IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 6, Original

THE UNITED STATES OF AMERICA

vs.

STATE OF CALIFORNIA

BRIEF IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

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STATEMENT ON INTEREST OF CITIES IN THIS CASE

The National Institute of Municipal Law Officers is an organization composed of 462 municipalities, with at least one member city in each of the 48 states. The association is formulated and carried on for the purpose of enabling its members, in concert and co-operation and with the purpose of procuring unanimity of view and effort relative to the legal rights and status of municipalities upon broad general issues of law which might affect them, to defend and protect the several interests and property rights of its member cities.

Although the Government in its complaint avowedly seeks only to establish the title of the United States of America in and to that portion of the bed of the Pacific Ocean adjacent to the State of California, beginning at low-water mark and extending seaward for three nautical miles and excluding bays, harbors and other inland waters, the Government in its Brief has urged propositions which, if sustained by this Court, and then carried to their logical conclusion, would, in the opinion of the members of this National Institute, not only jeopardize the sovereign rights of the various seaboard States in and to the so-called marginal sea, but would also jeopardize the rights and privileges of all municipalities whose boundaries extend, in California, to or into the Pacific Ocean, and, by analogy, of all municipalities whose boundaries extend anywhere in the United States to or into the Pacific or Atlantic Oceans or the Gulf of Mexico.

The assertion in the Government's Brief that the thirteen original States never acquired any rights in the marginal seas is startling to the various legal representatives of municipalities located in the United States, for the reason that many cities and towns are located on the seashore in areas which are on the open sea and not on a bay or river mouth or other inland waters, and that this claim of the Government, if sustained, would deprive such munici-

palities, concomitantly with the States in which they are located, of any right to, or control or use of their adjacent sea areas below low-water mark.

The bold assertion in the Plaintiff's Brief that none of the several States have ever owned the lands underlying the three-mile belt is a matter of grave concern again to those municipalities whose limits may extend to or into the seas.

While the Complaint of the United States of America purports to exclude bays, harbors and other inland waters, and to quiet title only to the three-mile maritime belt lying beyond the limits of such bays, harbors and other inland waters, the circumstance that there is no attempt to define a bay or a harbor raises grave concern in the minds of the members of this Institute as to the protection of the rights of those municipalities who may now be enjoying and using harbors and bays in the exercise of municipal functions and powers delegated by the various States to them. This concern arises from the fact, as exemplified by statements in the Government's Brief, for example, that the Government is not sure that San Pedro Bay is a bay; that the maritime belt in and to which the title is sought to be quieted, may commence at the low-water mark in many so-called doubtful bays and harbors; that there are many areas along the Atlantic, Pacific and Gulf seacoasts upon which municipalities are located on the seaboard which may, or may not, be bays, and it cannot be determined whether, if the Government is successful in this case, the rights of those municipalities to the use of the seashore and waters lying below low-water mark will be affected or not.

Again, the members of this Institute are concerned because, if the Government is successful in its challenge against the States to the title to the marginal sea, no adequate reason can be perceived why the Government could not next challenge the rights of the State of California and the other States, upon identical principles and theories, in

their gulfs, bays, river mouths, and harbors, especially in those bays and harbors where the headlands are far apart.

After mature and thorough consideration of the basic principles involved in this litigation and of the claims and theories advanced by the Government in its Brief, the members of this Institute are convinced that both legally and logically there is no merit to any of the contentions and theories of the Government, either singly or collectively, and that every one of the statements and theories advanced by the Government, without exception, have already been judicially decided many, many times over. However, because of the magnitude of the efforts of the Government to attempt to prevail in this litigation, and because of the seriousness of the consequences that would result if the Government should be permitted to prevail, the members of this Institute seriously believe that the concern which they have is neither fanciful nor unfounded.

SUMMARY OF ARGUMENT

We propose to show briefly, that

1. The Government's complaint is uncertain in that it contains no adequate or certain description of the "marginal sea," in and to which the Government is seeking to quiet its title;

2. The settled, undeviating law as announced by the decisions of this Court is that the thirteen original States (as well as all others) are the owners of all the navigable waters and the soil of the beds thereof within their respective territorial limits;

3. California was admitted upon "an equal footing" with the original thirteen States, and therefore has the same right of property in its navigable waters and the soil of the beds thereof as they have;

4. Navigable waters include the "marginal sea," and are not "public lands" reserved to the United States;

5. The principles of *stare decisis,* judicial rule of property, *res judicata,* and long acquiescence bar the Government's claim, whether well founded or not.

I

The Description of the Marginal Sea in the Complaint is Uncertain; It Cannot be Determined What the Marginal Sea Includes; This Uncertainty Will Permit the Government, if Sustained in its Contentions, to Thereafter Lay Claim to Many "Uncertain" Bays and Harbors as Being in the Marginal Sea

The complaint of the Government described the property, in and to which it seeks to quiet title, as "the lands, minerals and other things of value underlying the Pacific Ocean, 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. . . ."

Immediately, the following uncertainties obtrude themselves.

On the open sea, where is the low-water mark, and as of what date is it to be considered? Is it to be taken as of the date of admission of California, or as of the present?

What are inland waters? Which so-called bays and harbors are true bays and harbors and which are only parts of the "marginal sea"?

That these questions are not theoretical uncertainties, let us look first at the Government's Brief, then at some of the authorities. The Government admits that certain bays, so-called, are in the doubtful class. (Pl. Brief, p. 167.) Fourteen of the transactions plead in the Appendix to the State's Answer occurred in San Pedro Bay and are listed by the Government as doubtful, i. e., it is not certain whether San Pedro is a bay or in the marginal sea. If the Government is doubtful whether San Pedro Bay is a true bay, the Government's next move, if successful herein, may be to claim that a fair portion of both Los Angeles and Long Beach Harbors is located in the marginal sea, under Government ownership. If San Pedro is a doubtful bay, how about Santa Monica Bay, where the headlands are twenty-five nautical miles apart and the indentation of the bay is shallow?

Again, if a so-called bay is not a bay, because the headlands are too far apart, may it still be considered a bay, landward of a line drawn from points where the headlands narrow to a distance of six (or ten), nautical miles, or is it no bay at all?

The same questions can arise as to Santa Monica Bay, Monterey Bay, and, by precedent, as to all similar types of bays along the coast of all maritime States.

Since a State's territory can be no greater than international law will sanction, any uncertainty in the rules of international law only further serves to add to the confusion created by the inherent uncertainty of the complainant.

Oppenheim's International Law, 4th Ed., p. 409, states the condition of the rules of international law thus:

> "As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not."

In *People* v. *Stralla,* 14 Cal. (2d) 617, the Court said, with respect to Santa Monica Bay on the California Coast:

> ". . . In the absence of any controlling legislative or executive act or judicial decision, the court will look to the international law, namely, the customs and usages of civilized nations. (*The Paquete Habana,* 175 U. S. 677, 700 [20 Sup. Ct. 290, 44 L. ed. 320].) But resort to the law of nations does not disclose any agreed definition of what constitutes a bay which may be included within the territorial waters of a state. (See, also, *Ocean Industries, Inc.* v. *Superior Court, supra,* p. 246.)"

As was said in *Direct United Cable Co.* v. *Anglo-American Telegraph Co.,* (1877) L. R. 2 App. Cas. 394, "we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose."

In *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, in considering whether Monterey Bay was a true bay, the California Supreme Court, after a thorough consideration of international law rules, decided that "it cannot be said that there is any rule of international law upon the subject."

In *Manchester* v. *Massachusetts,* 139 U. S. 240, it was indicated that true bays were confined to those whose headlands were no more than six marine miles apart. International law sometimes uses six, ten, or more marine leagues as a test.

The confusion and uncertainty distresses the various municipalities of the several maritime States, because in cases of "doubtful" bays and harbors, which they may for the

benefit of their inhabitants be using and upon which they may have been granted rights by the State, such municipalities cannot now determine whether their improvements constructed by the expenditure of municipal funds are in jeopardy or not. It is certain, that as construed by the Government in its Brief, the "marginal sea" may include property rights of many others beside the State of California, which others should be made parties to this proceeding, or the proceeding should be dismissed.

II

The Law of this Court is that all of the States Own the Navigable Waters and the Soil of the Beds Thereunder Within their Respective Territorial Limits, Subject to the Rights Granted to the United States by the Constitution

It was early decided by this Court that the States have jurisdiction over and the ownership of their navigable waters and the beds thereunder. This jurisdiction and ownership is, of course, subject to the power granted to the United States to provide for the common defense and regulate foreign and interstate commerce.

The long line of decisions rendered by this Court starts with *Martin* v. *Waddell,* 16 Pet. 367, 10 L. ed. 977 (1842), and continues to the very present without amendment or deviation in principle. All cases have decided that, no matter what the navigable waters may be, whether marginal sea, bay, harbor, river, or lake, if they are navigable, the ownership thereof and of the bed thereunder is that of the State in whose territory the waters may be. The case of *Martin* v. *Waddell, supra,* was an action in ejectment to recover some submerged lands in New Jersey valuable as oyster beds. The decision revolved about the construction of certain Crown grants to the Duke of York. It was held that the title to the lands involved followed that transfer that carried with it the governmental sovereignty, because

the ownership of the beds of navigable waters is an incident of a state's inherent sovereignty.

The next case was *Pollard's Lessee* v. *Hagan,* 3 How. 212, 11 L. ed. 565 (1845), where the action was for ejectment with reference to some tidewater lands along the Mobile River in Alabama. For the same reasons, the decision was that the States hold the absolute right to all their navigable waters and the soils under them. A great number of subsequent decisions, based upon these two, have been rendered by this Court, covering nearly all possible situations. Many of the decisions deal with tide and submerged lands of the sea.[1] Others deal with the beds of the Great Lakes,[2] navigable rivers,[3] and other inland lakes.[4] At least ten de-

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[1] *Goodtitle* v. *Kibbe,* 9 How. 471 (1850);
Smith v. *Maryland,* 18 How. 71 (1855);
Mumford v. *Wardwell,* 6 Wall. 423 (1867);
Weber v. *Board of Harbor Commissioners,* 18 Wall. 57 (1873);
McCready v. *Virginia,* 94 U. S. 391 (1876);
Manchester v. *Massachusetts,* 139 U. S. 240 (1890);
San Francisco v. *LeRoy,* 138 U. S. 656 (1891);
Knight v. *U. S. Land Association,* 142 U. S. 161 (1891);
Shively v. *Bowlby,* 152 U. S. 1, (1894);
Mobile Transportation Co. v. *Mobile,* 187 U. S. 479 (1903);
United States v. *Mission Rock Co.,* 189 U. S. 391 (1903);
The Abby Dodge, 223 U. S. 166 (1912);
Greenleaf Lumber Co. v. *Garrison,* 237 U. S. 251 (1913);
Port of Seattle v. *Oregon & W. R. R. Co.,* 255 U. S. 56 (1921);
Borax Consolidated, Ltd. v. *City of Los Angeles,* 296 U. S. 10 (1935);
United States v. *O'Donnell,* 303 U. S. 501 (1938).

[2] *Illinois Central R. R. Co.* v. *Illinois,* 146 U. S. 387 (1892);
Massachusetts v. *New York,* 271 U. S. 65 (1926).

[3] *St. Clair* v. *Lovington,* 90 U. S. 46 (1874);
Barney v. *Keokuk,* 94 U. S. 324 (1876);
Shively v. *Bowlby,* 152 U. S. 1 (1893);
St. Anthony v. *Board,* 168 U. S. 349 (1897);
Scott v. *Lattig,* 227 U. S. 229 (1913);
Donnelly v. *United States,* 228 U. S. 243 (1913);

cisions were with regard to the ownership of navigable waters and beds within the State of California.[4a] The lists of cases given in the footnotes are by no means complete. There are many others. Those cited, and all others dealing with the same subject, hold with significant unanimity that the States own their own navigable waters and the soil of the beds thereof.

III

The Navigable Waters and Their Beds Which the States Own Include the "Marginal Sea," Claimed by the Government

The Government seeks to avoid the effect of the decisions cited in Point II, *supra,* by stating that none of them actually involved a direct consideration of the "marginal sea."

This method of attempting to dispose of this array of authority in rather cavalier fashion, ignores the fact that both the general reasoning and the terminology used in this group of decisions of this Court necessarily include the "marginal sea." Some of these decisions of this Court employ the all-inclusive phrase "navigable waters, and the

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Oklahoma v. *Texas,* 258 U. S. 574 (1921);
United States v. *Utah,* 283 U. S. 64.

[4] *Hardin* v. *Jordan,* 140 U. S. 371 (1891);
McGilvra v. *Ross,* 215 U. S. 70 (1909);
United States v. *Holt Bank,* 270 U. S. 49 (1926);
United States v. *Oregon,* 295 U. S. 1 (1935).

[4a] *Mumford* v. *Wardwell,* 6 Wall. 423;
Weber v. *Board of Harbor Commissioners,* 85 U. S. 57;
Packer v. *Bird,* 137 U. S. 661; 34 L. ed. 819;
San Francisco v. *LeRoy,* 138 U. S. 656;
Knight v. *U. S. Land Assn.,* 142 U. S. 161;
United States v. *Mission Rock Co.,* 189 U. S. 391;
United States v. *Coronado Beach Co.,* 255 U. S. 472;
Borax Consolidated, Ltd. v. *Los Angeles,* 296 U. S. 10;
United States v. *O'Donnell,* 303 U. S. 501.
California v. *Southern Pacific Co.,* 157 U. S. 230.

soils under them."[5] Other decisions employ the phrase "soils under the tidewaters."[6] Still others speak of lands "below the high water mark." As already stated *supra* pages 8-9, at least nine of the decisions have dealt with the title of the State of California in and to the beds of its navigable waters.[7] It is immediately observable that "navigable waters, and the soils under them" and "lands below the high water mark," both encompass the "marginal sea." It is less obvious that "soils under the tidelands" include the marginal sea, but as this Court has used the phrase, that is its exact meaning. It was said in *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387, that "tidewater and navigable water are synonymous terms." Again, in *Smith* v. *Maryland,* 18 How. 71, this Court declared that "whatever soil below low-water mark is the subject of exclusive priority and ownership, belongs to the State on whose maritime border, or within whose territory, it lies . . ." There can be no question but what such language not only is amply broad enough to include unquestionably

[5] *Mumford* v. *Wardwell,* 6 Wall. 423;
County of St. Clair v. *Lovington,* 23 Wall. 46;
Scott v. *Lattig,* 227 U. S. 229;
Port of Seattle v. *Oregon & W. R. R. Co.,* 255 U. S. 56;
United States v. *Holt Bank,* 270 U. S. 49;
Fox River Co. v. *R. R. Comm.,* 274 U. S. 651;
United States v. *Oregon,* 295 U. S. 1.

[6] *Weber* v. *Board of Harbor Commissioners,* 18 Wall. 57;
McCready v. *Virginia,* 94 U. S. 391;
San Francisco v. *LeRoy,* 138 U. S. 656;
Knight v. *U. S. Land Assn.,* 142 U. S. 161;
Illinois Central R. R. Co. v. *Illinois,* 146 U. S. 387;
Appleby v. *New York,* 271 U. S. 364;
Borax Consolidated, Ltd. v. *Los Angeles,* 296 U. S. 10.

[7] See *supra* note 4a.
Weber v. *Board of Harbor Commissioners, supra;*
San Francisco v. *LeRoy, supra;*
Knight v. *U. S. Land Association, supra;*
Borax Consolidated, Ltd. v. *Los Angeles, supra;*
California v. *Southern Pacific Co.,* 157 U. S. 230;
United States v. *Mission Rock Co.,* 189 U. S. 391.

the "marginal sea," but also was intended by this Court to include all water areas seaward of land that were recognized by international law as being subject to ownership and appropriation by the adjacent state, i. e., to the international three marine mile limit from shore.

Moreover, when we consider the historical development of the ownership of the "marginal sea" by the respective States, it is plain that this Court has always intended that "navigable waters," "tidelands," and "all lands below high water mark" to be inclusive of the "marginal sea."

At common law, when the original thirteen States were still colonies, the Crown owned all the navigable waters in which the tide ebbed and flowed, and the beds and usufruct thereof, out to the limit (3 marine miles) allowed by international law. This ownership has lately been firmly established in the Privy Council decision in the case of *Secretary of State of India* v. *Chelikani Rama Rao,* L. R. 43, Ind. App. 192 (1916), where it was held that islands suddenly formed within the three mile limit off the open coast of India belong to the Crown, because the Crown owned the bed of the "marginal sea," three miles out, from which the islands were formed. The opinion in this case cited a number of much older authorities, showing that the Crown's ownership of its "marginal sea" was of ancient origin, long before the Revolution of the Colonies.[8]

This view of the status of the common law was accepted by this Court in several cases. In *Shively* v. *Bowlby,* 152 U. S. 1, 11, it was said:

> "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the

[8] In this case, the Privy Council cited and relied upon *The Anna,* 5 C. Rob. 373 (1805); *Lord Advocate* v. *Wemyss,* 1900 A. C. 48; *Lord Advocate* v. *Clyde Transp. Co.* (1891), 19 Rettie 174; *The Duchy of Cornwall Arbitration,* where the arbitration award, confirmed by an Act of Parliament (21-22 Vict., C. 109), was that the Crown owned mines off the coast of Cornwall that were under the "marginal sea"; and such publicists as Craig, Stair, Erskine, Bell, Selden, Hale, Grotius, Vattel and other ancient writers.

> tide ebbs and flows and of all lands below the high-water mark, within the jurisdiction of the Crown of England, are in the King."

And in *Manchester* v. *Massachusetts,* 139 U. S. 240, this Court said:

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

This last quoted language also clearly shows that the word "tidewaters" is used in a sense that definitely includes the "marginal sea."[9]

By the declaration of Independence each of the thirteen colonies became separate, independent, sovereign nations; such is the language of the Declaration. In the "Treaty of Paris" in 1783 that fixed the peace terms with England, the King treated with the colonies as separate, independent, and completely sovereign entities.

As complete and separate sovereignties, each of the original States took and succeeded to whatever title the Crown had to the navigable waters within or adjoining its boundaries, which waters naturally included the "marginal sea," because the King owned it before the original States became independent. There was no classification of navigable waters at that time into inland and marginal. Both types, generally classified as navigable waters, were owned by the King before 1776 and became State owned in 1776.[10] It is equally well settled, that when the thirteen original States

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[9] See also: *Hall's Essay on the Rights of the Crown in the Seashore* (in *A History of the Foreshore,* by Stuart A. Moore, pp. 667 et seq.); Angell, *Right of Property in Tide Waters,* 2nd Ed., 1847.

[10] *Martin* v. *Waddell,* 16 Pet. 367;
Pollard v. *Hagan,* 3 How. 212;
Den ex dem. Russell v. *The Jersey Co.,* 15 How. 426;
Mumford v. *Wardwell,* 6 Wall. 432;
Shively v. *Bowlby,* 152 U. S. 1;
Appleby v. *New York,* 271 U. S. 364.

entered into the Union of the United States, in 1788, upon nine of their number ratifying the then new Constitution, the Constitution did not transfer any property rights to the national government.[11] So the original States have, since 1776, always been the owners of the beds of their respective navigable waters, including the "marginal sea," even after the adoption of our Constitution. There is, therefore, no logical basis for the Government's present contention that, though the title of the States to the beds of their inland waters may be conceded, the States do not own the bed of their "marginal sea."

IV

The Admission of California, Upon an Equal Footing with the Original States in All Respects Whatever, Vested in California the Same Title to the Marginal Sea as the Original States Held

It is the established rule of law that new States, when they are admitted to the Union upon "an equal footing" with the original States, take whatever prerogatives are inherent in the sovereignty of a State. These prerogatives are to be measured by determining what the State would have owned if it had remained completely sovereign and an independent nation.[12]

California was admitted to statehood in 1850 by an Act of Admission (9 Stat. ch. L, 452), which recited the presentation to Congress of the Constitution of 1849 of California. This Constitution of 1849 was found to be republican in form, was ratified by the Act of Admission, Art. XII there-

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[11] See authorities cited in note 10, *United States* v. *Bevans,* 3 Wheat. 337.

[12] *Manchester* v. *Massachusetts,* 139 U. S. 240;
Borsage v. *State,* 23 Ala. App. 18, 121 So. 427; cert. den., 280 U. S. 368;
Shively v. *Bowlby,* 152 U. S. 1;
Goodtitle v. *Kibbe,* 9 How. 471.

of, and contained a boundary description of California, which on the west extended into the ocean three English miles, and included all islands, harbors, and bays.

The Government concedes that the territory of the State of California extends three English miles into the "marginal sea," but claims that that "sea" should be classed in the same category with "public lands" which were reserved to the United States by the Act of Admission

But all navigable waters and their beds are subject to a public trust for fishing, bathing, commerce and other public uses for the people of the State within which they are located.[13] These trusts, and the title to the corpus thereof, having been assumed by the thirteen original States prior to the formation of the present Union, and being local or municipal in character, never passed and could not pass to the United States under the Constitution.

"Public lands," being subject to unqualified disposal and not being impressed with any public trusts, are not of the same character as the beds of navigable waters within the territory of a State. So it has been held that "public lands" do not include navigable waters and their beds.[14]

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[13] *Pollard* v. *Hagan,* 3 How. 212;
Martin v. *Waddell,* 16 Pet. 367;
Van Brocklin v. *Anderson,* 117 U. S. 151;
Hardin v. *Jordan,* 140 U. S. 371;
Illinois Central R. Co. v. *Illinois,* 146 U. S. 387;
Manchester v. *Massachusetts,* 139 U. S. 249.

[14] The following cases hold that public lands do not include any lands under navigable waters:
Borax Consolidated, Ltd. v. *City of Los Angeles,* 296 U. S. 10;
Mann v. *Tacoma Land Co.,* 153 U. S. 273;
Newhall v. *Sanger,* 92 U. S. 761;
Knight v. *United Loan Assn.,* 142 U. S. 161;
Doolan v. *Carr,* 125 U. S. 618, 31 L. ed. 844;
Leavenworth L. & G. R. Co. v. *United States,* 92 U. S. 733, 23 L. ed. 634.

It was held in *St. Anthony Falls, etc., Co.* v. *City of St. Paul,* 168 U. S. 349, 42 L. ed. 497, that a grant of public lands does not in-

Should the United States be held to own the marginal sea, these trusts (which are inalienable and inextinguishable under both English and our law) would necessarily fail because the ownership of the corpus thereof would be in the hands of a sovereign lacking the constitutional power of administering them.

This distinction is carefully explained in *Van Brocklin* v. *Anderson,* 117 U. S. 151.[15]

The United States could not constitutionally retain title to the beds of navigable waters in newly admitted States, even if the Act of Admission attempted so to do. *Hardin* v. *Jordan,* 140 U. S. 371.

It is apparent, therefore, that when California was admitted "on an equal footing," the State became immediately vested with title to the beds of its navigable waters, including the "marginal sea" within its territorial limits.

The right to regulate fishing, oyster beds, sponge beds,

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clude navigable waters or their soils. In the case of *Inland Finance Co.* v. *Standard Salmon Packers,* 7 Alaska 131, the Court decided that land held by the United States situated below mean high tide along the coast of Alaska, was held in reserve for the benefit of the future state and was not public land of the United States.

[15] " * * * The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State, and not in the United States. *New Orleans* v. *U. S.,* 10 Pet. 662, 737 (35 U. S. bk. 9, L. ed. 573, 602); *Pollard* v. *Hagan,* 3 How. 212 (44 U. S. bk. 11, L. ed. 566); *Goodtitle* v. *Kibbe,* 9 How. 471 (50 U. S. bk. 13, L. ed. 220); *Doe* v. *Beebe,* 13 How. 25 (54 U. S. bk. 14, L. ed. 35); *Barney* v. *Keokuk,* 94 U. S. 324 (Bk. 24, L. ed. 224). But public and unoccupied lands to which the United States have acquired title, either by deeds of cession from other States or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise."

and similar fruits of the sea, connotes a property right in them. This Court has decided several times that, within the territory of a State, the State may regulate fishing, and the gathering of sponges and oysters.[16] The decisions presume that the State is the owner thereof in the first instance. And since these regulations have been held to be proper in the marginal sea as well as in inland waters, it is not true to assert that this Court has never decided that the States own the bed of the "marginal sea," in addition to inland waters, within their respective boundaries.

From all of the cases cited in this Point and in Point II of this Brief, the conclusion is ineluctable, that the ownership of and domain over the marginal sea and its bed is vested in the respective littoral States adjacent to whose coast line those lands and waters lie, and that the State of California owns the marginal sea and its bed within three English miles of its coast line, exclusive of bays, harbors, and river mouths; all subject to the right of the United States to regulate commerce and provide for the national defense.

V

The United States is Precluded from Claiming that the States Do Not Own the Bed of the Marginal Sea, by the Principles of Stare Decisis, Judicial Rule of Property, Res Judicata, and Long Acquiescence

The decisions of this and inferior Federal courts, and of the highest State courts apply the rule of State ownership equally to the marginal sea as to harbors, bays, or navigable rivers. There is no distinction based on location merely; the single test is navigability in fact of the overlying waters.

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[16] *The Abby Dodge,* 223 U. S. 166;
Manchester v. *Massachusetts,* 139 U. S. 240.

The very language of many of these decisions shows that this is the only classification that has ever been considered.

This Court held in the case of *Pollard* v. *Hagan,* 3 How. 212, that

> "First, the shores of *navigable* waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively. Second, the new states have the same rights, sovereignty and jurisdiction over this subject as the original states. . . ."

In *Smith* v. *Maryland,* 18 How. 71, the Court held that "whatever soil below low-water mark is the subject of exclusive proprietary ownership belongs to the state *on whose maritime borders* or within whose territories it is. . . ."

In *Barney* v. *Keokuk,* 94 U. S. 324, the Court discusses the question with these remarks:

> ". . . In our view of the subject the correct principles were laid down in *Martin* v. *Waddell, Pollard* v. *Hagan,* and *Goodtitle* v. *Kibbe* (9 How. 471). These cases related to tide waters it is true, *but they enunciate principles which are equally applicable to all navigable waters.* . . ."

The court in *Manchester* v. *Massachusetts,* 139 U. S. 240, says that

> "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. . . ."

In *Hardin* v. *Jordan,* 140 U. S. 371, involving certain lands under a small lake in Illinois, this Court held that the right of the States to regulate and control the shores of tide waters, and the land under them is the same as that which is exercised by the Crown in England, and said further:

> "In this country the *same rule* has been extended to our great navigable lakes, which are treated as inland seas. . . ."

Precisely this same doctrine was set forth in *Illinois Central* v. *Illinois,* 146 U. S. 387, and in the leading case of *Shively* v. *Bowlby,* 152 U. S. 1, which contains an exhaustive discussion of the subject and a review of virtually all the previous authorities. In that case the court alludes to *Pollard* v. *Hagan, Goodtitle* v. *Kibbe,* and *Martin* v. *Waddell,* and says that the rule is the same for all navigable waters. These are but a few of the decisions of this Court upon the question.[17] They are followed by those of many inferior Federal and State courts, and it is to be particularly noted that the cases involving lands beneath the open coast are treated in every single instance exactly as lands beneath a harbor, bay, or navigable river. Notable among these is *Humboldt Lumber Mfgrs. Assn.* v. *Christofferson,*[18] a case involving the death in a storm of certain seamen in a ship off Humboldt Bar, California. The facts show that the accident occurred in the "marginal sea" off the open coast. The Court held that the jurisdiction of the State over the sea is that of an independent nation, and that since the Constitution of the State defined its boundaries as three English miles from shore, such jurisdiction extended that far; likewise, that any State, with the consent of the Congress, has the right and power to define its own seaward boundaries.

This rule of state proprietorship and municipal sovereignty has been quoted by the Attorney General of the United States in many, many opinions relative to the titles to submerged lands, stating in one,[19] that ". . . the principle extends in fact to the whole body of any navigable water in the United States and the soil under it."

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[17] See also:
United States v. *Holt State Bank,* 270 U. S. 49, 70 L. ed. 465;
Massachusetts v. *New York,* 271 U. S. 65, 70 L. ed. 838;
United States v. *Oregon,* 295 U. S. 1, 79 L. ed. 1267.

[18] 60 Fed. 428; aff. 73 Fed. 239. And see, also, *Boone* v. *Kingsbury,* 206 Cal. 148, cert. den. 280 U. S. 517.

[19] 6 Opn. Atty. Gen. 172, 173.

It is immediately apparent from a perusal of the authorities above cited that the argument made by the Government throughout its Brief that there is a different rule to be applied to the "marginal sea" from that applicable to a harbor, bay, or navigable river, has no foundation in reason, and absolutely no authority, judicial or otherwise, to support it.

The State of California was admitted into the Union September 9, 1850. Its boundaries were defined in its first Constitution; they were, and still are, fixed at three English miles from shore. The Congress, as well as the Courts and the Executive Department of the United States Government, have recognized these boundaries numberless times since then, in legislative enactment, judicial decision, and executive action. And since that time, placing their reliance and trust upon the legislative and executive attitude, and especially upon the rule of law so often and so clearly enunciated in all the decisions, State and Federal, the State and its political subdivisions, particularly the larger seaboard municipalities, have expended many, many millions of dollars upon ports and harbors, upon breakwaters, wharves and jetties, upon beaches and channels, and upon industries entirely dependent upon the sea, such as fisheries and the recovery of petroleum and kelp. Contracts, leases, and permits in large numbers, involving enormous sums, have been made with individuals and corporations, taxes in comparable amounts have been levied, collected, and expended again for coastal improvements, all in the faith and confidence that the title of the State in and to these submerged lands, having been confirmed again and again, was entirely free from doubt, and that the right of the State to own and administer such lands had been established beyond all question. Accordingly, the alarm of all cities at the assertion of the Government in this case is not difficult to understand.

Not less than ten decisions of this Court [20] have applied the rule to California waters, and we think that they and the myriad others of lesser courts have established a rule of property, and that *stare decisis* should be the governing principle in this action.

It is a very serious and grave situation in which a principle upon which property rights have depended for nearly one hundred years is urged to be changed to the unquestionable disparagement of such rights, and to the utter confusion and uncertainty of those political subdivisions and individuals directly affected. The question has no concern with the paramount right of the general government to control navigation or to provide for the common defense; it is in its essence a question of *municipal* sovereignty, which can only be exercised by a State. The question was thus discussed in *Pollard* v. *Hagan*.[21]

> "This right of eminent domain over the shores and the soils under navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of a State sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any right of eminent domain or jurisdiction which the United States have been invested by the Constitution . . ."

This Court, nearly one hundred years ago, promulgated the rule of property that the States are the owners of all their navigable waters and the soil of the beds thereof, and has ever since, without exception, adhered thereto. The

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[20] See *supra* note 4a.

[21] 3 How. 212.

language of the opinion in *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443, should now be followed:

> "For every one would suppose that after the decision of this Court in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to."

This Court again pointed out the need of *stare decisis* in *Gilman* v. *City of Philadelphia,* 3 Wall. 713, thus:

> "It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly unless clearly erroneous. Vacillation is a serious evil . . ."

This Court held in *United States* v. *Mission Rock Co.,* 189 U. S. 391, that when California became a state there passed to it "absolute property in and dominion and sovereignty over all soils under the tide waters within her limits. . . ." Her limits are clearly and specifically defined, and there seems to be no other interpretation of the above words than that they mean all soils under *all* tide waters within those limits. No distinction is made between open coast and harbor, and nowhere in this or any other opinion of this Court does one single suggestion appear that there is any difference in principle. The Government, to be sure, urges that such a distinction exists because relatively few of the cases involve lands beneath open coastal waters. But not one single judicial authority is produced to support such a contention, and we think all the authorities, of which those cited above are only a fraction, conclusively refute it. It is accordingly submitted that the *Mission Rock* [22] decision has made the question *res judicata,* and that the rule of that case is the rule applicable to all submerged lands beneath *all* the navigable waters within the boundaries of the State.

[22] 189 U. S. 391.

VI

Conclusion

It is respectively urged that the reasons advanced and the authorities cited herein demonstrate a complete lack of merit in the Federal Government's complaint and that title to the lands claimed by the Government in this case is in the State of California and the State's grantees.

Respectfully submitted on behalf of the 462 member municipalities of the National Institute of Municipal Law Officers,

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