RIGHT, TITLE AND INTEREST IN THE TERRITORIAL SEA: FEDERAL AND STATE CLAIMS IN THE UNITED STATES

Controversy and confusion have surrounded claims of ownership and control in the territorial sea and the underlying subsoil. With the advent of offshore oil wells, and the tax revenues they produced, the question of ownership assumed greater significance. On one side, the states have claimed ownership on the theory that when they entered the Union the federal government quit-claimed the rights to the territorial sea and the adjacent subsoil back to the various states. The federal government has claimed title to the territorial sea on the ground that the states gave up all their rights in the territorial sea to the federal government upon entry into the Union.

Extension of the territorial sea will intensify the controversy over licensing facilities such as superports. At present, the United States recognizes a three mile limit to the territorial sea. The United States will probably extend its territorial sea to a twelve mile limit, possibly as early as this summer at the Law of the Sea Conference. This nine mile extension includes favorable sites for superports and offshore power systems and oil reserves and other valuable mineral resources. The leasing and development of this area offers substantial revenues for the owner: the states, the federal government or both.

I. HOW FAR DOES THE TERRITORIAL SEA EXTEND

The navigable sea is generally divided into three legally distinct zones. They are classified into the following: (1) nearest to the nation's shores are found its internal or inland waters; (2) beyond this zone, and measured from its seaward edge, lies a belt known as the marginal or territorial sea; and (3) outside the territorial sea belt are the high seas.¹

One of the earliest judicial assertions concerning the extent of a nation's control over the sea was made in 1702 by the Dutch judge, Judge Bynkershock, who stated that the best rule is that coastal state jurisdiction over the sea should extend as far as a cannon can fire.² Control should extend to where the power of man's weapons end, since weapons are what guarantee possession. By the eighteenth century this test was accepted by both writers and national practices, equating the distance of a "cannon shot" with three nautical miles, or one marine league.³ The three mile territorial limit was recognized by the Supreme Court in Manchester v. Massachusetts:

We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory, not exceed-

ing two marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil.

In 1923, the Supreme Court, while considering the Eighteenth Amendment and Prohibition Laws, reaffirmed that federal territorial jurisdiction extended from the coast line seaward one marine league, or three geographic miles.

But in 1951, the International Court of Justice, in deciding the Anglo-Norwegian Fisheries Case, declared that the delimitation of territorial waters is not a question that falls within the internal and exclusive jurisdiction of the coastal nation. The limitation of territorial waters always has an international aspect and cannot be dependent merely upon the will of the coastal nation as expressed in its own municipal law. The act of delimitation is necessarily a unilateral act, because only the coastal nation is competent to undertake it, but the validity of the delimitation with regard to other nations depends upon international law.

The reasons why the territorial sea is accepted as a part of a nation’s territory and why an extension of such a nation’s jurisdictional powers into that adjacent sea are recognized, can be summarized as follows: (1) The security of the littoral state demands that it should be given exclusive and absolute control over the marginal seas adjacent to its shores; (2) for the protection of its commercial and political interests, the coastal state must have the right to inspect foreign ships entering its territorial waters; (3) and economic interests demand that exclusive enjoyment of the products of the sea be regarded as a right of the coastal nation.

Regardless of how the seabed is divided between national and international interests, the United States has the further problem of apportioning its share of the seabed and territorial waters between the federal government and the states. The states were granted a portion of the seabed with passage of the Submerged Lands Act in 1953. But this Act did not precisely delimit the boundary between federal and state interests.

II. FEDERAL AND STATE CLAIMS

The Supreme Court has recognized state ownership of lands beneath navigable waters within a state’s boundary on many occasions. In Pollard’s Lessee

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7id.
9Submerged Lands Act, 43 U.S.C. § 1301(a) (1970). The statute defines “lands beneath navigable waters” to mean:

(1) All lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and
v. Hagan, the Court concluded that ownership of the navigable inland waters, between high and low water marks, and the soil underneath was reserved by the Constitution to the states and not granted to the federal government. Furthermore, new states had the same "rights, sovereignty, and jurisdiction" over this area as the original states.

This question of ownership did not attract major concern until the advent of offshore oil wells. The potential tax revenues associated with these offshore wells made the question of ownership one of considerable importance.

Out of this controversy two theories emerged: the state theory and the federal theory. It was assumed by the states, and not without reason, that the Pollard rule would be applied to lands beneath the waters of the territorial sea. The states claimed title as incident to a transfer to the states of local sovereignty at the time of their admission into the Union. According to this theory, upon entry into the Union, the federal government quitclaimed authority over the submerged lands back to the various states.

Beginning in the 1930's the federal government, while conceding the validity of Pollard as to inland waters, disputed its applicability to submerged lands beyond that limit, and claimed ownership for the federal government. Under the federal theory, when the states came into the Union they gave up all rights they had in these lands to the federal government.

The federal government brought an action in the Supreme Court against the
State of California for a declaration of rights within the three mile marginal belt off the California coast and for an injunction against trespass by California upon these lands. The Court stated that the original thirteen colonies did not acquire from the crown of England the title to the three mile marginal ocean belt or the land underlying it. Even if the original states did acquire elements of sovereignty from the English crown by their revolution against it, the State of California could not claim interest in the marginal belt along the coastline, by reason of its alleged admission into statehood on an equal footing with the thirteen original states. The protection and control of the three-mile marginal ocean belt off the coast of the United States is a function of national external sovereignty. A state's exercise of its local police power in part of the three-mile marginal ocean belt within its boundaries did not detract from the federal government's paramount rights in, and power over, such an area. In conclusion, the Court held that the State of California was not the owner in fee simple of the marginal ocean belt along its coast, and that the federal government, rather than the individual state, has paramount rights in, and power over such belt; an incident to which is full and complete dominion over the resources of the soil under that water area, including oil. This first encounter between these competing theories ended with the Supreme Court siding with the federal theory.

After this decree was entered, the federal government requested a clarification of the award. California claimed that certain areas with substantial oil mining activity were within California's inland waters. The Court appointed a Special Master, and directed him to determine the line of inland waters for seven specified segments of the California coast.

The Supreme Court directed the Special Master to recommend answers to the following questions:

\[\text{United States v. California, 332 U.S. 19 (1947).}\]
\[\text{Id. at 31.}\]
\[\text{Id. at 34.}\]
\[\text{Id. at 36.}\]
\[\text{Id. at 38. In } \text{United States v. California, 332 U.S. 804 (1947) (per curiam), the Court states:}\]
\[\text{The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles . . . The State of California has no title thereto or property interest therein.}\]
\[\text{Id. at 805.}\]
\[\text{The late William H. Davis of New York City.}\]
\[\text{United States v. California, 342 U.S. 891 (1951). Inland waters are subject to complete sovereignty of nations, as much as if they were part of its land territory, and a coastal nation has privilege even to exclude foreign vessels altogether. United States v. Louisiana, 394 U.S. 11, 22 (1969). See also van Panhuys and van Ende Boas, Legal Aspects of Private Broadcasting, 60 A.J.I.L. 303 (1966) (regarding the authority of a nation to deny access to its waters to foreign vessels).}\]
Question 1—What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

Question 2—Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers, and other inland waters to be drawn?

Question 3—By what criteria is the ordinary low water mark on the coast of California to be ascertained?²

The Report of the Special Master submitted answers to all three questions.²⁴ The Special Master defined inland waters according to the criteria being applied by the United States in the conduct of its foreign affairs at the date of the Court's decree. In response to the first question, the Special Master determined that the channel between the mainland and the offshore islands were not inland waters. The Special Master answered the second question by applying a rule that only a bay having a closing line across its mouth less than ten miles in length and enclosing a sufficient water area to satisfy the Boggs Formula would be referred to as inland waters, with the qualification that a bay which had been historically considered inland waters would so continue to be considered as such.²⁵ Under this rule, none of the seven particular coastal segments under consideration was a bay constituting inland waters. The Special Master determined the ordinary low water mark on the coast of California to be the intersection of the shoreline with the plane of the mean of all low waters established by the United States Coast and Geodetic Survey from observations made over a period of 18.6 years.²⁶

The following year, the Submerged Lands Act was enacted.²⁷ The purposes of the Submerged Lands Act are described in its title:

To conform and establish the titles of the States to lands beneath navigable waters within state boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and

²⁵Report of the Special Master at 2-5, United States v. California, 344 U.S. 872 (1952) [hereinafter cited as Report]. The conclusions of the Report are found in United States v. California, 381 U.S. 139, 144-45 n.6 (1965). The Report was neither adopted, modified nor rejected by the Supreme Court but was simply allowed to lie dormant until 1964. Id. at 148-49. In United States v. California, the Supreme Court approved the recommendations of the Special Master, subject to the modifications set out in that opinion. Id. at 177; see p. infra.
²⁶To determine whether a coastal indentation is of sufficient depth and shape to be inland water, the Boggs formula would (1) draw the closing line across the mouth of the indentation; (2) draw a belt around the shore of the indentation (similar to a small marginal belt) having a width equal to one-fourth the length of the closing line across the entrance; (3) compare the remaining area inside the closing line with the area of a semicircle having a diameter equal to one-half of the length of the closing line, and if the enclosed area is larger than that of the semicircle, the indentation is inland water. Boggs, Delimitation of the Territorial Sea, 24 A.J.I.L. 541, 548 (1930).
²⁷United States v. California, 381 U.S. 139, 144-45 n.6 (1965).
to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.\textsuperscript{28}

The Submerged Lands Act accomplished these objectives by extending state control. First, the Act relinquished to the states the interest of the United States in all lands beneath the navigable waters within state boundaries.\textsuperscript{29} Second, the Act defined that area in terms of state boundaries as they existed at the time such state became a member of the Union, or as heretofore approved by the United States Congress, not extending, however, seaward from the coastline of any state for more than three marine leagues\textsuperscript{30} in the Gulf of Mexico or more than three geographical miles into either the Atlantic or Pacific Oceans.\textsuperscript{31} Third, a seaward boundary of each state of three geographical miles was confirmed, without "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."\textsuperscript{32} However, the Act did not remove all incidents of control by the government. For purposes of navigation, commerce, national defense, and international affairs, the United States reserved all constitutional powers of regulation and control over the areas within which the proprietary interests of the states are recognized.\textsuperscript{33} Furthermore, the federal government retained all rights in sub-

\textsuperscript{28}67 Stat. 29 (1953).
\textsuperscript{29}43 U.S.C. §1311 (1970):
(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the rights and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters. . .
\textsuperscript{30}Three marine leagues are equivalent to nine marine, nautical or geographical miles. A conversion can also be made to English, statute or land miles. One English, statute, or land mile equals approximately .87 marine, nautical or geographical miles. Therefore, three marine leagues refers to approximately 10.35 land miles.
\textsuperscript{32}Id. § 1312.
\textsuperscript{33}Id. § 1314(a).
The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership,
merged lands lying beyond those areas to the seaward limits of the continental shelf. 31

Thus, under this Act, the United States relinquished32 to the coastal states all of its rights in submerged lands within certain geographical limits and confirmed its own rights therein beyond such limits. This Act was upheld in *Alabama v. Texas*33 as a constitutional exercise of Congress’ power to dispose of federal property.

Both federal and state interests found support for their positions in the Act. States asserted that this Act was a congressional recognition that broad rights to these lands and waters had always existed in the states and that upon each state’s entry into the Union the federal government had relinquished these broad rights to the state rather than retaining them in the federal government. The federal theory maintained that this Act merely granted limited authority over these lands back to the states, leaving most aspects of authority still vested in the hands of the federal government.

Several cases have come before the Supreme Court involving the interpretation of this Act. In 1960, the Court was called upon to hear the case of *United States v. Louisiana.*37 The federal government filed this action asking the Court to declare that the federal government had exclusive possession and authority over the land and natural resources underlying the Gulf of Mexico more than three geographical miles seaward from the coast of each State. The Court held that the Submerged Lands Act had made each coastal State the owner of the submerged lands to a distance of three geographical miles from the coast. 38 However, no boundary in excess of this distance had been established ipso facto for any state. 39 The Act provided each Gulf State the right to prove that its boundary extended more than three miles and the existence of such a boundary was to be proved in judicial proceedings. 40 Accordingly,  

or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

31*Id.* § 1302.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

Congress passed, later in the same year, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1970), which provides for federal exploitation of the submerged lands of the Continental Shelf beyond those lands granted to the states by the Submerged Lands Act.

32However, in subsequent cases construing the Submerged Lands Act the United States has asserted that the Submerged Lands Act merely granted these submerged lands to the coastal states instead of relinquishing them as the states claim.

33*Id.* at 24.

34*Id.* at 25.

35*Id.*
the Court held that the Act granted to Texas the submerged lands in the Gulf of Mexico within three marine leagues from her coast but did not grant Louisiana, Mississippi or Alabama any rights in the submerged lands beyond three geographical miles from their respective coasts. The submerged lands beyond these boundaries were declared to be owned by the federal government. In a decision handed down on the same day as United States v. Louisiana, the Court held that the Submerged Lands Act granted to Florida a three marine league belt of submerged lands under the Gulf of Mexico seaward from its coastline; beyond this belt all submerged lands were owned by the federal government.

The Submerged Lands Act set forth a two-fold test for determining seaward boundaries of states beyond three geographical miles; boundaries which existed at the time of admission into the Union and boundaries which were theretofore approved by Congress. State boundaries were to be determined by the historic action taken with respect to them jointly by Congress and the state itself. The framers of the Act determined that such joint action would fix the states' boundaries against subsequent change without their consent and thereby confer upon the states the long-standing equities which the Act was intended to recognize.

In 1965, the case of United States v. California came before the Supreme Court. The Court was required to determine the extent of submerged lands which were “granted” to the State of California by the Submerged Lands Act of 1953, and in particular to declare whether specified bodies of water on the California coast were “inland waters” as contained in the Convention of the Territorial Sea and the Contiguous Zone, as approved by the Senate and ratified by the President, were to be adopted for purposes of the previously passed Submerged Lands Act.

A year later, the Court declared that the Special Master’s recommendations would be modified to provide that the State of California has no title thereto or property interest therein to the subsoil and seabed of the Continental Shelf, more than three geographical miles seaward from the nearest point or points on the coastline; that waters between islands, roadsteads; and waters between islands and the mainland are not per se inland waters and that the United States is not entitled, as against California, to any right, title or interest

4United States v. Louisiana, 363 U.S. 1, 27-29 (1960). See also United States v. Alaska, 352 F. Supp. 815 (D. Alas. 1972). The Alaska opinion held that under general principles of international law, Cook Inlet was an “historic bay;” therefore, title to its subsurface resources vested in the State of Alaska in accordance with the Submerged Lands Act.
4381 U.S. 139 (1965).
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in any of these submerged lands, improvements and natural resources except as provided by § 5 of the Submerged Lands Act.\textsuperscript{48}

\textsuperscript{48} Id. at 449-52. The Supreme Court concluded that:

1. As against the State of California and all persons claiming under it, the subsoil and seabed of the continental shelf, more than three geographical miles seaward from the nearest point or points on the coast line, at all times pertinent hereto have appertained and now appertain to the United States and have been and now are subject to its exclusive jurisdiction, control and power of disposition. The State of California has no title thereto or property interest therein.

2. As used herein, "coast line" means—
   (a) The line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or an island; and
   (b) The line marking the seaward limit of inland waters.

The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system within the meaning of Article 8 of the Convention on the Territorial Seas and the Contiguous Zone, T.I.A.S. No. 5639.

3. As used herein—
   (a) "Island" means a naturally-formed area of land surrounded by water, which is above the level of mean high water;
   (b) "Low-tide elevation" means a naturally-formed area of land surrounded by water at mean lower low water, which is above the level of mean lower low water, but not above the level of mean high waters;
   (c) "Mean lower low water" means the average elevation of all the daily lower low tides occurring over a period of 18.6 years;
   (d) "Mean high water" means the average elevation of all the high tides occurring over a period of 18.6 years;
   (e) "Geographical mile" means a distance of 1852 meters (6076.1033 U.S. Survey Feet or approximately 6076.11549 International Feet).

4. As used herein, "inland waters" means waters landward of the baseline of the territorial sea, which are now recognized as internal waters of the United States under the Convention on the Territorial Sea and the Contiguous Zone. The inland waters referred to in paragraph 2(b) hereof include—
   (a) Any river or stream flowing directly into the sea, landward of a straight line across its mouth;
   (b) Any port, landward of its outermost permanent harbor works and a straight line across its entrance;
   (c) Any "historic bay", as that term is used in paragraph 6 of Article 7 of the Convention, defined essentially as a bay over which the United States has traditionally asserted and maintained dominion with the acquiescence of foreign nations;
   (d) Any other bay (defined as a well-marked coastal indentation having such penetration, in proportion to the width of its entrance, as to contain landlocked waters, and having an area, including islands within the bay, at least as great as the area of a semicircle whose diameter equals the length of the closing line across the entrance of the bay, or the sum of such closing lines if the bay has more than one entrance), landward of a straight line across its entrance or, if the entrance is more than 24 geographical miles wide, landward of a straight line not over 24 geographical miles long, drawn within the bay so as to enclose the greatest possible amount of water. An estuary of a river is treated in the same way as a bay.

5. In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of
The Supreme Court rejected a claim asserted by Texas that its coastline extended to the seaward edge of the artificial jetties constructed by Texas in the Gulf of Mexico after 1845 when Texas was admitted to the Union. This holding relied on a provision of the Act that the three-league claim must be measured to such boundary as it existed at the time the State became a member of the Union. Therefore, Texas was not entitled to lease certain submerged lands, portion of which lay more than three leagues from any part of the natural shoreline of Texas, but within three leagues of the jetties.

In 1969, the Supreme Court held that the part of Louisiana’s coastline “marks” the seaward limit of inland waters is to be drawn in accordance with the definitions set forth in the Convention on the Territorial Sea and the Contiguous Zone.

III. THE FEDERAL WATER QUALITY IMPROVEMENT ACT OF 1970: EXERCISE OF A STATE’S POLICE POWER

In addition to the question of the ownership of the submerged lands, a question exists regarding the authority the federal government and states may exercise in the territorial sea. The debate over state authority has concerned regulation of fisheries, international shipping traffic, oil well land leasing and particularly pollution control.

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mean lower low water meets the outermost extension of the headlands. Where there is no pronounced headland, the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway.

6. Roadsteads, waters between islands, and waters between islands and the mainland are not per se inland waters.

12. With the exception provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. § 1313 (1964 ed.), and subject to the powers reserved to the United States by § 3(d) and § 6 of said Act, 67 Stat. 31, 32, 43 U.S.C. §§ 1311(d) and 1314 (1964 ed.), the State of California is entitled, as against the United States, to the title to and ownership of the tidelands along its coast (defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water) and the submerged lands, minerals, other natural resources and improvements underlying the inland waters and the waters of the Pacific Ocean within three geographical miles seaward from the coast line and bounded on the north and south by the northern and southern boundaries of the State of California, including the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law. The United States is not entitled, as against the State of California, to any right, title or interest in or to said lands, improvements and natural resources except as provided by § 5 of the Submerged Lands Act.

51Id. at 161.
53Id.
In *Askew v. American Waterways Operators, Inc.*, the Court addressed itself to two issues. First, did the Federal Water Quality Improvement Act of 1970 [hereinafter cited as WQIA] preempt the Florida Oil Spill Prevention and Pollution Control Act of 1970 [hereinafter cited as Florida Act]? Second, can a state validly exercise its police power to control marine pollution? The broader question of whether the paramount right of control over the territorial sea lies in the federal government or the states was not directly presented to the Supreme Court.

In this case, the Appellees, constituting merchant shippers, world shipping associations, barge and towing companies and owners of oil terminal facilities located in Florida, brought an action to enjoin application of the Florida Act. The appellees challenged the validity of the Florida Act on the ground that it was preempted by federal legislation. The State of Florida maintained that her interests were broader than the named defendants and intervened as a party defendant. The appellants contended that federal oil spill legislation was deficient, that Congress desired to encourage and not preempt state regulatory action and that Florida's interest in preserving its environment overrode the predilection for maritime uniformity. The case was presented to the Supreme Court on appeal from a holding by a three judge district court that the Florida Act was an unconstitutional intrusion into the federal maritime domain. The Supreme Court reversed finding no constitutional or statutory impediment to

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833 U.S.C. § 1161 (1970), amending 33 U.S.C. § 1151 (1970). Basically, this Act subjects owners or operators of vessels or onshore and offshore terminal facilities, to liability without fault for oil spills. The WQIA allows only four defenses against strict liability: (1) acts of God, (2) acts of war, (3) governmental negligence, and (4) acts or omissions of third parties. *Id.* § 1161(f)(1)-(3). Absent these defenses, liability is set at the federal government's cost in cleaning up the spill, not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is less. *Id.* The liability of an onshore or offshore terminal facility is limited to $8,000,000. *Id.* If the spillage results from willful negligence, liability for cleanup costs can be unlimited. *Id.* Also, owners or operators of vessels must give evidence of financial responsibility to meet the liability to the U.S. *Id.* § 1161(p)(1). In addition, the President is authorized to issue regulations requiring vessels and terminal facilities to maintain equipment for the prevention of oil spills. *Id.* § 1161(j).

8FLA. STAT. ANN. § 376 (Supp. 1972). Since the WQIA did not provide for state recovery for oil spill damage and believing the limit on liability was too low, the Florida Legislature passed this Act to support and complement the WQIA. *Id.* § 376.02(b). The Florida Act imposes unlimited, strict liability upon a vessel or terminal facility which discharges oil or any other pollutant into the state's territorial waters. *Id.* § 376.12. The Florida Act further requires every owner or operator of a vessel or terminal facility to pay all cleanup costs or damages which may result from the discharge of pollutants and to maintain satisfactory evidence of financial responsibility to satisfy such liability. *Id.* § 376.14(1). Finally, the Florida State Department of Natural Resources is empowered to set regulations with respect to containment gear and other equipment which must be maintained by vessels and terminal facilities for the prevention of oil spills. *Id.* § 376.07(2)(a).

8335 F. Supp. 1241, 1244-45 (M.D. Fla. 1971). Plaintiffs also contended that the Florida Act: (1) violated the constitutional guarantee of maritime uniformity, (2) violated federal supremacy in admiralty law, (3) violated the Commerce Clause since it sought to regulate foreign and interstate commerce and (4) denied plaintiffs due process and equal protection.

prevent a state from imposing "any requirement or liability" in regards to the spillage of oil into any waters of the state.

Prior Supreme Court decisions have established various rules regarding preemption. Before federal legislation can preempt a particular field of regulation, it must first be determined that the given congressional action has been undertaken pursuant to one of the powers delegated to Congress by the Constitution.\(^6\) The Constitution, article III, section 2, read in context with article I, section 8, grants Congress the power to alter maritime law through legislation.\(^6\) The Supreme Court has taken several approaches to the preemption issue. If a state statute field conflicts with one or more material aspects of a federal statute, then the state statute is preempted.\(^4\) The preemption question also arises in situations where Congress has legislated only in a limited area of a particular field and a state passes a statute to regulate the untouched portion of the field. In such a situation, it must be determined whether the federal government intended no further regulation in the field or that Congress alone could decide when further regulation was necessary. State legislation is invalid if it is determined that Congress has occupied the field with either of these intentions.\(^5\) Another test used by the Supreme Court is whether the federal scheme is so pervasive as to cover the entire field and preempt state regulation.\(^6\)

In *Askew* the Court did not have to resort to one of these preemption tests. The WQIA does not preclude state action but explicitly recognizes the right of states to act.\(^6\) The Conference Report of the WQIA states:


\(^{6}\) This provision of the Constitution extends the judicial power of the federal courts to "all cases of admiralty and maritime jurisdiction." It was recognized that some remedies in the maritime field of law had been traditionally administered by common law courts of the original states. This role of the states in the administration of maritime law was preserved by the "savings clause." Judiciary Act of 1789, §9, I Stat. 76, 77 (1789); *see* The Hamilton, 207 U.S. 398, 404 (1907); New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. 343, 390 (1848).

\(^{6}\) The Thomas Barium, 293 U.S. 21, 42 (1934); Southern Pacific Co. v. Jensen, 244 U.S. 205, 214-15 (1917); *In re* Garnett, 141 U.S. 1, 14 (1890); Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 556-57 (1889).


\(^{6}\) U.S.C. § 1161(o) (1970) provides,

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(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 dis-
any State would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts.86

In addition to recognizing the rights of states, the WQIA presupposes a coordinated effort with states to combat marine oil pollution.86 Because Congress only dealt with cleanup costs incurred by the federal government, the states were left free to impose liability for damage suffered by states and private interests.

Since the WQIA explicitly recognized the rights of states in this area, the Court turned to a closely related issue of whether a state could validly exercise its police power in the federal area of maritime law. Admiralty tort jurisdiction has traditionally depended upon the locality where the tort occurred and not upon the nature of the tort.70 In 1948 Congress passed the Admiralty Extension Act.71 The purpose of this Act was to extend admiralty jurisdiction to cases where damage, consummated on land, was caused by a vessel on navigable waters.72 The Admiralty Extension Act was not designed to eliminate any state remedies but simply made available a concurrent remedy in admiralty law.73

State regulation has been permitted to supplement the admiralty area when the State regulation does not directly conflict with federal law.74 But two cases, Southern Pacific Co. v. Jensen,75 and Knickerbocker Ice Co. v. Stewart,76 have limited the extent to which a state may regulate in the admiralty area. The Supreme Court in Jensen held that the widow of a deceased maritime worker could receive no award under New York's workmen's compensation law. The New York statute was declared unconstitutional since the deceased maritime

charge of oil 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.

7Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 59 (1914). Prior to 1948, if the damage or injury occurred on land then admiralty jurisdiction was not available. If the injury or damage occurred on the high seas or navigable waters then the tort was within the admiralty jurisdiction. The Plymouth, 70 U.S. 20, 35 (1865) (admiralty jurisdiction did not exist where the cause of damage originated on water but was done wholly upon the land). See also Martin v. West, 222 U.S. 191 (1911); Recent Decisions, 4 GA. J. INT'L & COMP. L. 232, 239 (1974).
72State, Department of Fish and Game v. S.S. Bournemouth, 307 F. Supp. 922, 925 (1969); cf. Victory Carriers Inc. v. Law, 404 U.S. 202, 214 (1971), where the Court states, “at least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law.”
7244 U.S. 205 (1916).
75253 U.S. 149 (1919).
worker was on a vessel in navigable waters, making admiralty the exclusive remedy. Congress sought to nullify the effects of this decision by amending section 9 of the Judiciary Act to give claimants the right to remedies under state workmen's compensation statutes. But in Knickerbocker Ice, the Supreme Court held that Congress had no power to allow states to grant a remedy in this area. These two cases stood for the proposition that federal rules of maritime law displace rules of common law in actions brought under the saving to suitors clause of section 9 of the Judiciary Act.

Since the 1940's, this denial of state power has been relaxed. In Just v. Chambers, the Court held that states have authority to act in the maritime area as long as the state action does not conflict with federal laws or the essential features of an exclusive federal jurisdiction. The Court required uniformity only if the essential features of exclusive federal jurisdiction are involved. The line that separates the scope of federal power and state power has not been defined with exact precision. A state's exercise of its police power is superseded by federal legislation only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. With the lack of a definite rule to determine the scope of a state's power in advance of litigation each case has been considered on its own facts and surrounding circumstances. Where a federal agency has conducted hearings and determined that the case falls within federal jurisdiction then state regulations are preempted. But where no hearings have been conducted by a federal agency then the applicable state law is presumed constitutional.

In the majority opinion, Justice Douglas limited the rule of Jensen and Knickerbocker Ice to cases involving vessels on navigable waters. Therefore, the rule in those cases cannot be extended to apply to cases involving injuries on or to the shore by ships on navigable waters. In these ship-to-shore cases

78After the Court's decision in Knickerbocker Ice, Congress re-amended the saving clause to preserve "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State." Act of June 10, 1922, ch. 216, § 1, 42 Stat. 634 (1922). This amendment did not achieve the desired result. In Washington v. Dawson & Co., 264 U.S. 219 (1924), the Court held that Congress would have to prescribe general rules if it wanted to legislate for maritime employment. To settle the problem, Congress turned to a federal compensation remedy and passed the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1958). Under this Act, on the land side of the line established in Jensen, state compensation would be available; on the water side of the line, federal compensation would be available.
80312 U.S. 383, 392 (1940).
81Kelley v. Washington, 302 U.S. 1, 10 (1937).
the Admiralty Extension Act does not preempt state law. Accordingly, states may exercise their police powers, as Florida did, to enact statutory schemes to govern ship-to-shore torts such as oil pollution. States may now cleanup their waters and recover their costs at least within federal limits so far as vessels are concerned.

The Supreme Court did not specifically answer the broad underlying issue of whether the paramount right of control over the territorial sea lies in the federal government or the states. In regard to this unanswered issue does Askew support the federal theory or the state theory? One view is that Askew supports the federal theory. The State of Florida could regulate ship-to-shore pollution only because the WQIA impliedly provided that the states could act in this area. Florida had authority to regulate the territorial sea only because Congress impliedly gave this right to the states. By appropriate congressional action this right could be removed from the states. The other view is that Askew recognized the validity of the state theory. The WQIA recognized a right that has always existed in the states; it did not grant any new rights to the states. The Supreme Court noted that the major concern was with the prevention and cleanup of marine oil pollution, even at the risk of destroying federal uniformity of maritime law. States have always had this right and it cannot be taken away by the federal government.

IV. FEDERAL LEGISLATION SINCE ASKEW

Congress has recently enacted three statutes which deal with the relationship between federal and state governmental powers in the territorial zone. The Federal Water Pollution Control Act Amendments of 1972 supports the Supreme Court decision in Askew. This Act specifically allows states to impose higher standards of care for control of water pollution, than the federal standards and requirements imposed by this Act. The congressional purpose behind this Act was to encourage compacts between the states in order to develop a uniform system of law for the prevention and control of pollution.

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84 Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). The Admiralty Extension Act extended the admiralty tort jurisdiction only to ship-caused injuries on a pier; ship-to-shore injuries are under state jurisdiction.

85 Currently, it is not clear whether the WQIA overrides the Limitation of Liability Act, 46 U.S.C. §§ 181-89 (1970). This Act limits the liability of owners of vessels to the value of the vessel and freight pending. It should be noted that this Act does not affect the liability of owners of terminal facilities. The Solicitor General has stated that the Limitation of Liability Act, so far as vessels are concerned, would override the Florida Act. However, the Court in Askew refused to decide whether the amounts Florida could recover were limited to those specified in the WQIA and whether in turn the WQIA removed the pre-existing limitations of liability in the Limitation of Liability Act.


87 Id. § 1370.

88 Id. § 1253(a). Under this Act, the States are to lead the national effort to prevent and control water pollution. The federal role was limited to that of supporting and assisting the States. See S. REP. NO. 414, 92d Cong., 2d Sess. 2 (1972).
The Marine Protection, Research, and Sanctuaries Act of 1972,\(^9\) takes a somewhat different approach. Instead of providing for concurrent control between the various states and the federal government, this Act provides, “no State shall adopt or enforce any rule or regulation relating to any activity regulated by this subchapter.”\(^9\) Therefore, with regards to the dumping of materials\(^8\) into ocean seas lying seaward of the international baseline, the federal government has exclusive control. However, this Act does not regulate oil or sewage from vessels\(^8\) and does not regulate the dumping of fish wastes.\(^4\)

The third Act is the Coastal Zone Management Act of 1972. This Act is designed to encourage and assist the states in the development and implementation of management programs for the territorial zone.\(^6\) This assistance is to be in the form of grants to aid in development and administrative costs for these programs.\(^6\) In order to receive one of these grants a state’s management plan must meet federal requirements and be approved by the Secretary of Commerce.\(^7\) It is not mandatory that state management plans follow federal requirements. This is found in the language of the Act which states:

(e) Nothing in this chapter shall be construed:

1. to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters.

(f) ... nothing in this chapter shall in any way affect any requirement (1)...

\(9\)Id. § 1416(d). The federal government will regulate the dumping and transportation for dumping of waste and material in ocean-waters beyond the territorial jurisdiction of the United States over which it may exercise control under accepted principles of international law. S. REP. NO. 451, 92d Cong., 2d Sess. 1 (1972). However, the Ocean Dumping Act does not extend federal authority over the deposit of oyster shells or other materials pursuant to a state program for the purpose of developing, maintaining or harvesting fisheries resources. 33 U.S.C. § 1402(f) (Supp. II, 1972).
\(10\)Id. § 1402(c).

"Material" means matter of any kind or description, including, but not limited to, dredged material, solid waste, incinerator, residue, garbage, sewage, sewage sludge, munitions, radiological, chemical, and biological warfare agents, radioactive materials, chemicals, biological and laboratory waste, wreck or discarded equipment, rock, sand, excavation debris, and industrial, municipal, agricultural, and other waste; but such term does not mean oil within the meaning of section 11 of the Federal Water Pollution Control Act and does not mean sewage from vessels within the meaning of section 13 of such Act.

\(11\)Id.
\(12\)Id. § 1412(d).

No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or enclosed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location.

\(14\)Id. § 1452(b). Congress did not intend to preempt state authority. S. REP. NO. 753, 92d Cong., 2d Sess. 1 (1972).
\(15\)Id. §§ 1454 - 1455. These grants may be made in an amount up to 66 2/3 percent of the costs incurred by the State.
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established by the Federal Water Pollution Control Act, as amended . . . or
(2) established by the Federal Government or by any state or local government
pursuant to such Acts.68

Although states are not required to follow federal requirements in developing
management plans, unless federal requirements are followed no grant will be
issued. Since development and administration of such plans require large ex-
penditures, the states are left with little alternative but to follow federal require-
ments. Developing plans for management of the territorial zone is important
and cannot be discarded. States must either find their own source of funds or
follow federal guidelines in order to fund these plans.

In summary, these three statutes recognize that states have concurrent pow-
ers of control over the territorial zone. In none of these statutes does the federal
government preempt the right of control of the territorial zone for exclusive
federal domain. But in an effort to impose exclusive federal control on this
area, Congress has offered federal money to entice states to follow federal
standards.

The Federal Water Pollution Control Act Amendments of 1972 and the
Coastal Zone Management Act of 1972 are, in effect, a statutory enactment
of the holding in Askew. However, Congress has been unwilling to extend the
holding in Askew beyond the territorial jurisdiction of the States. To date there
has been no judicial determination of whether Askew will be extended beyond
to three mile territorial limit of the States. Therefore, the present status of the
law appears to be that the federal government has exclusive dominion and
power of control beyond the three mile State limit.

V. RECOGNITION OF A TWELVE MILE LIMIT

In all likelihood, the United States will soon adopt a twelve mile territorial
limit. A twelve mile limit for territorial waters may be adopted on an interna-
tional basis as early as the summer of 1974 at the Law of the Sea Conference.

The question of ownership of this nine mile extension will be of great eco-
nomic significance. Superports and offshore power plants are proposed for sites
within the extended areas. Licensing the proposed new uses and the exploitation
of mineral resources found in the submerged lands of this area will mean
tremendous amounts of revenue for the owner. Conflict between federal and
state claims can be expected.

One approach to this conflict would be an extension of the holding of
Askew.100 Proposed new ocean uses such as superports and offshore power

68Id.
69Id. § 1456.
100At present the Court has not considered the issue of extending the Askew holding beyond the
three mile territorial zone. Cf. Union Oil Company of California v. Minier, 437 F.2d 408 (9th Cir.
1970). The Court of Appeals of the Ninth Circuit affirmed an injunction to cease the efforts by
the District Attorney of Santa Barbara County to stop the development by oil companies on the
Outer Continental Shelf. The Court acknowledged that the federal government is authorized to
systems threaten possible harm to state interests. To protect their interests, the states should have authority to prevent uses or consequences hostile to those interests. However, authority must be found to regulate these new uses.

Upon acceptance of a twelve mile limit to the territorial sea, Congress should act to transfer authority to the states to license and control activity in the extended territorial zone. This state authority need not conflict with federal maritime regulations. The need for extended state ownership and control can be seen by examining the proposed new uses. For example, a deep water superport located ten miles off the coast would require a pipeline to an inland refinery. As authority is now allocated between the federal government and the states, a pipeline would be controlled by the state for the first three miles and by the federal government for the last seven miles. Any conflict in regulations might lead to inconsistent demands being made on the construction of a pipeline. Although this is only one example, it demonstrates the need for uniform control by one governmental body. Because the states already control the area out to three miles, because the land-based support system will be located in the states and because the states governments are responsive to local concerns, Congress should extend state authority to the twelve mile limit, if Congress recognizes the extended territorial sea.

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