

# Sea-Change from Bush to Clinton: Setting a New Course for Offshore Oil Development and U.S. Energy Policy

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*Nothing endures but change.*

Heraclitus, 540-480 B.C.

## I.

### INTRODUCTION

The proposed energy tax of Clinton's first budget became a hotly contested issue so swiftly that a major question has been left as to whether any broad-based energy tax can survive passage into law. In fact, though new taxes are always a politically difficult matter, a broad energy tax could have been much easier to sell to the American public. Though the Administration chose to portray and defend its broad energy tax as merely another vehicle to achieve deficit reduction — which undoubtedly is the best use for revenue from such a tax — there is actually a far better rationale to justify putting a new tax on energy. Surprisingly, this stronger argument was scarcely heard.

Put aside for a moment the distaste universally associated with new taxes, and instead consider that an energy tax could actually make the U.S. economy work better. A broad-based, though modest, tax on already cheap energy is a useful incentive to increase efficiency and improve energy conservation. "Finding" new sources

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of energy in this fashion would also slow unneeded increases in the national energy supply, while the revenue raised can reduce the budget deficit in ways less distorting to the economy than, for example, raising income tax rates. Moreover, by shifting costs of pollution back onto the heavy energy users and off of American society as a whole, a properly tailored energy tax would help to correct distortions of the free market. A moderate "green" energy tax thus combines environmental benefits with real federal deficit reduction — and at a relatively low level of economic pain. All this and cleaner air to boot.

Yet policies which call for even modest new energy taxes are never popular politics. A perfect example is the gas tax. What started as a broad tax on energy was swiftly knocked-down in the U.S. Senate to a minimal 4.3-cent levy on each gallon of gas. That figure is trifling; yet a tax two to three times that amount would go a long way to promote conservation and hence a cleaner environment. And so, over the next few years, the Clinton Administration must demonstrate that its energy policy is sound, and that, taking account of environmental quality, its policy is more rational and truly low-cost than the policies pursued by the Reagan and Bush Administrations. Happily, this should not be too difficult to do. This Article will focus on the specific case of offshore oil and gas policy and on the new thinking that a sea-change from the Bush to Clinton Administration can bring. In fact, current policy for offshore oil and gas development is an excellent area for careful review because there is such substantial room for improvement.

This discussion of opportunities for new thinking in federal energy policy and the management of offshore oil and gas development is divided into two parts. Part II fleshes out current problems with federal management of offshore oil and gas. The suggested solution for improving the present scheme is to offer interested coastal states a formal role in the federal planning process. Part III of this Article shows that statutory provisions already in existence can provide coastal states with greater input in offshore planning. This part examines the bureaucratic culture of relevant federal agencies and suggests incremental legislative changes to be undertaken in the Clinton presidency.

#### A. *The Significance of Change in the Bureaucracy*

"Congress proposes and the Executive disposes." This old saw on the distinction between legislative and executive functions still rings true today. But while Congress functions as the political, law-

making organ, does the executive branch subsequently implement these laws in a dispassionate, objective fashion? The answer to this important question is "no," and as the Clinton-Gore Administration takes a new direction in environmental law and policy from that of the Reagan-Bush years, there is bound to be significant redirection in the politics of bureaucracy. Thus, bias in executive branch attitudes becomes a particularly timely issue in 1993.

The attention that President Clinton and Vice-President Gore devote to environmental affairs will be quite interesting, because it is likely to be far greater than under former Presidents Reagan and Bush, and because bureaucratic "tilt" can be especially important in determining the efficacy of environmental protection laws. As the scope of federal environmental legislation has broadened in recent decades, the executive branch's role as implementer has come to play a much greater part. Where federal agencies were once mere "disposers," they have since grown into "policymakers," issuing regulations and decisions that range across a wide spectrum of environmental issues.

Though quite significant, "bureaucratic culture" has received little attention. Such might be expected of so dry a subject; yet bureaucratic culture is ignored only at the peril of wise resource management. This is particularly so now. Culture in federal agencies is highly visible with a change in the presidency — especially when the new president is from the non-incumbent party, as with the recent election of Democrat Clinton. In the wake of every new president comes an army of new political appointees, bringing prejudices and attitudes presumably shared by their president and party. Change in the presidency can therefore mightily affect the vigor with which existing environmental laws are administered.

Presidential change also presents an important opportunity to pass new legislation. By allowing a significant new direction in the executive branch and promoting a new agenda in Congress, values and principles previously ignored or ridiculed may suddenly be elevated to the top of the agenda. In the instant case, the Clinton-Gore victory will likely mean increased support for new statutory means to protect the environment. Getting new legislation through the Congress, however, typically takes time and effort, and there is some lag before environmental bills are passed into law.

In contrast to the slow passage of new legislation, significant changes in bureaucratic culture are apparent from Inauguration Day. Just as every new president wins the right to place her or his appointees throughout federal agencies, these appointees will, at the

president's pleasure, strive to shape the values, attitudes and output of their subordinates.

A fine example of bureaucratic culture, and the focus of this Article, is federal management of offshore oil and gas development. Issues of the relative costs versus the benefits of offshore oil are hardly new to the political scene — the need for new offshore development has been a contentious issue for decades. Yet while debate over federal policy is often virulent, it has seldom scratched beneath the surface. For instance, while federal plans for offshore development face intense opposition in coastal communities, little is typically said, or cared, about the federal bureaucracy that came up with these pro-development plans in the first place. Curiously, it seems to be assumed that the federal agency which balances development against conservation carries out the task with dispassionate expertise.

However, this assumption is far from correct. A president's attitude towards offshore oil and the environment sets the tone for the way federal agencies carry out such balancing. Norms and values in government agencies are set broadly by the president at the top, and in turn skew the output of actors working below. As with the private sector, government employees "inside the beltway" make decisions with one eye on "what the boss thinks." These preconceptions affect the way government is administered. Accepting then that government is run by subjective human beings, one must accept that agency culture will affect the manner in which salient laws — especially the vaguer ones — are carried out.

## II.

### OFFSHORE OIL AND GAS MANAGEMENT AND U.S. ENERGY USE

#### A. *The Sins of Past and the Present*

Persistent and pointed criticism of offshore oil and gas management strongly suggests that coastal states lack sufficient voice in federal offshore activities; currently, coastal states can only exercise their full authority up to three miles offshore.<sup>1</sup> Beginning at the outer edge of state waters, exclusive federal authority thereafter ex-

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1. For an excellent discussion of state-federal relations for offshore oil and gas, see John K. Van de Kamp & John A. Saurenman, *Outer Continental Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73 (1990) (co-written by John Van de Kamp, California Attorney General). See also *infra* note 135 (describing the Coastal Zone Management Act).

tends to the 200-mile limit of U.S. jurisdiction. This scheme has created a broad 197-mile wide zone under federal control, formally known as the outer continental shelf, or "OCS," where federal officials traditionally have promoted offshore oil and gas development.<sup>2</sup>

Arguably, this scheme for managing offshore oil and gas development is structured improperly.<sup>3</sup> The outline of this regime was conceived fully forty years ago, at a time when coastal states felt little impact from minimal federal OCS development activities. But coastal states are now subjected to tremendous impacts from modern OCS activities, and therefore should be given a voice in OCS management.<sup>4</sup> Because the present OCS oil and gas management regime has so little to recommend it, there are few reasons to retain this scheme given the opportunity for new thinking that is represented by the Clinton presidency.<sup>5</sup>

With the sea-change from Bush to Clinton, real change in federal offshore policy is possible.<sup>6</sup> The problem up to this point has been continued, severe bifurcation in America's domestic ocean policy, due primarily to the legal fiction of a three-mile line drawn across the water. Because of this division, individual states and the federal government have been encouraged to pursue vastly different policies when managing their offshore public resources — an approach that makes no sense in managing the fluid and interconnected marine environment.<sup>7</sup> Over the years, this tension has settled into an easily recognizable pattern. Coastal states are generally seen as more cognizant of, and responsive to, the concerns over environmental and other negative impacts which stem from offshore development.<sup>8</sup>

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2. See, e.g., Biliiana Cicin-Sain & Robert W. Knecht, *Federalism Under Stress: The Case of Offshore Oil and California*, in PERSPECTIVES ON FEDERALISM 149 (Harry N. Scheiber ed., 1987).

3. See generally Robert J. Wilder, *The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism*, 32 VA. J. INT'L L. 681 (1992).

4. See Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 404-05 (1984).

5. See Wilder, *supra* note 3, at 689, 739-46.

6. Robert J. Wilder, *Cooperative Governance, Environmental Policy, and Management of Offshore Oil and Gas in the United States*, 24 OCEAN DEV. AND INT'L L. 425, 436-39 (1993); see also Robert J. Wilder, *Prospects for Establishing Shared State/Federal Governance in the Extended Territorial Sea*, (March 19, 1992) (paper presented at the 1992 Annual Meeting of the Western Political Science Association, San Francisco, CA, concluding that shared state-federal authority for OCS management is possible should George Bush lose the 1992 election) (on file with author).

7. See Wilder, *supra* note 3, at 683-85.

8. See also *infra* text accompanying note 15. See generally DWIGHT HOLING, COASTAL ALERT: ECOSYSTEMS, ENERGY, AND OFFSHORE OIL DRILLING 13-38 (1990) (Negative impacts from the exploration and development of offshore oil and gas include significant air pollution, possible toxicity generated from drilling muds and

Coastal states are thus considered as almost uniformly opposed to new OCS development, with the exception of states bordering on the Gulf of Mexico and the State of Alaska.<sup>9</sup>

Conversely, the federal officials charged with managing the OCS during the Reagan-Bush years were regarded as aggressive proponents of new offshore development.<sup>10</sup> Thus, the national interest, as interpreted by previous secretaries of the interior such as James Watt and Manuel Lujan, seemed to demand increased exploitation of the submerged federal lands lying offshore. As a consequence of that attitude, sustained conflict between federal administrators and coastal states became the norm, rather than a preferable cooperation and consensus-building.<sup>11</sup>

To a large degree this conflict stems from the asymmetric distribution of the costs and benefits of offshore development.<sup>12</sup> Federal officials enjoy most of the benefits of OCS development. For instance, oil produced from the OCS reduces the United States' massive dependence on foreign oil supplies,<sup>13</sup> and royalties from OCS production substantially contribute to the federal Treasury.<sup>14</sup>

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other wastes, and a risk of oil spills. In addition, there are negative impacts on marine wildlife, commercial fisheries, and the tourist industry.)

9. See *infra* notes 91 & 143 (coastal states generally oppose new OCS development). But see Richard Hildreth, *Ocean Resources and Intergovernmental Relations in the 1980s: Outer Continental Shelf Hydrocarbons and Minerals*, in OCEAN RESOURCES AND U.S. INTERGOVERNMENTAL RELATIONS IN THE 1980s 155, 189 (Maynard Silva ed., 1986) (exception regarding states bordering the Gulf of Mexico "where there has been very little litigation and a great deal of oil and gas production").

10. President Bush did place parts of the OCS off-limits to drilling (after a recommendation to this effect was made by a National Academy of Sciences and administration task force), yet, "[u]ndoubtedly, the political realities of the paralyzed [OCS] program and the well-supplied world oil market had a lot to do with the Bush decision." Charles F. Lester, *The Search for Dialogue in the Administrative State: The Politics, Policy, and Law of Offshore Oil Development* 251-53 (1991) (unpublished Ph.D. dissertation, University of California (Berkeley)) (providing good analysis of the severe gridlock that now pervades OCS management).

11. See generally Cicin-Sain & Knecht, *supra* note 2.

12. See Miller, *supra* note 4, at 404-05.

13. To those who support new OCS drilling as a way to rectify excessive imports of foreign oil, it should be pointed out that even massive OCS production would not solve this U.S. energy problem.

The total amount of undiscovered OCS oil and gas resources, including the central and western Gulf of Mexico, is estimated to be only 21.4 billion barrels, or enough energy equivalent to fuel the nation for about 1,300 days at the current rate of consumption, which is roughly 17 million barrels per day.

Including OCS oil and gas with domestic onshore reserves won't make the nation energy self-sufficient. . . . *As long as the country is dependent on oil, it will remain dependent on foreign sources.*

HOLING, *supra* note 8, at 67 (emphasis added).

14. See, e.g., Cicin-Sain & Knecht, *supra* note 2, at 166.

Coastal states, on the other hand, bear most of the costs associated with OCS development. New OCS development often means degradation of coastal environmental quality and disruption of traditional lifestyles, while newly-created jobs may go to experienced oil hands brought in from other areas.<sup>15</sup> Cicin-Sain and Knecht aptly note that “[t]he crux of the policy dilemma posed by offshore oil development is that the benefits of offshore oil production tend to be distributed nationally, while the costs tend to be concentrated locally.”<sup>16</sup>

As will be shown, both individual states and the federal government have, from their differing perspectives, raised legitimate concerns, though each has failed to account sufficiently for the perspective of the other. State governments are much closer to the concerns of local coastal communities and therefore are more willing to oppose new offshore development. On the other hand, federal officials during the Reagan and Bush Administrations were seen as mostly concerned with supporting new OCS production.

In setting the tone for “ocean management bureaucratic culture,” it is important to spotlight the aggressive pro-development views of both Reagan and ex-oilman Bush. Arguably, the Reagan-Bush view was not sufficiently farsighted as a matter of public policy. Environmentalists correctly point out that U.S. energy demand is excessive, and that important long-term savings can be had by offering tax and other incentives to encourage greater conservation and efficiency. Moreover, achieving better energy efficiency would help the American economy grow. Yet conservation and efficiency require the sort of painful steps the Reagan and Bush Administrations were unwilling to take.

Thus from 1980 to 1992, there was an almost complete absence of federal programs for improving energy efficiency and conservation. On the demand side of the energy equation, federal government was seen as having no role to play. Free-market orthodoxies let energy demand grow unchecked, resulting in a policy of dangerous addiction. On the supply side, however, the U.S. government and its military were perceived as viable tools to ensure a continual supply of oil. That attitude, coupled with antipathy to conservationist energy policy, left little room for efficient energy use, even though improved efficiency would mean a stronger America in the long run.<sup>17</sup>

Numbers help tell this story. While current estimates of federal

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15. *See id.*

16. *Id.*

17. For more on the free-market rationale for a national energy tax, see *Sapping the*

OCS oil and gas resources are put at 21.4 billion barrels of oil equivalent (BBOE), it is also estimated that the oil that could be saved by implementing higher energy efficiency measures would come to 45 BBOE by the year 2020.<sup>18</sup> Such savings might be had by raising gas mileage standards for automobiles, expanding mass transit, putting better insulation in houses and buildings, and by using more efficient light bulbs and appliances.<sup>19</sup> Yet another market approach is to raise the price of gasoline through a "green" tax at the pump (this increase might for instance be in the range of ten to twenty-five cents per gallon); these new revenues could be used solely to reduce the federal deficit, or be offset by reductions in some other "non-green" tax. Still another way to encourage energy efficiency is through a tax on Btu's, though potential opposition in the U.S. Senate, as seen in the last budget debate, makes this last option an unlikely one.

Establishing any of these policies, however, first requires an American president to recognize that he or she can use economic incentives to further the cause of environmentalism. Although George Bush and Dan Quayle never did "get it," happily, Bill Clinton and Al Gore already understand the importance of domestic energy policy. Yet until a national energy policy is established which emphasizes energy conservation and efficiency, thereby reducing energy demand, there should be no new drilling of the OCS.<sup>20</sup>

So far, the path of energy "policy" in America has not been impressive. Over the past twelve years, Reagan and Bush Administration officials chose to portray enhanced environmental protection as a radical option costing jobs — an incorrect and misleading portrait. Among the world's community of nations, high, sustainable GNP growth is not simply associated with nations with the cheapest oil and least efficient use of resources. Quite the contrary: en-

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*Energy Tax*, ECONOMIST, June 12, 1993, at 17, 17; *Much Heat, Little Light*, ECONOMIST, *supra*, at 73, 73.

18. See HOLING, *supra* note 8, at 67-69.

19. See *id.* at 68. One market-based approach to an energy policy is suggested by Bruce Babbitt (now secretary of the interior), who writes:

A green tax could be promoted as the ideal link between the environment and economic growth, and it might be imposed by reducing other taxes an equal amount for each dollar of green tax — a dollar up and a dollar down. The ideal candidate for tax reduction has already been identified in current congressional debates as the payroll tax designated for Social Security.

Bruce Babbitt, *Will America Join the Waste Watchers?*, WORLD MONITOR, June 1991, at 34, 35.

20. See Van de Kamp & Saurenman, *supra* note 1, at 130 n.210.

ergy-efficient and growing nations such as Japan and Germany have economies which expand in a more sustainable fashion than the U.S. economy. Future generations in Japan and Germany will benefit from these energy paths. In the United States, officials in the Clinton Administration should look to states such as California which have adopted incentives for alternative energy sources and conservation programs; these states could serve as models for an active federal energy policy.<sup>21</sup>

Reagan and Bush were unwilling to break free of the cheap energy scenarios of the past. Their personal philosophies help explain twelve years of federal efforts to encourage new OCS production, despite intense opposition from coastal states and environmental groups. Within their respective spheres of jurisdiction, individual states and the federal government have for too long pursued dissonant policies with respect to offshore oil and gas. The result — policy breakdown and institutionalized anticipation of litigation — has little to recommend it.<sup>22</sup>

Clearly, cooperation between state and federal officials in managing the offshore environment would be a welcome turn of events.<sup>23</sup> But where might the new consensus lie? We cannot expect that the diverse majority of coastal states now opposed to offshore oil and gas development will suddenly come to favor the old Reagan-Bush policy of greater offshore drilling. Coastal states that have opposed

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21. See *id.* at 128 n.206. Where state action is not preempted by "softer" federal requirements, California is doing quite a lot. To wit,

California is driving worldwide interest in electric cars by the way it is tackling pollution. In September 1990 the California Air Resources Board adopted tough new rules to reduce air pollution above Los Angeles. It requires by 1998 2% of the cars sold by each manufacturer in the state be zero-emission vehicles (ZEVs). The proportion increases to 10% in 2003.

*Car Industry Survey*, ECONOMIST, Oct. 17, 1992, at 15-16.

22. In a telling statement in a 1987 interview, the former director of the agency that manages OCS development laments that litigation has come to be expected:

Several years ago when we were fairly fresh into the process of evolving the next [OCS development] five-year program, we had a new undersecretary. I briefed her, and went through this entire process. I got to the point where we adopted the five-year program, and she said, 'Well, then what happens?' and I said, 'Well then we go to court,' and she was taken aback. I said, 'Well, the Andrus (secretary of the Interior 1977-1981) program was litigated, the Watt (secretary of the Interior, 1981-1983) program was litigated. We know that this will be litigated. We have to take that into account in the way we go about the process — how we write every document.'

R. SCOTT FARROW, *MANAGING THE OUTER CONTINENTAL SHELF LANDS: OCEANS OF CONTROVERSY* 136 (1990).

23. See Robert J. Wilder, *State/Federal Relations in the Expanded Territorial Sea: An Opportunity for Shared Governance* 1-9 (1991) (unpublished Ph.D. dissertation, University of California (Santa Barbara)); see also Wilder, *supra* note 6.

OCS development have done so for too many valid reasons to be suddenly brought into the pro-drilling fold.

Instead, the Clinton-Gore Administration presents an opportunity for rethinking ocean policy, albeit from the federal government's point of view. The confrontational style which characterized the Reagan-Bush era should now thankfully be laid to rest. The new Administration means that the old confrontational approach can be replaced with a new *modus vivendi*, one where attitudes of federal officials better comport with environmentally-aware, cooperative state and federal governance.

Significantly, much of this can be accomplished without legislative amendments to the existing management regime for offshore oil and gas. In fact, better cooperation between state and federal officials can be achieved from the start of the new Administration by instilling a new culture in the federal bureaucracy, one that encourages partnership and involvement by states which desire a greater say in management beyond three miles offshore. In matters of administration, attitudes of federal officials and *ethos* fostered in their agencies can make a surprisingly large difference.

It is possible that the new Clinton appointees will make important strides towards securing greater states' rights and environmental protection offshore, just as Reagan's appointments had a markedly opposite effect a dozen years ago. Radical changes undertaken in the early 1980s should be recalled here. At that time, in order to push through new OCS development, the "Reagan administration began its deregulation effort by appointing OCRM [the federal Office of Ocean and Coastal Resources Management] administrators clearly sympathetic to the administration's position on offshore development. . . . The 'capture' of OCRM by oil interests became evident almost immediately after Reagan's election."<sup>24</sup>

If the Reagan and Bush Administrations "fell down on the job" as regards ocean resource management, how can this management system itself be improved? Although bureaucratic culture alone can have great impact on how salient environmental laws are administered, this Article also suggests certain legislative amendments as a means of improving existing OCS management.<sup>25</sup> The goal is second-generation cooperative governance,<sup>26</sup> which is more appropri-

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24. Lester, *supra* note 10, at 75, 76 (footnote omitted).

25. These suggested legislative changes are discussed *infra*, at notes 150-56 and accompanying text.

26. See Wilder, *supra* note 3, at 739-40. Other commentary suggesting variations of cooperative governance includes Robert W. Knecht & William E. Westermeyer, *State*

ate than the current scheme, since it will give greater deference to states' rights.<sup>27</sup> Perhaps most important, the suggested approach places a higher value on intelligent resource management.<sup>28</sup> Indeed, intelligent resource management and good government are here intertwined. Thus, Cicin-Sain and Knecht contend that a main reason why so many issues relating to offshore governance

remain contentious is that the existing configuration on these issues is simply inequitable, and, in some ways, irrational. It is clear that the states and localities are profoundly impacted by development in the federal offshore zone, and yet have only a very limited role in decisionmaking about activities in this zone. . . . It is clear too . . . that the situation necessitates shared management. Ocean processes and resources and the human activities connected with these resources are far too intertwined to permit separate governance through a system of sharply divided jurisdictions.<sup>29</sup>

It is time for change in OCS management. But what direction should change take? The next section argues that the time has come to extinguish divided jurisdiction.

#### B. *Challenging Exclusive Federal Control over the OCS*

Current management of oil and gas is based on a strict state-federal division, aptly called "geographic dual-federalism."<sup>30</sup> Because of the division's forty-year tenure, one might assume that there are important, perhaps unstated, policy reasons why only federal officials should be allowed to manage the area beyond three miles offshore. Actually, the original rationale for the three-mile measure is

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vs. *National Interests in an Expanded Territorial Sea*, 11 *COASTAL ZONE MGMT. J.* 317 (1984); Michael E. Shapiro & Rosella W. Shapiro, *Opportunities for a State-Federal Partnership in an Expanded Territorial Sea*, 11 *COASTAL ZONE MGMT. J.* 335 (1984); Richard K. Littleton, *Coastal States, Inland States, and A 12-Mile Territorial Sea*, 17 *J. MAR. L. & COM.* 539 (1986); Edward J. Cook, *Federalism at Sea? State-Federal Relations in an Extended Territorial Sea*, 5 *J. L. & POL.* 429 (1989).

27. See G. Thomas Koester, *State-Federal Jurisdictional Conflicts in the U.S. 12-Mile Territorial Sea: An Opportunity to End the Seaweed Rebellion*, 18 *COASTAL MGMT.* 195, 204 (1990).

28. See *infra* note 157 and accompanying text.

29. Cicin-Sain & Knecht, *supra* note 2, at 168.

30. Federalism has been described as a division of powers between distinct and coordinate state and federal governments, each of which is supreme within its own sphere. See, e.g., Sally Fairfax, *Old Recipes for New Federalism*, 12 *ENVTL. L.* 945, 949-55 (1982). In resource management, federalism has proven flexible enough to encompass a wide variety of governance forms, only one of which is "dual-federalism." In a pure dual-federalist model, functions of state and federal government are kept strictly separate with no overlap between the two. Dual-federalism thus paints a fairly accurate picture of state-federal relations for offshore oil, with state-federal jurisdiction strictly divided by the geographic boundary three miles offshore.

based on historical considerations which are no longer relevant today; the three-mile limit now lingers by the force of inertia alone.<sup>31</sup>

By limiting state jurisdiction to an imaginary line three miles offshore, the present scheme accepts — even strengthens — an assumption that coastal states do not have valid interests in OCS activities. Because this is not the case,<sup>32</sup> why should federal officials have exclusive control over the OCS? Why should not coastal states affected by OCS activities also have limited authority beyond the “magic” three-mile line? The following discussion will help illuminate three assumptions that in the past supported this scheme.

The first is that a management system based on exclusive state or exclusive federal control has an intuitive appeal due to its sheer simplicity. Such appeal is illusory, because striking the most appropriate balance between state and national interests can never be so static or easy as this governance scheme seems to suggest.<sup>33</sup> Hence, as regards offshore management, “[n]o fully satisfactory standard is at hand for locating the divide where the full sovereignty of a State ends and that of the United States begins.”<sup>34</sup>

It may be best to follow Albert Einstein’s sage advice that “things should be made as simple as possible, but never simpler.” The three-mile state-federal division is just too simple. As it belies ecological complexity in the marine environment and the interweaving

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31. See generally Wilder, *supra* note 3.

32. “If continental shelf activities had no effect on coastal zones, there arguably would be no need for state regulation based on local needs and preferences. However, shelf activities *do* affect state coastal zones, and in so doing they also affect spheres of state regulation.” Kenneth W. Swenson, Note, *A Stitch in Time: The Continental Shelf, Environmental Ethics, and Federalism*, 60 S. CAL. L. REV. 851, 864 (1987) (citation omitted).

33. See MILNER S. BALL, *THE LAW OF THE SEA, FEDERAL-STATE RELATIONS AND THE EXTENSION OF THE TERRITORIAL SEA* 59 (1978).

34. *Id.* Cicin-Sain rightly cautions that no dominant model of federalism characterizes state-federal relations across ocean resource regimes. See Biliiana Cicin-Sain, *Ocean Resources and Intergovernmental Relations: An Analysis of the Patterns*, in *OCEAN RESOURCES AND U.S. INTERGOVERNMENTAL RELATIONS IN THE 1980s* 241, 243 (Maynard Silva ed., 1986). Among the many marine policy subsectors are fisheries management, endangered species protection and offshore oil development; each displays a unique pattern of state-federal relations due to the very specific circumstances involved. Cicin-Sain argues that a tendency to characterize certain periods as represented by particular dominant models of federalism is largely the result of experience in specific well-studied fields such as economic or urban policy. *Id.* at 258-59. She urges that patterns of federalism seen in one particular area (such as urban policy) should not be characterized as applying to all others (such as marine policy). See *id.* As regards state-federal relations for offshore oil and gas, Cicin-Sain observes that they are characterized by “adversary federalism.” See *id.* at 246. See also Fairfax, *supra* note 30, at 947-49, 959 (similarly urging caution as regards allegedly comprehensive models of federalism).

of natural processes, it likewise ignores the consequent interweaving of state and federal interests that must accompany good environmental stewardship. Any argument for the strict three-mile division which is based on the simplicity of this management system must ultimately fail.

In an astute analysis, Milner Ball identifies and refutes two more arguments supporting federal control over the OCS.<sup>35</sup> The first of these arguments asserts "the further seaward the marine area lies, the more preponderant the Federal interest; the further landward the area, the greater the State interest."<sup>36</sup> The reasoning implicit in this argument is not beyond reproach. For instance, Ball argues the national interest in defense does not grow weightier with the distance one moves seaward. Coastal states are as certain of common U.S. defense on land as they are at sea; similarly, important state conservation interests do not decrease with distance seaward. Thus,

California is as ill-equipped to defend against foreign attack landward of the shore as it is to seaward . . . . If the Federal defense interest does not grow weightier as the focus moves to seaward, neither does a State's conservation interest grow less weighty. Thus, however Alaska's interest in preserving king crab may be described, it does not wane with distance against a waxing Federal interest. Nor would Washington's interest in preserving salmon vary in weight in comparison with a Federal interest depending upon whether the fish were at the further extreme of their migratory pattern or spawning in State inland waters. The degree of Federal as against State interest cannot always be determined according to nautical distance.<sup>37</sup>

The concept of special concern for the oceans for purposes of national defense does provide some justification for special federal interests there.<sup>38</sup> However, Ball argues persuasively that national defense interests are really no more overpowering at sea than on land.<sup>39</sup> Moreover, coastal states can and do possess a certain sovereignty over land even while their defense is ensured by the national government. The need for national defense does not provide an adequate argument for exclusive federal control offshore.

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35. See BALL, *supra* note 33, at 59-61; see also Milner S. Ball, *Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf*, 12 ENVTL. L. 623, 637-43 (1982). These arguments were advanced by the Supreme Court in its seminal 1947 decision in *United States v. California*, 332 U.S. 19, 38-39 (1947) (holding that the federal government alone possessed "paramount rights" offshore).

36. BALL, *supra* note 33, at 59.

37. *Id.* at 61 (footnotes omitted).

38. See, e.g., *United States v. California*, 332 U.S. at 35-36; see also BALL, *supra* note 33, at 59-60.

39. BALL, *supra* note 33, at 59-61.

Ball also criticizes a second argument, based on the issue of "uniformity versus diversity," that the OCS is an area that requires "disinterested" uniformity in its management.<sup>40</sup> Like the argument based on national defense, this one too is seriously flawed as a rationale for limiting states' rights offshore. It assumes that the federal government alone should prevail over the OCS, because the OCS requires "someone with an overview."<sup>41</sup> However this argument does not explain why a federal agency should be "disinterested."<sup>42</sup> Indeed, Ball notes that a federal agency may actually take a position "more parochial, bureaucratic, or provincial than any which the States might wish to pursue,"<sup>43</sup> adding that in such case a federal agency would not be capable of "overviewing."<sup>44</sup>

Ball observes that pushing uniformity as a rationale for federal control misses another important point. It fails to admit that there are many important instances where the national interest may actually lie in diversity. And thus,

the uniformity/diversity test, like the seaward-distance scale, is not adequate to determine the point where state sovereignty ends and national sovereignty begins. Factually, the test fails to provide for the possibility that some federal agencies may lack the capacity for disinterested, uniform regulation. Theoretically, it fails to provide for the possibility that national interest warranting federal priority may sometimes lie in diversity rather than in uniformity. Nor does the test allow for the possibility that states may best protect the national interest in uniformity, especially where the uniformity propounded by a federal agency is . . . a narrow interest writ large . . . .<sup>45</sup>

Allowing for some diversity in offshore planning is especially important in the case of offshore oil and gas development. This is due to the fact that the coast of the United States is exceptionally long, and consists of remarkably varied habitats with a broad range of biodiversity. There surely are many coastal areas that deserve

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40. *See id.* at 61.

41. *Id.* at 66.

42. *Id.* Ball asks, somewhat facetiously, if the national government possesses the "overview" are states then considered to have the "underview"?

43. *Id.*

44. *Id.* This point should not be taken too far. It is not, for example, that federal agencies will usually take positions more parochial than those adopted by states. Rather, the point is simply that federal agencies do not have a magic wand which allows them to be better run, or less affected by extraneous pressures, than state agencies. This point might simply be summed-up with the observation that states have a valuable part to play in the governance process.

45. Ball, *supra* note 35, at 642; *see also* BALL, *supra* note 33, at 66 (engaging in a similar discussion).

heightened, even absolute protection as, for example, a marine sanctuary. To place everything beyond three miles under federal control could cause federal officials to overlook those special areas that merit heightened environmental protection. In the Reagan-Bush years, for example, areas which finally received protected status often did so only after a protracted fight with federal officials.<sup>46</sup>

The coastal states have been tied to this three-mile sea ever since enactment of the Submerged Lands Act (SLA) of 1953. Significantly, the SLA was written in an early period in OCS oil and gas development when OCS activities had only a minimal impact on the coastal zones of adjacent states. Such a paucity of impact on near-shore waters is no longer the case today; modern OCS activities have important consequences for ecosystems which fall under coastal state stewardship.<sup>47</sup> For this reason alone, coastal states deserve to have real authority over OCS oil and gas activities.

Although substantial increases in OCS activities over the past forty years do make a case for extending the state voice beyond three miles, the boundary has nonetheless remained firmly fixed. This regime has failed to recognize the increasingly vital interests of states in exploration and development activities which occur farther seaward.<sup>48</sup> Extending states' authority should provide an important opportunity for incorporating local environmental concerns throughout the OCS planning process, and can ensure that unique and valuable coastal areas will benefit from OCS deliberation by managers who best appreciate their worth.<sup>49</sup>

From both the ecological and management perspectives, real benefits will stem from the formal extension of coastal state jurisdiction.<sup>50</sup> But what are the costs? Formally adding the states' perspectives to the OCS planning process would doubtless make the

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46. Witness the protracted fight by state and local officials to secure national sanctuary status for the federal waters of the Monterey Bay area off the coast of California. In the Reagan-Bush years, the designation of new sanctuary sites became a slow and laborious process.

47. See, e.g., Wilder, *supra* note 3.

48. Indeed, states have vital interests in many activities that occur in the federally controlled 200-mile zone offshore. See Robert W. Knecht, *The Exclusive Economic Zone: A New Opportunity in Federal-State Ocean Relations*, in OCEAN RESOURCES AND U.S. INTERGOVERNMENTAL RELATIONS IN THE 1980S 263, 266-67 (Maynard Silva ed., 1986).

49. This conclusion is based on a not unreasonable assumption that state officials may be best aware of special characteristics of certain coastal areas. Where states concur with the federal government's intent to increase OCS development, as with states bordering the Gulf of Mexico, increases in OCS development may be acceptable since the decision was made in the context of shared state-federal decision-making.

50. The ecological benefits stem from the coastal state aversion to new OCS develop-

entire process more "burdensome," and result in something less "streamlined" than the present system, as it was intended in theory to be. Existing conflicts, for instance, will become formalized within the planning process, since state officials already opposed to new development would be expressly allowed to have their say. Yet, these are costs only to those who would seek rapid expansion of new offshore development. Moreover, and perhaps most significant, extension of state authority beyond three miles could not lead to an outcome more ineffective than the current so-called OCS "planning process," a system mired in stalemate.

C. *Management Failure: Is There Really Exclusive Federal Control over the OCS?*

Those who fear that extension of coastal state jurisdiction might upset some presumed state-federal "balance" need only look at the existing situation. While it may appear as if federal government has sole control beyond three miles, this is hardly the case; in point of fact, the current scheme has simply broken down.<sup>51</sup> Although this Article thus far has described the present management scheme as one based on exclusive federal control of the OCS, in an important sense that description is misleading. The dual-federalism model cannot account for the fact that coastal states have been extremely effective in halting new federal development of the OCS.

It is critical here to highlight the role and importance of OCS "drilling moratoria."<sup>52</sup> Moratoria operate through the actions of coastal state representatives in Congress; resorting to the federal budgetary process, coastal state representatives yearly insert spending prohibitions in appropriations bills to prevent federal officials from spending dollars for OCS exploration and development. This allows coastal states effectively to prohibit new OCS development even though they are not formally part of the federal OCS planning process.<sup>53</sup>

To a significant degree, states are also effective in blocking new OCS development due to the emergence of environmental non-governmental organizations (NGOs). These environmental advocacy groups are now seen as regular ingredients in American federal-

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ment being made a formal part of the planning process. In terms of better management, nothing could be worse than the current OCS stalemate.

51. See, e.g., Wilder, *supra* note 3, at 739-46.

52. For a good discussion of the history of OCS drilling moratoria, see Lester, *supra* note 10, at 226-57.

53. *Id.*

ism.<sup>54</sup> Working in conjunction with coastal states, these coalitions have used moratoria to shut down new OCS development.<sup>55</sup>

Political scientist Sally Fairfax suggests that the success of NGOs in halting federal plans for development is owed to what she calls "new opportunism."<sup>56</sup> In acting out this "new opportunism," environmental NGOs have teamed up with coastal states to seek out all available means of opposing federal OCS development plans.<sup>57</sup> She finds "comfort in this new opportunism because it reflects the increasing sophistication of state, local, and private actors who forum-shop to achieve their objectives and thus diversify centers of government authority."<sup>58</sup> Also implicit in this "new opportunism" is a reorientation of federalism. In making natural resource policy, and in response to the earlier Reagan and Bush eras, states have gradually come to be a more competent, capable, and — most important — accessible level of government.<sup>59</sup> States have now begun to "emerge as competent participants in policy making and implementation: an appropriate target of opportunity for advocates dissatisfied by federal response to their entreaties or seeking a solution closer to home."<sup>60</sup>

While some underlying environmental problems may be rectified at the federal level under Clinton, the legitimacy of states' attempting their own policy alternatives likely will still increase. Environmental activists learned to work with states; those who were dissatisfied with the perceived unaccountability that surrounded federal OCS policies in the Reagan-Bush years found that states offered a more effective means of channeling opposition to federal

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54. See Fairfax, *supra* note 30, at 960.

55. For discussion of this state-environmentalist coalition and its effectiveness in halting OCS development, see generally Wilder, *supra* note 6.

56. See Fairfax, *supra* note 30, at 979.

57. See *id.* at 978-80. Environmental groups may, for example, seek action at the county level for redress of grievances.

58. Marc J. Hershman, *Building a Federal-State Partnership for U.S. Ocean Resource Management*, in OCEAN RESOURCES AND U.S. INTERGOVERNMENTAL RELATIONS IN THE 1980s 221, 224 (Maynard Silva ed., 1986).

59. See Fairfax, *supra* note 30, at 965, 966. To get to this point, states have thankfully "shed their malodorous affiliation with racial oppression." *Id.* at 965. In an earlier day, this sorely tainted their ability and potential because of state-sanctioned discrimination. The very real problem of race relations has had a deleterious effect on the broad notion of states' rights, as witnessed by the statement that "if in the United States one disapproves of racism, one should disapprove of federalism." *Id.* at 955 (quoting WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964)).

60. *Id.* at 965.

OCS policy.<sup>61</sup> Though the Clinton-Gore Administration will prove more friendly to the environment than the previous two administrations, states may still fulfill a useful function as fifty laboratories formulating and testing new policies. In fact, Clinton may be particularly open to this outcome, since as a governor and member of the Democratic Leadership Council he was a standard-bearer for the "gubernatorial wing" of the Democratic Party.

#### D. *Finding a State Role Beyond the Three-Mile Limit*

The intent of the current regime has been to limit coastal states to a three-mile belt of jurisdiction. Because this scheme fails federalist ideals of states as viable, co-equal political entities,<sup>62</sup> the case is made that states should be given formal, though limited, authority to co-manage with federal officials the area outside the three-mile limit.<sup>63</sup> This suggestion is not new; the work of various commentators provides alternatives for expanding the state role.<sup>64</sup>

A review of the extant work of commentators reveals that, for some, a key impetus for state-federal partnership is "good government."<sup>65</sup> For others, enhancing the states' authority outside the three-mile limit is instead a viable means of reducing state-federal conflict over management of offshore oil and gas.<sup>66</sup> This lack of convergence is hardly surprising; an expansion of coastal state authority beyond three miles might take any number of forms. Three basic possibilities are distilled here — all of which rely on deliberate congressional action.<sup>67</sup>

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61. During the Reagan-Bush years, environmental activists could more easily advance an energy policy that stressed conservation and efficiency at the state rather than the federal level. An example of this principle is California, where a more sympathetic attitude was evidenced by the strong anti-offshore oil drilling and pro-environmental stance taken by John Van de Kamp, the state attorney-general. *See infra* note 157.

62. *See generally* Swenson, *supra* note 32. One important reason why this scheme fails federalist notions is due to "spillover effects": inescapable, negative impacts inextricably linked to offshore development, which inevitably "spill over" into state jurisdiction. In fact, the "occurrence of spillover effects across jurisdictional lines represents a classical problem in federalism." Cicin-Sain & Knecht, *supra* note 2, at 163. The inability of geographic dual-federalism to deal adequately with legitimate state concerns forcefully argues against the model. *Id.* at 163-66.

63. For a farsighted discussion, see Hershman, *supra* note 58, *passim*.

64. For an illustrative sampling of extant commentary on this subject, see *supra* note 26; *see also* Koester, *supra* note 27, at 195 (listing several possible means available for expanding the state role offshore).

65. *See, e.g.*, Knecht, *supra* note 48, at 268.

66. *See, e.g.*, Koester, *supra* note 27, at 206.

67. The preference here is for direct congressional action (rather than, for instance, judicial action) as a means of extending states' rights offshore. *See id.* at 202-03. There are also practical considerations behind this preference: In offshore oil matters "[t]he

The simplest method of expanding state jurisdiction would be to amend current law to increase the percentage of federal OCS revenue shared with coastal states.<sup>68</sup> While under this alternative coastal states would not actually gain new *authority* over OCS planning, they would obtain a larger portion of the federal largesse that comes from offshore oil receipts and thus, in one sense, have expanded jurisdiction. A fiscal complication of this method is that the federal government would collect lower total receipts, thus penalizing the inland states. Such a loss might be partially offset by overall increases in production, since some coastal states may drop their opposition to offshore development in order to receive greater revenues. Nonetheless, increased revenue-sharing alone<sup>69</sup> is a somewhat unlikely option. The main flaw of this option is that it does not allow coastal states greater authority than they currently have, making it a nonstarter as far as environmental NGOs and many coastal states are concerned.

A somewhat more radical option is to extend coastal state authority by congressional action.<sup>70</sup> Within their three-mile belt, the

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Supreme Court, more often than not, has tended to make judgments against the states." Cicin-Sain & Knecht, *supra* note 2, at 172. This fact, coupled with the sympathy of Congress for states' rights arguments, indicates that Congress is the appropriate forum for seeking an enhanced state role offshore.

68. Coastal states recently obtained a settlement with the federal government pursuant to section 8(g) of the Outer Continental Shelf Lands Act (OCSLA) amendments of 1978, whereby states now receive 27% of the revenues derived from oil pools situated three to six miles offshore. The host of alternative revenue-sharing options available is limited only by one's imagination. For instance, the shared-revenue zone could be expanded still further in size (such as from three to twelve miles), or the percentage of the states' share increased, or both. For a partial listing of revenue-sharing suggestions, see Koester, *supra* note 27, at 206.

69. New legislation might increase the coastal states' share of OCS revenues, in conjunction with allowing greater state authority offshore.

70. The new zone might extend out to twelve miles — this distance being derived from Reagan's 1988 proclamation of a twelve-mile territorial sea. Proclamation No. 5928, 3 C.F.R. 547 (1988), reprinted in 43 U.S.C.A. § 1333 (West Supp. 1989); see Wilder, *supra* note 3, at 739-42. This 1988 extension spurred a number of commentators to argue that coastal state "consistency review" authority was moved out to twelve miles under the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1988 & Supp. III 1991). See, e.g., John A. Saurenman, *The Effects of a Twelve-Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand?* 1 TERR. SEA J. 39 *passim* (1990). But see Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1 *passim* (1990) (arguing that a twelve-mile proclamation has no domestic impact, though admitting the question was not free from doubt). Recent congressional action seems to have settled this matter, at least for the time being. For more on the impacts of the 1991 amendments, see Tim Eichenberg, *State Jurisdiction Under the Coastal Zone Management Act After Extension of the U.S. Territorial Sea*, 2 TERR. SEA J. 118 (1993).

states would retain control over near-coast activities.<sup>71</sup> However, coastal states could, if they so desired and were adequately prepared, share authority with the federal government in OCS planning. Interested coastal states could thus become full partners with the federal government in managing offshore oil activities. "Granting the states a larger role in the process of making decisions with respect to the management of ocean resources could substantially reduce the current conflict between the coastal states and the federal government over federal offshore development efforts."<sup>72</sup>

The third statutory option is the most extreme. This option is to amend the Submerged Lands Act of 1953 to extend exclusive state control to twelve miles offshore. Such an extension would displace the sovereignty that the federal government now enjoys from three to twelve miles off the coast. Hence, geographic dual-federalism would still remain, albeit in an altered form.

A modified version of the second option is the best of the three. This option calls for the establishment of cooperative state-federal governance within the three- to twelve-mile zone through incremental amendments to existing statutes.<sup>73</sup> Presumably, this shared governance would also carry provisions for increased revenue sharing as well. Supporters of new drilling will likely voice their opposition to this plan, for if such legislation is passed, California would likely seek to prohibit new OCS development formally within this entire three- to twelve-mile zone.<sup>74</sup> Moreover, environmentally sensitive coastal states which currently have no OCS development off their coasts, but are slated for future exploration, might similarly reject federal plans for new development in the three- to twelve-mile zone.

During the Clinton Administration, however, opposition by supporters of drilling will not be an insurmountable obstacle.<sup>75</sup> Shared governance can be seriously considered over the next four years, because it provides for more equitable offshore management, and because it provides to states a means of ending OCS moratoria. While shared governance will not mean increased offshore develop-

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71. States' sovereignty within three miles would, however, remain subject to constitutionally-derived federal paramount rights, such as over commerce, navigation, and defense.

72. Koester, *supra* note 27, at 204.

73. See Van de Kamp & Saurenman, *supra* note 1, at 130-34.

74. For some states, the attraction of increased revenues might prevent such an outcome. However, California, like many other states, such as Florida, Oregon and Massachusetts, will likely remain opposed.

75. This contrasts with the Bush Administration's policy. See generally Wilder, *supra* note 6.

ment, that is not necessarily the proper objective of OCS management.<sup>76</sup> Moreover, since the prospects for opening new sites outside the Gulf of Mexico and Alaska to development could not get much worse from the oil industry's point of view, shared governance might be acceptable to many supporters of drilling after all.

Principles of federalism support an increase in state authority beyond three miles.<sup>77</sup> Yet realistically, an argument which is merely based on federalism would surely be insufficient to persuade Congress to extend state jurisdiction offshore.<sup>78</sup> What would constitute sufficient impetus for the overhaul of the present system is a desire to remedy the dismal relationship between the states and the federal government. Coastal states have vividly demonstrated that their cooperation is essential if OCS planning is ever to work.<sup>79</sup> Attempts to develop not just frontier areas but also proven development areas<sup>80</sup> have been stymied, demonstrating significant weaknesses in the existing system. How then, specifically, might the current OCS management regime be improved? The answer to this question is the focus of the following section.

### III.

#### THE IMPORTANCE OF STATUTORY DRAFTING AND BUREAUCRATIC CULTURE

##### A. *An Analysis of the 1978 OCS Lands Act Amendments*

To ascertain the best direction for OCS management under the Clinton Administration, it is beneficial to examine mistakes made in the 1978 amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA).<sup>81</sup> These 1978 amendments (OCSLAA) were four years in the making, and effected substantial changes to the

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76. Whether increased OCS development is the proper goal is a vexed political question for which there is no clear, absolute answer. For discussion from an objective economics perspective, see generally JOSEPH J. SENECA & MICHAEL K. TAUSSIG, ENVIRONMENTAL ECONOMICS (1974).

77. Koester, *supra* note 27, at 204.

78. *Id.*

79. *See id.*

80. Perhaps the most extreme example of a proven OCS area being shut down is Chevron's Point Arguello project near Santa Barbara. That offshore project cost a total of \$2.5 billion, and sits atop an oil field estimated to hold 300 million barrels. Yet local opposition in Santa Barbara effectively shut it down. Although fully constructed, the Point Arguello project faced numerous political obstacles to its operation. *See SANTA BARBARA NEWS-PRESS*, Feb. 22, 1991, at B1.

81. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified in scattered sections of 43 U.S.C. §§ 1331-1356).

OCSLA.<sup>82</sup>

The OCSLAA were drafted with several goals in mind, only one of which was to enhance the states' role in federal management of the OCS.<sup>83</sup> A larger goal of their drafting was to expedite OCS oil and gas development; unprecedented oil price shocks of the 1970s resulted in an outraged public demanding that the Congress deliver answers to energy questions. Nevertheless, the 1978 amendments have clearly failed to expedite new OCS development, as evidenced by the ongoing state-federal stalemate over offshore development. This section will be devoted to an analysis of the causes of this policy failure.

As originally drafted in 1953, the OCSLA<sup>84</sup> provided coastal states with only the most minimal of roles in a closed OCS planning process involving the federal government and industry.<sup>85</sup> To expedite OCS development and improve OCS management (in part through enlarging the states' role),<sup>86</sup> Congress in 1978 amended the OCSLA.<sup>87</sup> As implemented under Reagan and Bush, however, the OCSLAA provided coastal states with very limited authority be-

82. See Cicin-Sain, *supra* note 34, at 255.

83. Drafters of the 1978 OCSLA amendments expected the amendments would provide "an opportunity for [states] to participate in the decisionmaking process with regard to the overall leasing program . . . . Involving states in the process from the beginning should avoid time-consuming lawsuits later." REPORT BY THE AD HOC SELECT COMMITTEE ON THE OUTER CONTINENTAL SHELF, H.R. REP. NO. 590, 95th Cong., 1st Sess. 50 (1977), reprinted in 1978 U.S.C.C.A.N. 1450, 1457 [hereinafter H.R. REP. NO. 590].

84. Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1356 (1988 & Supp. III 1991).

85. See, e.g., H.R. REP. NO. 590, *supra* note 83, at 103-04, reprinted in 1978 U.S.C.C.A.N. at 1509-10. In the 1953 Act, OCS leasing was basically a closed-door process between the oil industry and federal government.

86. See, e.g., *id.* at 50, 53, reprinted in 1978 U.S.C.C.A.N. at 1457, 1460. For instance, a Committee Report describing purposes of the 1978 legislation states the OCSLA amendments will "expedite the systematic development of the OCS, while protecting our marine and coastal environment." *Id.* at 53, reprinted in 1978 U.S.C.C.A.N. at 1460. The same section also observes that "[t]he OCS Lands Act of 1953 has never really been amended and is outmoded. . . . [S]pecific mechanisms are needed to involve states, and local governments within states, in all OCS decisions." *Id.* (emphasis added).

87. The Committee Report on the proposed OCSLAA legislation states that [a] major purpose of [the legislation] is to involve the states and affected local areas within the States in the entire exploitation process to a greater degree. The bill provides an opportunity for them to participate in the decisionmaking process with regard to the overall leasing program of the Secretary, and individual development and production plans of the oil companies. . . . Involving States in the process from the beginning should avoid time-consuming lawsuits later.

*Id.* at 50, reprinted in 1978 U.S.C.C.A.N. at 1457.

yond the three-mile limit.<sup>88</sup>

On one side of this debate are those representatives in Congress who feel the OCSLAA, as implemented, have not provided states with an adequate voice in OCS management.<sup>89</sup> In the Reagan-Bush years, these representatives responded to this inadequacy through the device of OCS moratoria prohibiting new development. These moratoria, using "the backdoor procedure of the appropriations process, thus circumvent[ed] the usual congressional committees that deal with energy matters."<sup>90</sup> Indeed, moratoria are such a potent weapon *because* they can totally shut down federal plans for new OCS development.<sup>91</sup> Given the states' persistent recourse to moratoria, it must be acknowledged that mechanisms of the OCSLAA designed to improve state-federal cooperation have not been effective.<sup>92</sup> Like a canary in a coal mine, moratoria indicate that the OCSLAA, as implemented, have not provided the effective state voice envisioned.<sup>93</sup>

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88. For some assorted views on this matter, see generally *Improving the OCS Lands Act: Hearing Before the Subcommittee on Panama Canal/Outer Continental Shelf of the Committee on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. *passim* (1989) [hereinafter *Hearings on Improving the OCS Lands Act*]. The Hearings contain several conflicting opinions on whether states have been given sufficient input into OCS decision-making and, thus, demonstrate the pronounced lack of consensus on this issue.

89. See, e.g., *infra* notes 93 & 99.

90. Cicin-Sain, *supra* note 34, at 255-56. By removing dollars originally appropriated for administering private exploration and development activities, OCS moratoria have effectively halted new development.

91. The impact and extent of these moratoria is described thus:

Congressional moratoria, usually based on single year funding limitations specified by the appropriations committee, are the longest standing form of [state] intervention. Congress first passed a moratorium on leasing selected areas on the OCS in 1982; some part of the OCS has been under a leasing moratorium every year since then. . . . Most recently, following the spill from the *Exxon Valdez*, a moratorium on leasing was enacted that included areas from Maryland to Maine on the East Coast, all of California, parts of Florida, and, for the first time, part of Alaska.

FARROW, *supra* note 22, at 35.

92. See Cicin-Sain, *supra* note 34, at 256.

93. In *Hearings on Improving the OCS Lands Act*, the Hon. Leon E. Panetta, a leading "pro-environment" congressman from California, and now director of the Office of Management and Budget, remarked:

[F]rom the President to the Congress to the State Legislature and the communities, there is a universal sense that the OCS Lands Act does not work, and we are ad hoccking day to day. That is not the right approach, as I see it.

It makes no sense to continue this kind of guerrilla warfare when it comes to an important resource or the importance of trying to protect sensitive areas of our coastline.

For that reason, I would strongly recommend that the Congress has to take another hard look at the OCS Lands Act . . . .

Unless this Congress is willing to look at the entire law, we are going to operate on

Does such a pessimistic evaluation of the OCSLAA mean they represent failed policy in an absolute sense? As a general rule, policy success and failure are slippery, subjective concepts which often elude measurement.<sup>94</sup> Despite this caveat, the OCSLAA, as implemented, should probably be characterized as policy failure.<sup>95</sup> Clearly, the states do not enjoy a more cooperative relationship with the federal government under the OCSLAA.<sup>96</sup> The conflict and stalemate that continued were precisely what drafters of the 1978 amendments sought to avoid; the chair of the congressional subcommittee addressing means of improving the OCSLAA opened hearings with this comment:

The Subcommittee will proceed today from the presumption that the

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the basis of two things: Leadership or crisis. Right now, very frankly, we are operating by crisis when it comes to the OCS Lands Act.

*Hearings on Improving the OCS Lands Act, supra* note 88, at 10. Panetta was absolutely right then, and things still have not gotten any better.

94. See Helen M. Ingram & Dean E. Mann, *Policy Failure: An Issue Deserving Analysis, in WHY POLICIES SUCCEED OR FAIL* 11, 12, 30 (Helen M. Ingram & Dean E. Mann eds., 1980). Any evaluation of the OCSLAA put in terms of policy success or failure raises a number of interesting, but thorny, issues. For instance, assuming the amendments were an attempt to balance competing state-federal concerns, how would the hypothetical evaluator determine whether its goal has been accomplished? Measuring accomplishment can be a slippery task. See *id.* at 12. Ingram and Mann raise a number of salient points concerning the difficulty faced in evaluating whether a policy is determined a success or failure. Of particular relevance here is the problem posed by excessive policy demand and the lack of an adequate causal theory. See *id.* at 17, 22. The 1978 OCSLA amendments were expected to provide increased OCS production and (perhaps unrealistically) relief for a nation too dependent on foreign oil. The OCSLAA, when measured against those objectives, did not successfully provide the desired alternative to foreign oil imports.

Quite often, opposition to OCS development by environmentally sensitive states (expressed through drilling moratoria) has been held out by drilling supporters as "the problem." Yet, it would be far more accurate to acknowledge that even if the OCS were exploited in an accelerated fashion, this would still not solve the comprehensive long-term dilemma faced by this nation in its excessive dependence on foreign oil. See *supra* note 13. The recent war in the Persian Gulf is only one example of the consequences of America's dependence on foreign oil; other equally dangerous and costly consequences are certain to occur over time.

95. It has thus been observed that

[t]he coastal states and communities have shown a remarkable capacity to mount obstructive political action in the Congress to shut down the federal leasing program in those offshore areas they believe to be inappropriate for oil activities. Yet it can be persuasively argued, we believe, that the current situation of conflict and stalemate is not meeting the long-term needs of any party to this dispute. Uncertainty and delay are costly to the industry; the predictability that the federal government seeks in the oil program is elusive; and, other ocean users, state and local governments and the interested publics, must expend inordinate amounts of time in virtually continuous maneuver of one sort or another.

Cicin-Sain & Knecht, *supra* note 2, at 169.

96. See, e.g., Koester, *supra* note 27, at 204-06.

objectives of the OCSLA are not being met. Despite the need to harness additional energy resources, despite the need to reduce imports of foreign oil and the widely recognized need to reduce our dependence on tanker-transported oil supplies, the OCSLA program is essentially shut down.

The Act is not guiding the orderly and timely development of the OCS while providing for the protection of the marine and coastal environment. Whether or not the fault lies with the Act itself or elsewhere, the program simply isn't working.<sup>97</sup>

Most of this tension between the amendments' goals and the outcome stems from states' perceptions that they have not been provided an adequate voice under the OCSLAA.<sup>98</sup> However, this presents a dilemma, both as to the actual intent of the OCSLAA and as to the proper scheme of intergovernmental relations offshore. Did drafters of the amendments actually intend to provide the states with a truly effective voice in OCS planning? Or were the OCSLA amendments in fact intended to limit states to a minor advisory role within a federal OCS decision-making process?

This important query is not easily answered.<sup>99</sup> The OCSLAA did not define the intended system of offshore federalism in black and white terms. Rather, the proper state role in OCS planning re-

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97. *Hearings on Improving the OCS Lands Act*, *supra* note 88, at 2 (statement of Roy Dyson, U.S. Representative from Maryland and Chairman, Subcommittee on Panama Canal/Outer Continental Shelf).

98. *See generally* Hildreth, *supra* note 9, at 161-75 (providing a very good discussion of state versus national roles under the OCSLAA).

99. Among legislators, the range of opinions on the issue is diverse. For example, in *Hearings on Improving the OCS Lands Act*, one very knowledgeable congressman took a position lauding states' rights provisions in the amended Act but criticized its nationally oriented implementation. He stated that "the basic philosophy, the basic intent of the OCS Lands Act was a legitimate one and its basic goal was a legitimate one. Unfortunately, what happened was that in the process of trying to implement that Act, it has become grossly distorted." *Hearings on Improving the OCS Lands Act*, *supra* note 88, at 8 (statement of Leon E. Panetta, U.S. Representative from California, now Director of the Office of Management and Budget); *see also supra* note 93.

In contrast, another critic in Congress claimed that structural defects in the OCSLAA served to relegate states to a less than adequate role in OCS decision-making, and cited as evidence the inherent "imbalance that exists between [national concerns for] development and [state concerns for] environmental protection." *Hearings on Improving the OCS Lands Act*, *supra* note 88, at 13 (statement of Chester G. Atkins, U.S. Representative from Massachusetts).

In yet another argument, Congressman Regula placed fault on various coastal states for (allegedly) seeing greater states' rights provisions within the Act than were actually there, declaring "I would remind the Members of the Committee that the operative law at the moment says that the OCS is a vital national resource." *Id.* at 15 (statement of Ralph Regula, U.S. Representative from Ohio). Arguably, the first two positions are the better ones.

mained a gray area. Perhaps the most accurate interpretation of the OCSLAA is that they were intended to "denationalize" what until that time had been an almost exclusively federal process.<sup>100</sup> While Congress clearly did not intend for the amendments to elevate states to a role equal with that of the federal government, neither did it intend states to become mere supplicants in a largely federal process.<sup>101</sup> In the Reagan-Bush years, the state role in OCS decision-making turned out to be less than originally bargained for — *but this need not have been so*. Such an outcome was a product of the values of persons and agencies charged with implementing the OCSLAA,<sup>102</sup> and was thus a function of bureaucratic culture.

B. *Weakness in the State Role: The Problem of Ambiguous Program Objectives*

Slippage between the intent of the OCSLAA and their implementation is the result of vagueness in the amendments and the broad discretion afforded federal officials to determine whether states' recommendations are to be accepted. Given these two factors, it is not surprising that in the pro-development Reagan and Bush Administrations the OCSLAA were implemented in such way that states' rights provisions were interpreted in a very narrow fashion. Borrowing from a framework created by political scientists Paul Sabatier and Daniel Mazmanian, this section will show how and why specific statutory language in the OCSLA amendments failed to provide to the states a stronger voice in OCS planning.<sup>103</sup> Sabatier and Mazmanian offer "criteria for effective implementation of a regulatory program."<sup>104</sup> The first criterion requires enabling legislation to mandate "policy objectives that are clear and consistent or at

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100. Miller, *supra* note 4, at 440.

101. A true state-federal partnership is far preferable to states acting as mere supplicants. See Hershman, *supra* note 58, at 225-26.

102. Arguably, this possibility should have been foreseeable to legislators who drafted the statute, and they should have accordingly crafted it in such a way that the states' role could not have been minimized. However, this raises the question of whether the drafters actually intended a significant state role. See Miller, *supra* note 4, at 440.

103. For a thorough analysis of state-federal relations for offshore oil development and the sources of intergovernmental tension, see Cicin-Sain & Knecht, *supra* note 2, at 149. Cicin-Sain and Knecht list the three key "variables — structure of the statute, disposition of the implementors and agency culture — [that] contribute to the continued pattern of adversarial intergovernmental relations in offshore oil development." *Id.* at 154.

104. PAUL A. SABATIER & DANIEL A. MAZMANIAN, CAN REGULATION WORK? THE IMPLEMENTATION OF THE 1972 CALIFORNIA COASTAL INITIATIVE 7 (1983). The analysis of the OCSLAA undertaken here borrows only a few of the requirements listed

least provides substantive criteria for resolving goal conflicts."<sup>105</sup> Put another way, proper evaluation of actual program performance can become difficult when statutory objectives are conflicting and/or ambiguous, and lack a priority ranking.<sup>106</sup>

The OCSLAA's policy objectives are neither clear nor consistent. The 1978 amendments contain a statement of objectives, but this statement is ambiguous, especially regarding the exact weight to be afforded states' concerns. While a national interest in expediting development is given priority under the amendments' enumeration of objectives, the exact degree of state authority conferred is unclear. This ambiguity in the OCSLAA and their several cross-purposes are evidenced in the following excerpts from the amendments' statement of objectives:

§ 1332 Congressional declaration of policy

It is hereby declared to be the policy of the United States that —

. . . .

(3) the Outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for *expeditious and orderly development*, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments —

. . . .

(C) *such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and de-*

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by Sabatier and Mazmanian in their book. Moreover, this discussion applies their model to somewhat different ends.

105. *Id.*

106. See Daniel A. Mazmanian & Paul A. Sabatier, *The Role of Attitudes and Perceptions in Policy Evaluation by Attentive Elites: The California Coastal Commissions, in WHY POLICIES SUCCEED OR FAIL*, *supra* note 94, at 107, 107-08. To be sure, clear and concise enumeration of a statute's objectives may prove indispensable to the proponents of its stated objectives, within and outside implementing agencies. See SABATIER & MAZMANIAN, *supra* note 104, at 9. Yet, statutory declarations of objectives are often far from precise. This is sometimes necessary, since political realities may require that drafters resort to hazy policy directives in order to achieve consensus and therefore passage. Allowing some ambiguity in a statutory statement of objectives is a simple way of avoiding the sort of political opposition which could otherwise lead to the bill's demise.

velopment and production of, minerals of the outer Continental Shelf.<sup>107</sup>

Other introductory language, which similarly outlines the objectives of the 1978 amendments, puts even greater emphasis on states' rights beyond three miles, declaring:

SEC. 102. The purposes of this Act are to —

.....

(6) *assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf.*<sup>108</sup>

To be sure, some weakness in the statement of objectives of the OCSLAA (or any statute) is expected, since "congressionally mandated purposes seldom specify the exact program or the desired trade-offs to achieve their ends, or even the quantifiable measures to be used to evaluate the trade-offs."<sup>109</sup> While the 1978 amendments were intended to afford states some enhanced role offshore, ambiguity over the precise state role has led to policy breakdown. Even where legislative intent seems clear, there is disagreement over the basic compromises reached in this statute fifteen years ago. For instance, substantive language in the amendments provides that in the event of conflicts between federal and state interests, the ultimate decision rests with a federal official.<sup>110</sup> The problem has been that if the federal official is already strongly opposed to notions of a strong state voice, the potential for truly effective state participation in OCS management is significantly depreciated. Problems thus rest not only with ambiguity in the statute's goals, but also with the goals themselves — a problematic situation to say the least.

### C. *Incorporating State Concerns in OCS Planning*

According to the next criterion established by Sabatier and Mazmanian, the enabling legislation must structure the implementation process to maximize the probability that the implementing official(s) or agency will perform as desired.<sup>111</sup> Applying this crite-

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107. 43 U.S.C. § 1332 (1988) (emphasis added).

108. H.R. REP. NO. 590, *supra* note 83, at 3 (emphasis added).

109. FARROW, *supra* note 22, at 26.

110. Even when goals of a statute are internally consistent (which is not the case here), some qualitative and/or quantitative standards will be helpful in measuring the performance of implementers. See SABATIER & MAZMANIAN, *supra* note 104, at 48.

111. *Id.* at 7.

tion in the instant case, the OCSLAA should structure the process so that federal officials charged with creating and administering OCS development are encouraged to give weight to coastal state concerns. If the OCSLAA sufficiently incorporate the states' perspective in OCS planning, less state-sponsored litigation and a more cooperative state-federal relationship should result.

Unlike the previous criterion of unambiguous objectives, this criterion is evaluated through several "sub-conditions." Sabatier and Mazmanian list sub-conditions which must be met to maximize the probability that implementing officials will incorporate state concerns in OCS planning. Three of these sub-conditions are applied here, requiring the enabling statute to

- (1) assign implementation to [an] agenc[y] supportive of statutory objectives, [one] that will give the new program [a] high priority; (2) . . . minimiz[e] the number of veto/clearance points . . . by providing supporters of statutory objectives with inducements and sanctions sufficient to assure acquiescence among . . . [the] target [official(s) or agency]; . . . [and] (4) bias the decision rules of the implementing . . . agencies in favor of adherence to statutory objectives.<sup>112</sup>

As will be shown, provisions of the OCSLAA designed to enhance the states' input into the OCS management process have done a very poor job of meeting these three sub-conditions.

#### 1. Obtaining Target-Group Compliance: Assigning Implementation to an Agency Supportive of Statutory Objectives

This first sub-condition requires that the OCSLAA assign implementation to an agency or official(s) sympathetic to the goal of enhancing the state role. In their own case study of the California Coastal Commission, Sabatier and Mazmanian found the first sub-condition aptly met. The newly created and activist Coastal Commission had an environmentalist slant from the start, and this meant implementation of the Coastal Act was carried out by a sympathetic agency which gave conservationist goals a high priority.<sup>113</sup> In the case of the federal government's management of offshore oil and gas, the results have been radically different.

In implementing the OCSLAA, the federal agency charged with administering OCS development is the Minerals Management Service (MMS) in the Department of the Interior (DOI). Like the Cal-

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112. See *id.* at 10 (footnotes omitted). These conditions are slightly modified here, to be expressed in terms that are applicable to the present case study.

113. See *id.* at 50.

ifornia Coastal Commission, the Minerals Management Service is a relatively new body, created in January 1982. However, in contrast to the Coastal Commission's goal of providing coastal protection and access, federal administration of OCS development had been ongoing since the 1950s. The federal agencies that had previously administered OCS development were thus forerunners of the new Minerals Management Service — even their personnel were transferred to the MMS in the reorganization that created the Service.<sup>114</sup> Thus, some background information on these forerunner agencies provides clues to the organizational goals and ethic at the MMS.<sup>115</sup>

The agency previously given chief responsibility for supervising OCS exploration and development and conducting resource and economic evaluations was the Conservation Division of the United States Geological Survey (USGS).<sup>116</sup> The USGS's predominantly scientific orientation showed in the way its Conservation Division administered OCS development from 1953 until the creation of the MMS in 1982.<sup>117</sup> Elements of this Conservation Division became the foundation of the new MMS.<sup>118</sup>

By carrying over scientific specialists from the USGS, the new Minerals Management Service was immediately staffed with career personnel who favored reliance on scientific expertise in OCS leasing; these persons generally distrusted the ability of the free market properly to allocate offshore oil tracts and prices.<sup>119</sup> However, the high value these career bureaucrats placed on science and governmental planning was soon to be challenged.

Significantly, the "birth of the Minerals Management Service coincided with the emphasis of the Reagan administration on market forces, and so policies changed to expand industry's choice of areas to lease and to estimate the value of fewer [much larger] tracts."<sup>120</sup>

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114. FARROW, *supra* note 22, at 27.

115. *Id.*

116. *See id.*

117. *See id.*

118. Responsibility for supervising OCS lease auctions and collecting OCS revenues was transferred from the Bureau of Land Management (BLM) to the MMS in 1982. *See id.*

119. *See id.* at 28. Political scientist Herbert Simon observes that a person " 'does not live for months or years in a particular position in an organization, exposed to some streams of communication, shielded from others, without the most profound effects upon what he knows, believes, attends to, hopes, wishes, emphasizes, fears, and proposes.' " JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 24 (1989) (quoting HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR xvi (3d ed. 1976)). As aptly pointed out by political scientist James Q. Wilson, organization *does* matter. *Id.* at 23-28.

120. FARROW, *supra* note 22, at 27.

The result was a split in the MMS's organizational ethic. Political leadership installed during the Reagan Administration held a political philosophy that placed great emphasis on unhindered natural resource development and relied on market forces rather than oversight by geological specialists.<sup>121</sup> As a result, Reagan appointees took a far less scientific, selective approach to offshore management. Soon, tremendous offshore tracts were being offered at much lower prices, allowing the oil industry great leeway. This "area-wide" approach to leasing permitted industry to obtain sites at low cost and with little governmental interference.

Thus, a charge was leveled that OCS leasing in the 1980s became "a disposal program whose success might be measured by the extent of transfers to the private sector."<sup>122</sup> Whether the MMS was guided by an organizational ethic steeped in respect for scientific expertise, or affection for the forces of unrestricted capitalism and a free market, its operations were nonetheless generating billions of dollars for the federal Treasury. Taxes and royalties from OCS oil and gas were highly significant as a source of federal revenues, making new OCS production doubly important at the MMS. At the powerful Office of Management and Budget, the revenue generated by OCS lease sales — and not the degree of sensitivity the MMS might show to coastal state objections to new OCS development — was seen as a key indicator of overall MMS performance.<sup>123</sup>

America's dependence on oil and gas, together with the Treasury's reliance on OCS revenues, thus contributed to a singularity of purpose at the Minerals Management Service.<sup>124</sup> Not surprisingly, the agency's main concern became "maximizing for the United States the revenues derived from producing oil and gas from the outer continental shelf."<sup>125</sup> To be sure, given the importance of reducing America's dependence on imported oil and the value of OCS revenue for the Treasury, it is easy to understand why the MMS would seek to expedite OCS development greatly. Additionally, in

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121. *See id.* at 27-28.

122. *Id.* at 28.

123. *See id.* at 27.

124. As a result of this single-mindedness, the performance of the MMS is often viewed in terms of efficiency — meaning efficiency in leasing the greatest acreage of tracts to a willing industry. This emphasis on efficiency downplays the diversity of opinions that exist on the merit of OCS development. In fact, MMS performance should also be measured in terms of the tracts *not* leased. The objectives of the MMS subsequent to the OCSLAA are now too diverse to allow efficiency to be the single or even predominant measure of its performance.

125. Cicin-Sain, *supra* note 34, at 257.

so doing, the MMS would only be acting in accordance with its mandate and with the overall intent of the OCSLAA.

It is possible, however, for the MMS to go too far in the naked pursuit of OCS development, since increased OCS production should not be seen as the only important goal in the total U.S. energy picture. It must be remembered that OCS oil and gas form only a small part of a far larger energy picture, and that OCS policy should not be made in ignorance of this total picture. The better position is that conservation and efficiency should first be enhanced on the demand side and greater environmental protection factored in on the supply side, in part through consideration of coastal state concerns, before any new OCS development is undertaken.

The problem of obtaining target-group compliance and assigning implementation to an agency supportive of statutory objectives is complicated by the fact that the OCSLA amendments assign to the MMS the task of judging the worth of the states' objections to new OCS development, while the MMS itself will likely favor new OCS development. Clearly, the MMS is no environmental protection agency, and it doubtless would be extremely difficult for it to act like one. But because it is given the task of being a "balancer," its own organizational ethic and values become vital issues. Arguably, officials at the MMS under Reagan and Bush were insufficiently sensitive to environmental impacts of OCS development and to environmental concerns voiced by states opposed to increased OCS development.

Little incentive existed at the MMS to give coastal states' objections the real consideration that they deserved. For instance, in the Reagan and Bush years, requests that large areas of the continental shelf be set aside as sanctuaries were not viewed by managers at the MMS as viable or even reasonable options. The organizational ethic at the MMS in the 1980s attracted a certain type of manager, and this organizational ethic in turn constrained the range of options MMS officials considered feasible.<sup>126</sup>

Political scientist Herbert Kaufman has analyzed in considerable depth the impact that organizational ethic may have as a constraint on agency officials. In his classic study of forest rangers, Kaufman discusses how Forest Service personnel seek to conform, in the sense that they wish "to do as a matter of personal preference the

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126. *See id.*; see also HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR passim* (1960) (presenting a classic study in organizational behavior).

things that happen to be required.”<sup>127</sup> A similar situation occurs at the MMS, where the type of individual drawn to that agency seeks to do what that agency considers “right” — in this case, expanding OCS development. In his later work, Kaufman discusses why organizations tend not to change. This is not just due to the selection of specific types of individuals, but also to the manner in which behavior is programmed within the group. Kaufman observes that

[i]mportant as the preservice and selection processes are in producing personnel with the appropriate predispositions and abilities, it is *within* the organizations that the fitting of the individual to the requirements of the system takes on particular intensity. The organizations proceed methodically to try to shape the values and perceptions of new members, and to instruct them in what they must do if they would like to get ahead. The initial match of candidate to system is at best a rough approximation; the fine adjustments take place later on.<sup>128</sup>

In contradistinction to the organizational ethic at the California Coastal Commission, which Sabatier and Mazmanian found to favor preservation over development, the ethic at the MMS under Reagan and Bush favored development over preservation. In light of vagueness in the OCSLAA’s objectives as regards weight to be given to states’ objections, when push came to shove, the MMS preferred new OCS development. While the MMS already has several reasons to expand new OCS development, it does not have sufficient incentives to encourage compliance with another of the amendments’ objectives: providing states with an effective voice in management.

## 2. Obtaining Target-Group Compliance: Structuring Implementation to Minimize Veto/Clearance Points

The next sub-condition that Sabatier and Mazmanian offer for achieving target-group compliance<sup>129</sup> requires that the enabling statute minimize “the number of veto/clearance points.”<sup>130</sup> An enabling statute will have “inducements and sanctions sufficient to as-

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127. *Id.* at 198; see also WILSON, *supra* note 119, at 48-49 (addressing how tasks are shaped by the incentives valued by an agency’s personnel, when goals of that agency are vague or ambiguous).

128. HERBERT KAUFMAN, *THE LIMITS OF ORGANIZATIONAL CHANGE* 17 (1971).

129. SABATIER & MAZMANIAN, *supra* note 104, at 10.

130. *Id.* The concept of the veto/clearance point is derived from Pressman and Wildavsky’s groundbreaking work in implementation studies. See *id.* at 23 n.40. “A veto point occurs when an actor has the capacity to substantially frustrate and/or to veto the compliance of target groups with statutory objectives.” *Id.* (citations omitted).

sure acquiescence among those with a potential veto."<sup>131</sup> Again, if one desired goal of the OCSLAA was to provide states with an important role in OCS decision-making, then the specific provisions of the amendments which were designed to enhance the states' role have failed here.

In the instant case, two veto/clearance points in the OCSLAA have frustrated attempts by coastal states to achieve more than a supporting role in OCS planning. Ironically, these two veto points are also the two key OCSLAA sections that *should* provide states with the means to participate in the federal planning process. The first is found in section 18 of the OCSLAA.<sup>132</sup> This section grants states a formal means of influencing events at the very early "programmatic" stage of the OCS decision-making process. Section 18 requires that a five-year plan "be prepared and maintained in a manner consistent with" the "laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the [Interior] Secretary's consideration."<sup>133</sup> Section 18 also requires that each federal lease sale plan "be prepared and maintained in a manner consistent with" the "programs promulgated by the coastal states and approved pursuant to"<sup>134</sup> the Coastal Zone Management Act of 1972.<sup>135</sup>

However, under the influence of the Reagan and Bush Administrations, this section did not have its intended effect. Although designed to involve states in the planning process to a greater degree,<sup>136</sup> section 18 only requires that the interior secretary accept recommendations "if he determines that they are consistent with the national interest."<sup>137</sup> In practice, this lax standard has meant

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131. *Id.* at 10.

132. 43 U.S.C. § 1344 (1988).

133. H.R. REP. NO. 590, *supra* note 83, at 17.

134. *Id.*

135. The Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451-1464 (1988 & Supp. III 1991), contains "consistency review" provisions that already provide a groundwork for cooperative federalism, or "shared governance" in offshore resource management. The potentially important CZMA allows each coastal state (that so desires) the ability to share authority over certain federal activities via creation of a federally approved Coastal Management Program. In practice, however, the CZMA was not allowed to be the effective tool that it might have been. Recent 1991 amendments to the Act have notably enhanced the state role beyond three miles. *See supra* note 70.

136. *See* H.R. REP. NO. 590, *supra* note 83, at 50, *reprinted in* 1978 U.S.C.C.A.N. at 1457.

137. *Id.* Under this section, states' input *must* be incorporated within the five-year plan, at least when the secretary of the interior finds that it is consistent with the national interest. *See* Miller, *supra* note 4, at 436.

that under the pro-drilling secretaries of the interior appointed by Reagan and Bush, state objections at the important programmatic stage to federal OCS development plans were too easily rejected.

The second existing statutory mechanism that allows for state input in the federal process is in OCSLAA section 19;<sup>138</sup> language in this section ostensibly provides coastal states with a real voice regarding specific lease sales.<sup>139</sup> In drafting this section, a Conference Report declared that section 19 “ ‘is intended to insure that Governors of affected States, and local government executives within such States, have a *leading role in OCS decisions and particularly as to potential lease sales* and development and production plans.’ ”<sup>140</sup> As with section 18, it is the interior secretary who will ultimately have the final say concerning whether or not to accept states’ comments. However, the states are in a somewhat more favorable position here than in section 18. Section 19, as drafted, intends that the interior secretary accept these comments if she or he determines they have achieved a “reasonable balance between the national interest<sup>141</sup> and the well-being of the citizens of the affected State.”<sup>142</sup> Where recommendations have been rejected, state and environmental groups have resorted to litigation, often successfully.<sup>143</sup>

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138. 43 U.S.C. § 1345 (1988).

139. See Miller, *supra* note 4, at 438.

140. *Id.* (quoting H.R. CONF. REP. NO. 1474, 95th Cong., 2d Sess. 106 (1978)).

141. Relevant language in section 19 directed that “[f]or the purposes of this subsection, a determination of the national interest shall be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this Act.” H.R. REP. NO. 590, *supra* note 83, at 19. This vague language again leaves the secretary with broad discretion in determining whether the national interest is satisfied.

142. *Id.*

143. Despite the substantial discretion accorded the secretary under the amendments, states have enjoyed surprising success in obtaining favorable judgments. See Hildreth, *supra* note 9, at 166. Hildreth notes:

In reaching decisions under section 19, the Secretary must provide the governor and local government executives the opportunity for consultation. However, according to section 19, the Secretary’s decision whether or not to incorporate recommendations is ‘final and shall not, alone, be a basis for [judicial] invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious.’

Despite the broad discretion accorded to the secretary under section 19, state and local governments have sued to enforce section 19’s requirements in situations where they have felt their recommendations have not been given sufficient weight. Of the five federal trial courts to rule on alleged section 19 violations to date, three have found the secretary violated section 19, *California v. Watt*, 17 ERC 1711 (C.D. Cal. 1982) (Southern California Sale 68); *Conservation Law Foundation v. Watt*, 560 F. Supp. 561 (D. Mass. 1983) (Georges Bank Sale 52); *Massachusetts v. Clark*, 594 F. Supp. 1373 (D. Mass. 1984) (Georges Bank Sale 82).

*Id.* at 165-66.

Vague language in the Act vests the secretary of the interior with considerable discretion; in effect, it is the secretary who largely determines the role and extent of the state voice in OCS development. This means that states' rights and environmental protection in OCS decision-making will vary considerably over time, in accordance with the predispositions of the individual interior secretary. Since this post is a political appointment made by the president, the chief executive is the most important individual in determining states' rights in this area. Under the Clinton-Gore Administration, the secretary of the interior will be far more attuned to states' rights and environmental issues than were either James Watt or Manuel Lujan. Nonetheless, there may still come a time when a future president will be less sympathetic to these goals. For this reason, the law needs to be strengthened. Greater states' rights and environmental protection are two concerns important enough to be written into a newly amended OCSLA.

### 3. Incorporating Supportive Decision Rules in the OCSLAA

The third and last sub-condition for achieving target-group compliance is that appropriate "decision rules" be incorporated into the statute, to bias an implementing agency in favor of the desired outcome.<sup>144</sup> One means of structuring a statute to obtain favorable decision rules is through careful attention to the standard applied for the burden of proof.<sup>145</sup> If an interior secretary were to deny a state's comments offered under sections 18 or 19, the outcome of a lawsuit brought to challenge that determination would depend heavily upon where the burden of proof is placed. This comes as no surprise — many lawsuits hinge on the burden of proof. In this instance, the states bear the burden of proof; they must demonstrate why the secretary's decision denying their comments should be reversed. In doing so, the states must demonstrate that this decision was "arbitrary and capricious."<sup>146</sup> Most important, this standard was not originally written into law by Congress but was imposed subsequently by the courts.<sup>147</sup>

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144. See SABATIER & MAZMANIAN, *supra* note 104, at 10.

145. See *id.* at 24 n.42.

146. It is quite difficult to "beat" this standard of proof. This more difficult standard has been substituted by judicial pronouncement for the somewhat more easily met "substantial evidence" requirement originally part of the statute. See *e.g.*, Miller, *supra* note 4, at 440-49. Under the new "arbitrary and capricious" standard, the secretary need only show that he or she gave a bare minimum of consideration to a state's objections before rejecting them.

147. See Van de Kamp & Saurenman, *supra* note 1, at 79-100.

Being held only to this loose "arbitrary and capricious" standard does little to encourage the secretary to accept states' recommendations. Rather, this standard is just an added incentive for the secretary of the interior to favor the federal government's pro-development perspective, even though that decision conflicts with a state viewpoint. In response to the problems posed by this "arbitrary and capricious" standard, legislation has been introduced in Congress which would

(1) require the secretary to accept a governor's recommendations unless he can show that they do not provide a reasonable balance of state and federal interests . . . ; and, (2) require the courts in reviewing secretarial five-year plan decisions to apply the stricter 'substantial evidence' standard of review rather than the 'arbitrary and capricious' standard . . . .<sup>148</sup>

The above suggestion has not been adopted, and it may not provide enough incentive for the federal government to incorporate states' concerns. Professor Richard Hildreth argues that this proposed legislation is not enough to remedy the flaws associated with the federal government's OCS planning process. Hildreth astutely points to the suggestion by coastal states and environmental groups that the considerations used by the secretary be prioritized when determining whether to accept state objections. Thus, a secretary might instead be required to "give greater weight to traditional state concerns such as the risk of oil spills, the lack of onshore support facilities, and conflicts with commercial fishing activities."<sup>149</sup> Prioritization might thus enhance the effect of states' input, by compensating for vagueness in statutory objectives; it could also constrain the vast discretion allowed the secretary, which has thus far enabled him to act as too great a veto/clearance point.

#### D. *Suggested Statutory Changes to the OCS Lands Act*

The United States' energy situation in 1993 is far different than it was in the 1970s, when repeated oil price shocks sent a vulnerable U.S. and a startled Congress searching for ways to expedite development of the OCS. The outcome was the 1978 OCSLA amendments, which placed tentative though insufficient emphasis on states' rights and environmental protection. Over the last fifteen years, however, the American scene has changed considerably, and observers of federal offshore oil and gas management recognize that

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148. Hildreth, *supra* note 9, at 164.

149. *See id.* at 167.

it is time now to amend the OCSLA again. Proper OCS management is simply too important to continue to rely on OCS moratoria as means of circumventing the 1978 Act. Therefore, it is properly stated that

[t]he national interest identified in 1978 simply does not exist any more. The world then predicted for the 1980's never materialized. The present national interest is not served by continuing to rely on an invalid policy which focuses on expeditious OCS oil and gas development. This policy simply enhances our reliance on fossil fuels while placing at risk sensitive coastal areas and other environmental resources. The appropriate policy must emphasize conservation and the efficient use of fossil fuels while at the same time giving at least equal priority to protecting the environment. In a comprehensive national energy policy, OCS development will continue in some areas, but its role would be reduced by emphasis on conservation, by the presence of secondary recovery techniques, and by support for research and development into promising new sources of energy.<sup>150</sup>

What path needs to be taken to change the OCSLAA? First, OCSLAA section 19 must be amended. Section 19 should state explicitly that the DOI "must defer to the recommendations of coastal state governors and that Interior may reject these recommendations only if the secretary makes a factual determination that they are arbitrary and capricious."<sup>151</sup> This will take some authority away from federal officials and vest it where it belongs: with the governors of affected coastal states. The interior secretary — a federal official — should not be given free rein to reject a state's recommendations. Existing statutory language has left states at a disadvantage, and this problem is only exacerbated by assigning implementation to an agency, such as the MMS, that supports accelerated OCS development. Thus, the OCSLAA need to recognize that federal bureaucrats can be far less sensitive to coastal degradation issues than coastal state officials who hear these concerns clearly expressed by local voices.

Second, there is too much vagueness in the OCSLAA's mandate. Van de Kamp and Saurenman rightly state that "at the most general level, the policies of the OCS Lands Act must be amended so that expeditious development of the OCS does not overwhelm all other environmental and natural resource concerns."<sup>152</sup> Given the aggressive pro-development approach taken in the Reagan and

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150. Van de Kamp & Saurenman, *supra* note 1, at 129-30.

151. *Id.* at 132.

152. *Id.* at 131.

Bush years, when federal officials largely ignored the Act's states' rights provisions, any vagueness here is an especially fatal flaw. In sum, "policies of the OCS Lands Act need to specify that preserving our environmental and coastal resources is as important as finding oil and gas."<sup>153</sup>

Third, section 18 of the OCSLAA should now be amended to make "clear that in preparing a leasing program, protection of the environment and of coastal resources is to be given as much weight as the recovery of hydrocarbons."<sup>154</sup> For instance, coastal states should be allowed to require specific environmental provisions in any new leasing plan.<sup>155</sup> Van de Kamp and Saurenman suggest that the secretary "be required to accept [the states'] reasonable recommendations concerning the leasing program. [Further], [t]hese alterations to section 18 should lead to leasing programs which are far more specific and which, because of the increased role played by the states, are more free from controversy and thus easier to implement."<sup>156</sup>

#### E. *Reconnecting OCS Policy to the Complete Energy Picture*

Policy issues of OCS oil and gas development do not stand alone. Reality requires that the most fundamental questions, such as whether or not new OCS drilling is to be encouraged, must be considered in the context of the overall U.S. energy picture. That picture has to include not just supply, but also demand. This said, even a cursory review of the American energy portrait makes clear that the United States now needs to "find" new energy through greater conservation and efficiency, for here great strides can be made. But doing so requires a president with leadership and vision — in retrospect, "that vision thing" is something George Bush sorely lacked. A much more active program can be expected from Clinton and Gore.

To be sure, creating an energy policy that will reduce demand by encouraging efficiency and alternative fuel sources is no easy task. For example, the millions of automobiles in the United States are so tied to our oil consumption that automobile fuel-efficiency standards must be considered whenever OCS policy is addressed.<sup>157</sup>

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153. *Id.*

154. *Id.*

155. *See id.* at 131-32.

156. *Id.* at 132.

157. Hence the position taken in California, where, based partly on "the absence of a determinative role for the states in the OCS process, and in part on the absence of a

Yet achieving higher auto fuel-efficiency requires a paradigm shift away from the old ways of thinking inside the American auto industry, where, just as in government administration, bias in thinking enters the scene. With regard to current trends, the big U.S. auto manufacturers may well miss upcoming global business opportunities their foreign competitors grab as they move rapidly ahead in developing higher-efficiency and alternative-fuel vehicles. "The biggest danger for the established [American] car makers is believing that only they know how to make and sell cars. What they know is how to make and sell cars with internal combustion engines."<sup>158</sup> The Japanese and Germans already understand that making more environmentally friendly products will soon be big global business and one that will create, rather than cost, jobs.

Although they may not yet be able to see over the steering wheel of their parents' cars, a new generation of motorists weaned on environmental concern will have ideas as different about what they want to drive as their choice of music and clothes will be from that of their parents. Those car makers who master this new business are going to have millions of planet-friendly vehicles to sell.<sup>159</sup>

So far, the big U.S. auto companies seem strenuously opposed to calls for higher average fuel efficiency. But make no mistake, to continue building cars that are not fuel-efficient is an unhealthy policy for this nation and one that will ultimately drive the need for more OCS production. Even *The Economist*, a newspaper unmistakably devoted to free-market principles, points up the advantages of alternative-fuel vehicles and bemoans that when American auto companies are at last pushed into working

on alternative vehicles, they do so rather grudgingly and certainly not with the zeal of the [small] entrepreneurs. Clean-air provisions, fuel efficiency and recycling are all too often seen as the annoying requirements of politicians rather than as market opportunities. Just as much effort is often put into lobbying against new rules as meeting them. Yet it is clear in which direction the car business is turning. With massive investments in their existing factories and the old ways of doing things, there is little incentive for car producers to rush any

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national energy policy which emphasizes energy conservation, the California attorney general has taken the position that there should be no further leasing of OCS areas offshore of California." Van de Kamp & Saurenman, *supra* note 1, at 130 n.210 (citing Presentation of John K. Van de Kamp, Attorney General of California, to the President's OCS Task Force (May 24, 1989); Letter from John Van de Kamp, Attorney General of California, to the Hon. Manuel Lujan, Jr., Secretary of the Interior (July 14, 1989) (on file with *Harvard Environmental Law Review*)).

158. *Car Industry Survey*, *supra* note 21, at 18.

159. *Id.*

changes. And why, they retort, should they? With present technology, there is nothing to match the reliability, range, performance and low cost of a gasoline-powered car. A hundred years ago people made exactly the same claim about the horse.<sup>160</sup>

Alternative, more fuel-efficient vehicles will arrive; and for the good of this country, the federal government should provide incentives to ensure America builds them sooner rather than later. Some legislators, such as ex-Senator Timothy Wirth of Colorado, have taken up the cause of U.S. energy policy. His bill to create a national energy plan would have addressed related issues of "climate change, energy efficiency, research and development, state energy coastal programs, renewable energy, advanced nuclear reactors, fusion, coal, natural gas, a natural resource policy, basic science and moderating world population growth."<sup>161</sup> However, that legislation was introduced in 1989, during the Bush presidency, and thus had no chance of being signed into law.

Happily, times change. Providing incentives for industry to achieve higher efficiency may well be the new course taken by federal officials. Unlike under Bush and Reagan, Clinton officials are not so tied to orthodoxies of *laissez faire*; they recognize that sometimes the U.S. can and should turn to a limited government-industry partnership (as in Japan) to get private industry moving. Putting the American auto industry on the track of higher-efficiency and alternative-fuel vehicles will, in the long-term, make good business sense. Ultimately, reduced demand for carbon-laden fossil fuels will allow America to leave most of its OCS oil and gas resources where they belong: in reserve, in the ground.

#### IV.

#### CONCLUSION

Imposing a tax on the more environmentally dirty energy sources, such as gasoline, can help better to account for true long-term costs of America's heavy reliance on fossil fuels. It also would help to build a well-rationalized national energy plan with economic incentives for conservation and efficiency. To be sure, this long-term thinking represents a radical shift from the *laissez faire* ideals of the Reagan and Bush Administrations, and any new energy tax is always certain to encounter very significant, continuing political opposition from a wide host of fronts.<sup>162</sup> However, this opposition can

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160. *Id.* at 5.

161. Van de Kamp & Saurenman, *supra* note 1, at 130 n.211.

162. For instance, an energy tax is regressive, and so, hurts the poor more than it

be readily addressed,<sup>163</sup> and there remains a strong case for new energy taxes.

This Article has focused on various means for improving offshore oil and gas policy, and the discussion has highlighted how certain provisions of the OCSLAA resulted in a weak state role in OCS planning. Too much discretion allowed the Reagan-Bush pro-development perspective to trump state concerns over environmental and other negative impacts of OCS development. As implemented, the OCSLAA did not afford states an adequate voice in planning.<sup>164</sup> It was in response to this perceived defect of offshore federalism that states resorted to the drastic measure of OCS moratoria in order to shut down development. In effect, states were forced into moratoria as a means to affect federal OCS decisions, a response that is outside their prerogatives under the OCSLAA.

In considering the proper role for states in OCS development, the total U.S. energy picture should be taken into account. Regrettably, America's demand for oil is so great that even vast expansion of offshore production would not free our nation from its dependence on foreign oil.<sup>165</sup> Yet the federal government, first under Reagan and then under Bush, focused only on the supply side of the energy picture. These two Administrations opposed initiation of conservation measures on the demand side because of ideological preference for free-market forces and a distrust of government. This opposition was unfortunate, since sounder long-term policy calls for the federal government to offer economic incentives for energy conservation and efficiency.<sup>166</sup>

Defining the national interest is never a simple task and Reagan-Bush policy towards new OCS development was just one of many possible definitions. With the Bush tenure over, it is time to con-

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hurts others. For this reason, the liberal wing of the Democratic Party, which might otherwise support a new energy tax, could oppose it. However, in order to gain the liberals' support, some revenue from such a tax could be remitted to the poor through new changes in the tax code or increased welfare benefits. See *Much Heat, Little Light*, *supra* note 17, at 73. Likewise, conservatives may oppose an energy tax, due to their general distaste for taxes of any kind.

163. An energy tax, for example, is less distorting to the economy than other revenue raising devices (such as income taxes), and thus, a broad energy tax should be preferable to conservatives since it correctly penalizes pollution that is otherwise passed on "for free" to society as an externality.

164. The original 1953 OCSLA legislation was criticized by some for its "grant of almost total discretion to the Secretary of the Interior." H.R. REP. NO. 590, *supra* note 83, at 105, *reprinted in* 1978 U.S.C.A.N. at 1512. Criticism that the secretary of the interior enjoys too much discretion seems to be a hardy perennial.

165. See *supra* note 13.

166. See *supra* text accompanying notes 157-61.

sider a new approach in ocean resources management. Arguably, the national interest is now best served by developing an overall energy policy and ensuring that OCS oil and gas development is not resumed until this policy is in place. Although such an approach was unthinkable under Reagan and Bush, times have changed, and the new policies of Clinton and Gore may fall in line with these suggestions.

The fundamental question is whether exclusive federal control of the OCS is appropriate for domestic management of offshore oil and gas. This Article concludes that it is not, and argues for a second-generation approach in offshore governance. In sum, two means are suggested here to incorporate the state voice into OCS planning. The first calls on the Clinton Administration to appoint individuals to federal OCS management positions who will be more sympathetic to states' rights and environmental concerns. The second suggestion is that the OCS Lands Act of 1953 should again be amended to ensure a role for states and so secure better environmental protection. Such change is not to be feared; leaving real authority at the lowest level of government is, after all, what federalism and basic American political principles are all about.

