 91. However, the United States did begin to assert paramount rights in the offshore areas as early as 1930. Lewis, Offshore Boundary and Title Issues, 4 Nat. Res. L.J. 737 (1971).

[5]41 U.S. (16 Pet.) 367 (1842).

[6]44 U.S. (3 How.) 212 (1845).

Alabama, previously a territory, was admitted as a state, she was admitted on an equal footing with all other states and therefore ownership of the submerged lands was transferred from the United States to her.

Most state authorities assumed that the rule established by the Pollard case extended to giving a state ownership of, and sovereignty over, the lands underlying the coastal waters as well as over the lands underlying inland waters.[7] But during the 1930s this assumption was questioned by the federal government.[8] In 1945 a number of resolutions were introduced in Congress attempting to deal with the problem in a variety of ways, either by quitclaiming the submerged lands to the states or by asserting federal claims to the lands involved.[9] Finally a resolution was passed which did quitclaim federal rights to the states, but this was vetoed by President Truman because at that time (August 2, 1946) the matter was already before the Supreme Court in the first California Case.[10]

In that case, the first of three Supreme Court decisions now known as the Submerged Lands Cases, the federal government had sued the state of California, invoking the original jurisdiction of the Court, alleging that California had unlawfully issued oil and gas leases in the area lying seaward of the ordinary low water mark on the coast of California and extending seaward a distance of three nautical miles, such area lying outside the inland waters of the state.[11]

The federal government's complaint adroitly sidestepped the holding of the Pollard case by excluding lands underlying inland navigable waters and tidelands, nor did it include any bays or harbors.[12] Although this precluded one aspect of the potential controversy, it did lay the foundation for subsequent difficulties in defining the term inland waters and deciding what constituted a bay or harbor.[13] The reasons advanced for granting the states the sovereignty over inland navigable waters and ownership of the lands underlying them were primarily historical ones. As expressed in the federal government's complaint, the original states had, by virtue of their successful revolution against the English Crown, gained sovereignty over all lands within their borders, including tidelands and those underlying inland navigable waters. The cession in the Constitution by the states of certain rights did not put title to those inland submerged lands in the federal government. New states, such as California, were admitted on an equal footing with the original states, and thus acquired the same rights over these submerged lands as did the original states, the ownership of such lands being transferred from the United States to them at the time of their admission. There was no similar transferrence of rights in lands underlying the three mile belt of territorial waters.[14]

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[7]Browning, supra note 1, at 91.
[8]Lewis, Offshore Boundary and Title Issues, 4 Nat. Res. L.J. 737 (1971).
[9]Browning, supra note 1, at 91.
[10]United States v. California, 332 U.S. 19 (1947).
[11]Id.
[12]E. ERELI, THE LEGAL REGIME OF THE SEA AND ITS RESOURCES, (First draft of book, Houston, Texas, 1971 610 pp.) at 187, [hereinafter cited as Ereli].
[13]See United States v. California, 381 U.S. 139 (1965).
[14]Ereli, supra note 12, at 187-88.

The Court's decision in the First California Case accepted the federal government's argument as outlined above; but, there were even more compelling grounds for denying California's claim to the lands. The Court found that the concept of a maritime belt around the country was only a nebulous suggestion at the time the Thirteen Colonies separated from England, and that from "all the wealth of material supplied, we cannot say that the Thirteen Original Colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it."[15]

Although the Pollard rule had been assumed to be applicable to the lands underlying the three mile belt by some of the states, the Court felt free to distinguish that case since the exact federal-state controversy present here had not been at issue in Pollard because it involved only tidelands. Thus, the Court felt free to transplant the Pollard rule to this area, or to create a new rule, and, in the judgment of the Court, there were compelling reasons why a new rule should be established.[16]

The three-mile rule, in the opinion of the Court, was but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. Protection and control is a function of national external sovereignty and

> is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world: it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, 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 which it seeks.[17]

With that rationale backing it up, the Court announced its historic decision that "California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[18]

Certainly the Court was correct in its rejection of the Pollard Rule, or at least a mechanical application thereof to this quite different situation. However, one can discern in the opinion a strong concern with national security that may not have been totally justified, but is understandable in light of the fact that the case arose immediately after a long and very serious war. The decision may be criticized on the ground that complete ownership and dominion over the three-mile belt by the Federal Government was not necessary to preserve national security interests; this

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[15] 332 U.S. at 31.
[16] Id. at 32-33.
[17] Id. at 34-35.
[18] Id. at 38.

end could have been accomplished in a variety of other ways, among them, the then existing control under the Rivers and Harbors Act[19] and the Obstructing Navigable Waters Act[20] over all structures in navigable waters. Insofar as commerce was concerned, this would seem to be adequately taken care of by the Commerce[21] and Admiralty[22] clauses of the Constitution. The decision was most praiseworthy in that it did at least attempt to consider the question of why control over the area should be vested in one authority or the other,[23] which seems to be the correct way to approach the problem.

In the second of the Submerged Lands Cases, the Federal Government opposed Louisiana[24] and Texas[25] who were also involved at this time in leasing offshore oil lands. The Federal Government sought a determination that the offshore lands in the three mile belt belonged to it, and asked for an accounting of profits derived from those lands. The Court held, consistently with its ruling in the First California Case that ownership of the offshore lands was in the Federal Government.[26] However, different factors were present, and a brief examination of these two cases is in order.

The Louisiana case was very similar to the California case. Both were subsequently admitted states and both statutes of admission contained an equal footing clause. The significant difference was that in 1938 Louisiana had passed a statute claiming a seaward boundary and ownership of the lands beneath, of twenty-seven miles.[27] The government's complaint thus asked for a determination of rights out to that distance. The Court took note of the statute, but decided that it made no difference. Louisiana could claim no better footing than California as far as the three-mile belt was concerned for the same reasons that were decisive in the California case --national security and world commerce.[28] As for the additional claim of twenty-four miles, if these reasons were compelling for giving ownership of the three-mile belt to the Federal Government, a fortiori, they are even more so in the case of lands lying outside that belt.[29]

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[19]33 U.S.C. §§ 401-413, 30 Stat. 1151. Justice Reed in dissent, 332 U.S. at 42-43, found that the authorities substantiated the ownership of the original states to lands under the three-mile limit and, therefore, California also had title to lands adjacent to her coast. More importantly, Justice Reed pointed out that ownership of these lands by California "would not interfere in any way with the needs or rights of the United States in war or peace. 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 43.
[20]33 U.S.C. § 403, 30 Stat. 1121.
[21]U.S. CONST., Art. I, § 8.
[22]U.S. CONST., Art. III, § 2.
[23]332 U.S. at 34-38.
[24]339 U.S. 699 (1950).
[25]339 U.S. 707 (1950).
[26]339 U.S. at 705, 719.
[27]Louisiana Rev. Stat., § 49:1 (1950).
[28]339 U.S. at 705.
[29]Id.

The Texas decision involved substantially different considerations by reason of the fact that Texas was not a territory of the United States prior to her admission as a state, but an independent republic. As such she enjoyed full national sovereignty over her offshore waters and lands, and must have retained these unless it could be said that these lands were ceded to the United States upon her admission as a state.[30] The situation was further complicated by the fact that the grounds of decision were entirely unaffected by this historical accident, and if they were found to be compelling in the cases of California and Louisiana, they should remain so for Texas. Although there were no firm indications in the admission documents of Texas that the offshore lands had been ceded to the United States, the Court found that the lands were ceded by interpreting the equal footing doctrine to mean that Texas had done so. "When Texas came into the union, she ceased to be an independent nation. She then became a sister state on an 'equal footing' with all the other states. That act concededly entailed a relinquishment of some of her sovereignty...as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States."[31] Thus the rationale of the First California Case was applicable to the waters off Texas as well and the land was awarded to the Federal Government.

The Texas case did consider the feasibility of separating the jurisdictional rights between the states and the Federal Government. This was discussed in the traditional terms of the dominium and the imperium, the dominium being the property rights in the seabed and the imperium the right to control activity thereon. The Court found that in this context the two were inseparable, saying, "although the two are normally separable and separate...once low-water mark is passed the international domain is reached. Property rights must then be so subordinated as in substance to coalesce and united in the national sovereign."[32] The Court continued, "If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities."[33] (emphasis supplied). "Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States."[34]

The three Submerged Lands Cases clearly established that the United States and not the individual states had full power over and dominion in the lands underlying the three mile belt of the marginal sea, and a fortiori, federal rights were paramount over those of the states on the continental shelf lying outside that belt.[35] There was a double-barreled rationale for

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[30] Id. at 707-17.
[31] Id. at 717-18.
[32] Id. at 719.
[33] Id.
[34] Id.
[35] United States v. Louisiana, 339 U.S. 699 (1950).

reaching this conclusion; first, the Original Thirteen Colonies had not acquired any rights in the marginal seas when they revolted from the Crown,[36] and the admission of other states on an equal footing meant that they likewise had no rights in this area;[37] second, the paramount interest of the Federal Government in matters of commerce and national defense required that the Federal Government have paramount rights here.[38]

This was how matters stood when Congress again took action. In 1953 the Submerged Lands Act[39] was passed. It granted to the states title to, and ownership of, the lands beneath navigable waters within the respective states, and the right and power to manage, administer, lease, develop, and use such lands subject to other provisions of the Act.[40] The seaward boundary of each original coastal state was confirmed at a distance of three geographical miles "from its coast line."[41] Subsequently admitted states were given the right to extend their seaward boundaries to a distance of three geographical miles, or in the case of states located opposite from another country and separated from that country by a body of water, to the international boundary line.[42]

The Act also restored to the Gulf states the validity of some of their claims of ownership which exceeded three geographical miles by providing that "Nothing in this section (43 U.S.C. 1312) 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 has been heretofore approved by Congress."[43] The limitation of this provision to the Gulf States was put into § 1301, which also put an absolute limitation of three geographical miles in the Atlantic and Pacific oceans, and three marine leagues in the Gulf of Mexico, on the boundaries that any state might claim.[44] Thus, while Louisiana's claim of twenty-seven miles was barred, it was left open to her and the other Gulf states to claim up to three marine leagues, or about ten and one-half miles. Florida was put in the rather anomalous position of being able to claim three leagues in the Gulf, but only three miles in the Atlantic.

While the validity of claims in excess of three miles was revived by the Submerged Lands Act, no actual boundaries in excess of that limit were established. Repeated expressions of the Act's sponsors made clear that all that the Act did was make it possible for the Gulf states to prove judicially their historic claims out to a limit of three leagues.[45] Also,

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[36]United States v. California, 332 U.S. 19, 31 (1947).
[37]United States v. Louisiana, 339 U.S. 699, 704 (1950).
[38]Id. at 705.
[39]Public L. 31, 83 Cong. 1st Sess., 43 U.S.C. 1301-1315, 67 Stat. 29 (1950).
[40]Id. 43 U.S.C. § 1311.
[41]Id. 43 U.S.C. §1312.
[42]Id. However, the wording of this section makes it reasonably clear that this only applies to the Great Lakes and other similar situations and does not give the States the right to extend their boundaries to the international boundary of the United States in all cases.
[43]43 U.S.C. § 1312. The states bordering on the Gulf of Mexico have always been distinguished with regard to their boundary because of the historic Spanish claim of a three league marine boundary.
[44]43 U.S.C. § 1301.
[45]United States v. Louisiana, et al, 363 U.S. 1, 13-35 (1960).

because of the lack of a precise definition of the term "coast line" as used in § 1312 of the Act,[46] no fixed boundaries at all were established for any state.[47]

Thus what the Submerged Lands Act amounted to was a legislative reversal of the result of the Submerged Lands Cases for claims out to a distance of three miles from the coast line, and a legislative overruling of the result of the Submerged Lands cases as they applied to claims beyond three miles but less than three leagues in the Gulf of Mexico and perhaps in other bodies of water other than the Atlantic and Pacific Oceans. However, the fixing of actual boundary lines was left to the courts for resolution; this, of course, meant a reopening of all of the cases already decided plus new actions involving the other coastal states.[48]

The Submerged Lands Act did demarcate fairly clearly between the dominium and the imperium in that it retained for the Federal Government all constitutional powers of regulation and control over the areas in which the proprietary interest of the states was conceded.[49] All rights in the area between the states' seaward boundary and the seaward limit of the continental shelf were retained in the United States. Therefore it was only those rights associated with the dominium in the marginal belt that were ceded.[50]

At the same time Congress enacted the Outer Continental Shelf Lands Act[51] which claimed for the United States those submerged lands lying seaward of the lands beneath navigable waters which were ceded to the states in the Submerged Lands Act. The Outer Continental Shelf Lands Act provides that the constitution, laws, and civil and political jurisdiction of the United States extend to the subsoil and seabed of the outer continental shelf and to all artificial islands and fixed structures which may be built upon it for the purpose of exploring for, developing, removing, and transporting resources from the shelf, to the same extent as if the outer continental shelf were an area of exclusive federal jurisdiction located within a state.[52] The civil and criminal laws of the adjacent state are adopted for the outer continental shelf to the extent that they are not in conflict or inconsistent with federal law, however,[53] state taxation laws were expressly excluded.[54]

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[46]The term "coastline" is simply defined as being the composite "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the seaward limit of inland waters." "Inland Waters" is not defined by the Act. 43 U.S.C. § 1301 (b), (c), (1970).

[47]United States v. California, 381 U.S. 139 (1965).

[48]Wulf, Freezing the Boundary Dividing Federal and State Interests in Offshore Submerged Lands, 8 San Diego L. Rev. 584 (1971); and Coulter, The Outer Continental Shelf Lands Acts--Its Adequacies and Limitations, 4 Nat. Res. Law 725, 728 (1971).

[49]43 U.S.C. § 1314.

[50]The constitutionality of the Submerged Lands Act was sustained in the case of Alabama v. Texas, 347 U.S. 272 (1953) where the Act was decided to be a proper exercise of Congressional power to dispose of Federal property under Art. IV, Sec. 3, Clause 2 of the Constitution.

[51]Public L. 212, 83 Cong. 1st Sess., 43 U.S.C. §§ 1331-1343, 67 Stat. 462 (1953).

[52]43 U.S.C. § 1333. Browning, supra note 1, at 97.

[53]43 U.S.C. § 1333.

[54]Id.

The President is given authority in the Act to extend the existing boundaries of the states outward in order to determine which state's law should apply in each area.[55] Enforcement and administration of the laws is made the duty of the officers and courts of the United States, and the United States District Courts are given original jurisdiction of cases arising out of or in connection with any operations conducted on the outer continental shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer continental shelf.[56]

There are a number of other important provisions of the Outer Continental Shelf Lands Act, but the important factor for consideration here is that Congress felt that outside the three mile limit, the federal government should have exclusive competence, and that although civil and criminal law of the adjacent state might apply in the area, it was to be administered by the federal courts and not the states. The considerations that warranted Congress reaching the conclusions expressed in the Outer Continental Shelf Lands Act, judging from a reading of the Act, seem to be precisely the same as those considered by the Supreme Court earlier in the Submerged Lands Cases and by Congress itself in the Submerged Lands Act, though there a different result was achieved. They included the necessity of uniform regulation of interstate and international commerce, the importance of the United States being unhindered in its conduct of foreign affairs and international relations, and the paramount interest of the federal government in the conduct of military affairs. One may note that these same considerations were the reason for the exclusive grant of Admiralty jurisdiction to the federal courts contained in the constitution. On the other hand, the reasons for granting the proprietary rights in the lands underlying the three mile belt seem to be exclusively historical, though certainly considerations of fairness and the feeling that the states had acquired some vested rights during the long period of federal inactivity in the area played a role as well. In any event, the passage of the Submerged Lands Act and the Outer Continental Shelf Lands Act opened the way for a new series of cases to decide the exact boundary line for each individual state. In these new cases, essentially the same issues were raised, but now only in relation to submerged lands outside the three mile limit set in the Submerged Lands Act. And the issue of how to draw the boundary lines which has long been such a thorny problem of international law arose in the federal-state context. A brief examination of these cases is in order, though the line drawing issues will be discussed only insofar as they may relate to federal-state problems and not as substantive issues in themselves.

The year 1960 brought a landmark decision in the area of federal rights versus state rights in the lands underlying coastal waters. The United States filed suit in the Supreme Court against the states of Florida, Alabama, Mississippi, Louisiana, and Texas,[57] asking for a declaration that the territorial waters of each in the Gulf of Mexico were limited to three miles, and for an accounting of all profits derived by each of them from lands lying outside this limit since June 5, 1950 (the effective date of the Submerged Lands Act). All five states responded with claims that they were entitled under the Submerged Lands Act to three leagues of territorial waters and ownership of all

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[55] Id.

[56] Id. Venue is granted to any district where the defendant may be found, or to the judicial district of the state adjacent to where the claim arose, 43 U.S.C. § 1333 (b).

[57] United States v. Louisiana, et al, 363 U.S. 1 (1960).

lands and resources underlying those waters. A variety of theories were advanced to support these claims. First, the states argued that the Submerged Lands Act established a three league boundary for all of the states in the Gulf. Texas and Florida argued that if this were not true for all of the Gulf states, it was at least true for them by virtue of their prior claims of three leagues. Louisiana, Mississippi, and Alabama tried to bring themselves within this rationale by showing that various documents and acts relating to their admission as states included all islands within three leagues of their coasts as part of the states, and therefore it was a necessary implication that three leagues of territorial waters were included as well. Further all of the states contended that the national boundary in the Gulf of Mexico had always been three leagues in order to avoid the contention of the United States that a state's boundary could not exceed the national one.[58]

The Federal Government countered with the arguments that state claims could not exceed the limits of national territorial jurisdiction for any purpose, and that state claims were therefore limited to three miles upon their admission as states by the United States' historic policy of claiming only three miles of territorial waters. In other words, the event of admission had fixed each of the states' boundaries at three miles regardless of what claims they might have made beforehand.[59] This contention, if it had been upheld, would have negated the grant in the Submerged Lands Act to the states of historical claims in excess of three miles.

The opinion rendered by the Court was a reasonable and straightforward interpretation of the Submerged Lands Act, although as was pointed out in the dissenting opinions, it left something to be desired insofar as uniformity and ease of application were concerned. Like the Court's previous expressions on the subject of state-federal rights over territorial waters and underlying lands, it left the door open for more litigation before a precise determination of rights could be achieved.

The opinion began with a discussion of the purposes of the Act and the methods employed to achieve them, deciding that there was no dispute as to submerged lands within the three mile limit.[60] The Court then examined the legislative history of the Act and concluded two things. First, the Congress had intended that the claims of various states in the Gulf in excess of three miles be preserved although not ratified by the Act; that was to be left to judicial proceedings.[61] Second, the decisive event for the purposes of deciding the extent of a state's claims to territorial waters and underlying lands was the state's admission to the Union. In the words of the Court:

> Somewhat later, the last sentence of the present Act's § 4 was added, for the specific purpose of assuring that the boundary claims of Texas and Florida would be preserved. The first part of the sentence...intended to refer to Texas alone, protects the State's claim to a three-league boundary "as provided by its constitution or

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[58] Browning, supra note 1, at 99.
[59] Id.
[60] Id.
[61] 363 U.S. at 11-13.

> laws prior to or at the time such State became a member of the Union." That claim, however, was asserted to rest not only on its statute but also on the action of Congress in admitting it to the Union. If any doubt could remain that the event of admission is a vital circumstance in ascertaining the location of boundaries which existed "at the time" of admission within the meaning of the Submerged Lands Act, it is conclusively dispelled by repeated statements of its proponents to that effect.[62]

Thus the Federal Government's argument that boundaries in excess of three miles had to be approved by the act of admission of the state was upheld, but the further contention that all such seaward boundaries were limited to three miles from the coastline was not.

The Court then considered the effect that upholding claims in excess of three miles might have on the Executive conduct of the international affairs of the United States.[63] Two objections to the position of the Gulf states had been advanced by the United States. The first was that the exercise of rights by the states in the area beyond the three mile limit might embarrass the United States in its dealings with foreign governments. However, the testimony of Jack B. Tate, Deputy Legal Adviser to the Department of State made it clear that the exploitation of submerged lands was a jurisdiction of a "very special and limited character"[64] and that the exercise of such jurisdiction by the states beyond three miles "would not conflict with international law or the traditional United States position on the extent of territorial waters."[65] And since the United States had already asserted exclusive rights in the continental shelf as against the world, "the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve."[66]

The second objection to the states' position based upon considerations of international law was that the Federal Government felt that recogniton by the Federal Government that the states had rights in lands more than three miles distant from the coastline might put the United States in the position of having to recognize claims of other nations to more than three miles of territorial waters. This objection had been consistently pressed by the State Department and the opponents of the Submerged Lands Act and the other quitclaim bills that had been introduced before it. When this argument was pressed in behalf of the Federal Government, the Court disposed of it by saying that this aspect of the controversy was not before it, and need not be decided at this time.[67]

In support of the Court's resolution of the question of what effect the granting of three league boundaries to the Gulf States might have on the United States' position regarding the recogniton of claims in excess of three miles made by other states, one must consider the recent history of the international controversy over the breadth of territorial waters. In 1945, the

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[62] Id. at 13.
[63] Id. at 30-35.
[64] Id. at 32-33.
[65] Id. Browning, supra note 1, at 101.
[66] Id. at 35. See note 68 post.
[67] Id.

United States had issued the Truman Proclamation[68] which claimed for the Untied States the ownership of and jurisdiction over all of the resources of the continental shelf which was defined in an accompanying release as out to a 600 feet isobath, and simultaneously the exclusive right to regulate fishing in waters contiguous to territorial waters of the United States where fishing activities had been developed and carried out by United States nationals alone, and the concurrent right to regulate with other nations where both their nationals and U.S. nationals had jointly developed fishing activities in the area. It was made explicit in both contexts that navigational rights were not affected in any way.[69]

The Truman Proclamation represented the first break in the previously firm position of the United States regarding the breadth of territorial waters, i.e., that they were limited to three miles for any and all purposes. This attitude had of course been developed during times when the dominent consideration was the potential range of naval cannon[70] and when the United States was one of the world's great naval powers. With the advent of nuclear weapons and the development of intercontinental aircraft and long range missiles already on the drawing boards, the freedom of the seas that was formerly necessary to maintain a dominent naval position in the world became markedly less significant. One may also speculate that following the Second World War there was a general feeling among the people and in the United States Government that an age of great economic development for the United States was at hand, and that we should strive to secure the resources that would be necessary to nurture this development.

Despite this minor chink in the wall, the United States still maintained her position that territorial waters for purposes of full and complete sovereignty were limited to three miles. But in response to the Truman Declaration, a large number of foreign nations made substantial extensions in their claims of territorial waters and claims of exclusive jurisdiction for certain limited purposes such as fishing.[71] It was as well the time of the rising power of the Communist nations who typically claimed twelve miles. At the 1958 Conference on the Law of the Sea held in Geneva, the nations participating failed to reach agreement on the breadth of territorial waters.[72] However, most of the proposals put forth were for either six or twelve miles.[73] With the failure to reach agreement on the three mile territorial waters proposal, the United States then opted for a six mile limit which was jointly proposed by the United States and Canada at the 1960 United Nations Law of the Sea Conference.[74] This proposal failed being adopted by only one vote.[75] Subsequently the U.S. has agreed in principle to accept a twelve mile limit in preparation for the 1974 Conference on the Law of the Sea.[76] In the opinion of John

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[68]Pres. Proc. No. 2668, 10 Fed. Reg. 12304 (1945).
[69]Id.
[70]Note, Exploitation of Seabed Mineral Resources--Chaos or Legal Order, 58 Corn. L. Rev. 575, 576-68 (1973).
[71]W.W. BISHOP, INTERNATIONAL LAW, at 640-41 (Little Brown & Co., Boston 3rd ed. 1961).
[72]Stevenson, Who Is to Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference, 6 The International Lawyer 465 (1973) [hereinafter cited as Stevenson].
[73]Id. at 466.
[74]Id.
[75]Id.
[76]Id. at 472.

R. Stevenson the twelve mile figure would appear to be the only one on which there is a possibility of general agreement.[77] However, the United States is not yet willing to concede full sovereignty over twelve miles of territorial waters, but insists on a right of innocent passage through international straits and other international prerogatives such as overflight and scientific use.[78] Even with these simple demands there are substantial difficulties in the international sphere as to what constitutes innocent passage[79] and the baselines from which these limits should be measured.[80] As well, the acceptance by many nations of the twelve mile proposal is conditioned upon other demands made by them for a more extensive jurisdiction over mineral and fishing resources of the continental shelf.[81]

Probably the most significant result of the 1958 Conference on the Law of the Sea had been the Convention on the Continental Shelf[82] which granted to the coastal nation exclusive jurisdiction over resources of the seabed on the continental shelf which was defined as the land underlying the sea adjacent to the nation's coast out 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."[83] Similar areas surrounding islands were also included. The jurisdiction was exclusive in the sense that no one was permitted to exploit the resources without the consent of the coastal nation. Other sections of the Convention explicitly provided that rights claimed on the continental shelf were not to affect the status of the superjacent waters, and that activities conducted on the continental shelf should not interfere unreasonably with navigation.

Seen against the foregoing background, the granting by the Court in United States v. Louisiana[84] of the claims of Texas and Florida in excess of three miles was justified as a matter of international law. At the time of the Court's decision, the United States' international position had already moved to a six mile claim,[85] and the recent law of the Sea Conference had given sanction to claims for the purpose of seabed resource exploitation out to whatever depth could be exploited.[86] Since the claims of the Gulf States at this point in time were really only concerned with the exploitation of oil, there was no embarrassment to the international position of the United States. Furthermore the special position of the Gulf of Mexico and the historical claims of the states in that body of water gave the United States a valid basis for making larger claims in that area.[87]

In the case of Texas, the Court upheld the state's claim to three leagues of territorial waters because the terms of the Joint Resolution which admitted the Republic of Texas to the Union had provided that the area to be admitted was "the territory properly included within, and rightfully belonging

[77] Id.
[78] Id. at 472-77.
[79] Id.
[80] Id.
[81] Id.
[82] 15 U.S.T. 471; 499 U.N.T.S. 311; T.I.A.S. No. 5578 (1964).
[83] Art. 1, 15 U.S.T. 471; 499 U.N.T.S. 311; T.I.A.S. No. 5578 (1964).
[84] 363 U.S. 1 (1960).
[85] See text accompanying notes 71-77 supra.
[86] Convention on the Continental Shelf, Art. I., 15 U.S.T. 471; 499 U.N.T.S. 311; T.I.A.S. No. 5578 (1964).
[87] United States v. Louisiana, 363 U.S. 1, 11-12 (1960), where the Court is discussing the merits of the states' positions.

to the Republic of Texas...said state to be formed subject to the adjustment by this government of all question of boundary which may arise with other governments...."[88] The resolution had been worded in this manner because of the difficulties with Mexico over the location of the Texas-Mexican border.[89] Later, the Treaty of Guadalupe Hidalgo stated that that border was to commence in the Gulf of Mexico three leagues from the land opposite the mouth of the Rio Grande River.[90] Subsequent international conventions confirmed this.[91]

Florida was held to be similarly entitled to three leagues of territorial waters in the Gulf of Mexico on the basis of its Constitution of 1868 which was ratified by Congress in the Act readmitting Florida to the Union following the Civil War.[92] However, the absolute limitation of three miles contained in the Submerged Lands Act for the Atlantic and Pacific Oceans barred Florida from claiming more than three miles in the Atlantic.[93]

Louisiana, Mississippi, and Alabama were unsuccessful in proving the historical validity of their claims. Various documents pertaining to their admission had included all islands within three leagues of their coasts as being part of their territory, but there was no explicit reference to waters or submerged lands and the Court held that the references to the islands were insufficient to establish the states' claims to ownership of the submerged lands lying more than three miles out.[94] The Pollard case, of course, continued to give the states ownership of lands underlying their inland and territorial waters.

The Court perpetuated the regrettable failure of the Submerged Lands Act to give a precise definition to the term "coast line"[95] and thus virtually assured that there would be further litigation to establish the lines from which the established limits would be measured. The definition of "coast line" adopted by the Court was the same as that used in the Submerged Lands Act itself, "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 inalnd waters."[96] But in all fairness to the Court, this aspect of the controversy was not squarely before it and a decision at this time might have been somewhat premature, particularly in view of the countless particular questions relating to specific bodies of water that would have to be resolved before a definition agreeable to both sides could be reached.

Mr. Justice Black concurred in the judgment with regard to Texas and Florida but dissented from that portion pertaining to Louisiana, Mississippi and Alabama.[97] Justice Black felt that the irregular saw-tooth boundary resulting for those latter states because of their ownership of islands and

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[88] 5 Stat. 797 (1845); Browning, supra note 1, at 101.
[89] Browning, supra note 1, at 101.
[90] 9 Stat. 922 (1848).
[91] Browning, supra note 1, at 101.
[92] 363 U.S. at 128.
[93] 43 U.S.C. § 1301.
[94] 363 U.S. at 79-82.
[95] Id. at 67-68. See text accompanying and notes 45, 46 and 108 infra.
[96] United States v. Louisiana, Texas, Mississippi, Alabama, and Florida, 364 U.S. 502 (1960) (final decree).
[97] 363 U.S. 1, 99-100 (1960), separate opinion of Mr. Justice Black. See Browning, supra note 1, at 103.

territorial waters of three miles surrounding those islands that were as far as six leagues from the shore, would result in difficult problems of administration and dividing state and federal jurisdiction; and that the granting of the three league claims to Texas and Florida while denying them to the other Gulf states was unfair.

> In my judgment to interpret this Act in such a way which grants the land to Texas and Florida and withholds it from other Gulf States simply prolongs this costly and disquieting controversy. It will not be finally settled until it is settled the way Congress believes is right and I do not think that Congress will believe it right to award these marginal lands to Texas and Florida and deny them to the other Gulf States.[98]

Justice Black's prediction that the controversy would be prolonged was soon fulfilled. In 1965 the problem of ownership of submerged lands was again before the Court, and this time the issue of how to draw the measuring baseline was squarely presented.[99] California advanced the most ingenious argument that the term "coast line" as used in the Submerged Lands Act which is defined in that Act 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" actually meant that the line from which the seaward three miles of territorial waters should be measured was the seaward limit of what the state had historically considered to be inland waters. And, since California had historically claimed the waters out to a distance of three miles, the three miles of territorial waters granted by the Act should be measured from that line. This, of course, would have given California six miles of territorial waters as measured from the actual coast. Thus the actual controversy revolved around what could be considered to be "inland waters."[100]

In resolving this issue, the Court first looked to the legislative history of the Submerged Lands Act; it was concluded that this question had been left to the courts for resolution, independently of the Act. Although as originally proposed, the bill had contained a definition of "inland waters" that would have included "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea," this definition had been removed by the Senate Committee. As well, the absolute limitations of three miles in the Atlantic and Pacific and three leagues in the Gulf of Mexico had been added.[101]

> Removal of the definition for inland waters and the addition of the three-mile limitation in the Pacific, when taken together, unmistakably show that California cannot prevail in its contention that "as used in the Act, Congress intended inland waters to identify those areas which the states always thought were inland waters.[102]

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[98] 363 U.S. at 101.
[99] United States v. California, 381 U.S. 139 (1965).
[100] Id. at 139-151.
[101] Id. at 145-51.
[102] Id. at 151. See Browning, supra note 1, at 104-106.

Having thus decided that it was free to establish a definition of inland waters in order that the location of a state's coastline could be established, the Court proceeded to consider the issue of what would be a proper defintion of inland waters.[103] The Special Master who had previously considered the case had found that there was no settled international rule on establishing baselines from which the width of territorial waters could be measured and he had therefore recommended to the Court that the appropriate solution was to adopt the current United States position in international law,[104] but this solution was rejected by the Court in favor of the rules provided in the 1958 Convention on the Territorial Sea and The Contiguous Zone,[105] which the Court felt established an internationally accepted definition of inland waters.[106] In view of the fact that this treaty had been ratified by the United States and was already in force, the Court felt that it would be a particularly good solution and in line with the recommendations of the Special Master.[107] "This established a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations."[108] As well, the Court felt that the comprehensive rules laid down by the Convention would eliminate a number of lesser problems that otherwise might be left to the Court for resolution.[109]

In response to the decision of the Court on using the standards of the Convention on the Territorial Sea and the Contiguous Zone as the standard for defining inland waters and establishing the coastline, California argued that since the Convention gave nations the option to use the straight baseline method for establishing their coastlines, that states should have the same options open to them under the Submerged Lands Act. The Court upheld the argument in part but sharply qualified it by saying,

> ...California may not use such baselines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States. The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign.... But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves.[110] (emphasis supplied)

The Court concluded that the United States had the exclusive right to decide under the Convention whether the method of straight baselines could be employed.[111] Following this, the Court applied the Convention's standards to a number of specific claims made by California relating to particular bodies of water.

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[103] 381 U.S. at 160-166.
[104] Id. at 164-168.
[105] Id.
[106] Id. Browning, supra note 1, at 104-05. Erell, supra note 12, at 210-211.
[107] 381 U.S. at 168-175.
[108] Id. at 164-66.
[109] Id.
[110] Id. at 175-77.
[111] Id.

This opinion was perhaps the first of the cases dealing with the question of title to submerged lands since the passage of the Submerged Lands Act which answered more questions than it raised. The Court seemed acutely aware of the need to set precise standards upon which the parties could base firm expectations.

> Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed. Expectations will be established and reliance placed on the line we define. Allowing future shifts of international understanding respecting inland waters to alter the extent of the Submerged Lands Act Grant would substantially undercut the definitions of expectation which should attend it. Moreover, such a view might unduly inhibit the United States in the conduct of its foreign relations by making its ownership of submerged lands vis-a-vis the States continually dependent upon the position it takes with foreign nations. "Freezing" the meaning of "inland waters" in terms of the Convention definition largely avoids this, and also serves to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States.[112]

Most importantly, the decision reiterated the strong and compelling rationale of the original Submerged Lands Cases; and although their result was overturned by the Submerged Lands Act, the primary responsibilities of the United States in the areas of national defense and the conduct of foreign relations must be taken into account in any decision affecting the marginal belt of territorial waters.[113]

On the other hand, the decision did not resolve all of the problems with the definition of inland waters, since now the test will have to be applied to countless specific bays and other bodies of water to determine if they meet the test set out by the Court. As one writer has stated, it seems likely that litigation will continue between the states and the federal government for some time to come.[114] Furthermore, the United States may change its international position against the use of straight baselines because of the peculiarities of the Alaskan coastline.[115]

Other problems quickly arose with the application of the 1965 California decision to the Gulf coast. In United States v. Louisiana, Texas, Florida, Mississippi, and Alabama,[116] the Court had held Texas and Florida were entitled to claim three leagues of territorial waters. However, this decision had been based on the history of admission of those two states and the fact that this history qualified them under the optional grant in the Submerged Lands Act to claim their boundaries at the time they were admitted to the Union. In 1967 Texas made the claim that this three league boundary which had been successfully claimed by it in the earlier case should be

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[112] Id. at 169.
[113] Id.
[114] Browning, supra note 1, at 107.
[115] Id.
[116] 363 U.S. 1 (1960).

measured from the end of certain artificial jetties built in recent years on the coast of Texas.[117] Such a measurement would be permitted by the Convention on the Territorial Sea and the Contiguous Zone which was adopted by the Court in the 1965 California decision.[118] But the Court distinguished the California decision on the grounds that California was claiming under the unconditional grant in the Submerged Lands Act of three miles from the "coast line." Texas, on the other hand, had based its claim of three leagues of territorial waters on the conditional grant in the Act which was tied to a state's prior history. This grant "allows those states bordering on the Gulf of Mexico, which at the time of their entry into the Union had a seaward boundary beyond three miles, to claim this historical boundary as it existed at the time such state became a member of the Union." (emphasis supplied by the Court).[119] Other sections of the Act were found to fully support such an interpretation. Thus Texas by claiming under the three league grant was limited to the boundaries that existed in 1845. "It may not combine the best features of both grants in order to carve out the largest possible area for itself."[120]

The obvious difficulty with the decision was determining the location of the shoreline as it existed in 1845. Neither side could suggest any method for doing this except by agreement between the United States and Texas. The shoreline has apparently suffered substantial erosion since that time, making any solution somewhat arbitrary. This problem and others were pointed out by Justice Harlan in his dissent.[121] These problems include the fact that the international claims of the United States made in the Gulf will now have to be measured by a different standard than the claims of Texas.[122] If nothing else, this alone will represent a substantial expense to cartographers preparing maps to guide mineral exploration in the area. Another difficulty pointed out by Justice Harlan was that with this fixed boundary concept, at some point in time natural or artificial accretions to the land mass might accumulate to such a point that they would be located outside of Texas.[123] While that idea may seem somewhat speculative, it is not entirely unforeseeable.

In 1969, Texas was again before the Court;[124] this time her claim was that the three league maximum limitation contained in the Submerged Lands Act was also to be read as extending from the 1845 coastline rather than the current coastline. Because of the rather substantial erosion that the Texas coastline had suffered since 1845, the application of the maximum three league limitation from the present coastline would take away from Texas substantial areas of submerged land to which the State would otherwise have been entitled under the Court's prior decisions which held that it was entitled to three leagues of territorial waters as measured from its 1845 coast line.[125] The Court rejected the contentions of Texas, saying,

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[117] United States v. Louisiana, et al, 389 U.S. 155 (1967).
[118] United States v. California, 381 U.S. 139, 164-66 (1965).
[119] 389 U.S. at 156. Browning, supra note 1, at 108.
[120] 389 U.S. at 160.
[121] Id. at 164 (dissenting opinion of Mr. Justice Harlan).
[122] Id.
[123] Id.
[124] United States v. Louisiana, Texas, et al, 394 U.S. 1 (1969).
[125] Id. at 1-5.

> We said (in the 1965 California decision)...that "This (adoption of the Convention's definitions) establishes a single coastline for...the administration of the Submerged Lands Act..." 381 U.S. at 165. Our conclusion in this case that "coastline" means the modern, ambulatory coastline therefore necessarily follows from our decision in California.
>
> There is no basis for a finding that "coastline" has a different meaning for the purpose of determining the baseline for measurement of the three-league maximum limitation....[I]t seems evident that Congress meant that the same "coastline" should be the baseline of both the three-mile grant and the three-league limitation.[126]

In response to the claims by Texas that this solution was inequitable and would cause difficulties with the orderly development of its offshore mineral resources, the Court said that Texas must look to Congress for relief.[127]

Louisiana also attempted to gain more territory in a 1969 action,[128] advancing a number of claims and attempting to circumvent the effect of the 1965 California decision.[129]

The first claim advanced by Louisiana was that Congress in an 1895 Rivers and Harbors Act[130] had directed the drawing of lines separating the inland waters of the United States from the high seas for the purpose of regulating navigation. The authority to draw these lines was given to the Secretary of the Treasury and has since been delegated to the Commandant of the Coast Guard. The lines have been redrawn and relocated a number of times since the original Act, but in 1954, the Louisiana legislature had passed an act accepting the line as it was then drawn. Louisiana contended that Congress could not have intended to use a technical term such as "inland waters" in two different senses in the Rivers and Harbors Act and the Submerged Lands Act, and therefore this line must be accepted by the Court as marking the seaward limit of inland waters.[131] Had the contention been accepted, it would have operated to give Louisiana substantially more submerged land than the State would have been able to claim under a straightforward reading of the 1965 California decision.[132] Louisiana argued that that decision was not applicable here because the Convention on the Territorial Sea and the Contiguous Zone was not intended to be either the exclusive determinant of inland waters or to divest a nation of waters which it had long considered to be subject to its sole jurisdiction. The longstanding, continuous, and unopposed assertion of jurisdiction to regulate navigation on these waters by the United States was said to have established them as inland waters under

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[126] Id. at 8.
[127] Id.
[128] United States v. Louisiana, 394 U.S. 11 (1969), Reh. Den. 394 U.S. 994 (1969).
[129] United States v. California, 381 U.S. 139 (1965).
[130] 28 Stat. 672, Act of Feb. 19, 1895.
[131] 394 U.S. at 12-15.
[132] United States v. California, 381 U.S. 139 (1965).

traditional principles of international law.[133] Alternatively, Louisiana suggested that the assertion of sovereignty inherent in the establishment of the line separating the inland waters of the United States from the high seas was such as to make the waters within the line into "historic bays" conforming to the exception of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone.[134]

Although the Court conceded that historical as well as geographical factors play a role in determining if particular bodies of water can be classified as "inland waters," they said that "it is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea."[135] (emphasis supplied). Thus what was only an incident of jurisdiction over the territorial sea could not, in an of itself, constitute a claim to the ownership of the waters and underlying lands as inland waters.

Further, the Court found no evidence that Congress intended the navigational regulations to have any effect on the nation's boundaries. As well, the State Department had said in 1929 that these "lines do not represent territorial boundaries but are for navigational purposes."[136]

The Court also rejected Louisiana's contentions that dredged channels which were an aid to navigation into harbors could constitute "permanent harbor works" within the meaning of Article 8 of the Convention on the Territorial Sea, and that low-tide elevations could have a territorial sea of their own, but did say that they might be considered part of the coastline for purposes of delimitation of the territorial sea in proper instances. With regard to outlying fringes of islands, the Court said that they could not be considered as a part of the coastline unless the method of drawing straight baselines was employed, nor could the waters lying between them and the mainland be said to constitute historic bays within the meaning of Article 7 of the Convention.[137] The Court then reaffirmed its conclusion in the 1965 California Decision that only the United States had the option to use the straight baseline method.

> While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta Area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law.[138] (emphasis supplied).

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[133] 394 U.S. at 13-17.
[134] Id.
[135] Id. at 18.
[136] Id. at 19-20. Letter from W. R. Castle, Jr., to Charge d'Affairs Lundh, July 13, 1929, in 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 645 (1940).
[137] 394 U.S. at 20-26.
[138] Id.

Louisiana had also argued that it had gained title to certain waters in the Delta area by continuous and open activity on its own part regardless of whether the Federal Government's exercise of jurisdiction over these area was sufficient to put a claim on them as inland waters. In the California case[139] the Court had regarded the evidence of state activity too insubstantial to establish any form of title to the lands in question, and there had been some discussion of the issue whether state activity could be relevant in the establishment of historic title to waters.[140] It had been the position of the United States there, as it was here, that if the United States did not choose to accept such activity as establishing title, it could not be compelled to do so by the courts.[141] The Court here rejected that position saying,

> [I]t would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events.[142]

To this the Court added in a footnote:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of an historic title which may have already ripened because of past events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in United States v. California. 381 U.S. 129, 168. A contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.[143]

Thus, to the extent that state activity would be relevant in establishing a claim in an international contest, it is also relevant here.[144]

Having rendered this opinion, the Court appointed a special master to consider particular issues remaining in the case.[145]

The present status of the jurisdictional conflict is squarely presented in the case of United States v. Maine. In 1969, Maine issued exclusive exploratory rights in certain offshore lands as far as 80 miles off Maine's coast to King Resources, a Colorado company. The United States brought suit against the thirteen Atlantic Coastal States for a determination of rights in all the land and natural resources of the Atlantic Ocean more than three miles from the coast. In response to the complaint, the Coastal States alleged that as successors in title to grantees of the English Crown, they have been entitled since the formation of the Union to exercise control over the exploitation and exploration of natural resources found in the seabed and subsoil

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[139] United States v. California, 381 U.S. 139 (1965).
[140] Id. at 150-175.
[141] Id.
[142] 394 U.S. at 30.
[143] Id. at note 17.
[144] Id. at 31-32.
[145] Id.

underlying the Atlantic Ocean adjacent to their coasts to the exclusion of any other political entities, including the United States.

The United States moved for judgment on the pleadings; the states moved for reference to a Master and in June, 1970, the Supreme Court referred the case to the Honorable Albert B. Maris, Senior United States Circuit Judge. The United States rested its case without presenting any evidence, choosing to rely upon the strength of legal arguments alone. The states supported their case with materials relating to colonial practice, state legislation and international and English law and practice in the 17th and 18th centuries. Expert testimony in regard to the above, as well as with respect to foreign policy considerations was also submitted by the states. After concluding the hearings, the parties were directed to prepare proposed findings of fact and conclusions of law, after the receipt of which the Special Master is expected to make a decision and file a report with the Supreme Court.[146] An examination of these proposed findings of fact and conclusions of law reveal the nature of the states' interests and present positions with regard to jurisdiction over the continental shelf and resources therein.[147]

The findings of fact trace the right of the coastal nation to assert authority over its adjacent seas and seabed from Roman times to British practice in the 17th and 18th centuries. With the advent of colonization of the discovered lands in America, English claims over the adjacent waters were asserted with respect to the seas adjoining the colonies.[148] An exhaustive review of the early Charter grants to the New England and Virginia colonies reveals the intent to grant the colonies proprietary rights in the adjoining sea and seabed.

> The legal effect...of the charters and other developments during the colonial period was the establishment of a uniform 100-mile territorial sea in the Atlantic along the coasts of the [defendant] states.[149]

The American Revolution gave each colony independent nation status, thereby vesting the states with these same rights of maritime sovereignty over the marginal sea and seabed which the predecessor English colonies previously possessed. Testimony on the Declaration of Independence, the 1783 Treaty of Paris and the Articles of Confederation by Professor Joseph Smith and Judge Philip Jessup reveal that the American colonies were recognized internationally as separate sovereign and independent states prior to the Constitution with sovereignty equal to that enjoyed by other members of the

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[146]Much of the history of the United States v. Maine litigation was supplied by Gerald L. Baliles, Deputy Attorney General of the State of Virginia.

[147]Most of the references to the proposed finding of fact and conclusions of law are taken from the brief of the States of North Carolina, South Carolina and Georgia. The remaining ten Atlantic States submitted separate findings of fact and conclusions of law, as the Common Counsel states, but the two briefs are similar in all important respects. Any reference to the latter brief will be separately noted.

[148]Proposed Findings of Fact, Sec. VI at 23-44.

[149]Proposed Findings of Facts of Common Counsel States, Sec. 31 at 230.

international community.[150]

A conclusion of law, vital to the state position, is the contention that the states gave up only defined and limited powers of imperium [right to enforce the laws of the nation--i.e., national security power) and retained all rights of dominium (ownership and control) in the seabed and subsoil.[151] Only those powers specifically enumerated in the Constitution and those powers necessary and proper for the execution of the enumerated powers were granted to the federal government.[152] Nowhere in the Constitution is there an explicit transfer of any property by the states and, there being no implicit transfer of proprietary rights, property not expressly delegated was retained by the states. The states point out that Article IV, section 3 and Article I, section 8 of the Constitution require the consent of the state for the government to appropriate land for federal purposes.

The rights of dominium retained by each of the several states included proprietary rights in the seabed and subsoil.[153] Professor Flaherty of Virginia testified that there was clearly no express transfer to the federal government of the rights of the states to the seabed of the continental shelf. These proprietary rights of the states were acknowledged by the United States in 1848 and 1945 when the federal government requested permission to use submerged lands off the New Jersey coast. More critical was the testimony of Professor Kirkpatrick that state ownership of the continental shelf is not inconsistent with, or in conflict with, the federal defense powers exercised in that area and that proprietary rights did not pass to the federal government by virtue of the United State's paramount powers of national security, foreign affairs and commerce. Judge Jessup also testified that "the rights of dominium in the seabed and subsoil remain inherently vested in the states even though the particular states did not occupy or exploit the continental shelf."[154]

In its conclusions of law, the state briefs distinguish the California case[155] on several grounds. They contend that no defendant in the current litigation was a party to the California case and that the Court in that case neither conclusively determined whether the thirteen original colonies acquired proprietary rights in their adjacent seas nor whether they possessed such rights at the time of independence.[156] The states point out that the Court ruled against California merely because of a failure by California to prove ownership of offshore submerged lands, an interpretation stressed by the dissenting judges in that case.[157]

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[150]Proposed Findings of Fact, Sec. VII, at 56-58. Professor Jessup construes the Articles of Confederation as entailing a delegation of the foreign relations and treaty-making power to the United States in Congress but emphasized that such a delegation does not impair the sovereignty of the delegating state. See also McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808).

[151]Conclusion of Law, Sec. III at 93. See also text accompanying notes 31-38 supra.

[152]U.S. Const. art. I, § 8; McCullough v. Maryland, 17 U.S. 316 (1819); Hunter v. Martin's Lessee, 14 U.S. 303, 325 (1816).

[153]Proposed Findings of Fact, Sec. X at 71-76.

[154]Id. at 73.

[155]United States v. California, 332 U.S. 19 (1947). See text accompanying notes 10-15 supra.

[156]Id. at 83.

[157]332 U.S. at 41, 43. See also the dissenting opinion of Mr. Justice Black in United States v. Louisiana, 363 U.S. 1, 89-90 (1960).

The states also attack the California court, as did Justice Reed, for their conclusion that the "paramount rights" of the federal government in the areas of national defense, admiralty and international relations precluded a state from exercising any rights of dominion over the lands of the continental shelf. "It can hardly have been doubted that [Chief Justice] Marshall would have said, had the argument which was successful in the California case been presented to him, that the foreign-affairs and defense powers were no more intended to involve a cession of territory than was the admiralty jurisdiction."[158] The conclusion set forth by the states is that neither the adoption of a three mile territorial sea by the federal government nor the exclusive federal power in the foreign relations and defense fields are incompatible with the more limited assertion of jurisdiction over, and ownership of, the continental shelf by the states up to and beyond the three mile limit.[159]

The states interpret as merely confirming ownership in the coastal states of the seabed not less than three miles from their coasts. They contend that prior to the formation of the Union, they owned the seabed and subsoil to a distance considerably in excess of three miles and that the Act in no way barred the assertion of such claims.[160] In their final conclusion of law, the states assert that they have continued to possess the right to exploit the resources of the seabed and subsoil at all times subsequent to the formation of the Union. They rely on Judge Jessup's testimony that occupation or use is not necessary to establish exclusive rights in the continental shelf, point out that no state has ever renounced its claim to the continental shelf resources and maintain that no seabed rights have been ceded to the federal government.[161]

Existing international law and practice in no way affects the claims of the states asserted in United States v. Maine. The statement of Deputy Legal Advisor Tate in the Louisiana case "that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern..."[162] is still valid. The Convention on the Continental Shelf[163] confers on the coastal nation exclusive rights to explore and exploit the natural resources of its continental shelf which is defined as "the seabed and subsoil of the submarine areas...to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admit to exploitation of the natural resources...." While the extent to which the adjacent nation has exclusive rights is the subject of present international negotiation and will be an

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[158]Proposed Findings of Fact of Common Counsel States at 397. United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818) was cited for the proposition that the grant of admiralty jurisdiction to the federal courts in the Constitution did not divest a coastal state of territorial sovereignty over its coastal waters.

[159]Findings of Fact of Common Counsel States at 420-21. The Submerged Lands Act is cited as Congressional repudiation of the concept of the inseparability of state ownership of the submerged lands from the national sovereignty of the United States over the same lands for purposes of foreign relations, international obligations and commerce.

[160]Id. at 99-103.

[161]Conclusions of Law at 88.

[162]363 U.S. at 31.

[163]Arts. I, II, 15 U.S.T. 471; 499 U.N.T.S., 311; T.I.A.S. No. 5578 (1964).

important topic of the 1974 Law of the Sea Conference, the assertion by the states of proprietary and jurisdictional rights on the continental shelf as far as it extends is not destructive of, or inconsistent with, international law or policy.

On the other hand, the brief filed for the United States alleged that some of the states involved had been or were conducting activities in the area lying seaward of the three miles of territorial waters granted to the states by the Submerged Lands Act and that this was in violation of the Submerged Lands Act and the Outer Continental Shelf Lands Act which reserved all rights in that area to the United States. According to the Federal Government's brief, the question thus presented for decision was whether rights to the mineral resources of the seabed in that area belonged to the states or to the United States. The United States contended that although this area was beyond the territorial waters of the United States, the Convention on the Continental Shelf of 1958 granted rights to the coastal nations on the continental shelf and thus a justifiable controversy as to the ownership of these submerged lands as between the states and the Federal Government was presented.

The United States further contended that the states on the Atlantic Coast historically had no claim to any territorial waters except as granted by Congress. The United States cited the conclusion of the Court in the 1947 California decision, 332 U.S. 19 (1947), that the Original Thirteen Colonies had possessed no rights in submerged lands or in natural resources seaward of the low-water line and outer limit of inland waters, stressing the Court's reliance on the lack of any support for the thesis that either the colonial charters to the states or the treaty of peace with England following the Revolution had either made or granted any claim to a belt of territorial waters. The concept of territorial waters, the Court held in the 1947 California decision, arose and gained international acceptance after the formation of the Union; and was accomplished entirely by the Federal Government rather than the states, for the reasons of national defense, international relations, and external sovereignty. This same rationale had also been employed in a decisive manner in later submerged lands cases involving other states.

Even if the Court did wish to reconsider its holdings in those cases, the United States pointed out that the highest courts of Australia, Canada, and England had reached similar conclusions with regard to sovereignty over territorial waters and underlying lands.

While the Congress had perhaps not directly purported to foreclose claims by the states in excess of three miles, that was the only consistent reading which could be given to the Submerged Lands Act and the Outer Continental Shelf Lands Act when taken together and the only reading of the two Acts which would be consistent with the prior decisions of the Court on the subject.

The position of the states of course was based on proving claims in excess of three miles under the exception granted under the Submerged Lands Act for historical claims exceeding three miles. To this the United States countered with the absolute limitation of three miles contained in Section 2(b) of the Act.

Despite the insistence of the United States that what was presented was a purely legal controversy involving only the question of whether the states could have rights in resources located further than three miles from the coastline and that therefore the case should not be referred to a special master, the Court did follow what has been its usual practice in cases involving submerged lands to refer the case to a special master. His decision has not yet been announced.

If the past expressions of the Court on the subject of ownership of submerged lands have any meaning, and if the two Acts of Congress concerning the matter are to be given literal reading, almost certainly the states must lose. The mandate of Section 2(b) of the Submerged Lands Act seems to clearly foreclose the granting of any claims of Atlantic states in excess of three miles, and such a claim, if granted, would be in sharp conflict with the results of past submerged lands cases, the Texas decision notwithstanding.

The issue of whether the states or federal government has jurisdiction over the continental shelf lands beyond three miles, while of fundamental importance, is not the only conflict arising from competing claims to rights of ownership and management of the resources of the continental shelf. No matter how the Maine case and other boundary questions are ultimately settled, resolution of the question of which approach to use for the most effective exploration and exploitation of the continental shelf will be critical. This issue of non-fisheries resource management and exploration, while encompassing far more than the federal-state jurisdictional argument, subsumes many existing and potential problems of this conflicting jurisdiction in its broad scope.

With respect to the leasing of oil and gas concessions on the continental shelf, the Outer Continental Shelf Lands Act has been most successful. The accomplishments in these areas of ocean resource development and the advances in engineering technology undertaken and implemented by this country's oil and gas industries have resulted in worldwide pre-eminence of the United States in the field of continental shelf development.[164] The Outer Continental Shelf Lands Act permitted and encouraged this salutary result through its provisions preserving pre-existing state leases[165] and comprehensive provisions on the granting of oil, gas and sulphur leases by the Secretary of Interior including the grant of broad discretion to the Secretary to implement the leasing system by issuing regulations.[166] Additionally the Submerged Lands Act preserves pre-existing state leases and vests in the states the right to lease the submerged lands which the Act placed under state jurisdiction,[167] pursuant to which the states have effectively regulated the leasing of gas and oil rights on the "inner" continental shelf.

Similar success in other areas of regulation and exploitation of continental shelf resources does not exist. In the area of pollution and ecological conservation, particularly with respect to the production of petroleum, the Department of Interior has generally applied the state conservation regulations to the outer continental shelf.[168] However, on December 30, 1966, the Secretary of the Interior indicated that any

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[164]Coulter, The Outer Continental Shelf Lands Act--Its Adequacies and Limitations, 4 Nat. Res. Law at 725, 726-28 (1971) [hereinafter cited as Coulter].
[165]43 U.S.C. § 1335.
[166]43 U.S.C. §§ 1333-34, 1336-1340.
[167]43 U.S.C. § 1311(a).
[168]Browning, supra note 1, at 114.

conservation regulations applied on the outer continental shelf would be federal.[169] This matter is presently a hotly debated issue between the states and federal government.[170]

A conspicuous area where state and federal law and regulation are presently inadequate and potentially conflict is that of hard-mineral mining both on and "beyond" the continental shelf. The world's continental shelves are storehouses not only for oil but for such important hard minerals including diamonds, gold, tin, chromite, magnetite and sand and gravel. Despite the fact that the continental shelves are covered by far shallower water and are much closer to land than the deep seabed, where extensive mining has begun, there is no "offshore hard mineral industry" on the shelf.[171]

> Still there are more and more indications that new technology will allow these ventures to pay off in the relatively near future. It can be expected that several promising deposits of hard minerals lying on the continental shelves of the United States will soon be explored and that the mining industry will be requesting permission to extract the minerals.[172]

However, neither the states nor the federal government have developed management schemes for hard mineral mining. The Outer Continental Shelf Lands Act illustrates the federal government's singular concern with oil, gas and sulphur. The only reference to other minerals is the section 8(e) authorization to the Secretary of Interior to grant leases of any mineral other than oil, gas and sulphur on such terms and conditions as the Secretary may prescirbe.[173] State regulation is likewise inadequate with respect to hard minerals. There are thirty states with some sea border, each of which could profit from the extraction of hard minerals at least out to three miles. Of these thirty, twenty make some reference to offshore mining of hard minerals, but of these twenty, ten are part of larger schemes concerned with upland mining, six apply to sand and gravel only and two are incidental to petroleum regulating legislation leaving only two states, Alaska and California, with comprehensive management schemes especially for hard-mineral mining.[174] Regardless of how the United States v. Maine case resolves the federal-state jurisdictional dispute with regard to the continental shelf, both entities will have to take steps to regulate hard-mineral mining--the potential of conflicting regulation and jurisdictional battles, perhaps inherent in unilateral state or federal regulatory legislation is still preferable to no regulation and no management scheme at all.

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[169] 32 Fed. Reg. 95 (1966).

[170] Chapter III will concentrate on the federal-state problems which conflicting approaches to pollution control in coastal waters have generated.

[171] Jacobson & Hanlon, Regulation of Hard-Mineral Mining on the Continental Shelf, 50 Ore. L. Rev. 425, 426-27 (1971), [hereinafter cited as Jacobson].

[172] Id. at 428.

[173] 43 U.S.C. § 1337(c). At least one commentator argues that an adequate set of exploration, leasing and operating regulations can be established under § 8(e). Coulter, supra note 164, at 727-28.

[174] Jacobson, supra note 171, at 428. See the appendix following the Jacobson article at 454-61 for a table detailing the hard-mineral legislation and regulations of the thirty states.

The exploration and exploitation of non-fisheries resources beyond the continental shelf entails a conflict of three jurisdictions; state, federal and international. Intense interest in mining on the deep seabed has been occasioned by the successful exploration of commercially valuable manganese nodules. Recently, deep-sea mining technology has advanced to the point where a Japanese government supported consortium has developed a continuous line bucket system for recovering nodules at water depths of 12,000 feet and American, French and Soviet mining capacity is not far behind.[175]

A Moratorium Resolution of the United Nations Seabed Committee forbids exploitation of the seabed beyond national jurisdiction, pending the establishment of an international regime.[176] The Convention on the Continental Shelf limits national jurisdiction on the continental shelf to 200 meters or where the waters admit of exploitation of the natural resources of the seabed and subsoil. The federal-international conflict is thus rendered inevitable by recent technological advances which render water depth no longer a bar to exploitability. The result is that the outer continental shelf of the United States would theoretically encompass any areas of the deep seabed successfully mined, automatically making them continental shelf lands and not deep seabed areas as contemplated by the United Nations resolution. This would place these areas under the provisions of the Outer Continental Shelf Lands Act giving the federal government exclusive control over the subsoil and resources of these areas.

The theoretical jurisdictional conflict has in part been realized. In 1971, Senator Metcalf introduced the Deep Seabed Hard Mineral Resources Bill which provides the Secretary of Interior with authority to develop the hard mineral resources of the deep seabed pending adoption of an international regime.[177] While the bill would apply only to U.S. nationals, it is in direct contradiction to the United Nations Moratorium Resolution and would bring the problem of defining the boundary between the continental shelf and deep seabed squarely into focus. The conflict with the states over the exploitation of these extremely valuable manganese nodules centers on deposits 5000 feet deep in the Kouai Channel, five miles off the Hawaiian coast.[178] Hawaiian officials, forseeing a conflict with the federal government, have reasserted their archipelago claims[179] and a full-scale dispute over these deposits would entail an embarrassing three-sided jurisdictional conflict.

The hard mineral resource squabble points up the fundamental danger in all jurisdictional conflicts over the continental shelf and the resources

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[175]Auburn, The Deep Seabed Hard Mineral Resources Bill, 9 San Diego L. Rev. 491, 492 (1972), [hereinafter cited as Auburn].

[176]Id.

[177]S. 1134, 930 Cong., 1st sess. Comprehensive data and materials are collected in the Hearings, Subcommittee on Minerals, Materials and Fuels of the Comm. on Interior and Insular Affairs, 93d Cong., 1st sess. (May-June 1973).

[178]Auburn, supra note 175, at 497-98.

[179]The Hawaiian archipelago claim involves the assertion that the channels between the islands of Hawaii were within the boundaries of the state of Hawaii because of their status as historic waters acquired by prescription. Island Airlines Inc. v. CAB, 352 F. 2d 235 (1965) rejected this claim and adopted the State Department's view that each island of the Hawaiian archipelago has a three mile territorial sea and that waters seaward of that limit are "high seas."

therein. That is, the uncertain, unstable climate engendered by the conflicts create reluctance on the part of businessmen to undertake a risky and expensive enterprise since their major concern is a secure investment climate and security of the tenure of their claims and concessions.[180] The vital need for further development of continental shelf resources, particularly petroleum, should compel expeditious resolution of these jurisdictional disputes.

Tentative Conclusions

Assuming that the decision of the Supreme Court in the pending Maine case is consistent with its past expressions on the subject, it would seem that the basic federal-state controversy over ownership of the mineral resources of the submerged lands underlying the territorial waters and on the continental shelf is at least somewhat settled. By virtue of the Submerged Lands Act, the states now have title to those resources within three miles of the coast line as defined by the 1958 Convention on the Territorial Sea and the Contiguous Zone. The three league claims of Texas and Florida in the Gulf of Mexico represent exceptions to this general rule both in the extent of the claims and in the drawing of the baselines from which the claims may be measured, but are still subject to the absolute limitation of three leagues as measured form the modern, ambulatory coastline. Claims exceeding three miles in the Atlantic and Pacific would seem to be effectively foreclosed.

One question which may arise in the future is the possible effect of a change in the position of the United States on the use of straight baselines. Should this method be adopted under the Convention on the Territorial Sea and the Contiguous Zone in order to enable the United States to make more extensive claims in the area of Alaska, it would seem that Louisiana and other states to whom the method would be advantageous for gaining larger amounts of submerged land would also be entitled to use it according to the Court's decision in the Louisiana case.[181] However, that this would necessarily be the case is not certain, since there seems to be no absolute rule that all states must receive the same treatment in this matter.

The inequality of treatment that the different states have received seems to be the fundamental problem still lingering in the area of ownership of submerged lands. No matter what the historical considerations, it appears unreasonable that Texas and Florida should be entitled to three times as much submerged land as are their sister coastal states in the Gulf of Mexico, or the coastal states in the Atlantic and Pacific. Justice Black's dissenting opinion in the 1960 case still seems to ring strongly here.[182] However, there are enormous difficulties presented in attempting to rectify this situation. It would seem most unlikely that Congress would pass any legislation to take away the extra lands granted to Texas and Florida now that their rights in those lands have been approved by the Supreme Court and there is extensive exploitative activity going on in those areas under state supervision and control. Certainly any legislative attempt on the part of Congress to take back these lands would interfere with a very complex system of vested rights. On the other hand, to grant an equal amount of submerged lands to the other coastal states would also interfere with some established rights and would subject a number of enterprises to state regulation which presently escape it. Most importantly, it would result in a further interference with those needs of national security, commerce, and conduct of international

[180] Auburn, supra note 175, at 494-95.
[181] See note 128 supra.
[182] See note 93 supra.

relations which the Supreme Court felt were paramount in the earlier Submerged Lands Cases and which perhaps have Constitutional underpinnings in the grant of Admiralty jurisdiction, the Commerce Clause, and other sections.

A second argument against granting any additional lands to the states, but one which does not seem to have been utilized in any of the cases so far would be that if the Supreme Court was correct in its earleir decisions that sovereignty over the territorial waters was an incident of national sovereignty and not one which was ceded from the Original States to the Federal Government upon the formation of the Union, then the benefits and profits from that sovereignty would seem to belong to the nation as a whole rather than to the coastal states alone. Particularly in this time of pressing oil shortages, there seems to be no justifiable reason to take from all of the states in order to satisfy the demands of a few. While it is settled that Congress does have the Constitutional power to dispose of Federal property to the states, it would seem most unfair to the non-coastal states to make this sort of disposition of such valuable resources.

A second unknown quantity in this area is the outcome of the pending Conference on the Law of the Sea. International agreements reached at that conference might substantially alter the picture as between the Federal Government and the States, although, as discussed previously, it seems unlikely that anything inside of twelve miles might be affected. But pending this conference, the Federal Government should certainly have a free hand as to the agreements it makes regulating activity outside the twelve mile zone. Recognition of any state claims in excess of this figure would put the United States in a difficult position in trying to oppose such claims made by other nations. Even a recognition of full sovereignty over only twelve miles presents substantial problems where international straits are concerned.

It would seem to be in the best interests of the United States that state claims be confined within their present bounds until somewhat more definite agreement is reached concerning international control over the deep seabed and its resources. If this is not done, then the United States would face the well nigh impossible task of trying to reconcile the conflicting interests and claims of the twenty-three coastal states, as well as those of the nation as a whole, in the conduct of its international relations. In an area which is presently developing so rapidly, this simply could not be done if the states were allowed to make unlimited claims of jurisdiction for any and all purposes.

CHAPTER III

TORT JURISDICTION

Federal jurisdiction over torts occurring in or on the navigable waters of the United States is multi-faceted but there are areas of state competence intermingled. This portion of this paper will briefly survey the respective areas of state and federal competence in order to provide a sufficient basis of understanding to evaluate the entire jurisdictional picture with regard to the coastal waters of the United States.

Of foremost importance is the Constitutional grant of Admiralty jurisdiction to the Federal Government.[1] It was thought necessary to the successful conduct of foreign affairs and domestic and international commerce that there be a uniform and fairly administered law governing shipping, which was at the time the Constitution was written probably the most important means of transport, and certainly the only means for international trade.[2] The interpretation of the meaning of the phrase "all causes of admiralty and maritime jurisdiction" has steadily expanded. Initially, under the Judiciary Act of 1789,[3] only those torts occurring on navigable waters which were navigable from the sea by a vessel of ten or more tons burden fell within the Admiralty jurisdiction, but the grant by Congress was steadily expanded[4] until it included all torts occurring on the navigable waters of the United States.[5] The test of whether particular bodies of water are navigable is whether they are navigable in fact.[6] But this would of course include all of the coastal waters with which this paper is concerned.

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[1]U.S. CONST. Art. III, Sec. 2.

[2]See Jackson v. The Steamboat Magnolia, 61 U.S. (20 How.) 296 (1857) for an extensive disucssion of the origins of the Admiralty jurisdiction, as well as DeLovio v. Boit, 2 Gall. 395, 7 Fed. Cas. No. 3776 (1815).

[3]Act of 24 September, 1789, 1st Cong., 1st Sess.; 1 Stat. 76.

[4]The Admiralty jurisdiction in the early cases was limited to torts occurring on waters within the ebb and flow of the tide, see, e.g., The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825); The Steamboat Orleans, 36 U.S. (11 Pot.) 175 (1837). The first departure from the ebb and flow of the tide as the test of locality for Admiralty jurisdiction took place in the case of The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851), which held the Admiralty jurisdiction to extend to inland navigable waters above the ebb and flow of the tide. Jackson v. The Steamboat Magnolia, 61 U.S. (20 How.) 296 (1857) was the last case in which there was more than token dissent from the proposition that "admiralty and maritime jurisdiction" insofar as that term is defined by locality, extends to all water navigable in interstate and foreign commerce. J.S. LUCAS, ADMIRALTY - CASES AND MATERIALS at 30-36 (1969).

[5]Note 4 supra.

[6]The Daniel Ball, 77 U.S. 557, 563 (1870), and The Montello, 87 U.S. 430, 441 (1874).

Until very recently the locality of a tort was the exclusive test for federal Admiralty jurisdiction.[7] For example, in Davis v. City of Jacksonville Beach,[8] a man riding a surfboard had struck a swimmer in the ocean off Jacksonville Beach, Florida. Admiralty jurisdiction was upheld in the case despite the lack of any substantial maritime connection. Similarly, in Notarian v. Trans World Airlines[9] the plaintiff had been a passenger in defendant's airplane flying over the Atlantic Ocean. During the flight the aircraft lurched rather sharply, causing the plaintiff to fall to the floor, injuring herself. The aircraft had never touched the water, nor had any of the related events such as the purchase of the ticket taken place on or even near navigable waters. Nevertheless, Admiralty jurisdiction was sustained in the case because the accident had taken place over navigable waters.

Last year, however, in the Executive Jet Aviation, Inc. v. City of Cleveland[10] case, the Supreme Court countered this trend of expanding Admiralty jurisdiction. There, a jet aircraft was taking off from the Cleveland airport on a flight to Boston when it struck a flight of birds, causing it to crash down onto the runway and eventually bounce into the waters of Lake Erie. Fortunately there was no one injured in this accident, but the owners of the destroyed airplane brought suit against the airport for negligence, in failing to clear the runway of the birds. In deciding that there was no jurisdiction in Admiralty, the Court held that there must be some connection with a traditional maritime activity in order to sustain the Admiralty jurisdiction of a torts suit.[11] With regard to the precise facts at hand, the Court held that the fortuitous event that the airplane came to rest in navigable waters was insufficient to show this connection, when the contemplated flight would have been entirely over land and there was no other maritime connection with the accident.[12] The Court went on to say, in dicta, that Admiralty jurisdiction would not be upheld for torts related to flights of aircraft between points in the continental United States despite the fact that some portion of the flight might be over navigable waters.[13] However, the Court did not decide whether intercontinental flights over navigable waters, where the aircraft was performing a function traditionally performed by ships, would be within this rule.[14] Although many prior cases had discussed the requirement of a maritime connection with the tort,[15] and some courts had held that it was necessary to sustain Admiralty jurisdiction,[16] this was the first authoritative ruling on the question.[17]

A second substantial limitation on the scope of Admiralty torts jurisdiction is the "extension of land" doctrine which excludes from the

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[7]For cases upholding Admiralty jurisdiction based exclusively on the locality of the tort, see e.g., Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965); Notarian v. Trans World Airlines, 244 F. Supp. 874 (S.D. N.Y. 1965). However, as discussed post, these holdings are now of questionable validity.

[8]251 F. Supp. 327 (M. D. Fla. 1965).

[9]244 F. Supp. 874 (S. D. N.Y. 1965).

[10] 409 U.S. 249 (1972).

[11]Id. at 268.

[12]Id. at 269-71.

[13]Id. at 271-72.

[14]Id.

[15]See e.g., Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914); Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963).

[16]See e.g., Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).

[17]409 U.S. at 252.

Admiralty jurisdiction those injuries suffered on structures which are attached to the land. Perhaps the most concise and clearest expression of this doctrine is found in Thomson v. Chesapeake Yacht Club:[18]

> One point is clear; piers, docks, wharves and similar structures extending over navigable waters are extensions of land, though their use and purpose be maritime....personal injuries suffered while upon such structures are not compensable in admiralty, unless caused by a vessel on navigable waters, in which the Admiralty Jurisdiction Extension Act of 1948 gives admiralty jurisdiction.[19]

The Thomson case held that injuries sustained when the plaintiff fell through a hole in a pier into navigable waters were not compensable in admiralty.[20]

An exception to the Admiralty jurisdiction is found in the "savings to suitors" clause of the grant of jurisdiction to the district courts contained in 28 U.S.C. 1333, which saves to suitors all other remedies to which they are otherwise entitled. As interpreted in The Hine v. Trevor[21] and later in C.J. Hendry Co. v. Moore,[22] this clause preserves to plaintiffs those causes of action which they would have had at common law. Thus, a plaintiff with a common law cause of action has the option to pursue that remedy in addition to, or instead of, whatever causes of action he may have which are cognizable in Admiralty, despite the fact that the tort may have occurred on navigable waters and have a maritime connection. States may not give statutory remedies for causes of action that would otherwise fall within the Amdiralty jurisdiction.[23]

There are also a number of Federal statutes which give a right of recovery for torts occurring on navigable waters and the high seas. The Death on the High Seas Act[24] is basically a wrongful death act designed to give a recovery where the death occurs beyond one marine league from shore. It has been held applicable to deaths caused by the crash of an aircraft on the high seas,[25] as well as to deaths occurring on ships.

Mr. David S. Browning has pointed out a most interesting potential problem with the Death on the High Seas Act.[26] Since the Act by its terms applies to all deaths occurring more than one marine league from shore, would it apply to a death occurring in the Gulf of Mexico two marine leagues off the coast of Texas? The 1960 Supreme Court decision in the Louisiana, Texas,

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[18]255 F. Supp. 555 (D. Md. 1965).
[19]Id. at 557.
[20]Id. at 559.
[21]71 U.S. (4 Wall.) 555 (1867).
[22]318 U.S. 133 (1943).
[23]The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). It should also be noted at this point that a claim under general maritime law does not constitute a "federal question" for jurisdictional purposes under 28 U.S.C. § 1331. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).
[24]46 U.S.C. § 185 (1970).
[25]See e.g., Choy v. Pan-American Airways Co., 1941 Am. Mar. Cas. 483 (S.D. N.Y. 1941) and cases cited in Executive Jet Aviation, Inc. v. City of Cleveland, 41 Law Week 4085, 4090, fn. 13 (1972).
[26]Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, in 3 PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE 89, 118 (L.M. Alexander, ed. 1968).

Alabama, Mississippi, and Florida cases[27] decided that Texas owned the submerged lands out to a distance of three marine leagues. Ostensibly this should make Texas law applicable in that area, but on the other hand, the 1960 decision really only covered the ownership of resources in the submerged lands.[28]

It seems likely that the decision would be that Congress' power under the Admiralty[29] and Commerce[30] clauses of the Constitution would prevail in such a situation and the application of the Death on the High Seas Act would be upheld. The entire question is probably mooted by the Moragne decision,[31] discussed later, which would provide a federal remedy in any case, but could well arise in other contexts.

Within its sphere of application, the Death on the High Seas Act is the exclusive remedy for wrongful death, superseding any applicable state statute.[32] However, if a state survival statute is applicable, relief may also be granted under its provisions.[33]

Inside the three mile limit, the Death on the High Seas Act does not apply and formerly there was no federal cuase of action for wrongful death occurring within state territorial waters.[34] This lack of a remedy was compensated for by the practice of adopting the state's wrongful death act ot provide a remedy.[35] However, it was held in The Tungus v. Skovgaard[36] that where this practice was followed, the right given by the state Act must be enforced as an integrated whole with whatever limitations attached by state law enforced by the Federal Admiralty court as well. There were a number of problems with this approach, chiefly relating to the fact that the state statutes often had relatively shorter limitations periods attached to them or that the state statutes did not embrace unseaworthiness as a ground for recovery, and thus plaintiffs were often denied recovery clearly available had the accident occurred outside of the state's territorial waters.[37] This situation was changed in 1970 when the Supreme Court handed down the decision in Moragne v. States Marine Lines, Inc.,[38] which held that there was a cause of action for wrongful death under the general maritime law, and a recovery could be had under this law for wrongful death occurring within a state's territorial waters.[39] In so holding, the Court pointed out that it felt that

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[27]United States v. Louisiana, et al, 363 U.S. 1 (1960).
[28]Id.
[29]U.S. CONST. Art. III, Sec. 2.
[30]U.S. CONST., Art. I, Sec. 8.
[31]Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).
[32]Kessler v. National Airlines, Inc., 368 U.S. 859 (1961); d'Aleman v. Pan-American World Airways, 259 F.2d 493, 496 (2d Cir. 1958) (concurring opinion); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246, 248 (D. Del. 1964); Montgomery v. Goodyear Tire and Rubber Co., 231 F. Supp. 447, 452 (S.D. N.Y. 1964); King v. Pan-American World Airways, 166 F. Supp. 136, 139 (N. D. Cal. 1958) aff'd, 270 F. 2d 355 (9th Cir. 1959) cert. den. 362 U.S. 928 (1960).
[33]Dugas v. National Aircraft Corp. 438 F.2d 1386 (3d Cir. 1971).
[34]The Harrisburg, 119 U.S. 199 (1886).
[35]The Tungus v. Skovgaard, 358 U.S. 588 (1959).
[36]Id. (5-4 decision on this point).
[37]See e.g., Goett v. Union Carbide Corp., 361 U.S. 340, (1960) and Hess v. United States, 361 U.S. 314, 314-315, 338-39 (1960).
[38]398 U.S. 375 (1970).
[39]Id. at 349-408.

Congress had not included this type of situation within the coverage of the Death on the High Seas Act because, since the state statutes were applicable there was no necessity to do so, and did not wish to invite the courts to find that the Federal legislation had pre-empted the entire field.[40] Moreover, the state remedies were frequently more generous since the unseaworthiness standard at the time of enactment of the Death on the High Seas Act was an obscure and little used remedy.[41]

A second important Federal statute covering torts which occur on territorial waters is the Longshoremen's and Harborworker's Compensation Act.[42] This Act is a workmen's compensation measure and covers all injuries to longshoremen, harborworkers, and similar workmen occurring on navigable waters. Most of the litigation about jurisdiction under the statute has been concerned with marginal situations occurring on piers, docks and drydocks, and whether these could validly be said to be "on navigable waters."[43]

The history of the Act began with the Supreme Court's decision in Southern Pacific Co. v. Jensen[44] where the Court held that a state workmen's compensation act could not constitutionally be applied to an employee injured while working on navigable waters.

> [P]lainly, we think, no [state legislation affecting the general maritime law] is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.[45]

To fill the substantial void left by the Jensen decision, Congress enacted the Longshoremen's and Harborworker's Compensation Act.[46] The Act itself provides that it only covers cases where state compensation acts may not constitutionally be applied, but this has been subsequently interpreted to mean that it may apply in all cases where the state remedy is of doubtful constitutionality.[47] The clear purpose of the Act was to provide a remedy for all injuries sustained on navigable waters and to avoid uncertainty as to the source of that remedy.[48]

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[40] Id. at 381-83.
[41] Id.
[42] 33 U.S.C. §§ 901-950, 44 Stat. 1424, as amended, 86 Stat. 1251.
[43] See e.g., Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962); Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968).
[44] 244 U.S. 205 (1917).
[45] Id. at 210.
[46] 33 U.S.C. §§ 901-950.
[47] Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962).
[48] 370 U.S. at 125. For a fuller discussion of this problem, see Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, in 3 PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE 89, 120-24 (L.M. Alexander, ed. 1968).

The Outer Continental Shelf Lands Act[49] adopts the law of the adjacent state to the extent that it is not in conflict or inconsistent with Federal law. In a case[50] involving an injury to a worker on an oil drilling platform located some sixty miles off the coast of Louisiana (an area clearly outside any possible state claim of inland waters and also clearly within the coverage of the Outer Continental Shelf Lands Act), the Fifth Circuit was confronted with the question whether the Louisiana statute of limitations or the maritime, equitable doctrine of laches was applicable. If Louisiana law was held to apply then the claim was barred. The court decided that the maritime law should control because Congress had committed the regulation of oil drilling and similar activities in the offshore regions to the Coast Guard. The obligations and authority of the Coast Guard involved more than just marking and identifying the structure as a navigational air or hazard; structures like this which are located on the high seas present substantially all of the dangers of the sea and are to be regulated as such.[51]

The accident happened on the high seas, not within Louisiana, nor even within the territorial waters of Louisiana. The only factor which could support the application of Louisiana law here would be an affirmative indication in the Outer Continental Shelf Lands Act that Louisiana law was to apply. The court here found no such indication. To the contrary, the court found that it was the intention of Congress that the federal maritime law should apply in such cases.[52]

> Congress knew from long experience the desirability--if not the constitutional necessity--of a substantial uniformity in dealing with matters of maritime. [sic] It runs counter to the whole purpose of the Act to assume that Congress meant a matter of such importance as safety of life and limb should be left to the shifting policies of adjacent states.[53] (emphasis supplied)

While this statement may represent a somewhat strong viewpoint, other cases involving the question of whether to apply state or Federal law to injuries occurring on the outer continental shelf have upheld the application of Federal law.[54] In any case where the injury is related to a maritime or maritime related activity, this seems unquestionably correct for a number of reasons. First, Federal maritime law contains numerous precedents to which parties can look in reliance rather than await determinations as they may happen to come from the state courts. Second, if Federal law is applied, one can expect a grater uniformity of decision. Third, Federal law is better suited to balancing competing maritime interests than state law might be,

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[49] 43 U.S.C. § 1331-1343.

[50] Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir. 1961).

[51] Id. at 62-63.

[52] Id. at 63-66.

[53] Id. at 69. Again, for a somewhat more complete discussion, see Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, in 3 PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE 89, 114-115 (L.M. Alexander, ed. 1968).

[54] See e.g., in addition to the Snipes case, Rodrigue v. Aetna Cas. & Sur. Co., 266 F. Supp. 1 (E.D. La. 1967); Touchet v. Travelers Indemn. Co., 221 F. Supp. 376 (W.D. La. 1963); Ross v. Delta Drilling Co., 213 F. Supp. 270 (E.D. La. 1962).

particularly where a state tends to engage in only one type of maritime activity. Fourth, Federal courts may be better at balancing national interests. Fifth, since there will probably be substantial regulation of maritime activities by international organizations in the future, international interests and agreements must be taken in account; a uniform Federal law would seem much more capable of doing this. Sixth, the application of a uniform Federal law would eliminate many difficult problems in determining exactly where a particular tort occurred and whether the law of one state or the other would be applicable.

Another factor supporting the application of the Federal maritime law to torts occurring on the outer continental shelf by the court in the Snipes case was the fact that the Outer Continental Shelf Lands Act itself called for the application of the Longshoremen's and Harbor Worker's Compensation Act as the basis for compensation for the death or injury of an employee.[55]

In Guess v. Read[56] the question presented was whether the Louisiana direct action statute could be applied in a suit under the Death on the High Seas Act for a death occurring as the result of a helicopter crash eighteen miles off the coast of Louisiana. This was outside the state territorial waters, but on the outer continental shelf. The helicopter had just left an oil drilling barge.

In rejecting the application of the Louisiana statute, the court called attention to the fact that the Outer Continental Shelf Lands Act was enacted for the purpose of asserting ownership of and jurisdiction over the minerals in the seabed and subsoil; thus, it was only for the seabed and subsoil that state law was applicable under the provisions of the Act. This interpretation of the Act was supported by the mandate of Section 3(b) of the Act that:

> This Act shall be construed in such a manner that the character as high seas of the waters above the outer continental Shelf and the right to navigation and fishing therein shall not be affected.[57]

However, the court did say that if the helicopter had crashed on the drilling barge, it might have been within the jurisdiction of the Act. Here, the crash clearly occurred on the high seas and the Louisiana Act was inapplicable.[58]

The foregoing, while too brief to give an adequate picture of the complete scope of Federal jurisdiction over torts occurring in the territorial waters and contiguous zone and on the continental shelf, is sufficient to convey a fair idea of how that jurisdiction interacts with State jurisdiction in those areas. Only a few major caveats need be added. First, the

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[55] 293 F.2d at 66-67.
[56] 390 F.2d 622 (5th Cir. 1961).
[57] 43 U.S.C. § 1332(b) (1970); 390 F.2d at 625.
[58] 390 F.2d at 625. See Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, in 3 PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE 89, 117-18 (L.M. Alexander, ed. 1968).

three mile limit has nothing whatsoever to do with Admiralty jurisdiction.[59] If the Admiralty court has jurisdiction over the appropriate parties and/or the vessels involved, it may adjudicate the claim wherever the tort occurred, though the substantive law and navigational rules may vary according to the national jurisdictions involved.

Second, although the "savings to suitors" clause may give a State the right to decide the action if brought in a State court, this does not necessarily mean that state law will apply. Normal rules of conflicts of laws may indicate application of the maritime law. This is not forbidden by the exclusive grant of admiralty jurisdiction.

Third, the boundary lines of the three mile limit, the limit of inland waters and the beginning of the outer continental shelf are relevant for purposes of deciding whether state law can be applied to torts not falling within the admiralty jurisdiction.[60] If the dicta in the Executive Jet[61] case are to be taken as established law, this could be most important in cases of airplane crashes in territorial waters, the contiguous zone and the high seas. The three mile limit is also apparently determinative of whether the Death on the High Seas Act is applicable,[62] except perhaps off the Gulf coasts of Texas and Florida.[63]

One can draw very few firm conclusions in this area of torts which occur on the coastal waters. State and Federal authority is hopelessly intertwined and one really cannot make general statements without a precise set of facts at hand. Nevertheless, it is clear that there is Federal admiralty jurisdiction over all torts occurring on the navigable waters of the U.S. if they have some maritime connection.[64] However, if there is a common law remedy for such torts as occur, the States are competent to decide the case.[65] State law has an application of indeterminate extent outside of the three mile limit, but may be applicable in any non-maritime case occurring on the continental shelf because of the adoption clause in the Outer Continental Shelf Lands Act.

This uncertainty seems to be the strongest reason for letting the Federal maritime law apply exclusively in the coastal waters and on the underlying lands. If State tort law is permitted to have application, there can be

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[59]As discussed above, Admiralty jurisdiction is determined by the navigability of the superjacent waters, and since the Executive Jet Aviation Case, note 10 supra, by the presence of a maritime connection. Arbitrary boundary lines have nothing to do with this determination. The only test is whether the waters are navigable in fact. The Daniel Ball, 77 U.S. 557 (1870); Madole v. Johnson, 241 F. Supp. 379 (D. La. 1965).

[60]This is so by virtue of the adoption clause of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(b), and the line drawing done in that act.

[61]409 U.S. 249 (1972).

[62]The Death of the High Seas Act limits its application to deaths occurring more than one marine league (three miles) from shore. 46 U.S.C. § 761.

[63]See text accompanying notes 26-31 supra; this is the difficulty posed by Browning, note 26 supra, and as stated in the text accompanying note 31 supra is probably mooted, except in a theoretical sense, by the Moragne decision.

[64]Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972).

[65]The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867).

expected real difficulties (in those cases occurring any substantial distance from shore) in determining exactly where the tort occurred.[66] It may be reasonably anticipated that there will be many cases where the question of whether it happened in state A's waters, state B's waters, or in the federal domain will be important. Second, it will probably be the exceptional case in which some substantial connection with a maritime activity cannot be established,[67] and thus most of the cases will fall into the federal admiralty jurisdiction anyway. Third, for the reasons of having precedents to look to, greater uniformity, balancing of all maritime interests, balancing national interests, and conformity with international law as suggested previously,[68] it would be better to have a uniform Federal law apply. Fourth, because of the pervasiveness of Federal law in the area, one might reasonably expect Federal jurisdiction to be asserted on some other ground, and thus the Federal courts will be dealing with the case in any event.

On the other side, there seems to be no compelling reason, other than the "savings to suitors" clause, to preserve the authority of the States in this area. Although state courts are certainly competent to deal with torts actions, the reasons expressed above seem compelling for asserting federal jurisdiction. While there are a number of areas of local concern, the need for uniformity and the balancing of competing interests strongly outweigh them.[69] Most importantly, the elimination of most boundary line questions and jurisdictional haggling would allow both the State and the Federal courts to save judicial time and get to the merits of cases more quickly.

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[66]For a brief outline of the difficulties one may encounter in an admiralty action when the locus of the tort is uncertain, see J.D. LUCAS, ADMIRALTY-CASES AND MATERIALS 171 (1969). A case that struggles with these problems is The Marine Sulphur Queen, 231 F. Supp. 934 (S.D. N.Y. 1964).

[67]As required by the Executive Jet case, note 10 supra.

[68]See text accompanying notes 54 to 55 supra.

[69]However, in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), the holding is very clear that both the states and the federal government have concurrent jurisdiction over environmental matters. Admittedly, it is difficult to say that jurisdiction of tort actions is of less local concern than jurisdiction over environmental cases.

CHAPTER IV

ENVIRONMENTAL REGULATION

The interplay of federal and state jurisdiction in the area of environmental law presents quite a different picture than other areas of conflict which concern territorial waters. It is first, solely a question of which authority shall have the regulatory power; there is no problem of ownership of resources entailed, nor is it in any manner a profitable activity. Rather the concern is to prevent loss. However, there are financial considerations involved in that what to one person may appear to be a polluting activity is to another a valuable economic activity. Sometimes this division will appear between the federal government and the states. More often the interests of the two will coincide, but a private party may attempt to assert that there is a difference in their respective interests in order to avoid the regulatory control of one or the other.[1]

A second factor which distinguishes the area of environmental regulation is that it involves both civil and criminal jurisdiction.[2] Thus, there is present the potential conflict between state and federal authority that one might feel that criminal sanctions are the best means of regulation while the other would rely on the possibility of civil liability to curb polluting activity.[3] Although this presents no problem in the usual case, it might result in deterring otherwise useful activity because there was a substantial risk of pollution inherent in the activity. And although there would be no double civil liability, there remains the possibility that a violator would be subject to both federal and state criminal sanctions for the same act because there is no double jeopardy protection as between the federal government and the states. However, this situation exists in any number of other areas and there is really no good reason why the states should not have concurrent jurisdiction with the federal government in the area of environmental regulation.

Perhaps the most important factor distinguishing the area of environmental regulation in the territorial waters is that boundary lines simply have no meaning. Oil discharged into the sea spreads with the currents, and whether

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[1] See, e.g., Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) [hereinafter cited as Askew].

[2] Askew, supra note 1, discussed the imposition of both federal and state civil penalties. Id. at 329-32. For an example of criminal penalties imposed to regulate activities offshore, see, e.g., Skiriotes v. Florida, 313 U.S. 69 (1941); United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. United States Steel, 328 F. Supp. 354 (N.D. Ill. 1971); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969).

[3] This aspect of the problem was discussed in Askew, supra note 1, at 329-32. An example of a statute imposing criminal sanctions is The Rivers and Harbors Act of 1899, 33 U.S.C. § 407.

the initial discharge occurred three miles, or six miles, of fifty miles out from the shore is irrelevant to the state whose beaches are fouled or the fisherman whose catch is destroyed.[4] Similarly, the fact that the initial discharge of pollutants occurs in the waters of one state does not mean that other states will not be the ones who suffer its ill effects. Even pollution originating in an inland state may do its ultimate damage to a coastal state.[5] Taken by itself, this would argue for a uniform national regulation of polluting activity in order to balance competing local concerns with the national interest. Yet, there are at the same time many activities of purely local concern whose regulation is better left to the individual states to work out.[6]

It is also important to realize that there is perhaps no other jurisdictional area where the ultimate goals of federal and state regulation are so similar. Neither would advocate dirty water, or dying fish, or fouled beaches, or anyone suffering economic loss because the natural resources upon which he depended were destroyed by pollution. The differences are entirely in how one would choose to balance the competing economic and aesthetic interests. As in other areas where balancing is required, this often results in dissenting opinions. It brings to mind the old saying, "There are four and twenty ways of singing tribal laws, and every single one of them is right!"

The most significant and controversial issue between the federal and state governments with respect to ecological and environmental hazards in coastal waters and offshore submerged lands is the curbing of pollution caused by vessels and storage facilities in the coastal waters. Specifically, the area of conflict is the imposition by some coastal states of more stringent or more expansive controls with respect to pollution of their coastal waters than is envisioned by present federal law and policy.

This chapter focuses on the interaction and conflict between the legislation of those coastal states which have enacted extensive controls on discharges into their coastal waters and the federal legislation purporting to deal with this type of pollution. The constitutionality of both the Florida and Maine pollution control statutes, the two most extensive state legislative schemes, has been recently challenged and upheld in the United States Supreme Court and Maine Supreme Court respectively. These decisions will be analyzed in depth as to the courts' holding and rationale, and the consistency of the decisions with respect to prior decisions on federal-state conflicts in this area.[7]

Jurisdiction to regulate pollution is asserted by the United States in a number of different ways. Unlike other areas of regulation, it is not simply a question of whether the polluting activity occurs in a particular area. It is more correctly viewed as a question of subject matter jurisdiction, though

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[4]Hennessee, Legal Action to Curb Pollution of the Sea, in THE SURGE OF SEA LAW 119, 120-21 (Wurfel ed. 1973).

[5]Id.

[6]411 U.S. at 334.

[7]Generally, the only states with such strict pollution regulations are those whose coastal economy is based largely on fishing, tourism and recreation and thus to whom the arrival of the oil tanker causes considerable concern.

territorial considerations play their part as well. The most common assertion in the federal statutes covers the "navigable waters of the United States." Power to make this assertion is derived from the Admrialty and Commerce clauses of the Constitution. Such an assertion of jurisdiction is found in the Rivers and Harbors Act of 1899, the Obstructing Navigable Waters Act of 1895, and the Federal Water Pollution Prevention and Control Act of 1973.

Existing federal legislation to curb offshore pollution centers around section 1321 of the 1973 pollution control legislation.[8] The initial regulatory provision of section 1321 promulgates the policy of the United States against the discharge of oil and other hazardous substances upon the navigable waters of the United States, adjoining shorelines or waters of the contiguous zone.[9] Following this is a new provision, not contained in the Water Quality Improvement Act (WQIA), the predecessor to section 1321, which imposes liability for a civil penalty on the owner or operator of any vessel, onshore facility or offshore facility[10] from which there is discharged any oil or other hazardous substance which is determined not removable.[11] The amount of the penalty during a two year period beginning on October 18, 1972, will be based on the toxicity, degradibility and dispersal characteristics of the discharged substance but will not exceed $50,000. After that period expires, a penalty of up to $5,000,000 for discharge from a vessel and $500,000 in the case of an onshore or offshore facility will be imposed.[12]

Section 1321(c) establishes a National Contingency Plan to be prepared by the President for the expeditious containment, dispersal and removal of oil or other hazardous substances discharged upon navigable waters. There is listed a number of regulations to make operative the pollution removal plan

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[8]Formerly, control of polluting discharges on coastal waters was regulated by 43 U.S.C. §§ 1152-1165 known as the Federal Water Pollution Control Act of 1948 as amended by the 1970 Water Quality Improvement Act (WQIA). Now virtually all legislation on water pollution prevention, including research programs, water quality standards and issuing of licenses is found in 43 U.S.C. §§ 1251-1376 with section 1321 focusing on liability for the discharge of oil and other hazardous substances into coastal waters. Since the change was only made in October, 1972, most of the relevant literature and cases refer to the WQIA and §§ 1152-1165. We shall try to clarify any possible confusion--in general, section 1321 has not substantially altered the liability scheme of section 1161 of the WQIA but some significant provisions have been altered or amended and these changes will be noted. Section 1151 which is the Congressional declaration of policy with respect to controlling water pollution is still intact.

[9]33 U.S.C. § 1321(b)(1).

[10]All terms such as "onshore facility" or "offshore facility" are defined in § 1321(a). The facilities ordinarily refer to terminals or storehouses where oil is brought by vessels (offshore) or piped from them (onshore).

[11]33 U.S.C. § 1321(b)(2)(B)(ii). § 1321(b)(2)(B)(i) provides for a determination of whether a discharge substance can be removed.

[12]33 U.S.C. §§ 1321(b)(2)(B)(ii), (iii). There is no limit on liability if the discharge is demonstrated to be the result of willful negligence or misconduct within the owner's knowledge.

including authority for federal-state communications and co-operation in the execution of the National Contingency Plan. A new provision of the Plan, not found in the WQIA, sanctions "a system whereby the State or States affected by a discharge...may act where necessary to remove such discharge and...may be reimbursed...for the reasonable costs incurred in such removal."[13] Sections (d) and (e) give the United States the power to take certain steps in response to a discharge caused by a "marine disaster" upon the navigable waters and allows the United States attorney to seek relief to abate threats to the public health and welfare because of an actual or threatened discharge from an onshore or offshore facility.

Probably the most important section of the entire Federal Water Pollution and Prevention Control Act is section 1321(f) imposing strict liability on the owner or operator of vessels, onshore and offshore facilities for actual costs incurred by the United States in the removal of such oil or substance discharged from the vessel or facility. However, a defense to liability exists for all offenders "where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of War, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses."[14]

Liability for the owner or operator of the vessel from which the polluting substance is discharged, is limited to $100 per gross ton of such vessel or $14,000,000 whichever is less and the ceiling liability for discharges from onshore and offshore facilities is $8,000,000. Where the federal government can show that the "discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for the full amount of such [clean-up] costs."[15]

Section (g) involves absolute liability for the third party whose act or omission was solely responsible for a prohibited discharge from another vessel or onshore or offshore facility. This third party is entitled to the same defenses and to the same limitations of liability which the owner whose vessel or facility discharged the polluting substance would have been entitled if not for the third party's responsibility.

In conjunction with the National Contingency Plan, the President is authorized in section (j)(1) to issue regulations (1) establishing procedures for removal of discharged substances; (2) for developing local and regional removal contingency plans; (3) prescribing procedures and equipment to prevent and contain discharges from vessels and onshore and offshore facilities; and (4) for inspecting vessels carrying cargoes of oil and hazardous substances in order to reduce the likelihood of discharges. The following section includes penalties for failure to comply with such regulations.[16]

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[13] 33 U.S.C. § 1321(c)(2)(H).

[14] Id. § 1321.

[15] Id. The unlimited liability imposed for willful negligence applies to vessels, onshore and offshore facilities alike.

[16] 33 U.S.C. § 1321(m) grants the authority to persons enforcing § 1321 to board and inspect any vessel and, with or without a warrant, arrest any person violating the provisions of section 1321 or any regulation issued prusuant thereto.

A fund not to exceed $35,000,000 is established to carry out the removal of discharged oil or hazardous substances and any of the regulations authorized under section (j).[17] A requirement of financial responsibility for any vessel over 300 gross tons which carries oil or hazardous substances as cargo or fuel, using any United States ports or navigable waters, is imposed up to $100 per gross ton or $14,000,000, whichever is less, to meet its potential section 1321 liability.[18] Evidence of such financial responsibility may be established by insurance, surety bonds, qualification as a self-insurer or other evidence acceptable to the President. New provisions stipulate a $10,000 fine for failure to comply with the financial responsibility requirement and authorization for the Coast Guard to deny entry to any United States port or navigable waters or to detain at any port any vessel which does not present evidence of financial responsibility.

For the purposes of our inquiry, section 1321(o) is most important:

> (o)(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or...onshore facility or offshore facility to any person or agency under any provision of law for any damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from any removal of such oil or hazardous substance.
>
> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.
>
> (3) Nothing in this section shall be construed...to affect any State or local law not in conflict with this section.[19]

Several states have now enacted statutes relating to the control of oil spills or the discharge of other pollutants in their coastal waters which provide for some form of strict or unlimited liability for such hazards.[20] Prominent among these state legislative regulatory schemes are the Florida[21]

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[17] 33 U.S.C. § 1321(k).

[18] 33 U.S.C. § 1321(p)(1-6).

[19] 33 U.S.C. § 1321(o)(1-3).

[20] Besides Florida and Maine, states which have enacted oil pollution statutes are: Alaska Stat. §§ 46.03.740, 750 (1971); N.J. Stat. Ann. §§ 58:10-23.1 to -23.10 (Supp. 1972); Ore. Rev. Stat. §§ 449.155-.175 (1971); Wash. Rev. Code Ann. §§ 48.315-65 (Supp. 1971); N.C. Gen. Stat. § 143-215.75 et sec.; Texas Water Code §§ 21.251-.265 (1971); Mass. Gen. Laws Ann. §§ 130.22-27 (Supp. 1972). A full listing and discussion of state laws imposing strict and unlimited liability can be found in Note, Toward a State Remedy for Oil Spill Damages: An Insurance Approach, 47 N.Y.U.L. Rev. 60 (1972).

[21] Florida Oil Spill Prevention and Pollution Control Act, Fla. Stat. Ann. §§ 376.02-376.19 (Supp. 1972).

and Maine Acts.[22] These were the first state attempts at pollution control, forming a model for the others, and they are the most comprehensive, impose the most rigid standards and, as mentioned, have both been challenged in court on several constitutional grounds.

The legislative intent behind the Florida Act is the preservation of the uses of the seacoast "in as close to a pristine condition as possible" in the face of threats of great danger and damage to the environment, to owners of shorefront property, recreation facilities and the beauty of the coast from spills or discharges of pollutants involved in the transfer, storage and transportation of such products.[23] The statute points out that such hazards occurred in the past and there exist present threats of catastrophic proportions and that "it is the intent of this chapter to support and complement applicable provisions of the Federal Water Quality Improvement Act of 1970 [now amended]..."[24]

In order to procure the license necessary to operate a terminal facility for the transfer or storage of oil and other potential pollutants, the applicant must present evidence of satisfactory containment and cleanup capability to prevent and abate discharges of oil, petroleum or other pollutants.[25] The license issued to any terminal facility shall include vessels used to transport oil and other hazardous products between the facilities and vessels within state waters. The Department of Natural Resources is given authority to adopt regulations requiring that vessels transporting pollutants within state waters maintain discharge containment equipment and authorizing procedures and equipment to be used in the removal of pollution.[26]

Upon the prohibited discharge of a pollutant from any terminal facility or vessel, the person in charge of the facility or vessel is obligated to remove the discharge. If such person fails to act, the Department of Natural Resources will arrange for the removal or cooperate with the federal government, in accord with the National Contingency Plan, for the removal of any pollutant.[27] A coastal protection fund limited to $5,000,000 is maintained for department equipment costs, all costs involved in the abatement of potential and actual polluting discharges and all expenses of the cleanup and rehabilitation of injured water fowl or other waterlife.[28]

All moneys in the fund used in the cleanup or abatement efforts will be recovered from those causing the discharges except that this right to reimbursement for abatement costs may be waived if the discharge was the result of: "an act of war; an act of government...; an act of God, which means an unforseeable act exclusively occasioned by the violence of nature without the interference of any human agency; [and] an act or omission of a third party without regard to whether any such act...was negligent."[29]

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[22]Oil Discharge Prevention and Pollution Control Act, Me. Rev. Stat. Tit. 38, §§ 541-57 (Supp. 1972). (known as the Coastal Conveyance Act).
[23]Fla. Stat. Ann. § 376.021.
[24]Id.
[25]Id. § 376.06.
[26]Id. § 376.07. § 376.08(2) authorizes the port manager to board any vessel prior to its entry into port to ascertain the presence of required containment gear.
[27]Id. § 376.09.
[28]Id. § 376.11(1-5).
[29]Id. § 376.11(6).

Most important is section 376.12. This provision imposes strict liability without limitation on any licensee terminal, including vessels destined for or leaving a licensee's terminal, from which is emitted a prohibited discharge within state boundaries for "all costs of cleanup or other damage incurred by the state and for damage resulting from injury to others."[30]

Another significant regulation is the requirement that each owner of a terminal or vessel using a Florida port present evidence of financial responsibility, based on the capacity of the terminal facility or tonnage of the ship, to which the vessel could be subjected under the act.[31] Proof of financial responsibility may be established by insurance, surety bonds payable to the Governor of the State, qualification as self-insurer or other satisfactory arrangement.

In language virtually identical to that of the Florida Act, the Maine Pollution Control Act, in its statement of purpose, speaks of the need to preserve the uses of the seacoast as a haven for recreation and fishing against the imminent peril of pollution occasioned by the transfer and storage of petroleum[32] between vessels and onshore facilities within state waters. Section 543 prohibits the discharge of oil into coastal waters and section 544 establishes the jurisdictional scope of the state's enforcement agency, the Environmental Improvement Commission, under this act out to 12 miles from the coastline.[33]

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[30]It is not clear whether this language allows for recovery by private claimants injured by prohibited discharges. It may allow only for indemnification of the state with respect to third-party claims or it may create rights in private parties against the offender directly. Read in conjunction with the provision in the financial responsibility provision that any claims for costs of cleanup or damages by the state or any claims for damages by any injured person may be brought directly against the insurer, there is an intimation that private claimants can recover on a strict liability theory. Ordinarily, the private claimant is left to a conventional negligence action against the polluter.

[31]Fla. Stat. Ann. § 376.15.

[32]Me. Rev. Stat. Ann. § 541. The Maine Act throughout only refers to pollution by oil, petroleum products and their by-products in contrast to the Florida Act which also encompasses other non-petroleum pollutants discharged from onshore and offshore facilities.

[33]This extension to twelve miles is rather curious. Maine, as noted in Chapter I, is one of those states which has unilaterally extended its fishing jurisdiction to 200 miles. Additionally, it is one of the states claiming ownership of the continental shelf out to its external seaward limit. However, it only claims a territorial sea of three miles. This could be a unilateral extension by Maine of jurisdiction for purposes of pollution control but the literature on the Act has not discussed this possibility. One explanation may be that Maine has interpreted the explicit authorization of state legislation on pollution of 43 U.S.C. § 1321(o)(2) and other indications of encouragement of state action in the Federal Water Pollution Prevention and Control Act as federal recognition of concurrent state jurisdiction out to 12 miles which is the limit of federal jurisdiction for pollution prevention purposes.

Section 547 requires licenses for the operation of an oil terminal facility [defined in section 542(7) to include onshore and offshore facilities and vessels used to transport oil between a vessel and another vessel and between a facility and a vessel within state waters], for which license satisfaction of the prescribed procedures and equipment for the control and abatement of pollution must be presented. Regulations with respect to these operating procedures and equipment required for the prevention and abatement of oil spills may be adopted by the Commission under section 546.

The removal of prohibited discharges is the obligation of the polluter but the Commission may undertake the removal effort if necessary. Removal of unexplained oil spills ["mystery spills"] and discharges occurring in waters beyond state jurisdiction but penetrating within state jurisdiction is directed by the Commission,[34] with expenses for the removal to be paid by the Maine Coastal Protection Fund. The Fund, established in section 551 and limited to $4,000,000, is to be for administrative costs, removal of petroleum pollution, research and development into the causes, effects and removal of oil pollution [limited to $100,000 per annum] and the payment of damages to those who have suffered property or income loss directly or indirectly as a result of the prohibited discharge.[35] If the claimant, the Commission and the person causing the discharge cannot agree as to the amount of the damage claim, a Board of Arbitration, whose existence and composition is provided for in section 551(3), will make a final determination as to the claim.

The money in the Fund is supplied by a license fee determined on the basis of 1/2 cent per barrel of oil transferred by the applicant during the licensing period.[36] The Fund is to be reimbursed for all costs incurred in the abatement of a prohibited discharge, including third party claims. The duty of the party determined liable for reimbursement to the fund for abatement costs may be avoided if the Commission finds the occurrence was the result of an act of war, an act of government or an act of God, the latter defined as in the Florida Act. Section 552 imposes unlimited liability on a licensee facility for all costs of cleanup or other damage incurred by the state as a result of a prohibited discharge from that facility. The liability is absolute:

> In any suit to enforce claims of the State under this section, it shall not be necessary for the State to plead or prove negligence ...on the part of the licensee, the State need only plead and prove the fact of the prohibited discharge...and that if occurred at facilities under the control of the licensee...."[37]

The Massachusetts legislation on pollution of coastal waters,[38] while substantially less comprehensive and detailed than the Florida or Maine acts, does provide cities and towns with a tort recovery for twice the amount of damage done to the public fisheries within its limits as a result of a discharge of oil or other hazardous substance which directly or indirectly injures the fish. Private persons having fishing rights in these waters have

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[34]Me. Rev. Stat. Ann. § 548.

[35]Third party damage claims arising under this Act "shall be recoverable only in the manner provided under this subchapter, it being the intent of this Legislature that the remedies provided in this subchapter are exclusive." § 551(2)(D).

[36]Me. Rev. Stat. Ann. § 551(4)(A).

[37]Id. § 552.

[38]Mass. Gen. Laws Ann. §§ 130.22-27 (Supp. 1972).

a similar tort action against the polluter on account of injury to his private fishery rights.[39]

In American Waterways Operators, Inc. v. Askew,[40] shipowners, operators of oil terminals and world shipping associations successfully enjoined application of the Florida Pollution Control Act, the federal district court holding the Act to be an unconstitutional intrusion into the federal maritime domain. The Supreme Court reversed[41] finding "no constitutional or statutory impediment" to Florida's authority to fix any requirement or liability with respect to the impact of oil spills on Florida's coasts. The Supreme Court's decision was compelled by its resolution of two constitutional problems inherent in any state water pollution control legislation which regulates the same transactions as the federal legislation. The first was whether the Federal Water Pollution Prevention and Control Act preempts the field of regulation of oil discharges into coastal waters thus precluding state regulation of oil spills and the second issue was, notwithstanding the inapplicability of the preemption doctrine, whether a state can constitutionally exercise its police power respecting maritime activities concurrently with the federal government.

The essence of the preemption issue is whether the federal regulatory act and state legislation directly conflict so that the federal act cannot exist consistently with the application of the state act. The Supreme Court pointed out that section 1321(o) of the Federal Act explicitly permits states to fix their own requirements or liability with respect to discharges of oil and emphasized the Act's legislative history which envisioned state imposition of similar or additional penalties or requirements, separate from those imposed by the Federal Act, and enforced by the states through its own courts.[42]

On the question of the unlimited liability of oil terminal facilities and vessels for "costs of cleanup or other damage incurred by the state and...others" as prescribed by the Florida Act, the Court refers to the fact that limited liability under section (f) of the Federal Act is confined to cleanup costs thus precluding any conflict with respect to Florida's imposition of unlimited liability for damages to property interests.[43] As for the apparent conflict in the liability ceiling for cleanup costs, it is pointed out that the Florida Act relates only to the state's costs in cleaning up oil spills which cleanup activity is authorized by the encouragement of state cooperation in pollution abatement pursuant to the National Contingency Plan.[44] Therefore, the Court concludes that Florida may take the lead in cleaning up oil spills in her waters and recoup the costs, at least within federal limits, from those who did the damage. "Whether the amount of costs she could recover

[39] Id. § 130.24.
[40] 335 F. Supp. 1241 (M.D. Fla. 1971).
[41] 411 U.S. 325 (1973).
[42] 411 U.S. at 329.
[43] Id. at 331. The Court stressed that the Federal Act in no way touches the recovery for non-cleanup damage incurred by the state or private claimants and so §§ 1321(o)(1) and (o)(2) clearly do not preclude unlimited liability for this type of damage.
[44] Id. at 332.

from a wrongdoer is limited to those specified in the Federal Act...we need not reach here."[45]

Another potential obstacle to the Florida Act's constitutionality, the Limited Liability Act,[46] was avoided by the Court. It distinguished the Limited Liability Act as applying to vessels only, while the Florida Act is concerned only with the liability of terminal facilities and, thus, Florida's prescribed unlimited liability does not conflict with the federal legislation.[47] This distinction between vessels and terminal facilities also validates Florida's requirement of financial responsibility for a terminal facility in section 376.14 since the federal act only requires financial responsibility be shown by certain vessels.

With respect to Florida's imposition of liability without fault for damages suffered by state and private interests, the Court clearly found no conflict since the Federal Act only dealt with cleanup costs.[48] The Court did not expressly rule on the conflict between the differing state and federal standards for liability for cleanup costs, a question of some possible importance.[49] As far as potential conflicts between Florida's regulations for containment gear pursuant to section 376.07(2)(a) and federal regulations promulgated under section 1321(j)(1), the Court warned any resolution should await a concrete dispute, but that, at any rate, the Florida regulation is not per se invalid.[50]

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[45]411 U.S. at 331-32. § 1321(c)(2)(H), newly added to the Federal Act and not considered by the Supreme Court in Askew, seems to answer this question in the negative. Section (H) specifically envisions state cleanup activity and expressly provides for reimbursement of the state from the $35,000,000 section (k) fund. This incorporation of state cleanup activity into the federal act would appear to place the amount of state recovery for cleanup expenses under the same limitation as federal cleanup efforts.

[46]46 U.S.C. §§ 181-189 (1970). The Act limits the liabilities of owners of vessels to the "value of such vessels and freight pending." Actually the real conflict, left unresolved here by the Court, was whether the new Federal Water Pollution Act removes the pre-existing limitations of liability in the Limited Liability Act by its imposition of a $14,000,000 ceiling liability without regard to the value of the vessel. 411 U.S. at 332.

[47]411 U.S. at 336.

[48]Id.

[49]Both the Federal and Florida acts authorize strict liability for costs of pollution removal and provide for virtually identical defenses to this liability. [Compare § 1321(f) and § 376.11(b).] However, the Florida Act qualifies the "act of God" defense "as an unforseeable act exclusively occasioned by the violence of nature..." whereas the Federal Act imposes no such qualification. Thus, a conflict over liability could arise if a discharge was cuased by a tornado or hurricane which was, at least, meteorologically "forseeable."

[50]411 U.S. at 336-37. This rationale, used also to substantiate the Florida licensing requirement for terminal facilities is founded on Tit. I, § 102(b) of the Ports and Waterways Safety Act which provides that a state may prescribe higher safety requirements or standards than those prescribed pursuant to that Act.

In deciding that the State could constitutionally exercise its police power and legislate concurrently with the federal government in the maritime field, the Court severely confined the holding in Southern Pacific Co. v. Jensen.[51] The Jensen case itself involved a harborworker who was engaged in unloading a ship driving a small electric truck. While backing up the truck out of the ship, he failed to lower his head and it struck the top of the opening in the ship, breaking his neck and killing him. The Supreme Court held that the New York workmen's compensation act could not constitutionally be applied to him since to do so would involve a state intrusion on the exclusive admiralty jurisdiction granted to the United States by the Constitution. When Congress later passed an Act specifically granting the States power to grant a remedy in such cases, the Court found that it was unconstitutional.[52] However, as the Court stated in Askew, later cases have substantially eroded this doctrine.[53] The accepted view now is that a state may not constitutionally pass any law which would interfere with the proper harmony and uniformity of maritime law. The Court quoted a prior case:

> [A] state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.'[54]

Thus, the Askew court concluded that although Congress had acted in the area and there were still constitutional limitations on the extent of state action in the area of maritime law, state regulation in the pollution control field was permissible, absent a clear conflict with federal law. Finding no such "clear" conflict between the state remedies and federal maritime law, the court only had to decide whether the absence of congressional action or a need for uniformity of regulation in the maritime field barred state action. The Court referred to Kelly v. Washington[55] for the proposition that a state may protect its citizens without waiting for federal action, and cited Huron Cement Co. v. Detroit[56] as a basis for the exercise of the state police power in areas of interstate commerce and maritime activities concurrently with the federal government.[57] The Court concluded then that Florida could regulate the discharge of oil since their statute did not

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[51]244 U.S. 205 (1917).

[52]Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). See also Chelentis v. Luckenback S.S. Co., 247 U.S. 372 (1918).

[53]See Romero v. Int'l Terminal Co., 358 U.S. 354, 373 (1959); Just v. Chambers, 312 U.S. 355, 383, 389-90 (1941).

[54]411 U.S. at 332.

[55]302 U.S. 1 (1937). In this case, an inspection code enacted by the State of Washington regarding the safety and seaworthiness of vessels was upheld because the federal government had not legislated on these safety aspects.

[56]362 U.S. 440 (1960). Here a Detroit Smoke Abatement Code enacted for the purpose of preventing air pollution was held constitutional as applied to ships entering the port of Detroit since federal regulation in the same area was "limited to affording protection from the perils of maritime navigation" while the Detroit ordinance was aimed at "the elimination of air pollution to protect the health...of the local community."

[57]411 U.S. at 342-43.

clearly conflict with any provision of federal law, but served only to complement federal regulation for the protection of Florida's interests and concerns.

In June of 1973, the Maine Supreme Court upheld the constitutionality of the Maine Coastal Conveyance Act in a challenge brought by the nation's major oil companies and the Portland Pipe Line Corp.[58] The Maine Court employed virtually the same rationale as the Askew Court to rebut Portland's contention that the Act unconstitutionally created maritime legislation which conflicted with federal admiralty law. Indeed, Askew is cited for the proposition that regulations and absolute liability imposed upon terminals do not violate the uniformity requirement of the Admiralty Clause.[59] Similarly, Askew is relied on as determinative of the issue that the state's imposition of strict, unlimited liability on terminals for damage to the state and private parties is not inconsistent with the Federal Pollution Control Act.

However, the Maine Court went on the construe section 1321(o) of the Federal Act to allow states to recover in excess of $8,000,000, the federal limit, for their cleanup expenses.[60] Likewise, the Maine Act's provision which limited permissible defenses to liability in a reimbursement suit brought by the state for cleanup costs was upheld. The rationale for both extensions of Askew was that the Federal Act referred only to federal cleanup costs and, therefore, neither recovery of state expenses above the federal ceiling nor state imposition of a different standard of liability were precluded since these provisions referred to state cleanup costs, not touched upon in the federal act.[61] "...[C]ongress left the states free to devise whatever standards of liability were deemed necessary to realize the state's objectives."[62]

The Maine Act was challenged unsuccessfully on several other constitutional grounds. The 1/2 cent per barrel license fee was found not to constitute an impermissible burden upon foreign and interstate commerce since the license fee was imposed upon the act of transferring oil over water and not on the "goods in commerce" themselves, was a non-discriminatory, necessary adjunct to the regulation scheme and not a general revenue measure for the support of state government.[63] The 1/2 cent license fee also withstood a challenge that it was in violation of the Import-Export Clause of the Constitution[64] which forbids the states to impose an impost or duty on imports or exports. While the court concluded that the oil, at the time the fee is imposed, is an import, the license fee was regarded by the court as being imposed on the offloading of the oil and not upon the oil itself as the charge bore no

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[58]Portland Pipe Line Corp. v. Environmental Improvement Commn., 307 A.2d 1 (1973).

[59]307 A.2d at 43.

[60]The Supreme Court in Askew left this question open; see supra note 4 .

[61]307 A.2d at 44-45.

[62]Id. at 45.

[63]Id. at 36-40. The Court cites several cases in support of its conclusion but essentially the rationale is that the license fee goes into the fund whose disbursements are solely for the administration and operation of the pollution prevention legislation.

[64]Id. at 31-36.

relationship to either the value or volume of the imported oil.[65] Therefore, the fee was not imposed on imports or exports. Furthermore, since the regulatory scheme was found to afford the Portland Corp. a benefit, the fee in support of this scheme was not a burden on the import of oil and thus not a "duty or impost."[66] Due process, equal protection and denial of jury trial challenges were also presented to and rejected by the Maine Court.[67]

The decisions of the Supreme Court in Askew and the Maine Court in Portland that the Federal Pollution Control Act and other federal acts do not preempt the application of the state regulatory laws is consistent with the history of the preemption doctrine as developed and applied by the courts. The tests for whether a state statute can stand is (1) whether there exists an "actual conflict" between the two regulatory schemes and (2) whether Congress has intended to occupy the entire field.[68] The "actual conflict" is discovered by analyzing the words of the statutes while the intent to preempt may be explicitly stated in the statute or its legislative history, or implied by the comprehensiveness of the federal regulatory scheme.[69]

With regard to the latter test, section 1321(o) of the Federal Pollution Control Act manifests an explicit Congressional intent not to preempt state regulation.[70] As far as an actual conflict, the policy objectives of the state acts and federal acts are similar and, therefore, the state act should fail only if it frustrates the implementation of the federal purpose.[71] Additionally, the prescription of a more stringent standard by the states of identical activity less rigorously regulated by the federal government is valid if the federal act was merely intended as a minimum to be supplemented by state regulation.[72]

As the Askew Court pointed out, the largest portion of the Florida Act was supplementary to the Federal Act since the Federal Act did not legislate with respect to recovery by states, or private claimants, for damages caused by oil spills. Where the federal and state statutes arguably conflict, such as on the extent of liability of polluters for cleanup costs, or the standard of liability for imposing such costs, the state has always imposed more stringent controls which neither frustrate the fundamental purpose of the Federal Act to deter, control, and hold responsible those who pollute our coastal waters, nor make compliance with both the federal and state acts impossible.

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[65] Id. at 33-34. Interland Steam Nav. Co. v. Territory of Hawaii, 96 F.2d 412 (9th Cir. 1938) and Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) were relied on by the court in reaching its decision.

[66] 307 A.2d at 36.

[67] Id. at 14-30.

[68] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

[69] Maine's Coastal Conveyance of Oil Act: Jurisdictional Considerations, 24 Maine L. Rev. 299, 311 (1972).

[70] See Maine's Oil Spill Legislation: Can a State With an Extensive Interest in its Coastal Resources Protect Itself from Inadequacies in National and International Law? 7 Tex. Int'l L. Rev. 29 (1972).

[71] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[72] In the Florida Lime case, a California statute establishing more stringent standards for maturity of avocados than the relevant federal act was held constitutional as supplemental to minimal federal regulation. 373 U.S. 132 (1963).

The rejection of the Askew and Portland courts of the theory, embraced by the district court in the Askew case,[73] that the Constitution mandates that the federal government have exclusive authority to legislate maritime law finds substantial support both in precedent and logic.[74] The inference drawn from the delegation of admiralty jurisdiction to federal courts that all admiralty and maritime law be of strictly uniform content and application is refuted by several cases where the Supreme Court has permitted the application of state maritime law when federal remedies were unavailable or where the activity was such that local expertise was superior to centralized regulation.[75] Indeed, state law in the maritime realm has been upheld when it supplements federal law, when federal law has left gaps where it has failed to regulate, where there is a strong local public interest and where state law preserves or promotes public order, health and safety.[76]

State substantive maritime legislation is not per se invalid when not in accord with federal maritime law as stated by the district court in Askew, but rather the test of its validity is whether the statute's purpose justifies the interference with maritime commerce.[77] This requires a balancing of state interests and the extent of its interference with federal regulation. The state interest in preventing and containing pollution in its coastal waters entails the maintenance of tourism and fishing as vital economic forces in the state, and the survival of the aesthetic coastal environemnt in the face of an imminent threat of pollution from the increasing presence of huge oil tankers. The federal interest is primarily that of uniformity and, while a checkerboard pattern of liability for pollution discharge among the states is not desirable, the failure of Congress to enact state and private remedies and the explicit delegation of regulatory authority to the states in this area in section 1321(o) makes it manifest that the state interests certainly should be recognized to outweigh any competing concerns.

Another challenge to these expansive state acts on pollution control, raised by the oil companies in the Portland case, is that these acts interfere with the exclusively federal conduct of foreign affairs and conflict with international treaties to which the United States is a party. While there is no question of the supremacy of the federal government in foreign affairs,[78] whether the state can impose more rigid standards within our own territorial waters is a purely domestic matter leaving the state acts assailable only if they conflict with our treaty commitments.

The United States is a party to several international treaties and conventions for the purpose of pollution prevention. Chief among these is the London agreement of 1972.[79] This gives to all contracting nations jurisdiction

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[73] See supra note 40.

[74] Swan, Challenges to Federalism: State Legislation Concerning Marine Oil Pollution, 2 Ecology L.Q. 437 (1972).

[75] Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Morgan R.R. and S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886); Cooley v. Port Wardens, 53 U.S. (12 How.) 299 (1851).

[76] The Florida Oil Spill and Pollution Control Act, An Intrusion Into the Federal Domain, 12 Nat. Res. J. 615, 618 (1972).

[77] 24 Maine L. Rev. at 300-09, supra note 69 (1972).

[78] Hines v. Davidowitz, 312 U.S. 52 (1941).

[79] 11 Int'l Legal Materials 267 (1972).

over all vessels flying its flag as well as any discharged matter that came from its shores. This agreement is the successor to the International Convention for the Prevention of the Pollution of the Sea by Oil, London, 1954,[80] which covered only oil pollution.[81] The new agreement is much broader in its prohibitions.

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 1969,[82] which was a response to the legal snarls of the Torrey Canyon disaster, permits a nation to take any necessary action to protect its shores and resources from pollution resulting from a maritime disaster on the high seas without fear of liability to the polluters.[83]

Articles 24 and 25 of the Convention on the High Seas[84] require nations to draw up regulations for preventing the pollution of the seas by oil and to take measures to prevent pollution of the seas by radioactive waste. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone[85] provides that a nation may exercise the authority necessary to prevent violations of its customs, fiscal, immigration, or sanitary regulations in a zone contiguous to its territorial sea.

Article 5 of the Convention on the Continental Shelf[86] also contains provisions for environmental protection in relation to activities on the continental shelf. Paragraph 1 provides that exploration and exploitation must "not result in any unjustifiable interference with navigation, fishing, or the conservation of the living resources of the sea." And paragraph 7 further obliges the nation to undertake "all appropriate measures for the protection of the living resources of the sea from harmful agents" in the 500 meter safety zones which are established for installations built on the continental shelf for exploiting resources, including oil drilling platforms.

The International Convention on Civil Liability for Oil Pollution Damage,[87] neither ratified by the United States or in force, would, if applicable, seem to preempt state law at least with respect to liability for oil-

[80] 12 U.S.T. 2989; T.I.A.S. No. 4900; 37 U.N.T.S. #3; 9 Int'l Legal Materials 1 (1970). The U.S. acceptance of this treaty was conditioned on the understanding that full legislative freedom was retained over the territorial waters, specifically that ships violating U.S. law within U.S. territorial waters would be punishable, regardless of the ship's registry. 12 U.S.T. 3024; T.I.A.S. No. 4900.

[81] The Portland court found no conflict with the 1954 London Convention on oil pollution, which imposed liability for oil spills, on the grounds that Article XI of that treaty reveals an intent not to interfere with measures taken by contracting parties within its own jurisdiction. 307 A.2d at 46.

[82] 9 Int'l Legal Materials 45 (1970).

[83] See Nanda, The Torrey Canyon Disaster: Some Legal Aspects, 44 Den. L.J. 400 (1967); Note, Post Torrey Canyon: Toward a New Solution to the Problem of Traumatic Oil Spillage, 2 Conn. L. Rev. 632 (1970).

[84] 13 U.S.T. 2312, T.I.A.S. 5200; 450 U.N.T.S. 82; 52 Am. J. Int'l L. 842 (1958).

[85] 15 U.S.T. 1606, T.I.A.S. 5639; 516 U.N.T.S. 205; 52 Am. J. Int'l L. 834 (1958).

[86] 15 U.S.T. 471, T.I.A.S. 5578; 499 U.N.T.S. 311 (1958).

[87] 9 Int'l Legal Materials 45 (1970). See Healy, The International Convention on Civil Liability for Oil Pollution Damage, J. Maritime L. 317 (1970) for a discussion of the drafting of the Convention as well as the treaty itself.

carrying vessels.[88] Articles I and III of that treaty provide for federal recovery of cleanup costs and for damage actions by private and, presumably, local government claimants, for damages caused by the discharge of oil from ships. It imposes on offenders liability without fault, subject to the defenses of act of war, act of God, and third party negligence, up to a ceiling to 210 million francs [$14,122,000]. Very important is Article 2 which extends the application of the Convention to the territorial seas of Contracting States and the absence of any explicit authorization of supplemental national acts for oil pollution liability. Therefore, ratification would appear to supersede provisions of both the federal and state acts with respect to vessel liability for oil spills but would not preclude federal and state regulatory legislation with respect to discharges from terminal facilities.

The picture is different, however, with regard to state regulation in the waters of the contiguous zone.[89] The terms of the Federal Water Pollution Control Act indicate that the federal government has exclusive regulatory authority in this area. Section 1321 which imposes liability for the discharge of oil and other hazardous substances into the navigable waters of the United States and the contiguous zone makes reference to the two separately in each case. Most importantly, section 1321(o)(2) which preserves the state's right to impose liability refers only to "any waters within such state." Thus, the interpretation of exclusive federal regulatory power in the contiguous zone seems most consistent with the Act's language.

Also, the Outer Continental Shelf Lands Act[90] gives authority to the Secretary of the Interior to prescribe such rules and regulations as he determines to be necessary and proper for the prevention of waste and conservation of the resources of the outer continental shelf;[91] that is, that portion of the continental shelf located outside the three miles granted to the States by the Submerged Lands Act. The Federal Water Pollution Control Act provides that the provisions of the subsection establishing liability and setting forth penalties for pollution of waters of the contiguous zone[92] shall not apply where liability is established pursuant to the Outer Continental Shelf Lands Act.[93] In general, the sanctions provided by the regulations of the Secretary of the Interior are much less stringent than those of the Water Pollution Control Act. Since the Water Pollution Control Act does not preserve explicitly the authority of the states to regulate in the contiguous zone, and the Water Pollution Control Act itself defers to the Outer Continental Shelf Lands Act which asserts exclusive federal jurisdiction over all lands and waters outside the three mile limit, further doubt is cast upon the existence of any substantial

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[88] 2 Ecology L.Q. at 467 (1972); 7 Tex. Int'l L. Rev. at 35 (1972).

[89] The extension to twelve miles of the state regulatory jurisdiction in the Maine Act was argued in Portland to interfere with the position of our government favoring a three mile territorial sea. However, the Maine court regarded the three miles as a minimum and held that since the United States, for several purposes including pollution prevention, had asserted limited jurisdiction to twelve miles, the concurrent jurisdiction of Maine out to twelve miles did not impair our foreign relations policy. 307 A.2d at 46-48.

[90] 43 U.S.C. §§ 1331-1343.

[91] Regulations governing oil, gas, and sulphur operations on the outer continental shelf are published in 34 Fed. Reg. 13544-13547 (1969).

[92] 33 U.S.C. § 1321(b)-(j) (Supp. 1973).

[93] 43 U.S.C. § 1334.

state authority in that area.[94]

The contiguous zone to which the Water Pollution Control Act has reference is defined by the 1958 Convention on the Territorial Sea and the Contiguous Zone.[95] This is explicitly stated in Section 1362(9). Article 24 of that Convention limits the contiguous zone to an extent of twelve miles from the baseline from which the breadth of the territorial sea is measured. Since the Water Pollution Control Act defines territorial seas as being only three miles,[96] the contiguous zone is limited by the Act and the Convention to a breadth of not more than nine miles.

Of uncertain effect in the contiguous zone is the provision of the Outer Continental Shelf Lands Act which adopts state law to the extent that it is not inconsistent with or in conflict with federal law.[97] This could possibly be interpreted to permit state laws regulating pollution to apply. However, they would be subject to the limitation contained in the Outer Continental Shelf Lands Act that the character of the superjacent waters is not affected thereby.[98] This might mean that although state laws protecting the seabed could apply, those concerned solely with the waters might be excluded. The reach of state law under such an interpretation would also be limited by the extent of the continental shelf. In those areas where the drop off of the continental land mass is sufficiently rapid, the area that could be claimed as continental shelf by the United States subject to the generally accepted 200 meter isobath limitation might be inside the area which is claimed as a contiguous zone. Presumably, state law has no general application beyond the limits of the continental shelf and/or the contiguous zone.

The Federal Water Pollution Control Act also grants authority to the Administrator of the Environmental Protection Agency to set standards for the discharge of pollutants into the oceans,[99] which are defined as being any portion of the high seas beyond the contiguous zone.[100] Thus the Federal Government has extended its authority to regulate pollution beyond what is technically the limit of national jurisdiction. As noted above, the states would not seem to have any authority here, since this would be an assertion of national sovereignty not contemplated by current international agreements.

Although there has been considerable discussion in international circles about the establishment of anti-pollution contiguous zones adjacent to a nation's territorial waters, the United States has not yet adopted any of these proposals, and has actively opposed some of the more extensive ones.[101] When Canada passed an act asserting the right to enforce anti-pollution regulations out to a distance

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[94]For a discussion of the federal regulation of oil activity on the shelf as of 1971, see Rathje, Regulation of Oil Pollution from Ocean Petroleum Production, 22 Hastings L.J. 485 (1971).

[95]15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205; 52 Am. J. Int'l L. 834 (1958).

[96]33 U.S.C. § 1362 (9).

[97]43 U.S.C. § 1332 (a).

[98]43 U.S.C. § 1332. Art. III of the Convention on the Continental Shelf also preserves the high seas character of the superjacent waters.

[99]33 U.S.C. § 1343 (c).

[100]33 U.S.C. § 1362 (10).

[101]See, e.g., Dep't of State Press Release No. 121, April 19, 1970.

of 100 miles in Arctic waters,[102] the United States protested vigorously,[103] and a statement by John Norton Moore made in preparation for the upcoming Law of the Sea Conference indicated the United States' opposition to proposals made for a 200 mile anti-pollution contiguous zone.[104] The objections to such proposals are based on the potentially significant interference with navigational rights over what were traditionally parts of the high seas caused by the conflicting regulations which different coastal nations would pass.[105] The United States is, however, an active supporter of uniform international agreements to prevent pollution of the seas.[106] But any assertion of jurisdiction over waters of the high seas would be an act affecting the conduct of international relations, and thus would seem to be clearly outside the competence of the states.[107] In light of the current United States position against unilateral assertions of jurisdictional authority over the high seas for the purpose of preventing pollution, the states would seem to be clearly foreclosed from making such assertions.

Thus far the question of state versus federal jurisdiction over environmental matters has been discussed only in terms of areas. One should note that the United States has jurisdiction for many purposes over all vessels flying its flag wherever they may be.[108] The recent London Anti-Pollution Convention gives nations jurisdiction of this kind for the purpose of enforcing anti-pollution regulations, and it is a basis of jurisdiction long recognized in international law.[109] This type of jurisdiction is asserted in the Water Pollution Control Act of 1973 with regard to marine sanitation devices for treating sewage on United States vessels.[110] The section requires ultimate installation of such devices on all new and existing vessels and grants to the Administrator of the Environmental Protection Agency (EPA) the authority to set standards of effectiveness. Section 1322 (f) prohibits the states from setting any standards or enacting or enforcing any requirement with respect to the installation or use of such devices. However, the states have reserved the right to apply to the EPA Administrator for a complete prohibition of the discharge of sewage by vessels into the state's waters.

In conclusion, the effect of upholding the Florida and Maine legislation will certainly be salutary since it will provide vitally needed assurance

[102]Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Canada 1970). For a discussion of this Act, see Bilder, The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 Mich. L. Rev. 1 (1970). The immediate stimulus for the passage of the Canadian Act was the passage of the United States icebreaker tanker S.S. Manhattan through the arctic waters and ice north of the Canadian mainland.

[103]Dep't of State Press Release No. 121, April 19, 1970; 9 Int'l Legal Materials 605 (1970). For the rather sharply worded reply of the Canadians, see 9 Int'l Legal Materials 607 (1970).

[104]Statement of John Norton Moore, Vice-Chairman of the United States Delegation to the Committee (of the Law of the Sea Conference) on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, issued by United States Information Service, Geneva, Switzerland, (August 13, 1973).

[105]Id.

[106]Id. See also Dep't of State Press Release No. 121, note 103 supra.

[107]United States v. California, 332 U.S. 19, 34-35 (1947).

[108]See United States v. Flores, 289 U.S. 137 (1933).

[109]W. W. BISHOP, INTERNATIONAL LAW 578-651 (3d. ed. 1971).

[110]33 U.S.C. § 1322 (Supp. 1973).

of payment to private parties and the states for oil spill damage, and reimbursement to the states when they play their contemplated role in the cleanup effort. These acts serve, in addition, to establish a more equal sharing in the risks of the hazards of oil pollution. Formerly, under the Federal Act, a private claimant, whose property was damaged by an oil spill, was faced with the difficult task of proving negligence "and under such circumstances the average coastal shore owner would probably prefer to accept a significantly smaller settlement rather than face the prospect of protracted litigation..."[111] Now with the state legislation, the vessel owner and the oil industry who not only profit from the oil transport but are in a superior position to bear and distribute the risk will be responsible for the discharges.

Of course, the damaged property owner or state still has a non-statutory cause of action provided by federal maritime law. California v. S.S. Bournemouth[112] held:

> It is the view of this court that the general maritime law has consistently provided in rem relief to the owner of property tortiously damaged by conversion while such property is upon the navigable waters. While here the alleged injury was to the water itself, and possibly the marine life also, efforts to distinguish between various types of injury which may occur to various types of property would serve no useful purpose.[113]

The Bournemouth case originated when California brought suit in Admiralty against the vessel Bournemouth for having discharged a quantity of bunker oil into California waters. Another interesting aspect of the Bournemouth decision is that it shows how a state may use the federal Admiralty jurisdiction to provide a useful remedy in the event of polluting activities by vessels that are beyond the reach of the state's own jurisdiction.

This is not to say that the present situation of complementary state and federal regulatory schemes is without disadvantages. For the state which has imposed the stringent legislation to protect their citizens and coastal waters, there is the likelihood that substantial maritime traffic will bypass the state and its ports.[114] Moreover, uniform federal regulation would be preferable to checkerboard state regulation in that the federal government has superior resources in terms of money, knowledge and power to enforce prescribed standards.[115]

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[111] 12 Nat. Res. J. at 622 (1972).

[112] 307 F. Supp. 922 (C.D. Calif. 1969).

[113] Id. at 928.

[114] McCoy, Oil Spill and Pollution Control: The Conflict Between State and Maritime Law, 40 Geo. Wash. L. Rev. 47, 122 (1971-72). The author points out the certainty of higher liability insurance premiums for vessels which enter Florida's waters.

[115] 12 Nat. Res. J. at 625-26 (1972). This writer states that the federal government has the scientific and technical personnel to knowledgeably set water quality standards, the personnel to implement pollution programs and enforce the standards and is less vulnerable to the lobbying pressures of industrial polluters or other economic blocs. See J. Davies, Politics of Pollution 109 (1970).

The solution would perhaps be the adoption of laws similar to Florida and Maine by all coastal states or a "uniform" law incorporating the important provisions of these two acts. Another possible alternative would be for Congress to expand its law to cover fully terminal facilities and provide for damage actions by state and private claimants. However, it would be more beneficial to amend the present federal section 1321 to impose unlimited liability on vessels for unlawful discharges and to narrow the act of God defense.[116] For the present, the ineffectiveness and limited scope of the federal pollution control legislation compels the existence and, hopefully, the proliferation of state regulation as exemplified by the Florida and Maine acts.

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[116] 40 Geo. Wash. L. Rev. at 112 (1971-72).

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