THE NEW FEDERALISM AND THE MANAGEMENT OF OCEAN RESOURCES

Cynthia E. Carlson

Research Associate
U.S. Department of Commerce
National Oceanic and Atmospheric
Administration
Washington, D.C. 20230

LL.M. Candidate
Graduate Program in Oceans
Law and Policy
University of Virginia
Charlottesville, VA 22901

Abstract

This paper explores the concept of federalism; that is, the division of powers between the federal government and the states, and how such a division relates to the equitable and efficient management of our increasingly important ocean and coastal resources.

1. Introduction

Traditionally, ocean programs and regulatory schemes have been viewed as being totally federal in nature, with no direct role being left to the states. Due to initial needs for uniform standards, a centralized bureaucracy, and a dependable source of revenue, federal dominion in the oceans arena seemed to be the most logical regulatory locus. However, the role of the states has not been subject to total federal pre-emption. States historically have maintained jurisdiction over their coastal zones and over ocean areas to points three miles offshore, such areas being important resource zones from a biological as well as from a territorial perspective. Coastal states have not always exercised this jurisdiction to its full extent, though.

The "new federalism" policies of the Administration promise to change many of our regulatory schemes. Recognizing federal institutional limits, new federalism policies lean toward widespread decentralization and decreases in big government, shifting more of the costs and responsibilities to the states which receive the benefits more directly. Due to local geographical variations and needs, states can act as test laboratories in resource management schemes, providing greater flexibility and innovation in policy development and

implementation. Thus, the new federalism may result in the better protection and management of our most important ocean and coastal resources.

2. Federalism: Old v. New

The term "new federalism" is being used more and more often these days and, in fact, has become one of the major themes of the Reagan Administration. The term "federalism," however, is not a new term at all, as its initial use dates from the time of the framing of the U.S. Constitution in the 1780's. Specifically, federalism refers to "a form of government in which a union of states recognizes the sovereignty of a central authority while retaining certain residual powers of government."¹ Over the years, this term has acquired quite a broad meaning as components of federalism have become integrated into many aspects of intergovernmental relations and have become incorporated into many governmental programs and functions in varying degrees, depending upon social and economic needs as well as the substantive matter at hand. Thus, the term "federalism" has come to mean the constitutional, administrative, philosophical, and political allocation of power and decisionmaking authority between the federal government and the states, two distinct yet coordinate governments, each of which is supreme when acting in its own sphere.

As a result of specific constitutional mandates, the federal government exercises exclusive control over matters relating to areas such as admiralty and commerce. Also, due to a perceived overriding federal interest, the federal government traditionally has been the sole regulator of matters concerning the

national economy, national defense, and international affairs. In addition, as a result of a broad interpretation of the "necessary and proper" clause and in response to current problems and needs, the federal government has by its own initiative become the supreme decision-maker in areas such as pollution control. Reacting to such federal preemption, the states have often referred to this third category of federal control as "federal encroachment," contending that control at the federal level is often inappropriate and detrimental to the ability of the states to function as states.

Regarding the sphere occupied by the states, it is the states that have had exclusive regulatory control over land use decisions and police power matters, two categories that are quite broad and potentially farreaching. As for more indirect sources of state regulatory power, Wechsler has noted that

(t)he actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.

...

The fact of the continuous existence of the states, with general governmental competence unless excluded by the Constitution or valid Act of Congress, set the mood of our federalism from the start.²

From such an historical perspective, Wechsler concludes that "the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."³ Thus, the states play an important and influential role in our scheme of federalism, a role that has often been overlooked or underestimated.

Ideally, it should be most difficult to draw the line as to where federal control stops and where state control begins, federalism implying that regulatory programs be based upon a shared or overlapping plan of compatible coexistence. However, this has not been the case, for as a result of political and economic trends, "developments in the twentieth century have dangerously tilted the balances toward the federal government and eroded the sovereignty of the states."⁴ To illustrate, Stewart has noted that the responsibilities for establishing environmental policies has shifted from the states, the traditional

regulators of environmental quality, to the federal government. Due to the "perceived inability" of the states to effectively protect the environment, he cites the many comprehensive environmental control statutes enacted by Congress during the last decade.⁵ Such a regulatory plan by itself, however, will not ensure adequate environmental quality, for Stewart also mentions that "(t)he federal government ... is dependent upon state and local authorities to implement these policies because of the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources."⁶

On the other hand, one major reason for federal encroachment in the area of environmental protection was the real inability of the states to control adverse interstate environmental impacts or spills over as well as detrimental international environmental problems. Thus, our scheme of federalism poses a problem. Stewart has summarized the controversy by stating that "the factors favoring noncentralized decisionmaking have been powerfully reinforced by geography, history, and the structure of our politics"⁷ and that "environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington."⁸ However, in noting the equitable benefits and administrative ease to be gained from national uniformity, he also admits that "the need for central stimulus and direction is equally clear."⁹ What, then, is the proper mix of federal and state control? Will the new federalism promote a better balance?

3. Federal and State Roles in Ocean Resource Management

Paralleling the comprehensive federal regulatory scheme that governs the protection of the environment, the majority of our laws and policies regarding the conservation and management of ocean and coastal resources primarily stems from federal jurisdictional sources. Resulting from a broad interpretation of the commerce clause as well as from the perception of the ocean and coastal zone as new, unregulated resource areas, the federal government at first seemed justified to be the exclusive regulator in the oceans area. However, the role of the states has never been totally preempted, as many federal ocean programs allow for varying degrees of federal-state cooperation and control, depending

upon the nature of the resource in question. In addition, many ocean-related statutes have been amended in order to provide for an increased role for the states.

At one extreme, due to an overriding national interest resulting from the type and location of certain ocean resources, some federal ocean programs will always remain exclusively in the federal sphere. For example, the Deep Seabed Hard Minerals Resources Act, which establishes a national regime for the recovery and development of strategic offshore minerals, was enacted as an interim national response to a potential future international regulatory scheme.¹⁰ As the resources in question are outside of the states' 3-mile zones as well as beyond the federal government's 200-mile jurisdiction, there can be no doubt as to the need for a single federal policy regarding deep seabed mining.

As to the other extreme, due to the traditional regulatory roles of the states, other ocean programs which appear to be primarily federal in nature are actually federally-acknowledged state schemes. For example, the Submerged Lands Act declares 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 vested in and assigned to the respective states ...¹¹

Another such scheme is incorporated into the Coastal Zone Management Act, establishing federally-funded state coastal management plans and policies which federal coastal development activities cannot preempt.¹² It is important to note, however, that these and other state programs may still be subject to constitutional mandates, congressional policies, and national priorities which take precedence to the rights of the states.¹³

The majority of ocean programs fall between these two extremes, where the line between complete federal preemption and total state regulation is often hard to pinpoint. Close to the complete federal preemption end are the Ocean Dumping and Marine Sanctuaries Programs. The former establishes a national scheme "to regulate the dumping of all types of materials into

ocean waters and to prevent or strictly limit the dumping ... of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."¹⁴ Further, the federal program explicitly forbids any state to regulate ocean dumping.¹⁵ However, the states are not totally preempted, as a state may still play an important regulatory role by proposing supplemental regulatory criteria "relating to the dumping of materials into ocean waters within its jurisdiction, or into other ocean waters to the extent that such dumping may affect waters within the jurisdiction of such state."¹⁶ Similarly, the Marine Sanctuaries Program establishes a national program for the preservation and restoration of unique ocean areas.¹⁷ However, if a proposed sanctuary area lies within the jurisdictional limits of any state, state officials must be consulted prior to any formal area designation.¹⁸ Further, the objection to a designated sanctuary area by the governor of an affected state makes such a designation ineffective.¹⁹

A fourth category of ocean programs represents a potential balance between the often competing state and federal interests in the oceans area. For example, even though the Magnuson Fishery Conservation and Management Act establishes a national fishery program based upon national standards and objectives,²⁰ the Act also provides that "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any state within its boundaries."²¹ This important state role was recognized by a federal court in Alaska, holding that the regulation of the crab fishery in the Bering Sea, both within and beyond the 3-mile state limit, was not under exclusive federal jurisdiction.²² The court, in finding that the continued health of the fishery was vital to the state, also held that the state's regulation of the fishery beyond the 3-mile limit was a legitimate extension of the state's police power, which in turn served to promote and not burden interstate commerce.²³

The Outer Continental Shelf Lands Act, although relating to areas under exclusive federal control, allows the states to play an important role in the recovery of offshore oil and gas resources. Specifically, the Act recognizes the "rights and responsibilities of all States ... to preserve and protect their marine, human, and coastal environments ..., "²⁴ and

when proposed leasing is to occur within the 3-mile jurisdiction of a coastal state, the Act requires state participation in the development of leasing schedules as well as the inclusion of applicable state laws and policies in the final leasing plan.²⁵ Further, the Act provides for the "fair and equitable division" of revenues between affected states and the federal government that are generated by such offshore activities within the 3-mile limit.²⁶ The Act allows for potentially greater state regulatory involvement as well in that it expressly recognizes the validity of state jurisdictional claims over submerged lands²⁷ and the applicability of state civil and criminal laws to corresponding subsoil and seabed areas of the outer continental shelf.²⁸

And, in terms of other living marine resources, even though both the Marine Mammal Protection Act and the Endangered Species Act establish national programs for resource protection, each allows for the transfer of management authority to the states.²⁹ In addition, the Endangered Species Act, whose terms are generally more strict than those of the Marine Mammal Protection Act, provides that state laws that conflict with the federal act are void, but that any state law "may be more restrictive than the (federal law) ... but not less restrictive than the prohibitions thus defined."³⁰ Thus, federal ocean programs illustrate the many possible variations on the theme of federalism, ranging from exclusive federal regulatory authority to primarily state control, depending upon perceived governmental as well as resource needs.

4. Conclusion: Toward a Balance

The trends and policies of the new federalism are just beginning to be incorporated into many substantive areas, and their potential effects are still uncertain. It is also unclear as to how the new federalism will affect the management of ocean resources. The new federalism does present new and increased opportunities to the states, recognizing that "there are limits upon the power of Congress to override state sovereignty."³¹ The new federalism also views the states as capable policy makers, specifically viewing states as capable of exercising authority in many areas that are not currently regulated by the federal government. Further, where prior state actions were declared invalid if they intruded into a field traditionally occupied by

the federal government, the new federalism views federal standards as minimum standards, leaving room for noncontradictory, supplemental state regulation. Therefore, a supplemental state program, such as one relating to fisheries management or endangered species protection, will promote the particular geographical and resource needs of the state while promoting at the same time the primary purpose of the federal program.

The policies of the new federalism raise many questions concerning the respective roles of the federal government and the states in the equitable and efficient management of ocean resources. What is the appropriate regulatory level? Should the nature of the resource determine such a level, or should it be determined by other factors such as funding ability? Or, on the other hand, is federalism, specifically, federalism as related to ocean resource management, merely a policy perception?

To quote Ball, "(t)he Federal-State arrangement is at heart a matter of politics. So are marine resources."³² In any event, whether viewing federalism as a constitutional term, an administrative scheme, or a political perception, the decentralized trends of the new federalism present new possibilities to the states as well as to the federal government relating to the potentially better protection, development, and utilization of our ocean resources.

5. References

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4 LIEBER, H., FEDERALISM AND CLEAN WATERS 1 (1975).

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6 Id.

7 Id. at 1211.

8 Id. at 1266.

9 Id.

10 30 U.S.C. §§1401 - 1473 (1982).

11 43 U.S.C. § 1311(a) (1982).

12 16 U.S.C. § 1456(c)(1) (1982).

13 For example, as balanced against the rights of the states under the Submerged Lands Act, the federal government retains certain rights for "purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314(a). Also, under the Coastal Zone Management Act, the requirement that the federal government conform to state coastal plans and policies is tempered by the clause "to the maximum extent practicable." 16 U.S.C. § 1456(c)(1).

14 33 U.S.C. § 1401(b) (1982).

15 Id. at § 1416(d).

16 Id.

17 16 U.S.C. § 1342(a) (1982).

18 Id. at § 1432(b)(1).

19 Id. at § 1432(b)(2).

20 16 U.S.C. §§ 1801(a)(6), 1851 - 1861 (1982).

21 Id. at § 1856(a).

22 State v. Bundrant, 546 P.2d 530 (D.Alaska 1976).

23 Id.

24 43 U.S.C. § 1332(5) (1982).

25 Id. at § 1344(a), (c).

26 Id. at § 1337(g)(2).

27 Id. at § 1337(h).

28 Id. at § 1333(2)(a).

29 See 16 U.S.C. § 1379 (1982); 16 U.S.C. § 1535(a) - (c) (1982).

30 16 U.S.C. § 1535(f) (1982).

31 National League of Cities v. Usery, 426 U.S. 833, 841 (1976).

32 Ball, M., "The Law of the Sea, Federal-State Relations and the Extension of the Territorial Sea" 73 (1978).