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Constitutional Law - Federal Rights to Tidelands

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of ad hoc rulemaking with retroactive effect; the dissent pointed out that the decision actually represented a direct reversal of the court's stand on such problems. It also contended that the decision was a reversal of the 1943 decision.[9]

Mr. Justice Jackson emphasized the fact that no general rule had previously been adopted because the situation involved had never before been presented to the commission. He denied that experience could be deferred to in a situation which had never arisen before. This denial seemingly overlooks the fact that expertise applies generally to familiarity in the field wherein the problem arises, with all its ramifications, rather than to a particular situation.

This overlooked fact seems to be the true basis on which the majority recognizes such ad hoc action in complex and technical fact situations. Such recognition appears to be in accord with several cases decided in the interim between the two *Chenery* decisions.[10]

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CONSTITUTIONAL LAW—FEDERAL RIGHTS TO TIDELANDS—The United States brought action against the State of California, alleging that the United States was the owner in fee simple, or possessed of paramount rights in and power over, the land and things of value underlying the Pacific Ocean off the coast of California beyond the low water mark and extending three nautical miles seaward, and that California, without the authority of the United States, had executed certain mineral leases in this area. The prayer was for a

9. 67 S. Ct. 1760 (1947). While the majority opinion is not utterly irreconcilable with its earlier decision, it truly represents a change of attitude—hence the significance of the decision.

10. Notably the cases of Pacific Gas and Electric Company v. Securities & Exchange Commission, 324 U. S. 826, 65 S. Ct. 855, 89 L. Ed. 1394 (1945), where a divided court in a per curiam decision upheld the decision of the Circuit Court of Appeals for the Ninth Circuit. That court had upheld a commission order denying plaintiff's application for a declaration that applicant was not a subsidiary—such order being based on an interpretation of the words 'subject to controlling influence' as including susceptibility to domination. There was a dissent saying the order was arbitrary and capricious; and Republic Aviation Corporation v. N. L. R. B., 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945), in which ad hoc rulemaking of the commission was upheld so that ". . . a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation."

Both cases are distinguishable on their facts, but are closely in point in principle.

decree declaring the rights of the United States in this area as against California, and enjoining California and all persons holding under her from trespass on this area in violation of the rights of the United States. California answered, claiming ownership of the soil of the maritime belt as an incident of her sovereignty. The court held that California was not the owner of the soil of the maritime belt, but that paramount rights in and power over the area was vested in the United States. The United States was granted the relief prayed for. *United States v. California,* 67 S. Ct. 1658 (U. S. 1947).

State claims to ownership of the minerals beneath the marginal sea were based primarily upon the contention that ownership was an incident of state sovereignty, acquired from England by the states through the Revolution, and subsequently recognized by the United States Supreme Court in a long line of cases. The thirteen original American Colonies acquired as sovereign states all the then attributes of the Royal Sovereignty of England.[1] Only those elements of sovereignty specifically enumerated in the Constitution were surrendered by the states to the federal government at the time of the formation of the Union;[2] all others were retained by the states,[3] and acquired by other states on their subsequent admission into the Union on an equal footing with the original states.[4] If ownership of the marginal sea had been acquired by the original states, either as an incident of sovereignty or through grants, this right must have been retained by the states on their admission into the Union, and acquired by California on its subsequent admission. The court, however, concluded that the thirteen original states did not acquire ownership of the marginal sea from England as an incident of sovereignty, basing their decision on the fact that there was no "settled international custom or understanding among nations" in regard to ownership of the maritime belt,[5] nor any substantial his-

1. Martin v. Lessee of Waddell, 41 U. S. 367, 416, 10 L. Ed. 997, 1014 (1842).

2. U. S. Const. Amend. X; Pollard's Lessee v. Hagan, 44 U. S. 212, 11 L. Ed. 565 (1845) dealing specifically with the "shores of navigable waters and the soils under them"; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 (1876).

3. Note 2, supra.

4. Coyle v. Smith, 221 U. S. 559, 55 L. Ed. 853, 31 S. Ct. 688 (1911).

5. Fenwick, International Law (2 ed. 1934) 277-278, 317-319; Higgins and Colombos, International Law of the Sea (1 ed. 1943) 58, § 77 et seq.; I Hyde, International Law, Chiefly as Interpreted and applied by the U. S. (2 ed. 1945) 451, § 141; Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1 ed. 1927) chap. I and II; V Wheaton, Elements of International Law (6 ed. 1929) 361; Wilson, Handbook of International Law (3 ed. 1939) 98, § 38; Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf (1947) 56 Yale L. J. 356. As recently as the 1930 Hague Conference for the Codification of International Law seventeen of

torical support for the idea of a claim by the colonies to the maritime belt at the time independence was obtained.[6]

In many of the colonial charters appears language capable of interpretation as a grant to the colonies, if not of ownership, at least of the right to minerals, et cetera, within large areas of the ocean off their coasts.[7] However, it is difficult to understand by what process the original states might have acquired ownership in this coastal belt through such a grant from the Crown of England had not ownership of the area been at that time an incident of English sovereignty, and therefore capable of grant from the Crown. Moreover, it is probable that any claim to ownership of marginal seas made by the original states based on grants in the Colonial Charters must be placed in the same category as similar extravagant claims made by other nations at about the same time, and since dropped for lack of recognition.[8]

The leading case of *Pollard's Lessee v. Hagan*[9] announced the rule of state ownership of inland navigable waters. These inland navigable waters include rivers, lakes, bays and inlets,[10] and the open sea down to the low water mark,[11] the area between the high

thirty-six nations represented favored a national maritime belt of a width other than three miles. I Hackworth, Digest of International Law (1 ed. 1940) 628. Cf. Hurst, Whose Is the Bed of the Sea? (1923-1924) 4 British Year Book of International Law 34; Ireland, Marginal Seas Around the States (1940) 2 LOUISIANA LAW REVIEW 252 and 436; Keeton, Federal and State Claims to Submerged Lands Under Coastal Waters (1947) 25 Texas L. Rev. 262. But see Queen v. Keyn, L. R. 2 Exch. Div. 63 (1876). Although refusing to extend English criminal jurisdiction to offenses by foreigners on foreign vessels within the three mile limit in the absence of a specific statute, the majority of the court was of the opinion that the marginal sea was a part of the territory of England. Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1893).

6. Justice Reed dissented on this point stating that he believed that "the original states did claim . . . sovereignty and ownership to the three mile limit." See also Ireland, Marginal Seas Around the States (1940) 2 LOUISIANA LAW REVIEW 252, 271. The State of Texas contends that it has a special claim, stronger than that of the other coastal states, to dominion over a maritime belt three marine leagues (about 10.5 miles) in width. This contention is based on a claim to that area by the Republic of Texas during its existence as a sovereign state, and on the retention by Texas of all vacant and unappropriated lands within its territorial limits by express provision of the Joint Congressional Resolution admitting Texas into the Union.

7. Thorpe, American Charters, Constitutions and Organic Laws (1 ed. 1909) 529 (Connecticut), 557 (Delaware), 765 (Georgia), 1677 (Maryland), 1846, 1870 (Massachusetts), 2433 (New Hampshire), 2533 (New Jersey), 1641 (New York), 2743, 2761 (North Carolina and South Carolina), 3035 (Pennsylvania), 3211 (Rhode Island), 3783, 3790, 3802 (Virginia).

8. Fenwick, International Law (2 ed. 1934) 317.

9. 44 U. S. 212, 11 L. Ed. 565 (1845).

10. Higgins and Colombos, International Law of the Sea (1 ed. 1943) 58, § 78, 142, § 179 (rivers), 111, § 143 et seq. (bays and inlets), 121-124, §§ 156-158 (lakes).

11. United States v. State of California, 67 S. Ct. 1658, 1667 (U. S. 1947) "If this rationale of the Pollard case is a valid basis for a conclusion that para-

and low water marks being properly termed *tidelands*.[12] In subsequent cases involving the application of this rule there frequently appeared language clearly indicative that the court at that time considered state ownership to include the bed of the marginal sea, at least within the three mile limit, although in no case was the court called upon to extend state ownership beyond the low water mark.[13]

In the present case, the court termed these statements merely paraphrases or offshoots of the *Pollard* inland water rule, used not in enunciation of a new ocean rule, but only in explanation of the old inland water principle, and refused to extend the doctrine of the *Pollard* case beyond its application to inland navigable waters. The way to such an extension was clearly open to the court. In the case of inland navigable waters, the title to the bed and to all minerals found therein is vested in the states, while the federal government exercises broad powers of regulation over the stream itself and the uses to which it may be put, under its express grants of

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mount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale lends to the conclusion that national interests . . . are paramount in waters lying to the seaward in the three mile belt." Higgins and Colombos, International Law of the Sea (1 ed. 1942) 74, § 99.

12. Borax Consolidated, Ltd. v. City of Los Angeles, 296 U. S. 10, 22, 80 L. Ed. 9, 18, 56 S. Ct. 23, 29 (1935); Ballantine, Law Dictionary (1 ed. 1930) 1282.

13. Martin v. Lessee of Waddell, 41 U. S. 367, 10 L. Ed. 997 (1842); Goodtitle v. Kibbe, 50 U. S. 471, 13 L. Ed. 220 (1850); Smith v. Maryland, 59 U. S. 71, 15 L. Ed. 269 (1855); Weber v. Harbor Commissioners, 85 U. S. 57, 21 L. Ed. 814 (1873); Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224 (1876); McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248 (1876); San Francisco v. LeRoy, 138 U. S. 656, 11 S. Ct. 364, 34 L. Ed. 1096 (1891); Manchester v. Massachusetts, 139 U. S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891); Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428 (1891); Knight v. United States Land Ass'n, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974 (1891); Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1893); St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 18 S. Ct. 157, 42 L. Ed. 497 (1897); Scranton v. Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. Ed. 126 (1900); Mobile Transportation Co. v. Mobile, 187 U. S. 479, 23 S. Ct. 17, 47 L. Ed. 266 (1903); United States v. Mission Rock Co., 189 U. S. 391, 23 S. Ct. 606, 47 L. Ed. 865 (1903); Louisiana v. Mississippi, 202 U. S. 1, 26 S. Ct. 40, 50 L. Ed. 913 (1906); The Vessel "Abby Dodge" v. United States, 223 U. S. 166, 32 S. Ct. 310, 56 L. Ed. 390 (1912); United States v. Chandler-Dunber Water Power Co., 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063 (1912); Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251, 35 S. Ct. 551, 59 L. Ed. 939 (1915); Port of Seattle v. Oregon & W. R. R. Co., 255 U. S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1912); Oklahoma v. Texas, 58 U. S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922); Massachusetts v. New York, 271 U. S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926); United States v. Utah, 283 U. S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935); Borax Consolidated, Ltd. v. City of Los Angeles, 296 U. S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935); United States v. O'Donnell, 303 U. S. 501, 58 S. Ct. 708, 82 L. Ed. 980 (1938); United States v. Commodore Park, 324 U. S. 386, 65 S. Ct. 803, 89 L. Ed. 1017 (1944). But cf. Cunard Steamship Co. v. Mellon, 262 U. S. 100, 122, 43 S. Ct. 504, 507, 67 L. Ed. 894, 902 (1922) wherein the court defined the territorial operation

power in the Federal Constitution.[14] The extent of this control was considered in *United States v. Appalachian Electric Power Company,* where the court stated:

> "In our view it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . That authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the federal government."[15]

Application of this rule to the marginal sea would have resulted in state ownership of the bed of the ocean from the low water mark to the three mile limit, with the federal government empowered to exercise the necessary control over this area under the Commerce clause and its war and treaty-making powers.[16] Minerals within the marginal sea would belong to the adjoining state. The court preferred to make a distinction between inland navigable waters and the open sea, the distinction apparently being based upon predominance of state interest in the former and predominance of national interest in the latter, together with the further consideration that the state lacked the powers and facilities for assumption of the responsibilities which its ownership of the maritime belt would entail.

Having disposed of the arguments supporting state ownership of the area, the court without making use of the word ownership[17]

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of the Eighteenth Amendment stating: "It now is settled in the U. S. and recognized elsewhere that the territory subject to its jurisdiction includes . . . ports, harbors, bays and other enclosed arms of the sea along its coasts and a marginal belt of the sea extending from the coast line outward a marine league. . . ." citing *Church v. Hubbard,* supra, *Manchester v. Massachusetts,* supra, and *Louisiana v. Mississippi,* supra. Further indications of a belief on the part of the federal government that ownership of the maritime belt was vested in the states are the numerous instances in which the federal government acquired title to lands located in the belt from states, and numerous refusals by the Department of the Interior to grant federal leases to lands within the belt. Hearings before Subcommittee 4 of the Committee on the Judiciary on H. J. Res. 176, 76th Cong., 1st sess. (1939) at p. 172. In the present case, the court stated that these instances of federal recognition of state ownership could not operate as an estoppel to the assertion of federal ownership. But cf. n. 18, infra.

14. U. S. Const. Art. I, § 8.

15. United States v. Appalachian Electric Power Co., 311 U. S. 377, 426, 61 S. Ct. 291, 308, 85 L. Ed. 243, 262-263 (1940).

16. U. S. Const. Art. I, § 8, Art. II, § 2.

17. Justice Frankfurter dissented, contending that ownership of the maritime belt was neither in California nor the United States, but that the area should be treated as unclaimed land. There are conflicting opinions as to the nature of the right of a state in its maritime belt. Higgins and Colombos, International Law of the Sea (1 ed. 1943) 59, §80.

stated that the federal government had "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," and that "whatever of value may be discovered in the seas next to its shores and within its protective belt will most naturally be appropriated for its [nation's] use."[18]

The basis of the court's decision was two-fold: (1) the federal government rather than the states acquired the right to the marginal sea, since assertion of the right was first made by the federal government and subsequent assertions of that right by the federal government had been considered by the court as binding upon it;[19] and (2) recognition of the necessity for federal ownership of the marginal sea as a matter of national external sovereignty.[20] The conclusion is inescapable that the court was more strongly influenced in its decision by the latter consideration:

> "The three mile limit is but a recognition of the necessity that a government next to the 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 revenues, its health, and the security of its people from wars waged in or too near its coasts. . . . What this government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. . . . The ocean, even its three mile belt, is thus of vital consequence to the nation."[21]

That the maritime states had been allowed to exercise "local police power" in the area through acts similar to the assertions of authority

18. United States v. State of California, 67 S. Ct. 1658, 1668, 1666 (U. S. 1947).

19. First assertions of American dominion over the marginal sea were found in notes from Secretary of State Jefferson to the British [H. Ed. Doc. No. 324, 42nd Cong., 2d sess. (1872) 553-554] and French [American State Papers, I Foreign Relations (1833) 183, 384] Ministers in 1793. For subsequent assertion of authority over the marginal sea, see 36 Stat. 326, 16 U. S. C. A. § 644 et seq. (1910); 37 Stat. 499, 16 U. S. C. A. § 632 et seq. (1912); 43 Stat. 604, 33 U. S. C. A. § 431 et seq. (1924); 43 Stat. (II) 1761 (1924); 59 Stat. (II) 884 (1945), 5 U. S. C. A. § 485 (Supp. 1946). A Presidential Proclamation announcing that the natural resources of the sea bed of the Continental Shelf contiguous to the United States were regarded as appertaining to the United States, and subject to its jurisdiction and control. Church v. Hubbard, 6 U. S. 186, 2 L. Ed. 249 (1804); Ex parte Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232 (1891); Cunard Steamship Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922).

20. United States v. Curtis-Wright Export Corp., 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

21. United States v. California, 67 S. Ct. 1658, 1666-1667 (U. S. 1947).

in the area by the national government[22] was recognized, though the extent of this police power was not discussed. Recent national and international developments had necessitated a redrawing of the nebulous line between the national external sovereignty and the domestic sovereignty retained by the states. While the decision of the court is clearly limited to the maritime belt off the State of California, there can be little doubt that it will be applicable to Louisiana and other maritime states. The United States Attorney General stated recently that a suit against the state of Louisiana was at present being prepared.[23]

Attempts have been made to imply federal recognition of Louisiana's ownership of its maritime belt from the grant to Louisiana in its Enabling Act[24] of title to all islands within three leagues of its coasts, and the United States Supreme Court has recognized such an interpretation.[25] However, it would appear that the position of Louisiana is no stronger than that of California in this regard, in view of the fact that the Treaty of Guadaloupe Hildago[26] specifically fixed the boundaries of California at a point three miles from its shores, and California claimed this boundary in its first state constitution.[27]

By statute Louisiana has extended her boundary twenty-seven miles into the open sea off her coast.[28] Although the ruling of the instant case is limited to the marginal sea lying within the three mile limit, it would appear that the reasoning supporting federal dominion over that area would be even more strongly applicable to the extension of control over any further maritime area beyond that limit brought within the boundaries of the Union by state declaration.

Louisiana has four types of coast line. The first type, the lower delta below Forts Jackson and St. Philip in Plaquemines Parish, is,

22. Louisiana v. Mississippi, 202 U. S. 1, 26 S. Ct. 408, 50 L. Ed. 913 (1906), discussing various instances of regulation by Louisiana of the oyster beds off her southeastern coast.

23. Baton Rouge State Times (Wed., March 3, 1948) at p. 8B.

24. 2 Stat. 701 (April 6, 1812) [Enabling Act]; 2 Stat. 708 (April 14, 1812) [added West Florida area to Louisiana].

25. Louisiana v. Mississippi, 202 U. S. 1, 26 S. Ct. 408, 50 L. Ed. 913 (1906).

26. 1 Treaties (Malloy, 1910) 1109; Treaty of July 4, 1848, 9 Stat. 922 (1848).

27. Cal. Const. (1849) Art. XII, § 1.

28. La. Act 55 of 1938 [Dart's Stats. (1939) § 9311.1-9331.4]. See Ireland, Marginal Seas Around the States (1940) 2 LOUISIANA LAW REVIEW 252, 280-283; Lovet, Louisiana's Twenty-seven Mile Maritime Belt(1939) 13 Tulane L. Rev. 253; (1939) 39 Col. L. Rev. 317 (denying validity of statute). Leases have been granted in this area. Coastal Drilling (Sept. 15, 1945) Business Week 35.

in general, registering a gain due to silt brought down by the Mississippi River. The coast to the north and east, lying for the most part in St. Bernard Parish, was once an area of gain. About the eighth century, A. D., the Mississippi, which once emptied there, had built up the land to a point slightly beyond the present location of the Chandeleur Islands, which represent that ancient beach. Since the change in the course of the river, the coast line is receding to the west at a rapid rate. The Chandeleur Islands are retiring westward even more rapidly. The third type of coast, from the lower delta westward to Vermillion Bay, lying mostly in Terrebonne Parish, represents a more advanced development of the St. Bernard coast. There the ancient beach, similar to the Chandeleurs, has become tangential to the coast at many points. The shoreline continues to recede, though not so rapidly as that of St. Bernard. The remainder of the Louisiana coast represents a still further development. The ancient beach has integrated itself with the mainland. The shoreline in this region is fairly stable. It is, on the whole, retreating slowly, though there are some local gains at the mouths of principal rivers. The over-all result has been a loss of territory. The loss since 1812 has been considerable, and the process will continue.[29]

The line of division between state and federal control in the area is apparently fixed at the low water mark.[30] However, the foregoing indicates the existence of a large body of land off the Louisiana coast which has sunk below the low water mark, presumably since federal acquisition of the maritime belt.[31] At the same time, a smaller body of land has been built up above the old low water mark. In the event of the application of the instant decision to Louisiana, the question of the status of the title to this land under Louisiana rules of property might become of prime importance.

One well, Superior Oil Company's Vermillion Block No. 17 has been drilled approximately thirty miles below the low water mark. It is not producing.

29. Address by Dr. R. J. Russell, Professor and Head of Dept. of Geography; Assistant Director, School of Geology, Louisiana State University, before Seminar in Contemporary Legal Problems, Louisiana State University Law School. See La. Dept. of Conservation Geological Survey, Bulletin No. 8 (1936) entitled The Lower Mississippi Delta.

30. Supra note 19.

31. The time at which control of the marginal sea vested in the federal government is not clear. Control of the area was not considered an attribute of sovereignty at the time of the Treaty of Paris (1783). United States v. California, 67 S. Ct. 1658, 1665 (1947). Control was asserted for the first time by the federal government in 1793. Supra note 19. The first definite indication that the United States Supreme Court considered dominion over the maritime belt an attribute of sovereignty came in 1842. Martin v. Lessee of Waddell 41 U. S. 367, 10 L. Ed. 997 (1842).

Land built up by natural causes from the bed of the sea may pass to the littoral proprietor, in which case there would seem to be no question of federal dominion. This is the general common law rule.[32] On the other hand, this land may retain its status as common[33] property. The latter view appears to be supported by the Civil Code.[34] If this land retains its status as common property, but does not remain under federal dominion, control—at least so far as the leasing power is concerned—would appear to be in the state. It appears probable that Louisiana will rule that land submerging so as to become part of the bed of the sea becomes common property.[35] Presumably, this rule will insure federal dominion over all land and works thereon which have become submerged since federal acquisition of the maritime belt. Assuming that federal dominion over the marginal sea extends only to the low water mark, there is still an area of seashore between the high and low water marks which is common property,[36] and apparently susceptible of lease by the state.

The effect of the court's ruling might well be far reaching, comprehending as it does all things of value whatsoever, found within the maritime belt. This category would include, in addition to oil, all minerals whether found in the sea or in its bed, all types of marine life, and any remunerative uses to which the water itself might be put.[37] The right of a state to regulate the fishing rights in the marginal sea off its coasts has been frequently recognized, even to the extent of an exclusion of citizens of other states of the Union desiring to exercise those rights.[38] Continued state regulation, at least to the extent previously permissible, would appear difficult of reconciliation with complete federal dominion, and this would hold true not only in regard to fishing rights, but also with regard to all other things of value found within the area. However, the extent of the "local police power" over the area left to the states remains as yet undefined.

32. Stevens v. Arnold, 262 U. S. 266, 43 S. Ct. 560, 67 L. Ed. 974 (1922).

33. Art. 450, La. Civil Code of 1870.

34. Art. 510, La. Civil Code of 1870. See also Zeller v. Southern Yacht Club, 34 La. Ann. 837 (1882).

35. Arts. 450 and 482, La. Civil Code of 1870. See also Miami Corporation v. State, 186 La. 784, 807, 173 So. 315, 322 (1937). This is the French view. 6 Laurent, Principes de droit civil (2 ed. 1876) 66, no 44.

36. Arts. 450 and 451, La. Civil Code of 1870.

37. In addition to oil, the maritime belt off the coasts of Louisiana is known to contain valuable deposits of sulphur, salt, and shell deposits. The area is also rich in fish, shrimp, and oysters.

38. Corfield v. Corell, Fed. Cas. No. 3,230 (C. C. Wash. 1925); Louisiana v. Mississippi, 202 U. S. 1, 26 S. Ct. 408, 50 L. Ed. 913 (1906).

The scope of the instant decision, and its impact upon established conceptions of the relationship between federal and state powers will soon be tested in the case of *Toomer v. Witsell.*[39] This case presents an attack upon discrimination by state licensing statute in favor of state residents in regard to fishing rights within the maritime belt off the coasts of the state. The Federal District Court (sitting as a three judge court) upheld the validity of the state statute. The validity of discriminatory state regulation of fisheries in the marginal sea off its coasts, at least in the absence of federal regulation, was based principally on the cases of *McReady v. Virginia, Manchester v. Massachusetts, Louisiana v. Mississippi,* and the vessel *"Abby Dodge" v. United States.*[40] *United States v. California* was distinguished as holding that the state was not the owner of the land underlying the marginal sea and had no claim to the oil therein, but as not affecting the right of a state to exercise police power and to regulate fishing in the area. This case was appealed to the United States Supreme Court, has been argued, and is now awaiting decision.[41]

There can be no doubt that the language used in *United States v. California* did not limit federal dominion over the resources of the marginal sea to oil alone, although, of course, the injunction issued was itself so limited. Furthermore, while it is true that the Supreme Court, in the *California* case, expressly recognized the right of the states to exercise police power in this area, it would not seem that the scope of this police power could extend to the enactment of regulatory licensing statutes, a right which is usually considered as flowing only from complete authority over the thing regulated. Police power of the type exercised by the state in keeping the peace in federal post offices, which are subjects of federal ownership and jurisdiction, is one thing; a police power exercised to limit the use of the thing regulated to a certain class of persons is quite another thing. State regulation of fishing rights in the marginal sea might be upheld in the absence of federal regulation, but the power of the state to regulate would not seem to be unlimited, even in that situation.

It follows from federal dominion over the oil beneath the marginal sea that the lessor's royalties and the consideration of the mineral leases therein are due to the federal government. The United

39. 73 Fed. Supp. 371 (1947).
40. All cases, cited supra note 18.
41. 16 Law Week 3259.

States Attorney General has stated, however, that no repayment of revenues collected from these oil deposits prior to the decision in the present case will be demanded from the states.

Any change in the status accorded the marginal sea by this decision is now in the hands of Congress; further manifestations of federal dominion, and consequent limitation of state regulatory power, or a grant of these lands to the respective maritime states must await congressional action.[42] A number of bills proposing a quitclaim of this area to the states have been introduced at the present session of Congress.

JOHN PAUL WOODLEY

CONSTITUTIONAL LAW — THE FOURTEENTH AMENDMENT AND SEGREGATED EDUCATION—The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments theoretically placed the negro in a position of civil and political equality; but, practically, the manner in which the rights bestowed by these amendments are enjoyed is a problem of today. That the negro is entitled to education cannot be seriously denied,[1] but the question of whether or not he may validly complain because in some states such education is separate and segregated from that of white men raises new and complex political and social considerations. *Sipuel v. Board of Regents of University of Oklahoma,* 16 U. S. L. Week 4090, 8 C. C. H. Bull. 339, 68 S. Ct. 299 (1948).

The United States Supreme Court long ago declared that the policy of segregation is a social problem and not within the inhibitions of the Fourteenth Amendment.[2] The leading case of *Plessy v. Ferguson* upheld the constitutionality of this policy and remains today the backbone of judicial precedent on this point.

> "The object of the Fourteenth amendment was undoubtedly intended to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have

42. The recent history of congressional action in regard to the marginal sea is significant. Both houses of Congress passed a joint resolution quitclaiming the area to the States, H. J. Res. 225, 79th Congress, 2d sess. (1946); 92 Cong. Rec. 9642, 10316 (1946), which was, however, vetoed by the President (92nd Cong. Rec. 10660 (1946), and his veto was sustained, 92nd Cong. Rec. 10745 (1946). Congressional disposition of this area would be upheld under the power of the Congress to dispose of property belonging to the United States. U. S. Const. Art. IV, § 3.

1. Sipuel v. Board of Regents of University of Oklahoma, 16 U. S. L. Week 4090, 8 C.C.H. U.S.S.C. Bull. 339, 68 S. Ct. 299 (1948).

2. Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547 (1877).