

# SEA CHANGES AND THE AMERICAN REPUBLIC

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## I. INTRODUCTION

It seems clear that the world community is on the forward edge of major changes in the law of the sea. The arrangements provided in the treaties of 1958<sup>1</sup> and 1960,<sup>2</sup> imprecise at such crucial points as the breadth of the territorial sea<sup>3</sup> and the outer limits of the continental shelf,<sup>4</sup> have substantially eroded, and something else must take their place. Although the United Nations Conference on

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<sup>1</sup> Convention on the Territorial Sea and Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964); Convention on the High Seas, done April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962); Convention on Fishing and Conservation of the Living Resources of the High Seas, done April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (effective March 20, 1966); Convention on the Continental Shelf, done April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964).

<sup>2</sup> See G.A. Res. 1307, 13 U.N. GAOR, Supp. (No. 18) 54, U.N. Doc. A/L 253 (1958). Dean, *The Second Geneva Conference on the Law of the Sea*, 54 AM. J. INT'L L. 75 (1960).

<sup>3</sup> The Convention on the Territorial Sea and Contiguous Zone, note 1 *supra*, provided for coastal nation rights to belts of adjacent waters, baselines from which to measure such waters, the right of innocent passage through them, and contiguous zones beyond. But it did not provide a specific breadth for territorial seas.

<sup>4</sup> The Convention on the Continental Shelf, note 1 *supra*, defined the area of national jurisdiction as the "seabed and subsoil of the submarine areas adjacent to the coast but outside the areas of the territorial sea, to a depth of 200 meters or, beyond that limit, to where depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." "Exploitability" is a concept rather than a measure and does not fix a definite limit. See ODA, *INTERNATIONAL CONTROL OF SEA RESOURCES* 167 (1963); Brown, *The Outer Limit of the Continental Shelf*, 1968 JURID. REV. 111 (1968).

the Law of the Sea (UNCLOS)<sup>5</sup> has proceeded with glacial speed through seven sessions over a period of five years, there seems to be a growing consensus on more and more of the many elements in a comprehensive law of the sea treaty.<sup>6</sup>

If hopes for an international treaty prove illusory, then we can expect that individual nations, including the United States, will act unilaterally to assert their national interests. The United States has already extended its management of fisheries out to 200 miles.<sup>7</sup> In the absence of a treaty, congressional movement can be expected to enable United States companies to exploit the non-living resources of the deep seabeds,<sup>8</sup> establish a more general economic zone,<sup>9</sup> clarify our view of the outer limits of the continental shelf,<sup>10</sup> and extend the territorial sea from three to twelve miles.<sup>11</sup>

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<sup>5</sup> Preparation for the UNCLOS began in 1971 when the U.N. General Assembly called for the 1973 convening of the Conference. G.A. Res. 2750 c, 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/8028 (1970).

<sup>6</sup> The most recent meeting of the Conference was held in New York Aug. 21-Sept. 15, 1978. The Conference is scheduled to meet again for six weeks in Geneva beginning March 19, 1979. At the conclusion of the "resumed" seventh session in September, Ambassador Elliot L. Richardson, Special Representative of the President for the Law of the Sea Conference, reported some further progress toward a comprehensive treaty but with no consensus yet achieved on several items, including the most controversial of all, a regime for deep seabed mining. The Conference has produced an Informal Composite Negotiating Text (I.C.N.T.) which embodies a number of points on which consensus has been tentatively reached, including *inter alia* provisions for a twelve-mile territorial sea, I.C.N.T., Art. 3, U.N. Doc. A/CONF. 62/WP. 10 (1977), a 200-mile exclusive economic zone, *Id.* Art. 57, and a continental shelf to the outer edge of the continental margin or a distance of 200 miles, *Id.* Art. 76. See generally, e.g., Charney, *Law of the Sea: Breaking the Deadlock*, 55 FOREIGN AFFAIRS 598 (1977); *Law of the Sea X*, 15 SAN DIEGO L. REV. 357 (1978).

<sup>7</sup> Fishery Conservation and Management Act of 1976, tit. 1, § 101, Pub. L. 94-265, 90 Stat. 336 (codified at 16 U.S.C. § 1811 (1976)).

<sup>8</sup> The House of Representatives has passed a bill providing for United States licensing of deep seabed mining. H.R. 3350, 95th Cong., 2d Sess., 124 CONG. REC. H 7341 (daily ed. July 26, 1978), passed as amended by House, 124 CONG. REC. H 7382-83 (daily ed. July 26, 1978). A similar bill was passed by two committees of the Senate but did not reach the floor. [1978] 9 Envir. Rep. (BNA) 1184 (Oct. 20, 1978), 2nd [1978] 36 Cong. Q. 3010 (Oct. 21, 1978).

<sup>9</sup> In addition to fishery jurisdiction, the United States also claims jurisdiction to the 200-mile limit for certain environment purposes. See Clean Water Act of Dec. 27, 1977, Pub. L. No. 95-217 § 58(a)-(c), 91 Stat. 1593 (extending coverage of oil and hazardous spill provisions from 12 to 200 miles); Act of Sept. 18, 1978, Pub. L. No. 95-372 § 204, 92 Stat. 629 amending § 5(a)(8) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 (providing for applicability of ambient air quality standards to continental shelf exploration and development).

<sup>10</sup> The United States has never set continental shelf limits with any greater clarity than that observed by the Geneva convention, note 1 *supra*, except that when the shelf was first claimed as appertaining to the U.S., a press release at the time set the limit at the 100-fathom depth. *White House Press Release*, Sept. 28, 1945, 13 DEPT. STATE BULL. 484 (1945).

<sup>11</sup> See notes 31, 32, 45, 46, 47, 56, 57 *infra* and accompanying text.

It is understandable that governmental and private interest has been concentrated thus far on the international aspects of the law of the sea. Very little attention has been given in recent years to the impact of these prospective changes upon the internal arrangements of the United States, such as the many questions which will arise about the sharing of responsibilities between the Federal government and individual States. The purpose of this article is to raise some of these questions in the hope that solutions may be found on a considered basis rather than through helter-skelter, impulsive reactions as particular issues arise for decision.

## II. CURRENT FEDERAL-STATE RELATIONSHIPS IN UNITED STATES OCEANS POLICY—TOTAL CONFUSION

Our national life has always been shaped in important respects by the sea around us. Growing needs for fish and oil can only increase its influence. By the year 2000, according to one estimate, 80 percent of the population will live within fifty miles of the coast.<sup>12</sup> Already the sea is a source for food, fuel, weather, military defense, recreation, mythology, and garbage disposal. It may become as well a living space, a generator of consumable energy, and a supply of potable water.

Notwithstanding past and future dependence upon the sea, the United States lacks an oceans policy. What substitutes for a policy is a congeries of functional Federal and State agency operations lacking coherence and direction.

For many years, coastal States claimed title to the land underlying the territorial sea.<sup>13</sup> The Truman Proclamations of 1945<sup>14</sup> announced that this country regarded the continental shelf as "appertaining" to the United States. They were accompanied by a

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<sup>12</sup> *National Journal*, Dec. 9, 1972, cited in THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, EFFECTS OF OFFSHORE OIL AND NATURAL GAS DEVELOPMENT ON THE COASTAL ZONE 162 (1976) ("[B]y the end of the century, there may be almost as many people in the Nation's coastal zone as there are now people in the entire United States." *Id.* at 21).

<sup>13</sup> See, e.g., *United States v. California*, 332 U.S. 19, 23-24, 38-40 (1947); *Id.* at 43 (Reed, J., dissenting); Ireland, *Marginal Seas Around the States*, 2 LA. L. REV. 252 (1940); Comment, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 YALE L. J. 356 (1947).

<sup>14</sup> One proclamation concerned *Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Presidential Proclamation 2667, 3 C.F.R. 67 (1943-48 Comp.), reprinted in 59 Stat. 884 (1945). The other dealt with *Coastal Fisheries in Certain Areas of the High Seas*, Presidential Proclamation 2668, 3 C.F.R. 68 (1943-48 Comp.), reprinted in 59 Stat. 885 (1945).

press release explaining that the newly proclaimed position did "not touch upon the question of Federal versus State control."<sup>15</sup> Then in 1947 the Supreme Court held that the Federal government, as against the States, has paramount rights in the territorial sea, "an incident to which is full dominion over the resources of the soil under that water area, including oil."<sup>16</sup>

However, in 1953 Congress passed the Submerged Lands Act<sup>17</sup> which established coastal States' seaward boundaries at the three-mile limit and vested in the States title to the corresponding lands beneath. The Outer Continental Shelf Lands Act,<sup>18</sup> enacted later in the same year, gave statutory expression to United States control of the continental shelf and designated that portion of it beyond the territorial sea as an area of exclusive Federal jurisdiction.

This division whereby the States "own" the territorial sea and the Federal government "owns" the area to seaward is no more tidy than the boundary is visible. Each sovereign has acknowledged interests in the zone of the other.

When the Congress ceded title to the territorial sea to the States, it expressly reserved for the United States paramount rights with respect to commerce, navigation, defense, and international affairs.<sup>19</sup> The strength and vitality of these Federal rights in State waters have been recently re-affirmed by the courts.<sup>20</sup> Moreover, the Fishery Conservation and Management Act of 1976<sup>21</sup> contains a fresh statutory assertion of them. The chief purpose of the act was the extension of fishery jurisdiction to 200 miles, but it also provides that, under special circumstances spelled out in the statute, the Federal government may regulate fishing within a State's territorial sea.<sup>22</sup>

As a reverse corollary, there is in turn a growing appreciation of State interests in the area "owned" by the Federal government. Mineral resource development, oil spills and fishing may take

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<sup>15</sup> *White House Press Release*, Sept. 28, 1945, 13 DEPT. STATE BULL. 484 (1945).

<sup>16</sup> *United States v. California*, 332 U.S. 19, 38-39 (1947).

<sup>17</sup> Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-03, 1311-15 (1970).

<sup>18</sup> Outer Continental Shelf Lands Act of 1953, Pub. L. 67-212, 67 Stat. 462, 43 U.S.C. §§ 1331-43 (1970 & Supp. V 1975).

<sup>19</sup> 43 U.S.C. § 1314(a) (1970).

<sup>20</sup> See, e.g., *Ray v. Atlantic Richfield Co.*, 98 S.Ct. 989 (1978); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

<sup>21</sup> Pub. L. 94-265, 90 Stat. 331 (codified in scattered sections of 12, 22 U.S.C.).

<sup>22</sup> 16 U.S.C. § 1856(6) (1976).

place beyond the territorial sea but have ecological, economic, and social effects upon adjacent State waters and coasts.<sup>23</sup> State interests in such activities have been recognized in the law. The courts have allowed the States some control seaward of territorial limits. For example, the Supreme Court of Alaska upheld certain of that State's conservation measures restricting the King Crab season in the Bering Strait outside State waters.<sup>24</sup>

Like the courts, Congress has also recognized State interests beyond the territorial sea. The Coastal Zone Management Act of 1972<sup>25</sup> is a prime example. This act is designed to encourage the States to manage their coastal resources. One of the statutory means employed to that end is the not uncommon one of the offer of supportive financing.<sup>26</sup> Another is more novel: the offer of a share of power. If a State has an approved coastal management program, then it may exert extraterritorial influence. Amendments to the Act in 1976 specified that outer continental shelf activities undertaken or licensed by the Federal government must be "consistent" with a State's plan.<sup>27</sup>

State programs have been slow to be created and approved. The plans of thirteen states are now in place.<sup>28</sup> Whether the "consistency" approach will actually prove effective remains to be settled.<sup>29</sup> Nevertheless, the Coastal Zone Management Act does recognize state interests, and the requirement that continental shelf activities be conformed to State policies is a potentially significant response.<sup>30</sup>

Besides the statutory provisions already mentioned, there is a

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<sup>23</sup> See generally COUNCIL ON ENVIRONMENTAL QUALITY, OCS OIL AND GAS—AN ENVIRONMENTAL ASSESSMENT: A REPORT TO THE PRESIDENT (1974); *Id.*, OIL AND GAS IN COASTAL LANDS AND WATERS (1977); OFFICE OF TECHNOLOGY ASSESSMENT, COASTAL EFFECTS OF OFFSHORE ENERGY SYSTEMS (1976).

<sup>24</sup> *State v. Sieminski*, 556 P.2d 929 (Alaska 1976); *State v. Bundrant* 546 P.2d 530 (Alaska 1976).

<sup>25</sup> 16 U.S.C. §§ 1451-64 (1976).

<sup>26</sup> *Id.* at § 1456(a).

<sup>27</sup> *Id.* at §§ 1456(c)(1)(2).

<sup>28</sup> COASTAL ZONE MANAGEMENT NEWSLETTER, Vol. 9, No. 39, Oct. 4, 1978, at p. 1.

<sup>29</sup> Court challenges have been brought against approved State coastal management plans and the notion of consistency in only three cases. All were brought by the oil industry. The challenges to the Massachusetts and Wisconsin plans were dismissed. *American Petroleum Institute v. Knecht*, Nos. 78-623, 78-684 (U.S.D.C. D.C. Sept. 6, 1978). The California plan was upheld in a trial on the merits. *American Petroleum Institute v. Knecht*, No. CV 7703375-RJK (U.S.D.C. Cent. D. Calif. Sept. 1, 1978).

<sup>30</sup> See Omang, *States Rights vs. Federal Power in Coastal Waters*, *The Washington Post*, Oct. 1, 1978, p. C3, col. 3.

bewildering array of others touching upon Federal-State relationships in both the territorial sea and the area beyond. A sampling will suffice:

—The Fishery Conservation and Management Act of 1976 created Regional Fishery Management Councils which give the States an advisory role in fishery management in the two-hundred mile zone<sup>31</sup> (and may have established grounds for extraterritorial State jurisdiction in some circumstances).<sup>32</sup> But, as noted, it also provides for Federal rule-making authority over a State's waters under certain conditions.<sup>33</sup>

—The Outer Continental Shelf Lands Act Amendments of 1978<sup>34</sup> provide for review by, consultation with, and information disclosure to States concerning lease sales as well as development and production plans on the outer continental shelf.<sup>35</sup> Regulations for lease sales already embody many of these measures.<sup>36</sup>

—The Deepwater Ports Act of 1974,<sup>37</sup> allows a coastal State to exercise veto power over superports. (A veto is not allowed for development of resources under the Outer Continental Shelf Lands Act; only consultation is provided.) The act authorizes Federal licensing for construction and operation of such ports, only if the Governor of "the adjacent coastal State or States" approves or is presumed to approve it.<sup>38</sup>

—The Outer Continental Shelf Lands Act and the Deepwater Ports Act<sup>40</sup> make adjacent State civil and criminal law applicable to artificial islands and ports off of their coast. Such laws are adopted as Federal law to the extent that they apply and are not inconsistent with other Federal law and regulation. That is, they are surrogate Federal law.

<sup>31</sup> 16 U.S.C. § 1852 (1976).

<sup>32</sup> *Id.* § 1856(a). *But see* Curtis, *Alaska's Regulation of King Crab on the Outer Continental Shelf*, 6 UCLA-ALAS. L. REV. 375, 407 (1977).

<sup>33</sup> *See* note 23 *supra*.

<sup>34</sup> Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. 95-372, Sept. 18, 1978, 92 Stat. 629 (1978).

<sup>35</sup> *Id.* at § 204, amending 43 U.S.C. § 1334(5)(h); § 205, amending 43 U.S.C. § 1337(g); § 206, amending 43 U.S.C. § 1340(c)(2); § 208, adding 43 U.S.C. §§ 1344(a)(2)(F); (c)(1) and (2); (f); § 1345; § 1346(c); § 1351(a)(3), (f); § 1352(b)(2)(d)(2).

<sup>36</sup> 43 Fed. Reg. 3883 (1978) (to be codified at 30 C.F.R. § 250.34); 43 Fed. Reg. 3889 (1978) (to be codified at 30 C.F.R. pt. 250); 43 Fed. Reg. 3895 (1978) (to be codified at 43 C.F.R. § 3301.8); DEPARTMENT OF THE INTERIOR, GEOLOGICAL SURVEY, POLICIES, PRACTICES, AND RESPONSIBILITIES FOR SAFETY AND ENVIRONMENTAL PROTECTION IN OIL AND GAS OPERATIONS ON THE OUTER CONTINENTAL SHELF 5 (1977).

<sup>37</sup> 33 U.S.C. §§ 1501-24 (Supp. V 1975).

<sup>38</sup> *Id.* §§ 1503(c)(9), 1508(b).

<sup>39</sup> 43 U.S.C. § 1333(a)(2).

<sup>40</sup> 33 U.S.C. § 1518.

—The National Environmental Policy Act<sup>41</sup> mandates the filing of environmental impact statements for major Federal actions, and the adoption by Federal agencies of procedures for considering environmental values.<sup>42</sup> It has served as a major avenue for State and citizen impact on Federal decisions affecting the sea and seabed, but it suffers from the drawbacks inherent in all resort to the judiciary.

Two things emerge from a reading of this and other law. One is that the unseen boundary which divides what the States "own" from what the Federal government "owns" of the sea is no barrier to perception in the law of the interests of one sovereign in the area allotted to the other. The second is that this perception of mutual transfrontier interests has not been accompanied by any ordering of Federal-State relations in the governance of marine resources. Instead of order there is confusion.

Absent a rational, controlling oceans policy, Federal-State relations have been abandoned to shifting, discrete necessities and a burgeoning bureaucracy. Power is exercised by numerous Federal and State agencies with often competing and conflicting interests.<sup>43</sup> (At the Federal level these agencies include the Coast Guard, the Corps of Engineers, the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, the United States Geological Survey, and the Bureau of Land Management.) Public interest in the sea is not served by the resultant lack of coherence.<sup>44</sup>

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<sup>41</sup> 42 U.S.C. §§ 4321-47 (1970 & Supp. V 1975).

<sup>42</sup> 43 U.S.C. § 4332(2)(c) (1970); 43 C.F.R. § 3301.3 (1976).

<sup>43</sup> One list in 1977 included twenty-one marine activities at the Federal level under the jurisdiction of six departments and five agencies. Hollings, *First Annual Doherty Lecture in Oceans Policy*, 11 MARINE TECHNOLOGY SOCIETY J., July-Aug. 1977, at 30, 31 (1977). Since then the Department of Energy has been created so that seven departments are now involved.

<sup>44</sup> One recent study found hope for improvement in the marine sanctuaries program on the ground that it might serve as the key to a comprehensive and balanced approach to marine resources. Blumm and Blumstein, *The Marine Sanctuaries Program: A Framework for Critical Areas Management in the Sea*, 8 ENVIR. L. REV. 50016 (1978).

This program was established by Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-34 (1976), referred to as the "Ocean Dumping Act" because of the better known Title I which regulates dumping. Title II created oceanographic research programs. Under Title III marine areas may be designated as sanctuaries for their conservation, recreational, ecological, or esthetic value and then managed so as to preserve and restore them. *Id.* at § 1432(a). The program guidelines provide for multiple use management so that uses compatible with a sanctuary's primary purpose are permissible.

Only two areas have been designated as sanctuaries to date: a one-square-mile site

### III. OPPORTUNITY FOR A FRESH START—EXTENSION OF THE UNITED STATES TERRITORIAL SEA FROM 3 TO 12 MILES

In order to provide a realistic environment for the development of a comprehensive oceans policy it is critical, considering the present state of confusion, to have a clean slate. Obviously, one cannot simply repeal the morass of overlapping legislation; however, a somewhat fresh start can be achieved in another manner. We propose that the United States consider extending its territorial sea from three to twelve miles. Preliminary debate about and then implementation of a territorial sea change would provide a context for re-thinking Federal-State relations; for development of a comprehensive oceans policy; and for meaningful public participation in complex governmental affairs. In a word the territorial sea and an alteration of its boundaries offer a singular opportunity for carrying forward the American experiment. Success in this matter—or an instructive failure—would constitute a major contribution to the world community, which has undertaken its own search for modes of governance for natural resources in the face of growing scarcity.

Before any further discussion of this proposal, a preliminary question must be answered: would extension of the territorial sea of the United States have international repercussions of such a nature as to argue against the change? We think not.

Indeed, we believe the international repercussions would be minimal. The Informal Composite Negotiating Text developed by the UNCLOS reflect a strong consensus for recognition of territorial seas to a breadth of twelve miles. For all practical purposes, the United States recognizes the claims of other nations to the twelve-mile limit.<sup>45</sup> (Some ninety coastal nations claim a ter-

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around the sunken *U.S.S. Monitor* off Cape Hatteras and the 100-square-mile Key Largo Coral Reef off Florida. However, the sanctuaries program has been the subject of recent attention and was specifically recognized in President Carter's Environmental Message of May 23, 1977.

The program does hold promise insofar as it would allow for positive, flexible and balanced management in tandem with public involvement (since areas may be nominated to the National Oceanic and Atmospheric Administration for inclusion by any member of the public.) On the other hand, the promise is not unbounded. The program is directed at too limited a potential area to serve as the focal point of a national oceans policy, and, more importantly, it also is beset with uncertainty in the allotment of Federal-State responsibility, *see* Blum and Blumstein, *supra*.

<sup>45</sup> For example, the United States has observed the 12-mile limits claimed by both Russia and China. *See* S. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* 237 (1972).



ritorial sea broader than three miles.)<sup>46</sup> The original United States hope to use the breadth of the territorial sea as a bargaining chip to obtain satisfactory rules regarding the passage of straits has largely withered away, partly because it is clear that a three-mile limit cannot be sustained and partly because there has been genuine progress towards satisfactory rules on straits' passage.<sup>47</sup> An American extension of territorial sea limits would not likely elicit retaliatory response and would end the practice, a kind of self-denying ordinance, whereby we acknowledge the claims of others to boundaries which we do not allow to ourselves.

If United States action or simply growing practice did lead all coastal nations to move territorial boundaries to the twelve-mile limit, then the chief problem would be that of military and commercial passage of straits. There are one hundred forty straits in use by shipping.<sup>48</sup> One hundred sixteen would be overlapped by a twelve-mile territorial sea. Among them would be most of the thirty-five straits used by United States ships, including Dover and Gibraltar, which account for a considerable proportion in trade dollars.<sup>49</sup>

The UNCLOS has developed a new and satisfactory rule for straits embraced by territorial seas. Its solution, embodied in the Negotiating Text, is to provide for "transit passage" through straits "which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone."<sup>50</sup> "Transit passage" is defined as the exercise "of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit."<sup>51</sup>

Nations bordering straits may make laws and regulations relating to transit passage which may include safety and traffic regulations, pollution control, prevention of fishing, and enforcement of customs and immigration regulations.<sup>52</sup> But the Negotiating Text also provides that the adjacent nation's measures "shall not discriminate in form or in fact amongst

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<sup>46</sup> Interview, Office of the Geographer, U.S. Dept. of State, June 13, 1978.

<sup>47</sup> See notes 49-55 *infra* and accompanying text.

<sup>48</sup> U.S. DEPT. OF STATE, GEOGRAPHIC BULL. No. 3, SOVEREIGNTY OF THE SEA 22-27 (1969).

<sup>49</sup> D. LOGUE & R. SWEENEY, ECONOMICS AND THE LAW OF THE SEA NEGOTIATIONS 20 (American Enterprise Institute Original Paper 6, 1977).

<sup>50</sup> Informal Composite Negotiating Text Art. 37.

<sup>51</sup> *Id.* Art. 38.

<sup>52</sup> *Id.* Arts. 37-38.

foreign ships" or "have the practical effect of denying, hampering or impairing the right of transit passage."<sup>53</sup>

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

Even the total failure of the "transit passage" rule might not be a fatal blow. Under the practices which are presently possible in territorial seas and which would apply to straits overlapped by extended limits, shipping would be subject to one of four choices by the nations adjacent to straits. One option would simply be to allow free transit. This might even be the generally followed alternative since it would ultimately serve the interests of the bordering nations. Another choice would be to allow innocent passage, the rule adopted by the 1958 Geneva Conference.<sup>54</sup> Innocent passage provides for transit, but ships might be subject to search and submarines must surface and show their flag.<sup>55</sup> The third and fourth choices, at least hypothetically possible, are charging tolls for passage and closure—the denial of passage.

None of the four would present an insuperable barrier, especially since bilateral agreements for transit are possible. In a word, no foreseeable consequence of general expansion of territorial seas to twelve miles would cripple United States shipping.

#### IV. AGENDA FOR ORDERING FEDERAL-STATE RELATIONSHIPS WITHIN THE NEW TERRITORIAL SEA

The immediate effects of change in boundaries would be domestic rather than international. Of course a twelve-mile rather than a three-mile territorial sea could be a distinction which

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<sup>53</sup> *Id.* Art. 42.

<sup>54</sup> Convention on the Territorial Sea and Contiguous Zone, note 1 *supra*, Art. 14.

<sup>55</sup> *Id.* at Par. 6.

makes no real difference domestically. The extension of limits, that is to say, could be accompanied by a few administrative adjustments, by a laundering of applicable statutes to conform them to the new distance, and by nothing more. This kind of non-event is imaginable, but it is neither likely nor desirable. Necessarily, more would have to happen.

#### A. *Jurisdiction*

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

It could be contended that Congress meant by the Submerged Lands Act to vest in the States title to the lands and waters of the territorial sea whatever its extent.<sup>56</sup> The language of the statute, together with the Outer Continental Shelf Lands Act and subsequent Supreme Court interpretation do not support such a position.<sup>57</sup> In all likelihood, the Congress would be required to act again.

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

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

On behalf of the States, it could be maintained that leaner, more responsive agencies, closer familiarity with daily, mundane marine-related affairs, and a diversity of local concerns render the States the preferred government to exercise authority over an expanded territorial sea.

#### B. *Distribution of Revenue*

Another basic decision which would have to be made is that of

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<sup>56</sup> See, e.g., Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107, n. 23, 1113 (1976).

<sup>57</sup> See, e.g., *United States v. Maine*, 420 U.S. 515 (1975).

distribution of income generated by exploitation of the resources of the territorial sea: who gets how much for what purpose.

The division of revenue from activities on the Outer Continental Shelf has been a matter of contention. Some monies are available to the coastal States under the Coastal Energy Impact Program to plan for and to manage the impact upon coastal zones of development of outer continental shelf resources.<sup>58</sup> These funds were increased by amendments included in the Outer Continental Shelf Lands Act Amendments of 1978.<sup>59</sup> The States believe the funds to be both insufficient and distributed according to a defective formula.<sup>60</sup>

If a satisfactory formula for distribution is fashioned, should the monies be earmarked for designated purposes? Such funds could be restricted in a variety of ways. They might, for example, be limited to marine and environmental ends.<sup>61</sup> Or, the funds could be deposited in the treasury to meet general obligations.<sup>62</sup>

### C. *Legal and Managerial Problems*

Policing and regulation of an expanded territorial sea is another subject of minimally necessary action. Enforcement might pose considerable difficulties for those States which lack the equipment and personnel for it. But this incapacity ought not in itself preclude State jurisdiction if other factors weighed in favor of it. For example, there is no reason in theory why each coastal State could not contract with the Federal government for such policing

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<sup>58</sup> 16 U.S.C. §§ 1456(a); 1464(a)(3)(b) (1976).

<sup>59</sup> Outer Continental Shelf Lands Act Amendments of 1978, note 32 *supra*, § 502, amending Coastal Zone Management Act of 1972, 16 U.S.C. 1464(a)(3). The authorization was increased from fifty million dollars for each of eight years to one hundred thirty million dollars for each of ten years. These are authorizations; actual appropriations have been considerably less than the monies already authorized.

<sup>60</sup> *See generally*, THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, EFFECTS OF OFFSHORE OIL AND NATURAL GAS DEVELOPMENT ON THE COASTAL ZONE 249-57 (1976); Coastal Zone Management Act Amendments of 1976, S. Rep. No. 277, 94th Cong., 2d Sess. 11-19 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1768, 1778-1787. Outer Continental Shelf Lands Act Amendments, Hearings on H.R. 1614 Before the House Ad. Hoc. Comm. on Outer Continental Shelf, 95th Cong., 1st Sess., p. 1, at 430-31, 179-83, pt. 2 at 1183-87, 1580-82, 1588-89 (1977).

<sup>61</sup> New Jersey earmarks revenue from its public trust tideland's to public educational purposes. 18 N.J. Stat. Ann. § 10-5 (1937).

<sup>62</sup> Revenue from outer continental shelf lands leases are deposited into the Federal treasury and credited to miscellaneous receipts 43 U.S.C. §§ 1337(g), 1338 (1970). However some of these funds may be "covered over" to appropriations under the Land and Water Conservation Fund Act of 1965. 16 U.S.C. §§ 4601-4 to 4601-11 (1976).

and administrative needs as it finds necessary (the converse of those arrangements whereby the United States contracts with the States for the policing of certain Federal lands).<sup>63</sup> Or, management might be made a function of interstate agreements. The point is that this is a matter for planning and decision.

## V. AGENDA FOR ORDERING FEDERAL-STATE RELATIONSHIPS BEYOND THE TERRITORIAL SEA

If the territorial sea were to be extended, then the foregoing items would constitute a basic agenda. Actually, a territorial sea change implicates much more.

### A. *Oceans Policy*

The expansion of the territorial sea could serve as the occasion for development of an oceans policy. Practically, as well as theoretically, decisions precipitated by a change in territorial boundaries could not be made in isolation from decisions involving the areas both landward and seaward of the twelve-mile zone. An extension of this zone would act as the stimulus to a more general reckoning inclusive of all marine areas.

Landward of the territorial sea there is a constellation of issues which have already been touched upon and which are pointedly exemplified by the siting of support facilities, pipelines, storage tanks, and oil, gas and hard mineral processing works. Federal priority over and preemption of State action on such matters is not settled in law or in political fact.

Seaward of the territorial sea lies the remainder of the two-hundred mile zone, and then the high seas and deep seabed beyond national jurisdiction. As noted earlier, the States have interests in these politically and ecologically interdependent areas.

With respect to the two-hundred mile limit, it should be remarked that the UNCLOS has provided for the included area to be an "exclusive economic zone," in which the coastal nation would have *inter alia*:

- (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the

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<sup>63</sup> 16 U.S.C. § 1(a)–6(b) and (c).

economic exploitation and exploration of the zone, such as the production of energy from the water, current and wind; [and]

(b) Jurisdiction . . . with regard to:

(i) The establishment and use of artificial islands, installations and structures;

(ii) Marine scientific research;

(iii) The preservation of the marine environment . . . .<sup>64</sup>

Less is thereby given than is sought by those nations which would like to establish a two-hundred mile territorial sea, but more is provided than is presently claimed by the United States, which asserts jurisdiction to two-hundred miles only for fishery and some environmental purposes, and for exploration and development of the continental shelf.

If the "exclusive economic zone" is embodied in a comprehensive treaty or, failing that, becomes accepted international practice, then the United States would have to decide whether to claim the full rights of an economic zone and to plan for one if it did. Such planning would have to take account of administrative and enforcement needs as well as of State interests, questions which would already have been addressed and answered in the context of an extended territorial sea.

In regard to deep seabed mining, interest is presently directed to manganese nodules, the richest of which lie in areas on the Pacific floor.<sup>65</sup> The major minerals contained in these nodules are cobalt, copper, manganese and nickel. United States industry imports all four. There are several consortia with potential for commercial ocean mining, perhaps by the mid-1980's.

It has been argued that the United States ought now unilaterally to license mining of the deep seabed in order to protect United States strategic interests against the possibilities of cartelization and shortages of the minerals available from nodules.<sup>66</sup> In addition, it has been said that such licensing would help overcome growing

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<sup>64</sup> Informal Composite Negotiating Text Art. 56.

<sup>65</sup> See generally U.S. DEPT. OF THE INTERIOR, OCEAN MINING ADMINISTRATION, OCEAN MINING: AN ECONOMIC EVALUATION (1976); U.S. DEPT. OF THE INTERIOR, OCEAN MINING ADMINISTRATION, MANGANESE NODULE RESOURCES AND MINE SITE AVAILABILITY (1976); U.S. CONGRESS, SENATE SUBCOMMITTEE ON PUBLIC LANDS AND RESOURCES OF THE COMMITTEE ON ENERGY AND NATURAL RESOURCES AND THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, JOINT HEARINGS ON MINING OF THE DEEP SEABED, Publication No. 95-78 (1978).

<sup>66</sup> See generally DISCOVERY II, Fall 1977, at 1, 3 (publication of the United Methodist Joint Law of Sea Project); House debates on H.R. 3350, 124 CONG. REC. H 7341 (daily ed. July 26, 1978).

deficits to the balance of payments, encourage and protect industrial investment, and capitalize on the present lead of United States technology in ocean mining and processing.<sup>67</sup>

In opposition to the licensing bills presently before Congress, it has been maintained that such action would constitute a symbolic and economic threat to Third World Nations, that it might invite direct or indirect reprisal, that United States strategic interests are in no immediate danger of cartelization of the minerals at issue, that it would violate the notion of deep seabed resources as the "common heritage of mankind," and that it would jeopardize the long-range interest of the United States.<sup>68</sup>

Whether it is undertaken unilaterally or in a manner finally prescribed by treaty, seabed mining will likely begin sooner or later and may affect State interests in a variety of possible ways: environmental disruption, onshore processing, transportation, altered resource and job markets, and revenue gains and losses. But aside from discussion of some strategic and market interests, little attention has been devoted to the strictly domestic aspects of deep seabed mining. In this area, too, precedent drawn from the experience of expanding the territorial sea would provide the framework within which to take up the question of deep seabed mining as a component in an oceans policy.

### B. *Federalism*

Beyond what is minimally necessary to effect it, an expanded territorial sea would be part of and occasion for development of a comprehensive oceans policy. In addition, the territorial sea in particular and oceans policy in general confront us with fundamental questions about federalism. An ordering of Federal-State relations in the governance of marine resources has been due but not forthcoming at least since the Truman Proclamations of 1945. In fact marine resources expose and make acute some unresolved Federal-State issues of very longstanding. As projected onto the oceans, a Federal-State balance has been sought according to one or both of two standards of measurement.

According to one standard of measurement, the further seaward the marine area lies, the more preponderant the Federal

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<sup>67</sup> *Id.*

<sup>68</sup> See generally Raymond, *Seabed Minerals and the U.S. Economy: A Second Look*, 123 CONG. REC. E 733 (daily ed. Feb. 10, 1977); DISCOVERY II, Note 66 *supra* at 1, 3.

interests become.<sup>69</sup> As the focus moves landward, according to this standard, State interests gain in importance. Thus, Federal interests are given greatest weight in the high seas and deep seabed; those of the States greatest weight in the coastal and inland areas.

According to the other standard, where there is need for national uniformity, Federal interests prevail.<sup>70</sup> Where there is need for a local approach, then the States are to be dominant.

There is truth, utility and age to both approaches. But both are ultimately inadequate to the realities which they are employed to determine. The weight-of-interest/seaward-distance configuration breaks down at both ends. The national interest in defense, for example, is no less weighty at the landward than at the seaward extreme.<sup>71</sup> One assumes as great a national defense interest in Baltimore as in the Baltimore Canyon. Or, to cite a State-oriented example, Washington has as much interest in salmon at the furthest extent of their migratory pattern as exists in them when they return to spawn in State waters. A weighting of Federal and State interests cannot always be carried out according to geographical distance.

The other test, that of uniformity, has its own, several shortcomings. The linkage of Federal priority with uniformity is not always supportable in fact or in theory.<sup>72</sup> Factually, Federal agencies may lack capacity for disinterested uniformity if they have taken as their mission, as some have, the protection of parochial, bureaucratic interests. Theoretically, the national interest warranting Federal priority may lie in diversity rather than in uniformity. (A State, for example, may be unable to protect or even recognize the value and uniqueness of a coastal resource like estuaries absent the perspective and intervention of the Federal government.) The marriage of central government and uniformity also does not take full account of the possibility that States may best protect the national interest in uniformity. State priority might be especially appropriate where the uniformity propounded

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<sup>69</sup> Such a scale underlies the majority's reasoning in *United States v. California*, 332 U.S. 19 (1947). See *id.* at 35-36. Compare *id.* at 42-43 (Reed, J., dissenting); 44-45 (Frankfurter, J., dissenting).

<sup>70</sup> This standard originated in *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

<sup>71</sup> Cf. *United States v. California*, 332 U.S. 19, 44-45 (1947) (Frankfurter, J., dissenting).

<sup>72</sup> Cf. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 174-177 (1978).



by a Federal agency is either a narrow interest writ large or a surrender to the lowest common standard of regulation.

The Civil War and the constitutional amendments which followed, as well as subsequent events, have settled many questions about the value and role of the Union in the protection of civil rights. It will not gainsay the achievements of the past to observe that, in a different age and in the different context of natural resources, the relationships of the States to each other and to the Federal government are not unworthy of contemporary examination. This is not to say that present prerogatives could or ought to be altered. The structure might be left untouched after thorough reconsideration. It is to say that oceans policy, or its absence, does mirror confusion in Federal-State relations and that an extension of the territorial sea could be the medium for putting these relations in good and decent order. This is especially so at a time when State governors and State personnel are increasing the governmental competence and capacity of the States.

#### VI. CONCLUSION-CONTINUATION OF THE AMERICAN EXPERIMENT

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

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

Moreover, ocean affairs are singularly in the public domain. Anciently and modernly, the sea has been viewed in terms which distinguish it in this regard. Different marine areas and resources have been recognized variously as *res communis*,<sup>73</sup> as the subject of public trust<sup>74</sup> or as the common heritage of mankind.<sup>75</sup> It is a

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<sup>73</sup> JUSTINIAN, INSTITUTES, Lib. 11, tit. 1, at 90 (Sandars transl. 7th ed. 1962).

<sup>74</sup> Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

<sup>75</sup> The conception is that of Ambassador Arvid Pardo of Malta and is embodied in

resource *of* and *for* the people. The more interesting and nettlesome question is whether it can be a resource governable *by* the people.

The questions about the boundaries and uses of the territorial sea, about oceans policy and about federalism can always be removed from public judgment so that we may have decision-making of and for the people, but by, at best, an elite. This will be the result if the questions are not discerned, or if discerned, are abandoned to experts, managers, time, or market forces.

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

Expansion of the territorial sea could be taken as the opportunity for an experiment with popular participation in what Thomas Jefferson called "the government of affairs."<sup>76</sup> Even the process of informing and making the requisite public decisions about boundaries, uses and ends could itself be momentous.

To enjoy any prospect of a successful outcome, such a process would necessarily engage the public as citizens rather than as interest group counters. The pursuit and clash of competing interests can yield at best a temporary armistice of contending wills. The exercise of citizenship, on the other hand, entertains thought in broad categories about long-term consequences. It is the kind of thinking which rises above narrow interests, which generates fruitful policy, and which is the pre-condition to solution of specific problems like those we face with fish, oil and federalism.

Perhaps, as individuals, we have not completely reconciled or recently reflected upon the dual responsibility of our simultaneous Federal and State citizenship. Oceans policy and the problems of Federal-State relations depend for resolution upon how each citizen recognizes and meets the duties of double citizenship.

Our federalism is precisely an order for making and giving effect to citizen decisions. The consultation of public opinion polls in

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Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/8028 (1970).

<sup>76</sup> Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), reprinted in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 660, 661 (Koch & Peden eds. 1944).

the making of governmental choices and the recent resort to referenda in limiting property taxes ought to serve as reminders of the dangers of unstructured rule by plebiscite. Representative, republican government, when it really is that, is much to be preferred.

An experiment of citizen engagement in the structured, dialogic process of governing the affairs of the territorial sea might produce not only a legitimate oceans policy but also a renewal of the Federal-State enterprise. If it did, then it would be remarkably instructive for such other policies and choices as those concerning energy, natural resources generally, and foreign relations, all of which pose severe challenges to federalism in an age of scarcity. Moreover, a United States success in this setting would furnish a much-needed model to the international community as it wrestles with the means of governance of Antarctica, outer space and the deep seabed.

Alexander Hamilton proposed that it had been reserved to the American people to decide the question, "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend . . . on accident and force."<sup>77</sup> Paradigmatically, the territorial sea and the development of an oceans policy offer again the possibility of good government from reflection and choice. This possibility is the greatest contribution which the continuing American experiment can make to the world community.

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<sup>77</sup> THE FEDERALIST No. 1 at 3 (Hamilton) (Cooke ed. 1961).

