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NOTES

WATER AND WATERCOURSES – SOIL UNDER MARGINAL SEAS OF THE UNITED STATES: THE SLIDING INTEREST DOCTRINE

A hundred and twenty-nine years ago Chief Justice Marshall said, "there are not many questions in which a State would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory."¹ His statement is as timely today as it was then. In the so-called tidelands cases the United States Supreme Court decided that the Federal Government has "paramount rights in and power over" the submerged lands off the coasts of California,² Louisiana,³ and Texas.⁴ In view of the widespread criticism these decisions have received it is worthwhile to examine the reasoning of the Court in these cases to ascertain if it would be applicable to lands under the marginal seas of the original thirteen states⁵ that border on the Atlantic Ocean.⁶

By the common law the shore of the sea, and the arms of the sea, is the land between ordinary high and low watermark, the land over which the daily tides ebb and flow.⁷ The "seashore" has been denominated as that well-defined area lying between high watermark and low watermark of waters in which the tide daily ebbs and flows.⁸ There is general agreement among authorities as to what constitutes the shore or seashore. Agreement in distinguishing between the shore and tidelands is another matter and the two terms are often used synonymously. Tideland has variously been defined as: Land over which the tide ebbs and flows;⁹ land alternately covered and uncovered and between the dry upland and the navigable water which may be used in facilitating approach to the navigable waters from the upland;¹⁰ land that is covered and uncovered by

1. *Osborn v. Bank of United States*, 9 Wheat. 738 (U. S. 1824).

2. *United States v. California*, 332 U. S. 19 (1947).

3. *United States v. Louisiana*, 339 U. S. 669 (1950).

4. *United States v. Texas*, 339 U. S. 707 (1950).

5. Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island. (Listed in the order of ratification of the Constitution.)

6. Pennsylvania does not border on the Atlantic Ocean.

7. *United States v. Pacheco*, 2 Wall. 587, 590 (U. S. 1865); *Borax Consolidated v. Los Angeles*, 296 U. S. 10, 22 (1935).

8. *Mr. Justice Stone in Massachusetts v. New York*, 271 U. S. 65, 92 (1926).

9. *Woodward v. Davidson*, 150 Fed. 840 (C. C. W. D. Wash. 1907).

10. *Mr. Justice Brewer in Baer v. Moran*, 153 U. S. 287, 288 (1894).

the ordinary daily tides of public navigable waters;¹¹ land that extends to high watermark;¹² land that has a definite boundary at the line of mean low tide.¹³ Shore lands differ from tidelands not only in their situation, which in many cases makes an almost indefinite filling in of the latter a possibility, but also in legal definition.¹⁴ Since the shore and tideland are both lands covered by flood tide, one way to distinguish the two is that just given: capability of being filled in or reclaimed to facilitate access to navigable water. Even this distinction is faulty inasmuch as soil under a shallow marginal sea may be reclaimed by filling in.¹⁵ Although "tideland" in its popular usage includes land under the sea beyond low watermark, it should be remembered that the Government did not acquire the tidelands in the strict sense of the word under the decisions of the instant cases. Popular usage¹⁶ of the term tidelands, which includes the marginal sea lands, should not obscure the fact that prior decisions of the Court in respect to the tidelands remain substantially the same. The terms tidelands and marginal sea lands will be used in their legal distinctions herein. The tidelands and marginal sea lands both begin at the line of mean low tide; the former extending toward the upland and the latter extending seaward. Unless otherwise indicated the word "government" used herein denotes Federal Government.

I.

TITLE AND INTERESTS ACQUIRED BY THE STATES

The English possessions in America were not claimed by right of conquest but by right of discovery.¹⁷ Charters granted by the kings of England for territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tidewaters.¹⁸ In those governments which were denominated royal where the

11. *Miller v. Bay-To-Gulf*, 141 Fla. 452, 193 So. 425 (1940).

12. *Borax Consolidated v. City of Los Angeles*, 296 U. S. 10, 22 (1935).

13. *Mr. Justice Brandeis in Port of Seattle v. Oregon & Washington Railroad*, 255 U. S. 56, 66 (1921) (Here the state had defined the tidelands by statute.)

14. *Ibid.*

15. 3 *MIAMI L. Q.* 339 (Deals with the filling in practices at Miami Beach, Fla.)

16. An example of the popular usage of this term is seen in a previous issue of this Quarterly where the author says: "The Supreme Court of the United States has held that no state has any title to the natural resources under tidal waters." 5 *S. C. L. Q.* 131 (Dec. 1952).

17. *Martin v. Waddell*, 16 Pet. 367, 409 (U. S. 1842).

18. *Shively v. Bowlby*, 152 U. S. 1, 14 (1894).

right to the soil was not vested in individuals but remained in the Crown or was vested in the colonial government, the king could grant lands and dismember the government at will. Subsequent grants made out of the two original colonies are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. Almost every title within those governments is dependent on these grants. These various patents cannot be considered as nullities nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only would never contain words expressly granting the land, the soil and the waters.¹⁹

The Indians inhabited the lands claimed by the English by right of discovery. According to the principles of international law as then understood by the civilized powers of Europe the Indian tribes in the new world were regarded as mere temporary occupants of the soil and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.²⁰ Our whole country was granted by the Crown while in the occupation of the Indians. No objection was made to a grant on the ground that title as well as possession was in the Indians when it was made and that it passed nothing on that account.²¹ However, the rights of the original inhabitants were in no instance entirely disregarded. To a considerable extent their rights were necessarily impaired but they were admitted to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion. On the other hand their rights to complete sovereignty as independent nations were necessarily diminished. Nor could they dispose of the soil at their own will to whomsoever they pleased since the original fundamental principle was that discovery gave exclusive title to those who made it.²²

Consequent upon the American Revolution all the rights of the Crown and of Parliament vested in the several states,²³ for when the Revolution took place the people of each state became sovereign themselves.²⁴ The rights which the states acquired in the tidelands and marginal seas were through the people of each state in their

19. Chief Justice Marshall in *Johnson v. M'Intosh*, 8 Wheat. 543, 579, 580 (U. S. 1823).

20. *Martin v. Waddell*, 16 Pet. 367, 409 (U. S. 1842).

21. *Johnson v. M'Intosh*, 8 Wheat. 543, 579 (U. S. 1823).

22. *Id.* at 574.

23. *Shively v. Bowlby*, 152 U. S. 1, 14 (1894).

24. *Martin v. Waddell*, 16 Pet. 367, 410 (U. S. 1842).

sovereign capacity. In this capacity the people of each state hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered through the Constitution to the general government.²⁵ At common law the title and the dominion of lands flowed by the tide were in the king for the benefit of the nation. Upon the American Revolution these rights, charged with a like trust, were vested in the original states within their respective borders.²⁶ The doctrines of the common law as to the seashore and the soil lying under tidewaters and navigable streams were peculiar. The fundamental idea was that the property in the sea and tidewaters, and in the soil and shore thereof, was in the sovereign.²⁷ The sovereign owned, as far as it was capable of ownership, the sea and by virtue of this he owned the shores and arms thereof; but his title, *jus privatum*, was held subject to the public right, *jus publicum*, of navigation and fishing.²⁸

It is clear that the tidelands and shore were acquired by the states by conquest.²⁹ How far seaward their acquisition went is not free from doubt but that it did extend seaward beyond the tidelands and the shore for some distance is certain. The difficulty appears when an attempt is made to show specifically at what point the sovereign control terminated. From the earliest time it has been conceded that the sovereignty of nations bordering on the sea does not stop at the shore, but that for some distance at least it extends over and under the ocean. Such control has been regarded as necessary for the security of those living on the coast and as proper to assure the full enjoyment by them of the land which they inhabit. By the American Revolution dominion over these waters became vested in the several states and there it still remains except in so far as they have surrendered such control to the Federal Government through the Constitution.³⁰

There is authority holding that the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast³¹ and in time of war and for enforcement of revenue laws authority may be exercised beyond a marine league.³² The Act of

25. *Ibid.*

26. *Shively v. Bowlby*, 152 U. S. 1, 57 (1894); *St. Clair County v. Lovington*, 23 Wall. 46 (U. S. 1874).

27. *State v. Pacific Guano Co.*, 22 S. C. 50 (1884).

28. *Shively v. Bowlby*, 152 U. S. 1, 13 (1894).

29. *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. D. N. J. 1887).

30. *State v. Ruvido*, 297 Me. 102, 15 A. 2d 293 (1940).

31. *Manchester v. Massachusetts*, 139 U. S. 240, 258 (1891).

32. *Ibid.*

Congress admitting Florida to the Union made one of its boundaries the Gulf of Mexico. Under international law this means that the jurisdiction of the state extends one league into the Gulf or three miles.³³ The jurisdiction of a state over the sea adjacent to its coast is that of an independent nation with the exception of those rights granted to the Government by the Constitution.³⁴ Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea.³⁵ The sovereignty of a state over its territorial waters exists even though the state has never seen fit to define the extent of its marine boundary.³⁶ A state may extend its borders for the space of one marine league from low watermark and make the region so annexed as much a portion of the state as any other part of its territory. If that portion of the high seas which lies within a marine league of a nation's coast is territorially appropriated by such nation, then such portion is within a particular state or district.³⁷ With the approval of Congress a state may fix its boundaries.³⁸ With such approval Alabama extended hers into the sea.³⁹

Whatever soil below low watermark that is the subject of exclusive ownership belongs to the state on whose maritime border and within whose territory it lies, subject only to any lawful grants of that soil by the state or the sovereign power which governed its territory before the Declaration of Independence.⁴⁰ The state's power over this soil results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held.⁴¹ In determining the extent of the territory of the United States under the Eighteenth Amendment to the Constitution, the United States Supreme Court said that it was the regional areas — of land and adjacent waters — over which the United States claims and exercises dominion and control as a sovereign power. The Court said that the immediate

33. *Pope v. Blanton*, 10 Fed. Supp. 18, 21 (D. C. N. D. Fla. 1935). Dismissed by the United States Supreme Court for want of jurisdiction, 229 U. S. 521 (1937).

34. *Manchester v. Massachusetts*, 139 U. S. 240, 264 (1891).

35. *Ibid.*

36. *State v. Ruvido*, 297 Me. 102, 15 A. 2d 293 (1940).

37. *United States v. Newark Meadows Imp. Co.*, 173 Fed. 426, 429 (C. C. S. D. N. Y. 1909).

38. See note 33 *supra*.

39. *Pollard v. Hagan*, 3 How. 212, 230 (U. S. 1845).

40. *Smith v. Maryland*, 18 How. 71, 74 (U. S. 1855).

41. *Id.* at 75.

context and the purport of the entire section⁴² show that the term is used in a physical and not a metaphorical sense—that it refers to areas or districts having *fixity* of location and *recognized* boundaries. The Court further stated that it was then settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land area under its dominion and control, the ports, harbors, bays, and other enclosed arms of the sea extending from the coast line outward a marine league or three geographic miles.⁴³

Thus it is seen that a state bordering the sea has territory extending a minimum of a marine league seaward and that although the state holds this area subject to the public rights pointed out above its jurisdiction and control of it is not limited thereby, for the jurisdiction of a state is co-extensive with its territory—co-extensive with its legislative power.⁴⁴ The rights of a state in this area are not limited to regulatory powers over fishing, as was pointed out by the United States Supreme Court:

The Maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea.⁴⁵

A state's boundary on the sea is not necessarily limited to a marine league seaward but in order for it to extend its boundary beyond that point there is apparently required the consent of Congress.⁴⁶

II.

TITLE AND INTERESTS ACQUIRED BY THE FEDERAL GOVERNMENT

All rights in and claims to territory of the original thirteen states by the Government must be made by virtue of the Constitution. The several states, not the United States, won independence from

42. Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

43. *Cunard Steamship Co. v. Mellon*, 262 U. S. 100, 27 A. L. R. 1306 (1923).

44. Chief Justice Marshall in *United States v. Bevens*, 3 Wheat. 336, 386 (U. S. 1818).

45. *Louisiana v. Mississippi*, 202 U. S. 1 (1906).

46. *Skiriotes v. State*, 144 Fla. 220, 197 So. 736 (1940). But on appeal the Supreme Court did not decide the question of Florida's marine boundary. *Skiriotes v. Florida*, 313 U. S. 69 (1941).

England. There was no territory within the United States that was claimed in any other right than that of some one of the confederate states; therefore, there could be no acquisition of territory made by the United States distinct from or independent of some one of the states.⁴⁷ The United States acquired nothing by way of cession from England by the Treaty of 1783. That treaty has been viewed only as a recognition of pre-existing rights and on that principle the soil and sovereignty within the acknowledged limits of the original states were as much theirs at the Declaration of Independence as in 1827.⁴⁸ There were strong attempts to claim vacant lands and lands to which the title was in dispute as belonging to the Government and the contests long threatened the dissolution of the Confederation.⁴⁹ Even the Articles of Confederation contained a proviso that no state could be deprived of territory for the benefit of the United States. The issue was finally settled by declaring that the boundaries of the United States were the external boundaries of the several states and that the United States did not acquire any territory by the Treaty of Peace in 1783.⁵⁰

All rights acquired from the states by the Government are covered in the Constitution. The tenth section of the first article to the Constitution⁵¹ is employed altogether in enumerating the rights surrendered by the states and the clearness and brevity with which this is done make it clear that not a single superfluous word was used or words which meant merely the same thing.⁵² What was retained by the states was very aptly stated by Chief Justice Marshall in *Sturges v. Crowninshield*:⁵³

47. *Harcourt v. Gaillard*, 12 Wheat. 523, 526 (U. S. 1827).

48. *Id.* at 527.

49. *Rhode Island v. Massachusetts*, 12 Pet. 657, 729 (U. S. 1838).

50. *Ibid.*

51. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

52. *Holmes v. Jennison*, 14 Pet. 540, 570 (U. S. 1840) (Equally divided court).

53. 4 Wheat. 122 (U. S. 1819).

When the American people created a National Legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument.

The states retained the right of independent nations to settle disputed boundaries subject only to the consent of Congress.⁵⁴

Although the Government could make treaties with the Indians the states did not lose title to their land whereon Indian reservations were located.⁵⁵ Neither did the states lose any territory by the granting of admiralty jurisdiction to the Government. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the Government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory as a portion of sovereignty not yet given away.⁵⁶

The territory acquired by the Government by cession from the original states, by treaty, and by discovery was held in trust for certain purposes. The Government's rights were different in this territory from the rights of the states in their territory. The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama or any of the new states were formed except for temporary purposes and to execute the trusts created by the acts of the Virginia and Georgia Legislatures in the deeds of cession executed by them to the United States, and the trust created by the Treaty with the French Republic, of 1803, ceding Louisiana.⁵⁷ When the United States accepted the cession of territory they took upon themselves the trust to hold the municipal eminent domain for the new states and to invest them with it to the same extent in all respects that it was held by the states ceding the territories.⁵⁸ The right of eminent domain over the shores and the soils under the navigable waters for all municipal purposes belongs exclusively to the states within their respective territorial

54. *Poole v. Fleeger*, 11 Pet. 185, 209 (U. S. 1837).

55. *Fletcher v. Peck*, 6 Cranch 87 (U. S. 1810).

56. *United States v. Bevans*, 3 Wheat. 336, 388 (U. S. 1818).

57. *Pollard v. Hagan*, 3 How. 212, 221 (U. S. 1845).

58. *Id.* at 222.

jurisdictions and they alone have the constitutional power to exercise it.⁵⁹ The shores of navigable waters and the soil under them were not granted by the Constitution to the United States but were reserved to the states respectively.⁶⁰ The same rule applied to land acquired from Mexico.⁶¹ The reservations to the Government of public lands in territory thus acquired did not apply to tidelands because the term "public lands" did not include tidelands.⁶² Rights and interests in the tideland, which is subject to the sovereignty of the state, are matters of local law.⁶³ In applying the doctrine to the states of the northwest the Supreme Court recognized that the state's sovereignty extended seaward beyond the tidelands when it said through Mr. Justice Brandeis:

The state, being the absolute owner of the tidelands and of the waters over them, is free, in conveying tidelands, either to grant them rights in the adjoining water area, or to completely withhold all such rights.⁶⁴

The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters and in the lands under them within their respective jurisdictions.⁶⁵

III.

WHAT THE UNITED STATES CLAIMS UNDER THE CALIFORNIA, LOUISIANA, AND TEXAS CASES

As near a definition of what the United States claims in the marginal seas as has been found is in Mr. Justice Black's decision in the *California* case:⁶⁶

The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to

59. *Id.* at 230.

60. *Ibid.*

61. *Borax Consolidated v. City of Los Angeles*, 296 U. S. 10, 15 (1935).

62. *Id.* at 17.

63. *Id.* at 22.

64. *Port of Seattle v. Oregon & Washington Railroad*, 255 U. S. 56, 63 (1921).

65. *Shively v. Bowlby*, 152 U. S. 1, 57 (1894).

66. See note 2 *supra* at 29.

the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.

Briefly stated, the two capacities in which the United States asserts rights in the marginal sea are: 1. The responsibility (and the right — for neither exists without the other) of protecting this country against foreign dangers; and 2. The responsibility of conducting international affairs. Basically the two are the same. With the basis for the Government's claim thus determined, two logical questions follow: 1. Has the Government made out its case to show the necessity for maintaining these actions in order to enable it to execute its acknowledged responsibilities; and 2. Do the rights claimed by the states in the marginal seas interfere with the Government's proper execution of these acknowledged responsibilities? Assuming the affirmative answer to these two questions, a third question arises: Are these two responsibilities of the Government peculiarly adapted to the marginal seas or are they applicable to the shore and upland as well?

In the *California* case the Government alleged that it is the owner in fee simple of or possessed of paramount rights in and power over the lands, minerals and other things of value underlying the Pacific Ocean; lying seaward of the ordinary low watermark on the coast of California and outside of the inland waters of the State; extending seaward three nautical miles and bounded on the north and south respectively by the northern and southern boundaries of the State of California.⁶⁷ The complaint in the *Louisiana* case is a repeat of the one in the case of *California* except the distance seaward is the same as the boundaries claimed by Louisiana, extending seaward twenty-seven marine miles and bounded on the east and west respectively by the eastern and western boundaries of the State of Louisiana.⁶⁸ The pattern is followed in the case of *Texas*: extending seaward to the outer edge of the continental shelf and bounded

67. See note 2 *supra* at 22.

68. See note 3 *supra* at 701.

on the east and southwest respectively by the eastern boundary of the State of Texas and the boundary between the United States and Mexico,⁶⁹ again corresponding to the marine boundaries claimed by Texas.

It should be noted that at the outset the Government acknowledges that the land claimed in the case of California is bounded on the north and south by California's boundaries; and in the case of Louisiana the land claimed is bounded on the east and west by Louisiana's boundaries; and in the case of Texas the land claimed is bounded on the east and southwest by the boundaries of Texas. It then follows that the territory claimed by the Government is within the States of California, Louisiana, and Texas. The Government also limits its claim in each instance to the same distance seaward that is claimed by the state as being within its boundary.

The Court did not adopt the Government's contention that the Government had title to or owned the lands in dispute. Instead, it stated that "the issue in this class of litigation does not turn on title or ownership in the conventional sense"⁷⁰ and that the Government was not to be deprived of its interests by "ordinary court rules."⁷¹ It decided that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.⁷² The Government does not need title to this land under the marginal sea if paramount rights in and power over the belt gives it rights greater than and including those of a "mere property owner." This leaves unanswered the question of who, if not the Government, has the title. Title to all land submerged or not must rest somewhere, either in the state as sovereign or in the riparian owners, subject only to the declared trust as to navigation.⁷³ If not on title, on what does the Government base its claim? The United States has no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere except in the cases in which it is *expressly* granted.⁷⁴ The Court does not show where the express grant to the Government of the marginal sea bed came from. When the Government denies ownership in the state it denies its own rights,

69. See note 4 *supra* at 709.

70. See note 3 *supra* at 704.

71. See note 2 *supra* at 39.

72. *Ibid.*

73. *Angelo v. Railroad Commission*, 194 Wis. 543, 217 N. W. 570, 574 (1928).

74. *Pollard v. Hagan*, 3 How. 212, 223 (U. S. 1845).

for, as pointed out above,⁷⁵ there can be no ownership of and interests in these areas by the Government other than through the states. This attitude of the Court toward the title to the marginal sea lands prompted one writer to say:

The Supreme Court of the United States is just what its name suggests. It is Supreme, but it is only a court. It is not above the law. Any opinion of that or any other court to the contrary notwithstanding it always has been, still is, and ever will be the law (until we cease to live under a democratic form of government) that a title formally conveyed to a person or a state remains in that person and his heirs or in the state and its successors until it is conveyed out.⁷⁶

The Court says that the matter of state boundaries has no bearing on the present problem.⁷⁷ It is submitted that this is the crux of the problem.⁷⁸ Although it denies state ownership of the marginal sea bed, the Court admits the states have legislative and regulatory powers in the three-mile belt for certain purposes⁷⁹ but it makes no attempt to reconcile this holding with the one laid down by the same Court one hundred and thirty-five years ago that a state's territory, legislative power and jurisdiction are co-extensive.⁸⁰ In effect the Court says the state's jurisdiction extends beyond its territory. In conceding that California has been *authorized* to exercise local police power functions in the part of the marginal sea belt *within its declared boundaries*,⁸¹ the Court again acknowledges the disputed area to be within that state's boundaries. On the other hand, when the Court says that the state was authorized to act within its own boundaries by the Government it raises the question as to when, how, and by what authority the Government authorized the state to exercise local police power functions in this area. The Constitution granted the Federal Government no authority to authorize the states of the Union to exercise any powers. A state needs no authorization to exercise its powers. The thirteen original states obtained their several powers by the strong arm and the sword; their powers are exercised in the highest right known, *sovereignty*. The Government is a crea-

75. See notes 36, 37, 43, 47, 48, 49, 50, 56, *supra*.

76. 35 MASS. L. Q. 1, 9 (1950).

77. See note 3 *supra* at 704.

78. See notes 31-45 inclusive *supra*.

79. *Tommer v. Witsell*, 334 U. S. 385 (1948); *Skiriotes v. Florida*, 313 U. S. 69 (1941).

80. See note 56 *supra*.

81. See note 2 *supra* at 36.

ture of the original thirteen states with only certain delegated powers.⁸² It has long been settled that the police powers belong to the states. Therefore, it is difficult to understand how the Government could authorize the states to exercise powers it cannot itself exercise. As pointed out above,⁸³ states subsequently admitted to the Union came in on an equal footing. Upon the acquisition of a territory by the United States, whether by cession from one of the states or by treaty with a foreign country or by discovery and settlement, the same title and dominion passed to the United States as the original states had. This title and dominion was held by the United States for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory.⁸⁴ Upon the creation of a new state the Government relinquished all the powers it had held in trust and it then stood in the same relation to the new state that it did to the original states. Furthermore, for the Government to authorize a state to exercise power in a field which by the Constitution is delegated to the Government or prohibited to the state would be as destructive of our federal structure, as conceived by the creators of our Government, as would be a state's authorization for the Government to exercise powers reserved to the state.

In discussing these powers that a state admittedly has, the Court held state legislation regulating fishing rights in the marginal seas to be valid in the absence of conflicting federal legislation⁸⁵ or *assertion* of federal power⁸⁶ or conflicting federal *policy*.⁸⁷ If the Government has merely to assert power or evolve a new or different policy in any area or direction, without regard to its limits under the Constitution, to usurp a state's sovereignty, the Government can eventually emancipate itself from its intended limits set by the Constitution. A government by policy cannot be substituted for government by law under the Constitution and our federal system remain intact. Clearly it was this assertion of federal power, spoken of by the Court, on which the Government based its claim to the bed of the marginal seas because there was no federal legislation claiming the oil or other resources of the marginal sea bed. On the contrary, Congress rejected proposed legislation sponsored by the Executive

82. U. S. Const. Amend. X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

83. See notes 57-65 inclusive *supra*.

84. *Shively v. Bowlby*, 152 U. S. 1, 57 (1894).

85. See note 79 *supra*.

86. *Toomer v. Witsell*, 334 U. S. 385, 393 (1948).

87. See note 3 *supra* at 704.

Department to claim submerged lands containing oil off the coasts of this country as an oil reserve for the Navy.⁸⁸ However, there has been no lack of Congressional action since the *California* decision seeking to reinstate the status quo and it appears likely that such a result will be achieved in the near future.⁸⁹ On this point it might be noted that in regard to this legislation the popular expression is to *return* the disputed lands to the states.⁹⁰ It is not to be suggested or even intimated, however, that the Court's decision should have been influenced by Congressional legislation relative to the marginal sea beds or by lack of such legislation.

The Court said the thirteen original colonies never acquired ownership in the marginal sea⁹¹ but it does concede that they did acquire elements of sovereignty of the English Crown by their revolution against it.⁹² Prior to her admission to the Union Texas was a Republic. As a Republic she had not only full sovereignty over the marginal sea but ownership of it, the land underlying it, and all the rights which it held.⁹³ In other words Texas became an independent Republic through her revolution from Mexico but the thirteen colonies who attained their independence in the same manner through their revolution from England acquired less than Texas did. As shown above,⁹⁴ the original states were vested with *all* the rights of the Crown and Parliament upon the Revolution, not merely "elements" of those rights.

In discussing the three-mile rule the Court said that the rule is but a recognition of the necessity that a government next to the

88. See 2 L.A. L. Rev. 252 (1940) (Discusses proposed legislation).

89. At least three such bills were introduced on the opening day of Congress this year and others since: H.R. 629, H.R. 636, H.R. 641, H.R. 1062. The last listed is typical of those submitted and would confirm and establish titles of the states to lands beneath navigable waters within state boundaries. New legislation has been introduced in the Senate also: S. 294 (by Senator Price Daniel of Texas, who, as Attorney General, argued Texas' case before the Supreme Court in 1950), S. J. Res. 13, S. 107—this is a compromise bill which would give the Government control of submerged lands beyond the three-mile limit with joint state and federal ownership of the three-mile zone itself; with the Government receiving roughly two-thirds of any benefits derived from this area.

Another bill, H.R. 1931, has been introduced which would set aside President Truman's Executive Order giving the submerged oil lands to the Navy. In this regard it is to be noted that the new Secretary of the Navy, Robert B. Anderson, is an oil man from Texas.

For an article briefly summarizing the legislative history of the off-shore lands (two pages) see the Congressional Quarterly, Vol. XI, No. 4, page 126 (Jan. 1953).

90. N. Y. Times, Dec. 12, 1952, p. 34, col. 4.

91. See note 3 *supra* at 704.

92. See note 2 *supra* at 31.

93. See note 4 *supra* at 717, 718.

94. See note 23 *supra*.

sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenue, its health, and the security of its people from wars raged on or too near its coasts. And in so far as the nation asserts its rights *under international law*, whatever of value may be discovered in the seas next to its shore and within its protective belt will most naturally be appropriated for its use.⁹⁵ The Court here acknowledges the three-mile rule and the principles which brought it about but denies that these principles ever applied to the original states. From the foregoing it seems to follow that the Government may initiate an action in the original jurisdiction of the Supreme Court against a state regarding ownership of land, assert rights under international law as between the two, not litigate title to land in the "conventional sense" and not be bound by "ordinary court rules." Such was not the concept of the same Court at an earlier day when it said that a nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government.⁹⁶ If the Court has established a new doctrine then our federal system is subservient to international law.

If the original states never had these rights to the marginal seas which the Government claimed, how and when did the Government acquire them? The nearest answer that is found comes from the Court's statement that "acquisition" of the three-mile belt has "been accomplished."⁹⁷ In referring to the origin of the three-mile rule the Court states that when this nation was formed the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion; that neither the English charters⁹⁸ granted to this nation's settlers, nor the Treaty of Peace

95. See note 2 *supra* at 35.

96. Pollard v. Hagan, 3 How. 212, 225 (1845).

97. See note 2 *supra* at 34.

98. The following are extracts from some of the English charters. They will be found in THORPE, American Charters, Constitutions, and Organic Laws, at the pages indicated:

Letters Patent to Sir Humphrey Gylberte (1578): The grant in the new world read: "... With all commodities, jurisdictions, and royalties both by sea and land ... with the rites, royalties and jurisdiction, as well marine as other ..." (page 49).

Charter to Sir Walter Raleigh (1584): The charter was to: "... The said *Walter Raleigh*, his heires and assigns, and euery of them, shall haue holde, occupie, and enioye to him, his heires and assignes, and euery of them for euer, all the soile of all such lands, territories, and Countreys, so to bee discovered and possessed as aforesaide, and of all such Cities, castles, townes, villages, and places in the same, with the right, royalties, franchises, and jurisdictions, as well marine as other within the saide lands, or Countreys, or the seas thereunto adioyning ..." (page 53). The grantees were authorized to defend their settlements for a distance of 200 leagues (page 54).

The First Charter of Virginia (1606): "... From the same fifty Miles

with England, nor any other document to which it had been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership.⁹⁹ Although there has not been unanimity among nations over the centuries regarding the three-mile rule, it was more than a nebulous suggestion as will be seen from the following:

Grotius laid down the doctrine that territorial rights extended over as much of the sea as could be defended from the shore. Grotius, *The Law of War and Peace*, Book II, Chap. 3, Secs. 13-14. Other tests have been suggested but this general principle has remained dominant through the centuries. In 1703 Bynkershoek fixed the limit as a marine league or three miles from coast, a distance which was then the range of cannon shot. . . . In spite of the lengthening range of artillery this has remained the test generally applied to the present day.¹⁰⁰

The Government stressed that it did not *seriously* assert its *increasingly greater* rights in this area until after the formation of the

every way on the Sea Coast, directly into the main Land by the Space of one hundred like English Miles . . ." (page 3784). In this charter all islands within 100 miles of the coast were included also.

The Second Charter of Virginia (1609): All the ". . . said Territories, and the Precincts thereof, whatsoever, and thereto, and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining . . ." (page 3796).

The Third Charter of Virginia (1611-1612): This charter enlarged the previous charter, expanding the grant seaward: ". . . Within the said Tract of Land upon the Main, and also within the said Islands and Seas adjoining whatsoever and thereunto or thereabouts both by Sea and Land being or situate . . ." (page 3804).

Sir Robert Heath's Patent (1629): ". . . Fishings of all sorts of fish, whales, sturgeons & of other Royalties in the sea or in the rivers . . . with Royall rights & franchises whatsoever as well by sea as by land . . ." (page 70). This document is the one which named the territory in the new world that became Carolina. However, the terms "Carolina," "Carolana," "New Carolana," "Province of Carolana," are all used with the name Carolana" being used most frequently (page 71, *et seq.*).

Charter of Carolina (1663): This charter was granted upon the basis that the prior patent to Sir Robert Heath had been forfeited by reason of failure to exercise the patent. The holders under this charter were not satisfied with the validity of the charter in view of the prior patent to Heath, which opinion was more or less shared by the King of England. The heirs of Heath were prevailed upon to release their claims to Carolina (some land in what is now the middle Atlantic states was given to them as satisfaction in part or in whole), whereupon a new Charter of Carolina was granted with more or less the same wording but generally enlarging the grant of 1663. (Copy of charter on page 2744.)

Charter of Carolina (1665): ". . . With the fishings of all sorts of fish, whales, sturgeons, and all other royal fish, in the sea, bays, islets and rivers, within the premises, and the fish therein taken, together with the royalty of the sea upon the coast . . ." (page 2762).

Constitution of North Carolina (1776): North Carolina claimed within its boundaries "all the territories, seas, waters, and harbours with their appurtenances . . ." (page 2789).

99. See note 2 *supra* at 32.

100. *State v. Ruvido*, 297 Me. 102, 15 A. 2d 293 (1940).

Union; that it has not bestowed any of these rights upon the states but has retained them as appurtenances of national sovereignty.¹⁰¹ The implication is that the Government asserted its rights, but not seriously so, prior to the formation of the Union. This writer is at a loss as to how that could be. What is meant by "increasing" rights? If, as the Court says, the idea of a three-mile belt was but a nebulous suggestion when the nation was formed then it did not acquire any rights upon formation. The Government acquired nothing, yet it increased. Normally an increase of nothing is no increase at all. If the original states did not acquire ownership of the marginal sea, as the Court says, what is meant by the Government's "greater" rights in this area? If the Government has greater rights it follows that the states have lesser rights but rights nonetheless. What these rights of the states are is not disclosed by the Court. How soon after the formation of the Union the Government began to assert power in the marginal sea is stated by the Court as follows: "Until the California oil issue began to be pressed in the thirties,¹⁰² neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt."¹⁰³ If that be the case, and it appears to be, then this is the answer to the arguments made by the Government and followed by the Court. The Government's claim is not then based on the need to protect itself from dangers incident to its location and for the security of its people from wars raged on or too near its coasts, as the Court originally stated, but rather on the fact that oil was found under the marginal sea. If these rights as claimed by the Government are necessary for the purposes claimed why was there no assertion of rights prior to the thirties? Is the nation's need for protection greater now than prior to the thirties? It seems strange that the question arose during a period when this nation was not engaged in war and was not litigated until its most extended war had been concluded over a decade later. No contention was made that absence of the privilege of exercising these rights during the recent war impaired the nation's ability to wage war, when, admittedly, these rights now claimed by the Government were being exercised exclusively by the states. As pointed out in the dissenting opinion, this is not a situation where

101. See note 2 *supra* at 31.

102. See note 88 *supra*.

103. See note 2 *supra* at 39.

an exercise of national power is actively and presently interfered with.¹⁰⁴

Since, admittedly, no claim to this area was made by the Government until very recent years, what of the long exercise of jurisdiction and sovereignty over this area by the states? The Court's answer is that even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.¹⁰⁵ If this rule is to be applied in future contests between the Government and the states then no claim of a state to its property is secure and may be claimed by the Government when a new policy so directs. In contests between states regarding boundaries the Court has followed a long established attitude that as between the States of the Union long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, regardless of what the international rule might be in respect to the acquisition by prescription of large tracts of country claimed by both.¹⁰⁶ In one such case the Court said:

Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. *It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.*¹⁰⁷ (Emphasis added.)

It is to be noted that the Court uses the law applicable to nations when discussing state boundary disputes. As stated above,¹⁰⁸ the states are considered as independent nations where boundary disputes are concerned subject only to Congressional consent. It would seem that the authority quoted above would be applicable in these marginal sea cases also.

104. See note 2 *supra* at 44 (Dissent).

105. See note 2 *supra* at 39.

106. *Louisiana v. Mississippi*, 202 U. S. 1, 53 (1906).

107. *Indiana v. Kentucky*, 136 U. S. 479, 510 (1890).

108. See note 54 *supra*.

IV.

CONCLUSION

The dispute over the marginal sea beds should never have arisen in the Court. Who is sovereign *de jure* or *de facto* of a territory is not a judicial but a political question the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.¹⁰⁹ The Court does not base its decision on the Government's exclusive sovereignty for it says:

The question here is not the power of a State to use the marginal sea or to regulate its use in [the] absence of a conflicting federal policy; it is the power of a State to deny the paramount authority which the United States seeks to assert over the area in question The marginal sea is a national, not a State concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.¹¹⁰

But it also says the "equal footing" clause prevents extension of the sovereignty of a state into a domain of *political* and sovereign power of the United States.¹¹¹ How this view can be reconciled with the holding that a state has jurisdiction in the marginal sea for certain purposes is not understood. If a state has any jurisdiction at all it is exercised in its capacity as political sovereign. Therefore, to say that its sovereignty is less in the marginal sea than elsewhere within its boundaries is to divide its sovereignty into degrees of lesser and greater. This result impairs the equal footing doctrine itself because sovereignty denotes uniformity of political capacity within the jurisdiction of the sovereign. If one state's political sovereignty lacks this uniformity then it does not have equal footing with other states in the capacity of political sovereign.

This all boils down to the assertion by the Government that in order for it to exercise its political sovereignty as a member of the family of nations it must have absolute control and dominion of the marginal sea. Here again the Court is at variance with an earlier opinion in this regard which said there is neither the authority of law nor reason for the position that boundaries between nations or

109. *Jones v. United States*, 137 U. S. 202 (1890).

110. See note 3 *supra* at 704.

111. See note 4 *supra* at 720.

states is any more a political question than any other subject on which they may contend.¹¹² The Court does not show how the Government's obligations as a nation require greater powers in the marginal sea than elsewhere. The state could not in any way deny or impair paramount authority in the Government in the exercise of its political functions in this respect. The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may accordingly be made which affect rights exclusively under the control of the states.¹¹³ State ownership of the marginal sea bed would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine and factory of the nation.¹¹⁴

Claiming the resources of the marginal sea bed is asserting proprietary interests, not political interests. The question of how the Government acquired those proprietary interests is raised by the dissent of Mr. Justice Frankfurter and the answer, if any, is furnished in the same paragraph. The Government's acquisition of its proprietary interest "has not been remotely established except by sliding from absence of ownership by California to ownership by the United States."¹¹⁵ Whether this sliding interest doctrine has solely marine characteristics or whether it could become amphibious, or yet shed its marine attributes altogether and inhabit the upland, is not shown by the Court. Under the decisions of these three cases, if followed, the Government could assert the same rights to the uplands and the reasoning applied in the instant cases would be just as applicable because laxity in assertion of the Government's rights would be no bar to its claim. Neither would the question of the state's title or right to use the uplands be the issue but rather the issue would be the same as here; *the power of a state to deny the paramount authority which the United States seeks to assert over the area in question*. In justification of the Government's assertion of these proprietary interests the Court says this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty.¹¹⁶ By the same token the wheat fields of

112. Rhode Island v. Massachusetts, 12 Pet. 657, 737 (U. S. 1838).

113. Missouri v. Holland, 252 U. S. 416 (1920); 11 A. L. R. 984; 134 A. L. R. 886.

114. See note 2 *supra* at 42 (J. Reed's dissent).

115. See note 2 *supra* at 45.

116. See note 4 *supra* at 719.

Kansas could be so subordinated to the rights of sovereignty as to follow sovereignty.

"Stripped of legal paraphernalia the decision of the *California* case sharply focuses the conflict in authority, powers, rights and duties between the dual sovereignties that are the American government. The fear of our statesmen a century ago that the state governments would be 'the rival power of the federal government' has now inverted to the fear of the power and supremacy of the dominant federal government. The decision in the *California* case is but a step removed from the nationalization of our oil industry. Presumptively, other natural resources, necessary for the defense of this country are likewise only one step removed from federal control."¹¹⁷

"There can be little doubt but that it [*California* case] holds contra to the intimations of all previous holdings of the same court and the rules laid down by the highest courts of the individual states"¹¹⁸

"In a sense the problem, created by the Supreme Court's decision in *United States v. California*, is typical of our time. It arose because the Court declined to follow legal principles, established over a period of about one hundred and fifty years, which required recognition of title in the states. In this the action of the Court is an example of a current tendency not to look for a solution of problems in the spirit of those of a prior generation, giving appropriate consideration to the Constitution and to the traditional role of the states in the federal union; instead, the tendency is to seek a solution on the basis of expediency and of expansion of federal power to an extent incompatible with established concepts of the American federal structure. . . .

"The true basis of the *California* case, therefore, is not a rule of law but is expediency. Since the doctrine of paramount right and authority cannot be applied to internal affairs without violating our basic ideas of property and even of social organization, it must be only the justification of the decision rather than the legal theory logically requiring it. In a sense, however, the decision is in line with the trend of the Court to disregard the binding force of legal precedent and to decide constitutional issues from a fresh viewpoint."¹¹⁹

In addition to declaring that the states were not owners of the marginal sea lands the Court took the opportunity to weaken the

117. 19 Miss. L. J. 265, 289 (1948).

118. 3 Miami L. Q. 339 (1949).

119. 24 Tulane L. Rev. 51 (1949).

holdings of prior decisions relative to the tidelands as can be seen from the following:

The Government does not deny that under the Pollard rule, as explained in later cases, California has a qualified ownership of lands under inland navigable waters such as rivers, harbors, and even tidelands down to the low watermark. It does question the validity of the Pollard Case that ownership of such water areas, any more than ownership of uplands, is a necessary incident of the state sovereignty contemplated by the "equal footing" clause. . . . If this rationale of the Pollard Case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low watermark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.¹²⁰

Just what is meant by a "qualified" ownership is not clear. The Court's refusal to apply the tideland and inland navigable water rule to the marginal sea is difficult to understand. As mentioned above,¹²¹ the common law as to tidelands and navigable waters was peculiar. This peculiar law was applied to the Great Lakes and inland navigable waters which the rule at common law did not cover. The Court now refuses to apply the rule to the sea from whence it came. Note the clear and precise language used by the Court in *Hardin v. Jordan*¹²² relative to this rule:

With regard to grants of the government for lands bordering on tide-water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. . . . Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce.

120. See note 2 *supra* at 30, 36.

121. See note 27 *supra*.

122. 140 U. S. 371, 381, 382 (1891).

This right of the States to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas, and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.

"The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

"The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the state, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water."¹²³

It would seem that the same rule applicable to state regulation of the oyster industry in marginal sea waters would be applicable to extracting oil deposits from the same sea bed.

If future cases arise concerning the marginal seas of the original states those states will likely receive the treatment dealt Texas through the application of the equal footing doctrine; that is, since the Court has decided the states in the instant cases have no ownership of the marginal sea, no other state may have ownership of the marginal sea bed and remain equal to those other states bordering the sea which the Court has decided do not have such ownership. Neither will the states have an opportunity to present all phases of the issue, as was demonstrated by the summary treatment by the Court in the *Texas*

123. *McCready v. Virginia*, 94 U. S. 391 (1877); followed in *The Abby Dodge v. United States*, 223 U. S. 166 (1912).

case. Because these cases arise in the original jurisdiction of the Court it would seem that an exhaustive analysis of all aspects of the question should be considered.

A fitting summary of the Court's holding is found in Mr. Justice Frankfurter's dissent:¹²⁴

Considerations of judicial self-restraint would seem to me far more compelling where there are obviously at stake claims that involve so many farreaching, complicated, historic interests, the proper adjustments of which are not readily resolved by the materials and methods to which this Court is confined.

It might be thought that a discussion of these cases at this time might prove to be academic in view of the recent nation-wide elections and the announced attitude of the new President regarding ownership of the lands under marginal seas. However, it is believed that to so treat the subject is to fail to see the forest for the trees. Even if the Congress enacts legislation renouncing federal claims to the marginal sea lands such legislation will not weaken the basis for the Court's holding in these three cases. The Court could, in the future, infer that in the absence of Congressional legislation to the contrary the United States has "paramount rights in and power over" every segment of the nation's resources, animate and inanimate. As long as the principles laid down in the instant cases stand, there exists the possibility that they will be used as a springboard for expansion of the sliding interest doctrine, if such it may be called.

HOOPER C. BLANTON.

124. See note 2 *supra* at 46.