Pollution Control at the Maritime Frontier: The Limits of State Extraterritorial Power

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INTRODUCTION

The coastal states of our union hold a unique position in the international community. By bordering on the oceans, they receive all of the benefits and burdens that sea-borne commerce provides; yet because of our federal system, they lack the power that all coastal nations wield to determine the territorial extent to which they may control that commerce. The federal government often extends its maritime borders for specific purposes in order to regulate activities that affect the nation. Because the states lack this power, the extraterritorial applicability of their laws holds great significance. This is particularly true in the field of environmental protection.

California is currently grappling with the problem of controlling extraterritorial polluters at sea. The waters beyond California’s three-mile limit support a variety of vessel traffic, oil drilling platforms, and “lightering” operations with polluting emissions that can have a significant impact on environmental quality within the state. The state’s inversion-prone coastal basins are especially sensitive to air pollution originating at sea. In response to this problem, the California Air Resources Board (ARB) has drafted a set of model rules to be adopted by its regional districts that asserts jurisdiction to regulate pollution sources located within “California Coastal

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1. "Lightering" refers to the process of transferring to small ships the cargo from a vessel that is too large—i.e., has too deep a draft—to enter ports itself. The lightering of crude oil bound for United States refineries has increased dramatically in recent years due primarily to the use of more economical supertankers. As the oil enters the holds of the small "lighter" vessels, it displaces dense hydrocarbon fumes which have accumulated there from previous trips. Prevailing seabreezes then transport these gases to shore. P. Hess, Report on Tanker Lightering in San Francisco Bay (Sept., 1977) (unpublished Bay Area Air Quality Management District report); L.A. Times, Dec. 19, 1977 § 2, at 1, col. 5.

2. For example, in 1977, the state Air Resources Board estimated that, on some days, up to 13% of the hydrocarbon pollutants in the San Diego area were created by lightering operations occurring sixty-five miles from shore on the lee side of San Clemente Island. The Board estimated that on days of maximum lightering activity, 118,000 pounds of hydrocarbon, sulfur dioxide, nitrogen oxide, and particulate emissions were created by such operations. L.A. Times, Dec. 19, 1977, § 2, at 1, col. 5.
Waters”—a zone defined to extend up to seventy-five miles from shore.³

The ARB Model Rule for the Control of Emissions from Lightering Operations⁴ requires vessels lightering crude oil within California Coastal Waters to use low sulfur fuel,⁵ substantially reduce loading emissions,⁶ eliminate any operation that would result in vapor release from cargo tanks,⁷ and utilize sealed monitoring instruments.⁸ The Model New Source Review Rules⁹ require any new stationary source¹⁰ within the zone to obtain permits indicating compliance with “best available control technology”¹¹ and emissions offset¹² requirements.

3. “California Coastal Waters” means that area between the California coastline and a line starting at the California-Oregon border at the Pacific Ocean.

    Thence to 42.0 °N 125.5 °W
    Thence to 41.0 °N 125.5 °W
    Thence to 40.0 °N 125.5 °W
    Thence to 39.0 °N 125.0 °W
    Thence to 38.0 °N 124.5 °W
    Thence to 37.0 °N 123.5 °W
    Thence to 36.0 °N 122.5 °W
    Thence to 35.0 °N 121.5 °W
    Thence to 34.0 °N 120.5 °W
    Thence to 33.0 °N 119.5 °W
    Thence to 32.5 °N 118.5 °W

and ending at the California-Mexican border at the Pacific Ocean.


4. ARB, Model Rule for the Control of Emissions from Lightering Operations (July, 1978).

5. Id. § (b)(1) (sulfur content may not exceed .5% by weight). This provision has already been adopted by the South Coast Air Quality Management District. South Coast Air Quality Management District Rule 1116.1 (b)(1) (Oct. 20, 1978).

6. After January 1, 1981, organic vapor loading emissions must be reduced by 95% from uncontrolled conditions. ARB, Model Rule for the Control of Emissions from Lightering Operations § (c)(1) (July, 1978).

7. Id. § (d)(1).

8. Id. § (d)(2).


10. “Stationary source” includes any structure, building, facility, equipment, installation or operation (or aggregation thereof) which is located on or more bordering properties within the District . . . ,” id. Rule I, § I(4), “which are required pursuant to District rules to obtain a permit to construct . . . ,” id. § B(1), or which result in a “net increase in emissions of 250 or more pounds during any day of any pollutant for which there is a national ambient air quality standard . . . ,” id. § B(2)(a). The Rule is intended to apply to structures within “California Coastal Waters.” Telephone Conversation with Peter Hess, Bay Area Air Quality Management District (March 21, 1979).

11. ARB, Model New Source Rules, Rule I, §§ D(1), I(1) (Feb. 16, 1979), defining best available control technology inter alia as the “most effective emissions control technique which has been achieved in practice, for such category or class of source . . . .”

12. Id. § D(2)(a), (b). Increased emissions of each pollutant for which a national
Emissions within California Coastal Waters from vessels that load or unload at the stationary source are considered to be emissions from the stationary source.\textsuperscript{13}

The jurisdictional issues confronting states that attempt to regulate extraterritorial maritime pollution sources are well illustrated by the ARB model rules. In that context, this comment examines the international law of jurisdiction over vessels on the high seas, the constitutional limitations on state authority beyond territorial waters, and the applicability of state environmental laws to drilling platforms and deepwater ports on the outer continental shelf. It is concluded that the domestic effects created by vessels polluting on the high seas provide a valid jurisdictional basis for their regulation, and that such state laws do not violate either international conventions or the United States Constitution. State environmental laws are found to be applicable to structures on the outer continental shelf, but they can only be enforced by federal agencies.

**JURISDICTION OVER VESSELS UNDER INTERNATIONAL LAW**

Pollution, particularly air pollution, is a condition which knows only the boundaries prescribed by nature. This transitory character can frustrate efforts to deal with the problem because of jurisdictional barriers to acquiring control over its sources. The ARB's attempt to regulate lightering operations up to seventy-five miles from shore is an excellent case in point. The initial question raised is whether or not international maritime law, which "is a part of our law and as such is the law of all the States of the Union,"\textsuperscript{14} permits any arm of the United States to regulate activities at such a distance from shore. The emphasis must be on what international law currently allows rather than what it should allow; as will be seen, the states may not constitutionally affect foreign affairs. The various theories of jurisdiction over vessels will be discussed, followed by an examination of the Geneva Convention on the High Seas and the possibility of controlling extraterritorial activities by conditioning access to ports.

\textsuperscript{13} Id. § 1(4).

\textsuperscript{14} Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941).
Jurisdictional Theories

The Territorial Principle. According to presently codified maritime law, a country may regulate the conduct of vessels of any nationality while they are within its territorial waters, subject only to the vessel's right of "innocent passage." This is the traditional territorial principle of jurisdiction. The oceans beyond territorial waters are considered the high seas, which no nation may subject to sovereignty.

Although much of the law of the sea has been internationally ratified, attempts to set uniform territorial limits have failed repeatedly. Treaty negotiations have stumbled over the fundamental conflict between countries favoring free navigation beyond the traditional three-mile limit, and those desiring more extensive national boundaries for the preservation of their coastal resources and environments.

In the absence of international agreements, the reach of territorial waters must be determined by each coastal nation. In the United States, this function is reserved to the federal
government, which generally recognizes the three-mile zone. Limited exceptions are provided for the control of fishing by foreign vessels, ocean dumping, oil discharges, customs enforcement, and mining of continental shelf resources.

It is thus clear that the ARB Model Lightering Rule attempts to regulate activities occurring beyond state and federal territorial limits. It is also clear that the Rule may not be justified as an exercise of territorial jurisdiction merely because the lighter vessels eventually enter domestic waters. The mere presence of persons within national boundaries does not of itself provide jurisdiction for the regulation of their extraterritorial activities. Jurisdiction to prescribe a rule of law—subject matter jurisdiction—must be distinguished from enforcement or personal jurisdiction. Under international law, "[a] state does not have jurisdiction to enforce a rule of law prescribed by it unless it had jurisdiction to prescribe the rule." Constitutional due process also requires that enforcement be predicated

22. The power to admit new states resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the States. United States v. Louisiana, 363 U.S. 1, 35 (1960); see text accompanying notes 91-97 infra.


31. Id. § 7(2); 375 F.2d at 885.
upon established principles of jurisdiction over the conduct in question. The ARB Rule thus fails as an exercise of territorial jurisdiction.

However, the territorial concept of jurisdiction is not an exclusive characterization of the powers of countries to exercise authority beyond their geographical boundaries. The law of nations generally recognizes two relevant bases of jurisdiction over persons acting beyond territorial limits: nationality jurisdiction and protective jurisdiction.

The Nationality Principle. As applied to vessels, the nationality principle is embodied in the law of the flag—"perhaps the most venerable and universal rule of maritime law." It provides that the sovereign whose flag the ship flies may exercise authority over the vessel wherever it may be. Each country may determine the conditions under which it will grant its nationality to a merchant ship; it thereby accepts responsibility for and acquires control over the vessel. Nationality is evidenced to the world by the ship’s papers and its flag. The principle developed from the necessity of applying some law aboard ships on the high seas, where no nation may normally exercise jurisdiction.

When vessels enter foreign waters and nationality jurisdiction overlaps with territorial, the nationality principle must yield. However, in the interest of maintaining consistent laws on board ships calling at many ports, nations generally consent to recognize the flag country’s authority over all matters that are strictly internal to the vessel. Any conditions or activities that affect the port nation are subject to its regulation under the longstanding "peace of the port doctrine." Regulating pollution from foreign vessels in domestic waters is thus considered to be a proper exercise of authority. However, application of the peace of the port doctrine is limited to acts occurring within territorial waters, and much pollution is emitted by

34. 345 U.S. at 584.
36. 345 U.S. at 584.
38. The Wildenhus Case, 120 U.S. 1, 12 (1887); RESTATEMENT, supra note 16, § 50.
vessels of foreign registry while on the high seas. The lighters, for example, although owned by American petroleum companies, have been registered in Liberia.

This practice of registering tankers in Liberia has become commonplace in the American petroleum industry in order to avoid stringent United States shipping laws. It is at the core of many regulatory difficulties including the lightering problem. Liberia, Honduras, Panama, and other “flag of convenience” nations impose only nominal registration fees and taxes, and virtually nonexistent safety, environmental, and labor regulations on their vessels. As a result, labor unrest and disastrous oil spills involving such ships have frequently occurred. Provisions of the Geneva Convention on the High Seas requiring effective exercise of jurisdiction and control over vessels, and a genuine link between countries and their ships, have been all but ignored by the convenience flag nations.

Under international law, the existence of a genuine link with the flag nation cannot be questioned by other countries. Consistent with this view, no courts have allowed United States regulation of a convenience flag ship on the ground that it was actually of American nationality because of its domestic ownership. Convenience registrations have been accorded minimal significance, however, in the separate field of civil jurisdiction over seamen’s tort claims.

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41. See generally B. Boczek, Flags of Convenience (1962).
43. Convention on the High Seas, supra note 15, art. 5.
44. The Convention is unclear as to the result that follows if a genuine link does not exist. But a provision that would have enabled countries other than the flag nation to withhold recognition of a ship’s nationality if they determined that there was no genuine link between the ship and the flag nation was voted down at the Convention. The legislative history by which the U.S. Senate gave its consent to ratification of the Convention indicates that it believed that only an agreed-to tribunal, such as the International Court of Justice, might have the authority to question the existence of a genuine link. Senate Comm. on Foreign Relations, Law of the Sea Conventions, S. Exec. Rep. No. 5, 86th Cong., 2d Sess., reprinted in 106 Cong. Rec. 11189, 11190 (1960); Restatement, supra note 16, § 28, Comment b.
45. Restatement, supra note 16, § 28, Reporters’ Note 2(3)(c).
46. United States courts have occasionally pressed beyond nominal foreign registries to allow enforcement of comprehensive tort remedies provided by the Jones Act, 46 U.S.C. § 688 (1976), against American shipowners even though the tort occurred on the high seas. In Lauritzen v. Larsen, 345 U.S. 571 (1952), the Supreme Court
The question of whether or not a foreign flag vessel could be controlled on the high seas by regulating its American owner is open to debate. According to the Second Restatement of Foreign Relations Law, "[t]he state of nationality of the owner has jurisdiction to prescribe, and to enforce within its territory, rules governing the conduct of the owner, including those relating to the operation of the vessel." The Restatement's authors believe that the United States may control the conduct of a foreign vessel even when it does not have jurisdiction to prescribe rules directly applicable to the ship. As support for this proposition, the Restatement cites Lauritzen v. Larsen, where the Supreme Court said:

[The United States] is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.

Lauritzen, however, dealt with civil jurisdiction, not actual regulation of foreign vessel operations. Piercing the law of the flag under any rationale in order to control the equipment and operations of foreign vessels on the high seas would seem to be an infringement on the flag nation's rights. While there is little to prevent an exercise of United States' authority over foreign vessels, legislators and courts must consider the Supreme Court's warning in Lauritzen:

[In dealing with international commerce we cannot be]

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47. Restatement, supra note 16, § 28, Comment c.
48. Id.
49. 345 U.S. 571 (1952).
50. Id. at 587, quoting Skiriotes v. Florida, 313 U.S. 69, 73 (1941).
unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.52

That restraint must be exercised in applying United States law to domestically owned foreign flag vessels was illustrated in *McCulloch v. Sociedad Nacional*,53 where the Supreme Court refused to construe the National Labor Relations Act as applying to several Honduran flag vessels. The NLRB had justified its assertion of jurisdiction on the fact that the ships had substantial contacts with the United States, primarily, beneficial ownership by an American corporation. The Court's underlying concern was that application of United States labor law to foreign vessels through a case-by-case determination of American contacts could lead to uncertainty and disruption of international shipping. The Court distinguished its application of American civil law to foreign vessels based on domestic contacts54 by implying that enforcement of civil remedies does not have the same potential for disruption of shipping because it does not involve such pervasive regulation of the internal operation of foreign vessels.55

Considerations similar to those articulated in *McCulloch* argue against permitting environmental regulation of foreign ships on the high seas under any rationale that looks to the nationality of ownership. The difficulty of ascertaining the true nationality of shipowners, who may be multi-national corporations or hidden under foreign subsidiaries,56 could lead to uncertainty and overlapping applications of law by several countries in various contexts. The continued vitality of convenience registrations attests to the unwillingness of American courts to permit regulation of foreign vessels through their owners.

It is evident that the traditional jurisdictional tools can be ineffectual in combating a problem as transient as pollution.

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52. 345 U.S. at 582.
54. See note 46 supra.
55. 372 U.S. at 19 n.9. Even in civil jurisdiction cases, however, the Court felt that the law of the flag must be accorded great deference. *Id.*
56. Under some theories, the determination of corporate nationality depends on factors that are changeable and often difficult to evaluate. *Restatement*, supra note 16, § 27. Comment c.
Another theory has developed which bases jurisdiction not upon the location or nationality of the actor, but upon the effects of his actions. This protective jurisdiction, and similarly based extension of the territorial principle of jurisdiction, offer more positive possibilities for dealing with pollution originating on the high seas.

The Protective Principle. Jurisdiction based upon the effects of an action can be traced doctrinally to Church v. Hubbart, decided by the Supreme Court in 1804. There, Portuguese authorities seized an American flag vessel on the high seas for engaging in prohibited colonial trade. In upholding the legality of the seizure, Chief Justice Marshall said:

[A nation's] power to secure itself from injury may certainly be exercised beyond the limits of its territory. . . . It has the right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

Although the source of this power has stirred debate, its existence cannot be denied. Christened the "protective principle of jurisdiction," it has become the basis for judicial approval of immigration and customs laws which are enforceable against aliens acting extraterritorially, once they come within the power of United States courts, either through extradition, voluntary entry, or arrest on the high seas pursuant to congressional grants of authority.

Because protective jurisdiction is only asserted in those cases involving threats to national security or governmental functions, many extraterritorial activities having detrimental

57. 6 U.S. (2 Cranch) 187 (1804).
58. Id. at 234.
60. RESTATEMENT, supra note 16, § 33.
61. United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); Rocha v. United States, 288 F.2d 545 (9th Cir. 1961).
63. The President is authorized under 19 U.S.C. § 1701(a) (1976), to declare a "customs enforcement area" in places on the high seas where ships are engaged in smuggling operations. Ships in such areas are then subject to search and seizure by the Coast Guard.
domestic effects remain beyond its control. Only one jurisdictional theory, the objective territorial principle, provides governmental authority to regulate any extraterritorial conduct that has a domestic effect.

The Objective Territorial Principle. This theory developed as a response to the gap left by protective jurisdiction and essentially broadens the scope of traditional territorial jurisdiction. "Under the objective view, jurisdiction extends over all acts which take effect within the sovereign even though the author is elsewhere." "Underlying this principle is the theory that the detrimental effects constitute an element of the offense and since they occur within the country, jurisdiction is properly invoked under the territorial principle." The leading international case involving objective territorial jurisdiction is The S.S. Lotus, decided by the Permanent Court of International Justice in 1927. The court was asked to determine whether Turkey had jurisdiction to prosecute a French seaman who had been arrested in Turkey for allowing his French ship to collide with a Turkish vessel on the high seas. The court upheld jurisdiction on the ground that the Turkish vessel was an extension of Turkey itself and had been detrimentally affected by defendant's extraterritorial actions on the French ship. In Strassheim v. Daily, the Supreme Court clearly put the United States among those nations adopting the objective view of the territorial principle. As Justice Holmes stated:

Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been pres-

67. Article 11(1) of the Geneva Convention on the High Seas, supra note 15, supercedes the specific holding of the Lotus case that a vessel could be treated as national territory for the purpose of acquiring jurisdiction based on territorial effects in prosecutions of shipmasters for collisions on the high seas, by providing that jurisdiction in such a case belongs only to the flag nation or the country of which the shipmaster is a national. However, the case is still universally cited for the proposition that domestic effects create a valid basis of jurisdiction over extraterritorial conduct under international law, and to that extent, it remains valid. Restatement, supra note 16, § 18, Reporters' Note 1.
68. 221 U.S. 280 (1911).
ent at the effect, if the state should succeed in getting him within its power. 69

Although Strassheim dealt with jurisdiction among the states of the union, its holding was subsequently applied to uphold a wide variety of statutes taking effect beyond the national borders. For example, the Sherman Antitrust Act was applied by Judge Hand in United States v. Aluminum Company of America 70 to cartel agreements made abroad by foreign companies. He said that these agreements affected imports and that “any state may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.” 71

More recently, Deutsche Lufthansa Atkiengesellschaft v. CAB 72 upheld a Civil Aeronautics Board regulation requiring foreign air carriers to print liability limitations on tickets issued abroad. The court stated that “Congress may regulate the conduct of non-citizens, even if that conduct takes place in a foreign country, if the consequences of the conduct are felt within the United States.” 73

The preceding cases clearly indicate that there is no bar under contemporary international law to enforcing civil or criminal penalties for extraterritorial conduct by aliens that causes territorial detriment. As indicated in The S.S. Lotus, this principle may be used to acquire subject matter jurisdiction over acts on foreign ships beyond territorial waters. Although there is no authority for extraterritorial police action to enforce such laws, this does not pose a significant practical difficulty in the case of environmental controls on vessels. The vast majority of ships that would be affected by such laws are American-owned or will enter the jurisdiction and thus be subject to enforcement penalties. Furthermore, if the parties are

69. Id. at 285.
70. 148 F.2d 416 (2d Cir. 1945).
71. Id. at 443; for a collection of antitrust cases involving alien corporations, see Note, Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 COLUM. L. REV. 1441 (1963).
72. 479 F.2d 912 (D.C. Cir. 1968).
73. Id. at 917; accord, CAB v. British Airways Board, 433 F. Supp. 1379 (S.D.N.Y. 1977) (CAB rate regulation held applicable to fares collected in Britain by British airline); cf. Ford v. United States, 273 U.S. 593, 619-24 (1926) (prosecution for smuggling liquor from vessel beyond three-mile limit); Rivard v. United States, 372 F.2d 882 (5th Cir. 1967) (aliens prosecuted for extraterritorially conspiring to smuggle narcotics into the country); Marin v. United States, 352 F.2d 174 (5th Cir. 1965) (aliens prosecuted for extraterritorially conspiring to smuggle narcotics into the country).
subject to in personam jurisdiction, there is no bar to injunctions taking effect on the high seas beyond the court’s jurisdiction.14 Thus, although no regulations of pollution sources located beyond territorial waters have been reviewed by the courts,15 the precedents would appear to strongly favor their jurisdictional validity.

**Geneva Convention on the High Seas**

Even if a valid jurisdictional basis for regulating the extraterritorial operations of vessels is found, there is an issue of whether or not its exercise would violate the Geneva Convention on the High Seas.16 As with all treaties, the Convention is binding upon the states by virtue of the Supremacy Clause of the United States Constitution.17 Article 2 of the Convention states: "The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty."178 Article 6 states: "Ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas."179

It is doubtful whether invoking the objective territorial principle could be considered an exercise of sovereignty over international waters, or a prohibited assertion of jurisdiction over vessels while on the high seas. A distinction must again be made between prescriptive jurisdiction and enforcement jurisdiction.80 The United States may regulate the conduct of persons within a foreign country under the nationality or objective territorial principles, yet without enforcement power in the foreign country, such regulation could hardly be considered to subject foreign territory to United States sovereignty. In *The S.S. Lotus*,81 the Permanent Court of International Justice specifically held that territorial enforcement of an extraterritorial

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75. *But cf.* The Trail Smelter Arbitration (United States v. Canada), 3 R. Int’l Arb. Awards 1905, 35 Am. J. Int’l L. 684 (1941) (Canada held responsible under international law for damage done in the United States by atmospheric pollution originating from a smelter plant in Canada); Missouri v. Illinois, 200 U.S. 496, 520-21 (1906) (indicating that a state might have a remedy against a sister state for pollution of the former’s river).
77. U.S. Const. art. VI; Hauenstein v. Lynham, 100 U.S. 483 (1880).
79. *Id.* art. 6.
80. See text accompanying note 30 supra.
statute was not an illegal exercise of jurisdiction over foreign vessels while on the high seas. Although the *Lotus* decision predated the Convention on the High Seas, the principle should remain valid today since the Convention basically codified prior law.\(^2\) Thus, in order to be consistent with general principles of jurisdictional law, the Convention should be construed to merely prohibit enforcement jurisdiction on the high seas.

Resolution of the issue of compliance with the Convention must ultimately hinge upon international policy considerations. But the ramifications of upholding objective territorial jurisdiction over vessels polluting on the high seas are, for several reasons, relatively slight. First, all countries may currently impose design or equipment restrictions upon ships voluntarily entering their waters. Such regulations obviously have substantial extraterritorial effects. Objective territorial jurisdiction merely extends this power to the control of the activities of such vessels—a far lesser impact than equipment restrictions. Second, the interference with high seas commerce is kept to a minimum because only those activities that cause territorial detriment may be controlled. The requirement of territorial effects also prevents overreaching and overlapping regulation by several states or nations. Third, the requirement of territorial enforcement means that only those vessels voluntarily entering domestic waters and ports may be regulated. This prevents countries from promulgating laws that overly burden sea-borne commerce by ensuring that they will suffer economically. Finally, as the lightering case illustrates, foreign flag nations often lack sufficient familiarity or interest with local pollution problems to effectively deal with them. Accordingly, the courts should uphold objective territorial jurisdiction over polluters on the high seas as a relatively minor intrusion on commerce, and a significant step towards worldwide pollution control.

*Consent to Regulation*

Another potential means of controlling the extraterritorial activities of foreign vessels, although not technically "jurisdiction," is the imposition of certain conditions on their right to utilize domestic ports. While vessels of all nations have

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\(^2\) Restatement, *supra* note 16, at 32.
the right of innocent passage through territorial waters,83 in
Patterson v. Bark Eudora,84 the Supreme Court said that
the implied consent to permit them to enter our harbors
may be withdrawn, and if this implied consent may be
withdrawn, it may be extended upon such terms and con-
ditions as the government sees fit to impose.85

Under this theory, the lighters would "voluntarily" comply
with the ARB Rule on the high seas in order to utilize port
facilities. There is theoretically no limit to what activities may
be made conditions of entry, or where they may be required to
be performed.

It is quite possible, however, that this deceptively simple
principle does not exist at all. In Patterson, the Court held that
a federal statute prohibiting wage advances governed pay-
ments made by foreign ships while in domestic ports. The
Court's discussion on conditions of entry has been quoted in a
number of cases, notably Cunard v. Mellon86 and Strathearn
S.S. Co. v. Dillon,87 where the Court similarly held foreign
vessels subject to federal liquor prohibition and wage allow-
ance statutes while in American ports. In each case, the applicabil-
ity of the statutes was initially determined according to cus-
tomy principles of territorial jurisdiction. Although subse-
quent dicta in the opinions stated that Congress has the power
to condition access to ports, it becomes evident upon careful
reading of the cases that this was not a separate basis for up-
holding application of the statutes. The "conditions of entry"
were compliance with the territorial regulations. Although en-
forcement of the statutes incidentally impaired foreign con-
tracts or carriage of liquor, their application was nevertheless
a legitimate exercise of territorial jurisdiction. In no case has
the alleged condition of entry directly regulated extraterritorial
conduct, as does the ARB Rule.88

83. See note 17 supra.
84. 190 U.S. 169 (1902).
85. Id. at 177.
86. 262 U.S. 100 (1923).
87. 252 U.S. 348 (1919).
88. But see Armement Deppe v. United States, 399 F.2d 794 (5th Cir. 1968), cert.
denied, 393 U.S. 1094 (1969), in which collusive rate contracts executed abroad by
foreign flag shippers were held to be governed by the Shipping Act of 1916, 46 U.S.C.
§ 813a (1976). The opinion reiterated congressional power to condition access to Ameri-
can ports, and did not clearly discuss jurisdiction over the subject matter. The court
felt, however, that the decision hinged upon a finding that the unfair contracts were
The Restatement[^footnote] does not recognize this method of controlling vessels, perhaps because imposing conditions of entry is virtually indistinguishable from actual regulation. This similarity dictates that conditions of entry should only be used to control activities that would be within the reach of customary principles of jurisdictional law. Resorting to this fiction should therefore rarely be justified.

**Constitutional Limitations on State Authority**

Our federal government is composed of enumerated powers which the Constitution delegates to it from the states. The sovereign authority of the states to exercise these powers is accordingly diminished. The extent of this diminishment in sovereign power must be analyzed to determine whether the states may regulate extraterritorial conduct as the federal government may. State jurisdictional authority, power to affect foreign affairs, and power to regulate foreign commerce will be examined.

*State Jurisdiction at Sea*

*State Territorial Limits.* Prior to 1947 it was generally assumed that the states possessed absolute sovereign power to determine the breadth of their territorial seas.^90^ Beginning in 1947, the Supreme Court reversed this assumption in a series of cases, *United States v. California,*[^footnote] *United States v. Louisiana,*[^footnote] and *United States v. Texas,*[^footnote] in which the federal government sought declarations of its exclusive right to control exploitation of the continental shelf. The Court held that the states had no valid claim to ownership of the seabed beyond the low water mark and that “paramount rights” over the ocean floor were vested in the federal government. The decisions were based partly on a historical analysis and partly on the importance of the oceans to national security and other

[^footnote]: The Restatement[^footnote] does not recognize this method of controlling vessels, perhaps because imposing conditions of entry is virtually indistinguishable from actual regulation. This similarity dictates that conditions of entry should only be used to control activities that would be within the reach of customary principles of jurisdictional law. Resorting to this fiction should therefore rarely be justified.

[^footnote]: See, e.g., *People v. Stralla,* 14 Cal. 2d 617, 630, 96 P.2d 941, 947 (1939), where the court said: “[T]he ‘jurisdiction of the State of California over the sea is that of an independent nation’ [citation omitted], with the right to decide and prescribe its own boundaries.”

[^footnote]: *332 U.S. 19 (1947).*

[^footnote]: *339 U.S. 699 (1950).*

[^footnote]: *339 U.S. 707 (1950).*
federal interests. Although these cases specifically concerned title to the seabed, the reasoning is equally applicable to the waters above, and in fact, the Court has recently reinterpreted the cases as establishing that "paramount rights over the ocean waters and their seabed were vested in the Federal Government." As an exercise of its paramount authority, Congress passed the Submerged Lands Act of 1953, which set the outer boundaries of the coastal states at three miles from shore, a limit which the California Constitution claims. The federal government retains its paramount authority over the waters and seabed beyond the three-mile limit since the Act did not purport to affect rights to those areas.

As with any nation, it is clear that coastal states may exercise their full jurisdictional powers within their territorial waters. It is also clear from Strassheim v. Daily that the states may exercise objective territorial jurisdiction over persons acting in other states of the union. The question that remains is whether or not the states, upon entering the union,

94. The Court said:
California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U.S. pp. 31-34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

339 U.S. at 704.


97. Id. § 1312, which makes no distinction between, and is apparently applicable to, ocean jurisdictional boundaries as well as seabed title. See also id. §§ 1301(e), 1311(a) (giving states title to fish and other water borne resources); United States v. Louisiana, 420 U.S. 529, 530 (1975) (decree directing determination of "the extent of territorial waters under the jurisdiction of the State of Louisiana pursuant to the Submerged Lands Act. . . ."). But see People v. Foretich, 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (1970) (discussed in note 98 infra).

98. CAL. CONST. art. XXI, § 1, as clarified by CAL. GOV'T CODE § 170 (West 1966). Across certain bays, the California Constitution claims somewhat more than three miles. In People v. Foretich, 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (1970), the court held that the state retains "political" jurisdiction over these areas, although not title. See also note 107 infra.


101. 221 U.S. 280 (1911); see text accompanying notes 68, 69 supra.
gave up the power to exercise jurisdiction beyond the borders of the United States.

State Extraterritorial Power. The Supreme Court has said that each state is competent to exert "that residuum of sovereignty not delegated to the United States by the Constitution itself."\textsuperscript{102} As to jurisdictional powers, it appears from \textit{Skiriotes v. Florida}\textsuperscript{103} that the extent of state sovereign power delegated to the federal government is very little indeed.

In \textit{Skiriotes}, a Florida skin diver was found to have violated a state regulation prohibiting the use of diving equipment in collecting sponges. The diver contended that the regulation could not be applied to his activities because they occurred beyond the three-mile limit. The Supreme Court disagreed, basing its opinion on the nationality principle of jurisdiction:

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. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign.\textsuperscript{104}

\textit{Skiriotes} has been broadly interpreted by a number of state and lower federal courts which have sustained state regulations of fishing on the high seas. Earlier cases had upheld indirect regulation of extraterritorial fishing in the form of "landing laws"—prohibitions on possession within the state of protected sealife taken beyond state waters.\textsuperscript{105} After \textit{Skiriotes}, direct controls on high seas fishing were upheld, even to the point of permitting extraterritorial arrests.

In \textit{People v. Foretich},\textsuperscript{106} the California Court of Appeals upheld the prosecution of California citizens for fishing with purse seine nets in a statutorily prohibited area between three and twelve miles from shore.\textsuperscript{107} In \textit{Felton v. Hodges},\textsuperscript{108} the Fifth

\textsuperscript{102}. Coyle v. Oklahoma, 221 U.S. 559, 567 (1911).
\textsuperscript{103}. 131 U.S. 280 (1941).
\textsuperscript{104}. \textit{Id.} at 77.
\textsuperscript{106}. 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (1970); see also 34 Ops. Cal. ATT'Y GEN. 280 (1959) (state regulation of extraterritorial ocean waste discharges by California citizens is valid).
\textsuperscript{107}. The court was of the opinion that California retained "political" jurisdiction over the area in question, see note 98 supra, but it held that under \textit{Skiriotes}, the
Circuit upheld the arrest on the high seas of a Florida citizen for violating Florida statutes that regulated the taking of crawfish. And in State v. Bundrant and State v. Sieminski, the Alaska Supreme Court sustained arrests that occurred both within and beyond the three-mile limit for violations of state laws which prohibited the taking of crabs and scallops in specified areas of the high seas during certain seasons. Although the defendants had regular contacts with Alaska, most, including those arrested on the high seas, were not state citizens.

Two requisites for constitutional validity were stated in each case: first, the regulation served a legitimate state purpose, usually protection of marine life and fishing industries within the state by preventing depletion of migratory species while they were beyond territorial waters; second, the statutes were only enforced against those loosely defined as state citizens: persons having a certain minimum relationship with the state, such as residency, possession of state licenses, or regular use of state ports and markets.

The Skiriotes line of cases indicates that the states may regulate the conduct of their citizens beyond territorial limits pursuant to the nationality principle of jurisdiction. Extra-territorial pollution regulation of domestic vessels owned by state citizens or those having significant state contacts is thus a valid exercise of authority. However, as was noted earlier, extraterritorial regulation of locally owned foreign flag vessels would impinge upon the flag country's rights and thus should not be justified as an exercise of nationality jurisdiction over shipowners. Jurisdiction over foreign vessels could, however,
be obtained pursuant to the objective territorial principle. If the states have retained a sufficient “residuum of sovereignty” to exercise nationality jurisdiction on the high seas, they should be free to invoke the objective territorial principle which, due to its requirements of territorial effects and enforcement, would seem to constitute a lesser exercise of external sovereignty.

Still to be determined is whether or not the Constitution prohibits the states from regulating external affairs that involve foreign relations and commerce.

State Intrusion Into Foreign Affairs

Like the Commerce Clause, the foreign affairs clauses of the United States Constitution delegate powers to the national government and carve out an exclusive federal domain in which state police powers are implicitly restricted. State legislation may not constitute “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.” The recognition of this restriction on state authority is a relatively new development and its parameters remain largely undefined.

In the leading case of Zschernig v. Miller, the Supreme Court invalidated an Oregon escheat statute which had more than “some incidental or indirect effect in foreign countries,” it had “great potential for disruption or embarrassment” of our foreign policies. Louis Henkin suggests that this indicates an analysis similar to that under the Commerce Clause:

[C]ertain impingements on foreign affairs are excluded because national uniformity is required; infringements are barred if they discriminate against or unduly burden our foreign relations; the Courts will balance the State’s interest in a regulation against the impact on American foreign relations.

To the extent that state environmental laws are applied to

114. U.S. CONST. art. I, § 1, cl. 3; id. art. I, § 10, id. art. II, § 2; id. art. VI.
115. “Governmental power over external affairs is not distributed, but is vested exclusively in the national government.” United States v. Belmont, 301 U.S. 324, 330 (1937).
117. Id.
118. Id. at 434-35.
ships on the high seas, particularly those flying foreign flags, they must be deemed to affect the nation's foreign affairs. Nevertheless, such laws should be upheld if carefully circumscribed to be nondiscriminatory, consistent with international law, serve a legitimate state purpose, and avoid regulating equipment in a manner contradictory to other jurisdictions which the vessels might enter. Although specific state regulations will vary, the ARB Model Lightering Rule appears to comport with these conditions.

A final issue is whether or not the federal government's paramount authority over the oceans beyond territorial waters might preclude state regulation there. However, as was indicated in *Skiriotes*, the national government's authority over the oceans may be paramount, but it is not exclusive.

**State Regulation of Foreign Commerce**

The Commerce Clause of the United States Constitution reserves to the federal government the power to regulate interstate and foreign commerce, and implicitly prohibits such regulation by the states. Although a relatively clear picture of the limitation on state regulation of interstate commerce has emerged, very few cases have dealt with state regulation of foreign commerce. Nevertheless, as one commentator has noted, "nothing in the cases suggests, and there is no reason to believe, that they and the various doctrines do not apply equally to foreign commerce."  

In *Huron Portland Cement Co. v. Detroit*, the Supreme Court, in upholding the application of a local smoke abatement ordinance to vessels plying the Great Lakes in interstate commerce, explained the basic limitations on local power in this area:

> Evenhanded local regulation to effectuate a legitimate

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120. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 180 (1978), where the Supreme Court indicated in dicta that a state tanker regulation which required such integral design features as double bottoms, twin screws, and specific engine horsepower might constitute an invalid interference with the federal government's attempts to achieve international agreement on the regulation of tanker design.

121. U.S. CONST. art. I, § 8, cl. 3.


124. Although the opinion only stated that interstate commerce was involved, it is likely that Detroit's ordinance was also applied to vessels in foreign commerce with Canada and other nations.
local public interest is valid unless . . . unduly burdensome on maritime activities or interstate commerce . . . .

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. . . .125

Lightering regulations such as the ARB Model Rule would appear to comply with these requirements. Air pollution created by lightering is a local, not national, problem. The uniqueness of local meteorological conditions makes uniform emissions standards unnecessary. Uniform equipment regulations are also unnecessary since lightering operations involve only the ports of one state. Lighters face compliance costs which are minimal considering the size and expenses of the petroleum industry, and which are probably not so great as to reduce deliveries of oil—thus negating any inference of undue burden under a test recently articulated by the Supreme Court.126 Local lightering rules should thus readily pass constitutional muster, particularly in light of their benefits to "health, life and safety."

Federal Preemption

The modern law of air pollution control is governed largely by the federal Clean Air Act.127 The Act establishes a comprehensive scheme for regulating emissions from stationary and vehicular sources. Vessels are not covered,128 and with a few

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125. 362 U.S. at 443-44.
126. The Supreme Court recently held that a similarly restrictive Washington State tanker regulation did not constitute an undue burden on commerce after noting that the cost of compliance with it was insignificant compared to the size of the industry, and that the amount of oil refined had not declined since passage of the law. Ray v. Atlantic Richfield Co., 435 U.S. 151, 179-80 (1978); see text accompanying note 135 infra.
128. Id. § 7550(2).
exceptions, federal preemptive powers are restricted by the proviso that “nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce . . . any requirements respecting control or abatement of air pollution.”\textsuperscript{130} It seems clear, therefore, that the Clean Air Act does not preclude the states from regulating atmospheric emissions from vessels. However, there are other federal statutes regulating oil tankers which must be considered.

Title I of the Ports and Waterways Safety Act of 1972\textsuperscript{131} establishes a federal scheme for regulating the operations, traffic routes, and pilotage of tankers. Title II\textsuperscript{132} empowers the Coast Guard to regulate design, construction, and maintenance of tankers operating in United States waters. The introductory clause of Title I states that its primary purpose is “to protect the navigable waters and resources therein from environmental harm resulting from vessel or structure damage.”\textsuperscript{133}

The preemptive effect of the Ports and Waterways Safety Act was recently litigated in connection with a Washington state statute. By enacting the Washington Tanker Act,\textsuperscript{134} the state legislature sought to protect the waters of Puget Sound by prohibiting large supertankers, requiring others to take on a local pilot in the sound, and specifying minimum design features, a requirement which could be waived if the tanker was accompanied by a tug escort. In \textit{Ray v. Atlantic Richfield Co.},\textsuperscript{135} the Supreme Court ruled that the state design restrictions and some of the pilotage requirements were preempted by the federal statute. While exhibiting great deference to the state police power, the Court noted that the ends which both statutes sought were identical, that complying with both would be impossible at times, and that “Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.”\textsuperscript{136} The Court did state, however, that

\begin{itemize}
  \item\textsuperscript{129} \textit{Id.} §§ 7543(a) (new motor vehicles), 7545(c)(4) (fuels), 7573 (aircraft).
  \item\textsuperscript{130} \textit{Id.} § 7416.
  \item\textsuperscript{131} 33 U.S.C. §§ 1221-1227 (1976).
  \item\textsuperscript{132} 46 U.S.C. § 391a (1970).
  \item\textsuperscript{133} 33 U.S.C. § 1221 (1976).
  \item\textsuperscript{134} \textit{Wash. Rev. Code} § 88.16.170 (Supp. 1976).
  \item\textsuperscript{135} 435 U.S. 151 (1978).
  \item\textsuperscript{136} \textit{Id.} at 163.
\end{itemize}
does not prevent a state or city from enforcing local laws having other purposes, such as a local smoke abatement law.\textsuperscript{137}

The Court thus specifically distinguished and reaffirmed its holding in \textit{Huron Portland Cement Co. v. Detroit},\textsuperscript{138} a case directly analogous to the lightering situation. There, the Coast Guard, pursuant to federal statutes, inspected and licensed vessels to ensure their safety. The city of Detroit then enacted a smoke abatement ordinance which was applicable to vessels in its port. Compliance with the ordinance required equipment modifications on vessels previously approved by the Coast Guard. In holding that the ordinance was not preempted by federal law, the Court found "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance,"\textsuperscript{139} stating: "the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection. . . . By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution. . . ."\textsuperscript{140} As the dissent pointed out, the effects of the two laws were clearly at odds. The city was authorized to impound the same vessels which the Coast Guard had approved and licensed for use. The Court based its decision instead upon the purposes of the two laws being independent and largely compatible.

Similarly, in the lightering situation, a local air pollution district may find that its regulations prohibit equipment or activities approved by the Coast Guard. Yet there is no actual conflict between the laws because their purposes differ and the pollution districts recognize the Coast Guard's paramount authority in its field; section (e)(1) of the ARB Model Lightering Rule provides: "Nothing in this Rule shall be construed to . . . (r)equire any act or omission that would be in violation of any regulation or other requirement of the United States Coast Guard."\textsuperscript{141} This clearly satisfies the principle espoused by the Court in \textit{Kelly v. Washington}\textsuperscript{142} that an exercise of police power is only superseded by federal action when "the repugnance or

\textsuperscript{137} Id. at 164.
\textsuperscript{138} 362 U.S. 440 (1960).
\textsuperscript{139} Id. at 446.
\textsuperscript{140} Id. at 445.
\textsuperscript{141} ARB, Model Rule for the Control of Emissions from Lightering Operations § (e)(1) (July, 1978).
\textsuperscript{142} 302 U.S. 1 (1937) (also reaffirmed by Ray).
conflict is 'so direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'”

In the absence of direct conflict, state authority may still be preempted if the federal statute evidences congressional intent to wholly occupy the field. In *Huron*, although the Court observed that the federal statutes were an “extensive and comprehensive set of controls over ships and shipping,” it nevertheless found that Congress had not intended to wholly occupy the field of vessel regulation. This was so because the federal laws were limited in purpose to safety, and because there had been congressional declarations of policy to “preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution.” That policy continues today in section 101 of the Clean Air Act. In addition, the Court in *Huron* pointed out that air pollution control clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the States and their instrumentalities may act in many areas of interstate commerce and maritime activities, concurrently with the federal government.

**Offshore Structures**

State regulation of extraterritorial oil drilling platforms and deepwater ports presents jurisdictional issues that are quite dissimilar from those raised in regulating vessels; they are also less complex. The outer continental shelf, unlike the high seas, is subject to limited national sovereignty under international law. The Geneva Convention on the Continental Shelf provides each coastal nation with jurisdiction to explore and exploit the resources of the shelf within the zone where the depth of the superadjacent waters permits such activities. Coastal nations are given authority to construct structures necessary for such exploration and exploitation.

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143. *Id.* at 10.
144. 362 U.S. at 444.
147. 362 U.S. at 442.
148. Deepwater ports are fixed or floating offshore structures that are used to receive oil from supertankers which are too large to enter harbors. *S. Rep. No. 93-1217, 93rd Cong., 2d Sess. 5-7, reprinted in [1974] U.S. Code Cong. & Ad. News 7533-35.*
150. *Id.* art. 5. Such structures do not have the legal status of islands nor a
As was noted earlier, Congress has permitted the states to extend their authority over the oceans, including structures, within three miles from shore.151 Beyond this zone, the Outer Continental Shelf Lands Act of 1953 (OCSLA)152 confirms that the laws and Constitution of the United States apply to the seabed and structures erected thereon for the purpose of resource exploitation.153 Fixed and floating ports located beyond territorial limits are brought under federal authority by the Deepwater Port Act of 1974 (DPA),154 although such jurisdiction is not presently authorized by international law.155 The waters beyond territorial limits retain their status as high seas.156

The applicability of state laws to structures beyond the three-mile limit is restricted in a similar manner by the OCSLA and the DPA.157 Both acts provide that to the extent they are applicable and not inconsistent with federal laws, the civil and criminal laws of the nearest coastal states are declared to be the law of the United States for structures located directly

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   The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: provided, however, that mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

Structures not designed for resource exploitation are not covered by the Act or the Convention on the Continental Shelf. Note, Jurisdictional Problems Created by Artificial Islands, 10 SAN DIEGO L. REV. 638, 652-53 (1973).
off their coasts. All such state laws must be administered and enforced by the appropriate officers and courts of the United States.

The purpose of these provisions in the OCSLA was to define a body of law applicable to the seabed and structures of the outer continental shelf. Congress foresaw that development of the shelf would require a legal framework more extensive than that provided by the United States Code. The Act was thus designed to adopt state law in order to fill voids in the federal statutory scheme. However, state laws may not be applied directly to activities on the shelf; the Supreme Court in Rodriguez v. Aetna Casualty & Surety Co. held that "federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law."

Although Congress' primary concern in enacting the state law adoption provisions may have been with providing civil law for offshore structures, and most cases to date have involved only such issues, the clear language of the acts would make state environmental laws applicable as well. Moreover, adoption of state environmental laws would be consistent with congressional policies: Congress was not concerned with preserving uniformity of law applicable to all continental shelf struc-

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To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

State taxation laws shall not apply to the outer Continental Shelf.


161. Id. at 358.

162. Id.

163. Id. at 357; Chevron Oil Co. v. Huson, 404 U.S. 97, 100 (1971).

164. E.g., 395 U.S. 352; 404 U.S. 97.
Congress was, however, concerned with maintaining local environmental control. The 1978 OCSLA amendments provide that

the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized. . . .

Thus, in the absence of federal regulations on point, state air pollution regulations should be deemed applicable to structures on the outer continental shelf if they are consistent with federal law. As noted earlier, state regulations should rarely conflict with the Clean Air Act. The question of conflict with other federal laws could, of course, still be raised. State laws that required sources to control emissions in such a manner as would violate federal safety regulations might be unenforceable. Or a state law that in effect prohibited all drilling on the outer continental shelf could be viewed as an infringement on the federal scheme of leasing drilling rights.

In the case of valid state regulations, the major drawback for the states is that enforcement of their “federalized” regulations must be accomplished by federal agencies. But other than a loss of local control, no unusual problems should arise under such a procedure since the Environmental Protection Agency has often enforced state air pollution laws pursuant to section 113 of the Clean Air Act.

CONCLUSION

This comment has examined the jurisdictional issues involved in state assertion of authority to regulate pollution sources located on the high seas. The issues are twofold: First, what are the ramifications of such regulation according to in-

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165. Chevron Oil Co. v. Huson, 404 U.S. at 104.
168. Cf. Union Oil Co. of Cal. v. Minier, 437 F.2d 408 (9th Cir. 1970) (state nuisance law may not be used to frustrate federal leasing authority by enjoining oil drilling operations on the outer continental shelf).
international law? Second, can an individual state usurp the powers of the federal government in such matters? The California Air Resources Board’s Model Lightering and New Source Review Rules squarely address these questions.

State regulations of extraterritorial vessels should be constitutionally sustained, for the states have retained a sufficient residuum of sovereignty to control activities on the high seas. Such legislation, if within the realm of health or pollution control, will only be struck down if unjustifiably burdensome on foreign relations or commerce, or if in irreconcilable conflict with federal laws. The validity of state laws regulating structures on the outer continental shelf will depend primarily on their consistency with federal laws. Although such local regulations can only be enforced by federal agencies, this should not create any insurmountable practical difficulties.

Extraterritorial pollution regulation is also valid under general principles of international law. According to customary international law, a nation may assert jurisdiction on several bases. The most fundamental basis for jurisdiction is the territorial principle, under which a country possesses plenary jurisdiction over all matters occurring within its territorial limits. This principle has been extended to allow the assertion of jurisdiction over extraterritorial actions whose effects are felt within the nation. Although the courts have apparently never used this concept for pollution control, all indications suggest that it is an internationally acceptable method of obtaining jurisdiction over polluters on the high seas.

The policies underlying the ARB’s assertion of authority over vessels are strikingly persuasive. Coastal nations the world over are presently faced with the unconscionable pollution of their territories by poorly regulated foreign ships. Effective international and flag nation controls have proved to be lacking. Regulation of such vessels by the affected countries, who are uniquely motivated and familiar with the problems, is a definite step toward enhanced worldwide environmental quality.

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