

CONFLICTING STATE AND FEDERAL CLAIMS OF TITLE IN SUBMERGED LANDS OF THE CONTINENTAL SHELF

THE Presidential veto of House Joint Resolution 225 to quitclaim to the states title to lands below the tidewaters and navigable waters within their boundaries,¹ and the subsequent failure of Congress to override the veto,² have shifted a vexed political question to the Supreme Court. Whether the states or the Federal Government should control the disposition of the oil resources under the continental shelf³ within three miles of the West Coast has been debated nine years in the legislative arena.⁴ California, which has leased some of the lands to oil operators since 1921,⁵ and the executive branch of the Federal Government, which wants the lands as a naval petroleum reservation,⁶ will continue the dispute before the Court this term in an original suit to quiet title to the lands off the coast.⁷ Although the suit ostensibly involves all "the lands, minerals, and other things of value underlying the Pacific Ocean" three miles seaward from the California shore, and all the relative rights of the Federal and state Governments and persons claiming

1. H. R. Doc. No. 765, 79th Cong., 2d Sess. (1946). In H. R. 225, "lands beneath tidewaters and all lands beneath navigable waters within the boundaries of each of the respective states" included lands "oceanward to a line three geographical miles distant from the coast line and to the boundary line of each respective state where in any case such boundary line extends oceanward beyond three geographical miles."

2. N. Y. Times, Aug. 3, 1946, p. 2, col. 1.

3. Presidential Proclamation No. 2667, 10 FED. REG. 12303 (1945) claimed for the United States the entire continental shelf contiguous to the coast. The continental shelf is the extension of the land mass of the North American continent until a depth of about 600 feet is reached; off the Pacific Coast it extends a distance of from one to fifty miles. Ickes, *Underwater Wealth* (Feb. 23, 1946) COLLIERS 20.

4. See *Hearings before the House Committee on the Judiciary on S. J. Res. 208*, 75th Cong. 3d Sess. (1938); *Hearings before Subcommittee 4 of the Committee on the Judiciary on H. J. Res. 176 and H. J. Res. 181*, 76th Cong., 1st Sess. (1939); *Joint Hearings before the House Committee on the Judiciary and Subcommittee of Senate Judiciary Committee on H. J. Res. 225*, 79th Cong., 1st Sess. (1945); *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946).

5. Cal. Stats, 1921, c. 829, §§ 1-5, held constitutional in *Boone v. Kingsbury*, 206 Cal. 148, 273 Pac. 797 (1928), *cert. denied sub. nom. Workman v. Boone*, 280 U. S. 517 (1929). "Whenever it appears to the (State Lands) commission that oil or gas deposits are known or believed to be contained in any such lands and may be or are being drained by means of wells upon adjacent lands, the commission shall thereupon be authorized and empowered to lease any such lands. . . ." CAL. CODE (Deering, 1944) § 6872. See McGinty, *Oil and States' Rights* (1946) 10 CURRENT HISTORY 227.

6. *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 10; *Hearings before the House Committee on the Judiciary on S. J. Res. 208*, 75th Cong., 3d Sess. (1938) 34.

7. *United States v. California*, Sup. Ct., Original, No. 12, Oct. Term, 1945. Original jurisdiction was invoked under U. S. CONST., Art. III, § 2. A test case brought earlier against the Pacific Western Oil Corp. in the Federal District Court in Los Angeles was dismissed and the present suit instituted to avoid delay in reaching the Supreme Court (1945) 14 U. S. L. WEEK 2248.

under the state,⁸ the immediate issue is the disposition of the oil reserves.⁹ Whether the Court adopts a legalistic approach based on the title concept or a functional approach looking toward use of the wealth within the disputed lands, the decision will determine whether the citizens of California or the citizens of all the states will receive the lessor's royalties for that oil.

I

Classing the submerged lands¹⁰ under her marginal waters with those under her inland navigable waters, California and other interested states¹¹ trace title from the common law of England. For centuries the title to the beds of navigable waters within the territory or jurisdiction of England was owned by the crown as an incident of sovereignty, subject to the public rights of fishing and navigation.¹² When the thirteen original colonies achieved their independence from Great Britain, they themselves became sovereign states, endowed with all the rights and prerogatives previously belonging either to the king or to Parliament. Among the rights was the absolute title to all navigable waters within the states and the soil under them not previously granted away, to dispose of as they saw fit to private individuals or to reserve to their own uses.¹³ When these colonies entered the Union, they surrendered only the attributes of sovereignty enumerated

8. The controversy between the Federal Government and California involves lands "lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the state, extending seaward three nautical miles." See Complaint 6, 11, *United States v. California*, Original, No. 12, Oct. Term, 1945. Applications to the Department of Interior for leasing rights will also be affected by the decision. See *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 15, 242.

9. The possible impact on the law by future scientific development of ocean resources is discussed *infra*, n. 86 and text.

10. The terms "submerged lands" and "tidelands" are not used with precise meanings in most cases. Generally the former refers to lands below the line of mean low tide, the latter to lands between mean low tide and mean high tide. See Ireland, *Marginal Seas Around the States* (1940) 2 LA. L. REV. 252, 268.

11. The Attorneys General of 46 States, not including Washington and Arizona, signed a "joint brief" supporting passage of H. J. Res. 225 to quitclaim title to the states, and eighteen resolutions substantially identical to H. J. Res. 225 were introduced at the same time by representatives from California, Nevada, Alabama, New York, Ohio, Illinois, Mississippi, and Maine; *Joint Hearings of the House Committee on the Judiciary and Subcommittee of the Senate Judiciary Committee on H. J. Res. 225*, 79th Cong., 1st Sess. (1945) 12-18. Subsequently the Attorneys General of Missouri and Georgia were reported to have withdrawn their support; *Hearings before the Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 8.

12. *Shively v. Bowlby*, 152 U. S. 1, 11 (1894); *Weber v. Harbor Commissioners*, 18 Wall. 57, 65 (U. S. 1873).

13. *Appleby v. City of New York*, 271 U. S. 364 (1926); *Shively v. Bowlby*, 152 U. S. 1, 14 (1894); *Mumford v. Wardwell*, 6 Wall. 423, 436 (U. S. 1867); *Den v. Jersey Co.*, 15 How. 426, 433 (U. S. 1853); *Pollard's Lessee v. Hagan*, 3 How. 212, 229 (U. S. 1845); *Martin v. Waddell's Lessee*, 16 Pet. 367, 410 (U. S. 1842).

in the Constitution, reserving to themselves title to their submerged lands.¹⁴

New states were admitted to the Union "on an equal footing with the original states in all respects whatever."¹⁵ Where prior to the state's admission the United States had acquired the territory by purchase or cession, title to land under inland navigable waters has been deemed to have been held by the United States in trust for the future states.¹⁶ Although in admitting new states the Federal Government reserved to itself as public lands title to "waste and unappropriated lands" within their territory,¹⁷ the navigable inland waters and soils under them were not considered public lands; the new states were held to have the "same rights, sovereignty and jurisdiction over this subject as the original states."¹⁸ California, like other states, has accordingly patented, deeded and leased submerged inland soils since entry into the Union.¹⁹ In reliance on the state's title, extensive development of bays, harbors and rivers has taken place, both by the state and by private owners.²⁰

So much of the state's position as applies to inland waters is undisputed. Proponents of the state's title also maintain that within the territorial limits of states generally recognized by the law of nations, a state can define its boundaries upon the sea.²¹ By its Constitution California has asserted that

14. See cases cited *supra* note 13.

15. The condition of equality was apparently first legislated in the Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, passed by the Congress of the Confederation, 1787, readopted by 1st Cong., 1st Sess.; 1 STAT. 51 (1789). The statutes admitting subsequent states have contained nearly identical phraseology, e.g., 9 STAT. 452 (1850) (California); 3 STAT. 489 (1819) (Alabama); 2 STAT. 701 (1812) (Louisiana).

16. See *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 15 (1935); *United States v. Mission Rock Co.*, 189 U. S. 391, 404 (1903); *Knight v. United States Land Ass'n*, 142 U. S. 161, 183 (1891); *Shively v. Bowlby*, 152 U. S. 1, 26 (1893); *San Francisco v. Le Roy*, 138 U. S. 656, 670 (1891); *Mumford v. Wardwell*, 6 Wall. 423, 436 (U. S. 1867); *Pollard's Lessee v. Hagan*, 3 How. 212, 224 (U. S. 1845); *United States v. Ashton*, 170 Fed. 509, 513 (C. C. W. D. Wash. 1909).

17. "The people inhabiting the said Territory do agree and declare that they will forever disclaim all right and title to the waste or unappropriated lands lying within the said Territory," 3 STAT. 489, 492 (1819) (Alabama). Variations of this formula are found in the acts admitting the other new states with the exception of Texas. See note 49, *infra*.

18. *Pollard's Lessee v. Hagan*, 3 How. 212, 230 (U. S. 1845). See also cases cited *supra* note 16. But see *Case v. Toftus*, 39 Fed. 730 (C. C. D. Ore. 1889).

19. "The decisions . . . have become . . . the foundation of many titles," *United States v. Mission Rock Co.*, 189 U. S. 391, 406 (1903). See Field, J., concurring in *Knight v. U. S. Land Ass'n*, 142 U. S. 161, 189 (1891).

20. *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 61.

21. *Manchester v. Mass.*, 139 U. S. 240, 264 (1891); *United States v. Newark Meadows Imp. Co.*, 173 Fed. 426, 429 (C. C. S. D. N. Y. 1909); *Humbolt Lumber Manufacturers Ass'n v. Christopherson*, 73 Fed. 239, 244 (C. C. A. 9th, 1896). On the theory of obsolescence of the three-mile rule and to protect state interests Louisiana in 1939 passed a statute extending her boundary into the Gulf of Mexico 27 miles. See Loret, *Louisiana's 27 Mile Maritime*

its boundary extends three miles over the ocean from the line of mean low tide.²² Accordingly, California claims that the open sea within this three-mile limit is part of the state's navigable waters, and hence the soil and the minerals beneath these waters belong to the state, and have been recognized as so belonging by various acts of the Federal Government.²³ This argument denies that a distinction exists or has been enunciated in past cases between a state's navigable inland waters and the navigable waters of the open sea along the coast.²⁴ Accordingly, an adjudication that title to the continental shelf belonged to the United States would cloud the title to all land beneath inland waters by overthrowing a line of decisions a century old.²⁵

Clearly, where the states' titles derive from the common law sovereignty of the king, they can claim no more than the king claimed at the date of the Revolution when the colonies acquired his rights. While for centuries the territory of England has been considered to include lands under tidal rivers, landlocked bays, and harbors which are under the jurisdiction of the littoral counties,²⁶ the boundaries of the counties stop at the coast.²⁷ The coastal land between mean high tide and mean low tide vests in the crown.²⁸ But the

Belt (1939) 13 TULANE L. REV. 253. But see *Legis.* (1939) 39 COL. L. REV. 317, denying the power of the State so to extend its boundary without consent of Congress, but assuming that the bed of the Gulf within the three-mile limit is owned by Louisiana. In September, 1945, Louisiana leased 129,025 acres of shallow water extending 30 miles from the coast to the Magnolia Oil Co., an action which might lead to judicial test of this law. *Coastal Drilling* (Sept. 15, 1945) BUSINESS WEEK 35.

22. CAL. CONST. (1849) Art. XII, § 1; *id.* (1879) Art. XXI, § 1. "The boundary of the State of California shall be as follows: . . . west . . . to the Pacific Ocean, and extending therein three English miles; thence, running in a Northwesterly direction and following the direction of the Pacific Coast. . . ." Congress in admitting California with this boundary can be considered to have ratified state jurisdiction out to this boundary. See *Humbolt Lumber Manufacturers Ass'n v. Christopherson*, 73 Fed. 239 (C. C. A. 9th, 1896). This would no more constitute a recognition of state title in the land out to that boundary, however, than Congressional enactments concerning a Federal three-mile or other limit would constitute a recognition of Federal title within those limits. See discussion *infra*, p. 364.

23. Answer, *United States v. California*, Sup. Ct. Original, No. 12, Oct. Term, 1945, 89 *et seq.* Such acts include acceptance by the executive branch of the federal government of state grants for military or naval reservations containing some lands under submerged waters and previous statements by federal officers, *e.g.*, letter of H. L. Ickes, Secretary of Interior, to Olin S. Procter (1933) refusing federal license to drill for oil in offshore lands, *Hearings before Subcommittee 4 of the Committee on the Judiciary on H. J. Res. 176*, 76th Cong., 1st Sess. (1939) 172.

24. See discussion *infra*, p. 363.

25. *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 311.

26. *Queen v. Keyn*, L. R. 2 Ex. 63, 162, 195 (Ex. 1876).

27. *Id.* at 162.

28. *Id.* at 199. HALE, DE JURE MARIS (*Circ.* 1666) published in S. A. MOORE, HISTORY OF THE FORESHORE (3d ed. 1888) 378. MOORE, *id.* at 638-63, maintains that while the proposition was anciently true, the crown long since granted away this fee.

title to submerged coastal lands below mean low tide has even in this century been regarded by the British judiciary as an unsettled question.²⁹

The concept of a three-mile limit did not appear in English law before 1800, and then its application was confined to neutral waters in time of war.³⁰ In the leading British case on sovereignty over marginal seas, *Queen v. Keyn*,³¹ decided a hundred years after the states asserted their independence, thirteen justices expressed almost that many views on whether the jurisdiction of England extended three miles to sea for the limited purpose of making the criminal laws apply to foreigners in that area. In an exhaustive discussion of sovereignty in coastal waters, Chief Justice Cockburn, holding with the majority of seven that jurisdiction could not apply, wrote of the three-mile limit: "To this hour it has not, even in theory, settled into certainty. For centuries before it was thought of, the great landmarks of our judicial system had been set fast—the jurisdiction of the common law over the land and inland waters contained within it, forming together the realm of England, that of the admiral over English vessels on the seas, the common property or highway of mankind."³²

In a dictum in the same case the court considered a problem closely analogous to the oil deposits of the continental shelf. Title to certain coal mines extending below the bed of the ocean beyond low-water mark had been vested in Queen Victoria by a special act of Parliament.³³ Denying that this act indicated that "Parliament was asserting the right of the crown to the bed of the sea over the three-mile distance," Chief Justice Cockburn maintained it was merely "settling a dispute as to the specific mines . . . in question."³⁴ The relatively recent appearance of the three-mile limit in English law, the distinction between inland and coastal waters, and the denial of the crown's general title to submerged lands under coastal waters all negate California's contention that title to the disputed lands was an incident of royal sovereignty when the original colonies acquired the crown's rights.

The large number of Supreme Court cases frequently cited as holding directly or inferentially that title is in the states³⁵ are not conclusive as to

29. *Att'y General for British Columbia v. Att'y General for Canada* (1914) A. C. 153, 174 (P. C. 1913).

30. *The Twee Gebroeders*, 3 C. Rob. Adm. & Eccl. 162 (Adm. 1800), 336 (Adm. 1801); *The Anna*, 5 C. Rob. Adm. & Eccl. 373 (Adm. 1805).

31. L. R. 2 Ex. 63 (Ex. 1876).

32. *Id.* at 194-95.

33. *Cornwall Submarine Mines Act*, 1858, 21 & 22 VICT., c. 109.

34. See note 31 *supra*, at 202.

35. *Pollard's Lessee v. Hagan*, 3 How. 212 (U. S. 1845) (Mobile Bay); *Goodtitle v. Kibbe*, 9 How. 470 (U. S. 1850) (Alabama, navigable tidewater river); *Smith v. Maryland*, 18 How. 71 (U. S. 1855) (Chesapeake Bay); *Weber v. Harbor Commissioners*, 18 Wall. 57 (U. S. 1873) (San Francisco Bay); *Barney v. Keokuk*, 94 U. S. 324 (1876) (Mississippi River); *McCready v. Virginia*, 94 U. S. 391 (1876) (Ware River, Virginia); *Manchester v. Massachusetts*, 139 U. S. 240 (1891) (Buzzard's Bay); *Hardin v. Jordan*, 140 U. S. 371

the submerged lands of the marginal belt. It is true that the opinions abound with such dogma as "each State owns the beds of all the tide-waters within its jurisdiction"³⁶ or "the navigable waters and the soils under the same."³⁷ That such generalizations are more convenient than accurate, however, can be seen from an examination of the facts of the cases in which they are asserted. Invariably the submerged land in question has been beneath bay, harbor, river, lake or other inland body of water.³⁸ The leading case of *Manchester v. Massachusetts*,³⁹ often cited as indicating state control over three miles of the open sea, involved regulation of fishing in those waters by a state statute passed in the exercise of the police powers; furthermore, the court expressly disclaimed passing judgment over the relative rights of the federal and state governments. The only case directly involving competing rights in the open sea, *The Abby Dodge*,⁴⁰ arose from a challenged federal statute regulating sponge fishing in the Gulf of Mexico and the Straits of Florida. In a decision again apparently based upon the police power, the Court upheld the statute as an exercise of Congress' power over foreign commerce, but construed it not to apply to waters within the state territory, where the state powers of regulation were deemed exclusive. There is a clear distinction between the exercise of police power over a given jurisdiction and a proprietary right of land in that jurisdiction.⁴¹

California's claim also has been bottomed on the theory that the submerged lands were held in trust for the future state after their acquisition by the United States from Mexico in 1848.⁴² This trust doctrine was first enunciated in the case of *Pollard's Lessee v. Hagan*,⁴³ which involved a title dis-

(1891) (Illinois, inland lake); *San Francisco v. LeRoy*, 138 U. S. 656 (1891) (San Francisco Bay); *Knight v. United States Land Ass'n*, 142 U. S. 161 (1891) (San Francisco Bay); *Illinois Cent. R. v. Illinois*, 146 U. S. 387 (1892) (Lake Michigan); *Shively v. Bowlby*, 152 U. S. 1 (1894) (Columbia River); *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349 (1897) (Mississippi River); *Mobile Transportation Co. v. Mobile*, 187 U. S. 479 (1903) (Mobile River); *United States v. Mission Rock Co.*, 189 U. S. 391 (1903) (San Francisco Bay); *The Abby Dodge*, 223 U. S. 166 (1912) (Gulf of Mexico and Straits of Florida); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251 (1915) (Elizabeth River, Virginia); *Port of Seattle v. Oregon & W. R. R.*, 255 U. S. 56 (1921) (Seattle Harbor); *Oklahoma v. Texas*, 258 U. S. 574 (1922) (Red River); *Massachusetts v. New York*, 271 U. S. 65 (1926) (Lake Ontario); *United States v. Utah*, 283 U. S. 64 (1931) (Green, Colorado and San Juan Rivers); *United States v. Oregon*, 295 U. S. 1 (1935) (Inland non-navigable lakes, Oregon); *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935) (San Pedro Bay); *United States v. O'Donnell*, 303 U. S. 501 (1938) (San Francisco Bay).

36. *McCready v. Virginia*, 94 U. S. 391, 394 (1876).

37. *Mumford v. Wardwell*, 6 Wall. 423, 436 (U. S. 1867).

38. See note 35 *supra*.

39. 139 U. S. 240 (1891).

40. 223 U. S. 166 (1912).

41. See *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404 (1917).

42. The territory which now comprises California was part of the land ceded to the United States by the Treaty of Guadalajara which ended the Mexican War. 9 STAT. 922 (1848).

43. 3 How. 212 (U. S. 1845).

pute to reclaimed lands in Mobile Bay. The court there held that despite the reservation of all "waste and unappropriated land" to the United States as public land in the Act which admitted Alabama as a state,⁴⁴ the lands in question were not public land. Alabama, the Court reasoned, was admitted on an equal footing with the original states. Part of this equality was ownership of submerged lands in the same degree as the original states. During the period when Alabama was a territory, the submerged lands had been held in trust for the state, and could not have been granted away by Congress. Significantly, the dissenting judge denied the validity of the distinction between submerged land and dry land applied to "waste and unappropriated" land reserved as public land. He maintained that equality was a political matter, and regretted the introduction of the new idea of proprietary equality which reversed previous cases.⁴⁵

Whatever the merit of the distinction between dry and submerged waste lands, however, it has never been specifically applied to the lands under the open sea. Without clouding any of the numerous titles to lands under inland waters based on state title as a rule of law or overruling the cases following the state title doctrines, the Supreme Court could deny that California acquired the tidelands off its shore from any trust of the Federal Government as part of its admission to the union on an equal footing. Furthermore, there is nothing about the trust concept itself which indicates whether it should apply to the open sea or be limited to inland waters. Conceding that some lands were held in trust, the assumption that the lands in question were or were not among them is no more than a statement of a conclusion.

II

From a determination of the weakness of the State's claim to title to the three-mile belt of the continental shelf, however, it does not necessarily follow that the fee has always been in the Federal Government. The constitutional power to acquire such a fee is unquestioned, under Congress' power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."⁴⁶ The power of the executive and legislative branches of Federal Government to acquire new territory has been upheld,⁴⁷ but the manner in which federal title may be asserted is an open question.⁴⁸ With regard to the coastal belt, the simplest explanation, which distinguishes the thirteen original colonies and

44. 3 STAT. 489, 492 (1819).

45. See note 43 *supra*, at 235.

46. U. S. CONST., Art. IV, § 3.

47. *Wilson v. Shaw*, 204 U. S. 24 (1907).

48. The Navy Department at one time sought to persuade Congress to appropriate the oil deposits without compensation as an exercise of its control over navigable waters through its commerce power, dominant over any qualified title of the States, on the theory that the oil was necessary to the Navy, which aided navigation; *Hearings before the House Committee on the Judiciary on S. J. Res. 208*, 75th Cong., 3d Sess. (1938) 54. See *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 273 (1915); *Lewis Blue Point Oyster Co. v. Briggs*,

Texas from California and the other states,⁴⁹ is that the lands in question were public lands reserved to the Federal Government. The United States acquired all the territory of California by treaty of cession with Mexico in 1848,⁵⁰ and California was later admitted to the Union under an express reservation of title to the United States of all public lands.⁵¹ Admission on an equal footing could imply equality in sovereign political power without equality to title in lands.⁵² Advocates of this explanation maintain that the lands in question were at the time of California's admission waste and unappropriated and hence reserved to the United States, and that they have never since been granted to California.⁵³

However, not only is this explanation unsupported by any previous cases, but its proponents must also ignore the "trust" doctrine established in the *Pollard* case for inland waters. There was no less reason in 1850 for describing the lands under San Francisco Bay as waste and unappropriated than there was for so describing the lands now in question; yet the former have been held to have passed to the state.⁵⁴ A distinction between the inland waters and those of the open sea within California's boundaries, if it is to be drawn, cannot be founded solely on the general conception of public lands. Unless such a distinction is drawn, the proponents of the state's claim are correct in asserting that the assumption that these lands are public lands would cloud innumerable titles. Inland states admitted to the Union under similar provisions would be affected as well as coastal ones.

Neither can such a distinction be found in any previous American cases.

229 U. S. 82, 87 (1913); *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 62 (1913); *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634 (1912); *Scranton v. Wheeler*, 179 U. S. 141, 162 (1900); *Bailey and Fulgham v. United States*, 62 Ct. Cl. 77 (1926), *cert. denied*, 273 U. S. 751 (1927); *Hawkins Point Lighthouse Case*, 39 Fed. 77, 87 (C. C. D. Md. 1889); *Stockton v. Baltimore & N. Y. Ry.*, 32 Fed. 9, 20 (C. C. D. N. J. 1887). The tenuous relation of an easement for navigation and title in the oil deposits has apparently led the Navy to abandon this thesis. At present it takes no position as to the land or the pending suit; communication to YALE L. J. from Office of the Judge Advocate General, Navy Dep't, Aug. 27, 1946.

49. Texas is classed with the original thirteen states because prior to its entry in the Union it was a sovereign independent nation, and the annexation expressly provided that it should "retain all the vacant and unappropriated lands lying within its limits"; 5 STAT. 798 (1845). See Ireland, *Marginal Seas Around the States* (1940) 2 L.A. L. REV. 252, 271.

50. 9 STAT. 926 (1848).

51. 9 STAT. 452 (1850).

52. See *Pollard's Lessee v. Hagan*, 3 How. 212, 230 (U. S. 1845) (dissenting opinion); *Case v. Toftus*, 39 Fed. 730 (C. C. D. Ore. 1889).

53. *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 19; *Joint Hearings before the House Committee on the Judiciary and Subcommittee of the Senate Judiciary Committee on H. J. Res. 225*, 79th Cong., 1st Sess. (1945) 125.

54. The term "public lands" does not include tide lands. *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284 (1894); *San Francisco v. Le Roy*, 138 U. S. 656 (1891); *Knight v. United States Land Ass'n*, 142 U. S. 161 (1891); *United States v. Mission Rock Co.*, 189 U. S. 391 (1903); *United States v. O'Donnell*, 303 U. S. 501 (1938).

As indicated above, none of the cases decided by the Supreme Court apply to proprietary rights in the continental shelf. Where a consideration of the open sea was not before the Court, there was no reason for it to draw such a distinction. But though cases applying only to inland waters may not bind the court's determination of title in the land beneath the open seas, nevertheless the generalness of the language employed indicates that no distinction existed in the minds of the judges.⁵⁵ Therefore, while those cases do not indicate that title was in the states, neither can they be used to show that in 1850 it was in the United States. Failing such a demonstration, the "public land" theory of title collapses.

Another theory, denying any ownership of lands underlying the three-mile limit at the time of the Revolution, maintains that, "As rights in the three-mile belt, susceptible of possession and ownership, began to emerge subsequently, they emerged as property of the national sovereign, whose function it is to establish and vindicate those rights against the possible claims of other nations."⁵⁶ The reasoning is not based on a distinction between the original states and the others. It would admit that title to the beds of inland waters of California can be traced from the crown, and escape the problem of whether the admission of new states on an equal footing with the old implies a proprietary as well as political sovereignty. Previous cases based on proprietary equality, as they all involve inland waters, could not be applicable.

As there are according to this theory admittedly no American cases settling ownership of the three-mile belt of the open sea, its legal justification must be found in more general concepts of sovereignty announced in American cases, or in the cases of other nations or the customs of international law as indicated by writers on the subject. Granting the principle that the defense of American rights in these lands against possible claims of other nations is an attribute of "external sovereignty" vested in the federal government rather than the states,⁵⁷ it does not necessarily follow that ownership, too, vests in the Federal Government. It would be as logical to say that to exercise its powers of national defense or of regulation of commerce, the Federal Government needed a proprietary interest in the whole country. As for cases from other nations, it is true that courts have held pearl and chank beds,⁵⁸ oyster beds,⁵⁹ sponges⁶⁰ and coal,⁶¹ on or under the sea's floor

55. Since the continental shelf was not under consideration in these cases, the lack of distinction and generalness of language are of as little guiding value in this case as was the common law property doctrine of "ad inferos, ad coelus" when airplanes began using the sky over private property.

56. Motion for Leave to File Complaint, 2-4, *United States v. California*, Sup. Ct., No. 12, Original, Oct. Term, 1945.

57. See *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 315 (1936).

58. *Annakumar Pillai v. Muthupayal*, 27 Indian L. R. (Madras Ser.) 551 (1904), discussed in Hurst, *Whose Is the Bed of the Sea?* (1924) 4 BRIT. Y. B. INT. L. 34, 41.

59. Sea Fisheries Act, 1868, 31 & 32 VICT. c. 45, § 67. See Hurst, *id.* at 40.

60. See Hurst, *ibid.*

61. *Lord Advocate v. Wemyss* [1900] A. C. 48 (H. L. 1899).

and within and without a three-mile limit, to be controlled by the littoral nation under theories of occupation, prescription, or acquiescence of other nations. It is believed, however, that these foreign cases can be of little guiding value. Control in these cases seems to manifest a nation's regulatory power rather than its proprietary right. Furthermore, conflicts between individuals and nations will supply no analogy to the problem of dual sovereignty of the states and the United States.

Nor do the concepts of the three-mile limit and the marginal belt in international law shed much light on the present controversy. The early "extravagant pretensions" of various maritime powers of sovereignty over great expanses of ocean⁶² were replaced in the 17th century by the concept of freedom of the seas.⁶³ Its corollary was common ownership among all nations of the highway of the world.⁶⁴ The need of individual nations for self-protection,⁶⁵ however, qualified those concepts with the idea of a marginal belt over which a state could exert exclusive control because of its power to do so.⁶⁶ Control was originally conceived in terms of cannon range as one marine league or three English miles.⁶⁷ The views of writers on the law of nations, slowly adopted as law or policy by the nations themselves, were, however, almost as honored in the breach as the observance.

The first application of the three-mile limit in law was with regard to immunity from seizure in war time of belligerent vessels in the coastal waters of neutral countries.⁶⁸ This use of the rule was consonant with its basis of the self-protection of the state. Where the problem was protecting the state

62. *Queen v. Keyn*, L. R. 2 Ex. 63, 175 (Ex. 1876). SELDEN, *MARE CLAUSUM* (Howell's trans. 1663) 459; HALE, *op. cit. supra* note 28, at 400. The day of "extravagant pretensions" may be returning. See Clark and Renner, *We Should Annex 50,000,000 Square Miles of Ocean* (May 4, 1946) 218 SAT. EVENING POST 16, 92, 95, advocating drastic extension of exclusive control over large areas of ocean as a defense measure for atomic wars, apparently ignoring the effect of such a move on the concept of freedom of the seas. An official step towards reasserting these ancient doctrines might be implied from the Presidential Proclamation claiming the entire continental shelf, note 78 *infra*, although the aim of the Proclamation to conserve resources is completely different from the 17th century attempts to control commerce.

63. MEYER, *THE EXTENT OF JURISDICTION IN COASTAL WATERS* (1937) 4; FULTON, *THE SOVEREIGNTY OF THE SEA* (1911) 4-5.

64. GROTIUS, *MARE LIBERUM* (Magoffin's trans. 1916) 36.

65. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* (1927) 5.

66. BYNKERSHOEK, *DE DOMINIO MARIS DISSERTATIO* (2d ed. 1744; Magoffin's trans. 1923) 44.

67. BYNKERSHOEK, *ibid.* introduced the concept of cannon range. Galiani, an Italian jurist, first translated this as three miles; JESSUP, *op. cit. supra* note 65, at 6; FULTON, *op. cit. supra* note 63, at 563. For the first appearance of the three-mile rule in American law, see Letter of Sec'y of State Jefferson to the British Minister, Nov. 8, 1793, quoted in CROCKER, *THE EXTENT OF THE MARGINAL SEA* (1919) 636.

68. *The Ann*, 1 Fed. Cas. 926, 929, No. 937 (C. C. D. Mass. 1812); *The Twee Gebroeders*, 3 C. Rob. Adm. & Eccl. 162 (Adm. 1800), 336 (Adm. 1801); *The Anna*, 5 C. Rob. Adm. & Eccl. 373 (Adm. 1805).

against smuggling or by quarantine laws, however, both England⁶⁹ and the United States⁷⁰ have found it practical at times to deviate from a three-mile limit, either by law or treaty. On a nation's right to absolute control over navigation in a three-mile limit, there has been little dispute.⁷¹ Where nations have conflicted over fishing rights on the other hand, maritime powers have been reluctant to confine their claims of an area exclusively reserved to their citizens to three miles.⁷² Even the application of the concept in this field has been based more on a municipal power to regulate and conserve fishing within certain jurisdictions than on a proprietary attitude toward the fish, which are considered unowned until caught.⁷³ It thus far appears that, while international jurists have not distinguished control over the marginal belt from ownership in it, the claims of nations for the limited purposes for which a belt has been recognized have been conceived with the former in view.

It should be noted, however, that even for those purposes enumerated, a three-mile limit has never been accepted by all maritime nations.⁷⁴ A conference at The Hague in 1930 for the codification of international law failed to reach any international agreement on the extent of territorial waters.⁷⁵ Nations have tended to expand their claims over marginal waters, partly rationalizing on the obsolescence of a rule based on the cannon range of a hundred years ago.⁷⁶ Although the amount of recognition the three-mile rule achieved has been attributed largely to the backing it has had from the United States and Great Britain, the United States has been said "more than any other power [to have] varied her principles and claims as to the

69. 6 GEO. IV, c. 78 (1825) (quarantine, two leagues); 3 & 4 WM. IV, c. 52-4 (1833) (customs, four leagues); 16 & 17 VICT. c. 107, §§ 212, 218 (1853) (customs, one to eight leagues); 39 & 40 VICT. c. 36, § 179 (1876) (customs, one to three leagues).

70. *Church v. Hubbard*, 2 Cranch 187, 234 (U. S. 1804) (legality of seizure of American ship engaged in illicit trade four leagues off Brazilian coast). REV. STAT. §§ 2760, 2867, 2868, 2872-4 (1878); 14 U. S. C. § 66 (1940); 19 U. S. C. § 267 (1940). See CROCKER, *op. cit. supra* note 67, at 630-94. For Anglo-American Liquor Treaties, Treaty Ser. No. 22 (1924), see JESSUP, *op. cit. supra* note 65, at 279-317.

71. 1 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) 387.

72. MEYER, *op. cit. supra* note 63 *passim*; FULTON, *op. cit. supra* note 63 *passim*.

73. *Thompson v. Dana*, 52 F. (2d) 759 (D. Ore. 1931), *aff'd per curiam*, 285 U. S. 529 (1932). The regulatory rather than proprietary attitude seems to apply to sedentary fisheries also, since they are free to whoever chooses to use them so long as he conforms with conservation regulations. But see *Smith v. Maryland*, 18 How. 71 (U. S. 1855) (Maryland oyster regulation upheld on ground state owns soil in trust for private fishing rights); *McCready v. Virginia*, 94 U. S. 391 (1876) (Virginia statute restricting oyster planting in Virginia waters to Virginia citizens upheld).

74. Advocates of limits other than three miles have been Italy, Russia, Norway, Sweden, Finland, Denmark, Portugal, Spain, Uruguay, and Yugoslavia. See MEYER, *op. cit. supra* note 63, at 514; JESSUP, *op. cit. supra* note 65, at 62-66.

75. See *Territorial Waters* (1930) 74 SOLICITOR'S J. 311.

76. FULTON, *op. cit. supra* note 63, at 681-9; HALL, INTERNATIONAL LAW (7th ed. 1917) 157.

extent of territorial waters according to her policy at the time." 77 Recently this country abandoned all adherence to such a limit when a Presidential Proclamation 78 claimed control of the entire continental shelf and the waters over it, extending from one to 250 miles from the coast. 79

Several conclusions have been drawn from this fluid state of international law regarding the marginal belt. First is that the three-mile limit, though perhaps the "ordinary limit," is not the only one enforced, and that the boundary of a nation's jurisdiction for one purpose need not be the boundary for all purposes. 80 Second is that such a limit is not international law at all but national propaganda and policy. A nation can establish and change its boundary at will for any particular purpose, 81 subject to its power to enforce its policy and the power or inclination of other nations to oppose it. 82 Finally, since the right to withdraw minerals from under the bottom of the sea has never been the subject of conflicting national claims, it appears not to have been one of the purposes for which a claim over marginal seas has heretofore been exerted.

III

The foregoing legalistic examination of title to submerged lands indicates that there is no settled law which the Court need consider binding with regard to the lands in question. Neither national, foreign, nor international law has dealt with the specific problem of oil, and no rigid title concept blocks a fresh approach. It would thus seem both legally feasible and practical to deal with the problem *de novo* in light of policy considerations.

As yet, however, no clear policy has been established to serve as guide to the Court, which has tended in recent years to emphasize that formulation of policy should be a function of the political branches of the government, and that the judiciary's role should be limited to implementation. This tendency to eschew political issues has been expressed specifically in a reluctance to interfere where Congressional action involving questions of public domain was concerned. 83

The desirability of a legislative rather than judicial determination of

77. FULTON, *op. cit. supra* note 63, at 650. But see JESSUP, *op. cit. supra* note 65, at 49.

78. Proclamation No. 2667, Exec. Order No. 9633, 10 FED. REG. 12303, 12305 (1945).

79. See Ickes, *Underwater Wealth* (Feb. 23, 1946) COLLIER'S 20.

80. FULTON, *op. cit. supra* note 63, at 663-4; 1 OPPENHEIM, *op. cit. supra* note 71, at 389-92.

81. Borchart, *Resources of the Continental Shelf* (1946) 40 AM. J. INT. L. 53; Bingham, *The Continental Shelf and the Marginal Belt* (1946) 40 AM. J. INT. L. 173; HALL, *loc. cit. supra* note 76.

82. For an example of the power of other nations to oppose an extension of sovereignty, see the Bering Sea controversy. When English ships were seized for violating a federal statute controlling seal hunting throughout the entire Bering Sea, the Supreme Court refused to interfere with the extension of sovereignty, *In re Cooper*, 143 U. S. 472 (1892), and Great Britain successfully opposed the American claim in an arbitration tribunal. See CROCKER, *op. cit. supra* note 67, at 676; JESSUP, *op. cit. supra* note 65, at 54-56.

83. *United States v. City and County of San Francisco*, 310 U. S. 16, 30 (1940); Van

policy is heightened in the instant case by the Presidential Proclamation which claimed title to the entire continental shelf for the United States, subject to whatever claims of the States the courts might allow.⁸⁴ By excursion into what promises to be a new era in international law of the seas, the executive department would seem to have indicated the need for a realistic determination of the relation of ownership of all the submerged land of the shelf to that of land within the three-mile limit. While oil deposits which follow no arbitrary boundary lines⁸⁵ are the immediate issue in the case, science is only beginning to tap other resources which the sea and its floor have to offer. Techniques of obtaining power from ocean currents, extracting minerals other than oil from the ocean and its subsoil, and using marine agriculture are scientific developments yet in infancy.⁸⁶ Military considerations of defense also demand a new evaluation of the concepts of territorial waters⁸⁷ and perhaps a revision of the extent of recognition of freedom of the seas. What weight should be given these vaguely discernible potentialities, and whether vesting coastal title in the states is wise in view of the broad scale on which a future generation may desire to develop the continental shelf, is a question for the makers, not the juridical executors, of national policy. If the Court declares title to be in California, Congress would be deprived of the opportunity to exercise its will and to take into consideration the broad policy questions.

The legal foundation on which the Supreme Court could leave the question open to a policy decision by Congress could begin with a declaration that the disputed lands have been, as part of the bed of the sea, the unoccupied common lands of all nations, with title in none. Thereafter, the Court could reason that an undisputed attribute of sovereignty is the power to acquire title to unoccupied land,⁸⁸ but that the acquisition of new territory, as it involves the rights of and relations with foreign nations, is only within the power of the national sovereign and not of the states.⁸⁹ The executive and legislative departments, however, and not the courts, declare such an extension of sovereignty.⁹⁰ Congress has taken no final action regarding the

Brocklin v. Tennessee, 117 U. S. 151, 168 (1886); *Standard Oil of Cal. v. United States*, 107 F. (2d) 402, 409 (C. C. A. 9th, 1940), *cert. denied*, 309 U. S. 654 (1940).

84. See note 78 *supra*.

85. "What complicates the question is the fact that oil deposits know no boundaries such as the three-mile limit, hence wells may tap pools which extend well beyond not only the low-tide mark but even the three-mile limit." Ickes, *supra* note 79, at 48.

86. See Clark and Renner, *loc. cit. supra* note 62.

87. *Ibid.*

88. *Jones v. United States*, 137 U. S. 202, 212 (1890). See *Johnson v. McIntosh*, 8 Wheat. 543, 595 (U. S. 1823). 1 OPPENHEIM, *op. cit. supra* note 71, at 437.

89. ". . . the discovery is made for the whole nation . . . the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains. . . ." Marshall, C. J. in *Johnson v. McIntosh*, 8 Wheat. 543, 595 (U. S. 1823).

90. *Wilson v. Shaw*, 204 U. S. 24, 32 (1907); *In re Cooper*, 143 U. S. 472, 503 (1892); *Jones v. United States*, 137 U. S. 202, 212 (1890); *United States v. The Kodiak*, 53 Fed. 126

disputed lands. The Court could therefore consider the Presidential Proclamation as for the first time vesting title to the whole continental shelf, including that portion within the three-mile limit, in the Federal Government. This conclusion would avoid the palpable fiction of maintaining that title had vested during the long period when the lands were considered valueless and claimed by no one.

Where the Federal Government has through executive action acquired fee to new lands, it is still the duty of Congress to make "all needful Rules and Regulations" respecting them.⁹¹ In this case it could, if it deems wise, dispose of them to the littoral states.

Congress, in formulating policy regarding these lands, could at the same time dispose of subsidiary issues which have been raised by both sides and which are more suited to legislative than judicial handling. Proponents of Federal title, for example, have contended that the last great unexploited reservoir of natural petroleum must be conserved for national defense⁹² and that California, which has its own conservation laws⁹³ but is not a member of the interstate compact for proration of oil,⁹⁴ may be tempted to give as much weight to present royalties as to future security. These would seem to be matters for the consideration of the body constitutionally charged with responsibility for national defense⁹⁵ rather than the Court.

Proponents of the state's point of view, on the other hand, have emphasized the danger to interests other than oil⁹⁶ in a holding favorable to the United States, conceivably with the aim of distracting attention from the oil itself.⁹⁷ The Court's decision based on a distinction between the open sea and inland waters would not affect the titles on which port and harbor authorities rely. Nevertheless, Congress as a representative body would be empowered and could be expected to protect the few claims of its constituents existing in the open sea "in good faith reliance on the state's claim of ownership."⁹⁸

(D. C. D. Alaska, 1892); *United States v. The James G. Swan*, 50 Fed. 108 (D. C. D. Wash. 1892).

91. U. S. CONST. Art. IV, § 3.

92. See note 6 *supra*.

93. CAL. CODE (Deering, 1944) §§ 3000-3433.

94. 49 STAT. 939 (1935); 50 STAT. 617 (1937); 53 STAT. 1071 (1939); 55 STAT. 666 (1941); 57 STAT. 383 (1943). See Colby, *The Law of Oil and Gas* (1942) 30 CALIF. L. REV. 245, 268-9.

95. U. S. CONST. Art. I, § 8. Note that even if the Court declared title to be in the state, Congress could acquire this land for national defense under its right of eminent domain; in such an event, however, the state would be paid compensation. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Kohl v. United States*, 91 U. S. 367, 374 (1875).

96. The American Association of Port Authorities, for example, have been among the many opponents of record of the Federal Government's claim on the ground that it "creates an atmosphere of doubt and confusion with respect to the title" to submerged and reclaimed lands in ports and harbors. *Hearings before the Senate Committee on the Judiciary on S. J. Res. 48 and H. J. Res. 225*, 79th Cong., 2d Sess. (1946) 222.

97. *Id.* at 12.

98. *Id.* at 10. The Department of Interior has recommended that Congress pass relief

IV

It is submitted that a holding by the Supreme Court that the lands in dispute have been unoccupied lands in which no title vested until the recent Presidential Proclamation is in accord with reason and sound policy considerations. The representative body would thus be enabled to formulate a policy which would protect national and state interests and relate the problem of the lands in issue realistically to the whole problem of the continental shelf. The Court should allow Congress to dispose of the matter, undistracted by legalisms of title and addressing itself to the basic questions involved.

legislation in the event that the Supreme Court decide that the United States owns the lands, which would protect "the States concerned and those who have operated under State law" from "any liability for damage in trespass for any past development of the submerged land" and would protect "structures, such as docks and piers, which may have been erected on the submerged lands and the surface ownership of filled-in areas . . . if they were created or filled in accordance with the Federal or State law." *Ibid.* Following the withdrawal of oil lands from prospecting by President Taft in 1909, Congress passed legislation to save from injury those who already had substantial investments in the withdrawn land, 36 STAT. 847 (1910), 43 U. S. C. § 142 (1940); 36 STAT. 1015 (1911), 30 U. S. C. § 103 (1940); 38 STAT. 708 (1914), 30 U. S. C. § 104 (1940). See Colby, *supra* note 94, at 255-9.