No. 9. Original

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

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It is not every day that a litigant who has twice won all he sought complains that he should also have been awarded the same prize on still other grounds. Yet, that is now the stance of the defendant States in this case. The Special Master's Report recommends a decree that would vindicate the claims of Alabama and Mississippi in full—allocating to those States every acre in dispute. What is more, the Master supports that result on two independent bases: (1) by finding a "juridical bay" encompassing the whole of Mississippi Sound, premised on treating Dauphin Island as an extension of the mainland; and (2) by concluding that the United States, and therefore the States, acquired title to the Sound as an "historic bay." As the unsuccessful party, we have, naturally enough, challenged both rulings. U.S. Br. 6-20, 20-33. The surprise is that the States have also filed Exceptions to the Master's Report, together with elaborate supporting arguments.

We are perhaps entitled to derive some comfort from this unusual circumstance. Of course, Alabama

and Mississippi are entirely free to quarrel with the Master because he rejected some of their contentions, albeit he reached the same result for other reasons. But one may ask why those who have prevailed on two arguments insist that they should also win on as many as three additional grounds. The only apparent explanation is that the States are not sanguine about the soundness, and therefore the viability, of their tentative victory if it must rest on the Master's Report. We agree that they have cause for concern. But, in our view, the attempt to shore up the recommended decree with new props is equally unavailing.

I. MISSISSIPPI'S EXCEPTIONS

Mississippi's Exceptions are all the more extraordinary because, in each instance, the complaint is that the Special Master did not take it upon himself to rewrite the governing principles in disregard of this Court's clear precedents. As we detail in a moment, Mississippi is in effect re-arguing points firmly settled many years ago in this very case or in related proceedings involving Louisiana. Obviously, the Master was bound by those rulings. The Court itself is presumably free to reconsider them. But, in the context of sovereign claims to land, there are at least two reasons to decline the invitation.

The first is simply the strong tradition against disturbing real property rights and the rules that control title. See *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 17-18 n.10; *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 13-14. Equally important, however, is the rudimentary principle that the States are members of the Union on an equal footing. That doctrine is relevant here. *E.g.*, *United States* v. *Maine*, 420 U.S. 515, 523, 527-528 (1975); *United States* v. *Texas*, 339 U.S. 707, 717-718 (1950). As the Court has expressly held, the rules of the international Conven-

tion on the Territorial Sea must be applied uniformly to all coastal states. *Louisiana Boundary Case*, 394 U.S. 11, 33-34 (1969). See also *id.* at 72-73.[1] Accordingly, a special conservatism is appropriate here in avoiding a revision of coastline delimitation principles that controlled earlier controversies. Mississippi ought fare no better and no worse than its sister, Louisiana. Cf. *United States* v. *Louisiana*, 363 U.S. 1, 83 n.140 (1960).

With this preamble, we turn to consider seriatim the three Exceptions submitted by Mississippi.

A. Article 4 straight baselines

In its two first Exceptions (Miss. Br. 3), argued together (*id.* at 7-17), Mississippi contends that the "straight baseline" system condoned by Article 4 of the Convention on the Territorial Sea (App., *infra*, 1a-5a) should be applied to the area of Mississippi Sound, notwithstanding the deliberate decision of the United States not to adopt that method of coastline delimitation for this or any other area. This plea is, on its face, directly contrary to the Court's express holding that "the choice * * * to use the straight-base-line method for determining inland waters * * * rests with the Federal Government, and not with the individual States," and the corollary that this Court will not "review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders" by invoking the "optional method" of Article 4. *United States* v. *California*, 381 U.S. 139, 168 (1965); *Louisiana Boundary Case*, 394 U.S. at 72, 73. The pres-

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[1] For the Court's convenient reference, we have reproduced in an appendix, pages 1a-5a, *infra*, the full text of Articles 1, 3, 4, 5, 6, 7, 10 and 14 of the Convention. Although the effect of most of the provisions is undisputed, each is of some relevance to the issues presented.

ent attempt to circumvent those rulings should be rejected.

The only circumstance in which a current disclaimer of straight baselines by the federal Executive might be ineffective is where, as a matter of "firm and continuing international policy," the United States has, "in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention," and the Government now seeks to "abandon" that "consistent official international stance" "solely to gain advantage in a lawsuit to the detriment of [a State]." *Louisiana Boundary Case*, 394 U.S. at 74 n.97. But this is not remotely such a situation, as this Court effectively ruled when it rejected an identical claim by Louisiana. 420 U.S. 529 (1975).

1. It has not been shown that the United States at any time—much less for a sustained period—maintained a "consistent official international stance" of drawing straight baselines which clearly did, or by necessary implication would, enclose Mississippi Sound. At best, the available materials point to *inconsistent* positions, usually taken in a *domestic* litigation context, or reflect *unofficial* views. The only conclusion, as this Court and the International Court of Justice have both indicated, is that no clear international law rules on the definition of "inland waters" existed before the Convention on the Territorial Sea and that, in any event, the international stance of the United States was vacillating and uncertain. See *United States* v. *California*, 332 U.S. 19, 32-33, 37-38, 39-40 (1947); *United States* v. *California*, 381 U.S. at 163 n.27, 165-166 & n.33; *United Kingdom* v. *Norway*, [1951] I.C.J. Rep. 116, 131.

What is more, any change in the position of the United States certainly was not motivated by domestic considerations. When the United States adhered

to the Convention on the Territorial Sea in 1961, it was not supposed this would affect federal-state boundaries under the Submerged Lands Act. Indeed, in the ensuing several years we argued *against* the relevance of the Convention for such internal controversies, but this Court ruled otherwise. *United States* v. *California,* 381 U.S. at 164. Yet, the United States has eschewed the straight baseline method of coastline delimitation from the beginning, well before the domestic implications were known. That we persist in the stance—declining to draw straight baselines anywhere, including Mississippi Sound—cannot be presumed to be for the purpose of "gaining advantage" over Mississippi and Alabama, much less "solely" with that objective. Moreover, such a *continuation* of prior policy disclaiming the benefit of Article 4 obviously is not the kind of suspect "abandonment" of an international stance to which the Court adverted.

2. If any doubt remained, it was put to rest when the Court and its Special Master confronted the identical issue in the *Louisiana Boundary Case* after the decision rendered in 1969. Invoking the caveat in that opinion we have just noticed, the State argued that the United States had, in practice, employed a straight baseline approach to enclose several areas that did not qualify as bays under Article 7 of the Convention—including Caillou Bay and the whole of East Bay—and could not successfully abandon that stance. See Special Master's Report of July 31, 1974, at 7-13. The evidence in support of that contention was, for the most part, the same as it is here, including statements by State Department officers, by the Secretary of the Interior and by the Solicitor General. But the Special Master summarily rejected the plea. *Id.* at 13. And the point received no better reception from the Court itself when it was renewed

on exceptions. See Exceptions of the State of Louisiana (filed Nov. 1974) at 16-22, 46-59, 62-66, 123-129, and App. I, at 7-19, 35-45, 59-136, 129-145, 184-200, overruled, 420 U.S. 529. There is no arguable justification for giving the identical argument more favorable treatment now that it is advanced by neighboring Mississippi. See also U.S. Br. 22, 24, 26-33.

B. Mississippi Sound as a bay without treating Dauphin Island as a mainland extension

Perhaps the boldest feature of Mississippi's Exceptions is the extensive argument (pp. 17-39) devoted to the theme that the whole of Mississippi Sound qualifies as a juridical bay under Article 7 of the Convention even if the Court rejects (as we believe it should) the Special Master's recommendation that Dauphin Island be treated as an extension of the mainland. As we understand the contention, the State is *not* suggesting a closing line to Mobile Point (which would exceed 24 miles) or a unitary bay embracing the waters of Mobile Bay. See, *e.g.*, U.S. Br. App. 1a, Chart 1. Rather, the putative bay is closed at the east by a line from Petit Bois Island to Dauphin Island and another line from Dauphin Island northerly to Cedar Point on the mainland. This is the same area defined as a juridical bay by the Special Master, but in his case on the premise that Dauphin Island should be treated as an extension of the Cedar Point mainland. Mississippi insists the premise is unnecessary, and thereby sets itself at odds with at least two propositions expressly announced by this Court.

1. It seems perfectly plain on the face of the Convention that Article 7(2) (App., *infra*, 3a) requires of a bay, before it qualifies as such, that it meet the semi-circle test *and* that it be "a well-marked indentation whose penetration is in such proportion

to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." What is more, we read the Court's opinion in the *Louisiana Boundary Case*, 394 U.S. at 54, as unambiguously so holding. Accordingly, we will not follow Mississippi through the "legislative history" of the Convention. Miss. Br. 25-34. We accept the proposition as finally, and correctly, settled.

If, then, Mississippi Sound does not qualify as a bay merely by satisfying the semi-circle test, the critical question is whether the Sound as a whole constitutes a "well-marked indentation" and "encloses landlocked waters". We have already articulated our view that, except for relatively small bays at either end, Mississippi Sound is not an "indentation" and its waters are not "landlocked", *even if* Dauphin Island is deemed an arm of the mainland. U.S. Br. 15-20. *A fortiori*, that is so if Dauphin Island is treated as the island nature defined. Indeed, in that case, the Sound has no "headland" or "entrance point" at all on the eastern side.

2. Undeterred, Mississippi at this point (Br. 29-39) challenges another set of unequivocal holdings by the Court: that "Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland" (*Louisiana Boundary Case*, 394 U.S. at 67 (emphasis in original)); that "bays are indentations in the *mainland*," and that "islands off the shore are not headlands but at most create multiple mouths to the bay" (*id.* at 62 (footnotes omitted)). For our part, we do not re-argue matters so fully considered by the Court. See *id.* at 60-63, 66-71. We are content to close on this point by referring the Court to the map (*e.g.*, U.S. Br. App. 1a, Chart 1), which makes very clear that there is no appropriate eastern headland, no indentation encompassing landlocked waters, and therefore

no bay, in the main stretch of Mississippi Sound if Dauphin Island is not viewed as an extension of the mainland.

C. Mississippi's Act of Admission

Mississippi's last Exception (Miss. Br. 39-46) is at least as remarkable as the others in its refusal to accept anything already decided. As the State recites (Miss. Br. 40-41), the Special Master concluded that this Court's 1960 decision foreclosed a finding that the Congressional legislation admitting Mississippi to the Union, of its own force, granted or confirmed to the new State the submerged lands underlying Mississippi Sound, or that the Enabling Act fixed the State's "boundary" so as to encompass those water bottoms. Report 33-34. In our view, that conclusion was compelled by the Court's holding that the Mississippi Enabling Act and the congressionally approved State Constitution, in referring to the offshore islands, did not thereby "establish a boundary" or "include" all intervening "waters and submerged lands." *United States* v. *Louisiana*, 363 U.S. at 81. Yet, without even renewing its earlier Motion for Relief from final Decree (see 457 U.S. 1115 (1982))—which the Master recommended be denied (Report 3 n.2)—Mississippi now argues that its Enabling Act, without more, resolves in its favor the inland status of Mississippi Sound.

1. It is true that the stance of the parties was different in the proceedings leading to the 1960 decision. The United States was then conceding the inland status of Mississippi Sound, albeit expressly *not* on the basis of the Enabling Act description. See Miss. Br. 42-43. But it is clear the Court did not endorse that position. On the contrary, the Court expressly avoided approval of a like concession in respect of Louisiana (363 U.S. at 66-67 n.108) and referred to that discussion when disclaiming any rul-

ing on the location of Mississippi's coastline. 363 U.S. at 82 n.135. And the point was emphatically reaffirmed a decade later when Louisiana sought to invoke estoppel against the United States. See *Louisiana Boundary Case*, 394 U.S. at 73 n.97.

On the other hand, Mississippi, also, was urging a different result in 1959. The State was then asserting a maritime boundary six leagues (18 miles) from shore, neither measured to, nor from, the barrier islands. Indeed, in those days, the State was disclaiming those islands, said to be "impermanent" and "constantly shifting," as a boundary. 363 U.S. at 82; see also Supplemental Brief of the State of Mississippi, at 3-4, 6-7 (No. 10, Orig., 1959 Term). We, of course, do not suggest that Mississippi ought to be held to that position. But what is dispositive, in our submission, is the Court's firm rejection of Mississippi's "historic boundary" claim under Sections 2 and 4 of the Submerged Lands Act. 43 U.S.C. 1301(a)(2), 1301(b), 1312. Unless the 1960 decision is to be overruled, Mississippi and Alabama (like Louisiana) are restricted to a 3-mile belt of submerged lands measured from their present "coastlines," the location of which is to be fixed by reference to current geography or prescriptive usage, not a congressional boundary description. In sum, the Court has effectively decided that their Enabling Acts do not aid Mississippi or Alabama in locating their coastlines.

2. Even if the question were entirely open, however, Mississippi's strained reading of its Enabling Act could not survive scrutiny. How does a description that merely "includes" "all the islands within six leagues of shore" fix a boundary line anchored on a string of islands that are never more than 10 miles from shore? The Court's reasons for rejecting a uniform three league line in the case of Louisiana and a six league line in the cases of Mississippi and

Alabama (*United States* v. *Louisiana*, 363 U.S. at 67-69, 81-82) are even stronger as applied to a variable line that does not evenly parallel the shore and is barely half the stated distance away. We do not pursue the point: it is plain Mississippi's "conservative" alternative reading of its Enabling Act is entirely contrived.

3. We must add our own puzzlement that Mississippi should insist that the barrier islands "formed the southern boundary of the State under its Enabling Act." Miss. Br. 44. If that were so, the State's entitlement under the Submerged Lands Act would include nothing seaward of a line connecting those islands, since the Act grants no submerged lands beyond state "boundaries." 43 U.S.C. 1301(a)(2), 1301(b), 1311(a). Thus, while gaining title to the relatively small disputed "enclaves" within Mississippi Sound, Mississippi must forego the three-mile belt seaward of the barrier islands—which is otherwise conceded.

Presumably, Mississippi wants the benefit both of an "historic" admission boundary and a standard 3-mile territorial belt measured from the modern "coastline". That is not possible, however. The line of the barrier islands can be claimed as a "coastline" or a "boundary," but not both. The two terms are never confused in the Submerged Lands Act. "Boundary," as used in the Act, is *always* the outward limit of the grant, whether the boundary is a fixed "historic" boundary or an ambulatory boundary at the seaward edge of the standard three-mile belt grant. A boundary is not a baseline or coastline from which the grant is measured. So, also, the unique option afforded the Gulf States—to claim the standard 3-mile belt from the current coastline or out to an admission boundary—presents two self-contained alternatives, which cannot be merged. As the Court wrote in the context of the Texas "his-

toric" claim, a State "may not combine the best features of both grants in order to carve out the largest possible area for itself." *United States* v. *Louisiana*, 389 U.S. 155, 160 (1967). See, also *Texas Boundary Case*, 394 U.S. 1 (1969).

In the current proceedings, Mississippi fixes its admission boundary at the line of the barrier islands. To be sure, it claims a further three-mile belt to the south. But it does not, and could not on the face of the Enabling Act, assert that its historic boundary is described as a line three miles seaward of the islands. Since a boundary is by definition the limit of the grant under the Submerged Lands Act, there is no basis whatever for "tacking on" a three-mile belt if, as the State maintains, the boundary ends at the barrier islands. Of course, Mississippi is entitled to the standard grant of three miles south of the islands if the barrier islands and the closing lines between them form the seaward limit of inland waters (contrary to our submission), or, in any event (albeit in slightly varied form), to the same zone as territorial sea of the islands. But the State can make this claim, on either theory, only if it abandons the assertion that its boundary was and is the barrier islands. Mississippi cannot have it both ways. The barrier islands form a boundary or a coastline; they cannot be both.

II. ALABAMA'S EXCEPTIONS

Alabama lodges two complaints against the Special Master's Report which, as in the case of Mississippi, betray unease about the grounds on which victory was tentatively awarded, and it urges the Court to supply new foundations for the same result. We consider the Exceptions in turn.

A. The claimed "historic land boundary"

The argument primarily advanced by Alabama is in some respects elusive. Unlike Mississippi, Ala-

bama apparently does not claim an "historic boundary" under the Submerged Lands Act. Ala. Br. 4-5 n.1. Indeed, what is asserted is a "land boundary," said to have been fixed by the State's Enabling Act "as historically interpreted" at the line connecting the barrier islands, which now constitutes Alabama's "coastline" for the purposes of the Submerged Lands Act. *Id.* at 4. This involves some sleight-of-hand. It is nowhere explained how an Enabling Act which does *not* "on its face" encompass the lands underlying Mississippi Sound nevertheless immediately vested title to those water bottoms merely because it was later so "interpreted." Nor is it shown how a "boundary" description can do service as a "coastline", from which a new boundary three miles seaward is measured. See pages 10-11, *supra.*

These semantic difficulties reflect the more fundamental flaws of Alabama's argument. What the State is seeking to establish is a title acquired under the Equal Footing Doctrine, which, in its view, irrevocably freezes ownership of any submerged lands that underlay what were inland waters when the State was admitted to the Union. For our part, we believe the stated proposition of law is false and, in any event, would not sustain Alabama's claim to Misssissippi Sound.

1. *The Legal theory*

We cannot accept Alabama's basic premise: that the gloss of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-378 (1977), on the rule of *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), governs water bottoms like those underlying Mississippi Sound. The State insists that, at statehood, it received indefeasible title to those submerged lands, proof against any subsequent change in geography or law. Thus, according to Alabama, if Mississippi Sound was inland

water in 1819, it is entitled to the underlying bed—plus a 3-mile Submerged Land Act grant measured from the seaward edge of the Sound—regardless whether today the Sound qualifies as inland under the Convention and the Submerged Lands Act. *Corvallis* presumably would dictate that result if we were concerned with inshore non-tidal navigable waters.[2] But we deem it plain no such principle applies in tidal waters—at least those whose status affects the baseline for measuring the territorial sea.

(a) We assume that the *Pollard* doctrine applies to all navigable inland waters, whether tidal or non-tidal. But *Pollard* does not tell us which waters are inland. Beyond the shore of the mainland, the Court more recently has told us, the delimitation of inland waters is governed by the Convention on the Territorial Sea. *United States* v. *California*, 381 U.S. 139. The rules of the Convention—except for the special case of "historic waters"—ignore earlier law and past geography and establish ambulatory boundaries for bays. If, because of geographical changes (whether natural or artificially caused) a former bay ceases to meet the criteria, it loses its inland water status.[3] *Per contra*, water areas that formerly did

[2] We say "presumably" because, notwithstanding what was said in *Corvallis* (429 U.S. at 371-372 n.4), it is difficult to escape the conclusion that the Submerged Lands Act expressly announces an ambulatory rule even for non-tidal navigable water bottoms, the State's title to which is not frozen, but reaches "to the ordinary high water mark *as heretofore or hereafter modified by accretion, erosion, and reliction.*" 43 U.S.C. 1301(a)(1) (emphasis added). While *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982), dealt with *tidal* areas, the Court's recognition of the Submerged Lands Act as the controlling federal rule of decision in that context may suggest that the Act also governs State title to nontidal submerged lands, equally embraced by the statute.

[3] This can occur in many different ways: alluvion or accretion within the bay may reduce the water area so that it no

not qualify as bays can become bays and assume inland water status because of geographical changes or simply because the more generous 24-mile rule now encompasses what were once deemed "open sea" areas. So, also, the Convention defines the seaward edge of tidelands—the mean low water line of the shore on an open coast—as ambulatory, adding or subtracting from "historic" tidelands as nature (aided or unaided) or a man-made jetty alters the coastline.

All this is, of course, wholly at odds with the *Corvallis* principle of irrevocable vesting at statehood, regardless of later geographical changes. How do we reconcile these conflicting rules? To be sure, it is theoretically possible to say that the area encompassing what was a bay at statehood—to the then high-tide line around the interior perimeter and the then closing line at the mouth—remains in State ownership as a matter of domestic law under *Pollard*, regardless that changes in geography have made that area upland as a matter of federal law or open seas as a matter of international law. That result would be extremely awkward, requiring us to retrace all physical geography as of the date of statehood in order to sort out all riparian land titles and to determine the "coastline" for purposes of the Submerged Lands Act whenever it is alleged that a statehood bay—fictitiously still "inland water"—once existed at any point on the modern coastline. See *United States* v. *California*, 381 U.S. at 165-166 n.33.

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longer meets the semi-circle test or loses its character as a "well-marked indentation"; erosion may wear away, or a violent storm may wash away, one or both headlands so that the water is no longer "land-locked" or the closing line exceeds 24 miles; a former headland may become an island, depriving the bay of one of its mainland "arms"; or islands screening the mouth may disappear and lengthen the water crossing to the point where the semi-circle test can no longer be met.

Fortunately, however, it seems plain neither Congress nor the Court has construed *Pollard* to require any such complex investigation.

(b) Until the *Corvallis* decision in 1977, it was generally assumed, even with respect to the beds and banks of *non-tidal* navigable water bodies, that, although *navigability* was determined as of the date of admission, the boundaries of the State's title under *Pollard* shifted as the high water mark later moved as a result of erosion, reliction or accretion. See *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318-321, 322-327 (1973). That is the understanding codified in the Submerged Lands Act of 1953. 43 U.S.C. 1301(a)(1). See note 2, *supra*. All the more, it was universally accepted that State title to inland *tidal* water bottoms and tidelands (between high and low water lines) is ambulatory. This is evident in the decrees entered by the Court in the pre-Submerged Lands Act cases (*United States* v. *California*, 332 U.S. 804 (1947); *United States* v. *Louisiana*, 340 U.S. 899 (1950); *United States* v. *Texas*, 340 U.S. 900 (1950)); in the definitional provisions of the Act (43 U.S.C. 1301(a)(2)); in the Court's second *California* decision importing the current "coastline" and "inland water" rules of the international Convention—which are ambulatory—to define the limits of the Submerged Lands Act grant to the States (381 U.S. 139 (1965)); and in *Hughes* v. *Washington*, 389 U.S. 290 (1967), which effectively deprived the State of former tidelands in favor of the riparian owner where accretion had occurred along the coast.

It can be said that *Corvallis* repudiated these assumptions and announced a rule that State title, once vested at statehood under *Pollard*, can never be divested, except as the State itself chooses to do so. But the Court has since made it clear that *Corvallis*—itself concerned with inshore waters—does not affect the traditional ambulatory principle governing off-

shore water boundaries. The dispositive decision is *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982), in which the Court reaffirmed *Hughes* v. *Washington* (*id.* at 282-283, 284, 288) and rejected the contention that State title to tidelands was irrevocably vested by the Equal Footing Doctrine. *Id.* at 286 n.14. The upshot is that the *Corvallis* "freezing" principle has no application to the beds or shores of waters that affect the coastline.[4]

(c) Given that once permanently or periodically submerged areas that once qualified as bays are not irrevocably vested in the State as a matter of constitutional law, it is not apparent why changes in law

[4] This conclusion is re-inforced when we look at the other side of the coin. We assume that States are entitled to the beds and shores of bays formed or qualifying *after* statehood, to the subsequently submerged area of bays that have grown in size, and to newly formed tidelands along the open coast. Clearly, such new inland water areas or tidelands affect the "coastline" under the Submerged Lands Act. Yet, according to *Corvallis*, the *Pollard* Equal Footing Doctrine is fully spent at statehood and grants nothing thereafter. 429 U.S. at 376, 378. This might suggest that "inland water," so far as relevant in fixing the baseline from which the marginal sea is measured under the Submerged Lands Act, has nothing to do with the *Pollard* doctrine. Are there then "*Pollard* bays" and "Submerged Lands Act bays," and some that are partly of one character and partly of the other? Is it the same for coastal tidelands? Where the bay was formed long ago, but after statehood, within federal lands, did the State only acquire title to the bed in 1953? And if the post-statehood bay was carved out of private land, how did the State acquire title at all, at least in the absence of a pre-existing State law rule? See *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967) (Stewart, J., concurring). These questions lead us back to the traditional understanding of the *Pollard* rule as effecting a *continuous* grant with *ambulating* boundaries. In sum, *Corvallis* only applies inshore, and a less rigid *Pollard* principle, as codified in the Submerged Lands Act, governs all inland waters and tidelands that affect the State's coastline.

should not occasionally work a divestiture to the same extent as a change in geography. Indeed, the recent *California ex rel. State Lands Commission* case indicates that Congress can, by fashioning an accretion rule favorable to the United States, effectively deprive a State of some of its historic tidelands. See 457 U.S. at 283-284, 287. What is more, the Court has applied the Convention as domestic law in denying State claims to inland waters which the United States had conceded under its prior understanding of international law rules. That was true with respect to Caillou Bay and Isle au Breton Bay in Louisiana (see *Louisiana Boundary Case*, 394 U.S. at 66-67 n.87, 73-74 n.97) and Florida Bay in Florida, anchored in the Keys (see *United States* v. *Florida*, 420 U.S. 531 (1975); 425 U.S. 791 (1976)).

To be sure, the States invoke the caveat in *United States* v. *California*, 381 U.S. at 168, to the effect that the "contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." But this was written in the context of a ruling that *approved* the wholesale adoption of new international rules as controlling State offshore rights and cannot reasonably be understood to require rejection of any application that, contrary to the usual result, disadvantages a State. Indeed, the point was clarified four years later in the *Louisiana Boundary Case*, 394 U.S. at 74 n.97, where the Court said the Federal Government "arguably could not abandon [a consistent official international] stance solely to gain advantage in a lawsuit to the detriment of [a State]." Obviously, this description does reach any changes in inland water delimitation rules directly resulting from United States adherence to the Convention on the Territorial Sea, which *the Court*, over our objection, imported as the law of these cases.

See *United States* v. *California*, 381 U.S. at 164; pages 4-5, *supra*.

The whole rationale for adopting the comprehensive rules of the Convention as the "coastline" law of the Submerged Lands Act would be defeated if each application to a particular segment had to be tested against some supposed prior criteria and rejected if, in that context, the State fared less well. Cf. *California ex rel. State Lands Commission* v. *United States*, 457 U.S. at 286 n.14. Nor is it merely a matter of avoiding awkward burdens and pretexts for further controversy. This is a situation in which localized State concerns must yield to the broader national policies which inform the setting of a uniform international stance. Here, no less than in the case of coastal tidelands, we deal with "waters that lap both the lands of the State and the boundaries of the international sea," whose status is "too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land'." *Hughes* v. *Washington*, 389 U.S. at 293, reaffirmed in *California ex rel. State Lands Commission* v. *United States*, 457 U.S. at 280, 283, 288. See also, *United States* v. *California*, 332 U.S. at 29, 34-36, 40.

2. *The Factual Record*

Even if Alabama had been admitted to the Union with a boundary description that unambiguously drew the line of State dominion at the barrier islands, we do not believe that would resolve the issue presented whether Mississippi Sound is, today, State inland water. As it happens, however, that hypothetical question need not be answered because the Court has already effectively held that the Alabama Enabling Act of 1819, like the Mississippi Act of two years before, established no boundary beyond the mainland shore. *United States* v. *Louisiana*, 363 U.S.

at 82. See pages 8-9, *supra*. Nor was this a ruling merely as to the meaning of the Enabling Act "on its face." Although, in the case of Alabama, the opinion does not detail all the historical data dating from both before and after 1819, urged as aids to construction, it is plain the Court surveyed all the evidence tendered by Alabama, as it had for Louisiana and Mississippi (see 363 U.S. at 71-79, 80-81), before concluding that the Alabama Enabling Act fixed no offshore boundary.

(a) Against this background, Alabama's attempt to reinterpret its Enabling Act in light of historic materials ought to be rejected as barred by principles of finality. Cf. *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 10-22. At all events, even if the matter is deemed open, Alabama's Enabling Act claim is no stronger than Mississippi's and must be denied on the merits. See pages 9-10, *supra*. This does not quite end the debate only because Alabama is presumably free to argue, independently of any reliance on the Enabling Act, that, as a historical fact, Mississippi Sound was inland water in 1819 and that title to its bed therefore vested in the new State upon its entry into the Union. We briefly address that possibility.

(b) Again, Alabama's claim in this respect is, if anything, weaker then Louisiana's and ought fare no better. We invite the Court to compare the materials now tendered by Alabama (Ala. Br. 7-23) with the comparable menu of bits and pieces served up by Louisiana in 1959 (363 U.S. at 70-79) and 1974 (Exceptions of the State of Louisiana at 10-12 and App. I, at 63-126, 129-210). As one might expect, Louisiana easily wins the contest for the number and variety of dishes offered. Nor was that State reluctant to complain that depriving it of the submerged lands underlying Caillou Bay and all of East

Bay would work an impermissible "contraction of territory." That phrase occurs at least seven times in the papers filed by Louisiana in this Court. Exceptions of the State of Louisiana at 9, 46 and App. I, at 8, 16, 35, 41, 47. And yet, both the Special Master and the Court rejected the plea. Special Master's Report of July 31, 1974, at 16, 21-22; 420 U.S. 529 (1975). So it should be here.

It would unduly burden this submission to discuss each of the items put forward by Alabama. Ala. Br. 7-23. Even accepting the State's one-sided presentation as painting an accurate picture, it is obvious that nothing in these materials comes close to proving the inland status of Mississippi Sound in 1819. And, we repeat, such a demonstration, if made, would not establish Alabama's title today.

B. The Smaller Juridical Bay

Alabama's second Exception will not detain us. It matches our own second Exception and therefore requires little comment. See U.S. Br. 15-20. In sum, we fully agree with Alabama that *if* Dauphin Island is an extension of the mainland, it would be appropriate to draw a smaller bay closed by a line from Dauphin Island to Point Aux Chenes. See U.S. Br. App. 3a, Chart 3. Indeed, in our view, that is the *only* bay that would result. Our disagreement with Alabama is simply that we dispute the premise that Dauphin Island should be treated as an arm of the mainland.

CONCLUSION

For the reasons stated here, the several Exceptions to the Report of the Special Master filed by Alabama and Mississippi should be overruled; for the reasons stated in our opening brief, the Exceptions of the United States should be sustained; and a decree should be entered accordingly.

Respectfully submitted.

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APPENDIX

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

(Apr. 29, 1958, 15 U.S.T. 1606)

PART I: TERRITORIAL SEA

SECTION I. GENERAL

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

* * * * *

SECTION II. LIMITS OF THE TERRITORIAL SEA

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

* * * * *

Article 10

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

* * * * *

SECTION III. RIGHT OF INNOCENT PASSAGE

SUB-SECTION A. RULES APPLICABLE TO ALL SHIPS

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

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