CHAPTER FOUR:

TOWARD COOPERATIVE MANAGEMENT OF
OCEAN AND COASTAL RESOURCES

I. Jurisdictional Zones and Boundaries

Resource managers and planners today support theories of ecosystem management and comprehensive planning, rather than single species management or planning that does not consider the broad aspects of development and implementation. Unfortunately, our institutions, agencies, and laws have evolved in a manner that often frustrates attempts to approach management of coastal and ocean resources in a coherent and cooperative fashion. Rather than dealing directly with the issue of cooperative management of ocean and coastal resources that are of significance to both the state and federal governments, battles have been waged for more than forty years over proprietary interests and preemption. Immeasurable funds and resources have been expended in endless controversies over ownership, jurisdiction, and boundaries.

Understanding the evolution of governmental relationships in the coastal zone requires some familiarity with international law concepts of ocean jurisdictional zones and a look at the historical "proprietary" interests of the state and federal governments in the coastal zone. As in the case of the dividing line between state and private ownership, the boundary is not the ultimate arbiter of rights or authority. It is only a starting point in the analysis.

A. Jurisdictional Zones and the Law of the Sea

The modern law of the sea is said to have begun in 1945. Prior to that time, only limited jurisdictional claims were made over ocean space or resources. Most countries' offshore claims were limited to three-mile territorial seas. However, the United States' claim to sovereignty over the adjacent continental shelf started what has come to be known as the "ocean enclosure movement."

The 1945 Truman Proclamation on the Continental Shelf stated:

"Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and
the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

A White House press release issued the same day, September 28, 1945, contained the following commentary:

. . . .

"The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint. It will, however, make possible the orderly development of an underwater area 750,000 square miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf."

. . . .

Although the United States claim to the continental shelf had no basis in international law, there was little international objection to the claim, and the Proclamation became the starting point of the international law of the continental shelf.

During the 1950s, international offshore claims proliferated and codification of the law of sea became a goal of nations. The First United Nations Conference on the Law of the Sea in 1958 produced treaties on the territorial sea and contiguous zone, the continental shelf, the high seas, and high seas fisheries. Although these treaties were widely accepted as codifying international law, major issues, such as the allowable breadth of territorial sea and continental shelf claims, were not adequately addressed. The treaties were also inadequate to deal with the growing stresses on fisheries stocks and the environment. A second conference in 1960 failed to resolve these boundary issues.

The Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened in 1973, although preparations for negotiation of a single, comprehensive treaty on the law of the sea had been in progress since 1970. After a decade of negotiations and consensus building, the 1982 Law of the Sea Convention (LOSC) was adopted by a vote of 130 to four, with seventeen abstentions. The United States voted against the treaty because of disagreement with the provisions for governing the deep seabed beyond coastal state jurisdiction. The treaty, which requires sixty ratifications to come into force, currently has more than forty ratifications.

Even if the LOSC never comes into force as a multilateral treaty, many of the concepts developed by the treaty negotiators, including a number of jurisdictional concepts, have already passed into the realm of customary international law.
1. The Territorial Sea


A. The International Territorial Sea

The source of the concept of a coastal nation's jurisdiction over its adjacent territorial sea cannot be precisely identified. Cornelius van Bynkershoek, a Dutch jurist, is attributed with originating the "cannon-shot rule" for determining the extent of the territorial sea in the early eighteenth century.¹ Cannon-shot range was later equated by the Italian publicist, Galiani, with a distance of three miles or a marine league.² Thomas Jefferson's diplomatic notes in 1793 to the French and British ministers provide the first records of United States claim to a three-mile territorial sea.²

During the nineteenth and twentieth centuries, Great Britain and the United States became known as the "champions of the three-mile limit." As maritime powers, these countries sought to preserve the freedoms of the high seas³ and limit expansive coastal state claims which would encroach on the high seas.

¹(n.6) *See also*, S. Swartzrauber, *The Three-Mile Limit of Territorial Seas* 28-30 (1972). Bynkershoek's theory, as set out in his 1702 dissertation, *Dominion of the Sea*, was that control of the land over the sea should extend only so far as possession could be defended and maintained, i.e., to the distance a cannonball would carry.

²(n.8) The notes provisionally extended the "territorial protection of the United States" to "one sea league or three geographic miles from the seashore." Jefferson specifically reserved "the ultimate extent of [the territorial limit] for future deliberation." S. Swartzrauber, at 56-57.

Following World War II, preservation of a three-mile limit became a major national security issue for the United States. Submarine-based missiles are a major element of the United States system of deterrence. The effectiveness of this system is compromised, however, if restrictions on territorial sea transit, especially passage through international straits, require permission of the coastal nation or surfacing of submarines. Extension of jurisdiction from three miles to twelve miles brings approximately 135 international straits within territorial waters.

The 1958 Convention on the Territorial Sea and Contiguous Zone not only failed to limit territorial sea claims to three miles, but also did not foreclose the possibility of coastal states requiring notice and authorization for warships to pass through territorial seas. Innocent passage through territorial seas did not include subsurface navigation of submarines or overflight of aircraft.

By 1965, only thirty-two of 107 coastal nations continued to limit territorial sea claims to three miles. By the time the Third United Nations Conference on the Law of the Sea (UNCLOS III) convened in 1973 to develop a comprehensive oceans treaty, only twenty-five countries asserted three-mile claims; of the eighty-six coastal countries claiming more than three miles, fifty-six claimed a twelve-mile territorial sea. At the conclusion of UNCLOS III negotiations in 1982, seventy-seven of 135 nations claimed twelve-mile territorial jurisdiction, and only twenty-four maintained a three-mile claim.

The United Nations Convention on the Law of the Sea (LOS Convention) developed by UNCLOS III recognizes the right of coastal countries to claim a twelve-mile territorial sea. The provisions of the LOS Convention attempted to mitigate the impact of twelve-mile territorial seas on navigation, however, by providing for transit passage through international straits. A right of transit passage through straits used for international navigation between areas of high seas or exclusive economic zones includes overflight and submerged navigation of submarines, but requires continuous and expeditious passage complying with international regulations for safety and pollution control.

The United States has neither signed nor ratified the LOS Convention. However, on December 27, 1988, President Reagan announced the extension of the United States territorial sea to twelve miles. The proclamation provides that "[i]n accordance with international law, as reflected in the . . . 1982 United Nations Convention on the Law of the Sea," the United States will recognize a right of transit passage by ships of all countries through international straits. The

*(n.18)The 1958 convention did not resolve the issue of the width of the territorial sea. The convention did limit the combined territorial sea and adjacent contiguous zone to a width of twelve miles. TS Convention, art. 24(2).
proclamation also purports to apply only to the United States' posture internationally and to do nothing to alter domestic law.

2. The Contiguous Zone

Beyond the territorial sea, an additional zone may be claimed by a coastal nation to prevent infringement of sanitary, fiscal, customs, and immigration. The 1958 Convention on the Territorial Sea and Contiguous Zone, to which the United States is a party, allows a country to claim a contiguous zone beyond territorial waters to twelve miles from the shore. The 1982 LOSC allows a contiguous zone to be claimed up to twelve miles beyond the territorial sea boundary, i.e., out to twenty-four miles from shore if a twelve mile territorial sea is claimed. The United States claimed a nine mile contiguous zone prior to the 1988 extension of the territorial sea from three to twelve miles. Apparently, the contiguous zone is now subsumed in the territorial sea claim, because no additional claim to a contiguous zone has been made by the United States.

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Figure 2. Offshore Jurisdictional Zones
3. The Continental Shelf

Although the 1945 Truman Proclamation claimed a geologic feature, the natural prolongation of the land territory, as the nation’s continental shelf, the phrase has since become a term of art. By the time the 1958 Convention on the Continental Shelf was adopted, countries were skeptical about restricting claims to shelf resources. Rather than limit the continental shelf to a distance or a depth, the 1958 Convention recognized inherent exclusive rights to the 200 meter isobath or to the limits of exploitability of the seabed.

The 1982 LOSC contains a complicated formula for calculating the extent of a continental shelf claim. A continental shelf may be claimed to 200 miles from shore, or to the extent of the continental margin (the actual submerged land prolongation) whichever is further. The maximum seaward extent of the continental shelf is 350 miles or within 100 miles of the 2,500 meter isobath.

The United States, a party to the 1958 Convention, has placed no specific limit on its continental shelf claim by decree or statute.

4. Fisheries Zones and Exclusive Economic Zones

Prior to the convening of UNCLOS III, exclusive coastal state fisheries jurisdiction had been limited to a maximum of twelve miles by customary law. In most cases, this was coterminous with the territorial sea. Concern for the decimation of high seas fisheries and the economies and needs of adjacent coastal states led to early agreement in UNCLOS III negotiations concerning coastal state jurisdiction over economic and resource exploitation of the area to 200 miles offshore in the form an exclusive economic zone (EEZ).

In 1976, the United States passed the Fishery Conservation and Management Act (FCMA) extending an exclusive fishery conservation zone from three to 200 miles offshore. On March 10, 1983, President Reagan proclaimed a 200 mile exclusive economic zone based on customary international law. The FCMA was subsequently amended to replace the fishery zone claim with the EEZ designation.

Within the EEZ, the 1982 LOSC recognizes exclusive coastal states rights to: control and exploitation of living and nonliving resources; control of other economic exploitation of the EEZ, e.g., winds, currents, or thermal gradients; control of artificial islands and structures; "regulate, authorize and conduct" marine scientific research; and regulate pollution from seabed activities.

5. The High Seas

The high seas are the waters beyond national jurisdiction in which no nation can assert sovereignty. Both the 1958 Convention on the High Seas and the 1982 LOSC contain nonexclusive lists of the freedoms of the high seas. Both included the
freedoms of navigation, overflight, fishing, and laying submerged lines and cable. The LOSC also specifically includes freedom of marine scientific research and construction of artificial islands and installations. The LOSC contains the restriction that the freedoms "shall be exercised with reasonable regard to the interests of other states."

6. The International Seabed Area

The seabed beyond the continental shelf is the international seabed area or deep seabed. The 1982 LOSC declares this area to be the common heritage of mankind. If the resources of the international seabed are res communes, they are not subject to unilateral appropriation, but are to be exploited only to further common goals. If the seabed is res nullius, as claimed by the United States and others, the resources are may be appropriated by the first to establish effective occupation.

NOTES

1. Waters within bays, the mouths of rivers, and between fringe islands and the coast are internal or inland waters, not part of the territorial sea. The limit of the territorial sea must be measured from closing lines, not from the low water line. The figures below, adapted from Shalowitz, Boundary Problems Raised by the Submerged Lands Act, 54 COLUM. L. REV. 1021 (1954), illustrate some of the terminology and definitions involved in territorial sea delimitation.

![Figure 3. Marine Boundary Terminology](image-url)
The United States Supreme Court has adopted the Convention on the Territorial Sea and Contiguous Zone's semi-circle, twenty-four mile closing line rule for defining a bay. [Art. 7(4)] In order to qualify as a bay, a body of water must have an area larger than a semicircle, the closing line of the bay representing the diameter. In no event, however, can the closing line be more than twenty-four miles. In the diagram below, coastline B represents a true bay. Coastline C only has an indentation that does not constitute a bay.

![Diagram of an Open and Closed Bay](image)

Figure 4. An Open and Closed Bay

Historic bays are an exception to the 24-mile closing line/semicircle rule. In *United States v. Louisiana*, 394 U.S. 11 (1969), the Supreme Court set out the test for a historic bay:

- continuous exercise of authority and dominion over the area claimed . . . , [and]
- acquiescence by foreign nations.

See also *United States v. Alaska*, 422 U.S. 184 (1975).
Note that the territorial sea is not measured by a line running parallel to the coast, but is enclosed by an "envelope of arcs." This envelope of arcs method assures that the territorial sea boundary is always three miles from the nearest point on the coastline.

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Figure 5. The Principle of the Envelope of Arcs

B. The Tidelands Controversy

The popular name given to the dispute between the federal and state governments over the control of the land, water and resources of the territorial sea, the Tidelands Controversy, is technically a misnomer. As the cases in Chapter Two indicate, there has been no question concerning state ownership of the wet sand area, the area between the low and high tide lines. The major dispute that arose in the late 1930s and 1940s involved the lands seaward of the low tide mark.

Christie, State Historic Interests in the Marginal Seas, 2 Terr. Sea J. ___ (publication pending).

II. The Tidelands Controversy

A. Background of the Federal/State Offshore Ownership Controversy

In Martin v. Waddell, the United States Supreme Court articulated the basic principles governing the ownership of lands under navigable waters: "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their common use, subject only to the rights surrendered by the Constitution to the general Government." The "equal footing doctrine," first explained in Pollard v. Hagan and reiterated in Shively v. Bowlby, stood for the principle that "new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions." Until the 1940s, little doubt seemed to exist that the coastal states "owned" the lands under their territorial seas, which were presumed to be encompassed within the definitions of navigable waters or tide waters.

Prior to 1940, most coastal states had legislation establishing offshore marine boundaries,¹ and many state constitutions described state boundaries as extending a marine league or more offshore. Numerous state court cases had early concluded that the original colonies succeeded to the King's interest in the tidelands and adjacent seas and, therefore, title vested in the original colonies. Decisions of federal courts, including the United States Supreme Court, impliedly, if not expressly, supported the presumption of state ownership of the seabed of the territorial sea. The Secretary of the Interior Harold L. Ickes, charged with administering United States public lands, stated that the federal government had no

¹See generally Ireland, Marginal Seas Around the States, 2 L.A. L. Rev. 252, 283-293, 436-476 (1940) [hereinafter Ireland]. Ireland reviews the claims and law of each coastal state in this comprehensive work.
authority to lease the seabed for mineral exploration. In the now famous 1933 Proctor Letter, Ickes explained to a lease applicant that "title to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State."

In the late 1930s, controversies emerged within California concerning oil recovered from submerged lands by slant drilling from shore and ownership of mineral rights in submerged lands granted by the state to coastal cities for harbor and recreational development. Apparently instigated by Secretary Ickes and fired by the oil industry and vocal individuals from California interested in settling the offshore ownership issue, Congress in 1938 began a series of hearings and attempted resolutions addressing federal interests in the tidelands. These efforts culminated in 1946 in House Joint Resolution 225, which quitclaimed any rights of the federal government in lands beneath tidelands and navigable waters to the states. President Truman vetoed the resolution on August 2, 1946, citing the fact that the issue was currently before the Supreme Court in United States v. California. President Truman stated in his veto message:

[T]he issue now before the Supreme Court . . . presents a legal question of great importance to the Nation, and one which should be decided by the Court. The Congress is not an appropriate forum to determine the legal issue now before the Court. The jurisdiction of the Supreme Court should not be interfered with while it is arriving at its decision in the pending. 2

As one commentator remarked, the "failure of Congress to override the veto . . . shifted a vexed political question to the Supreme Court."

UNITED STATES v. CALIFORNIA
332 U.S. 19 (1947)

The United States by its Attorney General and Solicitor General brought this suit against the State of California invoking our original jurisdiction under Article III, sec. 2, of the Constitution which provides that "In all Cases . . . in which a State shall be party, the Supreme Court shall have original Jurisdiction." The complaint alleges that the United States "is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the

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coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California." It is further alleged that California, acting pursuant to state statutes, but without authority from the United States, has negotiated and executed numerous leases with persons and corporations purporting to authorize them to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and that the lessees have done so, paying to California large sums of money in rents and royalties for the petroleum products taken. The prayer is for a decree declaring the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

California has filed an answer to the complaint. It admits that persons holding leases from California, or those claiming under it, have been extracting petroleum products from the land under the three-mile ocean belt immediately adjacent to California. The basis of California's asserted ownership is that a belt extending three English miles from low water mark lies within the original boundaries of the state, Cal. Const. Art.XII (1849); that the original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal footing" with the original states, California at that time became vested with title to all such lands. The answer further sets up several "affirmative" defenses. Among these are that California should be adjudged to have title under a doctrine of prescription; because of an alleged long-existing Congressional policy of acquiescence in California's asserted ownership; because of estoppel or laches; and, finally, by application of the rule of res judicata.

The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it. In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.
At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See The Queen v. Keyn, 2 Ex. D. 63. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. And this assertion of national dominion over the three-mile belt is binding upon this Court.

Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty. The belief that local interests are so predominant as constitutionally to require state dominion over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean's bottom. This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations. The country's adoption of the three-mile belt is by no means incompatible with its traditional insistence

\[\text{(n.16) Secretary of State Jefferson in a note to the British minister in 1793 pointed to the nebulous character of a nation's assertions of territorial rights in the marginal belt, and put forward the first official American claim for a three-mile zone which has since won general international acceptance. Reprinted in H. Ex. Doc. No. 324, 42d Cong., 2d Sess. (1872) 553-554. See also Secretary Jefferson's note to the French Minister, Genet, reprinted in American State Papers, I Foreign Relations (1833), 183, 184; Act of June 5, 1794, 1 Stat. 381; 1 Kent, Commentaries, 14th Ed., 33-40.}\]
upon freedom of the sea, at least so long as the national Government's power to
exercise control consistently with whatever international undertakings or
commitments it may see fit to assume in the national interest is unencumbered. The
three-mile rule is but a recognition of the necessity that a government next to the
sea must be able to protect itself from dangers incident to its location. It must have
powers of dominion and regulation in the interest of its revenues, its health, and the
security of its people from wars waged on or too near its coasts. And insofar as the
nation asserts its rights under international law, whatever of value may be discovered
in the seas next to its shores and within its protective belt, will most naturally be
appropriated for its use. But whatever any nation does in the open sea, which
detracts from its common usefulness to nations, or which another nation may charge
detracts from it, is a question for consideration among nations as such, and not their
separate governmental units. What this Government does, or even what the states
do, anywhere in the ocean, is a subject upon which the nation may enter into and
assume treaty or similar international obligations. The very oil about which the state
and nation here contend might well become the subject of international dispute and
settlement.

The ocean, even its three-mile belt, is thus of vital consequence to the nation in
its desire to engage in commerce and to live in peace with the world; it also
becomes of crucial importance should it ever again become impossible to preserve
that peace. And as peace and world commerce are the paramount responsibilities
of the nation, rather than an individual state, so, if wars come, they must be fought
by the nation. The state is not equipped in our constitutional system with the
powers or the facilities for exercising the responsibilities which would be concomitant
with resources which might be of national and international importance.

The question of who owned the bed of the sea only became of great potential
importance at the beginning of this century when oil was discovered there. As a
consequence of this discovery, California passed an Act in 1921 authorizing the
granting of permits to California residents to prospect for oil and gas on blocks of
land off its coast under the ocean. This state statute, and others which followed it,
together with the leasing practices under them, have precipitated this extremely
important controversy, and pointedly raised this state-federal conflict for the first
time. Now that the question is here, we decide for the reasons we have stated that
California is not the owner of the three-mile marginal belt along its coast, and that
the Federal Government rather than the state has paramount rights in and power
over that belt, an incident to which is full dominion over the resources of the soil
under that water area, including oil.

We hold that the United States is entitled to the relief prayed for.
C. Interpretations of United States v. California

1. The Texas and Louisiana Cases

On the heels of the U.S. v. California holding, the United States brought suit against both Texas and Louisiana on the basis that the broad principles of the case also dictated federal ownership or control of the oil fields of the Gulf of Mexico. The Louisiana case, with little to distinguish its history from California, was found to be controlled by United States v. California. The Court reiterated that "[t]he marginal sea is a national, not a state concern. . . . National interests, national responsibilities, and national concerns are involved. . . . National rights must therefore be paramount in that area."

The Texas case, however, presented a clearly unique circumstance because of its preadmission history. Unlike California or Louisiana, which had "never acquired ownership in the marginal sea," Texas, as a sovereign republic prior to annexation, had established a boundary and dominion extending three-marine leagues into the Gulf of Mexico which had never been transferred to the United States. Texas argued that these differences necessitated a different result.

But the Court had set the stage for the Texas judgment in the Louisiana case when it stated that "the issue in this class of litigation does not turn on title or ownership in the conventional sense." The Court, instead, disposed of the case through a "converse" application of the equal footing doctrine. Even assuming that Texas as an independent Republic had full dominion to the three-league sea, the Court found that the equal footing clause "negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State." In order for Texas to become "a sister State on 'equal footing' with all the other States . . . entailed a relinquishment of some of her sovereignty." The relinquishment of "any claim that Texas may have had to the marginal sea" was held by the Court to be incidental to the transfer of Texas' external sovereignty to the United States.

In addressing the sovereignty/property issue that had also been raised in Frankfurter's dissent in California, the Court stated that in the "international domain" beyond the low water mark: "Property rights must . . . be so subordinated to political rights as in substance to coalesce and unite in the national sovereign."

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2. Congress

The Senate Judiciary Committee of the Eightieth Congress was given the task of examining the Supreme Court's handiwork in the *California* case. In hearings, the Committee heard testimony that variously described the case as "extraordinary and unusual," 'creating an estate never before heard of,' 'a reversal of what all competent people believed the law to be,' 'creating a new property interest,' 'a threat to our constitutional system of dual sovereignty,' 'a step toward the nationalization of our natural resources,' [and] 'causing pandemonium.' The Committee Report concluded that the "decision not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be."

In addition, the Committee was completely perplexed as to the meaning of the "paramount rights" in the territorial sea that the Court had attributed to the federal government. The Committee was "unable to determine whether or not the Supreme Court held that the United States has actual title in and to the submerged coastal lands adjacent to California . . .." If neither the United States nor California was the owner of the marginal sea, the Committee "deem[ed] it imperative that Congress take action at the earliest possible date to clarify the endless confusion and multitude of problems resulting from the California decision . . .."

In the Eightieth Congress in 1948, five measures concerning the marginal sea were introduced and one resolution quitclaiming federal territorial sea interests passed the House. The first session of the Eighty-first Congress in 1949 saw even more legislation introduced, but in the 1950 session, legislators seemed to be awaiting the Supreme Court's disposition of the Texas and Louisiana cases. The holdings instigated a flurry of activity in the Eighty-second Congress which culminated in quitclaim legislation passed in May 1952. President Truman again vetoed the quitclaim, calling the bill "robery in broad daylight—and on a colossal scale." The Senate did not attempt to override the veto.

Spurred by the election campaign pledge of President Eisenhower to sign legislation returning offshore lands to the states, legislators introduced almost fifty resolutions in 1953. On May 22, 1953, Congress, passed the Submerged Lands Act (SLA), quitclaiming to the coastal states all federal proprietary rights in the territorial sea and confirming federal government rights in the seabed and subsoil beyond that.

C. The Submerged Lands Act

Through the SLA, Congress accomplished three objectives: it established state title to the territorial sea; it delimited state ocean boundaries; and it reserved federal rights both within and beyond state territorial limits.
THE SUBMERGED LANDS ACT of 1953
43 U.S.C. §§ 1311-1314

Section 1311. Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is hereby 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 right 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 hereby, 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) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases. (1) The United States hereby 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 hereby 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; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act [enacted May 22, 1953], except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

Section 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing
the existence of any State's seaward boundary beyond three geographical miles if it was
so provided by its constitution or laws prior to or at the time such State became a
member of the Union, or if it has been heretofore approved by Congress. (Emphasis
added.)

Section 1314. Rights and powers retained by the United States; purchase of natural
resources; condemnation of lands.

(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, 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 3 of this Act [43 U.S.C. § 1311].

(b) In time of war or when necessary for national defense, and the Congress or
the President shall so prescribe, the United States shall have the right of first refusal
to purchase at the prevailing market price, all or any portion of the said natural
resources, or to acquire and use any portion of said lands by proceeding in
accordance with due process of law and paying just compensation therefor.

UNITED STATES v. FLORIDA
363 U.S. 121 (1960)

This controversy involves the interests of all five Gulf States—Florida, Texas,
Louisiana, Mississippi and Alabama—in the submerged lands off their shores. The
Court heard the claims together, but treats them in two opinions. This opinion deals
solely with Florida's claims. The result as to the other States is discussed in [a
separate] opinion. All the claims arise and are decided under the Submerged Lands
Act of 1953.

The Act granted to all coastal States the lands and resources under navigable
waters extending three geographical miles seaward from their coastlines. In addition
to the three miles, the five Gulf States were granted the submerged lands as far out
as each State's boundary line either "as it existed at the time such State became a
member of the Union," or as previously "approved by Congress," even though that
boundary extended further than three geographical miles seaward. But in no event
was any State to have "more than three marine leagues into the Gulf of Mexico."
This suit was first brought against Louisiana by the United States, invoking our original jurisdiction under Art. III, 2, cl. 2, of the Constitution, to determine whether Louisiana's boundary when it became a member of the Union extended three leagues or more into the Gulf, as Louisiana claimed, so as to entitle it to the maximum three-leagues grant of the Submerged Lands Act. After argument on the Government's motion for judgment against Louisiana, we suggested that the interests of all the Gulf States under the Act were so related, "that the just, orderly, and effective determination" of the issues required that all those States be before the Court. All are now defendants, each has claimed a three-league boundary and grant, which the United States denies, and the issues have been extensively briefed and argued by the parties. As stated, this opinion deals only with the United States-Florida controversy.

Florida contends that the record shows it to be entitled under the Act to a declaration of ownership of three marine leagues of submerged lands, because (1) its boundary extended three leagues or more seaward into the Gulf when it became a State, and (2) Congress approved such a three-league boundary for Florida after its admission into the Union and before passage of the Submerged Lands Act. Since we agree with Florida's latter contention, as to congressional approval, we find it unnecessary to decide the boundaries of Florida at the time it became a State.

Florida claims that Congress approved its three-league boundary in 1868, by approving a constitution submitted to Congress as required by a Reconstruction Act passed March 2, 1867. 14 Stat. 428. That constitution carefully described Florida's boundary on the Gulf of Mexico side as running from a point in the Gulf "three leagues from the mainland" and "thence northwestwardly three leagues from the land" to the next point. The United States concedes that from 1868 to the present day Florida has claimed by its constitutions a three-league boundary into the Gulf. The United States also admits that Florida submitted this constitution to Congress in 1868, but denies that the Gulf boundary it defined was "approved" by Congress within the meaning of the Submerged Lands Act. This is the decisive question as between Florida and the United States.

The 1868 Florida Constitution was written and adopted by Florida pursuant to the congressional Act of March 2, 1867 as supplemented by a second Act of March 23, 1867.

... Congress not only approved Florida's Constitution which included three-league boundaries, but Congress in 1868 approved it within the meaning of the 1867 Acts.

The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States' Reconstruction Constitutions were examined. We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this constitution was examined and approved as a whole, regardless
of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this. Moreover, the Hearings and the Reports on the Submerged Lands Act show, as the Government's brief concedes, that those who wrote into that measure a provision whereby a State was granted up to three leagues if such a boundary had been "heretofore approved by Congress," had their minds specifically focused on Florida's claim based on submission of its 1868 Constitution to Congress. When Florida's claims were mentioned in the hearings it was generally assumed that Congress had previously "approved" its three-league boundaries. The Senate Report on a prior bill, set forth as a part of the report on the 1953 Act, pointed out that "In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico." S. Rep. No. 133, 83d Cong., 1st Sess. 64-65. The language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida. Upon proof that Florida's claims met the statutory standard—"boundaries . . . heretofore approved by the Congress"—the Act was intended to "confirm" and "restore" the three-league ownership Florida had claimed as its own so long and which claim this Court had in effect rejected in United States v. Texas, 339 U.S. 707; United States v. Louisiana, 339 U.S. 699; and United States v. California, 332 U.S. 19. As previously shown, Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores. And, as we have held, the 1953 Act was within the power of Congress to enact.

We therefore deny the United States' motion for judgment. We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution. The cause is retained for such further proceedings as may be necessary more specifically to determine the coastline, fix the boundary and dispose of all other relevant matters. The parties may submit an appropriate form of decree giving effect to the conclusions reached in this opinion.

It is so ordered.

NOTES

1. The Submerged Lands Act of 1953 was the Congressional response to United States v. California and its progeny. Although the Act declared state ownership of the submerged lands and resources within three miles of the coast, it by no means ended the federal-state conflict in the marginal seas. Note that the federal grant to the states took the form of a "quitclaim" and was without prejudice to state claims beyond three miles. Rather than finally settling the issue of the state-federal boundary, the Submerged Lands Act signaled the beginning of another series of disputes concerning state claims beyond three miles.
The first series of cases involved the states bordering the Gulf of Mexico. Only Florida and Texas established the right to a three league boundary. The Supreme Court rejected the claims of Mississippi, Alabama and Louisiana to territorial seas beyond three miles.

2. The 1960 Florida boundary case, supra, settled only the Florida boundary in the Gulf of Mexico. In the 1970s, Florida and the other Atlantic states asserted claims beyond 3-miles in the Atlantic Ocean. In United States v. Maine, 420 U.S. 515 (1975), the Supreme Court rejected the claims of the states that made up the original thirteen colonies. Florida's claim was also rejected, United States v. Florida, 420 U.S. 531 (1975), resulting in Florida having a three-mile territorial sea in the Atlantic Ocean and a three-league territorial sea in the Gulf of Mexico. The final issue to be resolved, of course, was to determine where the Atlantic ends and the Gulf begins.

UNited States v. Florida
425 U.S. 791 (1976)

Decree

The joint motion for entry of a decree is granted.

For the purpose of giving effect to the decision and opinion of this Court announced in this case on March 17, 1975, 420 U.S. 531, and to the Supplemental Report of the Special Master filed January 26, 1976, it is ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As against the State of Florida, the United States is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean more than 3 geographic miles seaward from the coastline of that State and extending seaward to the edge of the Continental Shelf, and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "coastline" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, as determined under the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606.

2. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of 3 geographic miles, and the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. § 1313.
3. As against the State of Florida, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the coastline of that State; the State of Florida is not entitled to any interest in such lands, minerals, and resources. Where the historic coastline of the State of Florida is landward of its coastline, the United States is additionally entitled, as against the State of Florida, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the State’s historic coastline (but not less than 3 geographic miles from its coastline), and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "historic coastline" refers to the coastline as it existed in 1868, as to be determined by the parties.

4. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline; the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. § 1313.

5. For the purpose of this decree, the Gulf of Mexico lies to the north and west, and the Atlantic Ocean to the south and east, of a line that begins at a point on the northern coast of the island of Cuba in 83 degrees west longitude, and extends thence to the northward along that meridian of longitude to 24 degrees 34’ north latitude, thence eastward along that parallel of latitude through Rebecca Shoal and the Quicksands Shoal to the Marquesas Keys, and thence through the Florida Keys to the mainland at the eastern end of Florida Bay, the line so running that the narrow waters within the Dry Tortugas Islands, the Marquesas Keys, and Florida Keys, and between the Florida Keys and the mainland, are within the Gulf of Mexico.

6. There is no historic bay on the coast of the State of Florida. There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys, and the lower Florida Keys (from Money Key to Key West), the closing lines of which affect the right of either the United States or the State of Florida under this decree.

7. Jurisdiction is reserved by this Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree.
NOTES

1. Although it is now well settled that the federal government, not the states, "owns" the submerged lands beyond the 3-mile territorial sea, the actual boundary lines are still in dispute. Cases like United States v. Maine, United States v. California, and United States v. Louisiana have continued for decades in an attempt to determine the location of the 3-mile boundary. For states with large oil reserves offshore or with a major interest in inshore fisheries, the determination of the exact extent of state jurisdiction is considered extremely important. Irregular coastlines, bays, rivers and islands created delimitation problems not addressed by the Submerged Lands Act. In order to deal with these issues, the Supreme Court in United States v. California, 381 U.S. 139 (1965), adopted the definitions an international treaty, the Convention on the Territorial Sea and Contiguous Zone, done at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, to deal with the boundary delimitation issues left unresolved by the Submerged Lands Act.

2. The extension of the United States territorial sea to twelve miles has reopened the issue of what should be the extent of state waters and raised a number of new issues. First, does the president have the power to acquire territory and extend United States jurisdiction by proclamation? Does the proclamation affect domestic laws or jurisdiction in spite of the language of in proclamation disclaiming an effect on "existing Federal or State law or any jurisdiction, rights, legal interests, or obligations ..."? What are the reasons why state boundaries should or should not be extended to the international territorial sea boundary? For a complete discussion of many of these issues, see the inaugural issue of the Territorial Sea Journal (1990), which is devoted to issues surrounding the twelve-mile territorial sea extension.

II. Fisheries Management

A. State Fisheries Management

Prior to 1977, states were the primary managers of the country's fisheries. By virtue of the police power, the states regulated fisheries in inland waters and the territorial seas. The landmark case of Skiriotes v. Florida, 313 U.S. 69 (1941), recognized the right of a state to regulate its citizens outside territorial waters. In holding that state regulations on the taking of sponges would apply to a Florida resident even if he were not in territorial waters, the Supreme Court stated:
If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. . . .

A primary means of enforcement of state fisheries laws has been the use of landing laws or the prohibition of the possession of certain gear. In addition to regulating state citizens and other fishermen within the territorial sea, these kinds of laws can have significant impacts on noncitizen fishermen fishing outside the territorial sea. In spite of the extraterritorial impacts, the Supreme Court has, prior to 1977, upheld landing laws when they are necessary for enforcement of fishery management legislation.

The following excerpt provides an overview of state fisheries regulation prior to 1977:


A. State Jurisdiction Over Fisheries Within Territorial Waters

In analyzing the law of fisheries management one initially must determine the sources and extent of state jurisdiction and control over marine fisheries. States historically have asserted claims of control over fisheries located both within and without territorial waters. Prior to 1900, the United States Supreme Court recognized that the states, as sovereign representatives of the people, possessed an ownership interest in fish and wildlife located within their territories. In Missouri v. Holland the Court limited the state ownership doctrine to include only wildlife reduced to actual possession by skillful capture, noting that the claim to title in migratory creatures rested upon a "slender reed."

In 1948 the Supreme Court discarded the concept of "ownership" and described the doctrine as a "fiction," which was utilized to express the states' power to preserve and regulate the exploitation of their natural resources. This power to regulate fishes in territorial waters, the Court stated, was always subject to paramount powers

1(n.10) See, e.g., Geer v. Connecticut, 161 U.S. 519, 528-29 (1896) (the state, as the sovereign representative of its people, has the right to control and regulate, to the maximum extent possible, the common ownership of wildlife); Manchester v. Massachusetts, 139 U.S. 240, 259-60 (1891) (states have an ownership interest in territorial waters and the fish within those waters); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842) (the common ownership interest of New Jersey in marine fisheries within navigable waters was paramount to right of private ownership traceable to a grant by royal charter to the Duke of York).
retained by the federal government. The theory of state ownership resurfaced in 1953, however, with the passage of the Submerged Lands Act, which vested in the states "title to and ownership of . . . natural resources" within their navigable waters and the lands beneath them. Included in this statutory grant was the "right and power to manage, administer, lease, develop and use" the natural resources, which were defined to include fish, shrimp, oysters, and other marine animal and plant life. Subject to the paramount powers of the federal government, the Submerged Lands Act confirmed the ownership interest of the states in the marine resources found within their territorial waters.

B. Extraterritorial State Jurisdiction

In addition to the ownership theory empowering states to manage fisheries within their territorial waters, two legal doctrines establishing the authority of coastal states to regulate and manage marine fisheries located beyond their territorial waters have been recognized. The first doctrine arose from state regulations collectively known as "landing laws." Under such regulations, states may exercise control over fish caught beyond the three mile limit that subsequently are brought within their territorial waters. In the principal case of Bayside Fish Co. v. Gentry the Supreme Court upheld as a valid exercise of the state's police power a California landing law, regulating the processing of sardines, that applied equally to all of those fish regardless of where they were caught. The purpose of the regulation was to prevent a depletion of the local fish supply, and jurisdiction to control the sardines brought into the state was necessary to prevent evasion of this local policy. Because any impact on commerce was incidental and beyond the purposes of the legislation, the Court rejected the argument that the landing law placed an improper burden on interstate commerce. Consequently, justified by conservation enforcement considerations, the states could prohibit possession of fish taken outside their territorial waters and require a permit for any fishing vessel operating within state waters even though its catch may have come from operations conducted wholly outside the state.

The second basis for extraterritorial regulation of marine fisheries is derived from the right of a state to control the conduct of its citizens on the high seas. The Supreme Court relied on this rationale in Skiriotes v. Florida to affirm the conviction of a Florida resident who had used gear prohibited under Florida law to harvest sponges outside the territorial limit of the state's police power over one of its citizens, which was permissible in the absence of any conflict with federal law.

2 (n.24) Generally, landing laws prohibit the possession, sale, or transportation of fish or game within a state if such possession, sale, or transportation violates state law. The prohibition extends to all fish because it is impossible to distinguish between fish caught within or without state territorial waters, and any limitation on the prohibition would render its enforcement ineffective.
Recently, a series of cases arising in Alaska explored a new basis for state extraterritorial jurisdiction over marine fisheries. The controversies involved regulations to control crab fishing in the Bering Sea Shellfish Area, which extends hundreds of miles west of Alaska's shoreline. The regulations provided for the closing of the crab fishing area each year after 23,000,000 pounds of crab had been taken and made it unlawful to possess, transport, buy, or sell additional crabs "taken in any waters seaward of the officially designated as the territorial waters of Alaska." In Hjelle v. Brooks crab fishermen from the state of Washington obtained a preliminary injunction in the United States District Court for the District of Alaska against the enforcement of these regulations on the ground that they unconstitutionally burdened interstate commerce. Because the state purported to exercise direct control over crabs in the entire Bering Sea Shellfish Area, the court rejected Alaska's contention that the regulations were necessary to conserve crab fishing within the state. Although the landing law cases permit a state to regulate extraterritorial conduct to facilitate conservation of a resource clearly within the state, the court distinguished Hjelle from those cases on its facts. Because of the direct extraterritorial effect of the regulations and the absence of a showing that their purpose was to facilitate conservation enforcement within state waters, the court concluded that the plaintiffs were likely to prevail on the merits and issued the preliminary injunction.

Following the Hjelle decision the Alaska Board of Fish and Game repealed the objectionable regulations and issued emergency measures. These provisions established a series of crab fishing closures for designated "statistical areas," each of which consisted of a "registration" area of waters within state jurisdiction and an adjacent seaward "biological influence zone." In State v. Bundrant the Alaska Supreme Court reviewed the convictions of several crab fishermen charged with violating these new regulations. The defendants were of two categories: those charged with illegal possession within the three mile limit of crabs taken on the high seas and those charged with prohibited extraterritorial activities within closed areas located sixteen to sixty miles off the Alaskan coast. Only one of the defendants was an Alaskan resident.

In holding that both categories of defendants were properly charged and subject to state regulation, the Alaska Supreme Court repudiated the analysis of Hjelle and departed from the well-established limits on state power to exercise extraterritorial jurisdiction. The court refused to adopt a restrictive interpretation of the landing law cases, which would have required the demonstration of an enforcement problem within state territorial waters as a prerequisite for expanded state jurisdiction; instead, the court stated that the test was whether the regulations bore a "reasonable relationship to the purpose sought to be achieved." Thus the issue was whether extraterritorial control was necessary on ecological grounds for the conservation of fishery resources that existed partially within state waters. Applying this doctrine, the court concluded that because crabs are migratory creatures, moving beyond the state's territorial boundaries at various times during the year, Alaska's regulation of
activity on the high seas was necessary to conserve the crabs existing within its waters and thus clearly within the state’s police power.

The court in *Bundrant* also extended the *Skiriotes* concept of the power of a state to regulate the conduct of its citizens on the high seas. Citing precedents from domestic and international law, the court broadened this principle into a general concept of "objective territorial" jurisdiction whereby a state may control the activities of noncitizens outside its jurisdiction when those activities have detrimental effects on a fishery within state waters. The impact of this concept is to allow direct state enforcement against noncitizens on the high seas.

... .

C. Limits on State Jurisdiction

Even within the three mile limit, the Constitution and applicable federal law restrict state control over marine fisheries. In *Toomer v. Witsell* the Supreme Court held that a South Carolina statute requiring nonresidents to pay a $2,500 license fee and residents only $25 was a violation of the privileges and immunities clause of the Constitution. Interpreting the clause as a guarantee of the right of nonresidents to engage in commercial fishing within a state on an equal basis with citizens of that state, the Court stated that a disparity in the treatment of nonresidents is justifiable only when a substantial reason exists for the discrimination beyond the mere fact that the nonresidents are citizens of another state; furthermore, if such reason exists, the degree of discrimination must bear a close relation to the state’s purpose. The court rejected as unsubstantiated by the record arguments that the discriminatory fees were necessary to maintain conservation and to recover costs of enforcement.

*Toomer* also overturned a South Carolina statute that required all owners of shrimp boats fishing within the state’s territorial waters to unload their catch at a South Carolina port. Because the statute’s purpose was to divert business to South Carolina that otherwise would have gone to other states, it created a burden on interstate commerce, which contravened the commerce clause of the United States Constitution.

The equal protection clause of the fourteenth amendment also has been used as the basis for declaring state fisheries regulation unconstitutional. In *Takahashi v. Fish and Game Commission* the Supreme Court held that a California statute barring the issuance of commercial fishing licenses to "persons ineligible for citizenship" was directed towards resident Japanese aliens and therefore created an impermissible

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3(n.68) The Court also rejected the state ownership theory as a justification for discrimination against nonresidents, and distinguished *McCready v. Virginia*, 94 U.S. 391 (1876), which upheld a Virginia statute prohibiting nonresidents from planting oysters in the tidal waters of the Ware River. The Court restricted *McCready* to inland waters and non-free swimming fish. 334 U.S. at 401.
classification. The concept of equal protection guarantees resident aliens the same right to earn a livelihood as is enjoyed by all citizens.

In the recent Douglas decision, the Supreme Court announced another limitation on state regulation of marine fisheries.

DOUGLAS v. SEACOAST PRODUCTS, INC.
431 U.S. 265 (1977)

The issue in this case is the validity of two Virginia statutes that limit the right of nonresidents and aliens to catch fish in the territorial waters of the Commonwealth.

I.

Persons or corporations wishing to fish commercially in Virginia must obtain licenses. Section 28.1-81.1 of the Virginia Code (Sec. 81.1) (Supp. 1976), enacted in 1976, limits the issuance of commercial fishing licenses to United States citizens. Under this law, participants in any licensed partnership, firm, or association must be citizens. A fishing business organized in corporate form may be licensed only if it is chartered in this country; American citizens own and control at least 75% of its stock; and its president, board chairman, and controlling board majority are citizens.

Section 28.1-60 of the Virginia Code (Sec. 60) (Supp. 1976) governs licensing of nonresidents of Virginia to fish for menhaden, an inedible but commercially valuable species of fin fish. Section 60 allows nonresidents who meet the citizenship requirements of Section 81.1 to obtain licenses to fish for menhaden in the three-mile-wide belt of Virginia's territorial sea off the Commonwealth's eastern coastline. At the same time, however, Section 60 prohibits nonresidents from catching menhaden in the Virginia portion of Chesapeake Bay.

Appellee Seacoast Products, Inc., is one of three companies that dominate the menhaden industry. The other two firms, unlike Seacoast, have fish-processing plants in Virginia and are owned by American citizens. Hence, they are not affected by either of the restrictions challenged in this case. Seacoast was founded in New Jersey in 1911 and maintains its principal offices in that State; it is incorporated in Delaware and qualified to do business in Virginia. The other appellees are subsidiaries of Seacoast; they are incorporated and maintain plants and offices in States other than Virginia. In 1973, the family of Seacoast's founder sold the
business to Hanson Trust, Ltd., a United Kingdom company almost entirely owned by alien stockholders. Seacoast continued its operations unchanged after the sale. All of its officers, directors, boat captains, and crews are American citizens, as are over 95% of its plant employees.

At the time of its sale, Seacoast's fishing vessels were enrolled and licensed American-flag ships. Under 46 U.S.C. Section 808, 835, the transfer of these vessels to a foreign-controlled corporation required the approval of the Department of Commerce. This was granted unconditionally over the opposition of Seacoast's competitors after a full public hearing that considered the effect of the transfer on fish conservation and management, on American workers and consumers, and on competition and other social and economic concerns. Following this approval, appellees' fishing vessels were re-enrolled and relicensed pursuant to 46 U.S.C. Section 251-252, 263. They remain subject to all United States laws governing maritime commerce.

In past decades, although not recently, Seacoast had operated processing plants in Virginia and was thereby entitled to fish in Chesapeake Bay as a resident. More recently, Seacoast obtained nonresident menhaden licenses as restricted by Section 60 to waters outside Chesapeake Bay. In 1976, however, Section 81.1 was passed by the Virginia Legislature, c. 338, 1976 Va. Acts, and appellant James E. Douglas, Jr., the Commissioner of Marine Resources for Virginia, denied appellees' license applications on the basis of the new law. Seacoast and its subsidiaries were thereby completely excluded from the Virginia menhaden fishery.

Appellees accordingly filed a complaint in the District Court for the Eastern District of Virginia, seeking to have sections 60 and 81.1 declared unconstitutional and their enforcement enjoined. A three-judge court was convened and it struck down both statutes. It held that the citizenship requirement of section 81.1 was pre-empted by the Bartlett Act, 16 U.S.C. 1081 et seq., and that the residency restriction of section 60 violated the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction of the Commissioner's appeal, 425 U.S. 949 (1976), and we affirm.

II

Seacoast advances a number of theories to support affirmance of the judgment below. Among these is the claim that the Virginia statutes are pre-empted by federal enrollment and licensing laws for fishing vessels. The United States has filed a brief as amicus curiae supporting this contention. Although the claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause, Art. VI, cl. 2, it is treated as "statutory" for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications. Since we decide the case on this ground, we do not reach the constitutional issues raised by the parties.
The well-known principles of pre-emption have been rehearsed only recently in our decisions. No purpose would be served by repeating them here. It is enough to note that we deal in this case with federal legislation arguably superseding state law in a "field which . . . has been traditionally occupied by the States." Pre-emption accordingly will be found only if "that was the clear and manifest purpose of Congress." We turn our focus, then, to the congressional intent embodied in the enrollment and licensing laws.

A

The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since. Ships engaged in trade with foreign lands are "registered," a documentation procedure set up by the Second Congress in the Act of Dec. 31, 1792, 1 Stat. 287, and now codified in 46 U.S.C., c.2. "The purpose of a register is to declare the nationality of a vessel . . . and to enable her to assert that nationality wherever found." The Mohawk, 3 Wall. 566, 571 (1866); Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912). Vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" under procedures established by the Enrollment and Licensing Act of Feb. 18, 1793, 1 Stat. 305, codified in 46 U.S.C., c. 12. "The purpose of an enrollment is to evidence the national character of a vessel . . . and to enable such vessel to procure a . . . license."

A "license," in turn, regulates the use to which a vessel may be put and is intended to prevent fraud on the revenue of the United States. See 46 U.S.C. 262, 263, 319, 325; 46 CFR 67.01-13 (1976). The form of a license is statutorily mandated: "license is hereby granted for the . . . [vessel] to be employed in carrying on the . . . 'coasting trade,' 'whale fishery,' 'mackerel fishery,' or 'cod fishery,' as the case may be), for one year from the date hereof, and no longer." 46 U.S.C. 263. The law also provides that properly enrolled and licensed vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." Section 251. Appellees' vessels were granted licenses for the "mackerel fishery" after their transfer was approved by the Department of Commerce.

The requirements for enrollment and registration are the same. 46 U.S.C. 252; The Mohawk, at 571-572. Insofar as pertinent here, enrolled and registered vessels must meet identification, measurement, and safety standards, generally must be built in the United States, and must be owned by citizens. An exception to the latter rule permits a corporation having alien stockholders to register or enroll ships if it is organized and chartered under the laws of the United States or of any State, if its president or chief executive officer and the chairman of its board of directors are American citizens, and if no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens. 46 U.S.C. 11; 46 CFR 67.03-5 (a) (1976). The Shipping Act, 1916, further limits foreign ownership of American vessels by requiring the Secretary of Commerce to approve any transfer of an American-owned vessel to noncitizens. 46 U.S.C. 808.
Deciphering the intent of Congress is often a difficult task, and to do so with a law the vintage of the Enrollment and Licensing Act verges on the impossible. There is virtually no surviving legislative history for the Act. What we do have, however, is the historic decision of Mr. Chief Justice John Marshall in Gibbons v. Ogden, 9 Wheat. 1 (1824), rendered only three decades after passage of the Act. Gibbons invalidated a discriminatory state regulation of shipping as applied to vessels federally licensed to engage in the coasting trade. Although its historic importance lies in its general discussion of the commerce power, Gibbons also provides substantial illumination on the narrower question of the intended meaning of the Licensing Act.

. . . .

Although Gibbons is written in broad language which might suggest that the sweep of the Enrollment and Licensing Act ousts all state regulatory power over federally licensed vessels, neither the facts before the Court nor later interpretations extended that far. Gibbons did not involve an absolute ban on steamboats in New York waters. Rather, the monopoly law allowed some steam vessels to ply their trade while excluding others that were federally licensed. The case struck down this discriminatory treatment. Subsequent decisions spelled out the negative implication of Gibbons: that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.

For example, in Smith v. Maryland, 18 How. 71 (1855), the Court upheld a conversation law which limited the fishing implements that could be used by a federally licensed vessel to take oysters from state waters. The Court held that an "enrolment and license confer no immunity from the operation of valid laws of a State," and that the law was valid because the State "may forbid all such acts as would render the public right [of fishery] less valuable, or destroy it altogether." At the same time the Court explicitly reserved the question of the validity of a statute discriminating against nonresidents. To the same effect is the holding in Manchester v. Massachusetts, 139 U.S. 240 (1891). There, state law prohibited the use by any person of certain types of fishing tackle in specified areas. Though Manchester was a Rhode Island resident basing a claim on his federal fisheries license, the Court held that the statute

"was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. . . . [T]he statute may well be considered as an impartial and reasonable regulation . . . and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish . . . is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States." Id., at 265.
More recently, the same principle was applied in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), where we held that the city's Smoke Abatement Code was properly applicable to licensed vessels. Relying on earlier cases, we noted that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power." As an "[e]venhanded local regulation to effectuate a legitimate local public interest," the ordinance was valid.

Although it is true that the Court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny. We consider, then, its impact on the Virginia statutes challenged in this case.

C

The federal licenses granted to Seacoast are, as noted above, identical in pertinent part to *Gibbons*’ licenses except that they cover the "mackerel fishery" rather than the "coasting trade." Appellant contends that because of the difference this case is distinguishable from *Gibbons*. He argues that *Gibbons* upheld only the right of the federal licensee, as an American-flag vessel, to navigate freely in state territorial waters. He urges that Congress could not have intended to grant an additional right to take fish from the waters of an unconsenting State. Appellant points out that the challenged statutes in no way interfere with the navigation of Seacoast's fishing boats. They are free to cross the State's waters in search of fish in jurisdictions where they may lawfully catch them, and they may transport fish through the State's waters with equal impunity.

Appellant's reading of *Gibbons* is too narrow. *Gibbons* emphatically rejects the argument that the license merely establishes the nationality of the vessel. That function is performed by the enrollment. 9 Wheat., at 214. Rather, the license "implies, unequivocally, an authority to licensed vessels to carry on" the activity for which they are licensed. In *Gibbons*, the "authority . . . to carry on" the licensed activity included not only the right to navigate in, or to travel across, state waters, but also the right to land passengers in New York and thereby provide an economically valuable service. The right to perform that additional act of landing cargo in the State—which gave the license its real value—was part of the grant of the right to engage in the "coasting trade."

The same analysis applies to a license to engage in the mackerel fishery. Concededly, it implies a grant of the right to navigate in state waters. But, like the trading license, it must give something more. It must grant "authority . . . to carry on" the "mackerel fishery." And just as *Gibbons* and its progeny found a grant of the right to trade in a State without discrimination, we conclude that appellees have
been granted the right to fish in Virginia waters on the same terms as Virginia residents.

Moreover, 46 U.S.C. 251 states that properly documented vessels "and no others" are "entitled to the privileges of vessels employed in the coasting trade or fisheries." Referring to this section, Gibbons held: "[T]hese privileges . . . cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege . . . convey[s] the right [to carry on the licensed activity] to which the privilege is attached." 9 Wheat., at 213. Thus, under section 251 federal licensees are "entitled" to the same "privileges" of fishery access as a State affords to its residents or citizens.

Finally, our interpretation of the license is reaffirmed by the specific discussion in Gibbons of the section granting the license, now 46 U.S.C. 263. The Court pointed out that "a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." 9 Wheat., at 213-214. Gibbons recognized that the "grantor" was Congress. Thus Gibbons expressly holds that the words used by Congress in the vessel license transfer to the licensee "all the right" which Congress has the power to convey. While appellant may be correct in arguing that at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce. Accordingly, we hold that, at the least, when Congress re-enacted the license form in 1936, using language which, according to Gibbons, gave licensees "all the right which the grantor can transfer," it necessarily extended the license to cover the taking of fish in state waters, subject to valid state conservation regulations.

D

Application of the foregoing principles to the present case is straightforward. Section 60 prohibits federally licensed vessels owned by nonresidents of Virginia from fishing in the Chesapeake Bay. Licensed ships owned by noncitizens are prevented by section 81.1 from catching fish anywhere in the Commonwealth. On the other hand, Virginia residents are permitted to fish commercially for menhaden subject only to seasonal and other conservation restrictions not at issue here. The challenged statutes thus deny appellees their federally granted right to engage in fishing activities on the same terms as Virginia residents. They violate the "indisputable" precept that "no State may completely exclude federally licensed commerce." They must fall under the Supremacy Clause.

Appellant seeks to escape this conclusion by arguing that the Submerged Lands Act, 67 Stat. 29, U.S.C. 1301-1315, and a number of this Court's decisions recognize that the States have a title or ownership interest in the fish swimming in their
territorial waters. It is argued that because the States "own" the fish, they can exclude federal licensees. The contention is of no avail.

The Submerged Lands Act does give the States "title," "ownership," and "the right and power to manage, administer, lease, develop, and use" the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction. 43 U.S.C. 1311(a). But when Congress made this grant pursuant to the Property Clause of the Constitution, see Alabama v. Texas, 347 U.S. 272 (1954), it expressly retained for the United States "all constitutional powers of regulation and control" over these lands and waters "for purposes of commerce, navigation, national defense, and international affairs." See 43 U.S.C. 1314(a). Since the grant of the fisheries license is made pursuant to the commerce power, the Submerged Lands Act did not alter its preemptive effect. Certainly Congress did not repeal by implication, in the broad language of the Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licensees.

In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. Ibid.; Geer v. Connecticut, 161 U.S. 519, 539-40 (1896) (Field, J. dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U.S., at 402. Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.

III

Our decision is very much in keeping with sound policy considerations of federalism. The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. Menhaden that spawn in the open ocean or in coastal waters of a Southern State may swim into Chesapeake Bay and live there for their first summer, migrate south for the following winter, and appear off the shores of New York or Massachusetts in succeeding years. A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent. We cannot find
that Congress intended to allow any such result given the well-known construction of federal vessel licenses in *Gibbons*.

For these reasons, we conclude that sections 60 and 81.1 are pre-empted by the federal Enrollment and Licensing Act. Insofar as these state laws subject federally licensed vessels owned by nonresidents or aliens to restrictions different from those applicable to Virginia residents and American citizens, they must fall under the Supremacy Clause. As we have noted above, however, reasonable and evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply, stand unaffected by our decision.

The judgment of the District Court is *affirmed*.

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**B. Federal Fisheries Management**

In 1976, Congress enacted the Fishery Conservation and Management Act of 1976 (later entitled the Magnuson Fishery Conservation and Management Act) [hereinafter MFCMA or Magnuson Act], 16 U.S.C. §§ 1801-1882, which extended exclusive United States management authority over fisheries to 200 miles. The following excerpt describes the basic provisions of the MFCMA:


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**A. General Structure of the Act**

... The Magnuson Act corrected three deficiencies in federal laws for the conservation and management of fisheries. First, it had long been apparent that the contiguous zone created by the Bartlett Act did not establish an appropriate area for managing coastal fisheries [i.e., twelve miles]. Second, United States international agreements were ineffective to ensure conservation and management of fishery stocks on the high seas, and valuable fisheries were being depleted. Third, conflicts arose among state governments in managing high seas fisheries since migrating fish disregarded boundaries separating the territorial and high seas.

The Magnuson Act expanded the federal fisheries management authority from a twelve mile zone to a two hundred mile zone, thereby increasing its legal jurisdiction from an area of approximately 545,000 square nautical mile (nm) to over 2.2 million square nm. Approximately twenty percent of the world's fisheries were
thus brought under United States control. To promote management and conservation, the Act vested broad authority in the newly created [regional] Councils and the Secretary of Commerce to regulate both foreign and domestic fishing. The heart of the Magnuson Act is the creation of federal authority to prepare and implement, in accordance with national standards, plans that will achieve and maintain the "optimum yield" from fisheries subject to management. The Act establishes eight regional Councils responsible for the preparation of Fishery Management Plans (FMP's) for fisheries within their geographical regions of responsibility. These FMP's must be submitted to the Secretary of Commerce for his approval. Furthermore, the Councils may prepare, and submit to the Secretary, proposed regulations they deem necessary for FMP implementation.

The voting members of the Councils include the state government officials principally responsible for marine fishery management, the regional directors of the National Marine Fisheries Service (NMFS), and other individuals appointed by the Secretary from lists of "qualified" persons submitted by the governors of states represented on the Councils. The Councils' authority is constrained by the Secretary's power to approve or disapprove proposed FMP's and by the Secretary's rulemaking and enforcement authority. Although this relationship has at times resulted in jurisdictional conflict between Council and Secretary, the allocation of authority generally appears to work.

All FMP's and their implementing regulations must be consistent with the seven National Standards for fishery conservation and management set forth by Congress in title III of the Act. In addition, the Secretary must establish guidelines based

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1(n.97) The Act defines "optimum yield" as: the amount of fish---
(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and
(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor. 16 U.S.C. § 1802(18)(1976).


3(n.106) Magnuson Act section 301(a)(1)-(7), 16 U.S.C. § 1851(a)(1)-(7)(1976). These standards are:

1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield of each fishery.
2) Conservation and management measures shall be based upon the best scientific evidence available.
3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit.
on these national standards to assist Councils in the development of FMP's. The National Oceanic and Atmospheric Administration (NOAA) published such guidelines in 1977 and is now in the midst of a substantial review which will lead to revisions in the guidelines.

Any FMP prepared by a Council must contain conservation and management measures applicable to foreign and domestic vessels that are consistent with both national standards and other applicable law. Each FMP must describe the fishery and include information concerning vessels, gear, management costs, actual and potential revenues, the extent of foreign and American Indian fishing, and other relevant matters. The FMP must also assess and specify the fishery's condition and the fishery's maximum sustainable yield and optimum yield; supporting material for such specifications must also be included. The FMP must further specify the capacity of domestic fishermen to harvest the optimum yield, whether any portion is available for foreign fishing, and the extent of American fish processing capacity. Finally, the Councils must specify the data to be submitted to the Secretary concerning the fishery.

or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variation among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

4(n.112) Maximum sustainable yield, a traditional fisheries biology concept, is simply a tool by which the level of harvest of a given stock of fish can be determined. It is in essence, the surplus production of the fishery; the safe upper limit of the harvest which can be taken consistently year after year without diminishing the stock so that the stock is truly inexhaustible and perpetually renewable.

5(n.116) In addition, there are a number of provisions the Councils may consider in a discretionary manner. These include the subjecting of domestic vessels to permit and fee requirements; the designating of zones where vessel and gear restrictions apply; the limiting of catches based on number, size, or other criteria; and the limiting of the number of vessels in the fishery. Of particular relevance for purposes of this article is the provision that permits an FMP to "incorporate
After a Council prepares an FMP, the plan is submitted to the Secretary of Commerce, who then has sixty days to approve, fully disapprove, or partially disapprove the proposal. The Secretary coordinates his review with the Secretary of State with regard to foreign fishing, and with the Coast Guard with regard to enforcement at sea. If the Secretary approves the FMP, he is then required to publish proposed implementing regulations. Following public review and comment, the Secretary issues final regulations and is then responsible for their implementation.

(5 cont.) (consistent with the national standards, the other provisions of the Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery." Section 303(b)(5), 16 U.S.C. § 1853(b)(5).

NOTES

1. Florida belongs to two regional fishery management councils—the Gulf of Mexico and the South Atlantic. Is federal jurisdiction under the MFCMA the same in the Gulf of Mexico and the Atlantic Ocean? See 16 U.S.C. § 1811.

2. A major impetus for enacting the MFCMA was to strictly regulate or even exclude foreign fishermen from United States coastal waters. The MFCMA allows no foreign fishing unless the foreign country has a treaty or Governing International Fishing Agreement acknowledging United States authority over the fisheries of the 200 mile EEZ. Each foreign vessel must have a permit and is required to have an onboard observer. See generally, Comment, Fishery Conservation: Is the Categorical Exclusion of Foreign Fleet the Next Step?, 12 Colo. W. Int't L.J. 154 (1982).

The total allowable level of foreign fishing (TALFF) is the portion of the optimum yield (OY) that will not be harvested by United States fishermen. The Secretary of State allocates the TALFF among eligible nations. The MFCMA requires the Secretary to consider a number of factors in this determination, including:

1) the nation's tariff and import barriers;
2) whether the fish will be re-exported to the United States and domestic need for the fish;
3) fisheries research, technology transfer, and enforcement cooperation;
4) traditional fishing patterns; and
5) whether the country carries on whaling operations that undermine the effectiveness of the International Whaling Commission.
Fish bought by foreign processors from domestic fishermen is not included in
the TALFF. This had led to the creation of "joint ventures" operations, where fish
caught by United States fishermen are transferred to foreign processing vessels at
sea. To protect American processors, however, only that part of the domestic OY
above onshore processing capacity may be transferred in joint ventures. See Christie,
Regulation of International Joint Ventures in the Fishery Conservation Zone, 10 GA. J.
INT'L & COMP. L. 85 (1980).

3. The 1986 amendments to the took initial steps to link fisheries and habitat
protection. Fishery management plans must contain habitat information and
assessments of the effect of habitat change on the marine resource. Of perhaps even
more significance, councils are given authority to "comment on, or make
recommendations concerning any activity undertaken, or proposed to be undertaken,
by any state or federal agency that, in the view of a council, may affect the habitat

4. The Fishery Conservation Amendments of 1990 made several major changes to
the MFCMA. First, the act's exclusion of highly migratory species from the coverage
of the act was deleted. Highly migratory species include tuna, oceanic shark, marlin,
sailfish, and swordfish. The Secretary of Commerce, rather than the fishery
management councils, will develop plans for these species.

Fishery management plans must now "assess and specify the nature and extent
of scientific data which is needed for . . . effective implementation" and include a
fishery impact statement discussing the likely effects of conservation measures on
participants in the fishery.

Section 1857(1) (M) was amended to prohibit use of large-scale driftnets. The
amendments also contain findings concerning the adverse effects of the use of large-
scale driftnets and state United States policy against their use in areas beyond
national jurisdiction. The amendments require a certification procedure for fisheries
products by any nation that allows nationals to use large-scale driftnets in new
fisheries.

5. Further readings: H. Knight, Managing the Sea's Living Resources (1977); Symposium
of the Fishery Conservation and Management Act of 1976, 52 WASH. L.
Rev. 427 (1977); McHugh, Fishery Management under the Magnuson Act: Is It
Working?, 21 OCEAN DVLPM'T. & INT'L L. 255 (1990); Miller, Hooker & Fricke,
Impressions of Ocean Fisheries Management under the Magnuson Act, 21 OCEAN
DVLPM'T. & INT'L L. 263 (1990); Warner, Conservation Aspects of the Fishery
Conservation and Management Act and the Protection of Critical Marine Habitat, 23
C. State Fisheries Management after the MFCMA

Christie, Florida’s Ocean Future: Toward a State Ocean Policy, 5 J. LAND USE & ENVT. L. 527-29 (1990)

C. Florida Marine Fisheries Management

Although Florida has managed fisheries since 1861, management responsibilities have been shuffled among numerous agencies and authorities for over a century. In 1969, the Department of Natural Resources (DNR) was created and charged under chapter 370 of the Florida Statutes with the responsibility of "preserving, managing and protecting the marine, crustacean, shell and anadromous fishery resources" of the state. DNR had general rulemaking authority, but fishery management was largely accomplished through detailed legislation. Through the years, the legislature responded to specific issues with little or no consideration of a comprehensive fishery management policy. The result was a mass of confusing and sometimes conflicting statutes, including over 220 local laws.

In 1980, the legislature created the Saltwater Fisheries Study and Advisory Council to develop a comprehensive saltwater fishery conservation and management policy for the state's territorial waters. The recommendations of the Council resulted in legislation in 1983 that established policies and standards for marine fisheries management and that created the Marine Fisheries Commission within DNR.

The Marine Fisheries Commission (MFC) is composed of seven members appointed by the Governor to give consideration to various "affected interests." The MFC has full rulemaking authority over marine life, except endangered species, subject to approval by the Governor and Cabinet. Although the legislation only authorized a staff of four, the MFC's initial directive under the legislation was to review all of chapter 370's fishery provisions and recommend management measures to the Governor and Cabinet, and to review all local laws and determine whether each should be repealed, consolidated into statewide rules, or retained. However, the inconsistencies in management that led to the creation of the MFC still exist, because most of the MFC's efforts have had to be directed toward emergency management and stressed stocks.

As of September 1988, fifty-two sets of rules recommended by the MFC had been approved by the Governor and Cabinet. The primary fisheries currently managed through MFC rules include the following:

Sponge  Spiny & Slipper Lobster  Stone Crab
Tarpon  Snapper, Grouper & Sea Bass  Sturgeon
Pompano  Queen Conch  Hard Clams
Black Drum  Bay Scallops  Cobia
Mullet  Spearfishing  Snook
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<th>Amberjack</th>
<th>Spotted Sea Trout</th>
<th>Oysters</th>
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<td>Billfish</td>
<td>King Mackerel, Spanish Mackerel</td>
<td>Shrimp</td>
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<tr>
<td>Bonefish</td>
<td>Sardines (Tampa Bay)</td>
<td>Red Drum</td>
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Chapter 370 requires that all rules adopted by the MFC and approved by the Governor and Cabinet be consistent with the following state statutory policies and standards:

(a) The paramount concern of conservation and management measures shall be the continuing health and abundance of the marine fisheries resources of this state.
(b) Conservation and management measures shall be based upon the best information available, including biological, sociological, economic, and other information deemed relevant by the commission.
(c) Conservation and management measures shall permit reasonable means and quantities of annual harvest, consistent with maximum practicable sustainable stock abundance on a continuing basis.
(d) When possible and practicable, stocks of fish shall be managed as a biological unit.
(e) Conservation and management measures shall assure proper quality control of marine resources that enter commerce.
(f) State marine fisheries management plans shall be developed to implement management of important marine fishery resources.
(g) Conservation and management decisions shall be fair and equitable to all the people of this State and carried out in such a manner that no individual, corporation, or entity acquires an excessive share of such privileges.
(h) Federal fishery management plans and fishery management plans of other states or interstate commissions should be considered when developing state marine fishery management plans. Inconsistencies should be avoided unless it is determined that it is in the best interest of the fisheries or residents of this state to be inconsistent.

The Florida standards differ from the federal management standards in one very important respect. The optimum yield approach of the federal government uses quotas based on the scientifically determined maximum sustainable yield, *modified by any relevant economic, social, or ecological factor.* Chapter 370 of the Florida Statutes sets as a paramount management objective "the continuing health and abundance of the marine fisheries resources of this state," untempered by social or economic considerations.

Although the MFC has been granted rulemaking authority for marine fisheries management, DNR continues to be charged with the administration, supervision, development, and conservation of fishery resources, and the enforcement of fishery laws and rules. DNR implements fishery management plans and rules, and regulates all fishermen and fishing vessels. DNR also has authority to regulate public health aspects of harvesting, processing, and shipping oysters, clams, mussels, and crabs.
The Bureau of Marine Research of DNR, recently reorganized into the Florida Marine Research Institute, is directed "to conduct scientific, economic, and other studies and research . . . directed to the broad objective of managing . . . resources in the interest of all people of the state." To meet these responsibilities, the Institute provides research data and management plan proposals to the MFC. Unfortunately, the legislature does not fund research at the level necessary to prepare adequately the numerous plans that are pending. Management plans for stressed or over-utilized fisheries often cannot wait for complete information, but plans based on incomplete and insufficient data are difficult to support and lead to stricter regulation and public dissatisfaction with the plans and the management process.

1. PREEMPTION AND EXTRA-TERRITORIAL JURISDICTION

The fisheries jurisdiction retained by the states after enactment of the MFCMA is addressed in section 306, 16 U.S.C. § 1856. Note that a limited Skåniotes-type jurisdiction over state-registered boats is retained by the states. The harder question is determining to what extent Congress intended to displace the previous body of fishery management law. Read section 306 and evaluate the following cases on the issue of federal preemption of state fisheries law.

Section 306. State Jurisdiction.

(a) In General.

(1) Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

(2) For purposes of this Act, except as provided in subsection (b), the jurisdiction and authority of a State shall extend—

(A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party;

(B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventyeth meridian west of Greenwich;