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# PROBLEMS IN FLORIDA AND OTHER COASTAL STATES CAUSED BY THE CALIFORNIA TIDELANDS DECISION

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Of grave import to the people of Florida is the decision of the Supreme Court of the United States in *United States v. California*.[1] By superimposing the legal doctrine there applied to the tidelands[2] of California upon the coastal waters of Florida, in an analysis of its possible effect on her sovereignty, on her people and on her industries, the magnitude and complexity of the consequences, not only for Florida but for other coastal states as well, are readily apparent.

## I. THE DECISION

The Attorney General of the United States, in an original suit in equity, sought a decree (1) declaring the rights of the United States to the area "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 and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California"; and (2) enjoining California and all persons claiming under it from continuing to trespass thereon.[3] The Court held that California "is not the

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[1]67 Sup. Ct. 1658 (June 23, 1947).

[2]The term "tidelands" is employed in more than one sense. As used in the opinion in this case at p. 1664 it denotes the area between the high-water and low-water marks, probably between mean flood tide and mean ebb tide. In a second, or popular, sense it signifies the area extending from the high-water mark to the limit of the marginal belt of sea claimed. In the least precise sense it relates to the constantly flooded area between the low-water mark and the seaward limit of the marginal belt. This last meaning has been used in the name by which this case is currently mentioned, probably because this is the area transferred by the decision, for all practical purposes, from state to federal ownership.

[3]United States v. California, 67 Sup. Ct. 1658, 1660 (1947). Although the opinion quotes the complaint as claiming "lands, minerals and other things of value underlying the Pacific Ocean," the decision goes a step further, at 1668, and grants to the Federal Government paramount rights in and power over "the three-mile marginal belt," adding that "full dominion over the resources of the soil under that water area, including oil," is "an incident" thereto. The decision, in other words, embraces the ocean and its products, rather than merely the lands and minerals underlying it.

owner"[4] of the marginal area claimed by it, extending three statute miles seaward from the low-water mark on the California coastline. Conversely, however, although this would seem to be an inevitable sequitur, the decision does not explicitly determine the tidelands to be the property of the United States except by the implication to be drawn from these words:[5]

> ". . . the Federal Government rather than the state has paramount rights in and power over that belt [the tidelands area] an incident to which is full dominion over the resources of the soil under that water area, including oil."

As a practical matter California and all persons claiming under it are enjoined from continuing to trespass upon the area in question in violation of the rights of the United States.

Wishful thinking has impelled some general expressions among Florida lawyers to the effect that Florida has a claim to her tidelands superior to that denied California. Careful analysis of the opinion and of the history of the Florida tidelands, however, fails to reveal distinctions which are certain to overcome the concept that "national interests responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt."[6]

## II. Factual Background in Florida

Article I of the Constitution of the State of Florida, adopted in 1885, sets forth the boundaries as they exist today,[7] or at least as they existed

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[4] *Id.* at 1668.

[5] *Ibid.*

[6] *Id.* at 1667; the original lacks a comma after "interests." See note 2 *supra.* Although the decision covers the entire three-mile belt, including resources of the ocean bed, the whole tenor of the reasoning relates to oil and other materials strategic in national defense. A distinction between such materials and sponges, oysters or fish might be made. *Cf.* The Abby Dodge, 223 U. S. 166 (1912); Skiriotes v. Florida, 313 U. S. 69 (1941). Furthermore, the boundaries claimed by Florida extend beyond the limit of three nautical miles awarded the United States.

[7] Fla. Const. Art I provides: "The boundaries of the State of Florida shall be as follows. Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; thence due east to the Chattahoochee river; thence down the middle of said river to its confluence with the Flint river; thence straight to the head of the St. Mary's river; thence down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to, and including the Tortugas Islands; thence

until the *California* decision. The tidal shoreline of Florida totals 1,221 miles, of which 714 outline the mainland and 507 surround islands.[8] These figures do not take into account the numerous indentations, inlets, cuts, bayous, elbows, necks, sounds, bays, and estuaries.

The management of the tidelands is vested in the Trustees of the Internal Improvement Fund of the State of Florida, composed of the Governor, Comptroller, Attorney General, Treasurer, and Secretary of Agriculture.[9] Since approximately 1853 they have administered the submerged lands of Florida, both inland and coastal.

These lands have been leased for the removal of oyster and coquina shell, marl, lime rock, ilmenite, zircon, salt, seaweed, logs, precious metals and buried treasure. They are used for public ports, docks, seaplane runways, oyster farms and a host of other useful and productive purposes with which the state officials have long been familiar. In recent years they have been leased for oil exploration, the legality of which action has been upheld by the Supreme Court of Florida.[10] Millions of dollars have been invested in projects along the coastline, and still further millions have been expended in filling in land and artificially extending the low-water mark

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northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land to a point west of the mouth of the Perdido river; thence to the place of beginning."

The Florida Constitution of 1868 (Art. I) set the boundary at three leagues; that of 1865 (Art. 12) at five leagues; while the earliest Constitution, adopted in 1838, provided (Art. XII): "The jurisdiction of the State of Florida shall extend over the Territories of East and West Florida, which, by the treaty of amity, settlement, and limits, between the United States and His Catholic Majesty, on the 22d day of February, A. D. 1819, were ceded to the United States." The government of the Territory of Florida, consisting of the territory ceded by Spain, was established March 30, 1822 (3 STAT. 654). Florida was first admitted into the Union as a state March 3, 1845 (5 STAT. 742), and on July 4, 1868, after the War Between the States, a formal transfer from the military to the civil authorities was made (25 FLA. STAT. ANN. 326).

[8]C. Wythe Cook, Ph.D., of the United States Geological Survey, a digest, by permission from FLORIDA GEOLOGICAL SURVEY, Bulletin 17, in ALLEN MORRIS, THE FLORIDA HANDBOOK 1947-1948, 122.

[9]FLA. STAT. 1941, c. 253.

[10]Watson v. Holland, 155 Fla. 342, 20 So.2d 388 (1944), *application for extension of time within which to file cert. denied,* 325 U. S. 839 (1944). The Gulf area of Florida is now covered by oil leases from the Trustees of the Internal Improvement Fund to Gulf Refining Company, Magnolia Petroleum Company and Coastal Petroleum Company.

outward into the sea. On this land costly buildings and facilities have been constructed. The title to these areas derived from the Trustees of the Internal Improvement Fund over many years under the belief that the underwater lands belonged to the State of Florida.[11]

## III. The Dissents and Previous Law

That the reasons advanced and conclusion reached in the majority opinion would evoke strong dissents was to be expected. Mr. Justice Reed, dissenting, takes the view that the marginal belt is owned by California, which was admitted on an equal footing with the original thirteen states in all respects. As regards their ownership he states:[12]

> "The original states were sovereignties in their own right, possessed of so much of the land underneath the adjacent seas as was generally recognized to be under their jurisdiction. The scope of their jurisdiction and the boundaries of their lands were coterminous. Any part of that territory which had not passed from their ownership by existing valid grants were [*sic*] and remained public lands of the respective states."

The majority opinion attempts to answer this merely by showing that there was dispute among maritime nations at that time with regard to the precise extent of the marginal belt, and also as to the variations, both in distances claimed and methods of measurement employed, occasioned by differences of activity within the belt, such as fishing, maintenance of neutrality and control of navigation. This is a far cry, however, from the wholly unsupported assumption that maritime states, including as a matter of international law the thirteen sovereign states that later created the Federal Government, claimed no marginal belt whatever. Such a proposition can find no support, either in law or in history.[13]

Finally, the fundamental principle of our constitutional law that powers and rights not expressly granted to the Federal Government are

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[11]Holland v. Fort Pierce Financing & Const. Co., 157 Fla. 649, 27 So.2d 76 (1946); *accord,* United States v. Mission Rock Co., 189 U. S. 391 (1903); *see* Brickell v. Trammell, 77 Fla. 544, 559-563, 82 So. 221, 226-227 (1919).

[12]United States v. California, 67 Sup. Ct. 1658, 1671 (1947).

[13]Jessup, The Law of Territorial Waters and Maritime Jurisdiction xxxiv, 3, 7, 65 (1927); 1 Oppenheim, International Law 333-341, 452-453 (3d ed., Roxburgh, 1920); Hall, International Law 154-155 (7th ed., Higgins, 1917); Bynkershoek, De Dominio Maris Dissertatio, c. 2 (2d ed. 1744); 1 Hackworth, Digest

reserved to the sovereign states was completely disregarded.[14] Even assuming that the claims of the thirteen original states were nebulous, at least whatever they claimed in the way of ownership was never granted to the Federal Government. Conceding that support for state ownership of territorial waters could be stronger than it is, the fact remains that there is no support whatever for federal ownership as against the states, unless, as will appear further on, there be some practical argument inducing federal seizure.

Mr. Justice Frankfurter, in a dissent as searching as it is brief, maintains that Congress rather than the Supreme Court is the appropriate agency for the determination of issues of the type involved,[15] and that no threat to proper performance of the functions of the Federal Government, a point stressed in the majority opinion, has been in any manner indicated. The following passage in his opinion stands unanswered:[16]

> "To speak of 'dominion' carries precisely those overtones in the law which relate to property and not to political authority. Dominion, from the Roman concept dominium, was concerned with property and ownership, as against imperium, which related to political sovereignty. One may choose to say, for example, that the United States has 'national dominion' over navigable streams. But the power to regulate commerce over these streams, and its continued exercise, do not change the imperium of the United States into dominium over the land below the waters. Of course the United States has 'paramount rights' in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted—and rights of ownership are something else."

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OF INTERNATIONAL LAW, 612, 623-642, 694 (1940); Fraser, *The Extent and Delimitation of Territorial Waters,* 11 CORN. L. Q. 455 (1925); Manchester v. Massachusetts, 139 U. S. 240, 257-258 (1891).

[14]U. S. CONST. AMEND. X provides: "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."

[15]United States v. California, 67 Sup. Ct. 1658, 1671 (1947).

[16]*Id.* at 1670.

He accordingly advised that the bill be dismissed without prejudice.[17]

The United States alleged that it was the "owner in fee simple of, or possessed of paramount rights in and powers over," the lands and minerals in question.[18] Many lawyers have pondered the omission from the majority opinion not only of all reference to fee simple[19] but also of an affirmative statement that the tidelands are owned by the United States. Certainly, in dealing with concepts so fundamental, these omissions can hardly be due to mere inadvertence. Analysis indicates strongly that they were occasioned by lack of logical, legal or historical support for the position taken, and by the normal urge to attempt explanation of the decision without openly destroying the established law.[20]

The *Skiriotes* case,[21] on the basis of decision adopted by the Supreme Court, has little if any bearing on the matter, since the decision itself did nothing less—and nothing more—than confirm the power of Florida to regulate the conduct of its own citizens on the high seas with respect to matters in which it has a legitimate interest and in which there is no conflict with federal law. The opinion, however, refers to fishing for sponges "within the territorial waters of Florida"[22] in connection with the exercise of state police power; and it is common knowledge that the Florida sponge beds are located in the Gulf of Mexico rather than in bays. The obvious implication is that Florida has territorial waters along its coast.

*Manchester v. Massachusetts*[23] sustained the right of the state to control menhaden fisheries in a bay at the mouth of which the headlands were separated by less than two marine leagues, or six modern nautical miles. The violation was committed by a citizen of Rhode Island. The right of Congress to control these fisheries was expressly not considered, as no relevant federal statute then existed. Similarly, *Louisiana v. Mississippi*[24] established the boundary between the two litigating states in inland waters only. State ownership of the beds of all tidewaters within state jurisdiction

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[17]*Id.* at 1671.

[18]*Id.* at 1660.

[19]Sir Edward Coke states that "a man cannot have a more large or greater estate of inheritance than fee simple." Co. Litt. *18a; United States v. Hyde, 132 Fed. 545, 550 (1904); Woodberry v. Matherson, 19 Fla. 778, 785 (1883).

[20]See note 13 *supra* and note 30 *infra.*

[21]Skiriotes v. Florida, 313 U. S. 69 (1941).

[22]*Id.* at 75.

[23]139 U. S. 240 (1891).

[24]202 U. S. 1 (1906).

was unequivocally pronounced in *McCready v. Virginia*,[25] and was necessary to the decision that Virginia could fine a Maryland citizen for planting oysters in Ware River where the tide ebbed and flowed, and where Virginians alone were allowed by statute to plant. Coastal waters, however, were not involved in the facts of the case.

The decision in *The Abby Dodge*,[26] however, rests squarely on the principle that state territorial waters, geographically speaking, belong to the state as a matter of law. The waters involved were coastal, and not inland. Appellant had been fined for violating a federal statute forbidding the landing in the United States of sponges taken in certain proscribed manners at prohibited times in the Gulf of Mexico and the Straits of Florida. Since the libel did not specify whether the sponges had been taken in Florida territory or on the high seas, the decree below was reversed with leave to amend the libel so as to show, if such were the facts, a taking on the high seas and therefore in foreign commerce and subject to federal jurisdiction. Obviously the decision would have been just the opposite if the coastal belt had been held to belong, as a matter of law, to the United States rather than to Florida.

The observation of Mr. Justice Reed that "state ownership" of marginal lands "has been assumed"[27] in decisions relating thereto is amply sustained. For example, in *Manchester v. Massachusetts* the Court stated emphatically:[28]

> "The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State."

This quotation was preceded by the following:[29]

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over the tide-waters is a marine league from its coast . . . ."

The basic assumptions, and in some instances the holdings, of the other leading cases take for granted state sovereignty over the marginal belt.[30]

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[25]94 U. S. 391 (1876).
[26]223 U. S. 166 (1912).
[27]United States v. California, 67 Sup. Ct. 1658, 1672 (1947).
[28]139 U. S. 240, 264 (1891).
[29]*Id.* at 258.
[30]C. J. Hendry Co. v. Moore, 318 U. S. 133, 134-135 (1943); Borax Consolidated

## IV. The Practical Difficulties Raised

It is not the province of this article to trace in detail the history of marginal belts as claimed by the different maritime states of the world in varying degrees for various purposes. The significant fact is that the legality of a marginal belt of at least some dimensions was established prior to the creation of the Federal Government by the states.[31]

*Inland waters.* The problem of what constitutes inland waters, as distinct from coastal waters, was not of major import prior to the *California* decision, but in view of the new distinction set up between the two the task of delineation becomes vital. This field in itself would require an entire article, but some of the difficulties can at least be mentioned here. Is the test of the character of a bay mere visibility from headland to headland at its mouth? If so, is discernment of the other headland sufficient, or must people and objects thereon be distinctly discernible? Is the limit a fixed distance of six nautical miles from headland to headland? Or is effective control of the entrance by shore batteries the test? Or should some other test be applied?[32]

In *Pollard's Lessee v. Hagan*[33] the title to lands in Mobile, formerly flooded at high tide, was in dispute. The Court held that Alabama rather than the United States held these lands, and that accordingly a patent from the United States could give no title thereto. The doctrine that Alabama, by virtue of its admission into the Union on an equal footing with the original thirteen states, had thereby become the owner of the tidelands within its boundaries was recognized in the *California* case to the extent of stating that California has "a qualified ownership of lands under inland navigable waters such as rivers, harbors, and even tidelands down to the

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v. Los Angeles, 296 U. S. 10, 15, 22 (1935); New Jersey v. Delaware, 291 U. S. 361, 371, 374-376 (1934); Appleby v. City of New York, 271 U. S. 364, 381 (1926); Shively v. Bowlby, 152 U. S. 1, 11, 13, 57-58 (1894); Knight v. United States Land Ass'n., 142 U. S. 161, 183 (1891); McCready v. Virginia, 94 U. S. 391, 394-395 (1876); Smith v. Maryland, 18 How. 71, 74, 76 (U. S. 1855); Pollard's Lessee v. Hagan, 3 How. 212, 230 (U. S. 1845); Martin v. Waddell, 16 Pet. 367, 410 (U. S. 1842); Lipscomb v. Gialourakis, 101 Fla. 1130, 133 So. 104 (1931); Dunham v. Lamphere, 3 Gray 268 (Mass. 1855).

[31]See notes 13 and 30 *supra.*

[32]Manchester v. Massachusetts, 139 U. S. 240, 263, 258 (1891); Bynkershoek, *op. cit. supra,* note 13, c II, III; Jessup, *op. cit. supra,* note 13, at 355 *seq.;* Fraser, *supra* note 13, at 473-477.

[33]3 How. 212 (U. S. 1845).

low water mark."[34] If the Gulf of Mexico be an inland water, then Florida may retain title to its submerged areas on the Gulf side. Although the size of the Gulf, the nature of its boundaries, and the width of its connections with other bodies of water all point to the conclusion that such a contention is probably untenable, it has at least been made. Recently, in the determination of a boundary line in an oil lease, a company took the position that the Gulf of Mexico is an inland water and that Florida has the power to lease, for oil exploration, lands extending as far as 60 miles into the Gulf.[35]

This problem of inland waters affects other states as well. Logically, the Great Lakes are no more inland waters than are the Black Sea, the Red Sea or the Mediterranean. What, then of iron ore deposits under the Great Lakes? Unless that area be arbitrarily designated inland water, over half of the states are directly and seriously affected by the new law just established.

Pursuing the analysis a step further, what remains of the inland water doctrine now? If a state owns to the low-water mark only, do inland waters exist any longer unless completely surrounded by the dry land of one state at low tide? If, however, some new theory is to be advanced regarding certain bays, on what principle should it be based? Again, the Florida Keys consist of a chain of small islands. Logically, under the new law of the Supreme Court, each island still belongs to Florida, but the water and submerged lands between them, however limited in extent, are federal.[36]

*Territory beyond the three-mile belt.* To add to the confusion that inevitably follows the *California* decision, the boundary claimed by Florida is three marine leagues, with some exceptions, or nine nautical miles.[37] The California boundary extended three statute miles into the ocean; the

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[34]United States v. California 67 Sup. Ct. 1658, 1664 (1947).

[35]Minutes of Trustees of Internal Improvement Fund for September 1947, not yet printed.

[36]This matter is not purely academic. The Overseas Road and Toll Bridge District issued bonds to finance the highway to Key West. Over 40 miles of road, bridges and causeway, valued at more than $40,000,000 and including one bridge some six miles long, have been constructed along the course of the island chain. By a lease-purchase agreement involving servicing of the bonds this highway was taken over by the State Road Department. Refunding bonds have been issued and were validated in State v. State Board of Administration, 157 Fla. 360, 25 So.2d 880 (1946). It now appears that much of this highway has unwittingly been built on federal property.

[37]See note 7 *supra*. This is approximately 10.36 statute miles.

United States claimed three nautical miles; or .45 of a mile beyond the California boundary. If, however, the California decision be applied to Florida, it may embrace three nautical miles only, leaving the beaches in trust for the public, the Federal Government owner of the next three nautical miles, and Florida owner of the next six nautical miles seaward, separated from the coastline by the strip owned by the United States. This is stated purely as conjecture, since it is presumed that if the tidelands belong to the United States and not to California for three nautical miles, the Federal Government would extend its claim to the Florida tidelands to the full extent of Florida's boundary, or nine nautical miles from the low-water mark. This is by no means certain, however, and no brilliant light is shed on the subject in the *California* opinion.

*Police Power.* The Supreme Coure discusses the matter of local police power functions over the marginal sea as follows:[38]

> "Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area. Consequently, we are not persuaded to transplant the Pollard rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. 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 water mark, 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."

This can hardly be construed as a final holding eliminating the police power of the state. Yet if it does not do so, just what is its effect?

Generally, the purchase by the Federal Government of state lands within state boundaries requires the cession of jurisdiction to the Federal Government before full jurisdiction of the federal courts can attach.[39] In the tidelands decision, however, the boundaries claimed by the State of California were diminished and in effect a new boundary line drawn, and all land lying seaward of that boundary became the property of the United

[38]United States v. California, 67 Sup. Ct. 1658, 1667 (1947).

[39]James v. Dravo Contracting Co., 302 U. S. 134 (1937); *see* Surplus Trading Co. v. Cook, 281 U. S. 647, 650-652 (1930); Fort Leavenworth R. R. v. Lowe, 114 U. S. 525, 531, 539 (1885).

States. The opinion takes the position that this area never has been the property of California;[40] therefore it follows that no cession of jurisdiction from the state is required in order to give the Federal Government control over the area. California's political authority and police power cease where its boundaries end.[41] It may be confidently expected that some case will soon develop demonstrating that the *California* decision has abolished state power to control and regulate the waters which previously had been considered within its boundaries. There do not appear to be any legal principles granting a state jurisdiction over criminal acts started and completed outside its boundaries.

Certainly the tidelands of America, as closely interwoven as they are with the commerce and activity of the people of the several states, cannot be considered as a jurisdictional no-man's land. Accordingly Congress, unless it returns the law to its former status, will be faced with the necessity of enacting legislation to provide for federal control of all activities in these waters; as long as they are the exclusive property of the United States, they can be disposed of and regulated by act of Congress only.[42] It seems inconceivable that Congress would go so far as to set up a new federal bureau or agency, or to confer power on some already existing agency, to assume the control which the various states have exercised for decades over this great domain in all respects except navigation. Government will be further removed from the people, instead of being brought closer to them, if fishing, cultivating oysters, building docks and ports, removing seaweed, oyster and coquina shell, digging oil wells and engaging in all other activities in the marginal sea are controlled by bureaus in Washington. Yet the decision leads to precisely this.

*Vested rights and interests.* The *California* decision recognizes that, regardless of the prior ownership of the tidelands, rights previously considered vested have arisen as the result of dealing with this area as property of the State of California.[43] It recognizes that many improvements have been made "along and near the shores at great expense to public and private agencies."[44] It left to Congress the entire responsibility of working

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[40]United States v. California, 67 Sup. Ct. 1658, 1665, 1668 (1947).

[41]N. Y. Life Ins. Co. v. Head, 234 U. S. 149 (1914); Mississippi and Missouri R. R. v. Ward, 2 Black 485 (U. S. 1862); United States v. Bevans, 3 Wheat. 336 (U. S. 1818); *see* American Fire Ins. Co. v. King Lumber Co., 250 U. S. 2, 11 (1918).

[42]U. S. CONST. Art. IV, §3.

[43]United States v. California, 67 Sup. Ct. 1658, 1668-1669 (1947).

[44]*Id.* at 1669.

out a fair settlement of the respective claims arising from the situation in California, and presumptively in all other states, when it said:[45]

> ". . . we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission."

Accordingly it seems probable that in any legislation adopted Congress will not demand an accounting to it for the use made of the tidelands, or for revenues derived by the states therefrom, prior to the *California* decision or during such reasonable period thereafter as may be required to achieve final settlement of the matter by Congressional action. This, however, does not meet the major difficulties.

The developments in the tidelands include extensive oil fields in California, Texas and Louisiana. Docking facilities, oil and coal stations, ports and military bases (the latter established, incidentally, by the Federal Government after getting permission from the different states involved) are constructed on the tidelands of the various states. In many instances it seems evident that the fixing of low-water mark, and any rule adopted for determining the line between the inland waters and the ocean areas, will physically cut through many of these projects. Some ports were built on lands granted by the state with the aid of funds advanced by federal corporations; others, by private capital. How the precise rights of private interests that have invested their money in such projects can ever be determined following this overnight switch of landlords, when the difficulties of fixing the boundaries afresh are so serious, is beyond conception as a practical proposition unless Congress conveys the title back to the states.[46]

To be sure, the Supreme Court intimates and even suggests that in these instances Congress should execute its power in such a way as to avoid injustices to states, their subdivisions or private interests affected.[47] The fact remains, however, that any general rule will of necessity perpetrate serious injustices, though formulated with the best of intentions. The al-

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[45]*Ibid.*

[46]Several bills are in process of preparation for introduction in Congress which will, if enacted into law, revest title and jurisdiction over the tidelands in the respective states. As will be noted in its 1947 Minutes, the National Conference of State Governors has adopted resolutions memorializing Congress in favor of such legislation. So have numerous other groups, such as the Interstate Oil Compact Commission (Minutes of Aug. 12, 1947).

[47]United States v. California, 67 Sup. Ct. 1658, 1669 (1947).

ternative is to examine the merits of thousands of special acts covering particular circumstances. And in any event, a flood of litigation may reasonably be expected, by states as well as by individuals.[48] Strictly speaking, it is probably true that "demarcation of the boundary is not an impossibility."[49] But it is equally true that government is, or should be, a practical means of living together rather than an unnecessary legal labyrinth through which the unfortunate laymen are forced to grope their way for the better part of their lives.

## V. The Alleged Dangers of State Ownership

The opinion of the Court bases its refusal to countenance state ownership of the respective marginal belts on the ground that the United States alone regulates foreign commerce; that it alone conducts our relations with other nations; and that it alone undertakes the defense of the several states and bears the responsibility for waging war. The Court obviously regards the supply of oil available to the United States as a matter of such grave import that this warrants paramount right and power in the Federal Government to determine in the very first instance where, when, how, and by what agencies, either foreign or domestic, the oil and other resources of the marginal sea, whether now known or hereafter discovered, may be exploited.[50]

The first and obvious answer is that the United States is in fact not only an outstanding commercial and industrial nation, but has also achieved the distinction, unique among larger nations, of struggling through

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[48]The Governor of Florida, in an address delivered before the Texas Midcontinent Petroleum Institute in San Antonio in October 1947, stated that Florida would certainly litigate the question before surrendering her tidelands to the United States. The interests of the other Gulf states are equally vital, as the following table shows:

Alabama—6 leagues—Ala. Const. Art. II, §37.

Louisiana—27 marine miles—La. Acts 1938, No. 55, §1; La. Gen. Stat. §9311.1 (Dart 1939).

Mississippi—6 leagues—Miss. Const. Art. 2, §3.

Texas—edge of continental shelf—Tex. Laws 1947, c. 253.

The Texas boundary extension became effective May 23, 1947, just one month prior to the *California* decision. Formerly its boundary was similar to that of Louisiana, or 27 marine miles (Tex. Stat. Art. 5415a, Vernon, Supp. 1942). The present Louisiana boundary was established in 1938; as to constitutional and international law issues involved see 39 Col. L. Rev. 317 (1939).

[49]United States v. California, 67 Sup. Ct. 1658, 1662 (1947).

[50]*Id.* at 1666-1667.

to victory somehow in every war it has ever fought,[51] in spite of the alleged evils of state ownership of the marginal sea. The second answer is that the division of powers and duties between the Federal Government and the states was deliberately and carefully set forth in the Constitution,[52] and the citizens of this country have not yet seen fit to alter the compact in this respect, even though the Constitution provides methods of doing so.[53]

Certainly oil is no more important for purposes of war and foreign commerce than steel, or coal, or certain other products. The next step, logically, having in practical effect overruled *The Abby Dodge*[54] in the *California* case, is to overrule the *Pollard* case[55] wherever strategic materials under inland waters are found, and to assign these to the Federal Government. The final step is to overrule the other cases that stand in the way and allocate to the Federal Government all strategic resources wherever situated. Once the process has begun, on the basis outlined in the *California* case, there is no logical reason for halting only one third of the way.

Finally, of course, what is probably the best answer to the reasons advanced in the majority opinion is succinctly enunciated in the passage quoted[56] from Mr. Justice Frankfurter, namely, that all those "paramount rights" so eloquently championed in the majority opinion were already possessed by the Federal Government prior to the *California* decision. The war power, the commerce power, the treaty-making power and the power of eminent domain have long been in active use, with results deemed adequate until the *California* decision.[57] The power of eminent domain requires compensation to the state for the property seized,[58] but it has always

[51]An exception to this statement, technically quite tenable, may be found in the Seminole Wars.

[52]See note 14 *supra*.

[53]U. S. CONST. Art. V.

[54]223 U. S. 166 (1912).

[55]Pollard's Lessee v. Hagan, 3 How. 212 (U. S. 1845).

[56]See text *supra* p. 48.

[57]See note 59 *infra* (war power); United States v. Darby, 312 U. S. 100 (1941) (commerce clause); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, concluded 883 (1946); Santovicenzo v. Egan, 284 U. S. 30 (1931) (treaty-making power); note 58 *infra* and United States v. Powelson, 319 U. S. 266, 279 (1943) (eminent domain).

[58]Town of Bedford v. United States, 23 F.2d 453 (C. C. A. 1st 1927); Wayne County v. United States, 53 Ct. Cl. 417 (1918), *aff'd.* 252 U. S. 574 (1920); *see* St. Louis v. Western Union Tel. Co., 148 U. S. 92, 101 (1893); Jefferson County v.

seemed fundamental to most American statesmen and jurists that the expense of national projects, precisely because they are national, should be nationally borne rather than saddled exclusively upon maritime states or some other class of states. The *California* decision, however, in its combination disposal of the questions of fee simple title and political dominion, seems to have taken from the several coastal states not only the ownership of submerged oil lands but also the right to control all use of the tidelands. The states, under the dual sovereignty system obtaining prior to this decision, managed the development and exploration of tideland resources most successfully, yet without conflicting with the superior rights of the Federal Government.

During war, as the last two have conclusively demonstrated, the United States has evidenced adequate authority to enact legislation placing all the resources of the nation, including oil, at the disposal of the Federal Government to any extent that the exigencies of the situation have demanded.[59] We are not at war now; Congress can readily pass legislation revesting title to coastal lands in the states affected, with such further restrictions on state power to exploit oil resources as may be required to guarantee the availability of that oil for use by the Federal Government in reservoir pools, if necessary, and certainly for immediate use in war or upon threat of war. This would be a far sounder solution, it is submitted, than placing oil under the direct control of the Federal Government, at the expense of creating chaos among the states and those individuals and various other interests that have invested their money, time and ingenuity in the exploitation of the tidelands.

As a practical matter it should also be noted that if oil be considered the most vital issue in connection with the tidelands, the Federal Government has not been famous for any remarkable successes in either exploration for or production of oil in time of war or peace. Certainly nothing has been presented on the record to substantiate the view that under federal ownership of the tidelands, as against our traditional system of state-regulated development by private enterprise, more oil

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TVA, 146 F.2d 564, 565 (C. C. A. 6th 1945).

[59]See, *e.g.*, SECOND WAR POWERS ACT, 56 STAT. 176 (1942), as amended, 50 U. S. C. A. § 631 (1944); EMERGENCY PRICE CONTROL ACT, 56 STAT. 23 (1942), as amended, 50 U. S. C. A. §901 (1944); Hirabayashi v. United States, 320 U. S. 81 (1943); *see* United States v. MacIntosh, 283 U. S. 605, 622-624 (1931).

or other resources will be discovered, produced and made available to the citizens of the United States.

## VI. The Constitutional Issues and the Solution

The constitutional issues involved reach far beyond the mere question of oil supply for war. Basically the question is whether the citizens of the various states desire to be governed, in the traditional manner, by local agencies familiar with the practical problems at hand and subject via the ballot and otherwise to the effective control of those governed, or whether they prefer to have their economic life run by scores of bureaus located hundreds of miles away and subject as a practical matter to no control at all. Carefully analyzed, the *California* decision gives the Federal Government no needed rights not already possessed; it merely shifts the ownership of, and revenue from, local property of tremendous value that for decades has been treated as state property. It constitutes nothing more nor less than one more major step toward the steady economic strangulation of the states and the destruction of their capacity to serve their citizens. Perhaps this change is desired, but if so it should be decided squarely by the American people in the manner provided in the Constitution, and not by judicial fiat.

Viewed from another angle, this decision sets another milestone along the road of assumption of the legislative function by the judiciary.[60] Admittedly Congress has been slow in acting upon the matter. After years of debate a joint resolution was passed by both Houses in 1946,[61] quitclaiming to the states any title of the United States to lands below the waters within their boundaries—only to be vetoed by the President. While at first glance one might infer from this delay a lack of diligence in legislating, the more probable explanation is that Congress possessed a full realization, unfortunately not grasped by a majority of the Supreme Court, of the complexity and practical difficulty of the problems involved. Speed in matters of such weight is not always the most desirable factor.

The *California* decision has accomplished one thing; it has removed all legal barriers to reservations by Congress, if it quitclaims to the states, of any federal powers desired and not already possessed. It has

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[60]For an excellent recent example of judicial self-restraint see United States v. Standard Oil Co. of California, 67 Sup. Ct. 1604 (1947).

[61]H. R. Doc. No. 765, 79th Cong., 2d Sess. (1946); see Comment, 56 Yale L. J. 356 (1947).

also increased substantially the need for reassertion by Congress of its prerogatives under the Constitution. This time the blow has fallen on the coastal and Great Lakes states, but the inland states are not immune to similar attack from a different angle in the future. It is to the interest of every state, whether inland or coastal, that Congress nullify the unfortunate effects of the *California* decision and restore the law as recognized for over a century and a half. This decision, left standing, will inevitably create severe economic hardships and bitter litigation that will crowd the courts and stagnate tidelands development for many years to come.

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