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UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

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TABLE OF CONTENTS

Page

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES F-1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

I. ENGLISH LAW AND PRACTICE PRIOR TO THE SEVENTEENTH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE SEABED AND SUBSOIL THEREOF 7

A. THE ENGLISH SEAS WERE WITHIN THE REALM OF ENGLAND 8

B. THE CROWN'S RIGHTS IN THE ENGLISH SEAS INCLUDED CONTROL OF THE FISHERIES 18

C. THE ENGLISH MARITIME JURISDICTION WAS TERRITORIAL IN THE ENGLISH SEAS, AND INCLUDED BOTH LEGISLATIVE POWER AND CRIMINAL JURISDICTION OVER FOREIGNERS . . 25

D. THE CROWN'S OWNERSHIP OF THE SEABED OF THE ENGLISH SEAS WAS RECOGNIZED FROM VERY EARLY TIMES 31

E. IN THE REIGN OF ELIZABETH I THE LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS EXTENDED AND ELABORATED IN SEVERAL IMPORTANT RESPECTS 33

F. EXCLUSION OF FOREIGNERS FROM COASTAL FISHERIES WAS FIRMLY ESTABLISHED IN SCOTTISH LAW AND PRACTICE 45

II. SEVENTEENTH-CENTURY ENGLISH LAW AND PRACTICE FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS, SEABED AND SUBSOIL 47

Page

A. THE CROWN POSSESSED TERRITORIAL SOVEREIGNTY OVER THE ENGLISH SEAS 48

1. Court Cases 49
2. Acts of Parliament 55
3. Legal Opinions 56
4. Other Official Pronouncements and Acts of State 58
5. Legal Treatises of the Period 61
6. Modern Commentators 70
7. Acquiescence by Other States 72

B. THE CROWN POSSESSED THE LEGAL RIGHT TO EXCLUDE OR TO LICENSE FOREIGN FISHERMEN IN THE ENGLISH SEAS AND THE RIGHT TO CREATE MONOPOLIES OF NEWLY DISCOVERED FISHERIES; AND ALL FISHERIES IN ENGLISH WATERS WERE SUBJECT TO REGULATION 73

1. Court Cases 74
2. Acts of Parliament 76
3. Legal Opinions 78
4. Other Official Pronouncements and Acts of State 79
5. Legal Treatises of the Period 86
6. Modern Commentators 90
7. Acquiescence by Other States 91

C. THE ADMIRALTY JURISDICTION WAS TERRITORIAL IN THE ENGLISH SEAS, WAS AN ATTRIBUTE OF SOVEREIGNTY, AND INCLUDED JURISDICTION OVER FOREIGNERS . . . 92

1. Court Cases 92
2. Acts of Parliament 94

Page

3. Other Official Pronouncements and Acts of State 94

4. Legal Treatises of the Period 95

D. THE CROWN OWNED THE SEABED AND SUB-SOIL OF THE ENGLISH SEAS AND THE RESOURCES THEREOF 98

1. Court Cases 98

2. Other Official Pronouncements and Acts of State 106

3. Legal Treatises of the Period 107

4. Modern Commentators and Judicial Decisions 114

E. THE FLAG SALUTE WAS INSISTED UPON AS AN ATTRIBUTE OF ENGLISH SOVEREIGNTY IN THE ENGLISH SEAS 117

1. Court Cases 117

2. Acts of Parliament 118

3. Legal Opinions 118

4. Other Official Pronouncements and Acts of State 118

5. Legal Treatises of the Period 119

6. Modern Commentators 119

7. Acquiescence by Other States 119

Page

F. OTHER ASPECTS OF MARITIME SOVEREIGNTY DEALT WITH NAVIGATION AND NEUTRALITY . . . 120

III. BRITISH LAW AND PRACTICE IN THE EIGHTEENTH CENTURY DID NOT CHANGE SUBSTANTIALLY WITH RESPECT TO MARITIME SOVEREIGNTY AND DOMINION 124

A. THE BRITISH SEAS CONTINUED TO BE REGARDED AS SUBJECT TO BRITISH SOVEREIGNTY AND A PART OF BRITISH TERRITORY 126

B. THE CLAIM TO EXCLUSIVE FISHERIES IN THE BRITISH SEAS WAS NOT ABANDONED, AND INDEED WAS EXTENDED TO NEW BRITISH POSSESSIONS 129

C. THE ADMIRALTY JURISDICTION IN THE BRITISH SEAS REMAINED UNCHANGED 132

D. CROWN OWNERSHIP OF THE SEABED AND SUBSOIL AND OF THE RESOURCES THEREOF CONTINUED TO BE FULLY RECOGNIZED IN LAW 133

E. THE FLAG SALUTE CONTINUED AS A RECOGNITION OF SOVEREIGNTY IN THE BRITISH SEAS 135

F. OTHER ATTRIBUTES OF SOVEREIGNTY AND JURISDICTION INVOLVED NEUTRALITY AND SMUGGLING 136

IV. THE AMERICAN COLONIAL CHARTERS CREATED TERRITORIAL SEAS AND CONVEYED MARITIME SOVEREIGNTY AND DOMINION 140

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE COLONIAL CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD STOPPED AT LOW-WATER MARK 140

Page

1. The Issuance of the Colonial Charters and Important Acts of Maritime Sovereignty in British Waters Were Closely Correlated in Time 141

2. The Persons Involved in Acts of Maritime Sovereignty in British Waters Were Largely the Same Persons as Those Responsible for the Chartering and Establishment of the American Colonies 148

3. The English Discoveries and Symbolic Acts of Taking Possession Were Sufficient in Law to Establish Maritime Sovereignty 162

4. The Common Law of England, Including the Law of Maritime Sovereignty and Dominion, Became Law in This Country . . . 164

5. The Exploitation of Fisheries and Other Marine Resources Was of Paramount Importance as an Objective of American Colonization 167

B. BRITAIN CLAIMED MARITIME SOVEREIGNTY IN NORTH AMERICAN WATERS 170

C. THE COLONIAL CHARTERS, CONSTRUED IN THE LIGHT OF CONTEMPORARY LEGAL USAGE, CONVEYED EXTENSIVE RIGHTS BOTH OF SOVEREIGNTY AND OF PROPERTY IN THE MARGINAL SEAS 178

1. The Second Virginia Charter of 1609 . . . 179

2. The New England Charter of 1620 185

3. Modern Interpretation of the Charters . . . 191

4. The Free Fishing Clauses 207

Page

D. THE RECORD IS SUFFICIENT TO ESTABLISH A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE COMMON COUNSEL STATES 210

V. RIGHTS OF SOVEREIGNTY AND DOMINION WERE EXERCISED OVER THE AMERICAN TERRITORIAL SEA DURING THE COLONIAL PERIOD 216

A. THE FISHERIES WERE SUBJECTED TO EXTENSIVE REGULATION AND LICENSING, AND FOREIGNERS WERE EXCLUDED 217

1. The New England Fishing Controversy . . . 219

2. The Anglo-French Struggle for Monopoly of Fishing in American Waters 222

(a) In General 222

(b) Newfoundland 228

(c) Cape Breton and Nova Scotia 232

(d) The Fisheries of the Common Counsel States 233

3. Licensing of Fishing by the Colonies 236

4. Grants of Exclusive Fishery 237

5. Regulation of the Fisheries 240

B. THE COLONIES ASSERTED AND EXERCISED CONTROL AND JURISDICTION OVER THE SEABED AND ITS RESOURCES WHENEVER THE OCCASION AROSE 240

1. Sedentary Fisheries 240

2. Grants of Submerged or Derelict Lands . . . 241

3. Mining 243

Page

C. THE TERRITORIAL JURISDICTION OF ADMIRALTY EXISTED IN THE AMERICAN SEAS JUST AS IN THE ENGLISH SEAS 247

D. OTHER ASPECTS OF SOVEREIGNTY, OWNERSHIP AND JURISDICTION CONFIRM THAT THE AMERICAN SEAS WERE REGARDED AS SUBJECT TO THE SAME LAW AS THE ENGLISH SEAS 249

1. Wreck and Other Admiralty Droits 249

2. Establishment of Ports 250

3. Regulation of Marine Pollution 251

4. Smuggling Jurisdiction 251

E. SEVERAL MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR THE AMERICAN TERRITORIAL SEAS 251

F. THERE WAS NO CURTAILMENT OF COLONIAL RIGHTS IN THE MARGINAL SEA BETWEEN 1752 AND 1776, AND IF THERE HAD BEEN SUCH A CURTAILMENT IT WOULD NEVER HAVE BEEN RECOGNIZED IN AMERICAN LAW 255

VI. THE ENGLISH LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS NOT INCONSISTENT WITH INTERNATIONAL LAW IN THE PERIOD 1606-1783, AND NO BRITISH OR AMERICAN COURT COULD OR WOULD HAVE SO HELD 261

A. NO BRITISH OR AMERICAN COURT WOULD HAVE QUESTIONED ITS GOVERNMENT'S TERRITORIAL CLAIMS ON THE BASIS OF ALLEGED CONTRARY DOCTRINES OF CUSTOMARY INTERNATIONAL LAW 261

Page

B. PLAINTIFF'S CONTENTIONS REGARDING INTERNATIONAL LAW CANNOT BE SUSTAINED 263

1. Broad Claims to Territorial Seas Were Fully Sanctioned by State Practice 265

2. The Views of Publicists Recognized the Right to Territorial Seas with Virtual Unanimity, and no Consensus Had Developed Restricting Such Seas to Any Limit Less than 100 Miles 271

3. No Narrow-Limit Rule Was Applied to Seabed Claims 281

VII. AT THE AMERICAN REVOLUTION THE STATES INDIVIDUALLY SUCCEEDED TO THE MARITIME TERRITORIAL SOVEREIGNTY AND DOMINION BOTH OF THEIR PREDECESSOR COLONIAL GOVERNMENTS AND OF THE BRITISH CROWN 283

A. THE STATES WERE INDIVIDUALLY SOVEREIGN IN THE REVOLUTIONARY AND CONFEDERATION PERIODS 286

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL AND PROPRIETARY GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED 314

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS AND SHOW NO AMERICAN DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES OR 30 LEAGUES IN WIDTH 329

Page

D. THE PEACE OF PARIS ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES 333

VIII. THE EXCLUSIVE RIGHT OF THE STATES TO EXPLORE AND TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF WERE NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION 337

A. THE CONSTITUTION EXPRESSLY PRESERVES STATE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS 337

B. SEVERAL OTHER PROVISIONS OF THE CONSTITUTION AND THE DEBATES AT THE FEDERAL CONVENTION INDICATE THE INTENTION NOT TO CHANGE OR TO AFFECT STATE BOUNDARIES OR THE OWNERSHIP OF PROPERTY 339

C. THE GREAT WEIGHT OF SUPREME COURT AUTHORITY HAS RECOGNIZED STATE SOVEREIGNTY IN THE PERIOD 1776-1789, AND STATE SUCCESSION TO ALL TERRITORIAL AND PROPERTY RIGHTS OF THE CROWN AND THE COLONIAL GOVERNMENTS WAS UNIFORMLY UPHELD UNTIL THE *CALIFORNIA* CASE 341

IX. THE EXCLUSIVE RIGHTS OF THE STATES TO THE CONTINENTAL SHELF HAVE NOT BEEN ABANDONED OR EXTINGUISHED SINCE 1787 . . . 376

A. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN TIDE WATERS, INCLUDING THE MARGINAL SEA, AND THE BED AND SUBSOIL THEREOF, AND CONGRESS HAS REPUDIATED THE *CALIFORNIA* COURT'S DECISION TO THE CONTRARY 376

Page

B. THE UNITED STATES DID NOT ABANDON OR RELINQUISH THE RIGHTS OF THE STATES BY ADOPTING THE THREE-MILE LIMIT 389

1. No Renunciation Can Be Inferred from Mere Silence 391

2. The United States' Adherence to the Three-Mile Limit Has Not Been Consistent or Unqualified 393

3. The Three-Mile Limit Was Not Applied by the United States to the Seabed and Subsoil 401

C. THE STATES' CONTINENTAL-SHELF RIGHTS WERE NOT EXTINGUISHED BY ANY OBLIGATORY RULE OF INTERNATIONAL LAW IN THE PERIOD 1783-1945 407

1. Even If Plaintiff Were Otherwise Correct, the International Law Against Which the States' Claims Should Be Judged Is Present Law, Not Past Law 408

2. The Three-Mile Limit Never Became an Obligatory Rule of International Law 409

3. No Obligatory Rule of International Law Prior to 1945 Barred the States' Seabed and Subsoil Claims 414

X. THE FEDERAL FOREIGN-AFFAIRS AND DEFENSE POWERS DO NOT REQUIRE FEDERAL OWNERSHIP OF THE EXCLUSIVE RIGHT TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF, BUT MERELY THE SAME PARAMOUNTCY WHICH THE FEDERAL GOVERNMENT ENJOYS ON LAND 428

Page

A. THE *CALIFORNIA* COURT'S VIEW THAT EXCLUSIVE FEDERAL PROPRIETARY RIGHTS IN THE CONTINENTAL SHELF ARE REQUIRED BY THE FOREIGN-AFFAIRS AND DEFENSE POWERS WAS ALWAYS UNSOUND AND HAS BEEN REPUDIATED BY THE STATE DEPARTMENT, BY CONGRESS, AND BY SUBSEQUENT DECISIONS OF THE COURT 428

B. THE RECORD DEMONSTRATES THAT NO DEFENSE OR FOREIGN-AFFAIRS DIFFICULTIES WOULD RESULT FROM RECOGNITION OF STATE PROPERTY RIGHTS IN THE SEABED AND SUBSOIL OF THE CONTINENTAL SHELF . . . 439

XI. THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF TERRITORY OR PROPERTY 444

XII. THE DEFENDANT STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO PART OR ALL OF THE CONTINENTAL SHELF ARE DEEMED TO HAVE SPRUNG INTO EXISTENCE DE NOVO IN 1945 449

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE 449

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION 455

CONCLUSION 461

Page

APPENDIX:

BRITISH AND COMMONWEALTH LAW SINCE 1800 465

A. THE CROWN'S OWNERSHIP OF THE SEABED AND SUBSOIL OF BRITISH WATERS HAS CONTINUED UNCHANGED AND HAS BEEN APPLIED TO THE CONTINENTAL SHELF 465

B. VIS-A-VIS FOREIGN NATIONS, BRITISH ADHERENCE TO THE THREE-MILE LIMIT HAS NOT BEEN CONSISTENT AND HAS NOT BEEN GENERALLY APPLIED TO THE SEABED AND SUBSOIL 472

C. THE CANADIAN AND AUSTRALIAN CASES TURNED ON THE ALLOCATION OF POWERS IN LATE 19TH-CENTURY BRITISH CONSTITUTIONAL LAW BETWEEN THE IMPERIAL CROWN AND UNCHARTERED IMPERIAL PROVINCES, AND THUS HAVE NO RELEVANCE TO THE ISSUES IN THE PRESENT LITIGATION . . . 477

1. The Canadian Advisory Opinion 477

2. Bonser v. La Macchia 483

TABLE OF CITATIONS

Cases: Page

United States Courts

Abby Dodge, The,
223 U.S. 166 (1912) 380

Alabama v. Texas,
347 U.S. 272 (1954) 458

Armour & Co. v. Newport,
110 Atl. 645 (R.I. 1920) 115-16, 242

Balzac v. Porto Rico,
248 U.S. 298 (1922) 321

Bank of Augusta v. Earle,
38 U.S. (13 Pet.) 519 (1839) 308, 364

Barker v. Bates,
13 Pick. 255 (Mass. 1832) 192

Boone v. Kingsbury,
206 Cal. 148, 273 Pac. 797 (1928) 381

Brookhaven v. Strong, in Gould, *The Law of Waters*
70-72 (3d ed. 1900) 197

Champlin Refining Co. v. Comm'r,
286 U.S. 210 (1932) 459

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 341, 342, 343, 344

Church v. Hubbart,
6 U.S. (2 Cranch) 187 (1804) 139, 394, 405

Chy Lung v. Freeman,
92 U.S. 275 (1875) 429

Page

Commonwealth v. Manchester,
152 Mass. 230, 25 N.E. 113 (1890) 410

Commonwealth v. Newport News,
158 Va. 521, 164 S.E. 689 (1932) 40, 192, 379

Commonwealth v. Roxbury,
75 Mass. (9 Gray) 451 (1857) 117

Cooper v. Telfair,
4 U.S. (4 Dall.) 14 (1800) 355

Coyle v. Smith,
221 U.S. 559 (1911) 455

De Lovio v. Boit,
7 Fed. Cas. 418 (D. Mass. 1815) 26, 28, 30

Dorr v. United States,
195 U.S. 138 (1940) 318

Dunham v. Lamphere,
3 Gray 268 (Mass. 1855) 116, 192

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 312

Escanaba Co. v. Chicago,
107 U.S. 678 (1882) 455

Etheridge v. United States,
218 F. Supp. 809 (E.D. N.C. 1963) 196

Ex parte Morgan,
20 F. 298 (W.D. Ark. 1883) 318

Foster v. Neilson,
27 U.S. (2 Pet.) 253 (1829) 262

Page

Furman v. City of New York,
7 N.Y. Sup. Ct. 16 (1851) 116

Gough v. Bell,
22 N.J.L. (2 Zab.) 441 (1850) 115

Gough v. Bell,
21 N.J.L. 156 (1847) 192

Granville-Smith v. Granville-Smith,
349 U.S. 1 (1955) 318, 321

Harcourt v. Gaillard,
25 U.S. (12 Wheat.) 523 (1827) 321, 361, 362, 364

Hawaii v. Mankichi,
190 U.S. 197 (1903) 321

Illinois Central R.R. v. Illinois,
146 U.S. 387 (1892) 115

In re Certain Land in Lawrence,
119 F. 453 (D. Mass. 1902) 448

In re Cooper,
143 U.S. 472 (1892) 262, 404

Iowa-Des Moines National Bank v. Bennett,
284 U.S. 239 (1931) 458-59

Johnson v. McIntosh,
21 U.S. (8 Wheat.) 543 (1823) 163, 257, 321, 358

Louisiana v. Mississippi,
202 U.S. 1 (1906) 379

Mackenzie v. Hare,
239 U.S. 299 (1915) 374

Page

Manchester v. Massachusetts,
139 U.S. 240 (1891) 377, 379, 411, 468

Martin v. Waddell,
41 U.S. (16 Pet.) 367 (1842) . . . 115, 116, 163, 191, 320, 365

Massachusetts v. New York,
271 U.S. 65 (1926) 163, 433

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 287

McIlvaine v. Coxe's Lessee,
8 U.S. (4 Cranch) 209 (1808) 356

Middleton v. Campagnie Générale Transatlantique,
100 F. 866 (2d Cir. 1900) 411

Missouri v. Holland,
252 U.S. 416 (1920) 430

Narragansett Real Estate Co. v. McKenzie,
82 Atl. 804 (R.I. 1912) 115

Nathan v. Commonwealth,
1 Dallas 77 (Pa. 1781) 302

New York v. New York & S.I. Ferry Co.,
68 N.Y. 71 (1877) 115

New York, N.H. & H.R.R. v. Horgan,
56 Atl. 179 (R.I. 1903) 115, 192, 242

Nichols v. Boston,
98 Mass. 39 (1867) 192

Oklahoma v. Atkinson Co.,
313 U.S. 508 (1941) 445

Page

Penhallow v. Doane,
3 U.S. (3 Dall.) 53 (1795) 293, 344

People v. Trinity Church,
22 N.Y. 44 (1860) 192

Perez v. Brownell,
356 U.S. 44 (1958) 374

Pollard's Lessee v. Hagan,
44 U.S. (3 How.) 212 (1845) 319, 376, 377, 382, 385, 449

Poole v. Fleeger,
36 U.S. (11 Pet.) 184 (1837) 362

Pope v. Blanton,
10 F. Supp. 18 (N.D. Fla. 1935) 399-400

Preston v. Browder,
14 U.S. (1 Wheat.) 114 (1816) 356

Reid v. Covert,
354 U.S. 1 (1956) 374

Rhode Island v. Massachusetts,
37 U.S. (12 Pet.) 657 (1838) 257, 362

Rogers v. Jones,
1 Wend. 237 (N.Y. 1828) 116

Saulsberry v. Maddox,
125 F.2d 430 (6th Cir. 1942) 196

Schacht v. United States,
398 U.S. 58 (1970) 458

Scott v. Sanford,
60 U.S. (19 How.) 393 (1856) 318

Page

Shively v. Bowlby,
152 U.S. 1 (1894) 115, 192

Simons v. French,
25 Conn. 345 (1856) 116

Sim's Lessee v. Irvine,
3 U.S. (3 Dall.) 424 (1799) 262, 355

Skinner v. Oklahoma,
316 U.S. 535 (1942) 458

Skiriotes v. Florida,
313 U.S. 69 (1941) 400

Smith v. Maryland,
10 U.S. (6 Cranch) 286 (1810) 356

Snow v. United States,
85 U.S. (18 Wall.) 317 (1873) 318

South African Airways v. New York State Division of Human Rights,
315 N.Y.S.2d 651 (Sup. Ct. N.Y. Co. 1970) 431

Stearns v. Minnesota,
179 U.S. 223 (1900) 456

St. Louis v. Western Union Telegraph Co.,
148 U.S. 92 (1893) 445

Stockton v. Baltimore & N.Y.R.R.,
32 F. 9 (C.C. N.J. 1887), *appeal dismissed,*
140 U.S. 699 (1891) 446, 447, 448

The Alexander,
60 F. 914 (D. Alaska 1894) 405

Page

The Antelope,
23 U.S. (10 Wheat.) 66 (1825) 263

The Grace and Ruby,
283 F. 475 (1922) 262

The Hungaria,
41 F. 109 (D. S.C. 1889) 410

The Scotia,
81 U.S. (14 Wall.) 170 (1871) 263

The Sloop Active 347

The Susanna 347

Swift v. Tyson,
41 U.S. (16 Pet.) 1 (1842) 312

United States v. Bevans,
16 U.S. (3 Wheat.) 336 (1818) 356

United States v. California,
332 U.S. 19 (1947) . . . 5, 6, 184, 193, 268, 284, 341, 358, 376, 377, 378, 380, 381, 382, 383, 385, 388, 393, 428, 429, 430, 431, 432, 438, 443, 444, 484, 485

United States v. California,
342 U.S. 891 (1951) 207

United States v. California,
381 U.S. 139 (1965) 207

United States v. California,
382 U.S. 448 (1966) 207

United States v. Carmack,
329 U.S. 230 (1946) 445

Page

United States v. Chandler-Dunbar Water Power Co.,
209 U.S. 447 (1907) 432

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936). 284, 294, 371, 372, 374, 375

United States v. Florida,
363 U.S. 121 (1960) 400, 438, 439

United States v. Jackson,
390 U.S. 570 (1968) 459

United States v. Louisiana,
339 U.S. 699 (1950) 428

United States v. Louisiana,
363 U.S. 1 (1960) 184, 268, 382, 383, 398, 408, 435, 437, 438, 439, 457

United States v. Louisiana,
382 U.S. 288 (1965) 207

United States v. Louisiana,
389 U.S. 155 (1967) 207

United States v. Louisiana,
394 U.S. 1 (1968) 207

United States v. Louisiana,
394 U.S. 11 (1969) 207

United States v. Louisiana,
394 U.S. 836 (1969) 207

United States v. Louisiana,
404 U.S. 388 (1971) 207

Page

United States v. Texas,
339 U.S. 707 (1950) 3, 383, 426, 428

United States v. The James G. Swan,
50 F. 108 (D. Wash. 1892) 262, 405

United States v. The Kodiak,
53 F. 126 (D. Alaska 1892) 262, 405

United States v. Nelson,
30 F. 112 (Ore. Cir. 1887) 318

Ware v. Hylton,
3 U.S. (3 Dall.) 199 (1796) 350

Wayne County v. United States,
53 Ct. Cl. 417 (1918), *aff'd*, 252 U.S. 574 (1920) 445

Welsh v. United States,
398 U.S. 333 (1970) 458, 459

Weston v. Sampson,
62 Mass. (8 Cush.) 347 (1851) 193

Williams v. Suffolk Insurance Co.,
38 U.S. (13 Pet.) 415 (1839) 262

Wilson v. Shaw,
204 U.S. 24 (1907) 262

Workman v. Boone,
230 U.S. 517 (1929) 381

Yalobusha County v. Crawford,
165 F.2d 867 (5th Cir. 1947) 445

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 373, 431

Page

Zemel v. Rusk,
381 U.S. 1 (1965) 374

Zschernig v. Miller,
389 U.S. 429 (1968) 431

British and British Commonwealth Courts

Abbot of Benet Hulm, Case of 32

Abbot of Furneys, Case of 32

Abbot of Tichfield, Case of 32

Attorney General for Canada v. Attorneys General for Provinces,
(1898) A.C. 700 481

Attorney General v. Philpott,
in Moore, A History of the Foreshore
265-66 (3d ed. 1888) 100, 101, 102, 104, 145

Attorney General v. Richards,
in Angell, The Right of Property in
Tide Waters, Appendix, 9 (1826) 134

Attorney General v. Sir Edward Farmer,
2 Lev. p. 171, Maine et al. Exhibit 159 104

Attorney General v. Tomsett,
2 Cromp. M. & R. 170, 5 Tyrwh. 514,
1 Gale 147 (1835) 466

Attorney General v. Trustees of the British Museum,
[1903] 2 Ch. 598 200

Attorney General for Canada v. Attorney General for Quebec,
(1921) 1 A.C. 413 478

Page

Basket v. University of Cambridge,
96 English Reports 59 (1758) 199

Bonser v. La Macchia,
43 Austl. L.J. Rep. 411 (1969) 483, 484, 485

Bulstrode v. Hall,
82 English Reports 1024 (1980) 104

Carr v. Francis Times & Co.,
(1902) A.C. 176, U.S. Exhibit 17, p. 110 471

Carter v. Murcot,
4 Burr. 2162, 98 English Reports 127 (1768),
Maine et al. Exhibit 455, p. 129 131

Case of the Royal Fishery of the Banne
(1610), Maine et al.
Exhibit 157, p. 35 . . . 49, 74, 98, 100, 101, 115, 117, 131-32,
143, 153, 157, 158, 159-60, 161

Cornwall Mines Arbitration 466

Croft v. Dunphy,
(1933) A.C. 156 470

Doe v. East India Co.,
in Gould, The Law of Waters 70-72 (3d ed. 1900) 197

Duchess of Sutherland v. Watson,
6 Sess. Cas. (3d ser.) 199 (1868) 467

Dyke v. Walford,
5 Moore's Reports 434 (1846) 201

Earl of Devon, Case of 32

Earl of Lancaster, Case of 32

Page

Gammell v. Her Majesty's Commissioners of Woods and Forests,
3 Macqueen's Appeals 419 (1859) 465

Grabham v. Geales,
81 English Reports 995 (1619) 199

Johann Friederich, The
(1839), 1 Robinson, *Cases in the High Court of Admiralty* 35 (1842) 98

Johnson v. Barrett,
Aleyn 10, 82 English Reports 887 (1646) 103

Le Louis,
in Kent, Commentaries on American Law (1896), reprinted in Crocker (U.S. Dept. of State) The Extent of the Marginal Sea 182 (1919) 138

Lord Advocate v. Clyde Navigation Trustees,
19 Rettie 174 (1891) 469

Lord Fitzhardinge v. Purcell,
(1908) 2 Ch. 139 471

Manor of Burnham, Case of 32

Mortensen v. Peters,
(1906) 8 F. 93, 3 British Intn'l Law Cases 754 261-62

Officium Domini c. Dulinge
(1591), printed in Marsden (ed.), 2 Select Pleas in the Court of Admiralty 1547-1602 (1897), Maine et al. Exhibit 201 38

Officers of State v. Smith,
8 Sess. Cas. (2d ser.) 711 (1846), *aff'd sub nom. Smith v. Earl of Stair,* 6 Bell's App. Cases (House of Lords, 1849) 466

Page

Peters v. Olsen,
(1905) 4 Adam's Justiciary Reports 608,
3 British Intn'l Law Cases 750 261

Poll v. Lord Advocate,
(1897) 5 Scots L.T. 167,
3 British Intn'l Law Cases 747 (1965) 261, 474

Re Dominion Coal Co.,
40 D.L.R. (2d) 593 (1963) (Nova Scotia Supreme Court) . . 481

Re Offshore Mineral Rights of British Columbia,
65 D.L.R. (2d) 364 (1967) 477, 484

Re Provincial Fisheries
(1896), 26 S.C.R. 444; (1898) A.C. 700 483

Re Quebec Fisheries,
35 D.L.R. 1 (1917) 477, 478, 480, 481

Regina v. Keyn,
(1876) 2 Ex. D. 63 . . . . . 33, 94, 468, 469, 470, 471, 472, 473, 478, 479, 482, 484, 485

Rex v. Oldsworth,
Hillary, 12 Charles I (1636-37),
Maine et al. Exhibit 159 . . . . . 49, 75, 101, 102, 113, 145

Secretary of State for India v. Chelikani Rama Rao,
43 L.R. Ind. App. 192 (1916) 469, 470, 482

Ship Money Case (Rex v. Hampden),
3 Howell, State Trials 825-1254 (1816) . . . 49, 75, 103, 145

Sir Henry Constable's Case. 99

Sir John Constable's Case,
in Moore, *A History of the Foreshore* 224-32
(3d ed. 1888) 38

Page

Toppesham Case,
in Jerwood, *Dissertation on the Rights to the Sea Shores* 49-50 (1850) 31

Twee Gebroeders, The,
3 C. Rob. 162, 165 English Reports 422 (1800) 472

Whitaker v. Wise,
Vol. II Pasch. 23 Car. II B.R., in Moore, *A History of the Foreshore* 415-16 (3d ed. 1888) 103

Whitstable v. Gann,
20 C.B. (N.S.) 1, 144 English Reports 1003 (1865) 465

International Courts and Arbitral Tribunals

Arbitration of the Title to Islands in Passamaquoddy Bay and the Bay of Fundy,
Mixed Commission Under Article IV of the Treaty Between Great Britain and the United States of December 24, 1814, in 6 Moore, *International Adjudications* 3, 47 (1933) 181, 254, 257

Bering Sea Arbitration
Under the Treaty Between the United States of America and Great Britain, Concluded at Washington February 29, 1892 . . . . . 403, 407

Grisbadarna Case, The (Norway v. Sweden),
Scott, Hague Court Reports 121 (1916) 269

Lobster Fisheries on the Coasts of Newfoundland,
in Parry (ed.), 2b British Digest of International Law 420 (1967) 44

North Sea Continental Shelf Cases,
[1969] I.C.J. 1 . . . . . 423, 426, 432, 450, 452

Page

Saint Croix River Arbitration
Under Article V of the Treaty Between Great Britain and the United States of November 19, 1794, in 1 Moore, *International Adjudications* 110 (1929) . . . 253, 311

Charters:

Albemarle Grant of 1687 243

Avalon Charter of 1623 . . . . . 144, 152

Carolina Charter of 1663 . . . . . 146, 153, 154, 160, 254

Carolina Charter of 1665 153

Carolina Patent to Heath of 1629 . . . . . 144, 156, 195

Delaware Charter to Penn of 1683 211

Duke of Leinster Grant of 1692 250

Dunkirk Deed of 1662 106

First Virginia Charter of 1606 . . . 141, 142, 154, 155, 156, 158, 159, 160, 162, 213, 219, 222

Gilbert Patent of 1578 41

Gilbert Patent of 1584 41

Guiana Patent of 1627 152

Hudson's Bay Charter of 1670 . . . . . 147, 159, 160, 189

Maine Charter of 1639 . . . . . 145, 180, 208, 210, 248

Maine Grant to Gorges and Mason of 1622 . . . . . 144, 187, 210, 214

Page

Mariana Grant to Mason of 1622 . . . . . 157, 187, 189

Maryland Charter of 1632 . . . . . 145, 152, 180, 184, 208, 211

Massachusetts Bay Charter of 1629 . . . . 144, 161, 208, 210, 234

Muscovy Company Charter of 1555 39

Muscovy Company Charter of 1613 85

Neale Grant of 1690 250

Neale Lease of 1691 243

Neale Lease of 1692 243

New Castle (Delaware) Charter of 1682 147

New England Charter of 1620 . . . . . 144, 151, 152, 153, 155, 156, 157, 185, 188, 205, 210, 211, 213, 220

Newfoundland Charter of 1610 . . . 143, 151, 189, 207, 208, 228

New Hampshire Charter of 1635 . . . . . 145, 210

New Hampshire Grant to Mason of 1629 . . . . . 157, 210, 214

New Jersey Grant to Carteret and Berkeley of 1664 . . . . . 146, 153, 211

New Jersey Admiralty Patent to Boone of 1760 247

New York and New Jersey Patent of 1664 . . . . . 146, 211

Nova Scotia Charter of 1621 . . . . . 144, 161, 189, 190, 191

Nova Scotia Charter to Temple of 1662 . . . . . 146, 189, 224

Page

Nova Scotia Deed of 1630 185

Offley Grant of 1691 250

Pennsylvania Charter of 1681 . . . . . 147, 158

Pennsylvania Charter of Society of Traders of 1682 . . . 147, 236

Piscataway Area Grant to Gorges, Mason and others of 1631 189

Providence Island Charter of 1630 248

Providence Plantation Patent of 1643 145

Raleigh Patent of 1584 41

Rhode Island Charter of 1663 . . . . . 146, 208, 210

Second Massachusetts Bay Charter of 1691 . . . . . 148, 210, 217, 254

Second Virginia Charter of 1609 . . . 143, 151, 155, 159, 160, 162, 179, 182, 185, 187, 211

Third Virginia Charter of 1612 . . . . . 143, 151, 185, 196

Virginia Lease to Arlington and Culpeper of 1673 . . . . . 147, 150, 184, 213

Windward and Leeward Islands Charter of 1627 153

Page

Statutes and Other Legislative Materials:

American

Albany Plan of Union of 1754 . . . . . 258, 259

Articles of Confederation 5, 290, 292, 294, 295, 297, 302, 303, 305, 313, 316, 317, 344, 354, 355

Compact of 1780 between Virginia and Pennsylvania 355

Congressional Resolutions of 1782 326

Congressional Resolution of 1783 317

Constitution of 1787 . . . 5, 245, 246, 287, 293, 295, 305, 306, 307, 308, 312, 321, 337, 338, 339, 340, 341, 342, 355, 356, 362, 374, 445, 446, 447, 448, 449, 451, 455, 456, 481

Declaration of Independence . . . 260, 284, 288, 289, 290, 292, 356

Executive Order 9276,
dated December 2, 1942 (7 F.R. 10091),
as amended by *Executive Order* 9319,
dated March 23, 1943 (8 F.R. 3687) 435

Florida Constitution of 1868 399

Georgia Statute of 1782 355

Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary
76th Cong., 1st Sess. (1939) 381

Page

Hearings on S.J. Res. 13 and Other Bills Before the Senate Committee on Interior and Insular Affairs (83d Cong., 1st Sess.) 435

Maryland Statute of 1780 356

Massachusetts Proclamation of Neutrality of 1784 296

Massachusetts Statute of 1641 242

Massachusetts Statute of 1646 . . . . . 234, 235

Massachusetts Statute of 1646 251

Massachusetts Statute of 1647 235

Massachusetts Statute of 1647 251

Massachusetts Statute of 1667 . . . . . 234, 235

Massachusetts Statute of 1713 251

New Hampshire Statute of 1763 242

New Jersey Statute of 1719 240

New Jersey Statute of 1693 237

New Jersey Statute of 1766 249

Outer Continental Shelf Act, 43 U.S.C. §1333(a)(2) (1971) 438, 444

Pennsylvania Statute of 1693 239

Rev. Stat. §1956 (1869) 404

Rhode Island Statute of 1707 242

Page

Senate Resolution of 1837,
Congressional Globe and Appendix 307

Senate Resolution of 1860,
Congressional Globe 307

25 Stat. 1009 (1889) 404

Submerged Lands Act,
67 Stat. 29, 43 U.S.C. §§1301-1315 . . 433-34, 438, 439, 440, 441, 442, 444, 448, 455, 456, 459

Truman Proclamation of 1945 . . . . . 2, 404, 421, 422, 423, 424, 425, 426, 432, 450, 452, 453, 476

Virginia Statute of 1777 350

British

Act To Encourage the Trade to Newfoundland of 1698/9 . . . 230

British North America Act of 1867 481

Charles I's Fishing Proclamation of 1636 . . . 57, 60, 78, 83, 145

Charles I's Ship Money Proclamation of 1634 . . . . . 59, 106, 122, 145

Charles II's Proclamation of 1684 121

Commission to Dudley, Vice-Admiral of New England, of 1685 248

Commission to Shirley, Vice-Admiral of Massachusetts, of 1741 248

Page

Continental Shelf Act, 1964, c. 29 . . . . . 471, 477

De Prerogativa Regis 10

De Superioritate Maris 25, 26, 29, 95, 183

Fisheries Act of 1889,
52 and 53 Vict. c. 23 474

Hovering Act of 1699 148

Hovering Act of 1718 137

Hovering Act of 1719 . . . . . 137, 138

Hovering Act of 1736 . . . . . 137, 138

Hovering Act of 1751 . . . . . 137, 138

Hovering Act of 1763 . . . . . 137, 138

Hovering Act of 1764 . . . . . 137, 251

Hovering Act of 1765 . . . . . 137, 138

Hovering Act of 1779 . . . . . 137, 138

Hovering Act of 1783 . . . . . 137, 138

Hovering Act of 1784 . . . . . 137, 138

Hovering Act of 1794 . . . . . 137, 138

Irish Oyster Fisheries Act of 1856,
31 and 32 Vict. c. 45, §67 475

James I's Fishing Proclamation of 1609 . . . . . 56, 58, 60, 78, 80, 81, 143, 159

Page

Laws of Oleron 28

Magna Carta (1215) 22, 38, 40, 478

Massachusetts Government Act of 1774 314

Naval Instructions of 1632 59

Navigation Act of 1651 77

New England Restraining Act of 1775 256

Nova Scotia Proclamation of 1665 237

Ordinance of Edward III of 1339 27

Ordinance of King John of 1201 13

Parliamentary Resolution of 1652 77

Proclamation of 1634 . . . . . 59, 106

Proclamation of 1763 . . . . . 258, 259, 318

Quebec Act of 1774 . . . . . 239, 258, 260, 314, 318

Scottish Proclamation of 1618 82

Scottish Statute of 1661 77

Scottish Statute of 1681 . . . . . 55, 94, 147

Statute of 17 Edward 2, c. 11 11

Statute of 18 Edward 3 37

Statute of 9 George II, c. 35 139

Statute of 39 George 3, c. 37 133

Page

Statute of 1389, 13 Richard 2, c.5, 2
Statutes of the Realm 62 (1816) 14, 15, 16, 17, 18, 62

Statute of 1391, 15 Richard 2, c.3, 2
Statutes of the Realm 78-79 (1816) 16

Statute of 1424 46

Statute of 1536 30

Statute of 1566 39

Statute of 1571 23

Statute of 1584 41

Statute of 1605 76

Statute of 1621 221

Statute of 1624 221

Statute of 1652 55

Statute of 1660 . . . . . 77, 146

Statute of 1661 77

Statute of 1662 78

Statute of 1699 56

Statute of 1700 177

Statute of 1713 249

Statute of 1714 131

Statute of 1717 249

Page

Statute of 1771 131

Statute of 1791 131

Territorial Waters Jurisdiction Act of 1878 . . . . . 473, 474, 482, 484

Other

Australian Pearl Fisheries Act of 1953 476

Danish Statute of 1631 270

Proclamation of Philip II of Spain of 1565 278

Queensland Mineral Resources (Adjacent Submarine Areas) Act of 1964 484

Treaties:

Convention of 1320 between England and Flanders 27

Convention on the Continental Shelf, April 29, 1958, U.S.T. 2, 432, 450

Draft Treaty of 1604 between England and Scotland 79, 142, 151

Peace of Paris of 1763 . . . . . 225, 226, 227, 231, 232, 238, 259, 270, 322

Peace of Paris of 1783 . . . 277, 301, 302, 322, 327, 329, 330, 333, 335, 350, 361, 362, 395, 397, 407

Treaty between England and Sweden, signed at Upsala in 1654 72

Page

Treaty between Great Britain and Denmark,
signed at Whitehall in 1661 . . . . . 72, 91

Treaty between Great Britain and Spain,
signed at Westminster in 1670 175

Treaty of Friendship and Commerce
between Great Britain and Sweden,
signed at Whitehall in 1661 72

Treaty of Guadalupe Hidalgo of 1848
between Mexico and the United States 398

Treaty of Peace between Great Britain and France,
signed at Whitehall in 1686 176

Treaty of Tordesillas of 1494 267

Treaty of Utrecht of 1713 between
Great Britain and Spain 223, 225, 227, 230, 231, 233, 270, 334, 335, 336

Treaty of 1490 between England and Denmark 23

Treaty of 1523 between England and Denmark 23

Treaty of 1604 between England and Spain 35

Treaty of 1654 between Great Britain
and Holland 119, 120, 146

Treaty of 1656 between Sweden and England 91

Treaty of 1662 between Great Britain
and Holland 119, 120, 146

Treaty of 1662 between Great Britain and Tripoli 73

Page

Treaty of 1667 between Great Britain and Holland 119, 120, 146

Treaty of 1674 between Great Britain and Holland 119, 120, 304

Treaty of 1675 between Great Britain and Tripoli 73, 123

Treaty of 1682 between Great Britain and Algiers 73, 123

Treaty of 1685 between France and Morocco 270

Treaty of 1688 between Great Britain and Algiers 73, 123

Treaty of 1689 between Great Britain and Holland 119

Treaty of 1716 between Great Britain and Algiers 136

Treaty of 1716 between Great Britain and Tripoli 127, 136

Treaty of 1716 between Great Britain and Tunis 136

Treaty of 1751 between Great Britain and Tripoli 127, 136

Treaty of 1751 between Great Britain and Tunis 136

Treaty of 1762 between Great Britain and Algiers 137

Treaty of 1762 between Great Britain and Tunis 137

Treaty of 1767 between France and Morocco 270

Treaty of 1777 between the State of North Carolina and a tribe of Indians 356

Treaties of 1778 between the United States and France 300, 394

Page

Treaty of 1784 between Great Britain and Holland. 136

Treaty of 1790 between Great Britain and Spain . . . 130, 270

Treaty of 1794 between Great Britain and the United States 311, 396

Treaty of 1795 between Great Britain and Spain 396

Treaty of 1800 between the United States and France . . . 401

Treaty of 1807 between the United States and Great Britain [never ratified] 311

Treaty of 1839 between Great Britain and France 280

Treaty of 1853 between the United States and Mexico 398

Treaty of 1867 between the United States and Russia 404

Treaty of 1942 between Great Britain and Venezuela 476

Webster-Ashburton Treaty of 1842 391

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Page

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Bancroft, *History of the United States* (1874) 309

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Page

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Bollan, *The Ancient Right of the English Nation to the American Fishery* (1764) 164, 226

Bollan, *The Importance and Advantage of Cape Breton* (1746) 226

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Bowen, *Francis Bacon* (1963) 151

Bowen, *The Lion and the Throne* (1965) 154

Page

Brant, *James Madison* (1948) 325, 327, 397

Bridenbaugh, *Vexed and Troubled Englishmen 1590-1642* (1968) 158

Brierly, *The Law of Nations* (1928) 413

British and Foreign State Papers 150, 159, 160, 189, 228, 331, 392, 473

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Burgess, *Constitutional Law* (1890) 313

Burnett, *The Continental Congress* (1941) 288, 294, 316

Bustamante, *The Territorial Sea* (1930) 277, 413-14

Bynkershoek, *De Dominio Maris* 267

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Cauchy, *Le Droit Maritime International Considéré dans Ses Origines* (1862) 416

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Chitty, *The Laws of Commerce* (11th ed. 1857) 128, 277

Page

Codrington, *His Majesty's Propriety and Dominion on the British Seas Asserted* (London 1665) 67, 175

Cokayne, *Complete Peerage* (1889) 153

Coke, *First Institute* (1628) 65, 144

Coke, *Fourth Institute* (1644) 65, 95, 145

Coke, "Propositions for Fishing" (1633) 59, 145, 154, 171

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(Cooke ed.), *The Federalist* (1961) 292, 295, 318

Corpus Juris Secundum (1956) 196

Page

Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* (1919) 26, 34, 63, 71, 91, 119, 137, 139, 225, 266, 267, 269, 270, 275, 277, 278, 279, 281, 394, 395, 396, 397, 400, 402, 404, 473, 474

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Dictionary of National Biography . . . 67, 68, 126, 150, 153, 156, 158, 159, 160, 162

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Page

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Page

Goebel, "Constitutional History and Constitutional Law," *Col. L. Rev.* (1938) 302, 307, 310, 371

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Page

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

1. English law and practice prior to the seventeenth century recognized the sovereignty and ownership by the crown of the English seas and the seabed and subsoil thereof. Supplemental Brief for the Common Counsel States (hereinafter "Br.") 7-46.

2. The English seas were within the realm of England. Br. 8-18.

3. The crown's rights in the English seas included control of the fisheries. Br. 18-25.

4. The English maritime jurisdiction was territorial in the English seas, and included both legislative power and criminal jurisdiction over foreigners. Br. 25-31.

5. The crown's ownership of the seabed of the English seas was recognized from very early times. Br. 31-33.

6. In the reign of Elizabeth I the law of maritime sovereignty and dominion was extended and elaborated in several important respects. Br. 33-45.

7. Exclusion of foreigners from coastal fisheries was firmly established in Scottish law and practice. Br. 45-46.

8. Seventeenth-century English law and practice fully recognized the crown's sovereignty and dominion in the English seas, seabed and subsoil. Br. 47-124.

9. The crown possessed territorial sovereignty over the English seas. Br. 48-73.

10. The crown possessed the legal right to exclude or to license foreign fishermen in the English seas and the right to create monopolies of newly discovered fisheries; and all fisheries in English waters were subject to regulation. Br. 73-92.

11. The admiralty jurisdiction was territorial in the English seas, was an attribute of sovereignty, and included jurisdiction over foreigners. Br. 92-98.

12. The crown owned the seabed and subsoil of the English seas and the resources thereof. Br. 98-117.

13. The flag salute was insisted upon as an attribute of English sovereignty in the English seas. Br. 117-20.

14. Other aspects of maritime sovereignty dealt with navigation and neutrality. Br. 120-24.

15. British law and practice in the eighteenth century did not change substantially with respect to maritime sovereignty and dominion. Br. 124-39.

16. The British seas continued to be regarded as subject to British sovereignty and a part of British territory. Br. 126-29.

17. The claim to exclusive fisheries in the British seas was not abandoned, and indeed was extended to new British possessions. Br. 129-32.

18. The admiralty jurisdiction in the British seas remained unchanged. Br. 132-33.

19. Crown ownership of the seabed and subsoil and of the resources thereof continued to be fully recognized in law. Br. 133-35.

20. The flag salute continued as a recognition of sovereignty in the British seas. Br. 135-36.

21. Other attributes of sovereignty and jurisdiction involved neutrality and smuggling. Br. 136-39.

22. The American colonial charters created territorial seas and conveyed maritime sovereignty and dominion. Br. 140-216.

23. Given the legal and political climate in which the colonial charters were issued, it would have been incredible if the colonies they created had stopped at low-water mark. Br. 140-70.

24. The issuance of the colonial charters and important acts of maritime sovereignty in British waters were closely correlated in time. Br. 141-48.

25. The persons involved in acts of maritime sovereignty in British waters were largely the same persons as those responsible for the chartering and establishment of the American colonies. Br. 148-62.

26. The English discoveries and symbolic acts of taking possession were sufficient in law to establish maritime sovereignty. Br. 162-64.

27. The common law of England, including the law of maritime sovereignty and dominion, became law in this country. Br. 164-66.

28. The exploitation of fisheries and other marine resources was of paramount importance as an objective of American colonization. Br. 167-70.

29. Britain claimed maritime sovereignty in North American waters. Br. 170-78.

30. The colonial charters, construed in light of contemporary legal usage, conveyed extensive rights both of sovereignty and of property in the marginal seas. Br. 178-210.

31. The record is sufficient to establish a uniform territorial sea 100 miles in width off the coasts of the Common Counsel States. Br. 210-16.

32. Rights of sovereignty and dominion were exercised over the American territorial sea during the colonial period. Br. 216-60.

33. The fisheries were subjected to extensive regulation and licensing, and foreigners were excluded. Br. 217-40.

34. The colonies asserted and exercised control and jurisdiction over the seabed and its resources whenever the occasion arose. Br. 240-46.

35. The territorial jurisdiction of admiralty existed in the American seas just as in the English seas. Br. 247-49.

36. Other aspects of sovereignty, ownership and jurisdiction confirm that the American seas were regarded as subject to the same law as the English seas. Br. 249-51.

37. Several maps made in the colonial period provide additional evidence for the American territorial seas. Br. 251-54.

38. There was no curtailment of colonial rights in the marginal sea between 1752 and 1776, and if there had been such a curtailment it would never have been recognized in American law. Br. 255-60.

39. The English law of maritime sovereignty and dominion was not inconsistent with international law in the period 1606-1783, and no British or American court could or would have so held. Br. 261-83.

40. No British or American court would have questioned its government's territorial claims on the basis of alleged contrary doctrines of customary international law. Br. 261-62.

41. Plaintiff's contentions regarding international law cannot be sustained. Br. 263-83.

42. Broad claims to territorial seas were fully sanctioned by state practice. Br. 265-71.

43. The views of publicists recognized the right to territorial seas with virtual unanimity, and no consensus had developed restricting such seas to any limit less than 100 miles. Br. 271-80.

44. No narrow-limit rule was applied to seabed claims. Br. 281-83.

45. At the American Revolution the States individually succeeded to the maritime territorial sovereignty and dominion both of their predecessor colonial governments and of the British crown. Br. 283-336.

46. The States were individually sovereign in the revolutionary and Confederation periods. Br. 286-314.

47. The States, whether "externally sovereign" or not, succeeded individually to the territorial boundaries and property rights both of the crown and of the colonial and proprietary governments, including rights in the marginal sea and seabed. Br. 314-29.

48. The Peace of Paris of 1783 and the negotiations preceding it demonstrate American awareness of maritime rights, and show no American disagreement with territorial seas 100 miles or 30 leagues in width. Br. 329-33.

49. The Peace of Paris established for at least some purposes, including exclusive fisheries, a twenty-league maritime boundary off the coasts of the defendant States. Br. 333-36.

50. The exclusive right of the States to explore and to exploit the resources of the continental shelf were not transferred to the United States by the Constitution. Br. 337-75.

51. The Constitution expressly preserves State territorial boundaries and property rights. Br. 337-39.

52. Several other provisions of the Constitution and the debates at the Federal Convention indicate the intention not to change or to affect State boundaries or the ownership of property. Br. 339-41.

53. The great weight of Supreme Court authority has recognized State sovereignty in the period 1776-1789, and State succession to all territorial and property rights of the crown and the colonial governments was uniformly upheld until the *California* case. Br. 341-75.

54. The exclusive rights of the States to the continental shelf have not been abandoned or extinguished since 1787. Br. 376-427.

55. It was well understood throughout our history down to 1947 that under the Constitution the States retained their rights in tide waters, including the marginal sea, and in the bed and subsoil thereof, and Congress has repudiated the *California* Court's decision to the contrary. Br. 376-88.

56. The United States did not abandon or relinquish the rights of the States by adoping the three-mile limit. Br. 389-407.

57. No renunciation can be inferred from mere silence. Br. 391-93.

58. The United States' adherence to the three-mile limit has not been consistent or unqualified. Br. 393-401.

59. The three-mile limit was not applied by the United States to the seabed and subsoil. Br. 401-07.

60. The States' continental-shelf rights were not extinguished by any obligatory rule of international law in the period 1783-1945. Br. 407-27.

61. Even if plaintiff were otherwise correct, the international law against which the States' claims should be judged is present law, not past law. Br. 408-09.

62. The three-mile limit never became an obligatory rule of international law. Br. 409-14.

63. No obligatory rule of international law prior to 1945 barred the States' seabed and subsoil claims. Br. 414-27.

64. The federal foreign-affairs and defense powers do not require federal ownership of the exclusive right to exploit the resources of the continental shelf, but merely the same paramountcy which the Federal Government enjoys on land. Br. 428-43.

65. The *California* Court's view that exclusive federal proprietary rights in the continental shelf are required by the foreign-affairs and defense powers was always unsound and has been repudiated by the State Department, by Congress, and by subsequent decisions of the Court. Br. 428-39.

66. The record demonstrates that no foreign-affairs or defense difficulties would result from recognition of State property rights in the seabed and subsoil of the continental shelf. Br. 439-43.

67. The Submerged Lands Act and the Outer Continental Shelf Acts are unconstitutional if they purport to deprive the Atlantic States of territory or property. Br. 444-49.

68. The defendant States should prevail even if exclusive rights to part or all of the continental shelf are deemed to have sprung into existence *de novo* in 1945. Br. 449-60.

69. The Atlantic States are entitled to the shelf as residual sovereigns and owners of property of their land territories, to which continental-shelf rights are an "inherent" appurtenance. Br. 449-55.

70. At the very least, the Atlantic States are entitled to prove historic boundaries out to three leagues under federal legislation. Br. 455-60.

71. The crown's ownership of the seabed and subsoil of British waters has continued unchanged and has been applied to the continental shelf. Br. 465-72.

72. Vis-a-vis foreign nations, British adherence to the three-mile limit has not been consistent and has not been generally applied to the seabed and subsoil. Br. 472-77.

73. The Canadian and Australian cases turned on the allocation of powers in late 19th-century British constitutional law between the imperial crown and unchartered imperial provinces, and thus have no relevance to the issues in the present litigation. Br. 477-85.

74. The Common Counsel States are entitled to judgment. Br. 1-485.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

SUPPLEMENTAL BRIEF FOR THE COMMON COUNSEL STATES

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf. The issue was so stated in the Complaint of the United States which initiated the litigation (paras. II and III). The Complaint sought to establish that exclusive right on behalf of the United States and to defeat any conflicting "right, title or interest" claimed by the States (paras. IV, VI). The answers of the States varied in language, but generally claimed "some interest" in the area in question, denied plaintiff's claimed exclusive right, and asserted exclusive rights to explore and to exploit on behalf of themselves. See, *e.g.*, Answer of the State of Maine, paras. IV, VI, Affirmative Defense.

It is important to be clear about the issue, because plaintiff's witnesses and plaintiff's brief have repeatedly asserted that various arguments and evidence adduced by the Common Counsel States, while admittedly demonstrating some State interest in the seas and the seabed and subsoil of the continental shelf, are not sufficient to establish that the States or their predecessor sovereigns possess or ever possessed "full territorial sovereignty" or "general rights of property" (by which ownership in fee simple absolute is apparently meant) in the sea, the bed of the sea or the subsoil. *E.g.*, Plaintiff's Brief to the Master (hereinafter Pl. Br.) 30, 32, 35-37, 41, 48, 52-57, 66, 82, 93.

These contentions are difficult to understand in view of the undisputed fact (Tr. 2611) that the United States does not, even today, take the position that it possesses full territorial sovereignty or fee simple title to the seabed and subsoil of the continental shelf, let alone in the superjacent waters, either against the defendant States or against foreign nations; and plaintiff took no such position in its Complaint herein. Rather, the right asserted by the Truman Proclamation of 1945, and confirmed by the Continental Shelf Convention of 1958, is a more limited right: precisely the exclusive right to explore and to exploit which is at issue in this proceeding.[1] It is curious that the United States should take the position that to prevail in this litigation the States need to establish full territorial sovereignty or fee-simple ownership, in view of the fact that the United States itself has never claimed and does not now claim such things.

Historically, the right at issue in this litigation has been variously defined and established. Obviously, the States

[1] "The rule . . . gives to a state jurisdiction in the continental shelf off its coast only for the purpose of exploring and exploiting its natural resources." Restatement (2d), Foreign Relations Law of the United States § 23 (1965).

must prevail here if they can demonstrate that prior to 1776 they or their predecessor sovereigns had the precise right at issue here—the exclusive right to explore and to exploit—and that they have not lost it since that time. Plainly full territorial sovereignty or fee-simple ownership would embrace that right; therefore if we find that at a certain time the defendant States or their predecessors did lawfully claim and exercise such sovereignty or ownership, the right at issue here is established as a part thereof. But the United States can hardly prevail by showing that at a particular historical moment the continental-shelf rights claimed by the States or their predecessors fell short of full territorial sovereignty or fee-simple ownership. Rather, the United States must demonstrate that the States and their predecessors did not and do not possess the right at issue here: the exclusive right to explore and to exploit. Thus, evidence that at a particular time the continental shelf or the superjacent waters were regarded as within the boundaries or territories of the States or their predecessors, or belonged to them in property, is *sufficient* but not *necessary* to sustain the States' position as of that time. If some aspect of territorial sovereignty or fee-simple ownership was then lacking which today adheres to those terms, that avails the United States nothing unless the United States can show that what was lacking was the right at issue here. We have emphasized this point because of what appears to be a misunderstanding by the United States of the fundamental issue in this proceeding.

It is unnecessary to determine whether the right here at issue is to be described as a right of sovereignty *(imperium)* or a right of ownership or property *(dominium).* Whatever it be called, the issue is whether the States and their predecessors have lawfully possessed it and now lawfully possess it. In general, the Common Counsel States subscribe to the analysis by Dean Pound (Pound, "Rights Involved in *United States v. Texas,*" U.S. Exhibit 17, Ap-

pendix), who views the right as essentially one of property. The question of sovereignty becomes relevant, first, because of the doctrine that the sovereign owns all unallocated or ungranted property within its territorial boundaries. Thus if the States can show that in the critical periods here at issue their boundaries extended to the continental shelf or that the shelf was within their territories, they must prevail as a matter of course, unless they had granted or ceded the resulting right of property to the plaintiff. If they cannot show that, but can show that at the critical periods they were sovereign over the land areas and coasts adjacent to the Atlantic continental shelf, and that that land sovereignty entailed rights over the shelf which included the right at issue here, then also they prevail.

Very briefly, the position of the Common Counsel States is that the record establishes that under the law and practice of England prior to and during the 17th and 18th centuries the seabed comprising the continental shelf of England and of English possessions was subject to an exclusive right of exploitation in favor of the English crown. In that period no generally recognized principle of international law prohibited or denied that exclusive right to the English crown. During the period 1492 to 1776, England acquired by right of discovery and the performance of symbolic acts of sovereignty the territories now comprising the defendant States and the adjacent continental shelf. During that period the crown granted its right of exploitation over part or all of that continental shelf to colonial proprietorships and governments. At American independence those rights passed individually to the successor independent States. If any portion of the Atlantic continental shelf was not granted to the colonial proprietorships and governments by the crown prior to 1776, then such portions were retained by the crown until they passed to the adjacent coastal States individually at independence.

Nothing has occurred since 1776 which has divested the defendant States of the right of exploitation of the continental shelf which they had thus acquired. The States preserved their respective rights when they entered into the Articles of Confederation and into the Constitution of the United States. Nor have those rights been divested by any acts of abandonment or renunciation on the part either of the United States or of the States from 1776 down to the present, or by operation of international law. Thus they still exist in their full force and vigor.

Finally, even if it should be held, contrary to our submission, that the exclusive right here at issue did not exist on behalf of any one prior to 1945, but came into existence as a wholly new right between 1945 and 1958, then it is the position of the Common Counsel States that it came into existence as a right of the States rather than of the Federal Government, because of the allocation of powers and property incorporated in our Constitution, and particularly because of the status of the defendant States as residual sovereigns of their land territory and as owners of the unallocated or ungranted public lands within their territories or appurtenant thereto.

We dispute plaintiff's argument (Pl. Br. 25-29) that the defendant States bear "a heavy burden" in this proceeding. Plaintiff relies for that contention on (1) the *California* line of cases, (2) the legislation of 1953, (3) the States' alleged "acquiescence," and (4) purported "property rights" which "will not be lightly overturned." Pl. Br. 25.

(1) Both the result and the reasoning of the *California* line of cases have, as we shall show (pp. 382-88, 433-39, *infra*), been repudiated both by Congress and by subsequent decisions of the Supreme Court. These decisions were based on mistakes of fact; they had the benefit of no evidentiary record, and they treated the issues here involved only in the most cursory and superficial manner. The Court plainly in-

dicated its willingness to view the issues with a fresh and open mind by granting the States' motion herein for proceedings before a Special Master.

(2) Congress in 1953 had the benefit of neither an adjudication nor an evidentiary record concerning the title of the defendant States. Congress repeatedly made clear its underlying intent to affirm the historic title of any State having such a title (pp. 382-88, *infra*). If Congress inadvertently acted in a fashion inconsistent with vested territorial and property rights of the defendant States, such action is plainly unconstitutional (pp. 444-49, *infra*).

(3) The defendant States have never in any fashion "acquiesced" in any surrender of their title. Even if they had, no more weight should be given to that than was given by the *California* Court to the uniform failure by the United States to claim the marginal sea and the bed thereof, and its uniform acquiescence in State ownership, from the beginning of the nation to the year 1937. *United States v. California*, 332 U.S. 19, 39-40 (1947); see pp. 376-88, *infra*.

(4) Plaintiff has not asserted that it has, by lease or otherwise, created any private property rights in any of the submerged lands in dispute here; and we know of none. Hence there are no "property rights" to be "overturned" other than plaintiff's own asserted title, which is purely theoretical, abstract and undeveloped, and is the very title at issue in this proceeding. No reason has been or can be suggested why that should create any heavy burden for the States. In *California* and subsequent cases, to the contrary, the Court was willing, without finding that the United States had sustained any "heavy burden," to extinguish a great body of State and private property rights on the development of which large amounts of money had been spent. 332 U.S. at 40.

Nothing plaintiff has brought forward absolves it of the normal burden of proof which rests upon a party instituting litigation.

I.

ENGLISH LAW AND PRACTICE PRIOR TO THE SEVENTEENTH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE SEABED AND SUBSOIL THEREOF.

Professor Horwitz briefly summarized (App. 24-30) the great body of law and practice, down to the accession of James I in 1603, affirming the sovereignty and dominion of the English crown over the four seas surrounding the British isles. The tradition is an ancient one; 17th-century writers customarily traced it back to the reigns of the early Saxon kings (*e.g.*, Exhibit 695,[2] pp. 25, 34) or even earlier. *E.g.*, Selden, *Mare Clausum* 118-259. The ancient English doctrine, including both sovereignty and property of the seas, has recently been reviewed and restated by D.P. O'Connell, Chichele Professor of Public International Law at Oxford University, in "The Juridical Nature of the Territorial Sea," 45 British Year book of International Law 303-24 (1971).

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[2] For brevity, Maine et al. Exhibits are cited herein simply as "Exhibit __." Exhibits of other parties are preceded by the name of the party offering them. All quotations are modernized and made consistent as to spelling, punctuation and capitalization, but not otherwise. The transcript of the hearings is cited as "Tr.". Footnotes are usually omitted from quotations. "State" is capitalized when it means a State of the United States, but not otherwise.

A. THE ENGLISH SEAS WERE WITHIN THE REALM OF ENGLAND.

In view of England's geographical position, it is not surprising that from earliest times we find constant and intense preoccupation with control and regulation of the sea and its resources. Potter briefly summarizes the evidence as follows:

> "Culminating in the British claims to sea dominion, this long and extensive body of state practice found here its most vigorous expression. A document of Alfred extended the King's power to the middle of the surrounding seas, and Edgar styled himself 'king . . . of the ocean lying round about Britain.' After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea. Edward I (1272-1307) instructed his naval officers to maintain firmly 'the sovereignty which his ancestors the kings of England were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea.' Henry IV (1399-1413) granted leave to a certain Spaniard to sail 'freely from the port of London through our dominions to the town of Rochelle,' and Elizabeth (1588-1603) was besought by the king of Sweden to grant permission to one Wormaeus to sail to Spain 'through the sea-dominions of the Queen,' as the king wrote.

* * *

> "Much more evidence of the same type might be exhibited here. Admirals' commissions were based on the proposition that the British kings were 'lords of the English sea on every side.' Parliamentary records contain similar allusion to the 'sovereigns of the sea,' 'lords of the sea,' and so on . . . .
>
> "It will be observed that there are two elements present here. There is a great body of state practice, and there is some considerable comment upon it by observers." App. 695-98.

Another impartial modern summary is found in Colombos, *The International Law of the Sea* 48 (6th rev'd ed.):

> "§56. English claims to the sovereignty of the sea. —The first recorded claim of the English kings to sea power goes back to the tenth century when Edgar the Peaceful styled himself 'sovereign of the Britannic Ocean.' Edward III after the Battle of Sluys exacted a salute from all foreign vessels as being due to him as 'King of the Seas.' This claim however, 'to the guardianship or Admiralty of the sea' had already been advanced by his father, as appears from an official letter written in 1322 to Edward II by the King of France, who complained of the depredations committed upon French ships by English mariners 'who call themselves the custodians of the sea on your behalf.' In 1372, a Petition to Parliament contained the statement that 'then and in times past' all countries held and called the King of England 'King of the Sea.' A similar title, 'lord of the English sea on every side,' appears in a Patent of 1337, and in the Parliament Roll of 1420. As a price of their acquiescence in this acknowledgement of

> sovereignty, the Hanseatic merchants looked to the Kings of England to keep a passage for their ships free from the depredations of pirates. The right to 'the Sovereignty of the Seas' was thus coupled with the duty of the preservation of law and order therein."

See also Exhibit 723, p. xxxiv.

It has frequently been pointed out that the English claims became even more explicit, consistent and systematically enforced after Edward III's great naval victory of Sluys in 1340. Exhibit 715, pp. 165-66; App. 25, 658, 701; Selden, *Mare Clausum* 375 *ff.*

While plaintiff herein has argued that these mediaeval English assertions of sovereignty over the sea were for "protective" purposes only, and that any notion of "territorial" sovereignty came much later, there are very explicit mediaeval authorities which demonstrate that the English seas were regarded as part of the realm, within the territorial sovereignty and dominion[3] of the crown. Selden demonstrated that as early as the reign of Henry I banishments were made out of England and "out of the sea belonging to the king of England." *Mare Clausum,* p. 391; Exhibit 695, p. 149. As Professor Thorne conceded (App. 544), Bracton declared that the four seas around England were parts of the realm. App. 700. Gould likewise concludes, "the narrow seas were thus considered to be within the realm of England." *The Law of Waters* 19 (3d ed. 1900).

The famous document *Prerogativa Regis,* included in the the law books as a statute of Edward II, in defining the right

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[3] Today *dominion* means ownership in property. In the mediaeval period the term generally meant political lordship (the closest concept then existing to the modern *sovereignty)* with property rights as a concomitant thereof. We shall use the word in the modern sense, except of course when quoting.

to royal fish provided that the king shall have them when "taken in the sea or elsewhere within the realm" (App. 872; Exhibit 194, p. 40), thus clearly and directly expressing the conviction that the seas themselves were within the realm. Callis pointed this out in the 17th century, App. 778, and plaintiff's witness Professor Thorne agreed that this was the necessary meaning. App. 545. Britton, along with Bracton[4] the most authoritative of the English mediaeval civilians, likewise regarded the crown's right to royal fish as territorial, applying to fish caught in the English seas but not elsewhere. He wrote that "sturgeons taken within our dominions shall belong to us" (the crown), and likewise "whales caught within our jurisdiction." Nichols (ed.), *Britton* 57 (1901). (Britton's obvious use of "dominions" and "jurisdiction" as coextensive is significant.) The royal prerogatives of flotsam, jetsam and lagan were likewise territorial in the English seas only; outside their bounds such items belonged to the first finder. Exhibit 194, p. 41. The statute 17 Edw. 2, c. 11, provided that "the king shall have wreck of the sea throughout the realm."

Hale, in *De Jure Maris*, stated the "royal fish" doctrine as follows:

> "Touching royal fish, therefore called so, because of common right such fish, if taken within the seas parcel of the dominion and crown of England or in any creeks or arms thereof, they belong to

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[4] Bracton said nothing as to whether he regarded the right to royal fish as territorial or not. As to wreck, he regarded the royal right as applying to a wreck found on shore, or close to shore, or far out at sea providing it could be proved that the wreck would have floated to shore in England, but not otherwise. Thorne (ed.), 2 Bracton on the Laws and Customs of England 339 (1968). This gropes for, but has not yet reached, a fully territorial concept of the crown's maritime rights. It was Britton's more advanced formulation, not Bracton's more primitive one, which survived.

> the crown; but if taken in the wide sea, or out of the precinct of the seas belonging to the crown of England, they belong to the taker . . . . But salmon or lamprey are not royal fish. By the common right of the king's prerogative these belong to the king, if taken within his seas or the arms thereof. Anciently the entire sturgeon belonged not to the king, but only the head and the tail of the whale, according to Bracton, cited by Stamford upon this chapter of the prerogative. According to the custom used in the admiralty, these great fish, if taken in the salt water within the king's seas, they were divided, and a moiety was allowed to the taker, the other moiety to the admiral in right of the king." Exhibit 194, pp. 42-43.

Modern writers likewise agree that the ownership of royal fish was territorial, operating only within the English seas where the crown possessed rights of sovereignty and property. Chitty, *A Treatise on the Law of the Prerogatives of the Crown* 144 (1820); Jerwood, *Dissertation on the Rights to the Sea Shores* 85-86 (1850); Gould, *op. cit.* at 20 n. 2.

Robert Belknap, an eminent judge in the reign of Richard II, declared that "the sea is subject to the king, as a part of his English kingdom or of the patrimony of the crown." Selden, *op. cit.* at 385. Selden also demonstrated that in common mediaeval usage the terms "within the four seas" and "within the realm" were used synonymously and interchangeably, as were the terms "without the four seas" and "without the realm." Selden, *op. cit.* at 387-89. Many other 17th-century writers made the same point.

A somewhat mysterious and not always reliable legal treatise entitled *The Mirror of Justices,* apparently written by Andrew Horn, Chamberlain of London, about 1290, declared that the prerogatives of the crown included "sovereign jurisdiction, sovereign seigniory over all the land

as far as the mid-stream of the sea around the land." Whittaker (ed.), *The Mirror of Justices* 8 (1895).

The requirement that within the English seas foreign ships strike their flags to English ships, so important in the 17th and 18th centuries, can be traced back to an ordinance of King John as early as 1201. Exhibit 693, pp. 39-40; Fulton, *The Sovereignty of the Sea* 6-7 (1911).[5] Modern writers have recognized that the flag salute was required by the English crown as a recognition of territorial sovereignty, jurisdiction and dominion over the English seas; see, *e.g.*, 1 Halleck, *International Law* 134 (4th ed. 1908). The doctrine that an island rising in the sea belonged to the crown, while contrary to the views of Roman lawyers, was established in English law as early as the reign of Edward I (Exhibit 728, p. 53); thus Diggs' reassertion of the same principle in Elizabeth I's reign (Tr. 325) was no new doctrine.

Collectively, all the rights of the crown in the English seas, rights both of government and of property, were regarded as among the *jura regalia, regalia* or *royalties* of the crown. This point of terminology is important because of the conveyance of "royalties" in the American colonial charters. Since plaintiff's witnesses have conceded that these terms were the standard English legal usage for whatever rights the crown possessed in the English seas, App. 555-58, extended citations are unnecessary. Gould, citing authorities ranging from Bracton down to the 19th century, describes the conventional usage: "the rights of the Crown in tide waters are classed among the *regalia* or prerogative rights . . . ." *Op. cit.* at 34.

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[5] In the course of this brief we quote frequently from Fulton's *The Sovereignty of the Sea* (1911) and Moore's *A History of the Foreshore* (3d ed. 1888). Substantial portions of these works have been included in the record as Exhibits 693 and 728, respectively. References to those portions will be cited by the exhibit numbers. References to portions of these works not included in the exhibits are cited as "Fulton, *op. cit.*" and "Moore, *op. cit.*"

The term *tide waters,* frequently encountered in the literature, may require some definition. As used in English and American legal writings, it normally and properly means all those waters in which a perceptible tide ebbs and flows, including the seas, bays and other coastal waters, the foreshore, and tidal rivers up to the fall line. The legal distinction invariably made as to underwater land is between the land under tide waters, as thus defined (which belonged to the sovereign out to whatever was regarded as the limit of sovereign dominion at the time) and the land under non-tidal lakes, rivers, creeks, etc., which belonged to the adjacent proprietor. English law, as we shall see, has never made any distinction with respect to rights of property between what under current international-law usage would be termed internal waters (bays, rivers, etc.) on the one hand and the territorial or marginal sea on the other. *Accord,* O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 367 (1971). In this country the distinction has generally been defined as between navigable and non-navigable waters, which if applied to England would produce virtually the same result; in England, unlike this country, there are almost no waters which are navigable but non-tidal.

Plaintiff's witness Professor Wroth contended (Tr. 2507) that a statute of 1389, 13 Richard 2, c.5, 2 *Statutes of the Realm* 62 (1816), was inconsistent with the proposition that the English seas were regarded as part of the realm. The statute provided that the admiral should "not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea." On cross-examination, Tr. 2750-51, it was pointed out to Professor Wroth that the words "but only" could well have been used in the sense of "except," in which case the statutory language would be clear support for the proposition that the English seas *were* regarded as within the realm. Professor Wroth's attention was also called to the fact that an eminent admiralty

authority had so construed the statute, App. 748; but the professor maintained his previous position.

Since cross-examination we have found a Latin text of the formula in question, and it makes it wholly clear that in the English version "but only" was used in the sense of "unless" or "except." The Latin version is "quod admiralli et eorum deputati se de aliqua re infra regnum Anglie facta *nisi solomodo* de re super mare facta, ..." Coram Rege Roll, No. 569 (Trinity 1403), m.68, 7 Sayles (ed.), *Select Cases in the Court of King's Bench* (88 Publications of the Selden Society) 136 (1971). (Emphasis added.) The Latin word *nisi* means *unless* or *except,* and means *but* only in its meaning which is synonymous with those words. The use of *solomodo* further confirms the meaning; *nisi solomodo* means *except only with respect to.* If Professor Wroth's interpretation were correct, the formula would not have read *nisi solomodo* but rather *sed solum.* Thus, the formula was framed in such a way as to leave no doubt that the English seas were within the realm. The English translation in Sayles' edition agrees: "admirals and their deputies are in no way to intermeddle with anything done within the realm of England *save only* what is done upon the sea." *Ibid.*[6] (Emphasis added.)

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[6] Professor O'Connell believes, quite incorrectly in our submission for the reasons stated, that the 1389 statute used the word *realm* as excluding the English seas. But he correctly points out that if used in that sense *realm* included only the bodies of counties, which were far from coextensive with the territory and property of the crown, which as he observes included Wales, the Channel Islands, and the English seas, none of which were within the body of any county. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 372-73 (1971). O'Connell's view is that *realm* has been used in two senses: one meaning only the bodies of counties, the other including all the territories and property of the crown, including the English seas. O'Connell has no doubt that the crown had full rights of territory and property in the English seas.

The same document describes the Earl of Huntingdon as "the late admiral . . . in the western and southern regions of the realm of England." *Id.* at 137. Since everyone concedes that the admiral had jurisdiction only in the sea, this title is yet further confirmation that the seas of England were regarded without question as being "regions of the realm."

In the French text of the 1389 statute, the words corresponding to the English "but only" and the Latin "nisi solomodo" were "mes seulement." The word *mais* (mediaeval *mes, mez*) is derived from the Latin *magis,* which means *more;* and *more* is the original and primary meaning of mais, though its use in this sense is generally now archaic. At the period in question *mais* had not yet acquired its usual modern meaning (*but* in the conjunctive sense) at all, but *always* meant *more* or a meaning immediately derived therefrom, specifically including, when combined with *ne (ne mais, i.e., no more* or *not more),* the meaning *except, unless.* Greimas, *Dictionnaire de l'Ancien Français jusqu'au milieu du XIVe siècle 382;*[7] see also 4 Littré, *Dictionnaire de la Langue Française* 1855-57 (1957); Robert, *Dictionnaire Alphabetique et Analogique de la*

The only authority in the record who used *realm* as meaning only the bodies of counties appears to be Sir Henry Finch, writing in 1613. Finch's text (p. 69, *infra*) makes it clear that the realm, as he used the term, was far more limited than those areas over which the crown had sovereignty and dominion.

Two years after the 1389 statute, Parliament again acted on the subject of the admiralty jurisdiction. 15 Richard 2, c. 3, 2 Statutes of the Realm 78-79 (1816). The new act declared that the admiral had no jurisdiction over "things rising within the bodies of counties, as well by land as by water." The term *realm* was not used.

[7] The synonyms given by Greimas for *mais* in this sense are *excepté* and *sinon,* the modern French words for *except* and *unless.*

Langue Française 211 (1970). Thus the literal meaning of the statutory language in mediaeval French ("les admiralx et lour deputees ne soi mellent desore enavant de null chose fait deinz la roialme mes soulement de chose fait sur le meer," 2 *Statutes of the Realm* 62 (1816)) is: "the admirals and their deputies shall not meddle from henceforth of any thing done within the realm more than only of a thing done upon the sea," that is, *except for* a thing done upon the sea. Here, then, *mais* is *but* in the sense of *except*— indeed at that period *mais* was synonymous with *but* in that sense only—and the French text confirms our construction as does the Latin.[8] The statute is proof that the English seas were *inside* the realm, not *outside* it.

Professor Wroth made the astonishing statement that his interpretation of the 1389 statute was supported by "several generations of English lawyers." Tr. 2751. When asked what "lawyers" he had in mind, he named only one, Lord Coke. Tr. 2752. In point of fact Coke held explicitly that the English seas were within the realm; see pp. 65-66, *infra*. All Professor Wroth could say about his other alleged supporters is that they were "those lawyers who interpreted the statute . . . of Richard II as imposing limitations upon the admiralty's jurisdiction." Tr. 2751-52. In fact a typical representative of that class, Sir John Bramston, in a speech in Parliament in 1663 advocating further limitations on the

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[8] The above sources give many examples of the use of *mais* in this sense. Another example, which likewise makes the usage clear, is found in a rather ribald context in a mediaeval tale of Charlemagne's legendary journey to Jerusalem. See Koschwitz (ed.), Karls des Grossen Reise nach Jerusalem und Constantinopel 40-41 (1923). The old French text is "li coens ne li fist mais la nuit que trente feiz" (another version: "li quens ne li fist la nuit mes q:XXX feiz"). The literal English translation is "the count did not do it (during) the night more *[mais]* than 30 times," whereas he had boasted that he would do it 100 times. A 14th-century Englishman would probably have translated, "the count did not do it during the night but 30 times."

admiralty, construed the 1389 statute precisely as we have done:

> "From the body of the Act you may likewise observe: 1. The Act proceeds negatively. The Admiral shall not meddle with things done within the realm . . . . Then it goes on affirmatively and says *but only with things done upon the high sea,* else they had been excluded from the sea, because the sea is parcel of the realm." 2 Yale (ed.), *Nottingham's Chancery Cases* (79 Publications of the Selden Society) 942-43 (1961).

Blackstone well understood that the statute used *but* in the sense of *except;* he paraphrased the statute as providing "that the Admiral and his deputy shall not meddle with any thing, but only things done upon the sea." 3 Blackstone, *Commentaries* 106 (1765).

B. THE CROWN'S RIGHTS IN THE ENGLISH SEAS INCLUDED CONTROL OF THE FISHERIES.

It is hardly surprising that the doctrine of crown sovereignty and dominion over the sea was applied to fish, the chief resource of the sea; it would be astonishing if it had not been so applied. There is no dispute that royal fish found within the English seas were the property of the crown *(e.g.,* Exhibit 690, pp. 72-73; 1 Twiss (ed.), *Black Book of the Admiralty* 149, 153, 165 (1871)), or that the right to royal fish, as to wreck, flotsam, jetsam and lagan, in particular parts of the English seas or shore could be and were granted to subjects from the earliest times. App. 859-60; Exhibit 194, pp. 17-18, 37-44; Exhibit 728, pp. 20, 40-41, 51-52, 70, 96, 139-40, 233, 754-58.

But the royal right to grant exclusive fisheries in portions of the English seas was far from limited to royal fish.

"Grants and confirmations of fisheries in the sea by King John are very numerous." Exhibit 728, pp. 20-21. In Henry III's reign "there are very numerous entries on the records relating to fisheries and weirs in the sea all around the coasts of the kingdom." *Id.* at 41. Records of the reign of Edward I show that "sea fisheries and ports and the soil of the foreshore were parcel of many manors around the coast." App. 855.

Many cases prior to the 17th century "show that oyster grounds, which are below low-water mark, passed by grant." Moore, *op. cit.* at 418, n. 1;[9] App. 26. Plaintiff's witness Professor Thorne conceded that exclusive rights to fisheries in the sea could be and were granted by the crown prior to the 17th century. App. 545. See also Exhibit 157, p. 40.

The evidence as to the mediaeval English law and practice on this point is summarized by Moore as follows:

> "In whatever way the right to create several [*i.e.*, exclusive] fisheries in tidal waters arose, it is clear that in early times before the reign of Henry II the power was extensively exercised, and several fisheries which are now in existence almost completely cover the whole of the tidal estuaries and many parts of the coasts of the kingdom. Text-writers deriving their knowledge only from decided and reported cases have considered that these fisheries so granted were exceptional and few in number. This is a fallacy, for it can be shown by records that they existed in almost every piece of tidal water round the coasts which was naturally available for the profitable exercise of an exclusive fishery. Numerous several fisheries in tidal waters were in existence before the date of

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[9] See p. 13, n. 5, *supra*.

> Domesday, and in non-tidal waters the fisheries appear to have been all appropriated to the lords of the manors." App. 865-66.

Moore lists (App. 863-65; Exhibit 728, pp. 908-15) many ancient exclusive fisheries all around the coasts of England, both in the estuaries and "upon the open sea-coast [where] it is clear that they have existed from the earliest time." App. 864.

One of the recognized causes of action of the mediaeval common law, for which forms are given in the law books, was an action for trespass upon an exclusive fishery. Shanks (ed.), *Novae Narrationes* (80 Publications of the Selden Society) 76 (1963). Other forms existed for actions to assert a common right of fishery, that is, "to fish in another's water." *Id.* at lxxxiv-v, 22, 77, 192-93, 337. The royal writ of mort d'ancestor, providing for inquisitions post mortem to establish the seisin of decedents in real property and the right of heirship thereto, could and did issue with respect to a fishery as well as to land. Royal writs could and did also issue to protect an exclusive fishery from encroachments by others. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (77 Publications of the Selden Society) 177, 188, 190, 243, 248, 316 (1959).

The state of the English common law and practice on this point—that one of the ancient royalties or royal rights of the crown was the right to grant or to lease exclusive fisheries in portions of the English seas—is not open to question. The doctrinal basis for this right is more complicated, because of the persistence to a degree, in the writings of those English lawyers who were trained in the Roman or civil law, of certain vestiges of the ancient Roman-law doctrine that the sea and its resources were free to all. To the extent that such vestiges are found in the

works of Bracton, Britton and Fleta,[10] they were clearly out of tune with the actual state of English law and practice, and they form one of the principal bases on which these writers have been criticized for following academic Roman-law notions rather than the English law as it existed. See, *e.g.*, Exhibit 157; Jerwood, *Dissertation on the Rights to the Sea Shores* 89, 92 (1850).

Even the theoretical Roman-law writers, however, made crucial concessions to the actual state of English law and practice. Fenn has pointed out that the feudal lawyers conventionally numbered the *ius piscandi* as among the *regalia* (royalties) of the crown. Exhibit 690, pp. 70, 76, 136-39. An exclusive right to a sea fishery was a property right, and could be acquired by grant from the sovereign. App. 791-97; Exhibit 690, pp. 73-80.

There is a long-standing textual controversy as to whether Bracton said that *all* animals and fish, which by natural law were *res nullius*, now belong to the sovereign, or whether the better text indicates that only *some* animals and fish (all of which were previously *res nullius*) had been appropriated to the sovereign by man-made law. Tr. 2685-88. Either version of the text shows that even Bracton recognized that the law in fact had moved in the direction of eroding the old Roman law on the subject. Bracton wrote of "the four seas of England" as places in which English jurisdiction existed, Gould, *The Law of Waters* 7 (3d ed. 1900), and regarded that jurisdiction as including the

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[10] The description by Bracton and others of fish as ownerless apart from the king's prerogative carries no implication, as plaintiff claims, that the sea and seabed were not crown property. These authorities treated fish exactly as they did wild beasts, which were ownerless although the land on which they were present of course had owners. See, *e.g.*, 2 Thorne (ed.), Bracton on the Laws and Customs of England, 167, 293, 339, (1968). Surely plaintiff does not contend that the ancient doctrine of *ferae naturae* means that all land is *res nullius;* yet this is where its argument leads.

king's right to levy tolls on fishermen for the use of the sea. App. 544, 700. Fenn has shown that the Roman-law doctrine of freedom of the seas was everywhere on the defensive in the mediaeval and post-mediaeval period and by the end of that period had decisively given way to the doctrine of territorial sovereignty and dominion in adjacent seas. Exhibit 690, *passim*. Moore believes it clear that Bracton, in saying that fisheries were common, meant only that they were common except where the crown had placed them under exclusive ownership. Exhibit 729, p. xxxix.

By the late middle ages, even those continental Roman lawyers who denied a right of property in the sea asserted the right of the sovereign to lay servitudes on it, to tax its use, to create exclusive sea fisheries, and to impose the national laws and statutes on activities therein. App. 794-96, 803-04; Exhibit 690, pp. 105-08, 117, 135 *ff.*, 145. In these conditions, a denial that the sea and seabed could themselves be owned was plainly an academic vestige of a superseded legal attitude; and legal theory moved inexorably towards the conclusion that full ownership was possible. App. 811-12. In this instance as in many others, legal theory lagged behind practice; and the evidence of record demonstrates that there was no time during the middle ages at which the common law had any question about the right of the sovereign to grant exclusive fisheries or to license or to tax fishing, whether by English subjects or by foreigners, in the English seas.

Regulation of the English sea fisheries dates back at least to Magna Carta, which included a provision against the erecting of new weirs. That provision was enforced. Exhibit 728, p. 50.[11] Frequent inquisitions were made to discover

[11] A reading of the actual text of the Magna Carta provision in question indicates that it did not apply to weirs in the sea, but only in rivers. However, either Magna Carta or subsequent statutes appear to have been construed as applying to the sea. Exhibit 728, pp. 741-42. In

wrongs or encroachments *(purprestures)* upon the king's prerogative rights in the sea as well as on the land. *Id.* at 69. Persons were summoned and prosecuted for wrongfully claiming wreck or royal fish "in the waters of the lord king." *Id.* at 139. A statute of 1571, in order to protect fishing nets at sea, prohibited ships from anchoring "on the main sea" in the areas of fisheries during the fishing season. App. 867.

Selden shows that during the reign of Richard II a tax was imposed by act of Parliament on every ship, whether English or foreign, passing through the English seas or fishing therein. Selden, *Mare Clausum* 297-302; the text of the statute itself is set forth in Exhibit 710, pp. 156-57. Evidence to the same effect is found in many other reigns. Selden, *op. cit.* at 355-62. A statute of Edward IV prohibited all foreigners from fishing in the Irish Sea without license. *Id.* at 436-39; see also 1 Halleck, *International Law* 134 n.2 (4th Ed. 1908). That tolls for sea fishing were imposed and collected by the English crown was conceded by plaintiff's witness Professor Thorne. App. 544.

What the English kings claimed in their own seas, they accorded to other sovereigns in theirs. By treaties of 1490 and 1523, England acknowledged the sovereignty of Denmark in its northern waters, and agreed to take licenses for fishing there. Fulton, *op. cit.* at 112.

Fulton points out, *op. cit.* at 75, that the English kings by treaty and otherwise on many occasions permitted fishing by foreigners without charge in the English seas. See also Exhibits 558, 559, 560, 561, 563, 564. Such permission, of course, is in no way inconsistent with the assertion by the crown of sovereign rights which included the prohibition of

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any event, there is no doubt that weirs in the sea were in fact proceeded against as encroachments upon the king's rights, and that the law prohibited such encroachments.

fishing if and when the crown so chose. Obviously there could be many reasons for the crown to permit fishing—*e.g.*, reciprocal benefits received from foreign sovereigns; the general interest of good will and friendly relations—especially when, as was true throughout these early times, the volume of fishing was never such as to interfere with the ability of English fishermen to take as much as they wanted. With respect both to fishing and to navigation by foreigners, the 17th-century writers were fully aware that the English kings had not infrequently permitted these without charge, but quite reasonably pointed out that sovereignty includes the right to permit as well as the right to forbid. See, *e.g.*, Exhibit 710, pp. 129, 146-58.

The situation in the reign of Mary I (1553-1558) is described by Elder, *The Royal Fishery Companies of the Seventeenth Century* 4-5 (1912), as follows:

> "That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary when the fishermen of the Low Countries wished to seek new fishing grounds, there was granted to King Philip's subjects in Flanders a twenty-one years' lease of the fishings about the North Coast of Ireland, this lease being granted in consideration of a fine and £1000 paid annually to Sir Edward Fitton, Treasurer for Ireland. A like privilege to fish in the Irish seas was granted under similar conditions by the same queen to 'The Company of the old Hans.' Foreigners desirous of fishing in English waters were, at this time, regularly granted licenses at Scarborough Castle.[1]

[1] *Cal. S.P. Dom. Car. II, vol. 339.*"

While Fulton doubts these assertions, *op. cit.* at 140-41, there is substantial evidence for them, and it is beyond

question that they were regarded as authoritative legal precedents by the writers of the 17th century. Exhibits 565, 595, 596 (p. 6).

C. THE ENGLISH MARITIME JURISDICTION WAS TERRITORIAL IN THE ENGLISH SEAS, AND INCLUDED BOTH LEGISLATIVE POWER AND CRIMINAL JURISDICTION OVER FOREIGNERS.

Plaintiff's position apparently is that, both before and after 1603, English admiralty jurisdiction was in no sense territorial, but extended over English subjects, and no others except pirates, anywhere at sea. If we understand plaintiff correctly, it contends that the admiralty jurisdiction was, and was understood to be, precisely of the same nature and extent in the Mediterranean, in the South Pacific, and two miles from the cliffs of Dover. The Common Counsel States submit that, to the contrary, the evidence of record demonstrates that the admiralty jurisdiction was regarded as an attribute of sovereignty or lordship over the English seas and extended to foreigners as well as to English subjects in those seas. We think the record on this point is quite conclusive; we shall simply summarize the principal evidence briefly.

One of the most important records is the document *De Superioritate Maris,* dating from about 1305, in which the attorneys for England and several other nations asserted the "sovereign lordship of the Kings of England" over the "sea of England," and used that sovereign lordship as the foundation for the jurisdiction of the English admiralty to the exclusion of the rival jurisdiction of a French admiral. See App. 650-55; Exhibits 176, 177; *Mare Clausum,* pp. 403-28; Tr. 2761 *ff.;* Fulton, *op. cit.* at 741-49. While plaintiff has attempted to belittle the document as merely a "draft complaint," there is no serious dispute that at the very least

it represented the official position of the English government at the time, and therefore is an authoritative statement of that government's view of the nature and basis of its admiralty jurisdiction.

There cannot be the slightest question that 17th and 18th century admiralty writers regarded *De Superioritate Maris* as authoritative and that it played a major part in shaping their view of English maritime sovereignty and of the admiralty jurisdiction. *E.g.*, App. 25-26; Exhibit 693, p. 43; Selden, *Mare Clausum* 403-28. Modern writers have likewise regarded the document as authoritative. See, *e.g.*, Hall, *Treatise on International Law* § 40 (7th ed. 1917), republished in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 66 (1919); Halleck, *International Law* 134 (4th ed. 1908); La Pradelle, 5 *Revue Generale du Droit International Public* 264 (1898), translated in Crocker, *op. cit.* at 187 n. 5. Even Fulton[12] concedes that the document was submitted "on behalf of England." Exhibit 693, p. 45. Justice Story quoted it extensively as evidence for "the immemorial right of the King of England to the sovereignty of the British seas, and the right to make laws to regulate navigation, and to keep the peace, in those seas." *De Lovio v. Boit*, 7 Fed. Cas. 418, 420 n.5 (D. Mass. 1815).

Marsden regarded the origin of the admiralty jurisdiction as "intimately connected with the claim made by Edward III and his progenitors to be sovereigns of the sea." Exhibit 200, p. xv; App. 25. The various statutory definitions of the admiralty jurisdiction read in terms which leave no doubt that the jurisdiction was conceived as territorial. *E.g.*, App. 747-48; Exhibit 667, pp. 362; see also pp.

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[12]For the "revisionist" nature of Fulton's views, see App. 104-05. Fulton wrote in the period when devotion to the "freedom of the seas" was at its height, especially in England; and he approached the traditional law and practice in more of a polemical than a historical spirit, even though his work contains much of great value.

14-18, *supra.* And these statutes make no distinction between English subjects and foreigners as subjects of the admiralty jurisdiction within the English seas.

Fenn declared that for purposes of the admiralty jurisdiction in feudal law "the sea . . . is a district of the kingdom." Exhibit 690, p. 76. Baldus and the other continental feudal lawyers who were heavily relied on in England plainly regarded the admiralty jurisdiction as territorial. *Id.* at 107-08. In the 16th century, Thomas Craig wrote that crimes committed within the territorial waters of the king are tried in the waters of that king, as being within his jurisdiction. *Id.* at 172.

Envoys of England and Flanders declared in a formal convention of 1320 that the King of England was lord of the sea and that certain robberies had occurred "on the sea of England" and thus were "committed upon his sea within his power." Exhibit 723, p. xxii; Fulton, *op. cit.* at 54-56. The location of these robberies is believed to have been about 120 miles south of the southwestern tip of England. *Ibid.*

An ordinance of Edward III, probably dating from 1339, specified that the admiralty jurisdiction was to extend to all ships of any nation traveling through the English seas. Exhibit 715, pp. 165-66.

The commissions of the English admirals expressly founded their jurisdiction upon the proposition that the English kings were "lords of the English sea on every side." App. 697. The usual form of commission in Selden's time, which he said had endured for "very many years past," appointed the admiral "governor general over all our fleets and seas of our said kingdom of England and Ireland," and gave him jurisdiction over those fleets and seas. *Mare Clausum*, pp. 305-06. Particular admirals were given command and jurisdiction over particular portions of the English seas.

Id. at 396. One form gave the admiral "custody" of the sea. Exhibit 562.

Of what did this territorial jurisdiction in the English seas consist? Certainly it included, as plaintiff's witnesses have emphasized, the power and duty of protection and the prevention of piracy. However, the notion that jurisdiction over piracy is non-territorial, because a pirate may be seized and punished anywhere by anyone, is a crude anachronism when applied to this mediaeval period. No distinction appears from the mediaeval records between piracy and other crimes so far as the admiralty jurisdiction is concerned. While in the earlier middle ages there is some evidence that rulers regarded the suppression of piracy as a cooperative venture, certainly by the 15th and 16th centuries piracy, like other crimes, in the adjacent waters of a state was tried in the courts and by the law of that state and no other. App. 806-07.

Further, the English maritime jurisdiction was far more extensive than plaintiff concedes. It included, as Justice Story held, "the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas." *De Lovio v. Boit*, 7 Fed. Cas. 418, 419 (D. Mass. 1815). There can be no question that it included the right of the English kings to make and to enforce substantive law, both civil and criminal, applicable to the English seas as within the dominions of the crown. While the alleged origin of the famous laws of Oleron in a promulgation by Richard I, Exhibit 715, p. 168, has been questioned, there is no doubt that the laws of Oleron, while "founded upon well-recognized customs of the sea," were regarded as deriving their authority in the English seas from their adoption by the English crown. *Ibid.*; Jerwood, *A Dissertation on the Rights to the Sea Shores* 15 (1850). "But it was not alone from this source [the laws of Oleron] that the maritime law in England was derived . . . ; as time passed there also grew

up in England a body of precedents preserved in the ancient volume The Black Book of the Admiralty. This old register contains the admiralty laws, decisions, ordinances, proceedings and acts of the King, the Admiral and the courts of admiralty of England from the earliest time." Exhibit 715, p. 168. Edward I instructed his naval officers to maintain "the sovereignty which his ancestors, the Kings of England, were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea." App. 695-96. The document *De Superioritate Maris* expressly affirmed the crown's right of "making and establishing laws and statutes," as well as "all other things which may appertain to the exercise of sovereign dominion" over the English seas. App. 651. The jurisdiction included the right of visit and search of all vessels passing through those seas. Exhibit 469, p. 47.

The record of an admiralty inquisition held in 1376, App. 746-47, illustrates the comprehensive range of criminal offenses with which the jurisdiction was concerned. So far from being limited to piracy, the list extends to murder, manslaughter, petty felony, aiding the enemy, exporting goods without license, false weights and measures, unauthorized claim of wreck or other royalties of the seas, disobedience of maritime regulations and many others. Of particular interest are items demonstrating that at this early date sea fisheries, including sedentary fisheries, were regulated under English law:

> "9. Of such as take salmons at unreasonable times.
>
> "10. Of such as spoil the breed of oysters, or drag for oysters and mussels at unreasonable times.
>
> "11. Of such as fish with unlawful nets.

> "12. Of taking royal fishes, *viz.*, whales, sturgeons, porpoises, etc. and detaining one half from the King." App. 747. See also Exhibit 679, p. 243.

There is no hint or suggestion that the crimes listed were to be ignored if committed in the English seas by foreigners. Indeed it is apparent that the purpose of much of the admiralty criminal jurisdiction, including regulation of fisheries, would have been wholly defeated had foreigners been exempt therefrom.

Failure to observe the flag salute in the English seas was, from the time of King John (Fulton, *op. cit.* at 6-7), punished as a criminal offense and by criminal remedies. And no one disputes that the flag salute was required of foreign ships, and that it was "a token of the superiority of the British sovereign over the adjacent seas." *De Lovio v. Boit,* 7 Fed. Cas. 418, 419 (D. Mass. 1815) (Story, J.). Here, then, is an undeniable area of application of English criminal law and jurisdiction to foreigners in the English seas.

Professor Horwitz has summarized (App. 51-55) a considerable body of additional evidence that the admiralty jurisdiction was territorial and extended to foreigners. Such is the necessary implication of the statute of 1536, which provided that offences committed at sea shall be tried "as if any such offences had been committed or done in or upon the land" (App. 51), since obviously crimes committed by foreigners on land in England were subject to the jurisdiction of the English courts. Much earlier, a commission of 1361 expressly provided for the trial of crimes committed at sea "by certain of our subjects and others," that is foreigners. App. 664. While the early records of actual cases and trials in admiralty are sparse, Professor Horwitz found one clear case and another highly probable case of trials of foreigners in admiralty for offences other than piracy committed on the English seas. App. 53-54. As we shall see later,

the record contains conclusive and incontrovertible records of such trials and convictions of foreigners in the 17th century (pp. 93-94, *infra).* There is no doubt that the flag salute was at all times enforced against foreigners.

D. THE CROWN'S OWNERSHIP OF THE SEABED OF THE ENGLISH SEAS WAS RECOGNIZED FROM VERY EARLY TIMES.

While the doctrine that the king owned the bed of the sea did not achieve its most elaborate articulation until the reign of Elizabeth I, there is ample evidence that from a very early date English law accepted without question the common-sense proposition that the seabed under adjacent waters, and its resources, were proper subjects of ownership and belonged to the crown unless lawfully acquired by a subject.

As early as 1286 a dispute arose regarding the right to take stone from the bottom of the sea opposite Portland, and the case was litigated like any other question of title to real property. Exhibit 728, pp. 95-96. Neither party is seen claiming that the seabed is *res nullius* or that the right to take stone belonged to the first comer. The action was in trespass and the issue was whether title was in the lord of the manor fronting on the seacoast in question or in the earl as feudal lord.

At about the same time, the *Toppesham* case established prescriptive ownership by the earls of Devon of an exclusive fishery and of the soil under the port of Exeter. Jerwood, *Dissertation on the Rights to the Sea Shores* 49-50 (1850). It can hardly be doubted that other cases of this type would be discovered if the mediaeval records were thoroughly examined for that purpose. Gould, one of the leading modern authorities on the law of waters, declares that "the ancient municipal law of England" is that "the Crown had a property in the adjacent seas both as against foreign

nations and its own subjects." Gould, *The Law of Waters* 6 (3d ed. 1900).

In the reign of Edward III it was declared "that not only the dominion of the sea, but the very soil, belongeth unto the king." Jerwood, *op. cit.* at 91. A substantial number of cases during the reigns of Edward I, Edward II and Edward III (1276-1377) involved exclusive fisheries in the sea or other tidal waters, carried on by subjects under grant from the crown, which involved the placing of weirs on the seabed. Some of these cases were those of the Abbot of Tichfield, the Abbot of Furneys, the Earl of Devon, the Abbot of Benet Hulm, the Earl of Lancaster and the Manor of Burnham. Since the weirs involved the right to the soil, Hale regarded these cases as holding that title to the soil had passed along with the grant of the fisheries. Exhibit 194, pp. 18-22. In the 19th century Hall disputed that interpretation, Exhibit 728, pp. 727-31. Moore's position is that "Mr. Hall's averment that the cases quoted by Hale do not assume an ownership of the soil is wholly wrong." *Id.* at 730, n. *(k).* Large parts of both of Moore's works are devoted to discussions of when grants of exclusive fisheries should be construed as passing the soil of the seabed and when they should not. Exhibits 728, 729, *passim;* see especially Moore, *op. cit.* at 658-59.

On this technical point, Hale and Moore appear to have the better of the argument as against Hall. For our purposes, of course, it does not matter; the significant fact is that all three disputants agree without question that the soil of the sea and other tidal waters is susceptible of ownership and was so regarded as early as the 13th and 14th centuries by the English common law, and that title thereto was in the king unless a subject had acquired it by grant or prescription.

Gould does not consider that the doctrine of crown property in the sea was any sudden or new development:

"Prior to the decision in *Regina v. Keyn,* the open seas around the coasts of Great Britain were considered to be the property of the Crown, and it was commonly said that the sea is not only under the king's dominion, but that it is his proper inheritance. According to Selden and the writers of his time, the king is lord of the great waste, both land and water. Lord Hale says that the king is owner of this waste, and that the narrow sea adjoining the coast of England is 'part of his dominions, whether it lie within the body of any county or not.' In ancient times, it was declared that the sea is within the legiance of the king, as of his crown of England; and in the Rolls of Parliament, in the reign of Henry V., it appears that the Commons prayed that whereas the king and his progenitors have always been lords of the sea, and now it happens that the king is lord of the coasts of both sides of the sea, that therefore the king will lay an imposition upon strangers passing over the sea. Coke, Bacon, Blackstone, Chitty, and Woolrych, writing at different periods, reassert the same doctrine; and Callis considers that, by the common law, the king has, in the English seas, possession and rights of property as well as of jurisdiction." Gould, *op. cit.* at 18-19.

E. IN THE REIGN OF ELIZABETH I THE LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS EXTENDED AND ELABORATED IN SEVERAL IMPORTANT RESPECTS.

Plaintiff has made much of Elizabeth I's two well-known assertions of freedom of the seas, made in opposition to cliams by Spain and Denmark to prohibit navigation and to license fishing in large portions of the seas. Elizabeth's

statements are not altogether inconsistent with the English legal tradition of crown sovereignty and dominion over the English seas, since the right of free navigation through territorial waters (today called the right of innocent passage) has usually been recognized as a qualification on maritime sovereignty. Moreover, it has been observed that Elizabeth's position on these occasions was inconsistent with her claims and actions at other times, as well as being quite out of tune with the international and English law and practice of the day. Colombos, *The International Law of the Sea* 50-51 (6th rev'd ed.); Hall, *A Treatise on International Law* § 40 (7th ed. 1917), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 67 (1919).

"Queen Elizabeth, in 1600, stamped a portcullis on those dollars destined for the East Indian trade, to signify the right of closing navigation in her seas." Halleck, *International Law* 134 n.2 (4th ed. 1908), reprinted in Crocker, *op. cit.* at 84; see also Exhibit 726, pp. 125-26. "Queen Elizabeth seized upon some Hanseatic vessels lying at anchor off Lisbon for having passed through the sea north of Scotland without her permission." 1 Phillimore, *Commentaries upon International Law* clxxi (3d ed. 1879), reprinted in Crocker, *op. cit.* at 366; see also App. 854. Elizabeth's admirals issued licenses to Dutch ships to pass through the English Channel. 1 Marsden, *Law and Custom of the Sea* 332 (1915).

Elizabeth insisted on the flag salute in her seas, as her sister had done, and enforced it even against ships carrying foreign sovereigns through English waters. Colombos, *op. cit.* at 52. In 1576 the queen ordered ships to sea to clear pirates from the narrow seas, declaring that in those seas "she and her predecessors have been accounted to have always held supreme sovereignty." Exhibit 457, p. 210. In 1598, in allying herself with the Dutch against Spain and Portugal, Elizabeth envisioned not securing the freedom of

the seas to all, but "that England and the Netherlands would together hold the empire of the seas." Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, p. 240 (1917); Swarztrauber, *The Three-Mile Limit of Territorial Seas* 16 (1972).

It was during Elizabeth's reign that Dutch fishing first became obtrusive in English coastal waters, and Elizabeth was subjected to considerable pressure from her subjects to exclude the Dutch. The fact that she refrained from doing so was clearly due, not to any fixed views on her part about the freedom of the seas (as we have seen, those were views which she reserved for occasions when their expression was in England's interest), but to the fact that the Dutch and English were allies in a desperate war against Spain; quite obviously, to raise the fisheries issue would have been counterproductive so far as the essential cooperation between the allies was concerned. Exhibit 693, pp. 135-38; Beaujon, *The History of Dutch Sea Fisheries* 464 (1883).

Major doctrinal developments occurred under Elizabeth's aegis in the further refinement of the law of maritime sovereignty and dominion. Albert Gentili, an Italian who lived in England and wrote in defense of both English and Spanish maritime claims, appears to have been the first to apply the term *territorium* to the adjacent seas, and his usage is said to have been the origin of the modern term territorial sea or waters. Swartztrauber, *The Three-Mile Limit of Territorial Seas* 17, 24 (1972). Gentili, as counsel for Spain in the English prize courts, argued that the belt of territorial waters of 100 miles in breadth[13] was within the "dominions" of England within which, under the Anglo-Spanish treaty of 1604, England owed the duty of

[13]In Gentili's time, and for more than a century thereafter, the 100-mile limit was favored by most of those international lawyers who believed there was any limit to the territorial sea which nations might lawfully claim. See pp. 276-77, *infra*.

protection to Spanish ships. While the prize courts refused to extend the duty of protection beyond the "king's chambers" (pp. 121-24, *infra*), the English government early in James' reign embraced the 100-mile limit as the criterion for territorial waters and exclusive fishing in the absence of historic vested rights to a greater limit. See p. 58, *infra;* Exhibit 693, pp. 358-61; Fulton, *op. cit.* at 122.

Dr. John Dee, writing in 1577, asserted royal ownership of sea fisheries and urged that foreigners be taxed for fishing in English waters. App. 103-04; Fulton, *op. cit.* at 99-104. Dr. Dee relied on no special English right or occupation, but on the doctrine that every coastal sovereign had sovereignty and ownership over its adjacent seas up to the midline between its coasts and those of the opposite state. Dee modified this doctrine in the case of the English Channel, which he asserted belonged in its entirety to the English crown on the ground of the queen's claim to the French throne, and the oceans around Scotland, on the ground that Scotland was in English law regarded as no full sovereign but merely an English tributary state. Fulton, *op. cit.* at 101-04. He was also intensely concerned with American exploration and was a backer of colonial enterprises. On commission from the queen, to whom he was well known, he wrote in justification of the English title to North America at the time of the Gilbert patent (p. 41, *infra*). He himself owned part-interests in the Gilbert ventures. Rowse, *The Elizabethans and America* 17-21, 41, 182-83 (1959).

The most important of the Elizabethan common-law writers was Thomas Diggs. While as we have seen (pp. 31-32, *supra*), the seabed and the resources thereof had been recognized as a subject of ownership as early as the 13th century, it was apparently Diggs, in 1568 or 1569, who first elaborated a systematic theory of that ownership by the crown. App. 27-28; Exhibit 203; Exhibit 690, pp. 171-72;

Exhibit 728, pp. 180-84. Diggs originated new law in asserting crown *prima facie* ownership of the foreshore; he took crown ownership of the sea and seabed as established and noncontroversial. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 307 (1971).

Diggs was wholly clear that the bed of the English sea belongs to the crown while covered with water. "As the sea of all waters is the chief, . . . so the property thereof ought unto the chief the king himself to be attributed." Quoted at Moore, *A History of the Foreshore* 185. If what was formerly land territory is inundated by the sea and becomes submerged, that submergence "by continuation of time giveth the property to the prince." *Id.* at 188. "If any man doubt of the prince's interest in the sea let him consider the statute in 18 Ed. 3, where he licenseth his sea shall be open to all merchants for traffic." *Id.* at 190. See also the long passage, *id.* at 203, in which Diggs declares that the kings have always owned the seas "about this island," and the resources thereof, in property. "And also to make it manifest that the soil of the seas is also entirely the king's, no man can let fall any anchor in any road about this realm but he payeth for breaking the king's ground to the officers of the king." *Ibid.*

While Diggs' theory of the foreshore has been criticized, notably by Moore (Exhibit 728, *passim*), that criticism has nothing to do with the issues in the present proceeding. The dispute between Moore and Diggs went to the question whether, as Moore contended, the foreshore had been so extensively granted out by the crown, either expressly or by implication, to the owners of the adjacent upland that they should be presumed to have it unless specific proof showed the contrary—or whether, as Diggs had maintained, the presumption was in favor of the crown unless an express grant could be shown. Moore never questioned that both the foreshore and the seabed are proper subjects of owner-

ship, nor did he question that title thereto ultimately derived from the crown. Similarly, none of the cases, either in Elizabeth's reign or later, in which the crown's claim to the foreshore or derelict lands was defeated stands for the proposition that the seabed cannot be owned or that the crown was not the original owner. In every such case, the crown lost because the court found a grant, a presumed grant or prescription.

As Professor Thorne recognizes (Tr. 2446-47), Elizabeth and her government warmly embraced Diggs' theory. Inquisitions to recover submerged and derelict lands were promptly undertaken. App. 41-42; Exhibits 213, 643. The *Dulinge* case combined Diggs' theory on the foreshore with the ancient legal tradition that the crown is "owner and proprietor" of the English seas and with the equally ancient tradition (see pp. 22-23, *supra*) of crown surveillance against illegal weirs, which dated at least back to Magna Carta. App. 125-27; Exhibit 201.

In *Sir John Constable's Case* of 1575, which involved a dispute between the crown and the owner of the adjacent manor as to the right of wreck on the foreshore, Plowden argued that, while the boundaries of England included the entire English Channel and one-half of the seas on every other side, the crown did not own the sea and seabed. Moore, *op. cit.* at 224-32. Professor Horwitz' assertion (Tr. 311) that Plowden is the only English authority who has ever denied crown ownership of the seabed has not been disputed by plaintiff herein. While Plowden's client won the case, the court's decision was based not on Plowden's theories but on the holding that the foreshore in question and the right of wreck thereon had been granted by the crown to Constable's predecessor in title. Moore, *op. cit.* at 233; see Tr. 2714-15. Moreover, Plowden based his assertion that the crown did not own the seabed on the observation that the bed "is of no value" (Pl. Br. 51), implying

that if the state of technology had given it value he would have been of a quite different opinion.

During Elizabeth's reign, in 1571, Parliament enacted a statute asserting regulatory jurisdiction over fishing practices in the main sea off the coasts of Norfolk and Suffolk. Because of interference with fishing nets, the statute prohibited any ships from anchoring in fishing areas of the sea during the fishing season. App. 867.

Another legal development during the reign of Elizabeth is of critical importance in understanding the legal climate in which the American colonial charters were issued. This was the law of monopolies. As new portions of the world were rapidly opened up to English navigation, trade, fishing and other exploitation, it became customary for the crown to vest these new commercial opportunities in particular persons or companies by charters or patents of monopoly. The late 16th-century and early 17th-century colonial charters were instruments of this type; but they were not the only ones, or the earliest.

The prototype was the charter of 1555 to the Muscovy or Russia Company, which, as confirmed by act of Parliament in 1566, prohibited all Englishmen other than the company from trading to any country lying north, northwest, or northeast of London where English trade had not been commonly carried on prior to 1553. Exhibit 777, p. 41. Such monopolies proliferated throughout the reign of Elizabeth and in the succeeding reigns. They had a double purpose: first, the encouragement of trade and economic exploitation; second, the production of revenue for the crown.

One of the economic opportunities discovered and developed by the Muscovy Company was the whale fishery in the seas covered by its charter. As a matter of English law, there is no doubt that the company had a monopoly of that fishery, to the exclusion of all others. Exhibit 776, p. 127.

Towards the end of Elizabeth's reign, the crown's right to create such monopolies was called into question, both in Parliament and in the courts. Elizabeth vehemently maintained that the right was an attribute of her prerogative, which might not be challenged. Exhibit 776, p. 106. About 1600 Sir Edward Coke, then Attorney General, rendered a careful legal opinion on the subject. He held that monopolies were legitimate when justified for the advancement of trade, for the exploitation of new inventions or for new trading voyages, but not otherwise. *Ibid.* While questions continued to arise from time to time in Parliament as to whether particular monopolies were sound policy, Coke's opinion established a legal test which endured: that a monopoly was valid if it covered some new discovery, venture or economic opportunity, but not if it attempted to exclude Englishmen from particular economic activities in places in which they had previously engaged in them.[14] See also 1 Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720* 118-25 (1912). As we shall see (pp. 234-38, *infra*) this standard was invoked by both sides during the New England fishing-monopoly controversy of the 1620's, where the issue really boiled down to the question of fact of whether English fishermen had customarily frequented the New England fishing grounds prior to the New England charters of 1606 and 1620 which created the monopoly.

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[14]The theory implied limitations on the crown's right to grant exclusive fisheries. Eventually the doctrine grew up, though long disputed, that an exclusive fishery in English waters must antedate Magna Carta to be valid. Interestingly, that doctrine was not applied in this country, on the ground that a limitation on a personal sovereign (the king) did not bind the people acting through their legislature. In this country it was therefore generally held that the legislatures had the power to grant exclusive fisheries or sedentary fisheries in tide waters, and many such grants were made. See Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689, 698 (1932), and authorities there cited.

As a matter of English law, then, the situation was quite clear on the eve of American colonization. The application of the established doctrine to the issues in the instant proceeding is obvious. There can be no doubt that, if during Elizabeth's reign some newly exploitable mineral resource had been discovered in the seas or seabed adjacent to England, the crown would have asserted and exercised the right to license such exploitation or to create a monopoly to exploit it.

The letters patent granted by Elizabeth to the Gilberts and Raleigh, which are the precursors of the American colonial charters of the next century, were typical grants of monopolies in this legal context. As Professors Horwitz and Smith have testified, these patents vested their recipients with royal or palatine rights both in the lands to be discovered and settled and in the seas adjacent thereto. App. 99-101, 250-58. Sir Humphrey Gilbert's patent of 1578 conveyed "all commodities, jurisdictions and royalties both by sea and land," and "the rights, royalties and jurisdictions, as well marine as other, within the said lands or countries or the seas thereunto adjoining. . . according to the order of the laws of England." Exhibit 139; App. 253, 255. The issuance of the patent was preceded by a legal opinion on the queen's title by Dr. John Dee, whose views on maritime sovereignty have already been described (p. 36, *supra*); Dee was instrumental in procuring the patent, and had an interest therein. *The Private Diary of Dr. John Dee* 4, 8, 18-19 (Halliwell ed.).

Raleigh's patent of 1584, which was confirmed by act of Parliament, contained similar language. App. 257-58; Exhibit 140; Rowse, *The Elizabethans and America* 48 (1959). Adrian Gilbert's patent, also of 1584, included all profits, jurisdictions and royalties both by sea and land, and the right to exclude others from both the territories and the seas to be settled by Gilbert; the rent to be paid to the

queen included the tenth part of, among other things, pearls, demonstrating that the possibility of exploitation of the resources of the seabed was well understood and avidly anticipated. App. 256-57. One of the first activities of the Raleigh colonists in what is now North Carolina was to search for pearl fisheries, and they were elated when they believed they had discovered signs of them. Stebbing, *Sir Walter Raleigh* 46 (1891).

It is beyond serious question that these patents were intended to convey monopolies both by sea and by land; that is, to authorize the patentees to exercise the exclusive right of exploitation of the resources of the seas and the seabed as well as those of the land. There seems no reason to doubt, given the state both of legal doctrine and of governmental practice at the time, that the patents were also intended to convey title to the seabed.

It is not difficult to reconcile such creations of monopolies with Elizabeth's occasional assertion, some years later, of the freedom of European waters for fishing. Even if it be supposed that Elizabeth was serious, and not merely expedient, in those assertions, it must be remembered that the English law of monopoly drew a sharp distinction between an attempt to monopolize a previously known and exploited resource, which was regarded as impermissible, and the monopoly of a newly discovered territory, opportunity or resources, which was valid. Elizabeth and her lawyers regarded an exclusive charter for a newly discovered territory, or a newly discovered fishery, or a newly discovered sedentary fishery or mineral resource of the seabed, in exactly the same terms as they regarded, and as we still regard, a patent vesting in the inventor an exclusive right to the exploitation of a new invention. Thus it is possible that Elizabeth might have regarded an attempt to monopolize established fisheries in European waters as illegal, without in any way implying that exclusive

rights could not be created for the exploitation of the resources of the sea and seabed in the new world. As we shall see, in the next century the English crown and government adopted the position that English sovereignty and dominion in its territorial seas overrode any right of foreigners to fish there, which was regarded to have been a mere revocable liberty or license when it had been allowed by the English crown. The two theories had somewhat different implications for crown rights in English waters; but the crown right to exclusivity in the waters and resources of the seas adjacent to newly discovered lands was common ground between them.

Indeed, it can be demonstrated that the intention to monopolize the North American fisheries, to the exclusion of foreigners, preceded and in principal part caused the earliest colonial ventures in Elizabeth's reign. In 1578, the same year Sir Humphrey Gilbert received his patent, Anthony Parkhurst, a merchant of Bristol, wrote a "Report of the True State and Commodities of Newfoundland." Parkhurst argued in favor of an English settlement at Newfoundland in order that the English might "be lords of the whole fishing." Rowse, *op. cit.* at 162. "The same year Sir Humphrey Gilbert advocated the scuppering of the Spaniards and their extrusion from the fishery there." *Ibid.* According to the 18th-century American lawyer William Bollan, Gilbert taxed all ships, English and foreign, fishing on the Newfoundland coasts. App. 769-70. "Apparently the English held the right to exclude the vessels of all other nations from the fishing grounds." App. 833, 884-85.

Even before Gilbert's settlement in 1583, English assertion of power over the fisheries had begun:

> "Sir Thomas Hampshire was sent out by Queen Elizabeth with five ships in 1582 with a commission to subject the fishery to proper

> regulation. It is known . . . that Sir Thomas did in fact lay down the bases of the fishing rules which were subsequently observed, and that before his voyage England was recognized by the fishermen of various countries, including France, who then frequented the island, as having a right of some sort, probably founded on discovery, to exercise jurisdiction among the adventurers from Euorpe. By 1580 it had become the practice, by common accord of the fishermen of all nations, that the captains of the English fishing vessels should act as judges and arbitrators, notwithstanding that at this time their numbers were relatively few. Shortly after that date English superiority was planted on a surer footing. In 1583 Sir Humphrey Gilbert, acting under a due commission, formally took possession of the island on behalf of his sovereign, in the presence of various persons, subjects of other nations, who happened to be there in pursuit of the fishery, and from whom he exacted tribute in acknowledgement of the queen's right. The fact that possession was taken was recorded by setting up a pillar of wood, upon which the Arms of England were carved." Lobster Fisheries on the Coasts of Newfoundland: Case of Her Majesty's Government (1892), quoted in Parry (ed.), 2b *British Digest of International Law* 420 (1967).

Although Gilbert's attempted settlement at Newfoundland in 1583 was unsuccessful, two years later Sir Bernard Drake "was sent to round up the Spanish fishing fleet in Newfoundland. This was a very profitable enterprise and six hundred fishermen were brought back to be taken care of. Henceforth no Spanish fishing fleet went to Newfoundland, and 'out of the whole number of fishing vessels England had more than double the fleet of her rivals and

all quietly submitted to her control.' " Rowse, *op. cit.* at 164; App. 832-33. So much for Queen Elizabeth's dedication to the freedom of the seas and of the fisheries.

Throughout the 17th and 18th centuries, England based its claim to Newfoundland and its fisheries on the Cabot discovery and on Gilbert's ceremonial taking of possession. App. 885.

F. EXCLUSION OF FOREIGNERS FROM COASTAL FISHERIES WAS FIRMLY ESTABLISHED IN SCOTTISH LAW AND PRACTICE.

While Scottish law as such never became law in this country, it is relevant to the issues in this proceeding as showing the legal climate in which James VI and I was educated and operated for most of his life, and which he brought with him on his accession to the English throne in 1603.

As early as the reign of David I (1124-1153), both Scots and foreigners were prohibited from exploiting the important sea fishery at the mouth of the Firth of Forth without obtaining licenses and paying tithes. Fulton, *op. cit.* at 59-60. As to the Scottish seas generally, "restrictive measures were in force from an early period." *Id.* at 75. The Scots fiercely resisted any intrusion of foreigners into what they called their "reserved waters," and sea battles were fought to vindicate that right in the 15th and 16th centuries. *Id.* at 77-79. The Scots "reserved waters" were generally defined as extending to a "land-kenning" of the coast, that is, the distance from which the land could be seen from the tops of masts. This distance was usually defined as either 14 or 28 miles, although the Scottish lawyer Welwood wrote that the Scots had asserted the right to exclusive fisheries for 80 miles from the coast and the Dutch had acquiesced therein. *Id.* at 77, 84. Sometimes two

"land-kennings" were claimed, Exhibit 777, p. 363, which probably explains the claim to 28 miles. No treaty entered into by Scotland ever sanctioned any foreign right to fish in Scottish waters. Acts of Parliament regulated the sea fisheries and excluded foreigners. Fulton, *op. cit.* at 82-83; Exhibit 756, pp. 290-93; Exhibit 464, pp. 34-36. The crown rights included the "assize-herring", an ancient tax levied on the herring fishery. Fulton, *op. cit.* at 82; Exhibit 693 at 152-53. An act of Parliament in 1424 fixed the tax as four shillings for each last (an old unit of weight) of herring caught by Scots and six shillings for each last caught by foreigners. Fulton, *op. cit.* at 171, n.1.

According to Professor Elder, Dutch fishermen first came into Scottish waters in 1594, pursuant to a Scottish license which kept them at a distance of 28 miles from the shore. App. 38; see also Exhibit 596.

Given this tradition, it is hardly surprising that the eminent Scottish lawyer Sir Thomas Craig, in a work published in the year of Elizabeth's death, affirmed that a sovereign is the proprietor of the fisheries in his adjacent seas and may permit or prohibit foreign fishing there according to custom. Exhibit 690 at 172-73; Exhibit 693 at 357. See also Exhibit 447. Likewise, William Welwood's *Sea Laws of Scotland,* published in 1590, affirmed the crown's exclusive right to enjoy sea fisheries and to grant them out to subjects. Exhibit 690, pp. 174-75.[15]

[15]But see Fulton, *op. cit.* at 352. We have not been able to obtain a copy of Welwood's 1590 work and thus cannot establish whether Fenn's assertion that the paragraph he quotes is from the 1590 version is correct or not.

II.

SEVENTEETH-CENTURY ENGLISH LAW AND PRACTICE FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS, SEABED AND SUBSOIL.

During the reign of James I (1603-25), English law became even more fixed and definite as to the rights of sovereignty and property of the crown in the adjoining seas, and had several very important practical applications. The English seas were regarded as part of the realm, just as much as the land, and therefore subject to the legislative, executive and judicial power of the state. The crown possessed and exercised the right to exclude or to license foreign fishermen and the right of admiralty jurisdiction, both civil and criminal, including criminal jurisdiction over foreigners for crimes committed in the English seas.

The English seas were regarded on historical grounds as extending all the way across both the North Sea and the English Channel, and for considerable distances into the Atlantic. Except where special circumstances operated (as in the English Channel, all of which was claimed on the basis of the English kings' claim to the French throne), the usual doctrine was that English sovereignty extended either for 100 miles or midway to the opposite coasts. Within the English seas, the right to the fisheries was exclusive, the admiralty jurisdiction was territorial, and the flag salute was required for foreign ships. As to the seabed and subsoil, the law of England was that the crown owned them and the resources thereof. These legal doctrines were subjected to further definition and elaboration throughout the 17th century.

The overwhelming body of evidence supporting these conclusions is summarized by Professor Horwitz at App. 30-102. The facts are largely conceded by plaintiff's witnesses.

Most of the evidence speaks quite well for itself, in spite of plaintiff's attempt to introduce subtleties and distinctions which never occurred to those who were making and interpreting the law in the 17th century. In this section we shall simply refer to the most important evidence broken down into appropriate categories. First we shall collect the evidence showing that as a general proposition, under English law throughout the 17th century, the crown was sovereign in the English seas and those seas were part of the realm of England. We shall then set forth the evidence in the four most important areas in which that sovereignty was exercised and implemented: the crown's exclusive right to the fisheries in the English seas, to exclude or to license foreign fishermen, and to regulate fisheries; the territorial admiralty jurisdiction in the English seas, including jurisdiction over foreigners; crown ownership of the seabed and of the resources thereof; and, finally, the requirement of the flag salute as a recognition of maritime sovereignty.

A. THE CROWN POSSESSED TERRITORIAL SOVEREIGNTY OVER THE ENGLISH SEAS.

Plaintiff's witnesses cannot and do not deny that England claimed and exercised sovereignty over the English seas in the 17th century. One of the plaintiff's witnesses, Professor Wroth, has attempted to explain that away by contending that the term *sovereignty* was regarded as entailing only some sort of "protective" jurisdiction over the seas, amounting perhaps to no more than a special English duty to prevent piracy in the seas adjacent to England. To the contrary, the evidence shows that English law in the 17th century had a fully developed doctrine of territorial waters entailing sovereignty in the complete modern sense over what were regarded as the English seas.

1. Court Cases

In the *Case of the Royal Fishery of the Banne,* in 1610, the Privy Council, the highest judicial body in England, declared that "the sea is of the legiance of the king as of his crown of England." Exhibit 157, p. 38; App. 93.

In *Rex v. Oldsworth,* a decision of the Exchequer in 1637, it was declared that "as the king is supreme upon the land, so he is upon the sea"—a clear expression of the view that the crown's sovereignty in the English seas was of the same nature as its sovereignty over the land territory of England. App. 39-40.

Also in 1637, all the judges of England joined in the decision of the great *Ship Money Case (Rex v. Hampden).* At issue was whether the king had authority, without the consent of Parliament, to levy an impost on his subjects to build ships for the defense of the English seas. One of the principal contentions of the crown was that the English seas were within the realm, and that subjects were obligated to contribute for the defense of the realm, in contradistinction to expeditions and ventures outside the realm, where no such obligation existed. By a vote of 7 to 5, the court held in favor of the crown. 3 Howell, *State Trials* 825-1254 (1816).

The ship money writs, whose lawfulness was at issue, declared that the kings of England had always been "masters of the aforesaid sea" and "lords of the sea aforesaid." *Id.* at 830, 848, 1191. Before issuing the writs, the king had obtained an advisory opinion, affirming their lawfulness, from the Chief Baron of the Exchequer and the Chief Justices of the Courts of Kings Bench and Common Pleas. In the subsequent prosecution of Hampden for refusing to pay, the Solicitor General, Sir Edward Littleton, based his argument in principal part on the duty of subjects to fight (or to contribute money for fighting) within the realm, as opposed to conquest or conservation of foreign

countries or territories beyond the sea. *Id.* at 924. "The kingdom of England consists of land and sea"; "the king is as much lord of the sea as land"; "if the king could command for land, he may for sea, for both are one kingdom"; "the sea and the land make but one kingdom"; the king is "lord of the narrow seas." *Id.* at 928, 932, 937, 947. Sir John Banks, the Attorney General, likewise arguing for the crown, was to the same effect:

> "This dominion is not only upon the land, but it is upon the sea. And so the king he hath not only a dominion at sea, but he is 'dominus maris Anglicani,' he is both owner of the sea and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the barons in the Exchequer, in the case of Sutton Marsh, Mich. 13 Car. That the soil of the land, so far as the sea floweth is the king's, and the king is seized thereof, *jure corona.* Mirror 8, Bract, fol. 8, temps Edw. 1, Avowry, 46 Ed. 3, Com. 3, b. That not only the dominion of the sea, but the very soil belongeth unto the king.
>
> "In the next place he hath, besides his supremum dominum, a sovereign jurisdiction, and that extends both by sea and land.
>
> "First, for creation of all his great officers and judges; creation of the Admiralty, time out of mind. 20 Hen. 7, fol. 8, 12 Hen. 7, fol. 17, power to make justices could not be granted; and all these powers resumed in the statute, as inherent in the crown. 12 Hen. 7, fol. 17, there it is said by Fineux, that at the beginning all administration of justice was in one hand, that is, in the crown. And surely this jurisdiction did not begin in the time of Ric. 1, when those laws were renewed by

> him at his return from the Holy Land; but there were admirals in England, and the admiral law by sea long before. 27 Ed. 1, a famous record in the Tower, that the commissioners for the emperor, Spain and France, did appear before the king's commissioners, and did acknowledge the sovereignty of the king of England upon the sea did belong unto him time out of mind. And for further proof of this, it likewise appeareth in that learned book of Mr. Selden's called Mare Clausum." *Id.* at 1023.

As stated, the court held for the crown by a vote of 7 to 5.[16] The opinions of the majority fully accepted the crown's argument. Sir John Finch, Chief Justice of Common Pleas, held as follows:

> "By the fundamental laws and policy of this kingdom, the sole interest and property of the sea, &c. is in the king.
>
> * * *
>
> "Sea and land make but one kingdom, and the king is *sponsus regni;* Magdalen College Case, sir Joh. Davies' Reports, stat. 24 Hen. 8, 1 Eliz. and 1 Jac. The soil of the sea belongs to the king, who is lord and sole proprietor of them; and good reason why he should, as is well maintained by Mr. Selden, that worthy and learned author of Mare Clausum; and I hope shall be by his majesty maintained, with the sovereignty of the sea: and without a navy this authority can do but little good.
>
> * * *

[16]Two of the dissenters, Bramston and Davenport, disagreed with the majority only on the purely technical ground that by the record it did not appear to whom the money assessed was due.

> "[I]t cannot be denied but originally the king had the sovereignty of the whole kingdom both by sea and land, who hath a power of charging the whole kingdom.
>
> * * *
>
> "Then if sea and land be but one entire kingdom, and the king lord of both, the subject is bound as well to the defence of the sea as of the land; and then all are bound to provide ships, men, ammunition, victuals, and necessaries for that defence." *Id.* at 1225-27.

Judge Crawley's opinion referred, though more briefly, to the dominion of the sea, *id.* at 1086, as did Baron Weston's, *id.* at 1067.

Notably, none of the judges in the minority in any way questioned the holding that the English seas were within the realm; their disagreement was entirely on other matters. In fact Chief Baron Davenport of the Exchequer went out of his way to agree with the majority on that point:

> "[T]he king is lord of the sea; as it was argued at bar, in a cause brought before us the barons of the Exchequer, where we did unanimously agree, and adjudge that the king was, and is in my conscience, rightly the lord of the very propriety and ownership of the seas. The occasion upon which this grew a question was as I conceive, upon the writing of two books: the one called Mare Liberum, that no ownership of the sea should belong to the king; whereas it is the sea of our sovereign, and defence by sea, under Almighty God, that is our protection; and if we should suffer any else to have an interest in it, it would hazard the whole kingdom. But in answer to this book, Mr. Selden hath wrote very learnedly a

> notable book called Mare Clausum, approved of by his majesty, and enrolled in the Exchequer by command from his majesty, there to remain. But since there is another book written, which I had at my argument, by one Pontanus, directed to the great chancellor of the king of Denmark; and he undertaketh herein to make an answer to every particular chapter in Mr. Selden's book; and truly, as I think in my opinion though weak, Mr. Selden hath a judgment in law against him upon a *nihil dicit.*" *Id.* at 1210.

Sir John Bramston, Chief Justice of King's Bench, was in accord:

> "Thus much for defence upon the land; now for defence upon the sea. In the statute 18 Ed. 3, cap. 7, that they who serve the king out of the kingdom, serve for wages; but in case of necessity, without the realm, in times past, by no precedents, saith my brother Crooke, can it be proved it was done before.—I answer, that the sea is within the kingdom; see 2 Ed. 3, cap. 10, protect. 46 Bract' lib. 2, fol. 365, there the sea is made part of the kingdom. Doctor and Student, cap. 51. It is the ancient custom of England, that the king is lord of the narrow seas." *Id.* at 1246.

Counsel for the defendant likewise had no quarrel with the crown's argument on the question relevant here. Indeed, one of the defendant's arguments was that the king owned all the profits of the seas, not only royal fish but also "all other profits of the sea, if the king would take them," *id.* at 1004, and therefore had no need to make exactions of his subjects for the defense of the sea. Again the defendant argued:

> "For though the king be lord of both sea and land, and hath in them both the sole dominion; yet in the sea he hath the whole property, and in a manner all the considerable profit and privilege; the subject hath but the passage of the sea, and the *minima* to take fish, not considerable in point of benefit." *Id.* at 1010-11.

Thus we see that in this great case, surely one of the most famous and important in all the history of the English-speaking peoples, both parties and all the judges of England were in accord that the English seas were part of the realm. As is well known, the holding that ship money could be levied without the consent of Parliament was immensely unpopular, was denounced in Parliament, and was one of the major causes of the Civil War. However, in the parliamentary denunciation no trace of criticism can be found of the case with respect to its holding that the seas were within the realm. See *id.* at 1254, 1305.

An indictment in the High Court of Admiralty in 1674 of foreigners for failing to give the flag salute declared that "the British seas are, and from the time beyond the memory of man have been, within the sovereignty and of the dominion of the kings of England for the time being as a parcel of the kingdom of England." App. 721. Since this indictment was deemed legally sufficient and resulted in a conviction (App. 725), it has undoubted legal authority. Similar indictments are found at App. 726, 731. One of those convicted subsequently obtained a royal pardon for the crime of failing to give the flag salute "within Our British Seas." App. 737.

While Professor Wroth has sought to deprecate (Tr. 2501-03) the charges to admiralty juries of the great admiralty judge Sir Leoline Jenkins, the authoritative legal force of those charges can hardly be questioned. In his 1668 charge, Jenkins twice referred to the sovereignty of the

crown in the British ocean. App. 895-96. In another charge, Jenkins declared that "his majesty hath an undoubted empire and sovereignty in the seas that environ these his kingdoms, which by the ancient statute laws are called the quatuor maria, by foreigners, and by our modern treaties, the British seas." App. 897; see also App. 901.

2. Acts of Parliament

As Professor Thorne has conceded (App. 549), during the Commonwealth period the Council of State was the highest law-giving authority in England. In 1650, "whereas the dominion of these seas has time out of mind undoubtedly belonged to this nation," the Council directed the admirals "to preserve the dominion of the sea." Exhibit 224.

In 1652 Parliament adopted a resolution requesting the Council of State "to prepare a declaration to assert the right of this Commonwealth to the sovereignty of the seas, and to the fishery." Exhibit 693, p. 409. The Council's response was to order the translation and republication of Selden's *Mare Clausum*. *Id.* at 410.

In 1654 the Council of State granted a licence to a fishing captain of Dieppe "to enter those our seas between the coasts of England and France." Exhibit 586.

On the outbreak of the second Dutch War during the reign of Charles II, Parliament, in the preamble of an act granting money for the equipment of the fleet, declared it to be "for the preservation of his Majesty's ancient and undoubted sovereignty and dominion in the seas." Fulton, *op. cit.* at 458.

In 1681 the Scottish Parliament, in a statute defining the jurisdiction of the Scottish admirals, specified that it extended to all maritime and seafaring causes "within this realm," indicating Parliament's understanding that the Scottish seas were within the realm of Scotland. App. 647-48.

In 1699 the English Parliament enacted a statute directing the Lord High Admiral to appoint certain ships to cruise on the coasts of England and Ireland to seize smugglers. Masterson, *Jurisdiction in Marginal Seas* 3 (1929). The act specified no seaward limitations for this jurisdiction, a fact which Masterson explains as follows:

> "It is unnecessary, however, to determine those limits at this early period; for the English Government was then claiming and maintaining sovereignty over the entire four bodies of water known as the 'English Seas,' which would embrace the limits of all ports. Hence, there was nothing novel or unusual in the exercise of jurisdiction over smuggling craft for an indefinite distance, as provided by the Act of 1699." *Id.* at 3-4.

3. Legal Opinions

James I's fishing proclamation of 1609 was preceded by an exhaustive legal inquiry as to the juridical basis for the crown's assertion of sovereignty over the sea and the right to exclude foreign fishermen. This inquiry culminated in a favorable opinion to the Privy Council from a committee of five persons, of whom at least three (Caesar, Dun and Crompton) were lawyers. Exhibit 693, pp. 138-47.

In 1610 Sir Julius Caesar, a noted admiralty judge and later Master of the Rolls, delivered, in connection with the fishing negotiations with the Dutch, an opinion confirming English sovereignty over "the four great seas" and the right to exclude foreign fishermen therefrom. App. 712-14; Fulton, *op. cit.* at 158-59.

In 1617, Caesar delivered another legal opinion, asserting the duty of the Dutch to extradite, for trial and punish-

ment in England, Dutch citizens who had seized Captain Browne in the sea off the English coast while he was selling fishing licenses to Dutch fishermen. Caesar regarded the Dutch crime as having been committed "within the territory" of England. App. 715. Before rendering his opinion, Caesar had obtained the opinions of three other eminent lawyers. Exhibit 693, p. 174. On the basis of this opinion, diplomatic representations were made to the Dutch (Exhibit 567), who acquiesced and surrendered the culprits as demanded. Exhibit 693, p. 174.

Charles I, like his father, commissioned extensive legal research prior to issuing, in 1636, his proclamation asserting maritime sovereignty. Exhibit 679, pp. 230, 243-46; Exhibit 693, pp. 211-13, 364-65.

Similarly, the parliamentary government during the interregnum, before confirming the position of the Stuart kings regarding maritime sovereignty, commissioned William Ryley, the Keeper of the Records in the Tower, to provide proofs of the English sovereignty of the sea; Ryley did so. Exhibit 558; Exhibit 693, p. 409.

Charles II, when embroiled with the Dutch over the flag salute, requested the eminent admiralty judge Sir Leoline Jenkins for a legal opinion. Jenkins' response was that "the king of England for the time being is lord of those seas, where he hath the right of his flag acknowledged; and that those seas are, as much as that watery element is capable of being so in its nature, no less a domain of the crown, than the Honour of Greenwich, or the Manor of Eltham." Exhibit 211, p. 698; Exhibit 693, p. 484.

In 1671 Trinity House, in response to an inquiry from the crown, gave an opinion that the British seas included the entire English Channel and the North Sea all the way to the coast of the low countries, and in the south extended to Cape Finisterre. Uncertainty was expressed as to how far northward the British seas extended. App. 739-40.

In 1699 Sir Charles Hedges, admiralty judge, gave a report affirming that the British seas included the entire Bay of Biscay, as far as the Spanish coast. App. 667-68.

4. Other Official Pronouncements and Acts of State

As Professor Thorne has recognized (App. 548), the courts and Parliament were by no means the only law-making bodies in England in the 17th century; formal acts by the king in Council likewise had the force of law. In matters touching the prerogative, the ordinary law courts were rarely involved, and pronouncements by the king in Council—which indeed was the highest judicial body in England—are the best authority.

James I's fishing proclamation of 1609 (App. 675-77), made in Council and, as we have seen, after elaborate legal research, referred to the "sovereign power" of the English crown in the adjacent seas, declared that crown rights in those seas were a part of the prerogative, and described those rights as "regalities." The proclamation prohibited foreigners from fishing without license "upon any of our coasts and seas of Great Britain, Ireland and the rest of the isles adjacent."

In the years following James' proclamation, innumerable formal pronouncements by official bodies and high officers of the state reaffirmed the English sovereignty in the seas. We shall mention only a few of the most important. The great Earl of Salisbury, Lord Treasurer and prime minister, writing to the English Ambassador at Madrid, declared that by the civil law every state has sovereignty over its adjacent seas at least 100 miles out, and affirmed also the English claim to the entire channel between England and France on the basis of a special historic right. Exhibit 693, pp. 360-61.

Naval instructions of 1632 ordered the recipient " to preserve the king's regality in the narrow seas." App. 777. The use of this term—regality or royalty—for the collective sovereign rights of the crown in the English seas was altogether customary and habitual in this century as previously.

Among the long series of official papers preceding Charles I's fishing proclamation, the "Propositions for Fishing" of 1633, by Secretary of State Sir John Coke, asserted the crown's sovereignty and command at sea. App. 91, 656-57; Exhibit 693, pp. 211-13.

In 1633 the Lords Commissioners of the Admiralty requested Sir Henry Martin, admiralty judge, and the Attorney General to draft a "reglement" relating to the protection of the king's "ancient right, honours and sovereignty in the narrow seas, and in his chambers and ports." Exhibit 568. The reglement composed by them, and issued as a royal proclamation in 1634, asserted sovereignty over "the four English seas." Exhibit 569; Fulton, *op. cit.* at 251-52, 759-61. While measures for the enforcement of neutrality were prescribed only within certain limits, careful reservation was made that "his majesty doth justly challenge sovereignty and property in all those his seas far beyond the limits hereafter to be described and might with like justice require from all persons using those his seas a forebearance from injuries and all hostile actions." Exhibit 569, p. 760.

Charles I's ship money proclamation, also of 1634, based the levying of ship money on a declaration that English kings had ever been lords of the English seas. App. 697.

In 1635, one of the English complaints against France was that the French "challenged a joint sovereignty on the sea with his majesty." Exhibit 678, p. 402.

Charles I's fishing proclamation of 1636 was made "by the advice of our Privy Council," the highest court in England. Like his father's proclamation of 1609, it asserted sovereign rights over "the coasts and seas of Great Britain, Ireland, and the rest of the isles adjacent." Exhibit 222.

In 1639 Secretary Windebank, at the command of the king, gave directions for naval voyages "to preserve his majesty's sovereignty in those narrow seas." Exhibit 610. Innumerable other official documents similar to this one could be cited.

Under the Commonwealth and Protectorate, the English claims to maritime sovereignty were not diminished in the slightest. In 1644 the parliamentary committee for the Admiralty gave instructions to maintain "the kingdom's sovereignty and regality in the seas." Exhibit 693, p. 380. One of Cromwell's first directions was to the naval officers, that they "maintain the sovereignty of the commonwealth in the seas." App. 91.

Nor was there any change at the restoration. Charles II's declaration of war on the Dutch in 1672 was based primarily on their refusal to recognize English sovereignty and dominion in the English seas. Exhibit 693, pp. 482, 487-88.

Similarly, William III's declaration of war on France in 1689 gave, as one of the reasons for hostilities, French violations of the flag salute, which was stated to be an attribute of "our sovereignty of the narrow seas, which in all ages has been asserted by our predecessors, and which we are resolved to maintain, for the honour of our crown and of the English nation." Exhibit 693, p. 518. Another *casus belli* was declared to be French encroachments on the Newfoundland fisheries in the American seas. App. 893; Exhibit 741, p. 242; see pp. 229-30, *infra*.

5. Legal Treatises of the Period

William Welwood, writing in 1613 and 1615, asserted English sovereignty in the adjacent seas, and referred with approval to Bartolus' doctrine that the sovereignty of a coastal state extends 100 miles into the sea. App. 674; Exhibit 693, pp. 354-55. Welwood, like Selden, pointed out that the rules for acquiring title to sea are the same as those for the acquisition of land, and that "it is not needful for him who would possess himself in any part of the land to go about and tread over the same; but it is sufficient to enter in upon any part thereof with a mind to possess all the rest thereof, even to the due marches. And what can stay this to be done on sea, as well as on land? And thus far concerning the validity." Welwood, *An Abridgement of All Sea Laws* 67 (1613), App. 673.

Robert Callis, writing in 1622, is wholly specific that the English seas are within the realm, and that the crown is sovereign there by the common law of England. App. 30-32, 50, 777-83. Callis' purpose was to establish that the statute law of England, and specifically the Statute of Sewers, were in force in the English seas. Callis makes very clearly the distinction between the realm and the bodies of counties, which comprise only part of the realm. App. 780.

Professor Wroth argues (Tr. 2510), on the basis of Callis' statement that the intent of the statute of 1389 (pp. 14-18, *supra*) was rather to "limit the Admiral how far he should extend his jurisdiction than in any way set forth the bounds of this Realm," that Callis did not believe that the realm included all areas where the admiralty jurisdiction may be exercised. The argument is quite demonstrably specious. When read in context (App. 780-81), Callis' statement plainly means that the admiral's jurisdiction was limited on the *landward* side, not that the realm was more limited on the *seaward* side than was the admiral's territorial jurisdiction.

Of course the admiral's jurisdiction was different from the extent of the realm, since it did not extend to areas within the bodies of counties. This was the whole point of the statute of 1389, which Callis was expounding. On the seaward side, it is plain that Callis regarded the boundaries of the realm and the limits of the admiral's territorial jurisdiction as coextensive, since he relies heavily on the latter to establish the former. App. 777-78.

John Selden, of course, asserted full territorial sovereignty and dominon of England over the four English seas, including the entire English Channel and North Sea up to the opposite coasts, and also including very large expanses of the seas to the north and west of Great Britain.

> "[I]t is not to be conceived that any other kind either of causes or effects of sea dominion are here admitted, than such as have been of the dominion of an island, continent, port, or any other territory whatsoever . . . ." *Mare Clausum*, preface, p. e3.

Excellent summaries of Selden's views are found in Exhibit 188 and at App. 33-36, and some of the most important passages from *Mare Clausum* are included in Exhibit 204; see App. 670-71. *Mare Clausum* was republished in 1972 by the Arno Press, New York, as part of "The Evolution of Capitalism" series, and today is readily available.

While *Mare Clausum* was not published until 1635, it was written in 1618 and was read at that time by King James. Fulton, *op. cit.* at 366; Potter, *The Freedom of the Seas* 58 (1924); Swarztrauber, *op. cit.* at 20. Professor Thorne agrees that it was the "approved embodiment of British public policy." App. 551. The official status given the book is graphically illustrated by the famous entry of March 26, 1636, in the minutes of the Privy Council:

> "So satisfactory and so important was the work considered by the Government that the following

> entry, dated March 26, 1636, was made in the minutes of the Privy Council: 'His Majesty, this day in council, taking into consideration a book lately published by John Selden, Esq., entitled *"Mare Clausum, seu de Dominio Maris,"* written by the King's command, which he hath done with great industry, learning and judgment, and hath asserted the right of the Crown of England to the dominion of the British seas; the King requires one of the said books to be kept in the Council chest, another in the Court of Exchequer, and a third in the Court of Admiralty, as faithful and strong evidence to the dominion of the British seas.'" Fletcher, "John Selden (Author of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 8-9 (1962).

For other comments on the official status of *Mare Clausum*, see Exhibit 693, pp. 302, 356-65; Swarztrauber, *op. cit.* at 22; Crocker, *op. cit.* at 187; Potter, *The Freedom of the Seas* 61 (1924); Beaujon, *The History of Dutch Sea Fisheries* 471 (1883); Fulton, *op. cit.* at 365-67, 369, 374.

The Commonwealth regarded Selden as no less authoritative than King Charles had done. *Mare Clausum* was translated and republished in 1652 by the direction of the Council of State, which ordered 200 copies for its own use, declaring that the work "'learnedly asserted the rights and interests of the commonwealth in the adjacent seas and would be of good use for these and future times.'" Exhibit 693, p. 410. Charles II confirmed the official status of the work by commissioning a new translation and publication.

In his testimony, plaintiff's witness Professor Wroth accused Selden of inconsistency by attributing to him certain passages (Exhibit 692) from the 1741 edition of Fortescue's

De Laudibus Legum Angliae, in particular the statement that the high sea was *"mare liberum, nullius in bonis."* Tr. 2489-92. Professor Wroth was later compelled to admit that he was in error concerning Selden's authorship of this language. U.S. Exhibit 400. However, Professor Wroth continued to maintain that in 1616, at the time Selden wrote his footnotes to Fortescue, Selden held only a "protective" view of admiralty jurisdiction and believed that the English seas were outside the realm.

These contentions are utterly without foundation. Selden's footnote (Exhibit 691) was appended to Fortescue's statement that the admiralty jurisdiction concerned things done upon the sea without the body of any county of the realm. Selden's footnote deals entirely and exclusively with the controversial question of the boundary between admiralty jurisdiction and the jurisdiction of the common law courts on the landward side. There is not a word in the footnote inconsistent with anything in *Mare Clausum,* written two years later, which dealt with a far broader subject matter. Nor is there a word in the footnote which lends any support to Professor Wroth's assertion that Selden in 1616 believed that the English seas were outside the realm. As in the case of Callis, so with Selden, Professor Wroth's entire argument rests on an attempt to regard as synonymous the phrases "without the realm" and "without the body of any county of the realm." It is impossible to read Callis, Selden, Coke, Hale or any other authoritative writer of this period without concluding that the distinction between the two terms was entirely clear to them.

Sir John Boroughs, keeper of the Records, after an exhaustive inquiry, in 1633 wrote the first of the treatises commissioned for Charles I to demonstrate the sovereignty of the crown in the English seas. App. 32-33, 649-50. Boroughs asserted full maritime territorial sovereignty, including law-making power, criminal and civil jurisdiction, and owner-

ship of the resources both of the surface of the sea and of the seabed. Like Selden, he observed that a child born upon the king's sea is an English subject, not an alien, by the common law.[17] App. 650. In view of all this it is difficult to understand Professor Wroth's contention that "Boroughs' position is consistent with the earlier concept of sovereignty as a kind of protective jurisdiction having at most incidental and specific attributes of property." Tr. 2494. A fair reading of Boroughs can leave no doubt that he believed the king was sovereign in the English seas in the same sense that he was sovereign on land. And certainly there can be no doubt that Boroughs regarded the crown as having the exclusive right to exploit or to license any valuable resources found on the seabed of the English seas.

Sir Edward Coke declared unequivocally in his *First Institute*, published in 1628, that "if a man be upon the sea of England, he is within the kingdom or realm of England, and within the legiance of the king of England, as of his crown of England." App. 33, 655. He further clarifies his meaning, if any clarification were needed, by stating that "intra quatuor maria" means "within the realm of England." In his *Fourth Institute*, written after the discovery of the document *De Superioritate Maris*, Coke accepted that document as authoritative and as illustrative of the nature and basis of the admiral's jurisdiction "in the seas of England." App. 656.

Coke was the principal proponent of the common-law courts in their jurisdictional dispute with the admiralty court regarding the landward demarcation between them, and much of his discussion is devoted to that subject. Coke is crystal clear that the seas are without the body of any

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[17] International law was to the same effect: "as to children born at sea, if they are born in those parts of it that are possessed by their nation, they are born in the country . . ." Vattel, The Law of Nations 101 (6th American ed. 1844).

county of the realm, but are within the realm itself. There is nothing inconsistent or particularly subtle or difficult in this position. There is not a shred of support in evidence or in reason for Professor Wroth's strained, indeed preposterous, contention that every time Coke or other writers speak of the English seas as without the bodies of counties they are implying that the seas are outside the realm. Tr. 2508-09, 2751-53, 2788-90. Professor Wroth was unable to cite any authority who has ever interpreted Coke as he does. Tr. 2790. His interpretation, it is submitted, is palpably wrong and does violence both to the very words which Coke used and to the entire legal context in which those words were written.[18]

Selden, Coke and Hale formed a triumvirate who were doubtless the most eminent and influential authorities on English law during the 17th century. Like the other two, Sir Matthew Hale—Chief Baron of the Exchequer and Lord Chief Justice of England—was unequivocal as to English sovereignty in the English seas. "The narrow sea," he declared, "adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not." Exhibit 194, p. 10; App. 50. Here again we see the familiar and straightforward distinction between the realm, which included the English seas, and the counties of the realm, that is, the land area, ports and bays which comprised the counties. Hale believed that English sovereignty extended to "at least so much . . . [of the sea] as adjoins nearer to our coast than to any other foreign coast." Moore, *op. cit.* at 358. In

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[18]Plaintiff claims (Pl. Br. 79) that "Coke apparently meant to include within the realm only those portions of the adjacent seas which were considered at common law to be within the bodies of the counties," that is, "a roadstead or arm of the sea." This is ludicrous. What Coke said was within the realm was "the sea of England," and the "quatuor maria"—thoroughly familiar terms at that time which designated the four English seas as traditionally defined.

his *Pleas of the Crown,* vol. 1, p. 154, Hale declared that an attack on a royal ship in the narrow seas is a levying of war against the king within the realm, and therefore treason.

Gerard Malynes, writing in 1622, asserted that all princes possess "a distinct dominion of the seas adjoining to the territories and jurisdiction of their countries"; cited with approval Bartolus' view that territorial waters were 100 leagues *(sic)* in width, and gave historical documentation for England's territorial waters. App. 32, 663-64, 850.

Richard Zouche, writing in 1663 on the admiralty jurisdiction, founded the territorial jurisdiction of the admiral on the sovereignty and dominion of England over the English seas. Exhibit 212, pp. 19-20; App. 45-46. Zouche (1590-1661) was a noted lawyer, parliamentarian, regius professor of civil law at Oxford, judge of the High Court of Admiralty, and the most eminent civil-law authority of his time. 21 *Dic. Nat. Biog.* 1332-35. He was "much respected, even by his enemies." Mathiasen, "Some Problems of Admiralty Jurisdiction in the 17th Century," 2 American Journal of Legal History 215, 218 n.13 (1958).

To the same effect was John Exton, writing in 1664, who was judge of the admiralty court both under the Commonwealth and in the reign of Charles II. App. 46; 6 *Dic. Nat. Biog.* 962; Exhibit 187.

Identical views were stated in John Godolphin's work of 1661, which distinguished between sovereignty and dominion over the British seas and the admiralty jurisdiction therein, while arguing that the latter was an important consequence and attribute of the former. App. 46; Exhibit 191, pp. 30-31; Exhibit 695, p. 24. Godolphin was a doctor of civil law and judge of the High Court of Admiralty from 1653 to 1659.

To precisely the same effect is Robert Codrington, writing in 1665. App. 42-43; Exhibit 181.

Charles Molloy affirmed the full territorial sovereignty of England in the British seas extending from Cape Finisterre to Van Staten. Molloy regarded the seas as fully within the realm, pointing out, as many others had done, that persons born there are not aliens since they are born within the realm. App. 854. Molloy's work was long considered the standard work on the maritime law of England, and went through many editions extending through the 18th century. App. 43; Fulton, *op. cit.* at 514; 13 *Dic. Nat. Biog.* 577.

Sir Philip Medows, writing in 1689, affirmed the full doctrine of territorial waters, including sovereignty, property, exclusive jurisdiction and exclusive fishing. Exhibit 202; Exhibit 725; Colombos, *The International Law of the Sea* 63 (6th rev'd ed.). He pointed out, entirely accurately, that in his day everyone agreed that each state was sovereign in its adjacent sea by virtue of sovereignty over the land, but that there was disagreement as to how far that territorial sea extended. App. 668-69. While affirming England's historic right to the entire seas claimed by it, Medows believed that it would be wise for England to restrict its claims to a more reasonable scope.

Professor Wroth is inaccurate (Tr. 2496) in alleging that Medows urged that England's territorial sea be limited only to the bodies of counties plus the king's chambers and royal ports. To the contrary, Medows advocated English sovereignty not only over those areas but over a uniform maritime belt surrounding the entire coast. In discussing the possible width of that maritime belt, Medows mentioned four possibilities: the 100 miles asserted by Baldus, the 60 miles of Bodin, the 80 miles previously agreed between Scotland and the Dutch, and the 14 miles suggested in James I's reign in 1604 and 1618. App. 669; Exhibit 202, pp. 43-45. Medows is quite clear that in his view a 14-mile limit would be entirely reasonable, *id.* at 45, though he is not necessarily averse to a broader limit. Finally, he

suggests that England and the Netherlands should agree on a fixed limit to avoid future controversy. Exhibit 725, pp. 46-47. See also Tr. 2772-76, 2777-80. In view of all this, Professor Wroth's assertion (Tr. 2497) that "Medows makes clear that the concept of sovereignty as property was in the case of England limited to the waters of the King's Chambers or those within the bodies of the counties" is utterly without foundation.

The only English legal writer of the entire 17th century whom we have encountered who denied that the English seas were within the realm was Sir Henry Finch in his *Law, or a Discourse Thereof,* first published in 1613. Finch's entire discussion of maritime matters reads as follows:

> "And under the name of the realm of England, it is plain that Scotland and Wales, much less Ireland, are not included; neither is the main sea that is to say, beneath the low water mark, parcel of the realm; for there the admiral's jurisdiction (which hath nothing to do of things within the realm) doth only meddle, and not the common law: but between the high water mark and the low water mark, where by ordinary and natural course the sea ebbs and flows, the common law and the admiralty have *divisum imperium;* one upon the water, when it is full sea, the other upon the land, when it is an ebb." *Id.* at 77-78 (1759 ed.); Tr. 2508.

Finch was concerned solely with the dividing line between the jurisdiction of the common law and that of the admiralty; and plainly the above passage (the terminology of which is based on a misreading of the statute of 1389) cannot be taken as meaning that the crown had no dominions, rights of property or jurisdiction outside the "realm" in the narrow, and unconventional, sense in which Finch used the term.

6. Modern Commentators

Every modern commentator we have encountered who deals with the subject recognizes that as a matter of English law in the 17th century the crown held sovereignty and dominion over the English seas. We shall mention only a few of these commentators.

Fulton, after demonstrating at great length the 17th-century English position on maritime sovereignty and the official status of Selden's work, observes that that work, "apart from its extreme doctrines as to the sovereignty of England in the seas [that is, the doctrine that English territorial waters extended all the way to the coasts of the countries opposite England], . . . more correctly represented what are now the admitted principles as to the appropriation of the adjacent sea than did most of the works written on the other side, not excepting even those of Grotius." Fulton, *op. cit.* at 370.

As Professor Horwitz testified,

> "Professor Fulton, in his work on The Sovereignty of the Sea (1911), Maine, et al., Ex. No. 189, observes 'that Mare Clausum became in a sense a law-book, an authoritative work to which eminent lawyers, as Lord Chief-Justice Hale and Hargrave, appealed as proving the existence and the legality of the rights of the crown of England to the dominion of the British seas. Even as late as the year 1830,' he concludes, 'this doctrine held its place in certain recognised treatises on the law of England, together with Selden's definition of the extent of those seas.' *Id.* at p. 374." App. 36.

Fletcher, pointing out the soundness of *Mare Clausum* as a work both of the common law and of international law, states that "Selden based his treatise on the positive practice of his day. He stated the law as he found it . . . ." "John

Selden (Author of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 11 (1962).

Potter holds that "as argument attempting to prove the legal validity of maritime dominion or maritime liberty in the period prior to 1650, Selden's work is incomparably superior to that of Grotius in the opposite capacity." Exhibit 739, p. 64.

Fenn, among others, has pointed out that it was recognized and established in the 17th century that adjacent waters were under the full territorial sovereignty and ownership of coastal states; the controversial question was how far out those territorial waters extended. App. 809-11; Exhibit 690, p. 133. Again, Fenn recognizes that "the basic principles maintained by Selden, apart from his extreme claims, more nearly approximate the principles of modern international law touching territorial waters, than do those advanced by Grotius." *Id.*, at 196 Fenn's summary analysis of the 17th-century situation, App. 813-18, is well worth reading in its entirety. He demonstrates conclusively that the full doctrine of territorial waters, including both political sovereignty and ownership, was well recognized and virtually universally accepted more than a century before the American Revolution.

See also 1 Kent, *Commentaries on American Law* 26 *et seq.* (14th ed. 1896), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 179-80 (1919); Masterson, *Jurisdiction in Marginal Seas* 3-4 (1929); Tr. 2671-72.

James Jerwood's *A Dissertation on the Rights to the Sea Shores* (1850) restated the 17th-century doctrine of English maritime sovereignty and regarded it as fully in effect in his own day. Other eminent 19th-century English writers, including Chitty (Exhibits 445, 446), Hall (Exhibit 449),

Schultes (Exhibit 451) and Woolrych (*A Treatise on the Law of Waters* 4-6 (1830)), wrote to the same effect. App. 687-92.

7. Acquiescence by Other States

Obviously, acquiescence by other states is unnecessary to establish the law of England. Nonetheless, it is not wholly without significance that in 1637 the Spanish government expressly recognized English sovereignty in the English seas. App. 721. Other foreign acquiescence in specific attributes or corollaries of English maritime sovereignty, such as ownership of the fisheries and the flag salute, will be discussed under those headings.

In the Treaty between England and Sweden, signed at Upsala in 1654, it was provided (Article XIV) that "the present treaty shall derogate nothing from the rights of dominion either claim in their respective seas, straits, etc." 3 Parry, *Consolidated Treaty Series* 257, 269. Again, the Treaty of Friendship and Commerce between Great Britain and Sweden, signed at Whitehall in 1661, provided (Article XV) that "this present treaty and confederation shall in nothing derogate from any pre-eminence, right or dominion of either confederate within any his own seas, channels, or waters, but that they have and retain the same in as full and ample manner as they have hitherto had, or as of right belongs to them." 6 Parry, *op. cit.* at 469, 493-94.

The Treaty between Great Britain and Denmark, signed at Whitehall in 1661, gave the subjects of each party the right "to pass through the seas and territories whatsoever of either king respectively (doing no damage or prejudice), not only with merchant ships, but also with men of war" up to the number of six (Article XX). In Article XXII, England recognized the duty of English ships to pay the tolls levied for passage "through the sound appertaining to the king of Denmark and Norway," 6 Parry, *op. cit.* at 235, 250-51.

The treaties made by Great Britain with Algiers in 1682 and 1688, and with Tripoli in 1662 and 1675, gave the ships of those Barbary states a limited right of visitation of British merchant ships "not being in any of the seas appertaining to his majesty's dominions." Exhibit 674, pp. 355, 361, 711, 714. Here are four explicit recognitions by other states of British sovereignty in the British seas. The extent of those seas was apparently regarded as so well recognized as to require no definition.

The above treaties with Algiers were still fully in effect in 1800, being confirmed by a treaty of that year. *Id.* at 373. The treaties with Tripoli were likewise confirmed as being in full force and effect by a treaty of 1812. Exhibit 674, p. 732.

B. THE CROWN POSSESSED THE LEGAL RIGHT TO EXCLUDE OR TO LICENSE FOREIGN FISHERMEN IN THE ENGLISH SEAS AND THE RIGHT TO CREATE MONOPOLIES OF NEWLY DISCOVERED FISHERIES; AND ALL FISHERIES IN ENGLISH WATERS WERE SUBJECT TO REGULATION.

The law of England with respect to fishing rights in the English seas throughout the 17th century may be simply and categorically stated. *Prima facie,* the crown owned the sea fisheries as one of its principal *regalia* or royalties. That ownership was full and unabated with respect to the royal or great fish. As to lesser fish, English subjects had a common right to take them, except in areas of the sea where that right had been superseded by a royal grant of an exclusive fishery. Any newly discovered or developed fishery was a proper subject for an exclusive right or monopoly created by the crown.

As to foreigners, they had no right recognized by English law to fish within the seas of England; the crown could allow them, exclude them or license them at its pleasure,

and its decisions were enforced by the admirals and in the admiralty courts. Both as to English and as to foreign fishermen (to the extent they were permitted at all), England possessed law-making authority in the English seas; that is, England could and did regulate the times, places and manner of fishing. Such fishing regulations derived in part from the old common law of the sea, traceable ultimately back to the laws of Oleron; in part from acts of Parliament, and in part from acts of the king in Council. This body of English regulatory law of sea fishing was likewise policed by the navy and enforced judicially in the admiralty courts.

1. Court Cases

In the *Case of the Royal Fishery of the Banne* in 1610, the Privy Council, the highest court of England, held that a salmon fishery in a navigable river belonged to the crown as part of its prerogative. The *ratio decidendi* was that navigable rivers participate of the nature of the sea, and since the king owns the fisheries in the English seas he owns those in navigable rivers also. Exhibit 157. The crown right to fisheries the court called a "royalty." *Id.* at 41. And the court authoritatively reconciled the exclusive royal right to the fisheries with the common practice of permitting free fishing by subjects: while by right the king has the "sole interest" in all fisheries, "the profit of it is not commonly taken and appropriated by the king, if it be not of extraordinary and certain value." *Id.* at 40. Here, at the very outset of the period of American colonization, is the full-blown doctrine, promulgated by the highest judicial authority in England, of crown ownership of sea fisheries as a "royalty" pertaining to the crown by its prerogative. The court was well aware of the civil-law rule, reflected in Bracton, that fisheries are common, but expressly declared that the common law of England is to the contrary.

In *Rex v. Oldsworth,* in 1637, Baron Weston's opinion declared, "as to fishing, none will admit that the sea is free for every foreigner to fish there." Moore, *op. cit.* at 300.

In the *Ship Money Case,* also in 1637, all were agreed that the crown was not only sovereign but owner in property of the sea, and was entitled to all the profits thereof (pp. 49-54, *supra*).

One of Judge Jenkins' charges to an admiralty jury in Charles II's reign reviewed the existing regulatory law regarding sea fisheries which the jury was directed to enforce:

> "You are to enquire of all nuisances and abuses upon our salt-waters and navigable rivers, beneath those bridges that are next the sea; by erecting of water-mills, weirs, stakes, or kiddles, whereby the free course and passage of boats and vessels is hindered, or the young fry of fish destroyed, and you are to present as many as are within the limits of this commission.
>
> * * *
>
> "You are to enquire of all such as use any unlawful arts, engines, nets, or means, to catch fish withal upon the sea, or below the lowest bridges, contrary to the statutes in that behalf provided, and contrary to the ancient ordinances of the admiralty, likewise such as do destroy fish out of proper seasons, or while they are of an unsizeable growth, and particularly such as dredge for oysters, between the 3d of May and the 14th of September, that is, out of the seasons prefixed by the ancient statutes of the admiralty." App. 902-03.

Jenkins' charge of 1668 furnishes authoritative judicial recognition both that foreign fishermen could not lawfully fish in the English seas without license from the crown, and

also that, if licensed, they were subject to English fishing regulatory law:

> "You are to enquire, whether any fishermen, subjects of the French king, do presume to fish upon this Coast, without special license from his Royal Highness; and if they have license, whether they fish with any other nets than such as are of the English size? The offenders and their boats are to be seized on, in any port where they happen to come." App. 895.

2. Acts of Parliament

An act of the English Parliament of 1605, still in force three centuries later, prohibited the erection of any new weir along the seashore or within five miles of the mouth of any haven or creek, or the willful taking of any spawn, fry or brood of sea-fish in any weir without geographical limitation. App. 867-68; Exhibit 693, pp. 608-09; Exhibit 716, p. 394.

In 1630 the Scottish Parliament, appointing commissioners to treat with the commissioners of England regarding Charles I's projected association or company for fishing, instructed the commissioners "that the seas on the coasts of this kingdom and of the isles thereof and all that is interjected between them and that midline in the seas which is equally distant and dividing from the opposite land, are the Scottish seas properly belonging to the crown of Scotland, and that the English have no right nor liberty to fish therein, nor in any part thereof, but by virtue of the association and not otherwise." Exhibit 693, p. 225.

In 1632 the Scottish Parliament approved a royal charter for a fishing society to control the fishing "within his majesty's seas" and to enjoy the exclusive right to export

abroad any sea-fish taken within, or brought within, his majesty's dominions. *Id.* at 240.

The famous Navigation Act of 1651 has been construed as prohibiting foreign fishing in British waters, Exhibit 775, pp. 154-55; and the English insistence that the Dutch pay arrears of tolls due for fishing on the British coasts was one of the causes of the first Anglo-Dutch War in 1652. *Id.* 155-57.

A parliamentary resolution of 1652 called for preparation of a declaration to assert the English right both to the sovereignty of the seas and to the exclusive fishery therein. Exhibit 693, p. 409. (As shown previously, the Council of State thereupon ordered the translation and republication of *Mare Clausum.)*

In 1654, the Council of State granted a fishing license to a French fishing boat. Exhibit 586. Exhaustive research would doubtless reveal other licenses thus issued by the Council of State, the highest law-making power in England during the Commonwealth.

In 1660 the House of Commons passed a bill declaring the English right to control fishing in the English seas and adopting a number of regulatory measures, including the prohibition of trawling, whether by subjects or by foreigners, within eight miles of certain parts of the coasts. The bill failed to become law because of the dissolution of Parliament two days after it was sent to the Lords. Exhibit 693, pp. 443-44. Other clauses of the bill prohibited the use of certain types of nets on the coast "or within half seas over," or the use of seines by foreigners within 10 miles of any part of the coast to the hindering of English subjects in their fishing.

An act of the Scottish Parliament, passed in 1661, provided for the erection of fishing societies composed of

Scottish subjects and enjoying an absolute monopoly of the export of fish. *Id.* at 444-45.

An act of the English Parliament in 1662 prohibited the use of certain types of nets between June 1 and November 30 within one and one-half leagues of the coasts of the counties of Devon and Cornwall. App. 868; Exhibit 693, p. 609; Exhibit 716, pp. 394-95.

3. Legal Opinions

As stated previously, James I's proclamation of 1609, excluding unlicensed foreigners from fishing in the English seas, was preceded by an exhaustive legal inquiry culminating in a formal opinion of a committee of the Privy Council. Exhibit 693, pp. 145-48.

The opinion of Sir Julius Caesar, admiralty judge, likewise affirmed the crown's right to exclude or to license foreign fishermen. App. 712-14.

Similarly, Charles I's exclusive fishing proclamation of 1636 was preceded by an exhaustive legal inquiry and the collection of legal precedents supporting the crown's right. Exhibit 679, pp. 230, 243-46; Exhibit 693, pp. 364-65.

In 1636 Charles I received a formal opinion from the Lords Commissioners of the Admiralty as to both the lawfulness and the expediency of his proposed fishing proclamation. The admiralty lords, after having received and studied an elaborate legal opinion of Sir Henry Martin, admiralty judge, declared their opinion "that the right and royalty of that fishing upon your majesty's coasts doth undoubtedly belong unto your majesty by inheritance, so you may justly prohibit or license all strangers at your royal will and pleasure." The lords made it clear that in their opinion the crown right of exclusive possession pertained not only to the domains inherited by Charles from his father but also to

"any other your dominions," that is, to possessions in the new world acquired during Charles' own reign. App. 719; Exhibit 693, pp. 288-289, 726-64; Exhibit 223.

Also in the 1630's Thomas Wentworth, Earl of Strafford, who was a famous lawyer and parliamentarian as well as a privy councillor and minister of the crown, rendered a legal opinion vindicating the king's exclusive right to the English sea fisheries, relying both on traditional English practice and on the contemporary practice of Russia, Sweden, Denmark and Spain. Strafford also pointed out that exclusive fisheries in England were owned by the proprietors of the adjacent coastal lands, and that ordinary fishermen bought licenses from those proprietors for fishing in their waters. Exhibit 595.

The Commonwealth also, before embracing the traditional doctrine of English ownership of the sea fisheries, commissioned a legal study and opinion, which came to be known as the Ryley Treatise. Exhibit 693, pp. 409-10; Exhibit 558.

In 1674 the Earl of Shaftesbury, who as Lord Chancellor was the highest legal and judicial officer in England, declared to Parliament the king's "dominion and property of his own seas," including the right to exclude or to license foreign fishermen, which Shaftesbury called "a royalty . . . inherent in the crown of England." Exhibit 693, pp. 506-07.

4. Other Official Pronouncements and Acts of State

In 1604, at the outset of his reign in England (and three years prior to the first American settlement at Jamestown), King James caused to be prepared a treaty of union between England and Scotland, which contained a provision preserving to each nation the fisheries to a distance of 14 miles from the coast.

> "This treaty was drawn up by commissioners appointed by the respective Parliaments, the most active of whom were Secretary Lord Cecil (afterwards Earl of Salisbury) and the illustrious Sir Francis (afterwards Lord) Bacon on the English side, and Lord President Fyvie and Sir Thomas Hamilton (later Earls of Dunfermline and Haddington) on the part of the Scots. It was signed by thirty-nine of the forty-four English and by twenty-eight of the thirty Scottish commissioners; it was approved by the king and adopted by the Scottish Parliament, and it was thus an instrument of high authority with respect to the delimitation of the waters of exclusive fishing. The clause in the treaty dealing with freedom of commerce contained the reservation referred to, which was as follows: 'Excepted and reserved to Scottishmen their trade of fishing within their lochs, firths, and bays within land, and in the seas within fourteen miles of the coasts of the realm of Scotland, where neither Englishmen nor any stranger or foreigners have use of fish, and so reciprocally in the point of fishing on behalf of England.' " Exhibit 693, p. 223.

The treaty never came into force, having been rejected by the English Parliament for reasons wholly unrelated to the reservation of fishing rights. *Ibid.* The draft treaty is an authoritative statement of what in 1604 was regarded as a reasonable limit of exclusive fisheries as between two nations of subjects of a single crown. It in no way implies, of course, that James or his governments believed that the right to exclude foreign fishermen, such as the Dutch, was limited to 14 miles.

In 1609—two years after Jamestown—the king in Council issued the famous proclamation asserting the English

right to exclude or to license foreign fishermen in the English seas. App. 675; Exhibit 693, pp. 139-55. Plaintiff's witness Professor Thorne was unaware of the 1609 proclamation, but conceded that such an act taken by the king in Council had legal force. App. 548. Professor Thorne was aware that the exclusion of unlicensed foreign fishermen was established English state practice in the 17th century. Tr. 2694.

The 1609 proclamation gave rise to a critical and protracted dispute with the Dutch, which brought forth many further official articulations of the British legal position in diplomatic negotiations and otherwise, as well as actual enforcement of the British claims, to the extent militarily possible, through patrolling the British seas and requiring foreign fishermen to accept licenses, which many of them did. See Exhibit 693, pp. 155-208; Exhibit 186, pp. 4, 12; Exhibits 596, 599, 600, 601, 602, 603; Selden, *Mare Clausum,* 469, 471. In 1616, for example, the Privy Council of Scotland gave detailed instructions for the collection of the assize herring from foreign fishermen "in his majesty's seas." Fulton, *op. cit.* at 757-58.

French as well as Dutch fishermen requested and received licenses. Exhibits 600, 603. In 1618 the Dutch asked whether the British rights could not be liquidated by a lump sum payment, to which the British ambassador answered that this would be inappropriate since the right to exclusive fisheries in the British seas was a "royalty" of the crown. Exhibit 601, p. 4. In 1619 the dispute in its most aggravated form was put to rest when the Dutch government agreed to order Dutch fishermen not to come within sight of land of the British coasts, a distance which under Scots law, as we have seen, was reckoned as 14 miles. Exhibit 693, pp. 193, 604; Fulton, *op. cit.* at 201; Beaujon, *The History of Dutch Sea Fisheries* 470 (1883). Since the principal fisheries were located just off the British coast,

the Dutch withdrawal beyond the line of sight represented a major triumph for the British position.

In 1618, at the request of the King of Denmark, the king and Privy Council of Scotland issued a proclamation forbidding Scottish fishermen to fish in the waters of the Faeroe Islands and directing them to leave those fisheries to the subjects of the king of Denmark as sovereign of those islands, "conform[ably] to the law of nations." Fulton, *op. cit.* at 175-76. This episode demonstrates that the British insistence on exclusive fisheries in British waters was no mere power-play but was based on a principled view of a legal right which the crown was willing to accord to other nations in their waters just as the crown insisted on it in British waters.

Early in his reign, Charles I conceived a project of a great fishing corporation, comprising both Scots and English, which would have a monopoly of fishing in all the British seas. This project led to a fascinating dispute between England and Scotland, deriving from the Scottish government's insistence that the "reserved waters" of Scotland should not be shared with English subjects. Scotland claimed an exclusive right not only out to the 14 or 28 miles which we have so frequently encountered, but to the middle of the seas between Scotland and each opposite shore. England, of course, heartily agreed that foreigners should be excluded from all the British waters, but maintained that the right to charter or to license fisheries in those seas belonged to the crown, not to the Scottish Parliament or burghs. The dispute gave rise to many official declarations and acts on both sides, all of which held in common that the sea fisheries were British property to the exclusion of foreigners. Eventually the crown claim prevailed on most points, though certain limited waters remained reserved to the Scots, and the fishing society was chartered and approved by the Scottish Parliament. Exhibit 679, pp. 237-38,

384; Exhibit 693, pp. 216-40; Exhibit 777, pp. 363-65; Exhibit 779.

In 1636 Charles I, by formal proclamation of king in Council, confirmed and reiterated the crown right to exclude or to license foreign fishermen in the British seas. Exhibit 222. (A draft of the proclamation referred to the crown's right to exclusive fisheries as a "regality." (App. 716.) Thereafter, until necessarily diverted by the outbreak of the civil war, the navy systematically patrolled the fishing grounds, primarily in the North Sea, and required foreign fishermen to accept and to pay for licenses. Exhibit 186, pp. 24-27, 70-73; Exhibits 574, 575, 576, 577, 578, 579, 583, 605, 606, 607, 608, 676; Exhibit 679, pp. 51-52, 303; Exhibit 693, pp. 288-89, 300-03.

The Commonwealth and Protectorate governments insisted, no less than had the Stuart kings, on the ownership of the fisheries in the British seas. In 1653 the Commonwealth proposed that the individual licenses to Dutch fishermen be replaced by regular semi-annual payments by the States General of the Netherlands. Exhibit 598. The Council of State issued licenses to French fishermen in 1652, Exhibit 620, and to Swedish fishermen the following year. Exhibit 693, p. 427.

The restoration brought no change of policy regarding the fisheries in the British seas. Exhibit 693, pp. 441-45. Charles II licensed a royal fishery company as his father had done, being careful to exclude it from areas where the fisheries were "already granted appropriate or belonging to some other particular or private person or persons bodies politic or corporate." Exhibit 179, pp. 196, 200; see also Exhibit 444. Licenses were issued to the Dutch, Exhibits 587, 588, 589; to the fishermen of the Spanish Netherlands, Exhibits 591, 611, 612; and, in James II's reign, to the French. Exhibits 593, 594. Foreign fishermen not

possessing licenses were driven off. Exhibit 592; Exhibt 673, pp. 40-41 n. [c.].

We must now return to the beginning of the 17th century for a brief discussion of the "Greenland" whale fishery, which was practiced in waters far to the north of Britain, principally around the islands now called Spitzbergen, but also westwards from there as far as the coasts of Greenland itself and North America. It will be remembered (p. 39, *supra*) that the exclusive fishery in these waters fell within the charter rights of the Muscovy or Russia Company, chartered by Mary I and confirmed by act of Parliament under Elizabeth I. The English and the Dutch began whale fishing in "Greenland" waters at about the same time and each claimed an exclusive right therein—the Dutch on the ground that a Dutch admiral had discovered Spitzbergen in 1596, the English on the basis of a claim to sovereignty and possession of the Spitzbergen Islands and on the ground that English ships had first fished for whales in those waters. Exhibit 693, p. 193; Exhibit 775, pp. 43-44; Beaujon, *The History of Dutch Sea Fisheries* 465-67 (1883); Fletcher, "John Selden (Arthur of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 8 (1962).

The Greenland fisheries dispute occasioned Grotius' visit to England as a commissioner on the part of the States General, and according to Fletcher furnished the occasion for Selden's writing *Mare Clausum* in 1618. The controversy is of particular interest for the present proceeding in that most or all of the "Greenland" waters would not have been regarded as part of the English seas prior to the 16th century. England's claim to these fisheries on the basis of alleged sovereignty of the nearest land mass, the Spitzbergen Islands, and on the ground of discovery and initiation of the fishery there, is obviously closely analogous to the contemporaneous English assertion of sovereignty

and exclusive fishery in the waters adjacent to the English discoveries and colonies in North America. Indeed, as stated, the "Greenland" waters themselves extended to the North American coast. 2 Stock, *Proceedings and Debates of the British Parliaments Respecting North America* 40 n. 65 (1927).

In 1613 the Muscovy Company applied for and received a charter from James I specifically confirming its monopoly of "this new trade of whale-fishing," to the exclusion of both English and foreigners. Exhibit 777, p. 53. The company, when it could, cleared the whaling grounds of intruders, both English and foreign. Exhibit 775, p. 44. At times the company's income appears to have included fees from foreigners licensed to enter the whaling grounds. Exhibit 777, p. 54. The whaling rights were sold by the company in 1622 to a new enterprise known as the Greenland Adventurers. *Id.* at 58-59. The monopoly was questioned in Parliament in the 1620's as to its exclusion of other Englishmen, but was maintained nonetheless, and was enforced by the requirement and forfeiture of bonds by non-members of the company entering the Greenland whaling grounds without license. *Id.* at 70-71; Exhibit 750, pp. 81-83. The monopoly was confirmed by the navy committee of Parliament in 1645, Exhibit 777, p. 72, and again in 1657 as to the most desirable fishing grounds, though certain less desirable grounds were opened to others. *Id.* at 73-74; Exhibit 776, p. 250. The monopoly was abolished by act of Parliament in 1672, but was restored by the same authority in the reign of William III. Exhibit 777, pp. 74-75.

The Tobago Company, in the reign of Charles II, had as one of its assets two-thirds of the benefit of a patent "for taking up wrecks out of the sea and fishing for pearl and ambergris." Exhibit 778, p. 416.

Admiralty instructions during the reign of Charles I demonstrate that among the duties of the navy were not only the seizure of foreign fishing boats lacking licenses but also the enforcement of regulatory measures for the better preservation of fish, such as prohibition of trawling. Exhibit 679, pp. 51-52, 303.

Throughout the century, the navy patrolled the Enlish coast to prevent foreigners from taking any oysters or lobsters from the coastal waters. Exhibit 677, pp. 282, 289, 291, 299, 312, 313, 318, 324, 493; Exhibit 678, pp. 127-28; Exhibit 679, p. 479.

5. Legal Treatises of the Period

Most of the important writers of the period have already been discussed in connection with their general statements on sovereignty of the seas, and we need do little more than list here the principal writers who asserted and justified the crown's exclusive right to the fisheries in the British seas.

William Welwood. App. 673; Exhibit 209; Exhibit 690, pp. 174-75; Exhibit 693, pp. 352-55. Welwood justified his position not on the basis of any particular English or Scottish tradition or prescription, but on the general doctrine that coastal sovereigns have exclusive rights in the fisheries of their adjacent seas. That doctrine, in turn, he justified by what remains today the principal and most persuasive reason for the exercise of control by coastal states over marine and seabed resources: the risk of exhaustion of the resources from promiscuous and unregulated use.

Sir John Boroughs, App. 649; Exhibit 175. Boroughs, like so many others, referred to the crown's prerogatives in the English seas, including the exclusive right to the fisheries thereof, as "royalties." App. 649. Boroughs emphasized the need for jurisdiction in the seas in the sense of legislative authority, and made it clear that in his view the legislative

authority in the English seas was no less extensive than on land.

Lord Hale. Hale's work *De Jure Maris* is probably the most authoritative and most often-cited authority on the English law of fisheries and the seabed of all time. The essence of his doctrine may be briefly quoted:

> "The king's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow.
>
> "1st. The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown . . . .
>
> "But though the king is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty." Exhibit 194, p. 11.

See also Moore, *op. cit.* at 347, quoting Hale's draft treatise: the king may impose "restraints of fishing by proclamation upon the sea, . . . but until such inhibition it is free for every subject to fish there." Hale gives various examples of exclusive fisheries created by the crown in portions of the sea. *Ibid.*

John Selden, also, wrote at length in support of the crown ownership of the fisheries in the English seas, with primary emphasis on the crown's right to exclude or to license

foreign fishermen. Selden relied heavily on the historical evidence showing that England had maintained and exercised that right in the past, and based his position largely on a doctrine of prescription, appropriation or occupation. It was necessary for him to do this because of his insistence that the English ownership extended all the way to the coasts of the opposite countries, at least to the south and the east. Obviously no general claim of territorial waters as a necessary concomitant of the land sovereignty of any state could justify giving England the entire English Channel and North Sea and nothing to France or Holland.

In that sense Selden's doctrine, as has often been pointed out, was "extreme"; but it was not extreme in any other sense, and certainly not in its insistence that territorial waters were part of the realm and that the sovereign exercises there all the powers which he has on land. Among the writers of this period, Selden is unusual in the emphasis which he placed on prescription or appropriation. The more common tendency, and that which eventually prevailed, was to regard territorial waters as belonging to any coastal state, by virtue of its land sovereignty. It is natural, therefore, to find that those British writers who did not insist on ownership of the entire English Channel or North Sea, but who rather spoke in terms of ownership to the midpoint of those seas, or to a fixed distance (usually 100 miles), said little of appropriation and spoke much more of the doctrinal and practical reasons for territorial waters as a corollary of sovereignty and ownership of coastal land. Many writers combined the two themes: general considerations are used as the basis for a uniform belt of territorial waters which every sovereign could claim; superimposed on those considerations is the special English title based on tradition, prescription or occupation. Indeed Selden himself took this view; he asserted English sovereign rights in North American waters on the basis of discovery and symbolic acts of sovereignty over the land, and ex-

pressly denied that possession or occupation was necessary (pp. 172-74, *infra*).

Gerard Malynes. App. 663-64; Exhibit 197. Malynes affirmed the crown's ownership of the fisheries in the four seas of England, as opposed to those of the "main ocean seas." Exhibit 197, pp. 185-86, 190.

Charles Molloy. App. 850; Exhibit 726. That influential writer (see p. 68, *supra*) gave the following concise definition of a prince's rights over fisheries in his adjacent seas:

> "not only the regality of the fishing for pearl, coral, amber, etc. but likewise the advantage of all fish royal, as whales, sturgeon, etc. and not only those, but also the direction and disposal of all other fish, according as they shall seem to deserve the regards of the public." App. 852.

Sir Philip Medows. App. 668; Exhibits 202, 725. Medows relied primarily not on any prescription by England, but on the general doctrine that a coastal sovereign has, by virtue of that sovereignty, rights both of sovereignty in his adjacent seas and property in the fishing thereof. Medows defined the right to the fishery as follows:

> "All foreigners are excluded by virtue of such dominion [of the coastal sovereign] . . . from a right of fishing within those seas, without special license first obtained from the lord of the seignory, and under such conditions and considerations as he shall think fit. The reason is, because this is the patrimonial property of his crown, and the fishery is in a manner all the profit that his great sea territory yields him. The dominion of the sea, without an appropriate fishing, is as if a vineyard should be a property, but the grapes common. Or like an estate or

> possession of land, vested in one, to the use of another, and such we had many here in England, till a good statute executed the possession to the use, and so conjoined what ought not to have been divided. Nor can it be alleged that a promiscuous fishing in the sea is of no damage to the proprietor, for admitting the multitude of fish to be so great, as to suffice all men's use, which is not always true, yet this will abate the price of the market for sale, nor can the fishery be farmed out, if occasion be, at so good advantage." Exhibit 202, pp. 7-9.

Henry Stubbe. Exhibit 693, pp. 496-97. Stubbe (a political rather than a legal writer), writing in 1672 under a commission from the crown, mentioned the regality of fishing for pearl, coral and amber as among the exclusive crown rights of property in the British seas.

6. Modern Commentators

No modern authority whom we have encountered has denied the crown ownership of the English sea fisheries under 17th-century English law and practice. Among the principal writers who have affirmed and documented that ownership are Fulton, Moore, Elder, Chitty, Potter and Fenn, all of whose works have frequently been cited in this proceeding.

In this proceeding, Professor Thorne, one of the witnesses for the United States, agreed that "the law of England in the 17th century was that the crown had the ownership or the exclusive right to the fisheries in the English seas." App. 550.

7. Acquiescence by Other States

In 1637 the Spanish government conceded both English sovereignty in the English seas and the crown's right to license foreign fishermen therein. App. 721. As we have already seen, nationals of many countries accepted and paid for English licenses to fish throughout the 17th century. While the Netherlands government contested the English right to exclude or to license Dutch fishermen in principle, in practice that government acquiesced in major part to the English position by agreeing to keep its fishing boats away from the coastal areas where the principal fisheries were located (p. 81, *supra*).

A number of modern writers believe that in 1636 the Dutch government purchased an exemption from licenses by paying £30,000 to the English crown. *E.g.*, La Pradelle, 5 *Revue Generale de Droit International Public* 264 (1898), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 187 (1919); Colombos, *The International Law of the Sea* 55 (6th rev'd ed.); Sabine, *Report on the Principal Fisheries of the American Seas* 224 (S. Doc. No. 22, 32d Cong., 2d Sess. 1853). Though Fulton doubted this, *op. cit.* at 311, he admitted that the Dutch themselves later acknowledged having paid 20,000 or 30,000 florins. *Ibid.*

A treaty of 1656 between Sweden and England granted to Swedish subjects the liberty "to fish and catch herrings and other fish in the seas and on the coasts which are in the dominion of this [the English] republic, provided the ships employed in the fishery do not exceed a thousand in number." 4 Parry, *Consolidated Treaty Series* 127, 149.

A treaty of 1661 between Great Britain and Denmark, signed at Whitehall, gave to the subjects of each country most-favored-nation treatment with respect to fishing in the waters of the other and tributes, tolls and duties levied

thereon. 6 Parry, *Consolidated Treaty Series* 234, 247-48 (Article XIII).

C. THE ADMIRALTY JURISDICTION WAS TERRITORIAL IN THE ENGLISH SEAS, WAS AN ATTRIBUTE OF SOVEREIGNTY, AND INCLUDED JURISDICTION OVER FOREIGNERS.

1. Court Cases

It is beyond rational dispute that in the 17th century the English admiralty jurisdiction was regarded as territorial in the English seas and as an atribute of English sovereignty over those seas. The realm consisted of the bodies of counties and of the territorial sea; the common law courts had jurisdiction over the first, and the admiralty courts, in exactly the same sense, over the second. Parliament had legislative jurisdiction, and the crown executive jurisdiction, over both. The civil and criminal jurisdiction of admiralty in the English seas extended to foreigners in those seas as well as to English subjects, just as the jurisdiction of the common-law courts did on land.

These propositions are fully documented by Sir Leoline Jenkins' charges to admiralty juries which comprise Exhibit 762; excerpts are found at App. 894-903. The admiralty territorial jurisdiction is squarely based upon, and deemed coextensive with, the "sovereignty of our kings in the British ocean." App. 895. No distinction is made between English subjects and foreigners with respect to those whose activities in the English seas are to be investigated and regulated. Foreigners are singled out for special scrutiny and prosecution with respect to the crimes of fishing in the English seas without license and refusal to give the flag salute. App. 896. At App. 897-99 a clear distinction is made between the territorial jurisdiction of the admiralty in the four English seas, which is exclusive, and the non-

territorial jurisdiction over piracy anywhere in the world, which is non-exclusive. See also App. 47. At App. 899 the king's "ancient right of the flag upon his four seas" is again specified as a subject of the admiralty's territorial jurisdiction over foreigners. At App. 901-02 jurisdiction is asserted over foreign men of war breaking the king's peace within the four seas, and all these attributes of territorial jurisdiction are identified as "emanations of his majesty's sovereignty in these seas." Finally, mention is made of enforcement of the various statutes and ordinances regulating the fisheries, prohibiting or restricting certain methods of fishing, establishing seasons both for surface fish and for oysters, and prohibiting the taking of young fish. App. 903. See also O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 312 (1971).

In the nature of things the admiralty jurisdiction over foreigners was exercised only infrequently, since the English government would have no practical concern, for example, with crimes committed by foreigners against one another on foreign ships passing through the English seas. However, the available evidence is sufficient conclusively to establish that foreigners were prosecuted and convicted in admiralty, for crimes having nothing to do with piracy, when the occasion arose, and that this was considered in no sense irregular or unusual. Professor Horwitz has gleaned from Jenkins' papers one clear case, and one probable case, of prosecution of foreigners during the 17th century. App. 56-57. In addition, research commissioned by the Common Counsel States during this proceeding has unearthed hitherto unpublished documents demonstrating the indictment, trial and conviction of a number of foreigners for crimes other than piracy committed in the English seas. App. 721-38. See also 2 Yale (ed.), *Lord Nottingham's Chancery Cases* (79 Publications of the Selden Society) 464 (1961).

If Lord Cockburn had known of these documents in the 19th century, he could never have taken the position he did in his opinion in *Queen v. Keyn*. Professor Wroth cannot make the same excuse, since the documents were made available to him. His insistence on turning a blind eye to the evidence (Tr. 2786-88), and maintaining in spite of everything that he knew of nothing to show that the admiralty jurisdiction was ever exercised over foreigners, was hardly calculated to enhance respect for his testimony in general.[19]

2. Acts of Parliament

It does not appear that there were any acts of the English Parliament during the 17th century dealing with the admiralty jurisdiction.

However, in 1681, the Scottish Parliament enacted a jurisdictional statute making it clear that as to maritime causes, whether civil or criminal, the high admiral had jurisdiction over both "natives and strangers" in the seas "within this realm." App. 55, 647-48.

3. Other Official Pronouncements and Acts of State

The forms of admiralty commissions make the territorial nature of the jurisdiction clear. The title "admiral of the narrow seas" was used during Charles I's reign. Exhibit 679, p. 51. The record contains a number of admiralty commissions from later in the century, conveying jurisdiction over "our seas" and specifying particular British possessions, including those in North America, to whose seas the jurisdiction also extended. Exhibits 641, 642.

[19]Plaintiff continues to maintain a deafening silence concerning these conclusive records. Plaintiff's discussion of the evidence for criminal admiralty jurisdiction over foreigners in the 17th century (Pl. Br. 71-77) simply ignores their existence.

Evidence in the record confirms that throughout the century the duties of the admiralty included the exclusion of unlicensed foreign fishermen from the British seas, the enforcement of regulatory measures with respect to both surface and sedentary fisheries against subjects and foreigners alike, and the policing of improper conduct by foreign ships, including warships, in English waters. App. 776; Exhibits 676, 677, 678, 679.

4. Legal Treatises of the Period

Lord Coke plainly believed that the admiralty jurisdiction was territorial, since in the fourth part of his *Institutes* he set forth the document *De Superioritate Maris* and accepted it as authoritative. App. 656. It cannot be denied that that document states a territorial and exclusive view of the English admiralty jurisdiction in the English seas, since the whole question at issue was whether a French admiral had the right to exercise any jurisdiction there. App. 650-55. See also Exhibit 160, p. 155.

Hale plainly regarded the admiralty jurisdiction as territorial: "the narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not"; "in this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarly exerciseth by his admiral, and a right of propriety or ownership." Exhibit 194, p. 10. See also Exhibit 160, pp. 86-88, 147.

The United States will presumably not deny that Selden viewed the admiralty jurisdiction as territorial, exclusive and extending to foreigners; so we shall refrain from documenting the point unless it should be denied.

John Exton, who was an admiralty judge, regarded the admiralty jurisdiction, civil and criminal, over the British

seas as identical to the jurisdiction of land governors over the land. Exhibit 685, p. 10; App. 46.

Godolphin, also admiralty judge, regarded the admiralty jurisdiction as one of the *regalia* (Exhibit 695, p. 38), and described its subject matter at considerable length (*id.* at 43-48). He declared that the jurisdiction was both civil and criminal (*id.* at 48) and extended to foreigners in the British seas (*ibid.*) and that England possessed legislative as well as judicial and executive authority over the British seas (*id.* at 57).

Molloy declared, "as it is incumbent on a prince duly to execute justice in his kingdoms by land, so the sea being his territory, it is requisite and a necessary effect of his dominion, that he cause justice to be administered in case of maritime delinquency." App. 853.

Molloy specified that, while piracy committed in seas belonging to no one could be punished by anyone, piracy committed in the English seas could be punished only by the crown of England. App. 850.

Medows, likewise, regarded the crown as possessing "the sole marine jurisdiction within those seas", that is, "the seas of England." Exhibit 202, p. 7.

Zouche, admiralty judge, made a clear distinction between the territorial jurisdiction of admiralty in the English seas and the nonterritorial jurisdiction over English subjects elsewhere: the jurisdiction "over the seas of England, and Ireland, and the dominions and isles of the same . . . are limited and determined in those seas," while the jurisdiction over English seamen and over persons "hath no bounds, but extends to the Mediterranean, African and Indian seas, or any others far remote." App. 675.

Even plaintiff's witness Professor Wroth admitted at one point during cross-examination, Tr. 2757-58, that the admiralty jurisdiction was regarded as territorial, each sovereign exercising it in his own sea.

Plaintiff conceded in its Reply Brief to the Master (P.R.B.) that "the admiral had at least a limited jurisdiction over foreigners," but claims that it "existed . . . only for the protection of British subjects and property, including the keeping of the peace on British ships, and to prevent piracy" (P.R.B. pp. 25-26). Plaintiff did not say in which of these categories it proposed to place our Exhibits 621 through 629, which show the conviction of foreigners for failure to give the flag salute. Obviously plaintiff's categories cannot encompass such an offense, which (as the exhibits make very clear) was punished in England law as a matter of principle, as an insistence on foreign recognition of English sovereignty in the English seas.

Not one of the authorities cited at P.R.B. p. 26 contains a word which, as plaintiff alleges, supports the proposition that English maritime sovereignty "did not embrace matters of exclusively foreign concern," whatever that may mean. Jenkins, Exhibit 762, p. xc, defines the purpose of the admiralty criminal jurisdiction as to punish offenses "either against the dignity of the king, against the peace and good government of the kingdom, or against the rights and security of the subject." Molloy, App. 853, says that the prince exacts justice on the sea because it is his territory, and he has a general duty to exact justice in all his territories, whether land or sea. An act of piracy by, say, a French against a Spanish ship would be a matter "of exclusively foreign concern"; yet even plaintiff concedes that admiralty would have punished such a crime. Plaintiff's point thus seems to be limited to the fact that there is no recorded case of admiralty's taking jurisdiction over a crime by one foreigner against another involving only one

foreign ship, not two. While the formulations of the admiralty jurisdiction, and the basis therefor, cited by plaintiff itself would probably warrant the taking of such jurisdiction.[20] It is hardly surprising that this rarely if ever occurred. The admirals would be most unlikely even to know of the existence of such a crime. Does plaintiff seriously mean to infer that admiralty would have declined to take jurisdiction of the extraction of minerals by foreign ships from the seabed of the English seas? Even on plaintiff's theory, such conduct is hardly "of exclusively foreign concern."

D. THE CROWN OWNED THE SEABED AND SUBSOIL OF THE ENGLISH SEAS AND THE RESOURCES THEREOF.

1. Court Cases

In the *Case of the Royal Fishery of the Banne* in 1610, England's highest court, the Privy Council, took it as established law that the crown owned the English seas and

[20]There are, however, at least two theories on which admiralty might have refused such jurisdiction even in principle, without any inconsistency with the established view that the seas were within the realm. One such theory is that the right of innocent passage through territorial waters entails immunity from such jurisdiction as long as the acts in question have no effect outside the ship. The other theory is that a ship is part of the territory of the sovereign of its flag, and carries its own territoriality with it, resulting in immunity from the jurisdiction of the state through whose territorial waters it passes — again, so long as no effects outside the ship are produced. Both these theories are good law today; we have not investigated the extent to which they were known and accepted prior to and during the 17th century.

Admiralty demonstrably exercised jurisdiction within the English seas of civil cases involving collisions between two foreign ships, with no English involvement whatever except for the location of the incident. See The Johann Friederich (1839), 1 Robinson, Cases in the High Court of Admiralty 35, 40 (1842), where such jurisdiction was founded, among other reasons, on the fact "that the collision took place on the high seas close to the English coast."

the seabed thereof as property, and reasoned from that established law that the crown also owned the waters of navigable rivers and the soil thereof.[21] The court declared as follows:

> "The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; *22 Ass. p. 93. 8 Ed. 2. Fitz. Coron. 399,* and the *sea is not only under the dominion* of the king (as is said *6 R. 2. Fitz. Protect. 46. The sea is of the ligeance of the king as of his Crown* of England;) *but it is also his proper inheritance; and therefore the king* shall have the land *which is gained out of the sea, Dyer 15 Eliz. 226 b. 22 Ass. p. 93.* Also the king shall have the grand fishes of the sea, whales and sturgeons, &c. which are royal fishes, and no subject can have them without the king's special grant, *Praer. reg. c.* 11. *Stamf.* 37, 38. *Bract. lib.* 3. c. 3. 39 *Ed.* 3. 35. a. and the king shall have wild swans, as royal fowls, on the sea and branches of it; the *case of swans,* 7 Co. *So* wreck of the sea is a royal perquisite, 5 *Co.* 107. Sir *Hen. Constable's* case. And for this reason before the statute of 18 *Ed.* 3. no subject could pass over the sea, without the king's special license; but there it is enacted, that the sea shall be open to all merchants. And all port and havens, which are *ostia et januae regni,* appertain to the king, because he is *custos totius regni;* and F.N.B. 113 a. the king ought of right to save and defend his realm, as well against the sea, as against his enemies. And that the king hath the same prerogative and in-

[21] It is striking that Plaintiff's Brief never mentions this case.

> terest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath *in alto mari,* as manifest by several authorities and records." Exhibit 157, p. 38.

In the case of *Attorney General v. Philpott,* decided by the Exchequer bench in 1632, the doctrine of the *Banne* case was repeated and confirmed.[22] The issue concerned certain houses and wharves erected between high- and low-water marks on the River Thames in London. It therefore dealt with the foreshore; and Moore, who opposed the *prima facie* theory of the foreshore, criticised the decision and pointed out certain differences or doubts among the judges. Moore, *op. cit.* at 265-66. Neither Moore nor any of the judges, however, expressed any doubt concerning the crown's ownership of the soil of the sea, which was the first premise from which the court's theory of the case proceeded.

The Attorney General's information claimed the Thames as being an arm of the sea and a navigable royal port, and reasoned from the crown's ownership of the river as an arm of the sea to the then-controversial theory that the crown also owned the soil of the foreshore. Exhibit 728, p. 262. The court held unanimously in favor of the crown. *Id.* at 263. The opinion of Baron Denham followed precisely the reasoning of the Privy Council in the *Banne* case: "The king has interest in a navigable river as high as the sea flows and re-flows in it, and the reason is, because such river partakes of the nature of the sea, and is called an arm of the sea as high as it flows, and the king has the sole interest in the soil of such rivers." *Id.* at 264. Davenport, Chief Baron, added that "if an island riseth in the sea, it does not belong to the occupier, but to the king," *ibid.*, showing his

[22]Professor Thorne was obviously confused about this case at Tr. 2676-79.

agreement with Denham that the crown owned the bed of the English seas and *therefore* owned the soil of navigable rivers. The decree in the case is set forth in full at Moore, *op. cit.* at 896-907. It is a clear decree in favor of the crown, and holds that the land in dispute belonged to the king "as parcel of the same port [of London] and his inheritance of the crown of England." *Id.* at 902. The court's holding extended to "any navigable river or port," *ibid.;* and as we have seen, the opinions made it clear that the crown owned the soil of navigable rivers by analogy to its undoubted ownership of the bed of the sea.

The case of *Rex v. Oldsworth,* decided by the Exchequer Court in 1637, followed the law declared in the *Banne* and *Philpott* cases. At issue was the ownership, as between the crown and the owners of a coastal manor, of derelict lands left by the sea adjacent to the manor. The owners claimed these lands by custom and by prescription. Moore, *op. cit.* at 292 *et seq.* The Attorney General's argument was straightforward: the crown owns the British seas and the soil thereof, and since the crown owned the land in dispute when it was under the sea, it still owns it after its emergence therefrom. *Id.* at 295-300. The Attorney General contended that prescription does not run against the crown. *Id.* at 299-300. While he argued that the crown owned the seabed as a part of the prerogative, he plainly regarded the prerogative as a part of the common law, and dealt with the case as a perfectly conventional dispute over title to real property, to be governed by the common law as opposed, for example, to local custom. *Ibid.*

The court held unanimously in favor of the crown. Baron Weston's opinion shows that the defendants had relied on Bracton, Britton and Justinian as authorities for the freedom of the seas; but Weston held that those Roman-law authorities were overcome by Selden's doctrine and by the established English law that the sea is not free for

fishing to foreigners. Disagreeing with the Attorney General, Weston held that in principle prescription might lie against the king, but that facts sufficient to show prescription in the case at bar had not been made out. Weston regarded the *Philpott* case as establishing that the crown owned submerged land in ports (actually the holding, or at least the *ratio decidendi*, was broader; see pp. 100-01, *supra*) and reasoned from that holding that the king likewise owns submerged lands outside ports, since he "can increase or diminish the ports at his pleasure." *Id.* at 300.

Baron Trevor held in a straightforward fashion that submerged lands belong to the king while still under water, and that nothing had been shown sufficient to take the title from him when the lands at issue emerged from the water. Trevor's view is clear that the crown's ownership is part of the common law ("our law," *id.* at 302); he is equally clear that the king's ownership of submerged land is part of the prerogative. *Ibid.*

Professor Thorne indicated considerable confusion about the *Oldsworth* case. He asserted (Tr. 2453-54) that Baron Weston must have believed that the property was ownerless before its emergence from the sea, and gives as his reason that Weston discussed the question of prescription. This is an utter *non sequitur;* see Tr. 2715-20. As Weston himself pointed out, prescription is a title which overcomes a pre-existing title; Weston's words were: "prescription . . . ought to lie [if it lies at all] against the king, and this plainly shews that, if such prescription was not [made out in fact], the king is to have the property." Moore, *op. cit.* at 300.

Professor Thorne repeatedly argued (*e.g.*, Tr. 2720) that anyone who regarded derelict lands as belonging to the crown by the prerogative must necessarily believe that the lands were ownerless while still under water. This contention is fully refuted by Baron Trevor's opinion, which

declared both that crown ownership was by the prerogative and that "as the land was in the king when it was parcel of the sea, now, when it is made parcel of the dry land, it shall not be taken from him." Moore, *op. cit.* at 303. Professor Thorne is on completely unsound ground in apparently assuming that, merely because things subject to such admiralty droits as flotsam were regarded as ownerless until the king's ownership attached, the same was true of *everything* which the king owned by his prerogative. An obvious example to the contrary—and one which is mentioned by Baron Trevor, *id.* at 302, as analogous to the crown ownership of submerged lands—is the case of royal mines, which were never "ownerless."

We submit, therefore, that the contention repeatedly made by both Professors Thorne and Wroth, that the "prerogative" theory of crown ownership of derelict lands is inconsistent with crown ownership of the bed of the sea, is wholly unsound and quite foreign to the legal thinking of the 17th century. In any event, even were the professors correct, their argument would avail the United States nothing in this proceeding. It is conceded by all sides that the crown's ownership attached, at the latest, as soon as the land or anything of value therefrom emerged or was taken from the sea; and that is entirely adequate to sustain the position of the Common Counsel States in this proceeding.

In the *Ship Money Case (Rex v. Hampden),* several of the arguments and opinions mentioned the king's ownership in property of the English seas, and the soil and profits thereof. See pp. 49-54, *supra.*

In the case of *Johnson v. Barrett,* decided by the Court of King's Bench in 1646, it was disputed whether the crown owned a dock erected on the foreshore, "but it was clearly agreed that if it were erected beneath the low-water mark, then it belonged to the king." Moore, *op. cit.* at 310-11; App. 92-93.

As Professor Thorne admitted (Tr. 2681-82), in those cases relating to the foreshore or to derelict lands in which the crown was unsuccessful the winning argument against the crown was always based on either prescription, custom or a specific title derived from the crown by grant. (An example is the case involving the Lord Berkeley; see Moore, *op. cit.* at 306-09.) Professor Thorne conceded that none of these cases involved a denial that the king owned the seabed of the English seas. Tr. 2681-82.

In the case of *Whitaker v. Wise,* in 1671, the crown's lessee prevailed in a case regarding the ownership of land gained from the sea. Moore, *op. cit.* at 415-16. The court regarded the *Philpott* case, pp. 100-01, *supra,* as authoritative.

In *Bulstrode v. Hall,* in 1674, a King's Bench case, "it was frequently affirmed, and no one denied, that the soil of all rivers as high as the sea ebbs and flows as in the king and not in the lords of manors etc. without prescription." 82 *English Reports* 1024 (1908).

In *Attorney General v. Farmer,* in 1676, the defendant claimed derelict lands on the basis of a royal grant of the adjacent manor and of all grounds "which hereafter should be recovered from the sea." Moore, *op. cit.* at 417. Both parties agreed that the soil of the sea belonged to the king while it was still covered with water. Exhibit 159; App. 40-41. The Court of King's Bench held for the crown on the ground that the words of the grant were too vague. Moore, *op. cit.* at 417. Professor Thorne contends that in this case the crown argued that the king did not own the land at the time of the grant. Tr. 2459. This is questionable: the crown expressly argued that "the sea is the soil of the king," Exhibit 159. In the alternative the crown argued—and this is the argument which Professor Thorne seems to be referring to—that "it is only a possibility, and therefore void; as if the King grants land when it shall escheat, it is a

void grant." Exhibit 159. It seems clear enough that this argument referred to the language of the grant—land "which hereafter should be recovered from the sea"—as an attempt to create "a freehold to commence in futuro, which the law permits not." Exhibit 159. So construed, the argument is not at all inconsistent with the view that the crown owned the land while it was still under water, and could have conveyed it by a properly worded grant. In any event, if the crown did argue as professor Thorne believes it did, the argument was plainly wrong: "it is to be observed that the argument that the King had not the land in him to grant was untrue, for he has the soil of the sea by his prerogative, and may grant it to a subject." Moore, *op. cit.* at 417-18.

No English case which we have encountered either before, during or after the 17th century has ever made any distinction with respect to ownership (or susceptibility to ownership) between the soil under the open sea and the soil under the arms of the sea, bays and tidal rivers. The English doctrine has always been that these waters, and the soil under them, are identical in their legal nature: they all partake of the nature of the sea, which is defined as all waters where the tides rise and ebb. Thus in English law, the sea extends juridically from the outmost bounds of English waters, as they have been defined from time to time, to the point on rivers where any perceptible tide disappears. And as to all these tidal waters, the law of England has at all times been that the ownership of the soil under them is vested in the crown by the common law except where a subject may claim title by grant from or prescription against the crown. No soil under any tidal waters within the realm of England, including its territorial seas, has ever been regarded in English law as ownerless or unsusceptible of ownership.

2. Other Official Pronouncements and Acts of State

The Reglement for Preventing Abuses in and About the Narrow Seas and Coasts, promulgated by Charles I in 1634, asserted the "property" of the crown in the four English seas. Exhibit 569, pp. 759, 760.

Professor Thorne conceded that the crown's exclusive ownership, as against foreigners, in the English seas extended both to the sedentary fisheries thereof and to the mineral resources, and that any English court would have so held if a case had come before it. App. 551-54. This concession is entirely adequate to establish the position of the Common Counsel States in the present proceeding, without regard to the academic distinction Professor Thorne seeks to draw between crown ownership of the seabed while still covered with water and the undoubted crown ownership—which no one ever questioned—of anything of value that emerged or was extracted therefrom.

There is no doubt that, throughout the 17th century, the crown claimed title to the soil of lands reclaimed from, or left derelict by, the English seas, and habitually granted or sold such lands to others. App. 41-42; Exhibits 215, 216, 217, 218, 219, 220, 230, 231, 234, 644, 645, 647, 648, 649, 650, 651, 652, 653, 654, 655; Moore, *op. cit.* at 420-26. Exclusive oyster fisheries in the sea were likewise granted (Exhibits 226, 227; Moore, *op. cit.* at 416-17, 418 n. 1). as were salt pans, probably on the foreshore. Exhibit 777, pp. 468-70.

The deed of Dunkirk by Charles II to France in 1662 included the submerged lands in the Channel off the coast. App. 905.

"In 1669 the Earl of Bath and others petitioned the king for a grant of all lands overflowed by the sea in the counties of Denbigh and Flint, *with all mines and minerals which*

shall be found there . . . . " Moore, *op. cit.* at 415. (Emphasis added.)

Undersea mining for coal was already well known and of practical importance in Britain by the early 17th century, when Sir George Bruce's mines extended for a mile under the Firth of Forth. The undersea mines at Whitehaven, in Cumberland, owned by the Lowther family, were important by the early 18th century. The Lowthers had grants from the crown to the foreshore of their Whitehaven property, obtained during the reign of Charles II. App. 661-63; Exhibits 190, 195, 196; Moore, *op. cit.* at 415, 418. Plaintiff's argument (Pl. Br. 96-97) that these mining activities took place in the subsoil of "inland waters" is far from the mark, since English law never made any distinction with respect to property rights between such waters and the open sea. Moreover, to regard such major arms of the sea as the Firth of Forth and Solway Firth as inland waters, as contemporary international law may or may not do, is wholly anachronistic when applied to 17th-century Britain, which knew nothing of such a concept.

Among the known, exploited resources of the English coasts and coastal waters in 1700 were amber, ambergris, copperice, jet, pearls, fine pebbles and flint. Exhibit 460, p. 373.

About 1666 an island rose in the sea at the mouth of the River Humber. Ownership was asserted and exercised by the crown, which leased the property out to others for many years. This "is a clear instance of the unquestioned right of the Crown to islands rising in the sea," which of course was a corollary of the crown's ownership of the seabed while still under water. Moore, *op. cit.* at 414.

3. Legal Treatises of the Period

Robert Callis, writing in 1622, had no doubt that the king owned in property both the water and the soil of the

English seas, and had the exclusive right to the profits therefrom whether real or personal, and that this ownership and right were part of the common law of England. App. 777-78. The king's ownership "must needs be by the common law of England; for no law gives the king any soil, but only the common law of England." App. 780. Callis repeatedly affirmed, *e.g.*, App. 782, that the seabed "was the king's when it was covered with waters."

Plaintiff's witness Professor Thorne argued (Tr. 2458) that Callis did not really believe this, because he regarded it as "very disputable whether grounds before they be relinquished by the sea, may be gained by charter and grant from the crown." App. 783; see also Tr. 2721-25. Callis immediately went on to resolve his doubt: "I suppose they may." Whatever the reason for the doubt, it cannot be the one Professor Thorne advances, in view of Callis' repeated affirmation—with no doubt expressed—that the king *does* own the bed of the sea. The probable reason for the doubt is that Callis questioned whether an ordinary subject could hold title to submerged lands;[23] and it is significant that Callis immediately goes on to affirm that a palatine can hold such ownership. App. 783. It also seems likely that Callis' skepticism concerning title in subjects to submerged lands based on "charter and grant" was related to the legal situation of the time, when subjects were habitually relying on fictitious, hypothetical or "presumed" grants in attempts, often successful, to defeat the crown's title. In any event, there is no way to impeach the express authority of

[23]That this was what was on Callis' mind is further suggested by Exhibit 194, pp. 31-32, where Hale deals with the question of whether an ordinary subject could possess a proprietary interest in the sea. Hale's opinion is that in general he cannot, because he does not have the type of power necessary to exercise such rights of ownership, but that he may acquire and hold title to a particular limited part of the seabed contiguous to the shore.

Callis for the ownership by the crown of the seabed and the English seas and of the sedentary fisheries and mineral resources thereof.

Sir John Boroughs maintained that the king has rights of ownership in the English seas extending to all things floating on the water or lying on the soil thereof. App. 650.

Selden, of course, held that the crown owned the seabed of the English seas, and made specific reference to sedentary fisheries, pearls, coral and mineral resources of the seabed as among the subjects of crown ownership. App. 35, 670-71; Exhibit 739, pp. 73, 77; Fulton, *op. cit.* at 372. He adhered to the conventional terminology in referring to the crown's ownership of the sea and seabed as among the royalties or *regalia. Mare Clausum,* p. 176. Selden sounds very modern when he contends that the crown must have such ownership because of the importance of these resources to the national economy and because of their obviously exhaustible character. The arguments in favor of control by the adjacent coastal sovereign of the resources of the continental shelf have not changed substantially in the three and a half centuries since Selden wrote.

Lord Hale's *De Jure Maris* is beyond question the best-known and most frequently cited work of all time on the English common law of the seashore and seabed. Hale is unequivocal that by the common law the soil of the seabed of the English seas belongs in property to the crown. Exhibit 194, pp. 11, 14, 17, 31. For this doctrine Hale cites many cases and other authorities going far back into English history. Hale plainly regards the crown's *prima facie* ownership as relatively non-controversial, and devotes most of his attention to the highly controversial questions of whether and how a subject claiming ownership of derelict lands or the foreshore may overcome the crown's *prima facie* title by grant, prescription or custom. Hale freely concedes the possibility of prescription against the king; and

the fact that he endorses both prescription and the crown's title to land while still under water is a further refutation of Professor Thorne's theory that anyone who allowed prescription must have believed that submerged lands were ownerless until they were uncovered by the waters.

Professor Thorne contended (Tr. 2453) that at one time Hale regarded the ownership of the seabed by the crown as doubtful, though he concedes that Hale resolved any such doubts in favor of the crown. Tr. 2453-57. Professor Thorne relied on a passage from a Hale manuscript set forth by Moore; *op. cit.* at pp. 357-69. The passage relied on by Professor Thorne reads in full as follows:

> "Because as the King hath right of jurisdiction or dominion of so much at least of the sea as adjoins to the British coast nearer than to any foreign coast: which appears by *Belknap,* 6 R. 2. *protection* 46; so as soon as any matter of profit happens upon or by reason of the said sea capable of propriety, it doth presently belong to the King unless some other better title doth interpose: such are wrecks, floatsam, etc. *Insulae natae in mari,* etc.; therefore though the King cannot have propriety in the water, yet when any thing therein emergeth that it is capable of propriety it is the King's as aforesaid: The sea is the King's royal waste *de communi jure.* But to leave that doubtful question whether the soil of the sea by the King's *aqua marina adhuc coopertum.*" Moore, *op. cit.* at 362.

The first thing to be said about this passage is that, even if it, as interpreted by Professor Thorne, represented Hale's final view (which clearly it did not), it would avail the United States nothing in this proceeding, since crown ownership of anything emerging or taken from the sea or seabed which is capable of profit is wholly adequate to sustain the Common Counsel States' position.

Secondly, it seems unlikely that Hale was in this passage expressing a doubt which he himself entertained. A great deal of the treatise is devoted to analyzing and refuting the old Roman-law doctrine, of which Hale was fully aware, that the sea and seabed were insusceptible of ownership. It seems probable that in the passage just set forth Hale was using "doubtful" as meaning "controversial," and that those on the other side of the controversy were the old civil lawyers of prior centuries, not anyone either making, declaring or interpreting law in 17th-century England.

Moreover, as neither Professor Thorne nor indeed Moore seems to appreciate, a reading of the Hale manuscript or manuscripts in question makes it plain that they consist of a number of different drafts on the same subject-matter, all of which were later superseded by *De Jure Maris*. The manuscripts contain two other versions of the passage on which Professor Thorne relies, and both of those versions without question confirm the crown's ownership of the seabed while it is still under water. These two alternate versions are as follows:

> "Because the sea, at least so much thereof as adjoins nearer to our coast than to any other foreign coast: as it is within the king's jurisdiction, which amongst other evidences thereof appears by the book 6 R. 2, *protection* 46, where Belknap affirms the sea to be of the legiance of the king as of his crown of England, so likewise it is the king's in propriety as his royal waste, and therefore he hath those *bona caduca* or *vacantia, as flotsam* etc., partly in respect of the right of property which he hath in the soil underneath the water; and therefore questionless the islands near adjoining to our coast are parcel of the king's inheritance, as being part of that great royal waste covered with the British Ocean: and no more evident right

can there be of ownership or propriety than to be master of common right of such profits as any way the sea adjoining yields." Moore, *op. cit.* at 358.

* * *

"As touching the right of the sea shore and *jus alluvionis et maritima sinc fluvialia incrementa:* I conceive that by the common positive law of this kingdom they belong to the king as a part of his prerogative: my reasons are these as well in propriety as jurisdictions.

"1. The narrow seas, or at least so much thereof as adjoins to the English shore, is within the king's jurisdiction or royalty, 6 R. 2, *protect.* 46, etc.: and likewise in right of propriety; for although the use of the sea be common, yet the propriety thereof belongs to the king as a royal waste: which is the reason that as well all the *bona vacantia* upon the seas belong to the king as the right of his admiral jurisdiction, so likewise islands in the sea, which although by civil law *fiunt occupantis,* yet in our law they are annexed in point of interest to the crown, who is thereof presently in possession, and so prevents any right to be acquired *per occupationem.*

"2. All rights to any land in this kingdom depends upon mediate or immediate tenure of the king: therefore this *jus acquisitum per alluvionem,* if it be not otherwise derived out of him by some sufficient title, it is part of his waste and inheritance." Moore, *op. cit.* at 367-68.

Comparison of these two texts and that quoted by Professor Thorne leaves no doubt that all three are drafts or versions of the same passage. In the manuscripts as published by Moore, one of these appears before, and the other after, the version on which Professor Thorne relies.

The order in which these drafts was written is not known, but their language indicates that if Hale ever did have a doubt as to the crown's ownership of the seabed, it could not have endured for very long. It seems much more probable, as suggested above, that the "doubt" referred to was that of the archaic Roman lawyers, not of Hale himself. Finally, all this is academic since at no time was there ever any version of Hale's position which affords the United States any comfort in the present proceeding.

In the version from which the above quotation from p. 358 of Moore is taken, which affirms crown ownership of the seabed, Hale goes on, as he does in his final product *De Jure Maris,* immediately to affirm that prescription may lie against the crown, thus once again refuting Professor Thorne's notion that crown ownership and prescription are incompatible. It is also notable that, in the above quotation from pp. 367-68 of Moore, Hale combines the "common positive law," the prerogative, and crown ownership of the seabed, thus refuting Professor Thorne's allegations that the common law and the prerogative were regarded as distinct theories or bases for the crown's ownership, and that reliance on the prerogative necessarily implied that the bed of the sea was "ownerless."

Other points in his manuscripts at which Hale refers to the crown ownership of the seabed are published in Moore, *op. cit.* at 344, 347 and 357. At p. 321, in discussing ports, Hale declares that they are among the *regalia,* and establishes that they may be created by the king by proclamation—thus confirming Baron Weston's argument regarding ports in the *Oldsworth* case, p. 102, *supra.*

Professor Thorne testified (Tr. 2461) that in 1667 Hale "in effect rejected" the doctrine of crown ownership of the seabed while still under water. On cross-examination, Tr. 2728-31, Professor Thorne was compelled to withdraw that opinion, which is wholly without foundation. The statement

by Hale in 1667, as Professor Thorne finally conceded, questioned only the equity and practicality of rigorous crown enforcement of its right to derelict lands which had long been in the possession of the owners of the adjacent coastal properties. It bears repeating one last time that, while there was much controversy concerning the tests of adequacy for a claim of prescription or custom to overcome the crown's *prima facie* title to derelict lands, no one questioned the law that that title was indeed original and *prima facie,* and certainly no one questioned the crown's exclusive right to the resources of the sea and the seabed.

Molloy affirmed crown ownership of sedentary and seabed fisheries such as those for pearl, coral and amber, and expressly referred to them as a "regality." App. 852.

Chief Justice Rolle, in his *Abridgement,* declared that "the English sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects." U.S. Exhibit 9, p. 47.

The opinion of Sir Henry Spelman, writing prior to 1643, was to the same effect. Exhibit 207, p. 229; App. 45.

William Sheppard's *Grand Abridgement of the Common and Statute Law of England* (1675) held that the king "not only as to *protection,* but to *propriety,* is said to be lord" of the four English seas; "the soil, banks and shores" of "the sea and rivers" belong to the crown in property. Quoted in Jerwood, *Dissertation on the Rights to the Sea Shores* 43-44 (1850).

4. Modern Commentators and Judicial Decisions

Fulton recognizes that ownership by the crown of the sea and seabed became part of English law in the 16th and 17th centuries, though he believed that was an innovation dating from Diggs' time. Exhibit 693, pp. 361-62.

Moore likewise agreed that the crown's ownership was and is part of English law. Exhibit 728, pp. xxviii, xxxii-iii; Exhibit 729, p. 14.

Robert Hall, an authoritative 19th-century English writer, set forth the doctrine of crown ownership of the seabed with great explicitness, and regarded it as unchanged to his day. Hall, "An Essay on the Rights of the Crown," Exhibit 449; republished at Exhibit 728, pp. 668-73; see App. 855-62 for selections. Jerwood's *Dissertation on the Rights to the Sea Shores* (1850) is to the same effect. Jerwood regarded the *Banne* case as authoritative, and pointed out that it had been cited with approval in at least one 19th-century judicial opinion. *Id.* at 60-61. *Accord,* Woolrych, *Treatise on the Law of Waters* 19-29 (1830).

Fenn did not address himself to the question of title to the seabed in 17th-century English law. Fenn's point is that, even in countries where the old civil-law tradition of ownerlessness *ab initio* survived, it was agreed that the crown has the power to grant exclusive rights of exploitation of the resources of the sea and seabed. Exhibit 690, p. 122. Professor Thorne concurred. App. 545.

Modern judicial authorities, in this country as well as in England, have affirmed the crown's ownership of the seabed, both anciently and as still in existence; many of them have recognized Hale as the primary authority on the law of England on the ownership of submerged lands and have cited his views on the crown's ownership of the seabed with approval. *E.g., Shively v. Bowlby,* 152 U.S. 1, 11 (1894), *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 412 (1842); *Illinois Central R. R. v. Illinois,* 146 U.S. 387, 458 (1892); *New York v. New York & S.I. Ferry Co.,* 68 N.Y. 71, 76 (1877); *Gough v. Bell,* 22 N.J.L. (2 Zab.) 441, 445 (1850); *Narragansett Real Estate Co. v. McKenzie,* 82 Atl. 804, 810 (R.I. 1912); *New York, N.H. & H.R.R. v. Horgan,* 56 Atl. 179 (R.I. 1903); *Armour & Co. v. Newport,* 110 Atl. 645

(R.I. 1920); *Simons v. French,* 25 Conn. 345, 351 (1856); *Furman v. City of New York,* 7 N.Y. Sup. Ct. 16, 33 (1851); *Dunham v. Lamphere,* 3 Gray 268 (Mass. 1855); *Rogers v. Jones,* 1 Wend. 237 (N.Y. 1828); see English cases cited at Jerwood, *Dissertation on the Rights to the Sea Shores* 66-67, 70, 95-96, 118-119 (1850), and O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 323 n. 3 (1971). The following is typical:

> "Most of the English colonies had a similar origin in the charter of the sovereign, which granted not only the title to the soil, but the powers of government, and, as incident thereto, the right of the sovereign over the sea shores, and those powers denominated *regalia.* The nature and extent of these grants, both of property and powers, have been held to be regulated by the common law of England, which the English emigrants claimed as their birthright, and brought with them. This introduced and established the common law of England, as regulating the relative rights of the government and people in this country to the sea and sea shores. The effect of this charter was, to grant to the Governor and Company, as a body, the *jura regalia* or prerogative rights of the crown, to be held for the Colony, as the crown held them for the realm of England; and also the ordinary right of property in the soil, to be held and granted on the liberal tenure of free and common socage, as private rights in real estate are held at common law. Martin v. Waddell, 16 Pet. 367. The same rule, substantially, was established in all the colonial governments, the authorities for which, we think, are too numerous and uniform to require citation.
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> * * *

> "We had considered it settled beyond controversy that, by the common law of England, the right of soil, not only in the sea, the *fundus maris,* was in the king, but also in the sea shore, the land between high and low water mark . . . .
>
> * * *
>
> "[A]t the time of the granting of the colony charters herein before stated, the king held the sea shores as well as the land under the sea . . . ." *Commonwealth v. Roxbury,* 75 Mass. (9 Gray) 451, 481-82, 483 (1857) (Shaw, C.J.).

For a succinct summary of Hale's views, regarded as authoritative in the 19th century, see the Hargrave and Butler edition (1823) of *Coke on Littleton,* Exhibit 448, n.

Joseph K. Angell, the leading American authority on the law of waters in the early 19th century, believed it beyond question that under English law the crown owned in property the soil of the sea adjoining the English coasts. Among many other authorities, Angell relied on the *Case of the Royal Fishery of the River Banne* as determinative. Angell, *The Right of Property in Tide Waters* 18 (1826).

O'Connell writes: "that the Crown possessed the coastal sea as royal waste in the seventeenth century is beyond question . . . ." *Op. cit.* at 381. *Accord,* Wait, "Supplementary History of Title of Massachusetts to Submerged Sea Lands," 36 Mass. L.Q. 17, 20-21 (1951).

E. THE FLAG SALUTE WAS INSISTED UPON AS AN ATTRIBUTE OF ENGLISH SOVEREIGNTY IN THE ENGLISH SEAS.

1. Court Cases

The record demonstrates that the English courts enforced the duty of the flag salute by foreign ships to English

warships in the English seas, and that the flag salute was judicially regarded expressly as an attribute of the sovereignty of the English crown in the English seas as part of the realm. App. 721-38, 896, 899-900; Exhibit 211, p. 708; Exhibits 621 through 629; Fulton, *op. cit.* at 512-13; Colombos, *op. cit.* at 52; 1 Marsden, *Law and Custom of the Sea* 509-10 (1915).

2. Acts of Parliament

In 1650 the Council of State directed the admiralty to enforce the flag salute as an attribute of the English "dominion of these seas." Exhibit 224.

3. Legal Opinions

At the request of Charles II, Judge Jenkins gave an opinion affirming the duty of the flag salute in the English seas, explaining its basis as an attribute of sovereignty, and setting forth the precedents therefor. App. 674; Exhibit 634; Exhibit 693, p. 484 n. 1.

The admiralty experts of Trinity House gave an opinion to the same effect in 1671.

4. Other Official Pronouncements and Acts of State

The record shows that throughout the 17th century the English navy enforced the right of flag salute against foreign ships by attack, arrest and seizure wherever necessary. See Exhibit 578; Exhibit 579, pp. 5, 6; Exhibit 679, p. 51; Exhibits 584, 585, 632, 633; Exhibit 693, pp. 511-13, 517. Failure to honor the flag salute was a *casus belli* against the Dutch in 1671, Exhibit 693, pp. 482, 487, and against the French in 1689, being specifically mentioned in the declaration of war. Exhibit 693, p. 518.

The duty of enforcing the flag salute figured prominently in the naval instructions given by Charles I to his fleet, and equally prominently in those issued by the admiral in 1643 and by the Parliamentary Committee on the Admiralty in 1647, the salute always being explained as an acknowledgment of English sovereignty in the English seas. 1 Marsden, *Law and Custom of the Sea* 522 (1915); Exhibit 693, pp. 380-81. The instructions were likewise explicit in the reigns of Charles II, Exhibit 458, and William III, Exhibit 693, pp. 518-20, and continued unchanged throughout the 18th century.

5. Legal Treatises of the Period

Every one of the 17th-century legal writers we have previously mentioned who discussed the flag salute affirmed the right to it as an attribute of the crown's sovereignty in the English seas. These writers included Selden *(Mare Clausum,* pp. 398-402), Stubbe (Exhibit 693, p. 496), Molloy (Exhibit 726, pp. 102-30; selections at App. 850-55), and many others.

6. Modern Commentators

Among the many modern writers who have discussed the flag salute are Fulton, *passim;* Colombos, *op. cit.* at 52-55, and 1 Halleck, *International Law* 134 (4th ed. 1908), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 83 (1919).

7. Acquiescence by Other States

The Dutch acknowledged the duty of the flag salute in the British seas by treaty in 1654, 1662, 1667, 1674 and 1689; although they always managed to avoid explicitly conceding that it was an attribute of English sovereignty in those seas, there was never any question that the English so

regarded it. The 1654, 1662 and 1667 treaties required the flag salute "as has been heretofore accustomed," within the extent of the "British seas," which were undefined. 3 Parry, *Consolidated Treaty Series* 225, 249; 7 Parry, *op. cit.* at 193, 201; 10 Parry, *op. cit.* at 231, 242; Exhibit 717, p. 40. The 1674 treaty described the salute as a British "right" which the Dutch were "justly acknowledging," and specified that the salute was required in any of the seas from Cape Finisterre, in Spain to "the middle point of land in Norway, called Van Staten." 13 Parry, *op. cit.* at 123, 134-35; Colombos, *op. cit.* at 53. The 1689 treaty confirmed that of 1674. 18 Parry, *op. cit.* at 485, 488.

In 1694 the Danish government disavowed the conduct of a Danish captain who had refused to strike, and promised to punish him. 2 Marsden, *Law and Custom of the Sea* 165-66 (1916).

F. OTHER ASPECTS OF MARITIME SOVEREIGNTY DEALT WITH NAVIGATION AND NEUTRALITY.

All the principal 17th-century English legal writers who dealt with maritime sovereignty discussed whether, and on what conditions, foreign ships had a right of passage through the English seas. Their views need not be discussed at length; Molloy's opinions (Exhibit 727) are typical. While holding unequivocally that the English seas were part of the realm and "as much under the absolute jurisdiction of the prince as the very land itself" (*id.* at 209), he believed that ordinarily the right of innocent passage should be accorded to foreign ships. He asserted that the right of passage was subject to the right of the crown to suspend it for reasonable cause, to impose reasonable restrictions and regulations, and to charge tolls if they were directly related to expenses incurred by the crown for the protection or advancement of navigation. All this is vir-

tually identical to the modern international law relating to the right of innocent passage through territorial waters. For our purposes its significance is simply to confirm that a full-blown, and quite sophisticated, doctrine of territorial waters existed in the 17th century, rather than being a later development as the United States contends.

There remains the matter of neutral waters, that is, those portions of the adjacent seas in which a coastal sovereign prohibits other states from making war against one another. In 1604, and again 30 years later, England defined its neutral waters as the areas known as the "king's chambers." These consisted of the maritime areas within very broad baselines drawn from headland to headland; Fulton gives a map of them at p. 123. The "chambers," while far more extensive than what would be considered territorial waters today, nonetheless were not nearly so extensive as the English seas which were regarded as subject to the sovereignty and ownership of England. See, generally, Fulton, *op. cit.* at 750-54; Oudendijk, *Status and Extent of Adjacent Waters* 57-58 (1970); Exhibit 569; Tr. 347-51. Fulton recognizes that the king's chambers "had no reference to the claim of James to property in his seas." *Op. cit.* at 122. The limits were established by a jury of Trinity House, reporting to the High Court of Admiralty, and were described as "the king's chambers, havens or ports." *Id.* at 754. The formula in the royal proclamation was: "our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports or havens as may be reasonably construed to be within that title, limit or precinct." *Id.* at 751-52.

In 1684, Charles II by proclamation similarly defined the areas in which belligerent activities would be prohibited as "our ports, harbors, or other places reputed to be within our more immediate protection, and where our commanders and officers are accountable for the public

peace"; again, "so near our coasts, or the entry of our harbours, as may be easily construed to be under our more special care and protection"; again, "within our ports, havens, roads and creeks, as also in every other place or tract at sea that may be reasonably construed to be within any of those denominations, limits or precincts." Exhibit 225. The proclamation drew a clear distinction between "the seas belonging to these our kingdoms" and the more limited areas "under our more special care and protection."

It could be argued that a coastal state's assertion of sovereignty over its adjacent seas entails the obligation of maintaining neutrality wherever sovereignty is claimed. The Spanish government invoked this argument when, in recognizing English sovereignty over the Channel and North Sea, it contended that by that token England had an obligation in those seas to protect Spanish ships from belligerent activities. Exhibit 609.[24] However, since the enforcement of neutrality was plainly more of a burden than of a benefit to a maritime sovereign, England in the 17th century made a sharp distinction between the broad seas over which it claimed sovereignty and proprietorship and the more modest areas, the "king's chambers," within which it undertook to maintain neutrality. In reaffirming the king's chambers for neutrality purposes in 1634, Charles I "expressly declared that his maritime rights were far more extensive and as soon as he had created a powerful fleet his Admiral was instructed to permit no fighting between belligerents in the presence of his ships in any part of the Narrow Seas." Oudendijk, *op. cit.* at 57-58; Exhibit 569; p. 59, *supra.*

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[24]Gentili, as lawyer for Spain, had taken the same position in 1605-08 in prize cases in the English Admiralty Courts. Exhibit 693, pp. 358-61.

However, it became firmly fixed in English doctrine and practice that the maritime areas within which protection against belligerent activities would be afforded was far more limited than the areas in which English sovereignty and proprietorship were claimed and exercised. Hedges' legal opinion of 1699, defining the extent of the English seas, expressly made the point that they were much broader than the king's chambers, which were for neutrality purposes only. App. 667-68. Selden had earlier carefully distinguished between the king's chambers and the much broader English seas. *Mare Clausum*, pp. 363-75.

All this shows how far English law and practice in the 17th century were from the "protective" concept of sovereignty which plaintiff's witness Professor Wroth contended, without a shadow of foundation, was operative at that time. It is apparent, also, that 17th-century Britain was far from agreeing with Professor Henkin's assertion that "if you are talking about territorial sovereignty, it must include everything, including neutrality." Tr. 2602.

The distinction is also crucial for understanding developments in the late 17th and 18th centuries, when England in a number of treaties embraced the line-of-sight rule for neutrality purposes (at least as to certain of its possessions) without in the slightest degree renouncing its claims to sovereignty, exclusive fishing, ownership of the seabed and the right to the flag salute in far broader maritime areas. The British treaties with Algiers of 1682 and 1688 (see p. 73, *supra*) required Algerian ships to refrain from cruising or taking prizes in sight of any British roads, havens, ports, towns or places. Exhibit 674, pp. 356, 362. The 1675 treaty with Tripoli contained a similar condition applicable to Tangier only. *Id.* at 715. Since these treaties also contained explicit reference to the seas under the sovereignty of the British crown (p. 83, *supra*), they demonstrate very clearly the distinction which Britain made in this period between

the territorial seas and the more limited areas in which neutrality would be enforced. For later treaties of the same type, see p. 127, *infra.*

III.

BRITISH LAW AND PRACTICE IN THE EIGHTEENTH CENTURY DID NOT CHANGE SUBSTANTIALLY WITH RESPECT TO MARITIME SOVEREIGNTY AND DOMINION.

Plaintiff's position apparently is that at some unspecified time during the 18th century Britain abandoned its established doctrines regarding the British seas, and that the British claim to sovereignty and property in the sea and the bed thereof retreated either to the distance of cannon shot from the coast, or to three miles, or even all the way to the low-water mark.[25] (No one except plaintiff's witness Dr. Kavanagh believes that *high*-water mark is relevant to the discussion.)

To the contrary, the record shows that the British claim to the British seas, as previously defined, persisted fully in law throughout the 18th century, though there were reasons why those claims received less attention and discussion than they had in the previous century. Those reasons were essentially four:

(1) The establishment of British maritime supremacy in fact, in seas even broader than the British seas as

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[25] Plaintiff's position finds some support in Fulton, but Professor O'Connell has recently demonstrated that Fulton was wholly wrong on this point. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 316-319 (1971). Even Fulton acknowledges that the cannon-shot rule and the three-mile limit were "unknown to English law" prior to 1800. Fulton, *op. cit.* at 579-80.

traditionally defined, meant that the British legal claims were both less important to establish and less often called in question.

(2) Universal recognition of the right of innocent passage of foreign ships through territorial waters removed what had previously on occasion been a source of contention.

(3) The great decline in the Dutch North Sea fishery, and general observance by the Dutch of their agreement to stay beyond the line of sight in English waters, where their presence had been most obtrusive and where the fisheries were richest, reduced almost to the vanishing point what had been the principal ground of controversy in the 17th century.

(4) Foreign ships normally and usually acquiesced in the British right to the flag salute in the British seas from Finisterre to Van Staten. While the foreigners may have rationalized this in thier own minds as a mere tradition or mark of respect, Britain quite clearly continued to regard it as acquiescence in British territorial sovereignty over those seas.

As we shall see in a later section (pp. 222-36, *infra*), the most important disputes regarding maritime sovereignty and exclusive fishing in which Britain was involved in the 18th century concerned North American waters, and there the British exclusive claims were fully maintained.

As to the alleged rules of the cannon-shot line and the three-mile limit, no British authority ever applied any such rules to British waters throughout the course of the 18th century, even for the purpose of neutrality, let alone for the purpose of territorial sovereignty, exclusive fisheries or ownership of the seabed.

In the domain of private law or property rights, the 18th century brought no abandonment or hiatus whatever in the

doctrine that the crown owned the soil of the seabed beneath the British seas except to the extent that soil had been acquired by British subjects by grant, custom or prescription. That doctrine was as authoritative and unchallenged after the end of the 18th century as it had been before that century began.

A. THE BRITISH SEAS CONTINUED TO BE REGARDED AS SUBJECT TO BRITISH SOVEREIGNTY AND A PART OF BRITISH TERRITORY.

In 1713 Sir Charles Hedges, judge of the admiralty court from 1689 to 1701, Secretary of State and Privy Councillor, 1700-06 (9 *Dic. Nat. Biog.* 362-63), at the request of the Lords of the Admiralty, rendered a formal opinion concerning the extent of the British seas, which he believed are "without any doubt . . . within her majesty's sea dominions, as queen of Great Britain." App. 665. Hedges adhered to the traditional view that British territorial sovereignty included the entire North Sea, English Channel and Bay of Biscay, and the sea to the north of Scotland at least as far as Iceland. He expressed doubt only as to the extent of the British seas on the westward side. There he regarded as minimum limits the 100-mile belt or 60-mile belt generally asserted by civil lawyers as the territorial waters of any coastal sovereign. However, he advanced various theories by which British sovereignty might be considered as extending farther, including the theory that, being possessed of the North American coast as well as of Ireland, Britain might reasonably claim all the waters in between.[26]

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[26]Hedges' opinion may not be read as expressing any doubt as to whether the British possessions in North America had their own territorial seas. Those possessions were not part of the realm of Great Britain; and Hedges had been asked only for his opinion as to the extent of the seas in which the queen was sovereign "as queen of Great

In 1721 Sir Henry Penrice (later judge of the admdiralty court, Exhibit 640), at the request of the Lords Commissioners of the Admiralty, rendered an opinion on the question whether the British seas extended to Cape Finisterre, that is, included the entire Bay of Biscay as far as the Spanish coast. Penrice, after examining the precedents, affirmed that the British seas did so extend, and were under the sovereignty of the British crown. App. 693-94, 741-44.

A British treaty of 1716 with Tripoli provided for a limited right of visitation of British merchant ships at sea except "in any of the seas appertaining to his majesty's dominions." Exhibit 674, p. 721. In 1751 another treaty with Tripoli contained the same provision. *Id.* at 726.

If there was any abandonment or diminution of British territorial sovereignty in the four British seas as traditionally defined, during the 18th century, the legal writers of the period—mostly public officials knowledgeable both as to the state of the law and as to the attitude of the government—were certainly unaware of it. Alexander Justice's *General Treatise of the Dominion and Laws of the Sea* (1705) stated the full traditional doctrine of maritime sovereignty with its recognized attributes, including the exclusive right to the fisheries, territorial admiralty jurisdiction over both subjects and foreigners, and legislative power. Exhibit 450; Exhibit 710, pp. 129,

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Britain." Thus North American waters came within the purview of his opinion only on the theory that, of the four seas traditionally regarded as British waters, the western sea extended from Ireland all the way to the opposite shore. If there was a belt of international water in between, then the North American seas, though under British sovereignty, would not be part of the "British seas." This may seem a curious technicality to a modern student, but it is plainly the way Hedges thought. If asked, Hedges would obviously have said that if the British seas did not reach across to North America, the British colonies there would have their own territorial seas of 100 or 60 miles at minimum.

133-58. Writing in 1720, Josiah Burchett, who was Secretary of the Admiralty from 1698 to 1742, relied both on the historic English sovereignty over the four British seas and on the general law that any coastal sovereign has territorial waters of 100 miles from its coasts. Exhibit 675; selections at App. 771-75.

In 1735 Thomas Lediard, who was a British diplomat, asserted British sovereignty over the four British seas and gave a quite precise definition of them on the west and north as well as on the other sides, saying they were "generally reckoned" as those seas within a line drawn from Cape Finisterre to 63 degrees of north latitude, and thence eastwards to Van Staten in Norway. App. 824-28. (This demarcation was probably assumed by the many other writers who speak of the British seas as extending from Finisterre to Van Staten. It was reiterated as late as the 19th century. 1 Chitty, *The Laws of Commerce* 102 (11th ed. 1857).) Lediard goes on to discuss British sovereignty in American waters. He states what was plainly the general view at the time: that while the British seas properly so called did not extend all the way across the Atlantic Ocean, the British possessions in North America had their own territorial seas. App. 827.

In 1742 Charles Viner's *Abridgement* recorded the established law that the British seas are under both the sovereignty and the ownership of the crown. Exhibit 208. Viner traced back to King Alfred's time the doctrine that "the sovereignty of all the land to the middle of the sea about the land belongs to the king in right of his crown." 6 Viner, *Abridgement* 505 (2d ed. 1792).

Matthew Bacon's *Abridgement*, which appeared in 1759, likewise affirmed British territorial sovereignty and dominion in the British seas. Exhibit 171. The digest of Sir John Comyns, Chief Baron of the Exchequer, was to the same effect. App. 657.

In 1746 there appeared an ambitious and interesting work in two volumes entitled *The Laws, Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military.* Exhibits 716, 717; selections at App. 823-24. The work is anonymous, but obviously had official or semi-official status. The author affirms British sovereignty (which he calls dominion) in the four British seas. In prior times, he says, that sovereignty permitted the crown to prohibit navigation through the British seas and to levy tribute thereon. Now those rights have lapsed in the interest of free navigation and commerce. Nonetheless, "the being of our dominion [a modern writer would say: "the substance of our sovereignty"] subsists exactly as before." Exhibit 716, p. 9. This is an excellent statement of territorial sovereignty as limited by the right of innocent passage.

Blackstone, in affirming crown ownership of the seabed in the English seas, is clear that such ownership is a corollary of territorial sovereignty, the king being "lord of the sea." App. 649. And: "the main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction." 1 Blackstone, *Commentaries* 110 (1765).

B. THE CLAIM TO EXCLUSIVE FISHERIES IN THE BRITISH SEAS WAS NOT ABANDONED, AND INDEED WAS EXTENDED TO NEW BRITISH POSSESSIONS.

Early in the 18th century the Dutch herring fishery in the North Sea suffered a precipitate decline, and ceased to be a substantial interference with the British fisheries or with the British claim to maritime sovereignty. The French, when at war with Holland, destroyed many of the Dutch fishing ships; though Britain was not at war with the Dutch early in the century but indeed was allied with them, the British navy likewise took severe measures against the Dutch fishing boats to enforce the British claim to maritime sovereignty. "Not infrequently their [the Dutch] herring

fishery was entirely suspended, it might be for a series of years, owing to the inability of the States-General to protect the fishing vessels from the French or the British cruisers . . . . From these repeated blows the Dutch fisheries never recovered, and the fleets of buses gradually dwindled . . . . Thus the part of the pretention to the sovereignty of the sea which related to the fisheries along the British coasts was solved, the British fisheries, now the greatest in the world, rising on the ruins of the Dutch." Fulton, *op. cit.* at 534.

Controversy with the Dutch was also generally minimized by their observance of their agreement of 1619 (p. 81, *supra*) to stay beyond the line of sight from the British shores. At various times during the century the British government, when necessary, made representations to the Dutch, French and Danish governments to insure that their fishermen not come too close to the shore. Exhibit 693, pp. 604-05. There were no major disputes, however, and as we shall see the really serious controversies regarding foreign fishing in waters under British sovereignty related to North American waters (pp. 222-36, *infra*).

In 1790 Britain agreed by formal treaty that British subjects should not navigate or fish within ten leagues of any coast in the Pacific Ocean occupied by Spain. Exhibit 674, pp. 663, 666. Here, at the very end of the century, we see Britain, so far from adhering to any cannon-shot or three-mile rule, acquiescing in a Spanish claim to territorial waters of 30 miles for exclusive fishing purposes.

The treatise writers of the century uniformly asserted and recognized the British right to exclusive fisheries in the British seas as traditionally defined. These included Justice, Burchett, Lediard, Viner, Bacon and Comyns. See App. 657, 771-75, 824-28; Exhibit 710, pp. 129, 132; Exhibit 675, p. 28; Exhibits 208, 171. Comyns, in addition to the passages in Exhibit 185 (App. 657), declared that "the

fishery of every navigable river, as high as the sea flows and reflows, belongs to the king by his prerogative . . . but every one [*i.e.*, subjects] may fish in the sea, of common right . . . though it flows upon the soil of another [*i.e.*, the king]. But foreign nations cannot fish in the British seas, without the king's license." 7 Comyns, *Digest of the Laws of England* 70 (5th ed. 1822).

Thomas Neale's *Abstract of the Sea-Laws, as Established in Most Kingdoms of Europe, But More Particularly in England and Scotland* (1704), upheld the British claims to exclusive fisheries. He relied on Bartolus' 100-mile limit, and regarded the seas within that limit as part of the *territorium* (preface, pp. 8-9).

The author of *The Laws, Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military,* regarded the British right to exclusive fishing as extending midway to the opposite coasts, but indicated that at that period (the book was published in 1746) the British right was insisted upon in practice only "to a certain distance" from the shore, which at one point the author appears to identify as the line of sight. Exhibit 716, pp. 4, 5, 11, 38.

An act of Parliament of 1714 prohibited "any person" from using certain types of nets "at sea, upon the coast of England." App. 869-70; Exhibits 716, 413-414. A statute of 1771, still in force in 1903, provided that persons employed in the British white-herring fisheries "may fish in any part of the British seas." App. 872. Finally, an act of 1791 prohibited trespass by unauthorized persons upon "the several [*i.e.*, exclusive] oyster fisheries of this kingdom" and the use of nets or trawls therein. App. 870.

In the case of *Carter v. Murcot,* in 1768, it was held that the fisheries in navigable rivers, as arms of the sea, belong *prima facie* to the crown, but that a subject can acquire an exclusive fishery therein by royal grant or prescription. The court regarded the decision in the *Case of the Royal Fishery*

of the Banne (pp. 98-100, *supra*) as authoritative, and declared " 'tis a very good case." Exhibit 455, p. 129; Angell, *op. cit.*, Appendix, at 32-35. The court also relied on Hale.

The crown asserted and exercised jurisdiction over fishing in the waters not only of Britain, and America but also of new British possessions elsewhere. After Minorca (Mahon) became a British possession, one Charles Williams petitioned the Board of Trade in 1751 for a license for an exclusive tuna fishery in Minorcan waters. Williams' petition carefully explained that the license he sought would not interfere with established fishing rights, but would be exclusive only as to new and improved methods of fishing devised by him. This was fully in accordance with the law of monopolies in force ever since Elizabeth I's time. The governor of Minorca endorsed the petition. Its ultimate disposition does not appear in the record, but it seems highly probable that it was granted. See Exhibits 796, 807; Exhibit 772, pp. 147, 209, 232-33, 253, 257. Foreigners had previously petitioned for licenses to fish on the coasts of Minorca, but had been refused on the ground that they were not British subjects. Exhibit 807, p. 3.

C. THE ADMIRALTY JURISDICTION IN THE BRITISH SEAS REMAINED UNCHANGED.

Justice and Burchett, the leading admiralty writers of the period, affirmed the full traditional doctrine of the territorial jurisdiction of admiralty in the British seas, including jurisdiction over foreigners. Exhibit 710, pp. 153-58; Exhibit 675, preface, first and second pages. Similarly, the anonymous work of 1746 listed among the prerogatives of the British maritime sovereignty, along with exclusive fishing, "the regular execution of justice for all crimes committed within" the British seas. App. 824. Blackstone is to the same effect. 1 *Commentaries* 110 (1765).

The admirals' commissions of the 18th century were couched in territorial terms, and conveyed the maritime jurisdiction both of Great Britain and of the British dominions, including those of North America; they spoke of "our fleets and seas," granted powers "by sea, water or land within our kingdoms and places aforesaid," and conferred criminal and civil jurisdiction "within our maritime jurisdiction of our admiralty of England and other places aforesaid." Exhibit 638, pp. 2, 4, 5, 11. The patents of admiralty judges contain similar material. Exhibit 640, pp. 5, 8.

A statute of the reign of George III provided that the jurisdiction of the crown commissioners for admiralty extended to all crimes committed in the seas outside the bodies of counties. Exhibit 160, p. 88.

D. CROWN OWNERSHIP OF THE SEABED AND SUBSOIL AND OF THE RESOURCES THEREOF CONTINUED TO BE FULLY RECOGNIZED IN LAW.

The doctrine of crown *prima facie* ownership of the seabed and foreshore "has been stated in varying language by judge after judge from that time [the time of Hale] to the present day [1888]." Exhibit 728, pp. xxxii-iii. The crown's assertion of ownership of lands recovered from the sea likewise continued unchanged throughout the 18th century. Exhibit 646, pp. 4-6; Exhibit 656.

The treatise writers who referred to crown ownership of the seas and seabed include Lediard, App. 827, and Viner, Exhibit 208. The anonymous but authoritative author of 1746 listed among the crown rights in the British seas "the royalty of granting the liberty of fishing for pearl, coral and amber, and other precious commodities." App. 823. Comyns declared that "land, derelict by the sea, belongs to the king by his prerogative; for when the dominion and soil of the

British sea belong to him, the derelict land, by consequence, shall be his . . . . So, an island which rises in the sea . . . . So, if a wharf be erected under low water mark, it belong to the king . . . . Or, between high and low water mark." 7 Comyns, *Digest of the Laws of England* 75 (5th ed. 1822).

Blackstone, who was of course the weightiest British legal writer of the century, affirmed without question the crown ownership of the soil of the sea when covered with water and, by consequence, of lands reclaimed from the sea. App. 649. Blackstone referred to the crown's ownership as a "prerogative," yet again refuting Professor Thorne's theory that the "prerogative" theory means that the seabed is ownerless. Plaintiff's theory that Blackstone's reference to the prerogative meant that he believed the crown did not own the seabed while still covered with water (Pl. Br. 93, 95) is wholly without merit for the reasons stated at pp. 102-103 and 113, *supra.*

In *Attorney General v. Richards,* in 1795, the crown asserted ownership of a portion of the foreshore as against a subject who had erected buildings thereon. The information stated, and the Attorney General argued, that the crown owned the sea and the soil thereof, and therefore owned the foreshore also. The defendant denied none of this, but claimed title on the basis of a grant. The court held that the grant did not include the land in dispute, upheld the title of the crown, and ordered the buildings abated as a nuisance. Angell, *The Right of Property in Tide Waters,* Appendix, at 9-19 (1826); Moore, *op. cit.* at 434-35.

The crown's jurisdiction over sedentary fisheries, as well as surface fisheries, was asserted and exercised in the waters of new British possessions. Charles Williams' petition of 1751 (p. 132, *supra*) sought an exclusive license to exploit the coral resources in Minorcan coastal waters, the exclusive feature being justified by a showing that those

resources had not previously been exploited. Exhibit 807. Williams' petition, which was endorsed by the governor of Minorca, was that he should have the exclusive coral fishery for 14 years and that the fishery should thereafter be open to all British subjects but to them only.

Also in 1751, Britain considered acquiring the island of Tabarka from Tunis, and one of the principal arguments in favor of the acquisition was the existence in the coastal waters of the island of a rich coral fishery. If the island were acquired, Britain "might sell the liberty of fishing for coral to the Genoese or any other persons, until the English should have acquired the art of fishing it for themselves." Exhibit 772, pp. 203-04, 206-07. Exhibit 710, p. 158. See also Exhibit 675, pp. 35-37; Exhibit 718, p. 42; Exhibit 716, p. 2.

E. THE FLAG SALUTE CONTINUED AS A RECOGNITION OF SOVEREIGNTY IN THE BRITISH SEAS.

Sir Henry Penrice's legal opinion of 1721 affirmed the right of the flag salute as a recognition by foreigners of British sovereignty in the British seas. App. 694, 742. The navy enforced the obligation throughout the British seas; and this on occasion led to sea battles, Fulton, *op. cit.* at 520-21, though it appears that for the most part foreigners complied without incident. The admiralty instructions continued to require the salute throughout the century. Exhibit 458, pp. 263-64; 2 Marsden, *Law and Custom of the Sea* 263-64 (1916).

The treatise writers of the period are unequivocal both as to the duty and as to its significance as a recognition of British sovereignty in the British seas. Justice specified that foreigners failing to give the salute "are punishable by the king of England before his admirals, in the same manner as

if they had committed a crime within the jurisdiction of his territories by land; which ceremony has been for many ages exacted by the English kings with all imaginable vigor." Exhibit 710, p. 158; see also App. 828; Exhibit 675, pp. 35-37; Exhibit 716, p. 2.

The Anglo-Dutch treaty of 1784, ending the Dutch participation in the war of the American Revolution, provided that the flag salute should be honored and practiced as in the past. Fulton, *op. cit.* at 522.

F. OTHER ATTRIBUTES OF SOVEREIGNTY AND JURISDICTION INVOLVED NEUTRALITY AND SMUGGLING.

As we have seen (pp. 121-24, *supra*), it was already clearly established in the 17th century that the waters within which Britain protected foreign ships from belligerent activities of other states were by no means coextensive with the seas in which Britain claimed sovereignty and dominion. Plaintiff appears to argue that during the 18th century Britain adopted the cannon-shot rule for purposes of neutrality and that this represented a curtailment of its claims to sovereignty and dominion. Plaintiff is wrong on both counts: the neutrality belt bore no relation to Britain's definition of its territorial seas, and the measure used for neutrality purposes in British waters was not the cannon shot, but at a minimum the line of sight. That measure is found in British treaties with Algiers, Tripoli and Tunis of 1716 and 1751. Exhibit 674, pp. 369, 725, 729, 737 and 741. Several of these treaties were limited in their application to Minorca and Gibraltar, and it seems questionable whether any of the treaties were regarded as having any application to the home waters of the United Kingdom, since the Barbary pirates did not venture so far. In one of the treaties the line of sight appears to be regarded as 10 miles from shore. *Id.* at 737. As to British home waters, Sir Henry Penrice in 1718 regarded the "king's chambers" as still fully in effect

for neutrality purposes. 3 McNair, *International Law Opinions* 46-47 (1956); 2 Marsden, *Law and Custom of the Sea* 243-45 (1916).

Plaintiff's witness Professor Henkin (Tr. 2596-98) made much of the treaty between Britain and Algiers of 1762. That treaty adopted the cannon-shot rule for neutrality purposes in Algerian (not British) waters. Exhibit 674, p. 372. There was a similar treaty with Tunis the same year, *id.* at 744, though Professor Henkin did not mention it. These treaties forms the *sole* basis for Professor Henkin's contention that Britain had adopted the cannon-shot rule—and indeed the three-mile limit—in the 18th century for purposes of British sovereignty and dominion in the British seas themselves. The contention is patently frivolous.

A series of acts of Parliament spanning the entire 18th century asserted regulatory and criminal jurisdiction, including jurisdiction over foreigners, out to various limits from the British coasts for the purpose of preventing smuggling. These are the well-known "hovering acts." See Masterson, *Jurisdiction in Marginal Seas with Special Reference to Smuggling, passim* (1929); Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 535, 538, 539, 541 (1919).

A statute of 1718 prohibited the transfer of goods at sea from one ship to another with intent to bring them within the limits of any British port.

> "No limit or distance was specified. It is not necessary to determine the limits of the various ports; for the offense defined was an unlading 'at sea' with the intention to place the goods on board a vessel in the limits of any port, regardless of what those limits were. Nothing was said as to where the goods could have been seized or the

> masters arrested; but as already indicated, during this period, seizures and arrests were made anywhere on the 'English seas.'" Masterson, *op. cit.* at 7.

The penalties specified included not only the forfeiture of the goods in question but also fines upon the masters or persons in charge of both the in-taking and the unlading vessels. *Ibid.*

Acts of 1719, 1736 and 1783 prohibited hovering on the coast within the limits of any port or within two leagues of the shore. *Id.* at 12, 37. Another act of 1736 prohibited the taking in of foreign goods within four leagues of the coast, and authorized the seizure without geographical limit of ships which had previously come within the limits of any port. *Id.* at 26-27. Here again, the penalties included fines against individuals as well as the forfeiture of goods. Other statutes of the same general type were enacted in 1751, 1763, 1765, 1779, 1784 and 1794. *Id.* at 37-42, 58, 65. The 1784 act authorized the seizure, with no geographic limits specified, of ships which had previously come within four leagues of the British coast. *Id.* at 58. The 1794 statute asserted smuggling jurisdiction over the king's chambers, extending in places as far as 50 miles from land. *Id.* at 65. The hovering acts were enforced by the courts against both subjects and foreigners. *Id., passim; e.g.,* p. 42.

Chancellor Kent has an interesting comment as to the doctrinal basis for the hovering acts and its adoption into American law:

> "It was declared in the case of *Le Louis,* that maritime states claim upon a principle just in itself and temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic pur-

> poses, and the right was admitted by the courtesy of nations. The English hovering laws were founded upon that right. The statute (9 Geo. II, c. 35) prohibited foreign goods to be transshipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1799 (c. 128, secs. 25, 26, 27, 99), contained the same prohibition; and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court, in *Church v. Hubbart,* to be conformable to the laws and usages of nations." Kent, *Commentaries on American Law* (1896, reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 182 (1919).

Herbert A. Smith remarks that the hovering acts "seriously embarrassed the British government in its efforts to obtain a general recognition of the three-mile rule" in the late 19th and early 20th centuries. Exhibit 747, p. 143.

* * *

British law and practice since 1800, which are not part of the law of this country but which cast further light on certain aspects of the pre-1800 law, are treated in an appendix to this Brief.

IV.

THE AMERICAN COLONIAL CHARTERS CREATED TERRITORIAL SEAS AND CONVEYED MARITIME SOVEREIGNTY AND DOMINION.

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE COLONIAL CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD STOPPED AT LOW-WATER MARK.

As we have seen, the 17th century, during which all the Common Counsel States were founded and received their charters, was a period of intense British awareness and assertion of maritime sovereignty and its corollaries, including the right to exclude foreigners from fisheries and crown ownership of the seabed and the resources thereof. The official British position, repeatedly stated and acted upon, was that any nation had a right to territorial waters of 100 miles, and that in the four seas surrounding Britain there were particular historic rights sufficient to create a wider British sovereignty, extending at least in the case of the English Channel and the North Sea all the way to the opposite coasts.

It was also a time, as Edmundson put it, of "chartered companies, of trade monopoly, and of commercial protection in its most aggressive form." Exhibit 775, p. 6. The crown habitually granted monopolies of newly discovered areas, trade and resources; and the incorporated company—the device through which many of the American colonizations were begun—was a standard mechanism by which such monopolies were created.

In this atmosphere, it would be extraordinary—indeed inexplicable—if, as the North American English colonies

were chartered and established, we did not find the crown making, and either conveying by charter or retaining for itself, exclusive claims to sovereignty and ownership of the sea and seabed in North American waters. *Prima facie,* if we knew nothing of the colonial charters but fully understood the English background, we should expect to find such claims and would be astonished if we did not. As to distance, we should expect to find confident assertions of sovereignty and dominion, of the right to exclusive fisheries, and of proprietorship of the sea and seabed extending at least 100 miles from the North American coast. And if charters or other legal documents defining colonial rights contained any ambiguity on these points, we should have no hesitation, in view of the English background, in construing them to create such rights.

1. The Issuance of the Colonial Charters and Important Acts of Maritime Sovereignty in British Waters Were Closely Correlated in Time.

The charter of 1606, which vested in monopolistic corporations rights of settlement comprising the entire Atlantic seaboard now occupied by the Common Counsel States, was issued during the period of intensive legal analysis which preceded James I's proclamation asserting sovereignty in the British seas and exclusive fishing therein. The coincidence of dates, both then and throughout the century, is striking. The British kings and their governments would have all had to be victims of advanced schizophrenia had they not claimed sovereign and property rights in the North American seas, in view of their legal position and practical policies in British home waters at the same time.

To illustrate this point more fully, it may be instructive to set forth in parallel columns the chronology of the principal colonial charters together with some of the important events in the development of British law and practice regarding

maritime sovereignty and ownership in British waters. The following chart is far from complete but is, we think, sufficient to make the point.

Colonial Charters	Events in the Development of British Law and Practice Regarding Maritime Sovereignty and Dominion
	1603—James VI of Scotland succeeds as James I of England, bringing with him the Scottish legal tradition of "reserved waters." James is immediately met with intense urging to take action to remedy Dutch encroachments on English fisheries (Exhibit 693, pp. 135-38).
	1603—Publication of Sir Thomas Craig's work asserting maritime sovereignty and exclusive fishing rights.
	1604—Draft treaty of union between Scotland and England, reserving to each nation its coastal fisheries. James proclaims neutrality within the king's chambers.
	1605—The plan for assertion of sovereignty in the four seas and exclusive fishing therein "took more definite form" "within two or three years of the accession of James" (Exhibit 693, p. 138). Parliament regulates sea fisheries by statute.
1606—The Northern (Plymouth) and Southern (London) "Virginia companies are chartered.	

1607—First permanent English settlement in America, at Jamestown.

1607—The Privy Council considers the proposed proclamation of maritime sovereignty and exclusive fishing, and a committee reports favorably on the legality thereof.

1609—Second Virginia charter.

1609—Issuance of James I's proclamation of maritime sovereignty and exclusive fishing.

1610—Newfoundland charter.

1610—Decision by the Privy Council of the *Case of the Royal Fishery of the Banne.* Sir Julius Caesar's legal opinion asserting maritime sovereignty and exclusive fishing.

About 1610—The Earl of Salisbury, prime minister, declares that every state has sovereignty over its adjacent seas for at least 100 miles.

1612—Third Virginia charter.

1613—Publication of Welwood's *An Abridgement of All Sea Laws.* Russia Company receives charter confirming its exclusive right to "Greenland" whale fisheries.

1617—Sir Julius Caesar's legal opinion that crimes at sea were committed within the territory of England.

1618—Selden writes *Mare Clausum* and the King reads it. England claims the "Greenland" whale fisheries on the ground of first discovery and use, and occupation of the Island of Spitzbergen.

1620 Charter of New England.

1621—Nova Scotia charter.

1622—Grant of Maine by New England Council to Gorges and Mason.

1622—Callis' lectures on the Statute of Sewers.

1623—Calvert's charter for Avalon, in Newfoundland.

1628—Publication of Coke's *First Institute.*

1629—Massachusetts Bay charter; Heath patent for Carolina; grant of New Hampshire by New England Council to Mason.

1632—Maryland charter.

1632—Exchequer Court decides *Philpott* case.

1633—Sir John Coke's "Propositions for Fishing." Publication of Boroughs' *The Sovereignty of the British Seas.*

1634— Charles I's Ship Money proclamation. "Reglement" asserts maritime sovereignty.

1635—New Hampshire charter.

1635—*Mare Clausum* is published as a state paper.

1636—Charles I's proclamation of maritime sovereignty and exclusive fishing. Admiralty opinion affirming its lawfulness.

1637—The courts uphold maritime sovereignty and dominion in the *Ship Money* case and *Rex v. Oldsworth.*

1639—Maine charter.

1643—patent for Providence Plantation.

1644—Publication of Coke's *Fourth Institute.* The Parliamentary Committee on the Admiralty instructs the navy to maintain "sovereignty and regality in the seas."

1650—Council of State directs the admirals to preserve the dominion of the sea. Council grants fishing licenses to foreigners.

1652—*Mare Clausum* is translated and republished at the direction of the Council of State.

1652-54—First Anglo-Dutch war. By treaty of 1654, Dutch acknowledges flag salute.

1660—House of Commons passes bill regulating sea fisheries to the midline between England and coasts opposite England.

1662—Nova Scotia charter to Temple.

1662—Dutch again acknowledge flag salute by treaty.

1663-Rhode Island charter; Carolina charter.

1663—*Mare Clausum* is republished for Charles II in a new translation.

1664—Duke of York's patent for New York and New Jersey. The Duke grants New Jersey to Berkeley and Carteret.

1665-67—Second Dutch war. Act of Parliament appropriating supplies says it is for the preservation of the king's "sovereignty and dominion of the seas." By treaty of 1667, Dutch again acknowledge the flag salute.

1668—Jenkins' charge to an admiralty jury.

1670—Hudson's Bay charter.

1671—Opinion of Trinity House on the extent of the British seas.

1672-74—Third Dutch war. Dutch again acknowledge flag salute.

1673—Lease of Virginia to Arlington and Culpeper.

1674-1676, 1677—Foreigners are indicted and convicted for failing to give flag salute in recognition of crown sovereignty over the four British seas.

1681—Pennsylvania charter.

1681—Scottish statute defining the admiralty jurisdiction "within this realm."

1682—The Duke of York's charter for New Castle (Delaware).

1689—British declaration of war with France, specifying as a *casus belli* French incursions on British sovereignty in "our seas," including seas of America. Dutch acknowledge flag salute for the fifth time.

1691—Second Massachusetts Bay Charter.

1699—Enactment of the first "hovering act." Judge Hedges' legal opinion on the extent of the British seas. Parliament excludes foreigners from Newfoundland fisheries.

2. The Persons Involved in Acts of Maritime Sovereignty in British Waters Were Largely the Same Persons as Those Responsible for the Chartering and Establishment of the American Colonies.

Not only were these events happening during the same period; they involved for the most part the same people. The ruling group in England was small; most of its members knew each other intimately and were related by blood or marriage. In these circumstances it is hardly surprising that the men most actively involved in asserting, adjudicating and exercising British sovereignty and dominion over the British seas in Europe were also the persons most active in promoting, chartering and establishing the British colonies in North America. The following list, which could be greatly expanded both by the addition of more names and of more activities of the persons named, is sufficient to make the point. These men would have been schizophrenic indeed had they taken a wholly different view of maritime sovereignty and dominion in North American waters from the view which they were simultaneously establishing and vindicating at home.

First, of course, we have the sovereigns themselves. All the Common Counsel States were chartered during the

reigns of James I, Charles I and Charles II—each of whom was intensively aware and an ardent advocate of British maritime sovereignty and dominion, as was Cromwell. The establishment of a similar dominion in North American waters as the new colonies were chartered and established is hardly a matter likely to have escaped them.

The next sovereign, James II, had a unique triple status as Lord High Admiral, colonial proprietor and monarch. While Duke of York he served as admiral during the period, encompassing the second and third Dutch wars, in which the British claims to maritime sovereignty and dominion were carried to perhaps their highest pitch both in theory and in practice. His instructions to the navy as Lord High Admiral required enforcement of the flag salute "in acknowledgment of his majesty's sovereignty in those seas," extending to Finisterre. Exhibit 458. James was also one of the patentees of Charles II's royal fishery in 1677. Fulton, *op. cit.* at 516. And by grant from his brother Charles, he was himself the proprietor and viceroy of New York, New Jersey, Maine and Delaware. Any one reckless enough to assert that those colonies were deemed to end at high- or low-water mark, at least so long as James, admiral, colonial proprietor and king, had anything to do with them, bears a heavy burden.

In the early years the crown's supervision over the colonies was exercised by the Privy Council, consisting of the principal officers of state. In 1634, Charles I appointed as "Lords High Commissioners for the Plantations "the Archbishops of Canterbury and York, the Lord Keeper, the Lord Treasurer and eight other officers of state; under this administration the New Hampshire and Maine charters were granted. Under the Commonwealth colonial affairs were directed by a Board of Commissioners for the Plantations consisting of the principal men of the state, including Cromwell himself.

There follows a discussion of a few only of the men who were principal figures both in the assertion, adjudication and exercise of British maritime sovereignty and dominion at home and in the chartering and establishment of the North American colonies. These will be listed in alphabetical order.

George Monk, Duke of Albemarle (1608-1670). Monk was "general at sea" in the first Dutch war, and commanded the entire British navy in 1653. The principal architect of the restoration of 1660 and one of Charles II's most intimate advisors, he commanded the fleet during the second Dutch war when the Duke of York was absent. 15 *Encyclopaedia Britannica* 1723-24.[27] Albemarle was one of the patentees and proprietors of the Carolina colony in 1663. His son the second Duke was a patentee of the Hudson's Bay colony in 1670. 33 *British and Foreign State Papers* 1365.

Henry Bennet, Earl of Arlington (1618-1685). Bennet was secretary to the Duke of York from 1654 and Charles II's agent at Madrid in 1658-60. Secretary of State from 1662 to 1674, he was throughout that period the principal minister of the crown dealing with foreign affairs. He was heavily involved in the second and third Dutch wars and frequently asserted the English claims to maritime sovereignty and the flag salute. 2 *Dic. Nat. Biog.* 230-33; Exhibit 693, pp. 469, 483, 497; Fulton, *op. cit.* at 490, 502, 506. Arlington was a patentee of the Hudson's Bay Colony in 1670. In 1673 he and Lord Culpeper received a lease of Virginia for 31 years, including "all islands . . . within ten leagues of any of the coast of any of the said territories." Tr. 1489; 33 *British and Foreign State Papers* 1365.

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[27] All references to the Encyclopaedia Britannica in this section are to the 1959 edition.

Thomas Howard, Earl of Arundel (1585-1646). Arundel held many high offices, including that of Lord High Steward, in the reigns of James I and Charles I. He was a friend and patron of John Selden. 2 *Encyclopaedia Britannica* 493. Arundel was one of the commissioners and councillors for Charles I's exclusive fishing society. Exhibit 693, pp. 227, 239. He was also one of the patentees of the New England charter of 1620, Exhibit 11, and a leading member of the Council for New England. In the division of New England lands in 1622, he received a coastal tract "with all the fishing . . . islands, etc. . . . within 9 miles directly into the sea." App. 1003-05. He and the Duke of Lennox arbitrated the New England fishing dispute in 1619. App. 678-79; see p. 219, *infra*.

Francis Bacon, Viscount St. Albans (1561-1626). Bacon was one of the commissioners who drew up the draft treaty of union between England and Scotland in 1604, including the clause preserving exclusive fisheries for each nation in its reserved waters. Exhibit 693, p. 223. Bacon was Solicitor General from 1607, Attorney General from 1613 and Lord Chancellor from 1618. As Attorney General, he was involved in the collection of authorities to justify the English assertion of sovereignty and exclusive fishing in the English seas. Fulton, *op. cit.* at 163, n.1. As one of the principal law officers of the crown, he participated in drafting the colonial charters issued during his time, including the second and third Virginia charters. Scott, *The United States of America: a Study in International Organization* 71, 72 (1920). He advised the king concerning the establishment and management of the Virginia plantation, Bowen, *Francis Bacon* 124 (1963), and wrote an "Essay on Plantations." Bacon was himself one of the patentees of the second Virginia charter in 1609 and a member of the Council of the Virginia Company. Exhibit 42. He was also active in procuring the Newfoundland patent of the following year and was one of the patentees named therein. Exhibit 663, p.

304; Exhibit 756, p. 11. He became a member of the governing Council for Newfoundland. Rowse, *op. cit.* at 202. See also 2 *Encyclopedia Britannica* 882-88.

George Calvert, first Lord Baltimore (died 1632). Calvert was one of the principal officers and advisors of the crown for 30 years. In 1605 he became Clerk to the Privy Council, and from 1613 on he was in charge of Italian and Spanish diplomatic correspondence. A member of Parliament, he was Secretary of State from 1619 to 1625. 3 *Encyclopaedia Britannica* 1. Calvert was one of the patentees of the second Virginia charter of 1609. Exhibit 42. He signed the warrant for the New England charter of 1620. Exhibit 466, p. 31. Also a member of the Council for New England, he received a share of New England lands in the division of 1622. App. 1003-05. As Secretary of State, he was involved in the New England fisheries dispute in Parliament and defended exclusive fishing rights in American waters. Exhibit 740, pp. 35-36. In 1623 he received a royal charter for Avalon in Newfoundland. The Maryland charter was prepared for him in 1632 and issued to his son and heir just after his death.

George Villiers, Duke of Buckingham (1592-1628). As the royal favorite and intimate counselor of both James I and Charles I, Buckingham was much involved in their assertions of maritime sovereignty. In 1620, at a time when he held the post of Lord High Admiral of England, he was one of the patentees of the New England charter. Exhibit 11. He became president of the Council for New England on Lennox's death in 1624. Preston, *Gorges of Plymouth Fort* 235 (1953). He received a patent for Guiana, in South America, in 1627 and founded a colony there. Greene, *The Foundations of American Nationality* 41 (1922).

Sir Julius Caesar (1558-1636). A famous lawyer and public official, Caesar was Chancellor of the Exchequer in 1606-14 and Master of the Rolls from 1614 to his death. His

legal opinions (p. 61, *supra*) were of capital importance in establishing English maritime sovereignty and exclusive fishing rights in the English seas. He had previously been a commissioner of the Admiralty from 1581, and judge of the High Court of Admiralty from 1584 for many years. As Master of the Rolls, Caesar signed the warrant for the New England charter of 1620. Exhibit 466, pp. 31-32; 3 *Dic. Nat. Biog.* 656-59. He was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne,* which declared the crown's sovereignty and ownership of the sea and seabed of the English seas. 1 Turner, *The Privy Council of England* 75 (1927).

James Hay, Earl of Carlisle (c. 1580-1636). Carlisle was ambassador to France, Spain, Germany and Venice. He was active in the "reserved waters" negotiations between England and Scotland, and was one of the commissioners of Charles I's exclusive fishery company. In 1627 Carlisle received a charter for the Windward and Leeward Islands, in the Caribbean. 4 *Encyclopaedia Britannica* 875; 2 Cokayne, *Complete Peerage* 151 (1889); Exhibit 693, pp. 222 n. 1 and 227 n. 3; Greene, *The Foundations of American Nationality* 39-40 (1922).

Sir George Carteret (c. 1610-1680). In 1636, Carteret was one of the captains and commanders of the Earl of Northumberland's fleet collecting licenses from the Dutch in the North Sea and driving unlicensed fishermen from English waters. Fulton, *op. cit.* at 291; Exhibit 607, p. 3. The accounts of the expedition show that Carteret collected £657 in license fees from the Dutch. *Ibid.* He was comptroller of the English navy in 1639, and Vice Admiral of Jersey in 1644. Appointed Privy Councillor at the restoration, he served as treasurer of the navy from 1661 to 1667. Carteret was one of the eight proprietors named in the Carolina charters of 1663 and 1665. In 1664, he and Lord Berkeley were granted New Jersey by James, Duke of York. 4 *En-*

cyclopaedia Britannica 940. He was a promoter of the Hudson's Bay Company and a member of its Court of Adventurers. Exhibit 765, p. 14.

Edward Hyde, Earl of Clarendon (1609-1674). Father-in-law of James II and maternal grandfather of Queen Mary II and Queen Anne, Clarendon was Lord Chancellor and chief minister of Charles II from 1660 through the end of the second Dutch war in 1667. He asserted the sovereignty of the crown over the British seas against the Dutch. 5 *Encyclopaedia Britannica* 757-60. In 1666, Clarendon as Lord Chancellor received the royal warrant to grant a fishing license to 50 ships of the City of Bruges. Exhibit 693, p. 451. Clarendon was one of the patentees of Carolina in 1663.

Sir Edward Coke (1552-1634). As Attorney General from 1594 to 1606, Coke formulated crown doctrine as to the circumstances in which monopolies might lawfully be granted (p. 42, *supra*), and as Speaker of the House of Commons he defended that policy in Parliament. Coke was Chief Judge of the Court of Common Pleas, 1606-13, and of King's Bench, 1613-16. 5 *Encyclopaedia Britannica* 950-51. As a parliamentary leader, he was involved in the New England fisheries dispute in the 1620's. As one of the most eminent of all English legal authorities, he asserted the crown's sovereignty and ownership of the seas (p. 65, *supra*). As Attorney General, he supervised and participated in the drafting of the Virginia charter of 1606. App. 366; Bowen, *The Lion and the Throne* 343 (1956); Scott, *The United States of America: a Study in International Organization* 70 (1920).

Sir John Coke (1563-1644). Coke was a commissioner of the navy, Secretary of State from 1625 to 1639, and one of the councillors of Charles I's exclusive fishing society of 1632. Exhibit 693, p. 239. He wrote "Propositions for Fishing" and many other state papers asserting the crown's sovereignty and ownership of the fisheries in the British

seas. Exhibit 693, pp. 212 *ff.* His works include instructions issued to Captain John Mason for the Scottish fishery, directing among other things that foreigners be excluded. Exhibit 693, p. 219; Exhibit 756, pp. 276-81. Coke was one of the patentees of the second Virginia charter in 1609. Exhibit 42. As Secretary of State, he was involved in defense of the crown in the New England fisheries dispute in Parliament in the 1620's. In 1632 he declared, in the presence of the king, that the crown owned all the fisheries in both the British and the American seas. Exhibit 693, p. 235. See 5 *Encyclopaedia Britannica* 951.

Sir Dudley Digges (1583-1639). At various times a member of Parliament, Digges was a diplomat; sent as ambassador to Holland in 1620, he was doubtless involved in and fully aware of the continuing Anglo-Dutch dispute regarding the North Sea fisheries. Digges became Master of the Rolls in 1636. 7 *Encyclopaedia Britannica* 382. He was one of the patentees both of the second Virginia charter of 1609 (Exhibit 42) and of the New England charter of 1620 (Exhibit 11), and was a member of the Council of the Virginia Company. His son Edward Digges was governor of Virginia in 1655-1657. In the 1620's Sir Dudley Digges was active in Parliament in defending the Muscovy Company's right to its monopoly of whale fishing in "Greenland" waters. 2 Stock, *Proceedings and Debates of the British Parliaments Respecting North America* 61, 84 (1927).

Sir Dudley Carleton, Viscount Dorchester (1573-1632). As ambassador to Holland from 1616, Carleton bore the brunt of the diplomatic controversy with the Dutch resulting from James I's assertion of sovereignty and dominion of the North Sea. Fulton, *op. cit.* at 168, 180-85, 190; Exhibit 693, pp. 174, 192-93. Later Privy Councillor and principal Secretary of State in 1628, he collected authorities on the territorial admiralty jurisdiction in the narrow seas. Exhibit 693, pp. 212-13. Carleton was involved

in, or at least knowledgeable about, the inception of the Virginia colony in 1607. Exhibit 663, p. 82. In 1622 he received a petition from certain Walloons and French seeking permission to fish in the seas of Virginia. Tr. 2196.

Sir Ferdinando Gorges (c. 1566-1647), "the father of New England colonization." Exhibit 720, p. 34. A soldier and a sailor, Gorges was captain and keeper of the castle of Plymouth from 1596 to 1629, with considerable naval responsibility in the western part of the English Channel. He was, with Popham, chiefly instrumental in procuring the charter of 1606, was a member of the Plymouth Company in 1606 and was involved in the foundation of the Popham colony in Maine. Exhibit 756. One of the most important of the first generation of entrepreneurs of American colonial settlement, he was principally instrumental in obtaining the New England charter of 1620 and was the guiding spirit of the Council for New England. Later he became the patentee of Maine. 10 *Encyclopaedia Britannica* 530.

Sir Robert Heath (1575-1649). Heath was Solicitor General, 1621-25; Attorney General, 1625-31; Chief Justice of Common Pleas, 1631-34, and of King's Bench, 1642-45. He was one of the principal defenders of the prerogative in the Parliaments of 1623-25. "As a constitutional lawyer he was distinguished by learning and ability." 9 *Dic. Nat. Biog.* 348. He was a patentee of the New England charter of 1620 and a member of the Council for New England. Exhibit 11. In 1629 Heath was granted the "Heath patent" for Carolina, extending from sea to sea between the 31st and 36th parallels. He was also a Councillor of the Virginia Company. Greene, *The Foundations of American Nationality* 41 (1922).

Lodowick Stewart, Duke of Lennox (died 1624). As lessee of the crown, this near relative of James I was in charge of the measures in 1616 and subsequent years to

collect the tax called the "assize herring" from Dutch and other foreign fishermen in Scottish waters. Fulton, *op. cit.* at 168-71, 180. He was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne.* 1 Turner, *The Privy Council of England* 73-74 (1927). He was one of the commissioners to negotiate with the Dutch regarding the fisheries dispute in 1618. Fulton, *op. cit.* at 186. Also Admiral of Scotland (Exhibit 466, p. 54), Lennox was one of the patentees of the New England Company charter of 1620, Exhibit 11, and was president of the Council for New England until his death. Preston, *Gorges of Plymouth Fort* 235 (1953). In the division of New England lands in 1622 he received a coastal tract with "all the fishings . . . and islands . . . within 9 miles directly into the sea." App. 1003-05. He and the Earl of Arundel arbitrated the New England fishing dispute in 1619. App. 678-79.

Captain John Mason (1586-1635). In 1610 Mason was employed by James I to collect the "assize herring" from Dutch fisherman in Scottish waters, and made a naval expedition to that end. Fulton, *op. cit.* at 165; Exhibit 693, p. 153 n. He served as governor of Newfoundland from 1615 to 1621, and published the first map of that region. 15 *Encylopaedia Britannica* 15; Exhibit 663, p. 305. He was one of the guiding spirits of the New England Company, served as vice president of the Council for New England in 1632, and 10 years previously had obtained a grant of land called Mariana from the Council. New Hampshire was chartered to him in 1629. In the early 1630's he was the principal originator of the plan for an exclusive fishing society in Scottish waters, was a councillor and treasurer of the society, and was appointed admiral of its ships. Exhibit 693, pp. 216, 219-20, 241. He was the author of a state paper entitled "A Collection of Diverse Particulars Touching the King's Dominion and Sovereignty in the Fishings, as well in Scotland as in the British Ocean."

Exhibit 693, p. 364. He also wrote "A Brief Discourse of the New-found-land" (1620), emphasizing the fisheries. Bridenbaugh, *Vexed and Troubled Englishmen 1590-1642*, pp. 227-28 (1968). His last appointment was as vice-admiral for New England, but he died before taking up that position. See generally Exhibit 756; Exhibit 683, pp. 26, 28, 34-35.

Henry Howard, Earl of Northampton (1540-1614). Northampton was Lord Privy Seal from 1608 to 1614. In 1608 the draft of James I's proclamation of maritime sovereignty and exclusive fishing was referred to him and the Earl of Devonshire for their opinions; they recommended its adoption. Exhibit 693, p. 138. Northampton was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne.* 1 Turner, *The Privy Council of England* 73-74 (1927). He was active in procuring the issuance of the Newfoundland patent in 1610. Exhibit 663, p. 304.

William Penn (1644-1718). Penn owed his charter for Pennsylvania primarily to royal favor towards his father, Sir William Penn, admiral during the second Dutch war. The elder Penn had collected a number of documents on the crown's sovereignty and dominion of the sea, and the younger Penn presented those papers to the king. Exhibit 632.

Sir John Popham (c. 1531-1607). Privy Councillor from 1571, Solicitor General 1579-81, Speaker of the House of Commons in 1580, Attorney General 1581-92, and Chief Judge of the Court of King's Bench from 1592 until his death, Popham was one of the most eminent legal personages of his time. 16 *Dic. Nat. Biog.* 147-49. At the end of his life Popham was intensely interested and influential in colonial enterprises, and was one of the prime movers in procuring the "Virginia" charter of 1606, of which he is said to have been the principal draftsman. Scott, *The*

United States of America: a Study in International Organization 70 (1920). His nephew George Popham (died 1608), also one of the petitioners for the 1606 charter and one of the patentees named therein, was governor of the abortive Popham-Gorges colony in Maine.

Prince Rupert of the Rhine, Duke of Cumberland (1619-1682). Nephew of King Charles I, Prince Rupert commanded the royal army during the Civil War and the royal fleet in 1648-52, in which capacity he reduced Barbados and other West Indian islands to obedience. He was one of the principal British admirals in the second and third Dutch wars, and First Lord of the Admiralty from 1673 to 1679. The prince was one of the chief originators and backers of the Hudson's Bay expedition in 1668, and one of the incorporators of the Hudson's Bay Company and grantees of its charter in 1670; the company's land territories were called Rupert's Land after him. On the establishment of the Council for Trade and Plantation in 1670, Rupert became one of its first members. 17 *Dic. Nat. Biog.* 405-17; 33 *British and Foreign State Papers* 1365.

Robert Cecil, Earl of Salisbury (1563-1612). As chief minister of the crown from 1598 to 1612 and Lord Treasurer for the last four years of his life, Salisbury was at the head of government throughout the period which saw the charter of 1606, the second and third Virginia charters, and James' proclamation of maritime sovereignty in 1609 and the dispute with the Dutch which resulted therefrom. He was intensely active in defending diplomatically James' claim to maritime sovereignty and dominion, Fulton, *op. cit.* at 150-59, and stated England's official position that every coastal state was entitled to sovereignty out to at least 100 miles from its coasts. Salisbury subscribed to the opinion of the Privy Council Committee in 1607 which endorsed the lawfulness of James' proclamation, Exhibit 693, p. 146, and was of the Council when it decided the *Case of*

the Royal Fishery of the Banne. 1 Turner, *The Privy Council of England* 73 (1927). Salisbury was himself one of the patentees of the second Virginia charter of 1609. Exhibit 42. A kinsman of Sir Ferdinando Gorges, he took great interest in the initial ventures of colonization. Rowse, *The Elizabethans and America* 76, 98-100 (1959).

Anthony Ashley Cooper, Earl of Shaftesbury (1621-1683). Shaftesbury was a Privy Councillor and a leading minister in the first part of Charles II's reign, and served as Lord Chancellor in 1672-73. He was much involved in the third Dutch war and in the negotiations with the Dutch in which he repeatedly asserted the crown's sovereignty and property in the British seas. Exhibit 693, pp. 506-07. Shaftesbury was intimately involved in colonial affairs both before and after the restoration. 20 *Encyclopaedia Britannica* 426-29. He was one of the patentees of Carolina in 1663, and was the prime mover in the establishment and government of the Carolina colonies. In 1670 he was a patentee of Hudson's Bay. 33 *British and Foreign State Papers* 1365.

Sir Thomas Smith (c. 1558-1625). Smith was special ambassador to Russia in 1604 and chief executive of the Muscovy Company, which as we have seen had the exclusive whale fishery in the "Greenland" seas. For many years he was governor of the East India Company, and was a commissioner for the settlement of disputes with the Dutch in 1619. Smith was one of those most active in procuring the second Virginia Charter of 1609, and served as treasurer of the Virginia Company from 1609 to 1621. He was also one of the chief commissioners of James I's navy and governor of the Somers Islands (Bermuda) Company. 18 *Dic. Nat. Biog.* 536-37; Greene, *The Foundations of American Nationality* 38 (1922).

William Alexander, Earl of Stirling (c. 1567-1640). As Secretary of State for Scotland from 1626 to 1640, Alexander

was intimately involved in Charles I's exclusive fishing scheme, in 1630 was one of the commissioners to draft the project, and was a councillor of the fishing company. Exhibit 693, pp. 219-20, 227, 232, 239. Also a leading proponent of American colonization, Alexander received a charter in 1621 for Nova Scotia and New Brunswick, and served as lieutenant governor thereof. 21 *Encyclopaedia Britannica* 411-12.

Robert Rich, Earl of Warwick (1587-1658). Warwick was vice admiral of Essex from 1619, was appointed admiral of the fleet by Parliament in 1642, and held the office of Lord High Admiral from 1643 to 1645. In 1643 he was ordered to enforce the flag salute in the English seas. Exhibit 693, p. 380. Always interested in colonial ventures, he was one of the patentees of the New England charter of 1620 (Exhibit 11), was chiefly responsible for procuring the Massachusetts Bay charter in 1629, and was president of the Council for New England until 1631. In 1643 he was appointed head of the Board of Commissioners for the Plantations, which the following year granted a patent to the Providence colony in Rhode Island. 23 *Encyclopaedia Britannica* 377. In 1630 he and the parliamentary leader John Pym had founded a colony on the island of Providence, in the Caribbean. Greene, *The Foundations of American Nationality* 41 (1922).

Edward Zouche, Baron Zouche of Harringworth (c. 1556-1625). A diplomat, Zouche was ambassador to Scotland in 1593-94, and to Denmark in 1598. President of Wales from 1602 to 1615, he became one of the Commissioners of the Treasury at Salisbury's death in 1612. He was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne.* 1 Turner, *The Privy Council of England* 74 (1927). Zouche was a cousin, intimate friend and patron of Richard Zouche, one of the scholarly authorities for English maritime sovereignty (p. 67, *supra*) Lord Zouche was heavily involved in colonial enterprises. A

patentee of both the second Virginia charter of 1609 and of the New England charter of 1620 (Exhibits 11, 42), he was a member of the Council of the Virginia Company and also one of the first members of the Council for New England. As warden of the Cinque Ports from 1615 to 1624, Zouche had substantial responsibilities for the enforcement of English rights in the narrow seas. 21 *Dic. Nat. Biog.* 1330-32.

3. The English Discoveries and Symbolic Acts of Taking Possession Were Sufficient in Law To Establish Maritime Sovereignty.

Plaintiff seems to take the position that, admitting that England might have claimed sovereign rights in the seas adjacent to its North American colonies, it would have had to make some sort of occupation or appropriation in fact of those seas for its claim to be effective under the legal concepts of the time. That is plainly unsound. As Keller, Lissitzyn and Mann have demonstrated in their authoritative book *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800:*

> "Next, it may be asserted on the basis of the facts that the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or

> successfully opposed by continued occupation on the part of some other state." App. 822.[28]

Thus, even as to land areas, "effective occupation" was not regarded as necessary in the 16th, 17th and 18th centuries to create a valid and exclusive claim of sovereignty. *A fortiori* this was true of the adjacent seas. Under the established legal norms of the era, the establishment of sovereignty over a land area was regarded as entailing sovereignty over the adjoining territorial sea. See Tr. 1219. That this was true under English law we have demonstrated at length. It was likewise true under international law. The Supreme Court has recognized that this was established law in the colonial period, and that discovery, without "effective occupation," was adequate to establish English sovereignty. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 573 (1823) (Marshall, C.J.); *Martin v. Waddell,* 41 U.S. (16 Pet.) 367 (1842); *Massachusetts v. New York,* 271 U.S. 65, 85 (1926). *Accord,* 1 Story, *Commentaries on the Constitution* §§ 2-38, pp. 6-18 (5th ed. 1905).

1 Oppenheim, *International Law* 510 (1947), cited and relied on by plaintiff, is fully in accord with our position:

> "In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. Although even in the age of the discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his

[28]The quotation is from the conclusion of the work. The authors' conclusions are supported by a careful and exhaustive analysis of the evidence.

explorations, the taking of possession was frequently in the nature of a mere symbolic act. Later on a real *taking possession* was considered necessary. However, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation,[3] or until the nineteenth century that the practice of the States accorded with this postulate.

"[3]For an interesting and scholarly survey see Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts*, 1400-1800 (1938)."

William Bollan, an "able lawyer" in Massachusetts and agent for that colony in London, writing in 1764, founded "the ancient right of the English nation to the American fishery" on Cabot's discovery and Gilbert's symbolic acts, in the same manner as British entitlement to the land mass of North America was invariably justified. Exhibit 669; App. 766-71. Keller, Lissitzyn and Mann regard Gilbert's acts of taking sovereignty as typical of the period, *op. cit.* at 62-65; and control of the fisheries was the principal motive for the Gilbert expedition.

4. The Common Law of England, Including the Law of Maritime Sovereignty and Dominion, Became Law in This Country.

The English colonists considered, in general, that they brought the common law of England with them to their new home.[29] This was indeed explicity from the beginning: the King's Orders and Instructions of 1606 to the King's Council for Virginia provided that the law in the colonies should be "in substance as near to the common law of England,

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[29]The common law included the prerogative. Exhibit 755. This doctrine was restated by William Bollan in 1766. Exhibit 672, pp. 10-11.

and the equity thereof, as may be," and most of the colonial charters contain similar formulas. As a body of American common law grew up, it remained established doctrine that the common law of England was in force in this country except where inappropriate for some reason to conditions on this side of the Atlantic. "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law." 1 Story, *Commentaries on the Constitution of the United States* 140 (1833). See Tr. 802-37, 1278-86, 1721-27, 2032-33, 2341-46. Additional citations are unnecessary for a proposition that cannot be questioned without frivolity.

Plaintiff has not suggested, and cannot suggest, the slightest reason why the English common law bearing on sovereignty and ownership of the sea and seabed in adjacent waters might have been considered inappropriate here. There might, of course, have been a reason for such inappropriateness, particularly as the colonies came to feel more self-reliant and independent, if the crown had sought to retain for itself in American waters all the rights of sovereignty and property which the English law gave it. There could be no such inappropriateness, however, if the crown granted or delegated its rights to the colonial

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The American revolutionary statesmen had no quarrel with the royal prerogative, but rather with the purported legislative power of Parliament. The petition to the king adopted by the first Continental Congress in 1774 declared, "we wish not a diminution of the prerogative." 1 Journals of the Continental Congress 119; McIlwain, The American Revolution: a Constitutional Interpretation 116 (1923). Indeed the revolutionary statesmen *relied* on the prerogative as the source of the crown's power, by the colonial charters, to establish new governments not subject to parliamentary legislation. *Id.* at 130-37; Adams, Political Ideas of the American Revolution 97 (1939).

proprietorships and governments on this side of the Atlantic.

Plaintiff's witness Professor Morris conceded as much:

> "Q Let's assume for the moment—I know you don't believe it—but let's assume a hypothetical that you think is contrary to fact, that the English common law in the 17th century gave the sovereign of the coast rights of ownership or paramountcy in the surrounding waters and the bed and subsoil thereof. If that were the common law of England in the 17th century, can you think of any motive which the colonists might have had to change it, or to deviate from it?
>
> "A The only motive they might have to change it or deviate from it was their very strong opposition to the navigation laws which involved English control of the sea and seaports; and there was violent opposition between 1644 and 1681. This could be a motive.
>
> "Q That would be a motive, I take it you mean against recognizing crown control of the sea?
>
> "A That's right.
>
> "Q It wouldn't be a motive against recognizing their own control of the sea, would it?
>
> "A No.
>
> "Q And it wouldn't have anything at all to do with the seabed, would it?
>
> "A No." App. 538.

5. The Exploitation of Fisheries and Other Marine Resources Was of Paramount Importance as an Objective of American Colonization.

We can confidently go much farther and say that, given the objectives of the North American colonization, it was in the highest degree appropriate, and indeed essential, that rights of sovereignty and property be asserted in the American seas. The objectives of colonization were, of course, primarily economic; and in the early stages—the period of the charters—they were focused not so much on settlement and production of crops as on the discovery and exploitation of fisheries and mineral resources. Knowledge of the rich North American fisheries was one of the principal incentives to the English colonization. There was great awareness also of sedentary fisheries, and it was hoped that pearls would be found. The search for gold and other minerals was likewise a paramount objective, and those involved were hardly ignorant that these could be found below as well as above low-water mark.[30] For the paramount importance of fisheries in the North American colonization, see generally Tr. 2055-57, 2283; Exhibit 179, p. 51; Exhibits 663, 664, 719, 720, 740, 741, 742, 748; Exhibit 777, pp. 300-12; U.S. Exhibit 368, p. 27; Rowse, *The Elizabethans and America* 46, 64, 71, 93, 101, 103-05, 109, 160-80 (1959); Greene, *The Foundations of American Nationality* 32-33 (1922). In these circumstances, rights of sovereignty and property in the adjacent seas and seabed—particularly the right to exclude foreigners from such resources as might be found—were of very considerable importance both to the authors and to the recipients of the colonial charters.

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[30]Selden noted that "it is well known to us that precious stones and pearls are very often found also in the Western Seas," and referred to the exclusive coral and pearl fisheries in Middle Eastern waters. Mare Clausum, p. 142.

When all these factors are considered together—the English law and practice of the period with respect to maritime sovereignty and dominion; the fact that the same persons were intimately involved both in the assertion and exercise of such sovereignty and dominion in Europe and in the process of American colonization; the established English law and practice regarding monopoly of newly discovered resources; the firm belief both of England and of the other colonizing powers that valid title could be established by discovery plus symbolic acts of sovereignty; the conspicuous importance of maritime and seabed resources as one of the principal objectives of colonization—we would be utterly astonished to find that England asserted and the charters conveyed no rights of sovereignty and property below low-water mark in the American colonies. It is fair to say that, given the background and the surrounding circumstances, we must approach the colonial charters with a strong presumption that we shall find that they recognized the adjacent seas and seabed as proper subjects for the exercise of sovereignty and ownership.

Plaintiff's witness Professor Thorne conceded as much with respect to exclusive fishing rights:

> "Q Can you think of any reason why the Crown, given its frame of mind in that era, would not have asserted its exclusive fishing rights off the North American coast?
>
> "A No, I think they would have tried to do it if they could, yes.
>
> "Q So that it is logical to assume that they would have tried to convey exclusive fishing rights by charter?
>
> "A Right, that's true." App. 555.

Likewise plaintiff's witness Professor Henkin, once his confusion as to the period in which the colonial charters were granted was cleared up, made the obviously necessary concession:

> "Q Is it not the fact then that the period of issuance of these colonial charters coincided precisely with the period in which the English sovereigns were most intensively aware of sovereignty over the sea and making the most expansive claims to that sovereignty?
>
> "A Well, it is obvious, so there is some coincidence of the two events, yes.
>
> "Q That being the case, can you think of any conceivable reason why they would not have wished to make claims off the North American coast similar to the claims they were making around England?
>
> "A If they were made around that period then I would withdraw that [*i.e.*, his testimony in chief that he would not expect the charters to contain maritime claims]. I don't have the expertise on the history of the period, but I was assuming that these claims [*sic;* charters] were dated at a later period when Great Britain had already abandoned these claims." App. 540-41.

Both the legal and political climate in which the charters were issued, and the provisions of the charters themselves, have been aptly summarized as follows:

> "The expansion of England was largely due to the efforts of this group which was composed of men drawn from the landed classes, of merchants and of sea-captains who had gained experience in the expeditions of Elizabeth's reign. Either as in-

dividuals or as members of a company these men had received charters granting them land and sea within certain limits, the power to organise a government and exercise jurisdiction within these limits, and the right to control the trade and fisheries of the plantation. It was the period of the great struggle between the Stuart kings and the United Provinces over the North Sea fisheries, and everyone was familiar with the attempts of the British government to compel the Dutch to buy licenses to fish for herring in the North Sea; they knew of the expedition under the command of Captain John Mason to collect the white penny from the fishermen of the west coast of Scotland; they were acquainted with the arguments of Selden, who in Mare Clausum, argued that the sovereignty of the British king extended from the shores of the British Isles uninterruptedly to the coasts ruled by other sovereigns. Though Selden did not discuss the question of British sovereignty over the North Atlantic [*sic;* see pp. 172-74, *infra*], by making grants of these waters the crown tacitly assumed sovereignty there. The colonial patentees then received grants of jurisdiction and territory which had to be turned into a source of profit. In an age when fisheries were a favorite speculaton and the North Atlantic was already frequented by ships of several nations, considerable interest was taken in the grants of sole fishing rights and jurisdiction by sea as well as by land." App. 784-85.

B. BRITAIN CLAIMED MARITIME SOVEREIGNTY IN NORTH AMERICAN WATERS.

In this subsection we shall summarize what the record shows as to the general claims, made by British legal writers and in official documents, regarding maritime sovereignty

on the corollaries thereof in North American waters in the 17th and early 18th centuries. More specific claims and examples of the exercise of rights of sovereignty or ownership will be reserved for later sections.

The first writer to deal with England's rights in American waters appears to have been Albert Gentili, regius professor of civil law at Oxford, who died in 1608, the year after the first settlement in Virginia at Jamestown. Gentili maintained that Spain and England, owning as they did both opposite coasts of the Atlantic in their own latitudes, were each sovereign over the seas extending between those opposite coasts. Alternatively, he relied on the established doctrine that every coastal sovereign had territorial waters of 100 miles. Exhibit 693, pp. 359-60.

As we have seen, the Anglo-Dutch dispute over the "Greenland" whale fishery, beginning in the second decade of the 17th century, involved waters which were at least sometimes deemed to extend as far as the North American coast (pp. 84-85, *supra*). The dispute unquestionably involved an English claim to maritime sovereignty and exclusive fishing rights, outside the British seas as traditionally defined, based on first discovery and use and on occupation of the nearest land mass. The dispute thus demonstrates the natural and inevitable attitude of the English government and crown towards maritime sovereignty in the adjacent seas of new English colonies.

Sir John Coke, Secretary of State, in 1632 asserted in the presence of the king that the crown owned the fisheries in the American seas. Exhibit 693, p. 235. In his "Propositions for Fishing," written the following year, Coke wrote that the British exclusive fisheries comprised three areas: the coasts of Britain and Ireland themselves, the North Sea, and the waters of the "North and Northwest discoveries," that is, North America. Coke urged that the British must be vigilant to prohibit the French and Dutch from fishing in American waters.

Sir John Boroughs, in his *The Sovereignty of the British Seas* in 1633, immediately after establishing (p. 22) that in the British seas the crown enjoyed sovereignty, jurisdiction and exclusivity of fishing, continued as follows:

> " . . . [H]is majesty is now absolute commander of the British Isle, and hath also enlarged his dominion over a great part of the western indies; by means of which extent of empire (crossing in a manner the whole ocean) the trade and persons of all nations (moving from one part of the world to the other) must of necessity, first or last, come within compass of his power and jurisdiction." *Ibid.*

As we have seen, the immediate occasion for Selden's authorship of *Mare Clausum* was the "Greenland" fisheries dispute, involving not the traditional British seas but the newly discovered whaling fisheries in northern waters sometimes regarded as extending to the coasts of America. In *Mare Clausum* Selden wrote as follows regarding British maritime sovereignty in American waters:

> "But there is, moreover, in the more westerly part of this open and main sea, another right belonging to the King of Great Britain, and that of a very large extent upon the Shore of America. Whereas Sir Humphrey Gilbert, Knight, did by authority of Queen Elizabeth transport a colony into the New World, with design to recover certain lands in the east parts of the Northern America, which the right belonged to the English dominion, the queen was by him as her procurator, put into a possession, for ever to be held by her and her heirs, both of the port called by the name of St. John (which is in the Island of Baccalaos [Newfoundland]) and also of the whole sea as well as land on every side, for the space of six hundred

miles. Then he recieved this new kingdom of the queen, as her beneficiary, having a branch and a turf delivered in his hands, according to the usual ceremony of England in transferring the ownership of lands and possessions. *Nor truly was it necessary that he should otherwise get the possession, from whence this dominion of the queen and her posterity had its original. For (as Paulus says well) there is no necessity that he who intends to take possession of a field, should walk about the whole, but it is sufficient if he enter any part of that field, so long as he doth it with a mind, thought and intent, to possess the field to its utmost extent and bound: Which saying may relate to seas, as well as lands, that were never taken into possession.* So that as Siculus Flaccus treating of occupied lands, saith, men did not possess so much land as they were able to till, but they reserved as much as they were in hope they might be able to till, the like also may be said of a sea so taken into possession. Look how much was reserved in hope of using and enjoying; so much also was bounded. But perhaps the first original of the dominion of this sea of America did not proceed from the possession that was acquired by Gilbert. He rather restored and enlarged the right of the crown here: for, that Island called Baccalaos, was added to the English Empire by Sebastian Cabot, in the time of Henry the Seventh. And it is certain that afterwards it grew to be a custom for the officers belonging to the High Admiral of England (in whose charge are all the seas subject to the King of England and Ireland, as King of England and Ireland) to demand tributes of such as fished also in this sea; which was (I suppose) a most evident token of the king's dominion.

> But it was provided by an Act of Parliament, in the reign of Edward the Sixth, that no tributes of that kind, to the grievance of fishermen, should be paid any longer. How far our English colonies, lately transported into America, have possessed themselves of the sea there, I have as yet made but little enquiry." *Mare Clausum*, pp. 441-42. (Emphasis added.)

This most interesting passage, among other things, thoroughly explodes plaintiff's contention that Selden's theory of maritime sovereignty was based solely on historic appropriation or possession and hence could have no application to American waters. To the contrary, Selden is in entire agreement with the general contemporary opinion that discovery plus symbolic acts were sufficient to establish sovereignty and ownership, over both land and sea areas. And while Selden says that he is ignorant how far the American colonists have actually taken possession of their adjacent seas, he plainly regards them as having rights of sovereignty and ownership therein whether they had taken possession or not.

The report of the admiralty commissioners to Charles I in 1636 (App. 719; Exhibit 693, pp. 288-89, 762-64; Exhibits 604, 223; pp. 78-79, *supra*) declares the king's ownership of the fisheries not only in the seas "devolved unto you from your royal predecessors" but also in the seas "of any other your dominions," that is, territories acquired by the English crown since Charles' accession in 1625, which were all in North America.

Needham's translation and edition of Selden's *Mare Clausum*, published in 1652 by the direction of the English government as a state paper, includes in the dedication the following verse addressed by Neptune to the Commonwealth of England:

"Go on (great State!) and make it known
Thou never wilt forsake thine own,
Nor from thy purpose start:
But that thou wilt thy power dilate,
Since Narrow Seas are found too straight
For thy capacious heart.
So shall thy rule, and mine, have large extent:
Yet not so large, as just, and permanent."
Exhibit 693, p. 411 n.1; Tr. 1289-90.

One's amusement at the flowery style of this poetic effort should not divert attention from the fact that it is evidence of recognition and awareness of an extension of British maritime sovereignty beyond the traditional "narrow seas" because of the establishment of British colonies in North America.

Robert Codrington, in his *His Majesty's Propriety, and Dominion on the British Seas Asserted* (published in London in 1665), evidences a like awareness:

> "There is also another dominion of the sea belonging to the king of Great Britain, and that of a very large extent upon the shore of America, as on the Virginian sea, and the islands of the Barbados and St. Christophers and many other places. . . ." *Id.* at 101.

Since this passage is preceded by a lengthy exposition of the standard British claim to maritime sovereignty and its usual attributes, including exclusive fishery and admiralty jurisdiction, in the British seas, there is no doubt that by "dominion" Codrington meant full territorial sovereignty and its corollaries.

The treaty between Great Britain and Spain, signed at Westminister in 1670, included the following provision:

> "XV. The present treaty shall in nothing derogate from any pre-eminence, right, or dominion, of either confederate in the American seas, channels, or waters, but that they have and retain the same in as full and ample manner as may of right belong unto them: but it is always to be understood, that the liberty of navigation ought in no manner to be disturbed, where nothing is committed against the genuine sense and meaning of these articles." Exhibit 736, p. 400.

Similarly, the Treaty of Peace between Great Britain and France, signed at Whitehall in 1686, included the following:

> "It is agreed that each king shall have and retain for himself all dominions, rights and prerogatives in the seas, straits, or other waters of America, with the same amplitude which belongs to each by right and in the same manner in which he now enjoys them." Exhibit 737, p. 91, Article 4.

While these treaty provisions are very general in their terms —doubtless because the parties would have found it difficult to agree on all the specifics—they are hardly consistent with, for example, Dr. Kavenagh's notion that sovereignty and ownership were regarded as ending at high-water mark on the Atlantic coast of the British North American colonies. As to the "dominions," "rights," "preeminences" and "prerogatives" referred to, we have seen that English law and practice in the 17th century was more than adequate to provide specific content to those otherwise general terms.

There can be no doubt that the territorial jurisdiction of the Lord High Admiral of England was regarded as extending to the territorial seas of the North American colonies, since the commissions of the admirals and judges

in plain language referred to those colonies and gave the admirals jurisdiction in their seas. Exhibits 639, 640; see also Exhibit 675, 3d page of preface.

In 1688 the crown granted to Sir Robert Holmes for a three-year period all goods belonging to or seized by pirates "upon the land in any part or parts of America, or any the islands or sea limits or territories thereof." App. 368.

A fisheries tract of 1719, after affirming British sovereignty in the British seas, referred to the British exclusive fisheries of New England and Newfoundland. App. 694. Burchett, writing in 1720, claimed for the British crown the seas of "Newfoundland and the adjacent parts of North America," by virtue of Cabot's discovery and Sir Humphrey Gilbert's taking of possession, as well as the northern seas as far as the shore of Greenland on the basis of Sir Hugh Willoughby's "invention" and the discovery and exploitation of the whale fishery by the Muscovy Company. App. 775. Lediard, writing in 1735, is of the same view in almost the same words. App. 827.

Professor Henkin, more candid on this point than some of plaintiff's other witnesses, recognized that Great Britain claimed exclusive fishing rights in North American waters. Tr. 2628-30.

In 1720 the law officers of the crown issued a most interesting opinion demonstrating their conviction that the seas adjacent to the American colonies were within the boundaries of those colonies. In 1700 Parliament had enacted a statute providing for criminal trials in admiralty cases, pursuant to commission, "in any place at sea, or upon the land, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories." 1 Crosskey, *Politics and the Constitution* 450 (1953). In 1720 the question arose whether commissions could be issued under the statute for trials in any place at sea throughout the

world, or whether there were limitations. The law officers advised the crown that the proper construction of the statute was that the words "in any place at sea" were modified by the words "in any of his majesty's islands, plantations, colonies, dominions," etc., and that in consequence commissions for trials at sea could not be issued for "any place at large upon the sea" but only for trials in "the sea adjoining" to particular colonies. *Id.* at 452. This may or may not have been the most reasonable construction of the statute, and Crosskey disagrees with it; its significance for our purposes is that the law officers saw nothing anomalous about the formula "in any place at sea . . . in any of his majesty's . . . colonies." They plainly believed that the colonies had territorial seas and that those seas were within the boundaries or limits of the colonies themselves. The statute, incidentally, provided for jurisdiction over "all piracies, felonies, and robberies committed upon the sea, or in any haven, river, creek, or place where the admirals have power or jurisdiction," with no distinction between crimes committed by subjects and by foreigners. 6 Viner, *Abridgement* 511 (2d ed. 1792).

C. THE COLONIAL CHARTERS, CONSTRUED IN THE LIGHT OF CONTEMPORARY LEGAL USAGE, CONVEYED EXTENSIVE RIGHTS BOTH OF SOVEREIGNTY AND OF PROPERTY IN THE MARGINAL SEAS.

The 17th-century colonial charters are generally similar in language; there is no need in this brief to discuss all of them, which the witnesses in any event have done. We shall analyze the pertinent provisions of two typical charters, and then shall point out certain variations in the language of others.

1. The Second Virginia Charter of 1609

The pertinent portions of the second Virginia charter of 1609 read as follows:

> "all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest; *And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid;* Together with all the *Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones,* Quarries, Woods, *Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences within the said Territories, and Precincts thereof, whatsoever, and thereto and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which We, by our Letters Patents, may or can grant,* in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." Exhibit 42, pp. 3795-96; App. 263-64 (Emphasis added.)

Also granted was the right

> "to dig and to search for all manner of Mines of Gold, Silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and [any] part of the mainland not formerly granted to any other." Exhibit 42, p. 3798; App. 264.

The letters patent further provided

> "that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." Exhibit 42, p. 3801; App. 264.

Professor Smith has given some of the reasons which compel the conclusion that this language was intended to convey, and as a matter of English law did convey, territorial sovereignty and ownership in property of the seas and seabed out to 100 miles in the Atlantic. App. 264-66. His conclusion cannot seriously be questioned.

Among the rights conveyed are jurisdictions, royalties and franchises, all "by sea and land." *Jurisdictions*, of course, included the admiralty jurisdiction; and we have explained at some length what that consisted of, and on what basis it was considered to rest, in 17th-century English law (pp. 92-98, *supra*).[31] The term *franchises* was in common

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[31] Provisions in other charters confirm that the admiralty jurisdiction was territorial. The Gorges charter of 1639 for Maine is perhaps unique in specifying different distances for admiralty jurisdiction than for other purposes: the seas and islands were conveyed out to five leagues, but the admiralty jurisdiction to 20 leagues. App. 274, 277. The Maryland charter conferred admiralty jurisdiction in "the sea of those

use as including, among other things, exclusive fisheries, as Blackstone, Hall and Moore have all pointed out. App. 858-59; Exhibit 729, pp. 20, 33. The term *royalties* (sometimes *regalities* or *regalia*) was well understood to include the crown's rights of sovereignty and propriety in the adjacent seas and seabed, and is the normal term a 17th-century conveyancer would have used to grant such rights. App. 254, 555, 556-58; pp. 13, 58, 59, 60, 73, 74, 78, 79, 81, 83, 86, 89, 90, 96, 109, 112, 113, 114, 116, 133, *supra*.[32]

Why did the authors of the charter not simply write that the boundaries or territory of the colony were to include the seas out to 100 miles? The linguistic or legal usage of any period is based on unarticulated assumptions, which may or may not be wholly obvious to later generations. At the time the charters were written, a territorial sea, usually defined as 100 miles in width, was regarded not as a separate or independent piece of territory, to be conveyed separately, but as an accessory or appendent of territorial sovereignty on land.[33] The legal climate today is not significantly different on this point. A study of 20th-century peace treaties, acts of independence and instruments

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parts," App. 285. Plaintiff's witness Dr. Kavenagh admitted that the admiralty jurisdiction conferred by colonial charters was territorial in that it was to be exercised within fixed maritime bounds. Tr. 2050-51.

[32]In 1700 William Penn asserted his conviction that the grant in his patent of "the royalties of both land and water" made him "lord of the waters," with power to serve writs, admiralty jurisdiction and rights of property in the territorial sea. Exhibit 284, p. 349; Exhibit 285, pp. 140-41; App. 335.

[33]Similarly, in 1817, in the arbitration concerning title to the islands in Passamaquoddy Bay and the Bay of Fundy, the United States contended that islands within a reasonable distance from a mainland coast are dependent on it and pass, even without an express provision, along with a conveyance of the mainland. "Case of the United States," 6 Moore, International Adjudications 47, 58-60, 71, 107 (1933).

ceding territory would rarely, if ever, reveal explicit mention of a territorial sea or a continental shelf. These are regarded as passing automatically and implicitly along with sovereignty over a land area which has a coastline. The 17th-century attitude was substantially identical; indeed, the 17th-century documents are much more explicit than would be regarded as necessary or normal today.

The text of the 1609 charter suggests that, while the territorial sovereignty of the adjacent sea was regarded as passing automatically, it was considered necessary or at least prudent to mention specifically the attendant rights of property and government in those seas—the soils, the mines, the pearls, the fisheries, the admiralty jurisdiction, royalties and franchises. It is perhaps unclear from the text whether the adjacent sea was regarded as part of the "territories" or as part of the "precincts thereof" or "thereabouts . . . or in any sort belonging or appertaining." *Precincts*, Dr. Kavenagh to the contrary, included surrounding or adjacent areas, not merely subdivisions of the territory itself. Tr. 2072.

It is essential to understand, finally, that to a 17th-century mind a conveyance of "all the islands lying within 100 miles along the coast" was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. Over and over again, the writers of this period identified sovereignty and ownership of islands with sovereignty and ownership of the sea surrounding such islands and intervening between them and the mainland. Callis, for example, wrote that the islands in the English seas are part of the realm *because* they are in the English seas, which are themselves part of the realm. App. 781. Hale, likewise, considered that islands in the British seas are parts of those seas, which, with the bed thereof, belonged to the crown. Moore, *op. cit.* at 358.

Justice, seeking to prove British sovereignty and ownership of the British seas, argued that England is in possession of all the islands within those seas; to Justice, that is proof of dominion over the seas themselves. Exhibit 710, p. 154. Selden was to the same effect. *Mare Clausum,* pp. 333-43, as was Malynes, App. 663-64.

This mode of thinking can be traced back directly to Bartolus (1314-1357), the most famous jurist of the middle ages. Bartolus' view is described by Fenn, App. 798-803. "An island is regarded as part of the mainland, as it were, sticking to it . . . . It goes with the territory nearest to it." App. 800. A state automatically has extended power out to sea, entailing property in the islands and jursidiction in the sea itself. (The rights in the sea were not yet thought of as ownership, though that development followed inexorably.) Bartolus declares that he who has jurisdiction in territory adjoining the sea has jurisdiction in the sea also. App. 265, 802. To what distance? Without answering the question he turns to islands, and says that because there is jurisdiction over the sea there is jurisdiction over the islands also. He then arrives at 100 miles from the coast as the distance to which that jurisdiction over islands extends. This was later interpreted to mean jurisdiction over 100 miles of adjacent sea. Bartolus probably intended this, and "it follows from his reasoning," since "the state's jurisdiction over the islands in the adjacent sea is made to depend upon the jurisdiction of the state over that part of the sea." App. 802-03.

The integral linkage of seas and islands is likewise apparent in *De Superioritate Maris,* which founded England's sovereignty over the English seas on the fact that "the kings of England, by reason of the said kingdom, . . . have been in peaceable possession of the dominion of the sea of England and of the isles being in the same. . . ." App. 651.

Plainly, this background must be understood before the words used in the charters can be fully appreciated. Once

the background is understood, we submit, any superficial ambiguity in the charters is resolved.[34]

That a grant of islands was regarded as granting the intervening sea as well is further confirmed by language in at least two of the subsequent charters. The Maryland charter of 1632, App. 645-46, conveys all islands within ten leagues of the shore. It then goes on to convey the fisheries "in the sea . . . within the premises," except that free fishing to English subjects is reserved "in the sea . . . of the province aforesaid." What was the "sea within the premises," "the sea of the province"? Quite apparently, it was the sea within ten leagues of the coast, even though the reference to ten leagues reads in terms of islands rather than of the sea itself. There is no other language in the charter which can possibly be construed as creating a "sea of the province." Dr. Kavenagh, after struggling to resist the obvious, at length admitted that it could only be the language conveying islands within ten leagues which created a sea of the province and a sea within the premises. App. 531-35.

Similarly, the lease of Virginia to Arlington and Culpeper in 1673 conveys all islands within ten leagues of the coast. The charter goes on to convey "the royalty of the said seas . . . aforegranted." U.S. Exhibit 60. Yet no seas

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[34] In the second Gulf States litigation, the Court held that an early 19th-century boundary formula referring to islands within certain limits did "not appear on its face to establish a boundary line that distance from shore," and said that nothing in the history of Mississippi and Louisiana had been shown to require departure from that conclusion. United States v. Louisiana. 363 U.S. 1, 81-82 (1960). In his separate opinion Justice Black, who had written for the Court in *California*, conceded that this "islands" language provided "some color of title" to boundaries in the sea and that Congress had regarded the language as highly significant. *Id.* at 96-97. In the present proceeding, unlike the Gulf States litigation, we have a record which permits construction of the "islands" language in 17th-century charters in the legal and semantic context of that time.

have expressly been referred to or granted as such—only the islands have been referred to and granted. Yet the assumption that the grant of islands within a certain distance included within it a grant of the seas themselves to that distance was so strong that it determined even grammar: the draftsmen of the charter could and did refer to "the said seas" when only islands had previously been mentioned. Dr. Kavenagh was unable to suggest any other explanation of how the charter could have been constructed as it was. App. 528-31.

Another example of the same type of construction is found in a deed of Nova Scotia in 1630 from the Earl of Stirling to the Baron de la Tour. The deed grants "all the country, coasts and islands" within defined limits, and later in the same sentence "all the fruits, profits and emoluments" "of all the which said lands and seas," though no seas have been explicitly mentioned as such. 1 Moore, *International Adjudications* 92 (1929).

The third Virginia charter, of 1612, provides that its purpose is to create "a more ample extent of their [the colony's] limits and territories into the seas adjoining to and upon the coast of Virginia . . ." App. 363. This is an authoritative interpretation that the second charter did create limits and territories in the seas adjoining, which are now to be made more ample. The third charter also differs slightly in phraseology from the second in granting all soils, jurisdictions, royalties, franchises, etc., both on the mainland "and also within the said islands and seas adjoining"—language that can leave no doubt that both territorial sovereignty and rights of property in the main sea were conveyed. App. 364.

2. The New England Charter of 1620

The boundaries of the New England colony were stated in its charter of 1620 as follows:

> "that all that Circuit, Continent, Precincts, and Limits in America, lying and being in Breadth from Forty Degrees of Northerly Latitude, from the Equinoctial Line, to Forty eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Main Land, from Sea to Sea, with *all the Seas,* Rivers, *Islands,* Creeks, Inlets, Ports, and Havens, within the Degrees, Precincts, and imits of the said Latitude and Longitude, shall be the Limits, and Bounds, and Precincts of the second Colony: . . . ." Exhibit 11, p. 1829; App. 270. (Emphasis added.)

The granting language was as follows:

> "all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territories, viz, the aforesaid Part of America, lying and being in Breadth from forty Degrees of Northerly Latitude from the Equinoctial Line, to forty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Main Land from Sea to Sea, together also, with the . . . *Fishings, Mines,* and *Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones,* Quarries, and *all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining:* Provided always, that the said Islands, or any of the Premises herein before mentioned, and by these Presents intended and meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate, nor be within the Bounds, Limits, or Territories, of that Southern

> Colony heretofore by us granted to be planted by diverse of our loving Subjects in the South Parts, to have and to hold, possess and enjoy, all, and singular, the aforesaid Continent, Lands, Territories, *Islands,* Hereditaments, and *Precincts, Sea Waters, Fishings,* with all, and all Manner their *Commodities, Royalties, Liberties, Preeminences, and Profits,* that shall arise from thence, with all and singular their Appurtenances, and every Part and Parcel thereof, and of them . . . ." Exhibit 11, p. 1834; App. 270-71. (Emphasis added.)

The favorable-construction clause also was included:

> "And further our will and Pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty or Instruction or Interpretation of any Thing contained in these our Letters-patents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and their Successors, and every Member thereof." Exhibit 11, p. 1840; App. 271.

Here, in addition to the same formulas as appeared in the second Virginia charter, we have express statements that "all the seas" specified are within the boundaries of the colony, that "sea waters" are among the properties conveyed, and that the royalties and other benefits include those "within the said islands and seas adjoining." What is missing, however, is the specification of 100 miles or any other distance from the shore.

In its grant to Gorges and Mason in 1622 (App. 641), again in its grant of Mariana to Mason in 1622 (App. 642), and yet again in its grant of New Hampshire to Mason in 1629 (App. 644), the Council for New England authoritatively described the charter to it of 1620 as having conveyed the

land area "together with the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid." This most interesting interpretation obviously sheds decisive light on how we are to interpret both the 1620 charter and the many other charters and patents which speak of the adjacent islands and seas without specifying any particular distance. The Council doubtless based its construction on one or both of two factors, probably on both: first, that 100 miles was generally understood in English law at the time to be the breadth of the territorial sea in the absence of special historic factors; second, that the charter of 1606 had established or recognized a uniform 100-mile territorial sea all up and down the Atlantic coast and that such boundaries were implicitly incorporated into subsequent charters for particular areas.[35]

The "first division" of its lands made by the Council for New England in 1622 is likewise instructive as to how the Council interpreted its charter and as to the linguistic usage of the time. The Council agreed, for example, that the Duke of Lennox was to have a certain tract of land with boundaries "three leagues into the sea." App. 1003. When later in the same meeting Sir Ferdinando Gorges came to define this grant in conveyancer's language, he described the land area and added "with all the fishings, bays, havens, harbours and islands lying or being within 9 miles directly into the sea." App. 1005. The Earl of Arundel's division went through a similar process of definition and

[35] Plaintiff's witness, Dr. Kavenagh argued that the Council for New England was uncertain, and continually changed its mind, as to what it had been granted. He bases this (1) on the fact that certain other grants by the Council, in describing the 1620 charter, did not mention the 100-mile limit but merely referred back to the text of the charter for its boundaries, and (2) on the fact that the sea boundaries conveyed by the Council to its grantees were less than 100 miles off shore and differed from grant to grant. The argument is frivolous. See Tr. 2113-21, 2151-53.

description. App. 1003, 1005. These minutes confirm that the Council interpreted its charter as giving it boundaries in the sea which could be subdivided among the members. The minutes also show, most interestingly, that boundaries in the sea—"three leagues into the sea"—were regarded as accurately conveyed by language specifying fishings and islands within nine miles into the sea, without an express conveyance of the sea itself. This further confirms the position outlined above that a grant of islands within a certain distance was regarded as a grant of the intervening sea.

The patent of Mariana by the Council to Mason in 1622 expressly granted all the seas and islands within three miles of the land area conveyed. App. 643. The Council's grant to Gorges, Mason and others of the Piscataway area in 1631 conveyed "all the seas within 15 miles of the foresaid sea coasts," together with all the soil, mines, fisheries, royalties, franchises, etc. App. 311-12.

Other charters used formulas slightly varying from those so far discussed. The Newfoundland charter of 1610 granted "the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid." Exhibit 179, p. 53; App. 329. The grant of Nova Scotia to Sir William Alexander in 1621 conveyed the "islands or seas lying near or within six leagues from any part of" the mainland on the west, north and east sides, and to the south, "all the seas and islands . . . within forty leagues of the said shores." 1 Moore, *Arbitration Digest* 20 (1898); 6 Moore, *International Adjudications* 136 (1933). The boundaries created by the 1662 charter of Nova Scotia extended "30 leagues into the sea." App. 331; Exhibit 240, p. 101. The Hudson's Bay charter of 1670 conveyed the right of sole trade in all "seas," etc., "that lie within the entrance of the straits, commonly called Hudson's Straits" with all fishings "in the seas . . . within the premises" and "the royalty of the sea upon the coasts." Exhibit 777, p. 229; Exhibit 765; 33 *British and Foreign State Papers* 1364, 1370.

The Nova Scotia charter of 1621, with its express grant of territorial seas, was confirmed by a statute of the Scottish Parliament. 6 Moore, *International Adjudications* 14 (1933). Obviously, Parliament believed that boundaries in American waters extending at least 40 leagues from shore were legally proper. The British in the 18th century regarded the boundaries of Nova Scotia as those established by the Alexander charter. Exhibit 768, pp. 90-91, 97. In 1817 the United States agent in the boundary arbitration with Great Britain construed the Nova Scotia charter of 1621 as follows:

> "By the charter to Alexander he must have been the unqualified proprietor of all rights of fishing in the Gulf of St. Lawrence, in the Bay of Passamaquoddy and round his whole shores for six leagues from the coast, and in part for forty leagues, because his sweeping clause of title expressly gives him all the 'bays, shores, islands or seas' within that distance. It is not merely a right of jurisdiction, but of actual property; it is an indefeasible fee simple estate which is granted. It is not the claim of national sovereignty to the marine league which by the law of nations belongs to an independent community, but it purports to grant, and does in fact grant the same title to the sea for six leagues, that it does to any part of the lands upon the continent." "Case of the United States," in 6 Moore, *International Adjudications* 47, 161 (1933).

Nova Scotia as chartered in 1621 lay within the bounds granted by the New England charter of the preceding year. Gorges and Mason had consented that Nova Scotia be carved out of New England "within the bounds" granted by the New England charter. Gorges, quoted at 6 Moore, *International Adjudications* 243 (1933); see Exhibit 673, p.

25. Thus the Nova Scotia charter's express conveyance of "seas" is yet further confirmation, if any were needed, that the New England charter conveyed seas.

3. Modern Interpretations of the Charters

Prior to 1947 the Supreme Court uniformly construed the colonial charters entirely consistently with the views set forth above. In *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 412 (1842), in construing the charter of New York, the Court declared:

> "The object in view appears upon the face of them [the letters patent]. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usage of England; and in which the duke, his heirs and assigns were to stand in the place of the king, and administer government according to the principles of the British constitution . . . . The estate and rights of the king passed to the duke, in the same condition in which they had been held by the crown and upon the same trusts. Whatever was held by the king as a prerogative right, passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters-patent with 'other royalties' and conveyed as such . . . . And in the judgment of the court, the lands under navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him, in the same manner, and for the same purposes, that the navigable waters of England, and the soils under them, are held by the crown."

And in *Shively v. Bowlby*, 152 U.S. 1, 14, 16 (1894), the Court declared as follows:

> "The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters."
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> * * *
>
> "By those [colonial] charters . . . 'the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred . . . ' '[T]he lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; . . .'"

Many State cases are to the same effect. *E.g., Barker v. Bates*, 13 Pick. 255 (Mass. 1832); *New York, N.H. & H.R.R. v. Horgan*, 56 Atl. 179 (R.I. 1903); *Dunham v. Lamphere*, 3 Gray 268 (Mass. 1855) (sea fisheries); *Nichols v. Boston*, 98 Mass. 39, 42 (1867); *Gough v. Bell*, 21 N.J.L. 156, 160 (1847); *People v. Trinity Church*, 22 N.Y. 44, 46-47 (1860); *Commonwealth v. Newport News*, 158 Va. 521, 164 S.E. 689 (1932).

The United States will probably contend that such decisions had reference only to internal waters, *i.e.*, rivers, harbors and perhaps bays. Suffice it to say that there is not a word in any of the opinions which suggests such a distinction, and that no trace of any such distinction can be found in the English common law on which both the charters and the judicial decisions were founded. Many decisions are expressly inconsistent with such a notion; *e.g.:*

> "[T]he king is held to be owner of the soil under the sea, which royal right, by the common law of

> England, extends over the shore where the tide ebbs and flows to ordinary high water mark . . . .
>
> " . . . [W]e have no doubt, that by the charters of Charles I and James I, under which the land of the colony of Massachusetts was granted, for the purpose of founding a colonial government of English subjects, all the rights to the sea and sea-shores, with the incidental rights of fishing, were granted to the colonists . . . .
>
> "[A]ll the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the sea ebbs and flows, did vest in the grantees under those charters. Whatever right or jurisdiction, if any, remained in the crown after those grants, it is clear that it ceased on the establishment of independence, and has remained absolute in the States." *Weston v. Sampson,* 62 Mass. (8 Cush.) 347, 351-53 (1851) (Shaw, C.J.).

In *United States v. California,* 332 U.S. 19, 32-33 (1947), the Court, without the benefit of any evidentiary record, dismissed the charters as follows:

> "Neither the English charters granted to this nation's settlers, . . . nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth."

Of course the Court was correct that the charters did not create a three-mile belt: no one had ever heard of such a thing at the time of the charters, and the territorial seas they created were much broader, usually 100 miles either explicitly or implicitly. And the rights created in the marginal sea were not "private," but rather pertained to the coastal government just as they did in English waters.

In the present case, the record contains, besides a great wealth of historical and legal evidence bearing on the background, terminology and proper construction of the charters, interpretations of them by Professors Smith and Flaherty and by Dr. Kavenagh. We submit that on the basis of credentials, knowledge of the relevant areas of law and history, cogency of reasoning and behavior on cross-examination, the testimony of Professors Smith and Flaherty merits far greater weight than does that of Dr. Kavenagh. The latter is not a lawyer, was not qualified as an expert in either English or American law, and is not even an expert on English history—the milieu in which the charters originated. His unfamiliarity with English history and law during the pertinent period is striking; see, *e.g.*, Tr. 2075-76, 2131-32. He believes in a clear and sharp distinction between inland waters and the sea, Tr. 2076-78, 2090, although nothing of the sort can be found in English law or practice at the time. His entire testimony was based on the clearly erroneous view that under 17th-century English law the sea and seabed were not susceptible of ownership. Tr. 2072-74, 2097, 2120-21, 2132-37, 2142, 2151, 2153-56, 2174. His testimony generally was not such as to inspire confidence in his conclusions or in the accuracy of his research. See App. 528-29; Tr. 1422 (compare this with Tr. 2025-29 and Exhibit 754), Tr. 2037-38, 2041-43, 2081-82, 2090-91, 2093, 2102-03, 2108-12, 2179, 2186-87, 2193-94, 2205, 2211-20, 2224-34, 2240-41.

Dr. Kavenagh appears to give away plaintiff's entire case at App. 535-36, where he concedes that the maritime "jurisdiction" which all the colonial charters contain was sufficient to entitle the grantees to the exclusive right to exploit pearls or shellfish five miles off the coast. And Dr. Kavenagh referred to the colonial right to exclude or to license foreign fishermen as "exercising the jurisdiction." App. 536. Such rights, whether called "jurisdiction" or anything else, are plainly enough to sustain the position of the Common Counsel States in the present proceeding.

Finally, Dr. Kavenagh conceded (App. 537) that if he was mistaken concerning the state of English law and legal terminology in the 17th century, his testimony would fall. Since he was indeed mistaken, his testimony does fall.

The only way plaintiff has suggested to avoid the conclusive force of the grant of "royalties" in the colonial charters is Professor Wroth's argument that royalties were a part of the prerogative and such rights had to be more specifically mentioned; therefore, the Professor opines, a general reference to "all royalties" or "all royalties by sea and land" conveyed nothing whatsoever. Tr. 2793-94.[36] The argument, of course, flies in the face of the accepted principle of the common law that words in a grant are wherever possible to be construed as effective rather than as a

[36] Pl. Br. 129-30 accuses Professor Smith of inconsistency in not asserting that the third Virginia charter and the Heath patent conveyed the seas all the way to Bermuda and the Bahamas, respectively. Professor Smith pointed out the particular language in the third Virginia charter which led him to that conclusion. App. 269. As to the Heath patent, it was not one of Professor Smith's exhibits and Professor Smith naturally said "I haven't seen anything" to lead him to an opinion as to the extent of its maritime grant.

nullity.[37] Obviously, the crown's lawyers were not childish people who used flowery language to no effective purpose. Professor Wroth's argument, of course, also flies in the face of the favorable-construction clauses of the charters.

Gould gives the conclusive answer to plaintiff's argument:

> "Although royal grants to individuals, for private purposes, include only what is expressly granted, and pass nothing by implication, yet, in the case of a grant by the Crown of extensive foreign domains, where the obvious intent of the grant is not merely to vest the Crown's right of property in the grantees, but also to invest them with civil and political powers, and to establish complete though subordinate sovereignties, a different rule has been held applicable in this country. The grant of King James I, in November, 1620, to the council of Plymouth, upon the basis of which most of the others were framed, expressly named, as included in the grant, not only the lands described, but also all havens, ports, rivers, waters, fishings, mines, etc., and all and singular other commodities, jurisdictions, royalties, privileges, franchises, and preeminences, both within the tract of land upon the main, and within the islands and seas ad-

[37] *E.g.*, 26 C.J.S. § 86b (1)(1956); 4 Tiffany, The Law of Real Property § 981 (1939); Saulsberry v. Maddox, 125 F.2d 430 (6th Cir. 1942); Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

Plaintiff relies (Pl. Br. 127-28) on an opinion of 1723 that the New Jersey charter did not convey royal mines. The opinion never mentioned the word *royalties*, and its authors may have overlooked its presence in the charter. The result was doubtless influenced by the fact that the New Jersey proprietors had surrendered their governmental rights, and the opinion could well have reached that result on the ground that the surrender included royalties. The opinion gives no reasoning, and states that the proprietors had not been heard on the subject.

> joining; and, although such words as ports, rivers, waters, or fishings, may be insufficient, in the case of a private grant, to convey the soil, yet the other words employed, and especially the word 'royalties,' in connection with the manifest purpose of the grant, were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters, and to invest them with such powers of legislation and administration as were necessary to advance the prosperity of the colonists. Such was the construction adopted by the Supreme Court of the United States, and by the Courts of Massachusetts, New Jersey, and Connecticut. It is doubtless consonant to the law of England. Thus, in *Doe v. East India Co.*, before the Privy Council, it appears to have been conceded that the defendants, as representing the Indian government, had a freehold in the bed and shores of the navigable rivers of India. Upon this principle the colony of Massachusetts passed the ordinance of 1647, by which the seashores and flats of the colony, down to low-water mark, not exceeding one hundred rods from high-water mark, were made the property of the littoral proprietors. In *Brookhaven v. Strong*, in New York, a grant of an exclusive right to the soil and the oyster fisheries in an arm of the sea, which was made by the colonial government, and was ratified and confirmed by the colonial assembly, was held to be valid." *Op. cit.* at 70-72.

Likewise, Angell gives the answer, as commonly understood in this country in the early days of the Constitution:

"The territory, therefore, which was discovered, acquired and possessed by the early settlers of this country, although it was separated from the principal establishment, or mother country, might be considered as a part of the British empire, and subject to the rules and provisions of the British system of jurisprudence. Hence, not only the jurisdiction of the British sovereign extended over the possessions which were acquired by the colonists from the native occupants by grant or conquest, but also his *jus proprietatis*, or right of property in all the tide waters included in these possessions existed, at least to the same extent, as in the tide waters of England.

"But inasmuch as the king by virtue of his prerogative was authorized to create *political* power in this as in all countries newly discovered and possessed by his subjects, the colonies on receiving the royal charters, were invested with a *political character*, by which they succeeded to all the territorial interests, which had previously belonged to the sovereign power of the parent country. These charters, it is to be observed, were in the nature of grants, and were conferred by the king, on the idea that he was proprietor. But as they respectively created *governments*, they were not construed as his other grants were; that is as not excluding arms of the sea, &c. but as *including* them. And thus the governments of the several colonies had ample authority to alter the established law with regard to their tide waters, or to grant an exclusive property therein, at their discretion.

"If any doubt could be entertained on general principles, as to the property of the tide waters of

> this country being in the king before the charters were granted, it will be removed by referring to the charters. What is particularly alluded to, is the reservation of the right of fishery, which, (as will be shown, in the following chapter,) is contained in several of the charters; the object of which, was to prescribe how far this important and, *prima facie* public right, might be restrained by any colonial enactment. By a reservation of this kind, it is clear that the king considered himself as the undoubted legal proprietor of the tide waters; for if he had not thus considered, then to qualify his grants by such a reservation was manifestly absurd." Angell, *The Right of Property in Tide Waters* 36-38 (1826).

None of the authorities relied on by plaintiff stands for so absurd a proposition as that a conveyance of "all royalties" passes nothing because each royalty must be mentioned separately. The cases abstracted in 17 Viner, *General Abridgement* 130-39 (2d ed. 1792), simply show that where the granting language is vague or ambiguous it will be construed rather narrowly. A typical example is *Grabham v. Geales*, 81 English Reports 995 (1619), specifically relied upon by plaintiff. The rule was, moreover, one of intent, 17 Viner at 133, 135; *Grabham v. Geales, supra; Basket v. University of Cambridge*, 96 Eng. Rep. 59, 61, 64-65 (1758).[38] and applied to grants to "a common person," 17 Viner at 133, it not being presumed that the crown intended to grant governmental or royal rights to such per-

[38] Plaintiff cites the argument for defendant (not the opinion) in the *Basket* case, 96 Eng. Rep. at 64, that "the king cannot convey special prerogative rights by general words, where there are general prerogative rights, that may pass to satisfy the grant." The argument went on to give illustrations that the rule is never applied, if another construction is at all possible, to make words in a grant wholly void. That is exactly the application plaintiff seeks here.

sons unless the intent was made very clear. Thus the rule did not apply to colonial charters, which were plainly governmental, and indeed was expressly negated by the most-favorable-construction clauses of the charters.

A good illustration of the application of the rule in cases involving private parties is the case discussed at 17 Viner at 138-39. While the general rule was that a grant of "all mines" did not include royal mines, nevertheless, if the king had a royal mine and no other mine in the land of J.S. and granted "all mines, which he has in the land of J.S., by this grant the mine royal shall pass; for otherwise the words shall be void." This is hardly consistent with plaintiff's claim that the words "all royalties" passed nothing, even in a conveyance to a private grantee, much less in a colonial charter to a governmental body.

Plaintiff's construction of *Attorney General v. Trustees of the British Museum*, [1903] 2 Ch. 598, is expressly negated by the passage immediately following the passage which plaintiff quotes:

> "The same argument to some extent applies to the word 'royalties.' Mr. Warmington argued that the word 'royalties' would be sufficient to pass these flowers of the Crown on the authority of *Dyke v. Walford*, cited above. The Attorney-General does not admit this, and I express no opinion on the point; but if it would, it is not suggested that treasure trove belongs to the office of vice-admiral, and the fact that the only royalties granted are those that belong to that office raises a strong presumption that none other were intended to pass. I have arrived at the conclusion that treasure trove does not pass by the charters by applying the ordinary rules of construction, so far as is compatible with the subject-matter of the grant, and it is therefore un-

> necessary for me to express any opinion on the contention of the Attorney-General as to the rules by which the Crown is entitled to have its grants construed." [1903] 2 Ch. at 614.

The grant there at issue conveyed all franchises, but the court held that treasure trove was a royalty, not a franchise. The grant contained no conveyance of all royalties, but only all royalties pertaining to the office of vice admiral, of which the treasure trove was not one. As shown by the above quotation, the court expressly declined to decide the point for which plaintiff erroneously seeks to make the case stand, *i.e.*, that under a conveyance of "all royalties" treasure trove would not have passed.

In *Dyke v. Walford*, 5 Moore's Reports 434 (1846), the Privy Council, the highest court in England, held in an exhaustive opinion that the words "all royalties" in a grant of governmental and property rights to a county palatine were effective to convey such royalties. The losing party argued, just as plaintiff does here, that "grants by the crown are to be strictly construed," that "prerogative rights, unless specially named, do not pass," and that "general words will not carry, in Kings' grants, which pass nothing by implication," *id.* at 454, 455, 468. The court's holding was as follows:

> "The material words of the grant do not differ in the several Charters. The grant in the Charter of 1377, is, that the Duke of *Lancaster* shall have within the County of *Lancaster*, his Chancery, his Justices to hold Pleas of the Crown, as all other pleas at Common law, and all manner of executions, to be made by his writs and his ministers; then *'et quae cumque alia libertatis et jura regalia ad Comitum Palatinum pertinentia, adeo liberè et integrè sicut Comes Cestriae infra*

Eundem Comitatum Cestriae dinoscitur obtinere:' saving to the Crown certain rights, only material to the present purpose, as showing the great extent to which the preceding words of grant, but for the reservation, might be held to reach.

"Upon the construction of this Charter, two questions were made: First, whether the original words of the grant are sufficient to pass the right; and Secondly, whether they are restrained, by the subsequent reference to the Earl of *Chester.*

"The grant is, first, of all *'jura regalia,'* belonging to a County Palatine. These rights appear to have been very extensive. Lord *Coke* lays it down (4 Inst. 204), that a 'Count Palatine has *"jura regalia,"* within his county, as fully as the King himself.' In *Coke Littleton,* 114 a, he states that, though a man cannot claim directly by prescription, to have such franchises and liberties as cannot be seized, before the forfeiture appears on record, as the goods of felons, yet he may make a title to them indirectly by prescription, for he may claim a County Palatine by prescription, and by reason thereof, to have the goods of traitors, felons, &c. In the case of *The Queen v. Archbishop of York* (Cro. Eliz. 240), it was held, that the Queen was entitled to the same prerogative when she was seised in right of the Duchy of *Lancaster,* as when she was seised in right of Her Crown. In the case of *Bowes v. Bishop of Durham,* (2 Bulstr. 219), it was held, that the Bishop of *Durham,* having a County Palatine and *'jura regalia,'* should have, incident to a County Palatine, *'bona et catalla felonum,* and of such as stand mute,' although he should not have

had the goods of such as stand mute, under a grant of *bona et catalla felonum.* The same point appears to have afterwards come before the Court, on a *Quo Warranto,* and is reported under the title of *The King v. Bishop of Durham* (3 Bulstr. 156). The decision was to the same effect, and on the same grounds: and Lord *Coke* appears to have laid it down, (though there is some inaccuracy in the printing of the passage,) 'that if one prescribe for a County Palatine, and to have *"jura regalia"* within this; it extends to all which the King himself may have.'

"Upon these authorities, which are quite unopposed by any to a contrary effect, we cannot doubt that the right in question, passed to the Duke of *Lancaster,* amongst other *'jura regalia,'* unless there be something in the grant restricting its effect.

"Then are there any such words? The words relied on, are, that the Duke is to have these rights, *'adeo liberè et integrè sicut Comes Cestriae dinoscitur obtinere.'* There is nothing restrictive in these words. It is not a grant of such privileges and franchises belonging to a County Palatine, as the Earl of *Chester* enjoys; but it is a grant of all liberties and royal rights belonging to a County Palatine, to be enjoyed as freely and entirely as they are known to be enjoyed by the Earl. It is not necessary for the Duke of *Lancaster* to show an enjoyment of rights by the Earl of *Chester,* in order to found his title; but if it were necessary inasmuch as it appears that *'jura regalia,'* generally, was enjoyed by the Earl, and we are of opinion, that the right in question, is amongst *'jura regalia,'* we should presume the enjoyment

> of this right by the Earl of *Chester*, unless some evidence were offered to the contrary.
>
> "Upon the whole, we are of opinion, that the right to goods belonging to persons dying intestate, without leaving husband, or widow, and without kindred, was vested in the King, in right of His Crown, at the date of these Charters; that this right, within the County Palatine, passed, with other *'jura regalia,'* to the Duke of *Lancaster*, and is now vested in Her Majesty, in right of Her Duchy, and that the sentence complained of, must, therefore, be affirmed." 5 Moore at 496-98.

This authoritative holding, applied to a palatine charter which, so far as appears, unlike the colonial charters did not even contain a most-favorable-construction clause, is dispositive of plaintiff's contention.

Plaintiff's claim that the grant of all royalties in the New England seas "falls far short of a grant of ownership of the seas themselves" is wide of the mark. As shown exhaustively in our brief, the crown's ownership of the soil of adjoining seas was universally described as a royalty in 17th-century English law. But even if there were some doubt (which we think there is not) concerning title to the submerged lands themselves, there could be no doubt as to the right of extraction of minerals and other valuable resources therefrom. Plaintiff, focusing as always solely on "general property rights," *i.e.*, fee-simple title to land (see pp. 2-3, *supra*), never once denies that the crown's royalties included, at the very least, a property right in all things of value found upon or extracted from the bed of the adjacent seas. That is ample to sustain the States' title to the only right at issue in this litigation—the exclusive right to explore and to exploit seabed resources. To repeat, plaintiff has never once denied that the crown had this royalty in the

17th century and intended to convey it in the colonial charters. Plaintiff has simply ignored our demonstration on these critical points.

Thus, in analyzing the New England charter, plaintiff claims that the reference to the "seas adjoining" falls short of "ownership of the seas themselves," and that the "adjoining" seas must have been outside the boundaries of the colony. We think plaintiff's arguments on these points are wholly unpersuasive. But even if they were right, what does plaintiff make of the express grant of "Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all . . . other . . . Royalties . . . within the said . . . Seas adjoining"? Plaintiff does not and cannot tell us, and the reason is obvious: there is no possible construction of these words which fails to sustain the States' title to the right at issue in this litigation.

The testimony of plaintiff's witness Professor Morris was inconsistent and self-contradictory regarding maritime sovereignty in the American territorial seas in the 18th century. He conceded that there were territorial waters off the North Atlantic coast in that era; he believed the extent of those waters to be unclear, and in spite of the charter provisions asserted that they belonged to the crown, not to the colonies. Tr. 1854. He opined that the coastal sovereign could prohibit navigation in the territorial waters, Tr. 1857, but then said that the sovereign could probably not exclude foreign fishing boats, even from coming as close as 30 yards to the shore. Tr. 1859. (He had his law exactly backwards: because of the recognized right of innocent passage the coastal sovereign could not prohibit navigation, but did have the right to prohibit foreign fishing.) Yet again, Professor Morris said that "The coastal fisheries belong to the proprietor of the coast" (Tr. 1863), but then declared that as to the seabed neither the crown nor the colonial

government had any exclusive sovereign or property rights one foot below low-water mark. Tr. 1865-66. Professor Morris' expertise on the law and practice of England and colonial America regarding maritime sovereignty and property was, to put it charitably, shaky in the extreme.

Plaintiff relies (Pl. Br. 122-23, 131-37) on various descriptions of the colonies, in charters, governor's commissions and other documents, as extending "from sea to sea," as "bounded by the Atlantic Ocean," and the like. Such general statements, made in contexts involving no focus on maritime rights, are hardly persuasive that their authors believed that all territorial and property rights of the colonies stopped at low-water mark. Even today, it would be altogether natural to describe one of the defendant States, or the United States, as bounded on the east by the Atlantic Ocean, unless the purpose of the statement required a specific focus on territorial waters or continental-shelf rights. Such usage is of no probative value for the issues here involved.

Plaintiff also contends (Pl. Br. 131-32) that the absence of boundary disputes among the colonies as to their maritime territories is evidence that no such territories existed. In fact there were disputes among the colonies regarding invasion of one another's maritime rights, see pp. 219-22, *infra*, though after the initial years these were minimized by the prevalence of "free fishing" clauses. The fact that such disputes did not, so far as is known, take the form of disagreements as to the location of the maritime boundaries is of little if any significance.

Indeed, it is plaintiff's version of colonial law which, if true, would have been far more likely to give rise to a great body of evidence and literature of which in fact there is no trace. Plaintiff's position apparently is that English and colonial law made a rigid distinction between "inland" waters, including bays, harbors, and the like, within which

full territorial sovereignty and dominion existed, and the open sea, where there was neither. The problem of demarcating the boundaries between "inland" waters and the sea is vastly complex, has given rise to endless disputes since that unhistorical distinction was imported into our law, and even today is far from completely resolved. See U.S. Exhibit 9, pp. 17-20; *United States v. California,* 342 U.S. 891 (1951); *United States v. California,* 381 U.S. 139 (1965); *United States v. California,* 382 U.S. 448 (1966); *United States v. Louisiana,* 382 U.S. 288 (1965); *United States v. Louisiana,* 389 U.S. 155 (1967); *United States v. Louisiana,* 394 U.S. 1 (1968); *United States v. Louisiana,* 394 U.S. 11 (1969); *United States v. Louisiana,* 394 U.S. 836 (1969); *United States v. Louisiana,* 404 U.S. 388 (1971). The fact that no such problems arose in the colonial period is evidence that the distinction was unknown at that time.

4. The Free Fishing Clauses

The Newfoundland charter of 1610, which expressly granted "the seas and islands lying within ten leagues of any part of the sea coast of the country," and which contained the usual language conveying soil, pearls, fishings, royalties, etc., nevertheless contained a clause saving and reserving to "all manner of persons of what nation soever and also to all and every our loving subjects which do at this present or hereafter shall trade or voyage to the parts aforesaid for fishing, all . . . liberties . . . concerning their said fishing . . . in as large and ample manner as they have heretofore used and enjoyed the same, . . . anything in these presents to the contrary notwithstanding." Exhibit 179, p. 53; see also Exhibit 777, p. 317. As Angell points out (p. 199, *supra*), the fact that the saving clause was considered necessary is yet further proof, if any were needed, that in its absence the general language of the charter would have conferred an exclusive right to the fisheries upon the patentees. It is notable that the saving clause was carefully

limited to such fishing as had been practiced prior to the date of the charter; obviously this is a recognition of established or vested fishing rights, in accordance with the recognized English law of the period regarding the circumstances in which monopolies were proper and those in which they were not.

Dr. Kavenagh to the contrary (Tr. 2059-60), none of the charters of what are now the Atlantic coastal states of the United States contained reservations of free fishing both to aliens and to subjects. Only the Newfoundland charter did that, in recognition of the long-established fisheries of other nations in Newfoundland waters. The early charters of the Common Counsel States, down through the New England charter of 1620, contained no free-fishing clauses of any kind; and as we shall see (pp. 219-22, *infra*), those charters were universally understood and recognized to authorize their recipients to exclude or to license all fishermen, whether British or foreign, within their adjacent seas. As a result of the political uproar which this caused, in several of the charters after 1620 the crown included clauses saving the liberty of fishing to some or all classes of British subjects. Such clauses appear in the Massachusetts Bay charter of 1629 ("any of our loving subjects," App. 282), in the Gorges charter for Maine of 1639 ("all our subjects of our kingdom of England," App. 277), in the Maryland charter of 1632 ("all the subjects of our kingdoms of England and Ireland," App. 286), and in the Rhode Island charter of 1663 ("any of our loving subjects," App. 732). No argument was ever made that such clauses applied to foreigners or that the colonial governments did not have the right to exclude foreigners from the fisheries.

The saving clause in the Maryland charter applied to "fishing for sea fish . . . in the sea . . . of the province." App. 729. In 1766 Daniel Dulany, at one time Attorney General of Maryland, gave a legal opinion indicating his

view that in the absence of the saving clause the colonial government could have excluded English subjects:

> "When the charter of the Province was framed, it was thought that extensive fisheries might be carried on here, as a matter of great consequence in the national trade and navigation. As [*sic;* doubtless should be *An*] extensive legislative authority was conferred by the charter, under which, regulations might have been made, (if not controlled by the saving) less favorable to the *English* and *Irish,* than the inhabitants here; but it is not to be supposed that acts of assembly would be wanting, to put the people here upon as good a footing, as any other, and therefore there seems to be very little reason for the notion, that the distinction is unfavorable to the people of Maryland, when it only imports that the liberty is secured to one, against the attempts of the other, and yet leaves to the latter the right of exercising it, in what manner they please, not affecting the liberty of the former, if the provincial legislature should think it for the public benefit. And since an act of assembly may confer the same liberty and privilege to the inhabitants of Maryland, that is contained in the saving, may regulate, restrain or control it, as the general interest may require, I apprehend that the saving is rather favorable to the inhabitants here than otherwise, according to the above interpretation." Quoted in Angell, *A Treatise on Tide Waters* 56-57 (1826).

Dulany pointed out that the reservation was only to the subjects of the realms of England and Ireland, which did not include citizens of the colonies; it followed that Maryland remained free to exclude other colonials from its sea fisheries. Angell agreed:

"Admitting this exposition of Mr. Dulany to be correct, which seems too obvious to be disputed, however favorable it may be to the people of Maryland, it must be regarded as unfavorable to the inhabitants of the other States. For as the inhabitants of the other States were not originally included in the saving, and the reservation not extending to them, they were of course debarred the liberty of exercising any piscarial privilege afforded by the waters of Maryland. And it would therefore, be superfluous for the legislature of Maryland, to enact any law to prohibit the citizens of the other States from fishing in its waters. In fact, as the persons to whom the reservation was confined, lost the right thus reserved by the revolution, it became the common right of the inhabitants of Maryland only." *Op. cit.* at 57.

D. THE RECORD IS SUFFICIENT TO ESTABLISH A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE COMMON COUNSEL STATES.

By the end of the colonial period, the following situation emerged from the various charters so far as specific grants of territorial sea to the predecessors of the Common Counsel States are concerned. Maine had 20 leagues for admiralty jurisdiction, and five leagues for other purposes, by its grant of 1622 and its charter of 1639. App. 272-74, 277-78. New Hampshire, by its grant of 1629 and its charter of 1635, had five leagues. App. 309, 312. Massachusetts by its 1629 charter had a territorial sea with no explicitly defined limit (App. 281); by its 1691 charter it had ten leagues. App. 322. Rhode Island had no explicit limit by its charter of 1663. App. 287-89. As to all the New England colonies, the New England charter of 1620, while containing no explicity limit, had been authoritatively construed as con-

veying a territorial sea of 100 miles. The difference between that 100 miles and the specific boundaries later granted to particular New England colonies may have passed to the individual colonies upon the dissolution of the Council for New England, or that intermediate belt may have returned to the crown.[39]

New York had no fixed limit by its 1664 charter. App. 290-91. New Jersey had no fixed limit by the New York charter and the Duke of York's patent of the same year to Berkeley and Carteret. App. 294. Delaware had no fixed limit by the charter of 1683 to Penn. App. 304-07. Maryland had ten leagues by its charter of 1632. App. 285. Virginia retained the 100 miles conveyed by its second charter of 1609. App. 263-64.

The status and width of the territorial sea of all the colonies was not in the least affected by the chain of title or particular legal status of the charters as in force or not at any particular time. As Professor Flaherty has demonstrated (and Dr. Kavenagh conceded) in connection with the revocation of the Virginia charter in 1624 (App. 371-79; Tr. 2079-82), there was no intention to change the boundaries of the Virginia colony because of any change in its degree of autonomy or governmental status. Those boundaries remained the same except where specifically altered.[40] The same conclusion is equally applicable to the

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[39] The charter of 1620 never lapsed entirely, but is in the direct chain of title of the States whose territories were within its bounds. The United States took the position, in arbitrating the Maine-New Brunswick boundary with Britain in 1817, that "it is . . . only by a regular conveyance, consistent with this grand charter [of 1620], that any valid title can with propriety be derived from or to the English Crown." "The Case of the United States," 6 Moore, International Adjudications 47, 54 (1933).

[40] Virginia lost territory, of course, when Maryland was carved out of it. Since Virginia's territorial sea was 100 miles and Maryland's was only ten leagues, the question arose during the hearings as to what became of the 70-mile intermediate belt when Maryland was created.

other colonies. All of them relied before, during and after the Revolution on their charter boundaries, regardless of whether those charters were in force as governmental instruments or what the precise chain of title had been.

Quite naturally, two questions arise: (1) is the claim of each of the Common Counsel States limited to its charter boundary as summarized above; and (2) what boundary applies in the case of States whose charters specified no boundary explicitly? We believe the proper analysis is as follows. The crown in 1606 asserted and established a 100-mile territorial sea up and down the coast of all the Common Counsel States. Colonies which had no different limit specified in their charters therefore had territorial seas of 100 miles. As to colonies whose charters specified limits of less than 100 miles, the crown retained the waters between those limits and the 100-mile line. As we shall show, what was retained by the crown passed to each State separately at the time of the American Revolution.

We think the evidence is sufficient to show the establishment of a uniform 100-mile territorial sea all up and down the Atlantic coast. There is a wealth of 17th- and early 18th-century English authority for the proposition that 100 miles is the width of the territorial sea in the absence of special history or circumstances (pp. 35, 47, 58, 61, 67, 68, 126, 128, 131, *supra*). The 100-mile belt was the most frequently and authoritatively asserted standard of the

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Tr. 1244-48. We submit that the answer is perfectly plain: that belt reverted to the crown. A territorial sea is not an independent territory which can be owned without reference to the adjacent coast. To the contrary, the territorial sea was regarded in the 17th century, and has ever since been regarded, as an appurtenant or corollary of coastal sovereignty. Thus Virginia lost that part of its territorial sea which abutted Maryland when Maryland was erected as a separate colony. Since the crown chose to confer less than all of that territorial sea on Maryland, the remainder reverted to the crown, which held it as ultimate sovereign and feudal overlord of Maryland.

period under international law as well (pp. 276-78, *infra*). The 100-mile limit was asserted during the period of the earliest colonial charters both by the prime minister of England, speaking officially, and by the leading international-law authority resident in England at the time (pp. 35-36, 58, 171, *supra*). The charter of 1606, which asserted English sovereignty over the entire coastline of the Common Counsel States and authorized colonies there, included the 100-mile limit. Perhaps most conclusively, while the New England charter of 1620 specified no fixed limit, the Council for New England had no doubt that that was the limit in force, and in a number of official documents described its charter as having vested in it a territorial sea with that limit. That was a wholly legitimate conclusion on the basis of the existing legal situation and is equally applicable to the other colonies whose charters contained no explicit limits.

The charters which specify a territorial sea of less than 100 miles in width in no way imply a shrinking of what the crown believed it owned or had the power to convey. Plainly, the crown on occasion granted less than everything it had or claimed. For example, the lease of Virginia to Arlington and Culpeper in 1673 conveyed ten leagues, while Virginia's territorial sea and ownership of islands was known to extend for 100 miles. Likewise, it cannot be seriously contended that in 1632 the crown believed it owned only the ten leagues it granted Lord Baltimore, or that in 1635 or 1639 the crown believed it owned only the five leagues it granted Maine and New Hampshire. The briefest recollection of the position being taken by the crown in the 1630's with reference to maritime sovereignty in European waters is enough to render such a speculation preposterous. Doubtless whether a particular patentee received all or less than all of the territorial sea and the islands therein depended on how much he or it was in royal favor.

There are clear precedents, in the grants made by the Council for New England, for simultaneously asserting a territorial sea and islands of 100 miles and granting much less than that. The Council did so in 1622 and 1629 (pp. 187-88, *supra*); in each case the same document both declared the Council's 100-mile limit and granted a lesser maritime and island belt to the patentees. Indeed, two of these documents, the grant to Gorges and Mason in 1622 and the grant to Mason in 1629, created the very maritime and island belts of five leagues which the crown a few years later adopted in confirming the patentees' title to those territories, *i.e.*, Maine and New Hampshire.

Obviously, both the Council and the crown, vis-a-vis their respective grantees, sometimes wished to convey only a limited portion of their territorial sea and islands while retaining the rest. Probably the desire to allocate fishing rights was responsible for this type of differentiation. For example, when in 1622 the Council for New England granted its members tracts with boundaries "three leagues into the sea," it plainly regarded the grantees as having the exclusive right to the fisheries and islands within those three leagues, while the remainder of the territorial sea out to the Council's own 100-mile boundary was reserved as a resource of the Council, which doubtless wished to preserve the right to obtain revenue from licensing fishing there.

The legal effect, then, of the charters and other developments during the colonial period was the establishment of a uniform 100-mile territorial sea in the Atlantic along the coasts of all the Common Counsel States. In some cases, the crown granted this entire territorial sea to the colonial proprietor or government; in other cases, the crown granted only a limited part, retaining the remainder for itself until its rights and royalties passed to the States at the time of the American Revolution.

If it should be held that the evidence of record is not conclusive enough to establish a uniform 100-mile territorial sea all along the North American coast, it does not at all follow that the territorial sea was limited in the case of each colony to the width specified in its charter, since it cannot be doubted that the crown frequently granted less than all it possessed and that during the 17th century the crown never took the view that its territorial sea was as constricted as five or ten leagues. Rather, the proper conclusion would be that the territorial sea was regarded as not finally fixed and definite as to its width, but embraced all those areas of sea and seabed which could reasonably be said to be adjacent to the coast or which possessed valuable resources capable of exploitation from the coast.

As we shall see (p. 426-27, *infra*) that is precisely the situation today with respect to the continental shelf under contemporary international law. No one doubts that the exclusive rights of coastal nations extend to the point where the depth of the sea reaches 200 meters (a line which, as it happens, is approximately 100 miles offshore along most of the North Atlantic coast); but there is substantial doubt how much farther out than that the exclusive rights of the coastal sovereign extend, and resolution of the doubt hinges largely on the concepts of adjacency and exploitability. It is possible that the crown and the colonists avoided too-frequent or too-definitive articulation of a precise boundary in their marginal seas for similar reasons, wishing to preserve some degree of flexibility—though as we have said, we think the evidence is sufficient to establish a uniform 100-mile limit. Certainly the conclusion, if it should be reached, that the outer limit of exclusive rights was not fully fixed and definite would not lead to a conclusion that there were no such exlcusive rights, but rather to a recognition that the States at independence inherited a right to hold continental-shelf rights to whatever distance was then recognized, or would come to be recognized in the future,

as appropriate and proper for the exclusive seabed jurisdiction of a coastal sovereign. Plainly the fact that definition of the outer limit of exclusive rights to the continental shelf is an ongoing process, which even today is not fully completed, could not lead to the conclusion that no such rights exist or existed at a particular time in the past.

V.

RIGHTS OF SOVEREIGNTY AND DOMINION WERE EXERCISED OVER THE AMERICAN TERRITORIAL SEA DURING THE COLONIAL PERIOD.

The evidence as to the use and exploitation of the sea and seabed in North American waters during the colonial period demonstrates awareness and exercise of exclusive legal rights of sovereignty and property to the extent possible in view of the state of technology at that time. The evidence of colonial regulation of the sea and seabed resources, and the evidence of exclusion of foreigners from valuable fisheries, confirm that any important resource in the North American marginal sea would, as soon as discovered, be regarded as the exclusive possession either of the individual adjacent colony or, if "free fishing" clauses were applicable, of English subjects generally.

The evidence discussed in this section relates in part to the Common Counsel States and in part to the British colonies which are now included in Canada. For reasons of geography and the location of valuable resources in the American seas, certain issues arose more frequently or more sharply in the Canadian areas than to the southward. Precedents from Canada are equally relevant as those from the Common Counsel States themselves. There is no reason to believe that either the crown, the colonists or foreign states regarded the Canadian areas as in any way subject to different legal standards from those applicable to the areas now included in the United States. No distinction was made

between the two groups of colonies until they chose different paths at the time of the American Revolution. Indeed, in 1620-21 the Canadian maritime provinces were part of New England (p. 190, *supra*), and again after 1691 Nova Scotia was a part of Massachusetts, having been incorporated into it by the Massachusetts charter of that year. App. 319-20.

We think that plaintiff's argument that precedents from Newfoundland, Nova Scotia and other areas now in Canada are irrelevant is wholly unconvincing. Of course questions of maritime sovereignty and dominion arose most frequently where maritime resources were richest. But there is no reason for believing that Britain and the colonists would have changed or abandoned their claims if the richest fisheries had been located off, say, Virginia. The precedents from the areas where the relevant issues most clearly and most often arose are dispositive of the extent of British and colonial rights throughout the American marginal seas under British law and practice.

We are uncertain what plaintiff thinks it has proved by its assertion that during the colonial period fishing "was dependent upon the utilization of shore-based activities" (Pl. Br. 143). That is obviously a half-truth at best, having no application to whaling, to the Newfoundland banks fishery, or to many others. Even as to fisheries where plaintiff's assertion is accurate, the exclusive rights asserted by the crown and the colonies, documented in this section, unquestionably applied to the fishing as well as to ancillary activities on land.

A. THE FISHERIES WERE SUBJECTED TO EXTENSIVE REGULATION AND LICENSING, AND FOREIGNERS WERE EXCLUDED.

Alexander Hamilton, writing in 1795, well described the spirit in which the crown and the American colonies had

always approached the question of exclusive fisheries and fishing regulation:

> "Some nations, and among them Great Britain, have viewed the exclusive navigation and trade to their colonies, in the light in which they have seen their coasting trade and fisheries,—as a nursery for that body of seamen whom they have considered not only as necessary to the prosperity and protection of commerce, but as essential to the defense and safety of the state.
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> * * *
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> "Is it then surprising, that we see her so anxious to encourage and extend her navigation, as to exclude, as far as practicable, foreigners from any share of her fisheries, her coasting, and her colony trade? Does not candor require us to admit, since her national defense rests upon her navy, which again depends on her seamen, which an extensive navigation can alone supply, that Great Britain, having more to risk, is among the last powers likely to break in upon or materially to relinquish that system of exclusive colony trade, that has so long and uniformly prevailed among the great colonizing powers?
>
> "America has her opinions, perhaps prejudices, on the subject of commerce: she is, and, at least until she shall become a naval power, will continue to be, without colonies. But her laws manifest a similar spirit with those of other nations, in the regulations which they prescribe for the government of her fisheries and her coasting trade. The object of these laws is an exclusion of foreign competition, in order to encourage and increase her own navigation and seamen; from which resources, not only in wars

between other nations, but likewise in those in which she may be engaged, important commercial and national advantages may be expected." Exhibit 697, pp. 488, 489-90.

1. The New England Fishing Controversy

Under the 1606 charter, the "northern," or Plymouth, company, while not making any permanent settlement, sent out a number of fishing expeditions under license between 1606 and 1620 to the coasts within its grant. Exhibit 663, p. 320. Certain other fishing expeditions, however, were sent to the same regions both by the "southern," or London (later Virginia), company, from its colony at Jamestown, and by the powerful fishing interests of southwestern England. The Plymouth Company took the view that such expeditions not licensed by it violated its exclusive rights. In 1619 the issue was formally precipitated by the grant of a license by the Virginia Company and a protest by the Plymouth Company against such encroachment. Exhibit 466, pp. 34-35 n. 330; Exhibit 734, pp. 98-99; Preston, *Gorges of Plymouth Fort* 167, 413 (1953).

The dispute was referred to the Privy Council, and was arbitrated in 1619 by the Duke of Lennox and the Earl of Arundel under delegation by the Council. Their decision of 1619 was confirmed by orders of 1620 and 1621 by the Council itself. The decision was that, "by the consent of both colonies," the two colonies "should fish at sea within the limits and bounds of each other reciprocally, with this limitation that it be only for the sustentation of the people of the colonies there." App. 678-79. This most interesting order (1) made it clear that both colonies did have "limits and bounds" in the sea, (2) provided a strictly limited right of reciprocal fishing by each within the seas of the other, and (3) by implication excluded all other Englishmen from fishing within the seas of either colony.

The latter implication was made explicit three months after the 1621 order, when the Council directed a letter to the mayors of the fishing towns of the southwest of England warning them against permitting their residents to invade the exclusive rights of the New England colonly. App. 1001-02. Such invasions, the Council declared, "would not only be a prejudice to the plantation adventurers who by their industry have discovered those remote places, and with the hazard of the lives of their people and with the expense of their estates have laid the first foundation of so honorable an enterprise, but would also bring a confusion to the said plantation and an overthrow unto that trade, and be likewise an utter discouragement to all future endeavors of the like kinds." See also App. 367-68; Tr. 2126-31.

It is universally recognized that the 1620 charter of New England, which was issued immediately following the above decision of the Privy Council, did confer a monopoly of fishing on the grantees, with the sole exception of the agreed concession to the Virginia colony. The Council for New England sold fishing licenses, and indeed its entire scheme of colonization was based on the far-sighted plan that the revenue derived from such licenses would provide the capital necessary to support plantations. App. 786-89; Exhibit 663, pp. 263, 322, 346; Exhibit 740; Exhibit 777, pp. 303-04, 311. The Council appointed Captain Francis West as admiral and sent him over to enforce the licensing requirement and to expel unlicensed fishers from the New England seas. App. 788-90.

While the problem of keeping large expanses of seas in a remote area free of trespassers was a most difficult one, the Council had some degree of success:

> "The policy which it [the Newfoundland Company] adopted after 1620 was directly in line with that followed by Sir Ferdinando Gorges and the New England Council during the same period. Sir

> William Alexander and his Scottish supporters also sought to establish a colony in Nova Scotia along similar lines. In all cases the scheme of creating feudal domains and disposing of them to persons favorable to their cause was followed. Although not identical in personnel, all these associations had a common purpose, the control of the fishery adjacent to their particular field of colonization. In both New England and Newfoundland the policy of excluding independent fishermen was tried, but Gorges' group was more successful in keeping out 'interlopers' than was the Newfoundland Company and its grantees, who had the well-established western adventurers to oppose them." Exhibit 465, p. 46.

See also App. 830.

The southwestern English fishing interests did not passively submit to their exclusion from the New England fishery, and they were likewise alarmed about the similar developments at the same time in Newfoundland. They took the question to Parliament, and in 1621 and 1624 introduced "free fishing" bills which passed the Commons but not the Lords. These bills would have allowed liberty of fishing to all English subjects in the seas of Newfoundland, Virginia, New England and all other English possessions; there was never, of course, any question of admitting foreigners. App. 87-90; Exhibit 719, pp. 50-54; Exhibit 734, pp. 100-01; Exhibits 733, 740; Exhibit 750, p. 82.

Gorges opposed these bills on the ground that a fishery in the seas of a new English dominion was a proper subject for monopolization under established principles. Sir Edward Coke, one of the principal proponents of the free-fishing bills, based his argument on the allegation that Gorges and the Council for New England had not discovered the New

England fisheries but that fishermen of both England and other nations had fished there before. Thus Coke, now in opposition to the crown, adhered to the same doctrine concerning monopolies which he had formulated as law officer to Elizabeth I many years previously. As a matter of legal analysis, then, the issue really boiled down to one of fact: whether fishing by the southwestern Englishmen prior to the 1606 charter had been extensive and regular enough to amount to an "established" fishery which it would be improper to cut off by a subsequent monopolization. All this makes it wholly clear that if, once a charter had been issued, an admittedly new resource had been discovered in the sea or seabed of the colony, it would have been regarded as properly falling within the monopoly without question.

2. The Anglo-French Struggle for Monopoly of Fishing in American Waters

(a) In General

By the mid-17th century France and England were well advanced in their rivalry for control of North America. From 1689 to 1783 that rivalry was a major factor in five great wars and frequent intermittent skirmishes. It is universally recognized that one of the principal motives and ingredients in the colonial rivalry for mastery of North America was the determination on each side to control the rich North American fisheries. Exhibit 664, p. 212; Exhibit 665, p. 344. Neither side was willing to share those fisheries; each wished to monopolize them. While this may seem selfish to us, it was an integral part of the reigning mercantilist theory of that era. Both sides agreed that as a matter of law the possessor of a sea coast had the right to exclude nationals of all other countries from the fisheries adjacent to that coast. Thus, over and over again, we find the desire to monopolize a rich fishery operating as a primary motive in efforts to secure the mastery of the adjacent

coast.[41] Once that mastery was secured, the exclusive legal right to fishing in the adjacent seas followed as a matter of course, and was rigorously enforced, unless a treaty provided otherwise. See generally Exhibit 664, p. 212; Exhibit 665, pp. 341-46; Exhibit 673, *passim;* Exhibit 719, pp. 61, 93-94, 182-84, 229-43; Exhibit 720, pp. 70-75, 78-81; Exhibit 742; Exhibit 768, pp. 92-93; Exhibit 794; Tr. 2284.

Throughout the period, the French excluded English fishermen from the sea fisheries of those parts of North America which they controlled, and asserted the legal right to do so in peacetime. App. 840, 882-83; Exhibit 673, pp. 37-39, 42-43; Exhibit 681; Exhibit 719, pp. 182-84; Exhibit 720, pp. 98-99; Exhibit 766, p. 603; Exhibit 803; Tr. 2284. On occasion, the French taxed the English fishermen instead of excluding them. App. 838-39; Exhibit 742, p. 284.

By the Treaty of Utrecht of 1713, an attempt was made to resolve the fisheries issue. By Article X, France undertook to restore to England "the bay and straits of Hudson, together with all lands, seas, sea-coasts, rivers, and places situate in the said bay and straits." Nova Scotia, in French hands until the war, was ceded to England; and by Article XII, French subjects " shall hereafter be excluded from all

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[41] During the American Revolution, "to enhance her fishing opportunities France hoped to acquire Newfoundland and her old possessions around the Gulf of St. Lawrence. It must be borne in mind that eighteenth-century statesmen looked upon the fisheries as the nursery of seamen and as holding one of the keys to a powerful maritime and naval establishment. In the light of this traditional point of view the French national interest in the North Atlantic fisheries seems perfectly comprehensible." Richard B. Morris, The Peacemakers 14 (1965). In 1779 France agreed with Spain that if France regained Newfoundland it "would admit Spanish subjects to the fishery there, [and] *presumably no one else.*" *Id.* at 15. (Emphasis added.)

kinds of fishing in the said seas, bays, and other places, on the coasts of Nova Scotia; that is to say, on those which lie towards the east within thirty leagues, beginning from the island commonly called Sable inclusively, and thence stretching along towards the southwest." By Article XIII, the French ceded to England that part of Newfoundland which they had thither-to occupied, "but it shall be allowed to the subjects of France to catch fish, and to dry them on land, in that part only, and in no other besides that, of the said island of Newfoundland, which stretches from the place called Cape Bonavista to the northern point of the said island; and from thence running down by the western side, reaches as far as the place called Point Riche." Exhibit 673, p. 45; Exhibit 719, pp. 239-40; Exhibit 768, p. 97; for the full text of the treaty see 1 Israel (ed.), *Major Peace Treaties of Modern History* 177 (1967).

The 30-league line thus established in the sea off Nova Scotia corresponded to the 30-league territorial sea established by the English charter of 1662 (p. 189, *supra*). The fact that in the treaty no line was specified on the western coast of Nova Scotia makes it clear that the entire Bay of Fundy was regarded as British territorial waters from which the French were excluded. While the text of the treaty would indicate that the 30-league line applied only to Nova Scotia, it appears that the British regarded such a line as continuing on southward all along the coasts of the British colonies as far as the Georgia-Florida border. App. Vol. III, Exhibit 327. That interpretation was never put to the test since there were never any substantial French fishing encroachments southwards from Nova Scotia. (See p. 233, *infra*.) It was natural, in any event, for the British to regard 30 leagues as the exclusive-fishing limit even apart from the treaty, because 30 leagues are the substantial equivalent of 100 miles, and the 30-league line was itself a frequently en-

countered limit for territorial waters among international-law scholars, particularly the French.[42]

By the Peace of Paris in 1763, the provisions of the Treaty of Utrecht relating to Nova Scotia and Newfoundland were confirmed (Articles IV, V). Canada (that is, Quebec), Cape Breton Island and all other islands and coasts in the Gulf of St. Lawrence were ceded to England, together with "in general, everything that depends on the said countries, lands, islands and coasts" (Article IV). Britain "consents to leave to the subjects of the most Christian king the liberty of fishing in the Gulf St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at a distance of three leagues from all the coasts belonging to Great Britain" (Article V). As to the Cape Breton fisheries, the French were forbidden to fish within 15 leagues. *Ibid.* The islands of St. Pierre and Miquelon were ceded to France for the sole purpose of serving as a shelter to French fishermen (Article VI). The Spanish renounced all pretentions to share in the Newfoundland fishery (Article XVIII). Exhibit 673, pp. 83-85; Exhibit 674, pp. 422-23; Exhibit 742, pp. 197-98; Tr. 2297-2300.

As in Article XIII of the Treaty of Utrecht (p. 224, *supra*), the language regarding the French liberty of fishing in the Gulf of St. Lawrence is explicitly, indeed ostentatiously, permissive, making clear the understanding of both parties that no one had a *right* to fish in the territorial waters of another sovereign but could do so only if a "liberty," or license, were conferred by treaty.

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[42] Thirty English marine leagues equal 90 nautical miles or 103.5 statute miles. Thirty leagues was proposed as the normal limit for territorial waters by the French publicist Bodin in 1577, and achieved a wide currency. 5 La Pradelle, Revue Générale de Droit International Public 264 *ff.* (1898), reprinted in Crocker, *op. cit.* at 188-89. See also p. 277, *infra.*

The limits established for French fishing by the treaties of 1713 and 1763 were rigorously enforced by the British. Exhibits 766-774, 787, 789, 792-794, 798-800, 804, 805, 810-812.

The treaties were never regarded as establishing British rights to exclusive fisheries for the first time. To the contrary, the treaties were bitterly resented by Englishmen both in England and in North America as having made unnecessary concessions to the French. Exhibit 741, pp. 311-314; Exhibit 752, pp. 317, 322-23. The Common Council of London protested against the Peace of Paris on the ground that "the sole and exclusive right of fishing in the American seas should be reserved to the subjects of the British crown." Exhibit 741, p. 313.

The New Englanders, who were heavy users of the Newfoundland and Nova Scotia fisheries, were particularly vehement in denouncing concessions to the French. William Bollan, an able lawyer and colonial agent for the Massachusetts government in London from 1745 to 1762 (Exhibit 669), well expressed the New England attitude in a series of tracts published in London. His *Observations on the Preliminary Articles of Peace,* Exhibit 670, denounced the draft articles of 1762 for their concessions to the French. Previously, in 1746, after the first capture of Louisbourg by the New Englanders, Bollan had written desperately in an attempt to ward off its restoration to the French, highlighting the importance of the Cape Breton fisheries; in that work he also denied that the Spanish had any right to fish in the Newfoundland seas. Exhibit 671.

Bollan's most comprehensive work was *The Ancient Right of the English Nation to the American Fishery,* published in 1764. He traced the English title to the Newfoundland fisheries, as was conventional, from the Cabot discoveries and the Gilbert ceremonial acts of taking

sovereignty, and interpreted the Gilbert patent as including all the seas and fishing banks adjacent to Newfoundland. App. 771. Bollan was well aware of the English claims to sovereignty in the English seas, and maintained that the somewhat cryptic treaty of Whitehall (p. 176, *supra*), which confirmed English rights in the American seas without identifying them, should be interpreted in the light of English law and practice in the English seas themselves. Exhibit 673, pp. 40-41. Bollan denounced the Treaty of Utrecht on the ground of its fishing concessions to France, *id.* at 49, and continued to attack the Peace of Paris on the same ground. *Id.* at 85. Bollan urged that, at least, Britain should regulate the fisheries, including those which the French were allowed to enter, to prohibit fishing during the spawning time so as to avoid depletion of the resources. *Id.* at 104.

The New Englanders had taken an exclusionary position consistently since 1650, when the Plymouth colonists petitioned the English Council of State complaining that the Newfoundland government had allowed the French to fish in Newfoundland waters. U.S. Exhibit 266; Tr. 2197-98. In that same year of 1650 the Massachusetts government ordered the publication of Malynes' *Lex Mercatoria.* Exhibits 529, 530. It will be remembered that Malynes' influential work asserted maritime sovereignty and the 100-mile limit for territorial waters. See p. 67, *supra.* Much further documentation could be adduced, if the point were disputed, to demonstrate that throughout the 17th and 18th centuries the New Englanders were intensely zealous in asserting exclusive fishing rights and demanding the expulsion of the French from the fisheries on which their economy so heavily depended. See also Tr. 1696-97.

As late as 1816, John Quincy Adams, American minister to England, summed up the traditional New England view in a letter to Lord Castlereagh:

"The fisheries on the banks of Newfoundland, as well in the open seas as in the neighboring bays, gulfs, and along the coasts of Nova Scotia and Labrador, were by the dispensations and the laws of nature, in substance, only different parts of one fishery. Those of the open sea were enjoyed, not as a common and universal right of all nations; since the exclusion from them of France and Spain, in whole, or in part, had been expressly stipulated by those nations, and no other nation had in fact participated in them. It was, with some exceptions, an exclusive possession of the British nation . . . ." 7 *British and Foreign State Papers* 99, 107 (1834).

(b) Newfoundland

For the history of Newfoundland and its uniquely rich fishery, see generally Exhibits 465, 719, 741. The distinctive factor in the history of Newfoundland was the dominance of the fishery from early times not by settlers but by fishing interests based in southwestern England. For most of the period they were in control of the fishery, to the point where they were even able to discourage and in some cases to prohibit settlement on the island itself on the ground that such settlement would interfere with their monopolization of the fishery.

Other nations—principally the French, Portuguese and Spanish—fished in the Newfoundland seas from a very early date, though by the mid-17th century the Spanish and Portuguese had been effectively excluded and the seas divided into French and English zones. Exhibit 719, p. 55. The English at first pursued an ambivalent policy regarding attempts to exclude other nations, who after all had preceded them in exploitation of the fisheries. As we have seen, Raleigh's charter and the charter of 1610 (p. 207, *supra*)

reserved liberty of fishing both to English subjects and to aliens, though during Elizabeth I's reign the English did attempt to monopolize the fishery (pp. 43-45, *supra*).

Within the English zone, different groups strove for control and monopoly of the fishery. Under Governors Guy and Mason the settlers attempted to gain a monopoly, but were frustrated by the southwestern English. Exhibit 465, pp. 44-49. The southwesterners themselves obtained a substantial monopoly of the fishery in 1634. Exhibit 663, p. 313; Exhibit 719, pp. 76-77.

In 1637, a group headed by Sir David Kirke attempted to secure a monopoly, but was compelled to compromise with the west-country fishing interests, whose rights were preserved. However, Kirke did obtain the right to license and to tax foreign fishermen, which he exercised. Exhibit 719, pp. 78-82, 85-86, 137; Exhibit 784, p. 3; Exhibit 790, p. 4.

In 1671 the king in Council issued comprehensive regulations for the Newfoundland fishery, which was declared to be open to all English subjects. Aliens were excluded from the fishery between Cape Race and Cape Bonavista, that is, off the coast of that part of Newfoundland then occupied by the English. Exhibit 719, pp. 128-31. "The admirals were required to preserve peace and order among the fishermen and seamen ashore as well as at sea, to execute the royal charter concerning the fishery, and to apprehend and punish all offenders." *Id.* at 130-31. These regulations were confirmed by the crown in 1675. Exhibit 741, pp. 191-92. The royal instructions excluding aliens from the Newfoundland fishery were still in full force in 1749, Exhibit 795, and indeed down to the American Revolution.

In 1689 Britain, in its declaration of war against France, asserted ownership of all the Newfoundland fisheries and named French incursions thereon as one of the causes for

the war, which began the long series of conflicts to determine which nation should have supremacy in North America:

> "It was not long since the French took license from the Governor of Newfoundland to fish upon the coast and paid a tribute for such licenses as an acknowledgement of the sole right of the Crown of England to that Island; but of late the encroachments of the French on his Majesty's subjects trading and fishing there had been more like the invasions of an enemy than becoming friends, who enjoyed the advantages of that trade only by permission." Exhibit 741, p. 224; see also App. 893-94.

In 1698/9, Parliament enacted an Act To Encourage the Trade to Newfoundland, which excluded all aliens and strangers from fishing in Newfoundland, "the seas, rivers, lakes, creeks, harbours in or about Newfoundland or any of the islands adjoining or adjacent thereto." Exhibit 749, p. 515; see also Exhibit 671, p. 39; Exhibit 673, pp. 43-44. This act remained in force, and was enforced, throughout the century. Exhibit 714, p. 693; Exhibit 804, p. 7. " 'The Act of 1698 remained the fundamental law of Newfoundland for more than a century, that is to say, until its repeal in 1824' " 2b Parry (ed.), *British Digest of International Law* 428 (1967).

During the negotiations preceding the Treaty of Utrecht, the Guipuscoans or Biscayans, a fishing community of Basques in Spain, asserted an established right to fish for cod and whales in the Newfoundland seas. Exhibit 781, p. 2. The claim was referred to the Board of Trade, who reported that "some Spaniards have come hither with passes from her majesty, and others may have fished there privately, but never any that we can learn did do it as of right belonging to them." The Board pointed out that of

course the alleged right was inconsistent with the act of 1699, since the enactment of which "instructions have been given every year to the commodores of the convoy to prevent foreigners coming thither." Exhibit 781, p. 3. Article XV of the Anglo-Spanish Treaty of Utrecht dealt with the claim as follows: "And whereas it is insisted on the part of Spain that certain rights of fishing at the island of Newfoundland belong to Guipuscoans, or other subjects of the Catholic King, her Britannic Majesty consents and agrees that *all such privileges as the Guipuscoans and other people of Spain are able to make claim to by right* shall be allowed and preserved to them." Exhibit 790, pp. 2-3; 28 Parry, *Consolidated Treaty Series* 295, 334-35. (Emphasis added.)

Following ratification of the treaty, the Guipuscoans naturally again presented their claim. It was rejected in a most illuminating decision by the Board of Trade in 1719. Exhibit 790. The Board relied on the Cabot discoveries and Gilbert's symbolic acts of sovereignty as establishing an exclusive English right to the sea fisheries as well as to the island of Newfoundland. The Board asserted the English "undoubted right and interest over that country and fishery," Exhibit 790, p. 4, and declared that any Spanish fishery in Newfoundland waters had been conducted pursuant to English license. *Id.* at 5. The conclusion was that the Spanish had no legal right and their claim was denied. See also Exhibit 671, pp. 38-39; Exhibit 741, pp. 276-77; Exhibit 766, p. 401; Exhibit 768, pp. 90, 102, 104-05; Exhibit 810, p. 219. The Spanish claim was renewed later in the century on several occasions, Exhibit 770, p. 135; Exhibit 682, pp. 410-11, and was "justly resented." Exhibit 673, p. 82. The Spanish finally renounced their "pretention" by Article XVIII of the Peace of Paris of 1763.

This history of the Guipuscoans decisively refutes any argument by plaintiff that exclusive fisheries in American waters in the 17th and 18th centuries were established only

by treaty. To the contrary, the English legal position was clear throughout that England was sovereign over the land and the fisheries and that only a treaty or some other vested right could warrant any foreign fishing in the American seas.

In 1723 the British navy expelled French fishing ships from the great bank of Newfoundland, but the Board of Trade discountenanced this act on the ground that the great bank was 35 to 50 leagues distant from the land at its nearest point and was therefore considered free to all nations. Exhibit 769, pp. 49, 51-53, 124-25. The Board did not on this occasion state its belief as to the limits of the exclusive fishery; it was probably applying the 100-mile rule.

After the British acquisition of Labrador by the Peace of Paris in 1763, Labrador was annexed to Newfoundland and the Labrador fisheries were regulated in the same manner as those of Newfoundland. The French were, of course, excluded. Exhibits 800, 801, 805. In 1765 the Board of Trade, in an address to the king, urged even more diligence in ensuring the exclusion of the French from the fisheries of Newfoundland, Labrador and the Gulf of St. Lawrence, *"where both the territorial property and the sovereignty of the seas are vested in your majesty."* Exhibit 805, p. 2. (Emphasis added.)

(c) Cape Breton and Nova Scotia

The French systematically, and under claim of right, excluded the British from the Cape Breton fisheries while that island was in French hands. Exhibit 783. Acquisition of the Cape Breton fisheries was one of the principal motives for the New England expeditions which twice seized the island during the wars of the mid-18th century. Exhibit 659; Greene, *The Foundations of American Nationality* 363-64 (1922).

Nova Scotia changed hands several times, becoming permanently British by the Treaty of Utrecht in 1713. Both the French and the English asserted the right to exclude, and did exclude, nationals of the other from the rich Nova Scotia fisheries during their respective possessions of the province. The New Englanders were most interested in the Nova Scotia fisheries, and solicited permission to fish there from the British crown. Exhibit 780. After the final change of sovereignty in 1713 the French never disputed the exclusive British right to the Nova Scotia fisheries, although there were nagging disagreements as to whether certain areas fell within that exclusive fishery or not. See Exhibit 768, pp. 43, 91.

(d) The Fisheries of the Common Counsel States

The colonists of what are now the Common Counsel States were no more prepared than their neighbors to the north to tolerate French intrusions upon their fishing, and one of the motives for the seizure of Louisbourg in 1745 by the New Englanders was to prevent French incursions on the New England fisheries. Exhibit 659, p. 9; see also App. 903-04. The issue rarely arose, however, because—except perhaps in Maine waters—French incursions were infrequent and on a small scale. This was so essentially for two reasons: the New England fisheries were distant both from France and from any French-occupied territory; and, while at first believed to be even richer than the Newfoundland fisheries, those of New England turned out to be relatively modest and not such as to attract foreigners in any significant number. Exhibit 663, p. 300; Exhibit 665, p. 345; Exhibit 671, pp. 88-90; Exhibit 673, p. 37; Exhibit 740, pp. 33-34; Tr. 2125-26. Also, the New England fisheries rarely required action by the authorities in England, "probably because the people of that region were conducting the industry so successfully that they had no cause to bring pressure upon the home government."

App. 831. In a notable understatement, Dr. Kavenagh conceded that if the French had attempted to fish in New England waters, the colonists would have "asked them to leave." Tr. 2061-62.

The Board of Trade was interested in the New England fishery and regularly collected information concerning it. Exhibit 766, p. 615; Exhibit 768, pp. 31, 34-35, 122; Exhibit 791; Exhibit 810, p. 288. If there had been any French or other foreign threats to the fishery it cannot be doubted that both the British government and the colonists would have taken steps to combat it, just as they did in more northerly waters where foreign incursions did take place.

Southward of New England, the fisheries were not so rich as to attract any French or other foreign interest at all, so that the necessity of excluding foreigners never arose there. App. 791; Tr. 2283, 2290.

Plaintiff herein has relied on a Massachusetts statute of 1646, which recited in its "whereas" clause that "it hath been a custom for foreign fishermen to make use of such harbors and ground in this country as have not been inhabited by English men." App. 706; Exhibit 724, p. 52; Tr. 2287-88. This act — which was repealed in 1661, Exhibit 724, p. 52 — indicates that some fishermen who in some sense were foreign had been tolerated at one period. An act of 1667 stated that the 1646 act had been in accordance with "a reservation in the patent," that is, the Massachusetts Bay charter of 1629. App. 708. As we have seen (p. 208, *supra*), that charter included a free-fishing clause for the benefit of "any of our loving subjects."

The fact that this reservation was for the benefit only of British subjects makes it plain that when in 1646 the Massachusetts legislature, acting as it later explained in accordance with that "reservation," spoke of "foreign fisher-

men" it was speaking of some class or classes of British subjects whom the legislature considered "foreign." If non-British subjects were included, the reference to "a reservation in the patent" simply made no sense. The reference in the 1667 statute to "strangers," as synonymous with "foreign fishermen" in the 1646 statute, and the distinction made between them and "inhabitants" of the colony, further demonstrates that the reference in the 1646 statute was to residents of British North American colonies other than Massachusetts itself, and to fishermen from the British Isles also if any were then coming so far to fish. On the basis of the behavior and attitude both of New Englanders and of other colonists throughout the colonial period we may be sure that if there ever was any "custom" of tolerating French or other non-British fishermen it was because very few of them came to be tolerated and that such toleration was regarded as a matter of permission rather than of right.

Instructions issued in 1683 for the settlement of the Duke of York's colony at Pemaquid, in Maine, prohibited all vessels "that do not belong to this government" from fishing for herring; vessels from outside the government could otherwise come to fish, but only after procuring licenses. App. 536-37, 849.

In 1693 the Pennsylvania government required a payment by all foreigners of a royalty of 10% of oil and bone for the killing of any whale within Delaware Bay. Exhibit 281; App. 334. The government of New Jersey adopted a similar measure the same year. App. 704. Both these acts applied to all persons not residing in Pennsylvania or New Jersey.

In 1700 the Massachusetts governor and legislature referred to "the undoubted right and privilege of your majesty's subjects to fish in the seas on the whole eastern

coast, conformable to your majesty's rights of sovereignty over the seas." App. 322, 680.

3. Licensing of Fishing by the Colonies

Most of the colonial governments at one time or another asserted the right to grant fishing licenses and to charge royalties or taxes therefor. The Virginia Company, even while embroiled with the Council for New England on the fishing issue, issued licenses; the Virginia Company's position was not that there was no licensing power, but that the two companies chartered in 1606 had the reciprocal right to fish in each other's waters. Preston, *Gorges of Plymouth Fort* 157, 167, 413 n.20 (1953). In 1622 certain foreigners wishing to settle in Virginia applied for permission to fish in the seas thereof. U.S. Exhibit 261; Tr. 2196.

Pennsylvania, in chartering a society of traders in 1682, included in the grant a license to fish for whale, sturgeon and all royal and other fishes in the main sea and bays of the province. App. 335, 683; Tr. 2194-96.

New Jersey on a number of occasions granted licenses and charged royalties for whale fishing. Exhibits 482, 483, 484.

The New York government over a period of many years sold licenses for whale fishing; this practice was challenged in court, but was upheld. Exhibits 470, 474, 478, 782, 785; Exhibit 748, p. 15.

The Plymouth colony licensed its mackerel and bass fisheries (p. 238, *infra*), and Nantucket licensed whale fishing. Exhibit 748, p. 16.

In Bermuda, a corporation was given the monopoly of whale fishing in Bermuda waters, and issued licenses to others in return for royalties. Exhibit 777, p. 294.

Nova Scotia by proclamation of 1665 ordained that no one should fish without license. Scott, *Hague Court Reports* 161 (1960).

Under the administration of Governor Pallisser in the 1760's, American participation in the fisheries of Newfoundland, Labrador and Canada was permitted only "within certain limits and under certain restrictions"; in general, Americans were licensed for the whale fishery only and were excluded from other branches of the fishing trade. Exhibit 801, pp. 3, 8; Exhibit 748, pp. 45-46.

Frequent colonial legislation licensed the taking of drift whales whether on the shore or at sea, typically requiring the payment of a royalty to the colonial government by anyone taking such a whale.[43] See App. 334, 875, 879-80; Exhibit 374; Exhibit 732, p. 134; Exhibit 748, pp. 4-9, 12; U.S. Exhibit 9, pp. 86-87, 98; U.S. Exhibits 195, 199, 200, 208; Tr. 2216, 2230-33, 2246-47. As we have seen (pp. 10-12, *supra*) the sovereign right to whales had been regarded from the earliest times in England as an attribute of sovereignty and property in the territorial sea.

4. Grants of Exclusive Fishery

The Plymouth colony regarded the rich mackerel and bass fisheries in the waters off Cape Cod as one of the important economic resources and rights of property

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[43] We know of no basis whatever for plaintiff's assertion (Pl. Br. 139) that such statutes related only to whales caught "within a short distance of shore"; even if they did, they would still be irreconcilable with plaintiff's position that colonial property rights stopped at the water's edge. Nor do we know of any basis for plaintiff's inconsistent and contrary, and incredible, assertion (Pl. Br. 149) that a New Jersey statute established jurisdiction over whales caught anywhere in the world. By far the more natural construction of all these statutes is that they applied to the territorial sea.

belonging to the colony. At times licenses were sold, but the usual procedure was for the government to lease the exclusive right to the fishery to entrepreneurs for a term of years. Such leases resulted in substantial receipts of revenue by the colony. App. 837-38, 876-80, 886-89; Exhibit 730.

In 1647 the Connecticut colony offered John Whiting a monopoly for the taking of whales within the colony. Tr. 2242-43.

In 1715, and again in 1726, New York created monopolies for the exclusive fishing for porpoises "in the seas, harbours, rivers and other waters within this colony." App. 333, 680-82, 703-04.

The whaling company licensed by New Jersey had apparently only a non-exclusive license to take whales in the sea, but an exclusive right to all drift whales coming on shore. Exhibits 484, 485, 490.

In 1763 the Board of Trade received an application for a grant of the Madeleine Islands in the Gulf of St. Lawrence and the exclusive fishing thereof. Disposition of the application does not appear in the record, but in 1766 the Board of Trade recommended to the crown that an exclusive fishery be established there. Exhibit 681, pp. 347-48; Exhibit 806, pp. 7-8. In 1770 the Board expressed its opinion that if an exclusive fishery were to be granted the crown should receive "a valuable consideration" therefor. Exhibit 774, p. 227.

When Labrador was ceded to Britain by the Peace of Paris of 1763, it was annexed to the government of Newfoundland for the express purpose "that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands." U.S. Exhibit 367, p. 164. Governor Pallisser carried out this mandate with great vigor, to the extent of interfering with exclusive seal and sea-cow fisheries on the Labrador coast

which had been granted, together with posts or settlements on land, by the French government of Quebec and confirmed by the British on first taking possession. The owners of these exclusive fisheries protested to the Board of Trade. At first the Board was skeptical, regarding title to the property rights in question as unproved and taking the view that the initial British confirmation had only the nature of temporary licenses to carry on the fisheries. Exhibit 802, p. 9; Exhibit 806, pp. 7-8.

By 1772, however, the Board of Trade had become convinced that these exclusive fisheries were legitimate rights of property and also that the fisheries in question could as a practical matter be carried on only on an exclusive basis. Exhibit 786, pp. 2-4. The Board of Trade therefore memorialized the crown to re-annex the coast of Labrador to the province of Quebec. Exhibit 786, p. 6. This was done by the famous Quebec Act of 1774, which expressly declared the reason for the re-annexation of Labrador to Quebec to be the fact that under the Newfoundland regime the exclusive fisheries of the Labrador coast had been "subjected to regulations inconsistent with the nature of such fisheries." U.S. Exhibit 365, p. 549.

The instructions to the Quebec government in 1775 required that "the real and actual property and possessions" of the owners of fisheries on the Labrador coast should be "preserved entirely, and that they should not be molested or hindered in the exercise of any sedentary fisheries they may have established there." Exhibit 714. (Since these were seal and sea-cow fisheries, the word "sedentary" is obviously not used in the modern sense but appears to refer to a fishery carried on within a relatively restricted area from an established point on shore.) See also Exhibit 773, pp. 56, 76, 256, 266-67, 272-75, 277, 279-80; Exhibit 774, pp. 70, 308.

5. Regulation of the Fisheries

The record contains many examples of regulations enacted by every colonial government which had important fisheries, both surface and sedentary, within the seas of its province. Such regulations are found in Maine (App. 849), Massachusetts (App. 707-10; Exhibits 505, 511; Exhibit 724, pp. 53-54); the Plymouth Colony (App. 876-79); Rhode Island (App. 990); New York (App. 702); Nova Scotia (Exhibit 768, pp. 31, 34-35; Scott, *Hague Court Reports* 161), and Newfoundland and Labrador (Exhibits 465, 714, 719, 741; Exhibit 748, p. 45; Exhibit 766, p. 609; Exhibit 773, pp. 37, 259, 273-80; Exhibit 774, p. 62; Exhibits 798, 799, 801, 802, 804, 805, 806, 811).

The types of regulatory measures enacted, many of which we have previously encountered in England, included the chartering of fishery companies, the prohibition of certain types of nets and other methods of fishing, the specification of times and seasons for fishing, the prohibition of the taking of young fish, prohibitions of the dumping of garbage or waste in certain areas of the sea, exclusion of foreigners or of certain classes of subjects from fisheries, protection of foreigners where they enjoyed treaty rights to a fishery, suppression of one type of fishery in order to promote another conflicting type which was regarded as more valuable, protection and convoying of fishing fleets, and the encouragement and improvement of fisheries generally.

B. THE COLONIES ASSERTED AND EXERCISED CONTROL AND JURISDICTION OVER THE SEABED AND ITS RESOURCES WHENEVER THE OCCASION AROSE.

1. Sedentary Fisheries

On several occasions colonial legislatures asserted and exercised their jurisdiction over the seabed by regulation of sedentary fisheries. The New Jersey act of 1719 (App. 684,

705-06) prohibited the gathering of oysters within the province from May 10th to September 1st of each year; forbade all persons not living in that province to take any oysters; provided for the seizure of any oyster-raking equipment found on foreign ships and imposed fines for violations.

In New York there were four 18th-century statutes regulating the raking of oysters. Exhibits 277-280; App. 682-83. The first three of these dealt with oyster beds below low-water mark in the sea; the fourth dealt specifically with oyster beds "lying at and near Richmond county, within this colony." As Professor Smith testified, "this implies a distinction similar if not identical to that in English law: the 'body of a county' ended at low water mark but the sovereign's jurisdiction and prerogative extended much farther into the sea." App. 333.

Professor Henkin conceded (App. 541-42) that it is "likely" that foreigners seeking to exploit the sedentary fisheries in American colonial waters would have been driven off as late as 1765.

2. Grants of Submerged or Derelict Lands

Given the great wealth of unappropriated land in North America during the colonial period and the constant availability of land for expansion westward, it is not surprising to find few colonial grants of land covered with water. However, several examples of such grants have been found.[44] While most of these grants did not deal with land under the open sea, we have seen that English property law never made any distinction between the different classes of tide waters.

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[44]It can be stated with some confidence that there must be many such grants besides those here mentioned. Random searches through the deed books of every coastal county would be hopelessly time-consuming, and have not been undertaken. The few grants here mentioned were encountered essentially by chance.

In 1693 Sir Thomas Chicheley was granted derelict land in York County, Virginia. Survey Report No. 140, Virginia 350th Anniversary Corporation, Colonial Records Project, British Museum, Harleian MSS 7639.

In New York in the 1680's, the governor granted to the mayor and corporation of New York City lands reclaimed from the sea on which a dock was built. Exhibit 286, pp. 334, 367; App. 338.

A Rhode Island statute of 1707 authorized every town to develop the "waters" bordering thereon (without any limitation to internal waters) by constructing wharves or reclaiming the submerged lands. *Armour & Co. v. Newport*, 110 Atl. 645, 646 (R.I. 1920); *New York, N.H. & H.R.R. v. Horgan*, 56 Atl. 179 (R.I. 1903). A grant made under this statute conferred the right to build a wharf for 800 feet below low-water mark. U.S. Exhibit 11, pp. 18-19. A New Hampshire statute of 1763 was similar. *Id.* at 19.

Massachusetts statutes of 1641 and 1647 provided that the owner of coastal land had property in the foreshore (with no limitation to the foreshore of internal waters) down to the low-water mark. Exhibit 533. It is not to be supposed that the Massachusetts government were ignorant of the law of England that the foreshore partook of the nature of the sea and was a proper subject for ownership because of the crown's ownership of the seabed. The same statute cautioned that owners of the foreshore were prohibited from stopping or hindering the passage of boats "through any sea."

Grants of the foreshore were very frequent in New York. See Mershon, *The Power of the Crown in the Valley of the Hudson* 156-57, 166-68, 177-89 (1925). In New York we also frequently find grants of land under rivers, bays and Long Island Sound. *Id.* at 146, 169-76. An Indian deed of 1640 of what became the town of Southampton included "all

emoluments and profits thereto appertaining or in any wise belonging from sea or land within our limits." Exhibit 554.

Finally, Professor Smith testified as to a number of grants in the West Indian colonies of salt ponds and other waste lands below low-water mark. App. 336-38; Tr. 1268-69; and exhibits there cited.

3. Mining

The desire to discover and to exploit mines, particularly mines of precious metals, was of course one of the principal reasons for English colonization in North America. The colonial charters and instructions to governors contain frequent and pervasive references to mines and mining.

It is hardly to be supposed that the colonists would have turned a blind eye to mines below low-water mark, or would have regarded them as incapable of ownership. In 1630 Governor Harvey of Virginia hoped to discover a saltpeter mine in the Chesapeake Bay, and "will find out if there be any silver mines." Exhibit 233. Mining concessions in the royal colonies were frequently granted out to royal favorites. In 1687 the Duke of Albemarle received a grant of all mines of gold, silver, saltpeter, salts and any other minerals in Carolina "as largely as is in our power to grant such license or authority," he to pay a percentage of net proceeds to the crown. Exhibit 232. Thomas Neale, Master of the Mint, in 1691 received a 31-year lease of all mines and minerals belonging to the crown in Virginia, at a royalty of one-tenth. The following year Neale received a 51-year lease of all ungranted mines, including saltpeter, in the American colonies, with stated exceptions. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11.

We have found no evidence of the actual discovery and exploitation of any subsea mines in the North American seas during the colonial period. This is not surprising, in

view of the state of technology at the time and the vast expanse of unexplored land to the west which naturally dominated the economic ambitions of the colonies. But as Professor Smith testified, the lack of exploitation for these reasons "is not at all inconsistent with a quite general awareness that the exclusive right of exploitation was vested in the adjacent sovereign" if such mines had been discovered. App. 332.

Professor Morris admitted that under the common law in force in the 17th and 18th centuries mining rights on land in the American colonies were proper subjects of ownership all the way down to the center of the earth, even though they were not exploited during that era to any great depth below the surface. Tr. 2293-97; see 2 Blackstone, *Commentaries* 18. Likewise, as we have seen, the English common law which was in force in colonial North America recognized the crown, or his palatine grantees, as owners in fee of the property of the soil of the seabed in marginal waters. That ownership of course entailed ownership of any minerals found in the seabed or subsoil.

Even on Professor Thorne's view that the coastal sovereign's rights in the adjacent seas were mere rights of jurisdiction and the right to ownerless property, and that seabed minerals were therefore ownerless until discovered, there can be no question that the prerogative right would have extended to any mineral resources discovered and exploitable there, just as it extended to wreck, flotsam, treasure trove and royal fish. Professor Thorne was at great pains to argue that the crown did not own the waters of the sea and the fish floating therein while they were still free, but that the prerogative attached only to things of value found in or extracted from the sea. While Professor Thorne's view has been shown to be erroneous as to the law of England at any time since the 16th century at the latest, that view, had it been the law, would still be entirely adequate to sustain the position of the defendant States in

this proceeding. Even if the sovereign's right in the American marginal seas were viewed only as an inchoate or potential right to assert ownership of things of value found therein or extracted therefrom, the States must prevail once such things of value *are* found or extracted.

In one sense there is an analogy here to the power of Congress under the Constitution of 1787 over interstate and foreign commerce. When that power was conferred, it did not apply to airplanes, railroads, radios and television, because those inventions were unknown at the time; but there was never any question that once they came into being they were embraced under the provisions of the commerce clause. Here the case is much stronger, since during the American colonial period mining was well known and even subsea mining was not unheard of (p. 107, *supra*). Thus to argue, as the United States does, that colonial ownership did not extend to subsea mines because there were no such mines in American waters prior to 1776 is *even more* preposterous than an argument that the commerce clause could not be applied to airplanes or to television. A closer analogy would be an argument that the commerce clause did not apply to traffic by sea between Georgetown, South Carolina, and New London, Connecticut, on the ground that no ships sailed between those two ports prior to 1787.

We submit that no one familiar with the English and colonial background can have the slightest doubt that in fact, if valuable mineral resources had been discovered in the seabed or subsoil of the American marginal seas during the colonial period, the adjacent colonial government or the crown would have asserted jurisdiction and ownership over them, the right to control or to license exploitation, and of course the right to exclude foreigners, and that these assertions would have been upheld in the courts in the unlikely event that any one had challenged them. There is an analogy to fishing, but the reasons for assertion of owner-

ship and exclusion of foreigners would have been much stronger in the case of mines than in the case of the fisheries.

Unlike fishing, which had been practiced for centuries, and as to which there were arguably vested rights, based on prescription, for subjects and possibly even for foreigners, such seabed mineral exploitation would have been a new industry or invention and therefore would have been plainly proper for monopolization or licensing under the established law. Likewise, the prevailing mercantilist theory would have required the orderly harnessing and exploitation of such resources as a part of the economy and wealth of the empire. Moreover, mining, which requires permanent and immobile installations, would have been far easier to regulate than was fishing; we have seen that licensing or exclusion of foreigners from the sea fisheries, while always insisted upon as a matter of legal right, was sometimes given up as more trouble than it was worth in view of the ability of illicit fishing boats to slip in and out of territorial waters undetected. No such difficulty would have arisen in the case of mining installations. Finally, it is inconceivable that a colony would have tolerated the construction of such installations by foreigners in its marginal waters; that would have been regarded not only as larceny of the colony's wealth but, even more seriously, as a threat to the security and defense of the colony itself.

The United States may say that all this is hypothetical. It is no more hypothetical than the application of the commerce clause of the 1787 Constitution to airplanes or television, or than the ownership by the surface proprietor of mining rights far below the level of exploitation possible at that time. Yet no one doubts how those questions would have been resolved had they arisen, and they were resolved without controversy or doubt once they did arise. There is no greater room for doubt here.

C. THE TERRITORIAL JURISDICTION OF ADMIRALTY EXISTED IN THE AMERICAN SEAS JUST AS IN THE ENGLISH SEAS.

As we have seen (pp. 25-31, 92-98, 132-35, *supra*), throughout the 17th and 18th centuries in England, as well as earlier, the admiralty jurisdiction was regarded as an attribute or corollary of the crown's sovereignty over the English seas. As the English colonies in North America sprang up, the admiralty jurisdiction was extended to their seas as a matter of course. All the colonial charters conferred admiralty jurisdiction; some (*e.g.*, Exhibit 683, p. 35) reserved part of the jurisdiction to the admiral of England, but there is no need to discuss the somewhat complex subject of the division of the jurisdiction among the Lord High Admiral, the colonial vice-admirals and the various admiralty courts. The patents of the English admirals included territorial jurisdiction over the seas of the colonies, which were listed by name. Exhibit 642; see also Exhibit 675, preface. The jurisdiction was exercised, except so far as it was reserved to the crown, by the colonial legislatures and courts throughout the 17th and 18th centuries, including of course jurisdiction over ships at sea. See generally Exhibits 502, 541, 633. Appeals from decisions of the colonial admiralty courts lay in the High Court of Admiralty. 3 Blackstone, *Commentaries* 69.

The patents of the colonial vice-admirals conferred jurisdiction in unmistakably territorial terms. For example, the patent to Thomas Boone as Vice-Admiral of New Jersey granted him jurisdiction "throughout our province of . . . New Jersey . . . and territories thereof and maritime parts whatsoever adjacent thereto and also throughout all and every the sea shores public streams ports fresh waters rivers and creeks and arms as well of the sea as of the rivers and coasts whatsoever of our said province . . . and maritime parts whatsoever of the same and thereto adjacent." U.S. Exhibit 322. The patent in several places

speaks of things to be done "within the maritime jurisdiction of our vice admiralty of our said province," and confers all that jurisdiction "which of right and by the statutes laws and ordinances and customs anciently observed were wont and ought to be enquired after," including wreck, manslaughter and other felony, royal fish, etc. *Ibid.* These formulas leave no doubt that the jurisdiction was territorial and that it was intended to be of precisely the same nature and scope as the jurisdiction in the English seas themselves. See also U.S. Exhibits 323, 324, 325.

The language differed slightly from patent to patent; for example, William Shirley's commission of 1741 as Vice-Admiral of Massachusetts conferred jurisdiction "in our province of Massachusetts Bay aforesaid and territories thereon depending and in the maritime parts of the same, and thereto adjoining, whatsoever," and so on. 2 *Collections, Colonial Society of Massachusetts* 237 (1913). Two commissions have been encountered which set express geographical limits on the territorial jurisdiction conveyed: Joseph Dudley's commission as Vice-Admiral of New England, in 1685, conferred jurisdiction "of our colony of New England and maritime parts to the same adjoining, that is, from New York and Long Island toward the south and southwest to 40 degrees of north latitude." *Id.* at 369. And the charter of the Providence Island Company, in 1630, granting certain islands off the coast of Central America, conveyed admiralty jurisdiction "in and upon the seas, rivers and coasts of the said islands, and every or any of them adjoining, within 40 leagues of the islands." 1 Marsden, *Law and Custom of the Sea* 471 (1915). As we have seen, the Maine charter of 1639 granted admiralty jurisdiction out to 20 leagues from the coast. Tr. 716.

There is substantial authority for the proposition that a principal purpose and function of the admiralty jurisdiction in colonial North America was the exclusion of foreigners and other unauthorized or unlicensed persons

from the fisheries in the territorial seas. App. 784-91. The New England colony unquestionably used the admiralty jurisdiction for that purpose, and the same was true of Newfoundland. App. 788-90; Exhibit 719, pp. 128-31. This was, of course, wholly consistent with the scope of the admiralty jurisdiction in English home waters at the time; see pp. 92-98, *supra.*

D. OTHER ASPECTS OF SOVEREIGNTY, OWNERSHIP AND JURISDICTION CONFIRM THAT THE AMERICAN SEAS WERE REGARDED AS SUBJECT TO THE SAME LAW AS THE ENGLISH SEAS.

1. Wreck and Other Admiralty Droits

In 1713 the British Parliament adopted an act, confirmed by another act in 1717, which codified the common law of wreck and was to be applied on the coasts both of Great Britain and "any other of her majesty's dominions." The act required royal officers to assist all ships, British or foreign, in danger of being wrecked on the shore, and provided for the custody of all wrecked goods and their appropriation by the crown if not claimed within 12 months. While these acts applied of their own force to all royal colonies, the New Jersey legislature in 1766 enacted a statute specifically recognizing their application there. Exhibit 492.

In 1692 the governor of Maryland appointed an officer to salvage all "drifts, wastes and wrecks," including whales, "as shall be driven or cast on shore or shall be found floating within the limits and bounds" of the colony. Exhibit 374; App. 334. The reason for the appointment was stated to be incursions of Pennsylvanians and other foreigners "upon and within the limits and bounds of this province at the seaboard side" to take drift whales. *Ibid.*

The right of wreck in the royal colonies was granted, leased or sold by the crown on various occasions. In 1691

Thomas Offley was granted one-half of any proceeds to be realized "from several Spanish wrecks in America." In 1690 Thomas Neale received a grant of all wrecks within 20 leagues of Bermuda, and another grant of wrecks in certain specified Caribbean waters. Also in 1692, the Duke of Leinster was granted wreck in America between the latitudes of 12 degrees south and 40 degrees north, except as already granted. Neale and a partner received a grant of wreck within 30 leagues of the isle of Sables, off the coast of Nova Scotia between 40 and 50 degrees of northern latitude. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11. Neale's grant of wreck in the seas for 20 leagues around Bermuda included flotsam, jetsam and lagan as well as wreck properly so called, Exhibit 657; other grants doubtless did likewise.

In 1719 the North Carolina government claimed certain captured goods which had been seized "within the seas of the soil of the lords proprietors" of Carolina. App. 369.

The treatment of wreck and similar prerogative rights on the American seas and coasts is further confirmation that English law regarded those seas and coasts as subject to the sovereignty, jurisdiction and ownership of the crown in precisely the same senses as were the seas and coasts of England itself.

About 1615, the Bermuda (Somers Island) Company made substantial profits from "an immense piece of ambergris found on the coast." These profits supplied the capital which permitted the establishment and development of the Bermuda colony. Rowse, *The Elizabethans and America* 77 (1959).

2. Establishment of Ports

It is common knowledge, of which judicial notice can be taken, that the colonial governments as a matter of course

exercised the right to establish seaports and to define their limits.

It will be remembered that in England the right to establish seaports—which often extended quite considerable distances into the sea—was an undoubted prerogative of the crown, and was regarded as an attribute of, or evidence for, the crown's sovereignty and ownership of the sea and seabed, on the ground that if the king so chose he could designate ports covering the entire coastal seas. See pp. 102, 113, *supra*.

3. Regulation of Marine Pollution

Massachusetts enacted statutes against the throwing of ballast, dung or other matter from ships into the waters of roads, ports, harbors and coves within the province. Exhibits 507, 531, 537.

Other statutes of several colonies, already cited under the heading of fisheries regulations (p. 240, *supra*), forbade the dumping of garbage or waste by fishing boats in various other parts of the sea outside harbors.

4. Smuggling Jurisdiction

In 1764 the British jurisdiction over smuggling (pp. 137-39, *supra*) was extended to American waters by a "hovering act" of Parliament providing for the seizure and forfeiture of any foreign ships and all goods on board found within two leagues of the coast of any British colony or territory in America. Masterson, *Jurisdiction in Marginal Seas* 38-39 (1929).

E. SEVERAL MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR THE AMERICAN TERRITORIAL SEAS.

In the colonial period as today, maps very rarely indicate maritime boundaries or the width of the territorial sea.

There are a few colonial maps, however, which do show such boundaries, and others which contain nomenclature evidencing recognition of maritime sovereignty.

Professor Flaherty offered a number of maps from the colonial period designating the waters off the Virginia coast as the Sea of Virginia or the Virginian Sea. Virginia Exhibits 2-8. While suggestive, such designations could be interpreted either as merely geographical or as indicative of a claimed sovereignty or ownership.

Two maps of 1726 and 1733, drawn up in connection with a Massachusetts-New Hampshire boundary controversy, show the colonial boundaries in New England as extending out into the sea. App. Vol. III, Exhibits 615, 616. An earlier, 17th-century map, by William Reed of Boston, does likewise. App. Vol. III, Exhibit 815.

Exhibit 816, App. Vol. III, is an English map of North America, made in 1680 by William Berry and dedicated to King Charles II. The map includes maritime boundaries, labeled the north and south "bounds of the dominion of the British seas," extending from Van Staten and Finisterre due westwards across the Atlantic Ocean to the coast of North America. This was in accordance with the then-current doctrine that a nation owning opposite coasts owned all the waters, no matter how extensive, between those coasts. The map thus shows the British seas, properly so called, as having their southwestern corner at a point on the North American coast due west of Cape Finisterre, that is, at approximately the present Maine-New Hampshire boundary. But the map also recognizes that the American colonies to the southwards had their own territorial seas, which are designated as the "sea of Carolina, Virginia, Maryland, New York, New England."

Exhibits 817, 818 and 819, App. Vol. III, are English maps deriving respectively from about 1685, about 1690 and 1715. The first two designate the marginal seas of the

North American Atlantic coast as the "Sea of the English Empire." Exhibit 819, which was dedicated to the president of the Privy Council, uses the term "Sea of the British Empire." These are quite obviously not mere geographical designations.

Exhibit 613, App. Vol. III, is an official map made about 1720 by Captain Cyprian Southack, who was a royal naval commander and Commissioner of Treaties of the province of Nova Scotia, and dedicated by him to Francis Nicholson, Governor and Vice-Admiral of South Carolina. Southack's map, which covers the American coast from Cape Breton Island to New York, divides the sea off each province by precise designations: "the Sea of Nova Scotia," "the Sea of the Province of Maine," "the Sea of New Hampshire," "the Sea of New England," "the Sea of Rhode Island," and "the Sea of New York." These are obviously recognitions of territorial sovereignty rather than mere geographical designations, because of their precision and the fact that the various "seas" are in no possible sense separate bodies of water, the divisions among them being purely artificial and political.

In the St. Croix arbitration under the treaty of 1794 between Britain and the United States, the United States regarded Southack's map as authoritative and relied on it heavily. The United States agent declared of Southack, "there was in that day no man who possessed more ability for such a work, who had a greater opportunity to acquire knowledge in the business or who, for such a business, in a higher degree possessed the confidence of his country." 1 Moore, *International Adjudications* 141-42 (1929); see also 2 *id.* at 284-88 (1930). One of Southack's naval duties was the seizure of any French ship caught fishing or trading in Nova Scotia waters. Exhibit 768, p. 54; Exhibit 789. Southack was in a good position to know just what Britain was claiming in that era regarding sovereignty and propriety in the American seas.

Exhibit 820, App. Vol. III, a portion of a map of 1720, shows the Carolina-Florida boundary, identified as the "limit of King Charles II granted to the present proprietors of Carolina in 1663." The line does not stop at the coast but rather extends a considerable distance into the sea.

Exhibit 821, App. Vol. III, is an early 18th-century French map of what is now the United States. The English possessions have been shaded in; most interestingly, the shading includes the marginal sea of each of the English colonies. While the boundaries of this maritime shading are somewhat eccentric—usually following north-south and east-west lines rather than the indentations of the coast, and therefore producing a curious notching effect—in most areas the shading extends approximately 100 miles from the coast.

In the arbitration of 1817 between the United States and Britain concerning the islands in Passamaquoddy Bay and the Bay of Fundy, the agent of the United States presented a rough map on which he drew a maritime boundary off the Maine coast to show his understanding of the Massachusetts charter of 1691. The line is labeled "an imaginary line ten leagues from the shore being the Province boundary of Massachusetts." 6 Moore, *International Adjudications*, map opposite p. 110 (1933).

These maps, especially when examined in the light of what we already know concerning the British attitude towards maritime sovereignty in the 17th and 18th centuries, furnish powerful supporting evidence for the existence of the territorial sea off the North Atlantic coast and of general awareness thereof.

F. THERE WAS NO CURTAILMENT OF COLONIAL RIGHTS IN THE MARGINAL SEA BETWEEN 1752 AND 1776, AND IF THERE HAD BEEN SUCH A CURTAILMENT IT WOULD NEVER HAVE BEEN RECOGNIZED IN AMERICAN LAW.

One of plaintiff's principal contentions is, in the words of Professor Morris, "that after 1752 there was a deliberate effort on the part of the Crown to reassert its claims to the unoccupied and undistributed lands of the colonies and to tighten royal authority over disposition by the colonies of public lands." Tr. 1701. Plaintiff seems to contend that the process of curtailment of colonial rights after 1752 was so drastic and comprehensive that by 1776 the colonies had virtually nothing left which could be inherited by the successor State governments. To this contention there are three short answers, each of which would be separately adequate to deprive Professor Morris' thesis of any benefit to plaintiff in this proceeding.

1. The attempted curtailment of colonial rights was the principal cause of the American Revolution, and such curtailment never became part of the law of this country. The statesmen of the Revolution continuously and vehemently asserted that the colonial charters, charter rights and charter boundaries were in full force and vigor and that any British attempt to curtail or abrogate them had been and was unlawful. Our courts have uniformly so held.

2. To the extent that the crown did curtail colonial rights, it did so for its own benefit and aggrandizement, not for the benefit of foreigners or the world at large. Professor Morris conceded that the crown never took away any territory or right from any colony in order to make it *res nullius*. Tr. 2331-32. And anything the crown took away from the colonies came back to the States individually at the Revolution. Professor Morris' theory is that rights which under British law had been taken away from the colonies by the crown by 1776 passed "directly to the

United States, not to the individual states." Tr. 1701. It would be difficult to formulate a thesis more alien or repugnant to the views of the revolutionary statesmen or to the legal doctrine on which the American Revolution and Constitution were founded. Professor Morris has not brought forward any judicial or jurisprudential pronouncement from 1776 until today in which any American authority has ever used any version, let alone the British version, of the division between crown and colonial rights in 1776 as a measure of the allocation of powers between the States and the Federal Government. In 1782 Madison called such a notion "so extravagant that it could not enter into the thought of man." Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 484 n. 67 (1946).

3. As Professor Morris admitted, Tr. 1877, 2331, there is not the slightest evidence or indication that the crown ever took away or curtailed any colonial rights of sovereignty or property in the seabed. With one interesting exception, there is no evidence that the crown ever attempted to curtail any colonial rights on the surface of the seas either.

The exception is the New England Restraining Act of 1775, which prohibited the New England colonists from fishing on the banks of Newfoundland and in all other American waters. Tr. 1697-98; App. 846-48; Exhibit 720, pp. 113-20; Exhibit 742, pp. 315-23. This was a war measure, based on a finding that the New England colonies were in a state of rebellion. Exhibit 742, p. 316. Obviously, it was never regarded as being any part of American law. Most interestingly, Lord North justified the act on the ground of British ownership of the fisheries in the American seas. App. 847; Exhibit 742, p. 316. Moreover, the government advocated the measure, aside from its principal purpose of injuring the New England colonies, on the ground that it would encourage and strengthen British fisheries in North American waters. Exhibit 742, pp. 322-24. Thus the significance of the act for this litigation is as evidence that

at the outset of the American revolution the British government still fully asserted that the American seas and their fisheries were subject to sovereign ownership and were not free to all. While there were bitter debates in Parliament on the wisdom and humanity of the measure, there is no record that anyone opposed it on the ground that the American seas and their fisheries were *res nullius.* Quite to the contrary, the opposition argued that "the people of New England, besides the natural claim of mankind to the gifts of Providence on their own coast, are especially entitled to the fishery by their charters, which have never been declared forfeited. These charters, we think . . . to be of material consideration. The bill therefore not growing out of any judicial process seems equally a violation of all natural and all civil right." 3 *Parliamentary Papers* 519 (1797).

A few other observations are in order concerning plaintiff's curious thesis as to the events of 1752-1776 and their legal implications. While at times plaintiff argues sweepingly that the crown had the absolute right to revoke charters and to change colonial boundaries, plaintiff elsewhere admits, Tr. 2541, and it is in fact clear, that such measures could be taken only by legal proceedings such as *quo warranto* or *scire facias,* which required proof that a charter had been breached by the grantees. Exhibit 711, pp. 42-43. The crown never claimed the power to interfere with vested rights of proprietary colonies. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823) (Marshall, C.J.); *Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 739 (1838). In the Passamaquoddy Bay arbitration of 1817, the United States unequivocally took the position that the crown had no power to change any charter boundary without the consent of the colony involved. 6 Moore, *International Adjudications* 47, 126-29 (1933).[45] Jurisdiction in the crown

[45] "[T]o dispossess the government and province [of Massachusetts] of any part of this territory [the territory included in the Massachusetts

over boundary disputes among colonies—which disputes were invariably resolved on the basis of construction of the colonial charters—is of course a wholly different matter. See Tr. 2332-33.

As to property rights, Professor Morris admitted that the crown could not and did not interfere with private property rights either in the proprietary colonies, Tr. 1876, or in royal colonies, Tr. 2300-03. Professor Morris' contention therefore amounts to no more than that the unappropriated lands in *royal* colonies became crown lands. But this is meaningless, since they had always been crown lands! The most that happened is some reallocation, as between the royal governments in the colonies and the authorities at Westminster, of control over the management and distribution of such lands. Such a reallocation, to the limited extent it occurred, has nothing to do with any issue in this proceeding.

Plaintiff relies especially on four documents: the Albany plan of union of 1754, the royal proclamation of 1763, the Board of Trade's proposal of 1768 for the erection of interior colonies, and the Quebec Act of 1774. Each of these documents avails plaintiff precisely nothing.

The Albany plan of union (U.S. Exhibit 366) proposed a federation of eleven of the British North American colonies. Each colony would retain its "present constitution," and the federation was proposed by the colonies themselves—hardly an imposition on them from above. In fact the plan was never implemented. The only significant fact about the plan for purposes of this proceeding is that it spelled out the colonies' charter boundaries, extending as

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charter of 1691] required an explicit renunciation on the part of Massachusetts, either expressed or necessarily and fairly implied . . . . And . . . no act has ever been done by Massachusetts from which her relinquishment of sovereignty over the islands in question can be justly inferred." "Case of the United States," *id.* at 126.

far as the Pacific, and regarded them as still in force. *Id.* at 885-86.

The proclamation of 1763, U.S. Exhibit 367, imposed, on a provisional basis, limits of western settlement into areas beyond the Appalachians then occupied by the Indians. Tr. 1706-07, 2308-13. This was a temporary measure adopted to allow time for the working out of a comprehensive plan for the administration and settlement of all the western territories, including those just acquired from France by the Peace of Paris, and for a peaceful settlement with the Indian tribes. The proclamation did not purport to change the boundaries of any colony; it was not contemporaneously construed as changing any such boundaries (U.S. Exhibit 368, last page; Exhibit 662, p. 83; Tr. 2325-27), and the official position of the United States taken during the peace negotiations of 1781-83 was that it changed no boundaries and that the charter boundaries survived as the foundation of the States' title to their territories. Exhibit 661, pp. 129-30; Exhibit 707; Tr. 2322-23; Greene, *The Foundations of American Nationality* 518 (1922).

The Board of Trade's proposal of 1768, U.S. Exhibit 368, envisaged the creation of new colonial governments in the western territories. The proposal, which like the Albany plan was never adopted, included elements devastating to plaintiff's position. First, the proposal acknowledged that the charter boundaries extending to the Pacific were still in force and had never been altered. U.S. Exhibit 368, p. 22. The map attached to the report, U.S. Exhibit 368, last page, Tr. 2325-26, shows the colonies with their ancient charter boundaries as far as the Mississippi, proving that they were still in force in 1768. Second, one of the principal reasons which the Board of Trade put forward for the erection of new colonies in the interior was in order not "to divert your majesty's subjects in America from the pursuit of" the "important objects" for which the original colonies had been founded. *Id.* at 29. *First* among those objects was

listed "*promoting the advantageous fishery carried on upon the northern coast.*" *Id.* at 27. (Emphasis added.) Thus in the Board of Trade's view, if expansion of the Atlantic colonies to the westward was curtailed or was sought to be curtailed, one of the prime objects was to avoid diverting those colonies from their proper and originally intended concerns, chiefly the exploitation of the sea fisheries. This is hardly consistent with Professor Morris' thesis that curtailment of colonial rights westwards necessarily entailed their curtailment on the coasts and in the seas also. See Tr. 2329-31.

The Quebec Act of 1774, U.S. Exhibit 365, purported to incorporate the territory north of the Ohio River and west of Pennsylvania into the province of Quebec. Curiously, the act expressly provided that nothing therein contained "shall in any wise affect boundaries of any other colony," *id.* at 550, though of course it was well known that the territory in question was within the charter boundaries of Virginia. The act also provided that nothing contained therein altered the status of any lands previously granted by the crown. *Id.* at 552. In any event, the Quebec Act, being one of the principal causes of the American Revolution, Tr. 2335-38, and adopted on the eve thereof, was never regarded as part of the law of this country. The Declaration of Independence listed the Quebec Act as one of the unlawful and tyrannical acts of George III that justifed revolution. The official United States position in 1781-83 was that the act was unlawful when adopted and had always been a nullity. Tr. 2335-38. Finally, the act said nothing with respect to the sea and seabed.

In sum, despite plaintiff's earnest contention, it is plain that nothing happened between 1752 and 1776 which in any way altered, voided or curtailed the rights of the American colonies in their marginal seas and the seabed thereof.

VI.

THE ENGLISH LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS NOT INCONSISTENT WITH INTERNATIONAL LAW IN THE PERIOD 1606-1783, AND NO BRITISH OR AMERICAN COURT COULD OR WOULD HAVE SO HELD.

Plaintiff contends that, even conceding that maritime sovereignty and dominion were fully established in English and American colonial law in the 17th and 18th centuries, all the vast body of law and practice proved by the record herein should be ignored or regarded as a nullity on the ground that under the international law of that period sovereign nations were forbidden to claim and exercise such rights.

A. NO BRITISH OR AMERICAN COURT WOULD HAVE QUESTIONED ITS GOVERNMENT'S TERRITORIAL CLAIMS ON THE BASIS OF ALLEGED CONTRARY DOCTRINES OF CUSTOMARY INTERNATIONAL LAW.

Even if the international law of the period had been as plaintiff contends, it is beyond dispute that no British or American colonial court would have presumed to set aside provisions of English law, or to impeach the official acts of the executive organs of the state—particularly with respect to territorial claims—on the ground of alleged inconsistency with customary international law. It has always been, and still is, the law in both Britain and the United States that courts will do nothing of the kind, but rather that such territorial claims, and particularly claims to maritime sovereignty, by the proper governmental organs are conclusive on the courts and are not to be questioned. *Poll v. Lord Advocate,* (1897) 5 Scots L.T. 167, 3 British Int'l Law Cases 747 (1965); *Peters v. Olsen,* (1905) 4 Adam's Justiciary Reports 608, 3 British Int'l Law Cases 750; *Mor-*

tensen v. Peters, (1906) 8 F.93, 3 British Int'l Law Cases 754; *Sim's Lessee v. Irvine,* 3 U.S. (3 Dall.) 424, 464, (1799) (Iredell, J.); *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 306-09, 314 (1829) (Marshall, C.J.); *Williams v. Suffolk Insurance Co.* 38 U.S. (13 Pet.) 415, 420 (1839); *In re Cooper,* 143 U.S. 472 (1892); *Wilson v. Shaw,* 204 U.S. 24 (1907); *United States v. The James G. Swan,* 50 F.108 (1892); *United States v. The Kodiak,* 53 F.126 (1892); *The Grace and Ruby,* 283 F.475, 478 (1922); Scott, *The Declaration of Independence, the Articles of Confederation, the Constitution of the United States xvi-xvii* (1917). See also Exhibit 813, pp. 130-37, and authorities there cited.

In this country, even a treaty is overruled by a subsequent act of Congress, and treaties derive what status they do have in our domestic law from their position as part of "the supreme law of the land" pursuant to Article VI, Clause 2 of the Constitution. See *Restatement (2d), Foreign Relations Law of the United States* §§ 141, 145 (1965). Neither in this country nor in Britain has the judiciary ever been regarded as having the power to overrule acts of the executive or legislative branches on the grounds of inconsistency with customary international law. Thus if maritime sovereignty and dominion were established in English law and state practice in the 17th and 18th centuries—as they clearly were—the question of consistency *vel non* with customary international law is irrelevant.

Nevertheless, we shall proceed to examine the rather academic question whether an international court—if one had existed, which it did not—would have held Britain's claims to maritime sovereignty and dominion invalid if a case presenting such an issue had come before it.

B. PLAINTIFF'S CONTENTIONS REGARDING INTERNATIONAL LAW CANNOT BE SUSTAINED.

In contending that international law was inconsistent with English law, plaintiff bears a heavy burden of proof. As Judge Jessup has explained (App. 108-11), sovereign states are placed under restraints by international law only (apart from treaty) if there is a generally recognized and accepted international legal doctrine, forbidding the national conduct in question, which has achieved a consensus among civilized nations. *Accord, The Antelope,* 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.); *The Scotia,* 81 U.S. (14 Wall.) 170, 187 (1871). Thus the question is not whether in the 17th and 18th centuries international law affirmatively recognized or permitted claims by nations to maritime sovereignty and dominion, but rather whether international law definitely and positively, and by consensus, precluded them. When it is further recognized that Great Britain has since the very beginning of international law been one of the most active and influential nations in contributing to the establishment of that law in general, and to the establishment of international law dealing with maritime affairs in particular, plaintiff's task in proving that in the 17th and 18th centuries there existed an international consensus among civilized nations which outlawed Britain's claims and conduct is an arduous one indeed.

In fact, history and the record show that prior to and during the 17th and 18th centuries maritime sovereignty and dominion were claimed and exercised by the overwhelming majority of civilized nations bordering on the sea—probably, indeed, by *every* such nation—and that international law, so far from forbidding such sovereignty and dominion, affirmatively countenanced it. Never at any relevant time has international law failed to recognize the validity of national sovereignty and dominion in coastal

waters. In the 17th century there was no recognized limit to such waters, and whole seas were claimed and appropriated. By the 18th century it was generally (though far from universally) recognized that there was some limit on the maritime sovereignty and dominion which a nation could lawfully claim, but there was no consensus as yet on what that limit was; 100 miles was the limit most in favor, except with respect to neutrality, where a cannon-shot rule was beginning to develop. Other intermediate limits—particularly a 60-mile rule—had substantial currency as well, both in doctrine and in the practice of nations.

The situation in the second half of the 18th century—the period of the establishment of American independence—was that international law had long recognized the legitimacy of maritime sovereignty and dominion in coastal waters; that most certainly there was no established rule of international law forbidding such sovereignty and dominion; that there was universal recognition that a coastal state possessed sovereignty and dominion in its coastal waters; that there was no generally recognized principle of international law setting a limit on the geographical extent to which sovereignty and dominion could be established; that various distances were advocated, and that 100 miles was a limit very much in favor and in fact the limit most frequently encountered and advocated in this period. No consensus had developed by 1776 or 1783 which rejected 100 miles as too wide.

At the very end of the 18th century and thereafter, as we shall see later (pp. 409-14), international law developed some distance towards a consensus that for purposes of full territorial sovereignty of surface waters the older rules such as 100 miles were too expansive, and that the territorial sea should be considerably more limited. The motivating force in this development was the desire of the great maritime powers, and especially Great Britain and the United States,

to make as much of the seas as possible free for navigation, for naval operations and to some extent for surface fishing. The reasons for the more restrictive modern rules therefore had nothing to do with claims to the seabed or subsoil.

Plaintiff earnestly contends that prior to American independence the modern restrictive rules—the cannon-shot limit or the three-mile belt—had achieved the status in international law of obligatory limitations on the width of the territorial sea. That contention is demonstrably unsound; but the issue of exactly when (if ever) the cannon-shot or three-mile rule achieved the status of an obligatory maximum is academic, since those rules apply to the surface of waters only and not to the seabed or subsoil. Thus, even if the more expansive 100-mile territorial sea conferred by the colonial charters had been lost through operation of international law prior to American independence, that would avail plaintiff nothing unless it could show that the restrictive rules appropriate to navigational uses of surface waters applied with equal force to the seabed and subsoil. This it cannot do.

1. Broad Claims to Territorial Seas Were Fully Sanctioned by State Practice.

The situation prior to and during the 17th century has been accurately described as follows:

> "At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well-defined extent the waters stretch-

> ing outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden. In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognized; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting State for the cost and trouble to which it was put. From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported." Hall, *A Treatise on International Law* (7th ed. 1917), republished in Crocker, *op. cit.* at 65-66.

In addition to the examples given, Turkey claimed and exercised sovereignty in the Aegean. Many of these claims were uncontested down to the mid-18th century. Crocker, *op. cit.* at 71-72.

The above statement by Hall, and particularly the first sentence, has been quoted with approval or paraphrased by many eminent modern international-law authorities. *E.g.*,

Scott, *The Classics of International Law,* introduction to Bynkershoek's *De Dominio Maris* 15; Colombos, *The International Law of the Sea* 48 (6th rev'd ed.). Colombos adds that this situation obtained "up to the end of the eighteenth century." *Ibid.* Fletcher noted that, as an international lawyer as well as an English common lawyer, "Selden based his treatise on the positive practice of the day. He stated the law as he found it . . . ." Fletcher, "John Selden (Author of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 11 (1962).

The only nation which appears at any time ever to have denied the existence of any territorial sea was the Netherlands. Tr. 2590-91. The Dutch were driven to this extreme position by the fact that the richest of the North Sea herring fisheries were within a very short distance of the British coast, so that admission by them of any territorial sea at all would have seriously impaired their fishing industry. However, even the Dutch were by no means consistent; at the outset of the Anglo-Dutch fisheries dispute the Netherlands contended for the cannon-shot rule, Swarztrauber, *op. cit.* at 25, and shortly thereafter they acquiesced in the line-of-sight rule, at least in practice (p. 81, *supra*). They also claimed the entire Zuyder Zee as internal or territorial waters of their own. Crocker, *op. cit.* at 71.

By the Treaty of Tordesillas of 1494, Spain and Portugal purported to divide all the seas of the world between them, subject only to the right of innocent passage. Swarztrauber, *op. cit.* at 13. These ultimate claims to maritime sovereignty and dominion were of course resisted by other nations, and the reaction to them may be said to have been the beginning of the development of international law towards the establishment of some limits on exorbitant maritime claims.

There was a consensus in the 16th and 17th centuries among civilized nations on one relevant point of international law: that sovereignty and dominion over new areas could be established by discovery and the performance of symbolic acts of sovereignty, not requiring effective occupation or possession of the entire area claimed. App. 821-23.

"The three-mile limit of territorial seas, as a rule of international law, did not surface until the 18th century, but the concept of territorial seas had developed much earlier." Swarztrauber, *op. cit.* at 10. There is universal agreement among historians of international law that the concept of territorial sovereignty and dominion in marginal waters had developed long prior to 1700. One of the few authorities ever to doubt this proposition was the Supreme Court in the *California* and subsequent cases, which declared that "the concept of the territorial sea did not arise in international law until after this country achieved its independence." *United States v. Louisiana,* 363 U.S. 1, 74 (1960). Judge Jessup has testified, and indeed wrote long before the commencement of the present litigation, that this was a wholly erroneous view. App. 117-18. The Court seemed not fully to appreciate the demonstrable fact that the three-mile limit and the cannon-shot rule represented a curtailment, not an expansion, of the right to maritime sovereignty and dominion as previously recognized. App. 132-34.

In 1909 the Permanent Court of Arbitration, an international tribunal applying international law, recognized that the doctrine of full territorial maritime sovereignty and dominion was no recent invention. The court referred to

> "the fundamental principles of the law of nations, *both ancient and modern,* in accordance with which, the maritime territory is an *essential appurtenance of land territory,* whence it follows

> that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession." The Grisbadarna Case (Norway v. Sweden), Scott, *Hague Court Reports* 121, 127 (1916). (Emphasis added.)

In the 18th century it became more customary than previously for nations to agree by treaty, on a bilateral basis, on limits of national maritime jurisdiction for various purposes. The cannon-shot rule was used in many of these treaties dealing with the subject of neutrality. Swarztrauber, *op. cit.* at 30-32; Crocker, *op. cit.* at 253, 300. We have found no 18th-century instance of the application of the cannon-shot rule, either by treaty or by national regulation or other action, to any subject other than neutral rights and duties. In particular, the cannon-shot rule was never applied during this period as a measure of exclusive fishing rights. Professor Henkin admitted this, and conceded that the concept of the cannon-shot rule and the reason therefor had nothing to do with the question of exclusive fishing rights. Tr. 2579-80. *A fortiori,* the cannon-shot rule has never had anything to do with the question of the exclusive right to explore and to exploit seabed and subsoil resources.

Even for purposes of neutrality, the cannon-shot rule was far from the only criterion applied in 18th-century treaties. As we have seen (pp. 136-37, *supra*), the British treaties with North African states generally used the line of sight for that purpose; so did other treaties, such as that between the Turks and the Kingdom of the Two Sicilies, and national ordinances adopted by such nations as Spain and Denmark, which regarded the line of sight as equivalent to 16-20 miles. Swarztrauber, *op. cit.* at 36-37. Other limits sometimes used for neutrality in treaties were ten leagues

(Crocker, *op. cit.* at 183) and three leagues. *Id.* at 182. Franco-Moroccan treaties of 1685 and 1767 excluded all Moorish ships for 30 miles from the French coast. Crocker, *op. cit.* at 253, 300.

As stated above, no 18th-century treaty has been found which used the cannon-shot rule as a measure of exclusive coastal fisheries. In the relatively rare instances where fishing rights were regulated by treaty, much broader limits than cannon-shot were used. We have already discussed the Treaty of Utrecht and the Peace of Paris of 1763, both of which used 30 leagues for that purpose with respect to the North American coast, and the 1790 treaty between Britain and Spain, which recognized ten-league exclusive fisheries in the coastal waters of all Spanish possessions in the Pacific (p. 130, *supra*).

Denmark collected tolls for passage between the North Sea and the Baltic from early times until 1857. In the 17th century Denmark claimed full sovereignty and exclusive fishing in all the waters between Norway, Iceland and Greenland, and Denmark sold licenses to foreigners for fishing there well into the 18th century. Danish ordinances established a six-league exclusive fishing belt around Iceland in 1631, and a four-league belt was in force from 1682 to 1836. As to Greenland, a thirteen-league belt was established in 1738, which was expanded to fifteen leagues in 1740 and 1751 and reduced to four leagues in 1758. On the Norwegian coast, a ten-league exclusive fishing belt was established in 1692. Swarztrauber, *op. cit.* at 44-47; Crocker, *op. cit.* at 513-15. Neither Iceland nor Norway has ever been willing to accept a rule as restricted as three miles or cannon shot for its exclusive fisheries, and their insistence on wider maritime belts has given rise to considerable controversy down to our own century, which persists to this day.

In the 17th century, a decision of the Supreme Court of Piedmont, which then included Genoa, cited Bartolus and Baldus in upholding national sovereignty of the Ligurian Sea; the issue involved the capture of a Spanish ship at a distance of 50 miles from the coast. Swarztrauber, *op. cit.* at 11.

The sole instance of any three-mile limit for any purpose anywhere prior to the American Revolution which Professor Henkin was able to cite (Tr. 2575)—and we have encountered no other—was an instruction from King Adolph Frederick of Sweden in 1758 adopting three miles for neutrality purposes. In fact there is a learned debate as to the relationship between the Swedish mile and the modern nautical mile, and the better view appears to be that King Adolph Frederick's three miles actually amounted to 12 or 18 nautical miles. Swarztrauber, *op. cit.* at 52-53. The United States' three-mile limit of 1793 was the first clear use of such a limit in history, and as we shall see it was regarded as tentative, a minimum, and for the purpose of neutrality only (pp. 393-97, *infra*).

2. The Views of Publicists Recognized the Right to Territorial Seas with Virtual Unanimity, and No Consensus Had Developed Restricting Such Seas to Any Limit Less than 100 Miles.

Since until recently there were no international tribunals declaring and dispensing international law (and even today their jurisdiction and effectiveness are quite limited), the views of eminent scholarly authorities, or "publicists," have always been regarded as somewhat more important in international law than in most systems of municipal or national law. Such views, however, as Judge Jessup has pointed out, have always been considered *subsidiary* means of establishing international law, much less conclusive than

treaties[46] or general principles or customs recognized as obligatory by the consensus of civilized nations and applied by them in their state practice.

Fenn, Exhibit 690 (excerpts at App. 791-818), has ably described the doctrinal development of the concept of maritime sovereignty and dominion in the mediaeval and post-mediaeval period. He has shown how what was originally regarded as "jurisdiction," not all the attributes of which were wholly clear, took on more and more aspects of sovereignty and dominion until eventually it was recognized that marginal waters are part of the territory of a coastal state in the same sense as the land, subject only to the right of innocent passage for foreign navigation. This development was substantially complete prior to 1600; and ever since there has been an overwhelming consensus among scholars recognizing the legitimacy of the territorial sea. The proper extent of that sea, on the other hand, was the subject of violent disagreement, and many conflicting views were advanced. It cannot be said that by the second half of the 18th century any obligatory rule of international law had developed which limited the extent of the territorial sea, except that the 15th-century claims of Spain and Portugal to all the oceans of the world had been rejected.

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[46] A treaty, of course, makes law as between the parties to it. It may or may not be evidence of a general principle, since nations are at liberty to contract by treaty either in accordance with or in derogation from principles of customary international law. Treaties may be used as evidencing a general customary principle only where there is a large number of treaties whose provisions conform to the principle and where there is other evidence that the parties entering into the treaties recognized that they were acting in accordance with a general principle considered as binding, or at least as a customary norm, even apart from treaty. *E.g.*, 1 Hackworth, Digest of International Law 17-21 (1940); Schwarzenberger, A Manual of International Law 28-33 (5th ed. 1967).

Fenn thus summarizes the 17th-century situation, with particular reference to the Anglo-Dutch dispute:

> "The *right* of ownership, then, in *territorial* waters, was not the fundamental dispute in the controversy referred to, except in so far as unsound definitions of territorial waters made it so. The *extent* of ownership over the sea was the kernel of the dispute. What the owner could do with his sea became of crucial importance because of the amount of sea claimed by him and not because he claimed some part of the sea. That he should claim any part of the sea at all (excepting gulfs, bays, and inlets) scandalized the Dutch and became an issue only because the waters immediately off shore [from Britain] were abundantly supplied with herring, and *not* because the claim marked a departure from accepted or familiar legal theory." App. 810-11.

> "The evidence produced in the foregoing pages points to the conclusion that the somewhat uncritical praise which has been given occasionally to Grotius's essay on the freedom of the sea is not altogether warranted. The freedom of the high seas was not disputed by the advocates of a state's ownership of its territorial waters, with the possible exception of Selden. And even he conceded that, in practice, freedom of trade and of navigation should not be violated. His point that there is nothing in the *nature* of the sea to prevent its appropriation is sound. That the sea has not in fact been appropriated by the Powers is due to reasons of an entirely practical character. The only two countries which attempted to put into practice their claims to a monopoly of the western highways of traffic found that their case fell of its

own weight. The fiats of the *ius gentium*, of the *ius naturale*, and of the *ius civile* simply had nothing to do with it. The reason why Spain and Portugal failed to make good their claim was this, that it was unworkable. At the other extreme lay the claims to absolute rights in territorial waters. Here, the weight of opinion is overwhelmingly in favor of the thesis that a state has the rights of ownership in the sea adjacent to its coasts. Grotius's position on the matter is ambiguous. He separated gulfs, bays and inlets from the main sea; but he failed to clothe the state with tangible rights in these waters. He failed also to distinguish between that strip of coastal waters which had become known as the adjacent sea, and the main body of the sea. In his later work on the law of war and peace he modified his position somewhat on this latter question, but he failed there also to make any concession which would seem to countenance the existence of property rights in the sea. So far as can be gathered from his cautious statements on the whole subject, he seemed to think that the rights of the state in the waters in question extended only to the maintenance and enforcement of a certain jurisdiction over these waters, and to the protection of navigation and fishing therein. It may be said with some certainty that this is the view of 'Mare liberum.' When it is said that Selden and his colleagues were quick to see that Grotius had attacked the British claims in 'Mare liberum,' it should be remembered that it is his position on the adjacent sea which constituted the attack, and not his position on the high seas. For the Continental lawyers, also, who were not parties to the British controversy, the question concerned the adjacent sea only. Outside of

> Holland, the Grotian position found no support. Legal theory pronounced against the community of ownership, against a common proprietorship, of the littoral sea. The British claims, and, to a less degree, the Scandinavian claims, were extravagant to the point where they encroached upon the high sea. When Grotius denounced such pretensions, he spoke to the mark. But he denounced them for the wrong reason. This question is essentially different from the former one. That is to say, that the question, how far out to sea territorial waters extend, is essentially different from the question, whether there can be territorial waters. Grotius, in denouncing the pretensions referred to, denounced them on the ground that there could be no territorial waters .... The real problem was, to restrict territorial waters within reasonable bounds." App. 813-15.

Accord, O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 313 (1971): "the real question, as everyone in the seventeenth century recognized, was whether the extensive claims of England, Sweden, Venice and other nations to *Mare Clausum* in neighboring seas were intellectually defensible in respect of their distance, not their nature, which was undisputed."

Grotius' position was somewhat equivocal, and by no means remained consistent throughout his life. While in *Mare Liberum* he appeared to deny any territorial sea, that position was substantially qualified in his later work, *De Jure Belli ac Pacis.* There he admitted that some territorial sea was appropriate, and appeared to regard the line of sight as its proper limit. Exhibit 693, p. 347; Crocker, *op. cit.* at 189; Swarztrauber, *op. cit.* at 20. He agreed that a coastal sovereign could tax fishing by its own subjects; at

one point he recognized that fishing resources could be exhaustible, and therefore that it might be lawful to exclude foreigners as well. Exhibit 690, pp. 155-57; Tr. 2592. He never dealt at all with the seabed, the resources of which are obviously exhaustible. Exhibit 739, p. 67. Finally, after he left the Dutch service for the Swedish, he never opposed Sweden's maritime claims in the Baltic, and indeed is stated to have written on the publication of Selden's *Mare Clausum* that he had written his own *Mare Liberum* "as a Hollander, and is exceeding glad to see the contrary proved." Fulton, *op. cit.* at 375. In any event, Grotius appears to be the only publicist at any time since 1500—at least the only one of any importance—who even seriously entertained the notion of denying the territorial sea altogether.

Every jurist and publicist recognized as an international-law authority who wrote between 1670 and 1800 recognized the existence of the territorial sea and the entitlement of the coastal nation to full sovereignty and dominion therein. U.S. Exhibit 17 (Vol. 15), second pagination, pp. 18-21.

We shall now mention briefly the principal scholarly views as to the width of the territorial sea which were dominant in the 18th century, with mention of some of the principal authorities prior to and during that century who advocated them. English authorities have already been discussed. For the views held by scholarly American statesmen during the American Revolution, see pp. 368-72, *infra.*

The 100-mile limit for territorial waters, first proposed, at least as to jurisdiction, by Bartolus in the 14th century, was adopted by the great majority of jurists throughout the 15th, 16th and 17th centuries and was still distinctly the majority view as late as 1795. Among the great number of publicists who adopted the 100-mile limit, aside from the English writers whom we have already discussed, were

Caepolla (15th century), Stypmann (died 1650), Gentili, Loccenius (1651), Casaregis (1740), Abreu (1746), and many others. App. 798-803; U.S. Exhibit 7, p. 121; Crocker, *op. cit.* at 72, 183, 188-89; Swarztrauber, *op. cit.* at 11, 27, 33, 250, 424; Bustamante, *The Territorial Sea* 22-23 (1930). The 100-mile limit is sometimes described as a two-day voyage, which is the basis on which Bartolus arrived at it. Many other writers referred to the 100-mile limit as well known and customary without explicitly endorsing it. In view of the status of the 100-mile limit down through the 18th century, it is impossible to maintain that prior to the American Revolution a general consensus among civilized nations had developed which established an obligatory rule of customary international law requiring that territorial waters be narrower than 100 miles in extent.

Other writers, beginning with Bodin in 1577, described the limit of territorial waters as 30 leagues. U.S. Exhibit 7, p. 120; Crocker, *op. cit.* at 188. As we have seen (pp. 223-25, *supra*), the 30-league limit, which is virtually identical to 100 miles, was adopted for exclusive fishing purposes in the American seas by Britain and France in the treaties of 1713 and 1763.

After the 100-mile or 30-league limit, the next most frequently encountered proposal for the limit of territorial waters was 60 miles, which originated with Baldus in the 14th century. The 60-mile limit was referred to without disagreement in 1672 by Puffendorf, one of the best-known and most influential international publicists. U.S. Exhibit 7, p. 120; Crocker, *op. cit.* at 250, 425; Swarztrauber, *op. cit.* at 11, 15, 28. Sixty miles is the equivalent of 20 leagues, which as we shall see (pp. 333-36, *infra*) was adopted in the Peace of Paris between Britain and the United States in 1783. The 60-mile rule was frequently referred to well into the 19th century. *E.g.*, 1 Chitty, *The Laws of Commerce* 93 (11th ed. 1857).

The three rules described above—100 miles, 30 leagues (which is virtually identical) and 60 miles—enjoyed the approval of the overwhelming majority of publicists down through the 18th century. These can be grouped together as the broad-limit rules. There were also several versions of what may be called the narrow-limit rules, namely line of sight, three leagues, two leagues, cannon shot and finally three miles. All these narrow-limit rules had their primary, and generally their only, application to neutrality—the distance into the sea where the coastal nation had the right and the duty to protect belligerent ships from one another.

As we have seen in the case of England (pp. 121-24, *supra*), nations could and did establish much more modest limits for neutrality than for other aspects of sovereignty and dominion, and indeed were quite inclined to do so, since neutrality limits imposed onerous obligations upon them, without any corresponding benefits except as to hostilities committed so close to shore as to endanger the land territory. See also Tr. 1153. Moreover, powerful maritime nations had a strong interest in limiting the extent of neutral waters, in order to minimize those areas of the sea where their weaker enemies could find sanctuary in time of war. Down through the 18th century, the narrow-limit rules were rarely if ever regarded by publicists as reasonable obligatory limits for exclusive fisheries or for other aspects of sovereignty and dominion aside from neutrality.

The line-of-sight rule appears to have originated in a neutrality proclamation of King Philip II of Spain in 1565. Swarztrauber, *op. cit.* at 36. It was rejected by Bynkershoek as too indefinite, *id.* at 38, but was championed by Rayneval in 1803 for neutrality purposes. *Id.* at 39; Crocker, *op. cit.* at 72, 250. Unlike the other narrow-limit rules, the line-of-sight principle did have some limited application in fisheries matters, by virtue of treaties and pragmatic compromises; but we have encountered no

publicist who advocated line-of-sight as an obligatory maximum for exclusive fishing rights, let alone for seabed and subsoil rights.

Galiani, writing in 1782, appears to have been the first to suggest three miles as equivalent to the range of cannon. He considered that the limit for neutrality purposes should be two leagues, twice the range of cannon. Fulton, *op. cit.* at 563. Valin suggested that for exclusive fishing purposes the rights of the coastal state should be limited to two leagues or to as far out to sea as bottom soundings can be obtained, whichever is farther. Swarztrauber, *op. cit.* at 33.

The cannon-shot rule for purposes of neutrality was advanced by Bynkershoek in 1702, and won the adherence of many other 18th-century publicists, including the influential Vattel. Vattel, however, believed that the neutrality belt could be broader than cannon shot if the power of the coastal state permitted and some lawful purpose was involved; and he was clear that seabed resources such as the Ceylon pearl fisheries were proper subjects of ownership, even though they extended much farther out than cannon shot. Crocker, *op. cit.* at 84, 251, 458; Swarztrauber, *op. cit.* at 28-30. The geographical extent of cannon shot was frequently regarded as three leagues (not three miles) down to the end of the 18th century. Crocker, *op. cit.* at 254.

Martens, writing in 1785, was one of the many publicists who identified cannon shot with three leagues; he was also, as best we can establish, the *only* publicist prior to 1800 who regarded the cannon-shot or three-league limit as a boundary applicable not only to neutrality but also to full territorial sovereignty, including exclusive fishing rights.[47]

[47] O'Connell seems to assume that the cannon-shot rule was regarded in the 18th century as applicable to aspects of sovereignty and dominion other than neutrality. "The Juridical Nature of the

Apparently, however, Martens regarded the three-league rule not as an obligatory maximum but as a sort of obligatory *minimum:* he declared that the three-league belt "is the least that a nation ought now to claim as the extent of its dominions of the seas." U.S. Exhibit 17 (Vol. 14), pp. 65-66. It was well into the 19th century before cannon shot and three miles came generally to be identified, and that identification was never at any time universally agreed upon. William Paley's *Moral and Political Philosophy,* published in New York in 1824 and well known in this country, still identified cannon shot with three leagues (p. 77).

We have encountered no publicist prior to 1800 who advocated a three-mile rule for any purpose, even neutrality. As we shall see, Chancellor Kent, the first American international publicist of stature, recognized its adoption by Jefferson in 1793 but criticized it as much too narrow (p. 441, *infra*). Even when, after 1800, the three-mile rule became more popular, for some years it was regarded as applicable to neutrality only. One of the first treaties which used three miles for any purpose other than neutrality was the Anglo-French Treaty of 1839, which established three miles as the limit of exclusive surface (not sedentary) fishing rights. U.S. Exhibit 7, p. 139.

Territorial Sea," 45 British Yearbook of International Law 303, 320-23, 382 (1971). On the evidence, that assumption has no basis whatever in state practice and none, or very little, in the views of publicists aside from Martens. The assumption is a natural anachronism: in the *19th* century the cannon-shot and three-mile rules were frequently applied to surface maritime claims for purposes other than neutrality.

3. No Narrow-Limit Rule Was Applied to Seabed Claims.

No instance has been found during the period under discussion of any authority who denied the right of a coastal state to the exclusive ownership and use of the resources of the seabed and subsoil under its marginal sea. To the contrary, those writers who addressed the question, including Puffendorf and Vattel, fully recognized that the considerations militating towards freedom of the seas—the desirability of free navigation, the natural capacity of the sea to be used by nations in common, and the inexhaustibility of at least some of the fisheries—had no application whatever to the resources of the seabed and subsoil, and thus that there was no reason or necessity for any doctrine of *res communis* to be applied there. Crocker, *op. cit.* at 68, 312, 457; Colombos, *op. cit.* at 69; Tr. 477-79.

Judge Jessup, witness for the Common Counsel States, testified that the resources of the seabed and subsoil have always been regarded as subject to the exclusive ownership of the coastal nation as far out as such resources are exploitable. He summarized his views in a passage important enough to deserve quotation in full from the transcript:

> "To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies). If the Massachusetts authorities had consciously permitted free exploitation of that resource by persons of all nations, and that license had ripened by passage of time into established custom, Massachusetts might well have been limited, as a matter of international law, in later asserting exclusive rights—just as the United States argued respect-

ing Argentina. But I regard it as virtually inconceivable that as a matter of fact, in 1720, 1770 or 1785, Massachusetts *would* have consciously permitted internationally free exploitation on these hypothetical facts. From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. (Of course it might have bargained away part or all of its exclusive right by treaty, in return for other benefits.) I do not believe there would have been any significant international protest against that assertion. And I believe that assertion would have been fully in accordance with the international law and practice of the time. I think other sovereigns would have been bound to respect it, and I think they would have respected it. And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries." App. 229-30.

Plaintiff's witness Professor Henkin conceded that the practice of nations has been in accordance with Judge Jessup's views:

"Q. . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?

"A. I don't know of any such examples." App. 541.

Judge Jessup gave a wealth of examples of seabed and subsoil exploitation in many parts of the world, dating back long before 1800, demonstrating that wherever and whenever exploitable resources have been discovered in the seabed and subsoil of the marginal sea they have been regarded, more or less without question, as the exclusive property of the coastal state. App. 173-214.

In view of all the above, the United States cannot possibly sustain its position that exploitable resources in the seabed and subsoil of the North American marginal seas would have been regarded as incapable of ownership in the 17th and 18th centuries, let alone that there was any established rule of international law which prohibited the coastal state from asserting and exercising exclusive rights over them.

VII.

AT THE AMERICAN REVOLUTION THE STATES INDIVIDUALLY SUCCEEDED TO THE MARITIME TERRITORIAL SOVEREIGNTY AND DOMINION BOTH OF THEIR PREDECESSOR COLONIAL GOVERNMENTS AND OF THE BRITISH CROWN.

Plaintiff's position is that at American independence the United States, as an entity distinct from the States, succeeded in some fashion to the maritime sovereignty and dominion of the British crown and, apparently, even to those rights in the marginal sea and seabed which prior to 1776 belonged to the colonial and proprietary governments. The Common Counsel States maintain, to the contrary, that maritime crown and colonial rights, both territorial

and proprietary in nature, passed at independence to the States individually, just as did the equivalent rights on land.

Plaintiff's position is based entirely on the argument that the States never possessed "external sovereignty," which plaintiff appears to equate with sovereignty in the international-law sense. Plaintiff asserts that the United States, as an entity distinct from the States, acquired "external sovereignty" from the crown even prior to the Declaration of Independence, and that such sovereignty was therefore antecedent to and a limitation on whatever sovereignty the States acquired individually in 1776.

In our submission the concept of external sovereignty, or international personhood, is really irrelevant to any issue in this proceeding. States which consider themselves sovereign, and are sovereign by their own laws, may or may not be recognized as sovereigns by the international community; but to the best of our knowledge no nation claiming sovereignty has ever permitted its sovereign status under its own law to be determined by whether the international community recognizes it or not.

More importantly, sovereignty in the abstract is not the issue here: the question is whether it is the States or the Federal Government which succeeded to certain quite specific territorial and proprietary rights in the seabed and subsoil of the marginal sea, which rights prior to independence had belonged in part to the crown and in part to the colonial governments. Neither in international law nor in our own constitutional law apart from the *California* line of cases—not even in the eccentric *Curtiss-Wright* dicta, see pp. 371-75, *infra* — is there the slightest intimation that external sovereignty, in a nation where sovereign powers are divided, automatically means that the Federal Government necessarily divests the State governments of territorial jurisdiction and proprietary rights in any part of

the national domain, whether on land or at sea or under the sea.

In the case of the United States, it really makes very little difference whether the Federal Government acquired powers of external sovereignty prior to 1789 or not. The pertinent question is whether in our constitutional history the Federal Government was at any time regarded as the direct successor either of the crown or of the colonial governments to immediate territorial jurisdiction over, and proprietary rights in, any geographical area, and particularly over the marginal seas and their seabed and subsoil. We think it readily demonstrable that the Federal Government was never so regarded.

When plaintiff's contentions are translated from abstract terms like "external sovereignty" into concrete propositions, it is seen that plaintiff contends little more than that during the revolutionary and Confederation periods the United States possessed and exercised power over foreign relations and power to make war and peace; that is, to conduct hostilities and to terminate them. Tr. 2377. Plaintiff interprets the historical evidence in much too simplistic and categorical a fashion; the key to an understanding of what superficially is conflicting evidence is that in these periods the "United States" were not considered as having any identity separate from, let alone superior to, the 13 independent sovereign States; the "United States" *were* those States, acting in concert by virtue of an alliance, league or federation to win the war. In any event, it is entirely clear that the States individually succeeded to all the territorial boundaries and rights of property which had existed prior to the Revolution. Plaintiff has suggested no way whatever in which it can bridge the historical and logical gulf between "external sovereignty" on the one hand and, on the other, the alleged succession of the United States, considered as a separate en-

tity, to territorial and property rights in the marginal sea and seabed.

A. THE STATES WERE INDIVIDUALLY SOVEREIGN IN THE REVOLUTIONARY AND CONFEDERATION PERIODS.

In an attempt to make the national sovereignty antedate the independence of the States, plaintiff traces its concept of external sovereignty back to the first Continental Congress of 1774. Pl. Br. 176-77. The short answer is that the first Continental Congress did not regard itself or any authority in this country as possessing independence or powers of external sovereignty. Reconciliation with the crown was hoped for and earnestly sought, and the intent to seek independence was expressly disclaimed. Exhibit 757, pp. 529-35; Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 480-81 (1946). Independence did not come until 1776, and it came then as a wholly conscious revolutionary decision to make a fundamental alteration in the state of affairs that had existed until that date.[48]

It would be a mistake, if we wish to understand the thinking of the revolutionary statesmen, to speak of sovereignty, whether external or otherwise, as residing in any governmental body. In Europe, monarchs were the sovereigns; in England, the crown had anciently been considered the sovereign, but since the Revolution of 1688 sovereignty was generally regarded as residing in Parliament, consisting of King, Lords and Commons. The first article of the political philosophy which prevailed among our revolutionary statesmen was that sovereignty

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[48] For a thorough discussion of the nature and acts of the first Continental Congress, and a demonstration that it was not even a governmental body, let alone a union in any sense, see Small, "The Beginnings of American Nationality," 8 Johns Hopkins University Studies 14-42 (1890).

resided in the people, and in the people of each State. See, *e.g.*, Levitan, *op. cit.* at 480. Sovereignty was ultimate and indivisible. Sovereign *powers*, on the other hand, were divisible, and could be exercised by agents—governmental bodies. But those bodies—whether State legislatures, Congress or any others—were never regarded as themselves sovereign; they were only agents of one or more sovereigns.

Sovereignty remained with the people of the States, and the agents—the governmental bodies—served only at the sovereign's pleasure. Those powers which a sovereign had delegated to agents could be taken back and exercised by the sovereign acting directly. That was done through a convention of the people of a State, such as those which initiated the revolutionary State governments and those which later ratified the Constitution of 1787. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819). The theory further held that each original colonial charter was a compact, which British violations entitled the State to dissolve in favor of its full powers of self-determination.

Finally, it was considered that prior to the Revolution legislative power had been in each colonial legislature, not in Parliament, and that independence meant simply that the crown's executive and judicial powers were removed. McIlwain, *The American Revolution: a Constitutional Interpretation* 18-185 (1923); Patterson, "*In re* United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286, 302-04 (1944). Since prior to independence the colonies had had no legislative or governmental connection with one another, it followed, and was recognized to follow, that removal of the crown's paramountcy left the States separately independent.

The theory held that prior to the Revolution

> "the colonies in America were in fact states in the political sense, that they were what are commonly

> known as 'nations,' that their local legislatures were the supreme power over them, under the crown; that their sole connection with Great Britain lay in the crown; that the parliament at Westminister was but one of many co-equal legislatures, analogous, for example, to the General Court of Massachusetts Bay. The logical consequence of such a conception of the empire was complete independence, whereby the colonies would become units in international law, separate so-called sovereign states in the society or family of nations." Adams, *Political Ideas of the American Revolution* 17-18 (1939).

See also *id.* at 40-61, 86-181; Scott, *The United States of America: a Study in International Organization* 15, 33, 133 (1920); Scott, *Sovereign States and Suits* 5-24 (1925).

These propositions could be confirmed, if questioned, by a host of quotations from the writings of the revolutionary statesmen. The Declaration of Independence itself is steeped in these concepts.

The Declaration was the act of thirteen sovereigns acting together. It is entitled "The Unanimous Declaration of the Thirteen United States of America," and it declared those States to be "free and independent States." Several of the States had declared their independence even prior to the adoption of the Declaration. Every State had authorized its delegates to Congress to vote for the Declaration, which indeed had to be postponed until all the instructions had been received. Exhibit 757, p. 537; Burnett, *The Continental Congress* 154-81 (1941). The concept was that each State was declaring itself independent, through its delegates in Congress, and recognizing the independence of the others. During the debates on the Declaration it was declared by James Wilson, Robert R. Livingston, John Dickinson and others "that if the

delegates of any particular colony had no power to declare such colony independent, certain they were the others could not declare it for them; the colonies being as yet perfectly independent of each other." 6 *Journals of the Continental Congress* 1088; Levitan, *op. cit.* at 483. The Declaration, after its promulgation, was ratified by every State. Exhibit 757, pp. 537-38.

President James Monroe, in his annual message of 1823, described the results of the Declaration as follows:

> "The first is that in wresting the power, or what is called sovereignty, from the Crown it passed directly to the people. The second, that it passed directly to the people of each Colony and not to the people of all the Colonies in the aggregate; to thirteen distinct communities and not to one. To these two facts, each contributing its equal proportion, I am inclined to think that we are in an eminent degree indebted for the success of our Revolution." 6 Hamilton (ed.), *The Writings of James Monroe* 224 (1902).

In September, 1776 a committee of Congress appointed to confer with Lord Howe, consisting of Franklin, John Adams and Rutledge, explained to him that every colony had approved of the Declaration "and all now considered themselves as independent States." Exhibit 758, p. 140. Adams was even more explicit:

> "The resolution of the Congress which declared independency was not taken up upon its own authority. Congress had been instructed so to do by all the colonies. It is not in our power, therefore, my lord, to treat otherwise than as independent States. . . ." *Id.* at 143.

The congressional resolution preceding the conference had referred to Congress as "the representatives of the free and independent States of America."

The early State constitutions likewise make it clear that each State regarded itself as separately independent. Exhibit 700, p. 290; Scott, *Sovereign States and Suits* 50-52 (1925).

Both before and after the Declaration of Independence, and both before and after the Articles of Confederation, Congress was a league or alliance of the States, meeting together for the purpose of prosecuting the war. Congress was not regarded as an entity separate from the States, let alone superior to them; Congress *was* the States, acting together for common purposes. Each State had one vote, and action by Congress required the unanimous consent of all except in cases where each State had agreed to be bound by a non-unanimous vote. The reason invariably given for each State's having a single and equal vote was that each State was a sovereign, and under international law sovereigns are equal. Exhibit 687, p. 181; Exhibit 757, p. 542. When Benjamin Rush sought to attack the equal-vote principle, he felt it necessary to attack the State-sovereignty principle on which it was based. While Professor Morris relies heavily on Rush's statement, the fact is that his view did not prevail and his proposal was rejected. Tr. 1747-48, 2377-78.

The congressmen were appointed by the States, were removable at will, and were totally subject to whatever instructions the States gave them. Tr. 2382-83. The Journals do not even name what individuals were present in Congress, but rather what *States* were present. Exhibit 709, pp. 8, 109; Tr. 2384. The term *United States* was *always* used as a plural noun, followed by a plural verb; and the synonym "these States" was often used instead. Tr. 2430-31. The "United States" were not regarded as having any

reality separate from the States acting in alliance: "when a minister plenipotentiary or envoy shall arrive within *any of the United States*, ... " Exhibit 745, p. 94. (Emphasis added.) In the Continental Congress, "each State is considered as present, and its will expressed by the vote of its delegates. The Congress of States are left . . . to perform such duties as are enjoined, and execute such powers as are given to them, by their respective and varying instructions. . . . " Baldwin, *A General View of the Original Nature of the Constitution and Government of the United States* 16 (1837).

John Adams, Randolph and others described Congress as a diplomatic body or assembly, Exhibit 757, p. 542; and scholars have habitually done the same, though plaintiff's witness Professor Morris could not remember encountering that view. Tr. 2383.[49]

Since Congress *was* the States, had no existence apart from them, and possessed no powers except by their delegation and acquiescence, it is really irrelevant how extensive or limited Congress' powers were.[50] In fact, however, those powers were extremely limited. Congress was not a law-making body or a legislature. It had no courts, with the single exception of the prize appeal court (pp. 292-93, *infra*). It had no property or territory until the States ceded their western lands. It had no executive or en-

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[49] In assessing the candor, expertness and persuasiveness of Professor Morris' testimony, the Common Counsel States respectfully refer the Court in particular to Tr. 2271-73, 2280-83, 2285-86, 2309-12, 2328-29, 2378 (compare with U.S. Exhibit 388), 2385-87, 2389-91, 2394-2402, 2410-11, 2414-20, 2433-34.

[50] It could hardly be contended, for example, that the sovereignty of the allied nations in World Wars I and II was destroyed because by mutual consent they had integrated their military commands and performed other war-making functions in common.

forcement power within the States; for example it was the States individually, not the Congress, which seized the property of British subjects andTories. As has universally been recognized, Congress had no power to impose its will upon the States, even with respect to "external" matters such as compliance with a treaty. Congress had no taxing power, and relied entirely on the States and on credit for the financial resources necessary to support the army. "The concurrence of 13 distinct sovereign wills is requisite under the confederation to the complete execution of every important measure that proceeds from the union." *The Federalist,* No. 15, p. 98 (Cooke ed. 1961).

There is nothing to the contrary of any of this in Congress' circular letter to the States of 1779, on which Professor Morris has placed primary reliance, Tr. 2381. The letter deals mostly with finance, and shows the total dependence of Congress in that respect on State taxation and on borrowing. The letter declares the purpose of the war to be "the independence of these States," 15 *Journals of the Continental Congress* 1059, and points out that that goal had been declared by the representatives of the States in the Declaration of Independence and had been ratified by each State. Finally, the letter observed that while the Articles of Confederation had not yet come into formal effect, the confederation already existed *de facto. Ibid.* There is nothing in any of this inconsistent with the position of the Common Counsel States in this proceeding.

The establishment by Congress of a prize appeal court, with power to reverse decisions of State admiralty courts, was not inconsistent with the preservation of State sovereignty.[51] Establishment of the court was purely a war

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[51] No one has suggested that the existence of the international courts of today extinguishes the sovereignty of nations submitting to their jurisdiction. James Brown Scott (who among his other diplomatic accomplishments was a United States delegate to the Hague Conference

measure, and was acquiesced in by the States as a necessary corollary of the war in which they were engaged in alliance. Proof that the court was not regarded as derogating from State sovereignty is found in the fact that those most suspicious of any hint of encroachment on State sovereignty, such as Thomas Burke and Richard Henry Lee, voted to uphold its jurisdiction. Tr. 1742, 2376. The court had no power to enforce its decisions, and when it reversed a judgment of the New Hampshire Court of Admiralty that reversal remained a nullity until after the Constitution of 1787 went into effect, because New Hampshire simply declined to take any steps to implement it.

When eventually the Supreme Court under the Constitution held that the prize appeal court had had jurisdiction, it did so on the basis that establishment of the court was a war measure and that New Hampshire had expressly acquiesced in it and thus agreed to be bound by its judgments. *Penhallow v. Doane;* see pp. 344-50, *infra.* Julius Goebel's recent first volume of the Oliver Wendell Holmes History of the Supreme Court contains a definitive analysis of the prize appeal court and demonstrates that it was not, and was not regarded as, inconsistent with complete State sovereignty. Exhibit 694. Goebel regards Justice Paterson's statements in the *Penhallow* case (pp. 345-48, *infra*) as dicta and historically unsound, and observes that almost a century and a half later "they were made to buttress a historically indefensible judicial pronouncement on the control of

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of 1907, which revised the constitution of the Permanent Court of Arbitration, and who edited the Hague Court Reports) regarded the prize appeal court as a direct predecessor of and precedent for such international tribunals: the judicial provisions of the Articles of Confederation "are as capable of application to the sovereign, free and independent states forming the society of nations as they were to the sovereign, free and independent States forming the Confederation." Scott, The United States of America: a Study in International Organization 213 (1920).

foreign affairs," that is, Justice Sutherland's dicta in the *Curtiss-Wright* case. Exhibit 694, p. 768.

The Articles of Confederation in the most explicit terms confirmed and retained the sovereignty and independence of the separate States. Article II provided that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in congress assembled." Article III provided that those sovereign States enter into "a firm league of friendship with each other," thus characterizing the Confederation as a league or alliance. The equality of sovereigns as evidenced by the equal vote of each in the Congress was retained (Article V). Professor Morris' only explanation of these provisions was that the "nationalists," whom he regards as the only eminent statesmen, were off fighting for their country or abroad on foreign missions, and that those remaining in Congress to write the Articles of Confederation were in his opinion second-rate thinkers. Tr. 2387. What legal conclusion Professor Morris thinks can be drawn from this assessment of his is at best opaque.

The original draft of the Articles, introduced by John Dickinson, provided for "an alliance of sovereign States," Exhibit 666, p. 421, but contained no express declaration of State sovereignty and independence. An amendment so providing was promptly presented; it was debated for two full days and was adopted by a vote of 11 states to one, with one divided. Exhibit 704, pp. 122-23, footnote; Tr. 2379-80; McLaughlin, *Constitutional History of the United States, 118-20 (1936); Burnett, The Continental Congress* 237-38 (1941). Thus it is plain that this was no meaningless or rhetorical formula but was given the most serious consideration and was regarded as a matter of critical importance.

Congress' concern for State sovereignty, and its view that Congress under the Articles remained identical with the States themselves, are also shown by the drafting history of the provision of Article IX establishing a Committee of the States, consisting of one delegate from each State, to act on certain matters when Congress was not sitting. The name first proposed for this body was the Council of State, but it was carefully changed to "Committee of the States" by amendment. Exhibit 744, p. 339; Tr. 2385.

Madison's view was unequivocal that the Articles of Confederation created a league or alliance between independent States. In No. 43 of *The Federalist*, pp. 297-98 (Cooke ed. 1961), he addressed himself to the argument that the Articles could not be replaced by the new Constitution without the unanimous consent of the States. Madison's answer was that in many of the States the Articles had been adopted only by the legislature, not by the people, and "a compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties." Madison is here drawing on the doctrine that it is the people of each State who are sovereign, and that all governmental bodies possess powers only by delegation from them. The legislatures had not been delegated power to do anything more than to enter into treaties—not the power to change the organic law, let alone to surrender the sovereignty of the States. Only conventions of the people could do that. Since the State constitutions had been adopted by such conventions, Madison regarded those constitutions as superior to the Articles of Confederation. See also Exhibit 688, pp. 521-22. Both Madison and Randolph made the same point on the floor of the Convention of 1787, Exhibit 687, pp. 26, 122-23, in insisting that the new Constitution be ratified by State conventions rather than by the legislatures.

Paterson agreed at the 1787 Convention that the States under the Articles were sovereign and independent. *Id.* at 182. So did Alexander Hamilton, *id.* at 283; and indeed that view was "asserted from every quarter of this house," *id.* at 500, except for James Wilson and one or two others. Hamilton took the same position in his political writings in New York during the Confederation period. In 1784 he wrote that in 1776 "the late colony of New York became an independent State." Exhibit 696, p. 253. In 1787, a few months before the Federal Convention, Hamilton made a lengthy speech in the New York Assembly advocating a bill to accede to the independence of Vermont. Exhibit 698. Hamilton regarded Vermont as already independent *de facto, id.* at 45, and referred to it as a "country." *Id.* at 47. In arguing that the New York Legislature had power to enact the bill, Hamilton relied on its sovereign powers and on the doctrine of international law that a sovereign has authority to cede part of its territory. *Id.* at 49-50. Finally, in dealing with property owned by New York citizens but confiscated by Vermont, Hamilton regarded the international law of war and of requisition of alien property as applicable. *Id.* at 60-61. Plainly, Hamilton regarded the States as fully independent in every sense.[52]

Professor Morris has quoted a few "nationalist" statements, Tr. 1747-53, though a glance at them will demonstrate that they prove far less, even as to the views of those who made them, than Professor Morris claims. Of course there were such statements. There was always one faction among the revolutionary statesmen who wanted a national government; these were mostly persons who had long opposed independence and who were distrustful of the

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[52] New York and Vermont were close to a state of war in 1784. Massachusetts recognized the independence of Vermont in 1781, and in 1784 issued a proclamation of neutrality in the dispute. These are classic acts of international sovereigns. Scott, Sovereign States and Suits 61-62 (1925).

democratic tendencies in the State governments. The point is that this faction was entirely unsuccessful in achieving its ends down to 1787, when a permanent compromise was arrived at between them and their opponents. The issue was fought out on the text of the Articles of Confederation, on the western lands issue (pp. 316-28, *infra*), and on other matters, and invariably the nationalists suffered defeat. They were always in a minority in Congress, except for a brief period in 1781-83, and even during that period they failed to achieve any of their important goals. The whole subject has been exhaustively analyzed by Merrill Jensen, Exhibit 703.

Plaintiff insists that, though the States may have been and remained sovereign in every other sense, they never possessed "external sovereignty," that is, they were never recognized by international law or the international community as sovereign States. Even as to this irrelevant point, the weight of authority is clearly to the contrary.

We have seen that the States formed, first *de facto* and later *de jure* by the Articles of Confederation, a federated or federal league, a confederation. Such a phenomenon was well known in international law; the Dutch, Swiss and German confederations were the best known examples and were constantly cited as precedents by the revolutionary statesmen for what they were creating. International law fully recognized the nature of such a confederation as consisting of multiple sovereign states. Vattel, who was the international publicist best known and most often quoted in America during the revolutionary period (App. 174-75; McLaughlin, *Constitutional History of the United States* 33, 44, 69, 73, 315 (1935)), had this to say on the subject:

> "Sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal

> republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfill engagements which he has voluntarily contracted." Vattel, *The Law of Nations* 3 (6th American ed., 1844).

Vattel mentions the Greek, Dutch and Swiss confederacies as examples of this class. He also points out that two or many sovereign states may, without any impairment of their sovereignty, "be subject to the same prince." *Ibid.* That was, of course, the situation of England and Scotland in the 17th century, and of Britain and Hanover in the 18th. In fact *most* states in the 17th and 18th centuries were linked in one fashion or another to others, either in a federation, through a joint personal sovereign, by a protectorate, or by the duty of homage to an overlord. Vattel recognizes each of these types of affiliation and is clear that none of them entails the loss of international personhood. *Id.* at 2-3. All this was wholly familiar to any 18th century scholar or statesman.[53] Plaintiff's assumption that sovereigns recognized by international law are normally or invariably wholly unitary is a gross oversimplification even today, and as applied to the 18th century is the crudest of anachronisms. See, generally, Greaves, *Federal Union in Practice* 9-12 (1940).

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[53] The prevalent view among our revolutionary statesmen was that *before* the Revolution the British Empire had been a federation of States or even had consisted of unfederated separate States linked only by a joint personal sovereign. This is exhaustively demonstrated in Adams, Political Ideas of the American Revolution 17-18, 40-61, 86-152 (1939); see also Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 398, 410-11 (1948); McLaughlin, Constitutional History of the United States 15 (1935); McIlwain, Federalism as a Democratic Process 35 (1942).

Montesquieu, one of the most potent of all influences on the revolutionary statesmen, likewise analyzed the legal nature of a federal or confederate republic, and declared that "the confederates preserve their sovereignty." *The Spirit of the Laws,* Book IX ch. 1, p. 146 (1873 ed.).

Plaintiff is on unsound ground when it contends that a state must conduct its own foreign relations singly and separately in order to be recognized as a sovereign in the international-law sense. All sovereigns conduct their foreign affairs through agents, and particular persons or bodies can be agents for more than one sovereign at the same time. Certainly in the 18th-century view, a federal republic consisted of several sovereignties conducting foreign affairs through joint agents. Indeed, international law goes much farther and recognizes that a state may retain its international personality even if it delegates and transfers the conduct of its foreign affairs to a distinctly different state and its agents. As Judge Jessup pointed out, the Permanent Court of International Justice so held with respect to Morocco when it was a French protectorate and had turned over the conduct of its ofreign relations to France. App. 235-36. Morocco was by no means a unique situation; many countries from time to time have been regarded, and some are today regarded, as sovereigns in the international-law sense even though their foreign affairs are conducted by another country. A host of examples could be given. Cf. *Restatement (2d), Foreign Relations Law of the United States* § 4 (1965).

The American States did not go nearly so far; they never surrendered their foreign relations to a different state and its agents, but rather carried on their foreign affairs (for the most part) through joint agents of their own. Each diplomatic agent appointed by Congress was informed by his instructions that he was "the representative of sovereign States," and his first order of business was to procure

recognition of that status by the nation to which he was accredited. Exhibit 705, p. 521. The instructions to Francis Dana as minister to Russia required him to inform the Russian Empress of the "sovereignty, rights and jurisdiction of each of the thirteen States inviolably," and of the refusal of the States to make peace with Britain without an acknowledgment of the sovereignty of each and every one. U.S. Exhibit 351, p. 1171. The letters of credentials delivered by Congress to its diplomatic representatives named each State and appointed the diplomat the agent of each. Exhibit 705, pp. 521-22; Exhibit 706, p. 547; 15 *Journals of the Continental Congress* 1116. The "letters of credence" carried by Franklin and the other Commissioners to France ran from "the delegates of the United States of New Hampshire, Massachusetts Bay," etc., Congress as such not even being mentioned. 5 *Journals of the Continental Congress* 828, 833.

The treaties of 1778 with France, the only treaties made by the States prior to the entrance into force of the Articles of confederation, named as parties the thirteen States separately. App. 231-33. Professor Henkin concedes that "in various respects the terms of the treaties seem to treat each of the thirteen as a separate sovereign." Exhibit 700, p. 291. The naming of each state in treaties is wholly inconsistent with plaintiff's theory that the States were not internationally known or recognized. The treaties were made by the agents of the States, and were ratified by Congress, which as we have seen *was* the States acting together in alliance. That ratification would seem to have been entirely adequate, without any derogation of State sovereignty; nonetheless, the Virginia legislature ratified the treaties separately, App. 233-35, and according to Professor Henkin all the other States did so as well. Exhibit 700, p. 291; Tr. 2643-44.

The several treaties made during the Confederation period likewise named each State separately, and thus con-

stituted further international recognition of the independence and sovereignty of each State. App. 236-38. By the Peace of Paris Great Britain acknowledged the thirteen United States, each named, "to be free, sovereign and independent States," App. 230, and relinquished its claims "to the government, propriety and territorial rights of the same, and every part thereof." As in other treaties, the form used is the "United States, vis. . . .", followed by the name of each (Article I), confirming that the term "United States" *meant* the thirteen States, not any entity different from them.

The instructions to Oswald, the British commissioner, had empowered him to treat with commissioners of "the thirteen United States of America," naming each one separately. 5 Wharton, *Revolutionary Diplomatic Correspondence of the United States* 749 (1889). Oswald's prior instructions had authorized him to agree in a treaty to "the complete independence of the thirteen colonies," 6 *id.* at 17. As is well known, the American commissioners refused to treat with Oswald until he was able to acknowledge and to recognize the independence of the thirteen States prior to and separately from a treaty provision. In 1777 Congress had declared that it would reject any treaty between Britain and the United States "inconsistent with the independence of the said States."

John Adams considered that it was the States, not one State, which carried on foreign relations: "we are young States, and not practiced in the art of negotiations." 2 Wharton, *op. cit.* at 755. In diplomatic and foreign documents *United States* always take a plural, not a singular, verb, just as in documents relating to domestic affairs. Jefferson, writing in 1786 to Madison regarding the projected Constitutional Convention, stated its proper objective as "to *make* us one nation, as to foreign concerns, and to keep us distinct in domestic ones." 2 Washington (ed.), *The Writings of Thomas Jefferson* 66 (1853). (Em-

phasis added.) Hamilton considered that under the Articles the powers of external sovereignty were exercised *by the States:* "under the old Constitution the important powers of declaring war, making peace etc. can be exercised by nine States." 2 *Elliot's Debates* 263; Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555, 572 (1938). A Pennsylvania court held that under the Articles the States were sovereigns in the international-law sense. *Nathan v. Commonwealth,* 1 Dallas 77 (1781); see Scott, *The United States of America: a Study in International Organization* 58-59 (1920).

While the Articles of Confederation conferred upon Congress the power to make treaties, that power was regarded as severely limited. The provision of the Peace of Paris "that creditors on either side shall meet with no lawful impediment to the recovery" of debts (Article IV) was considered to be beyond the power of Congress, and some of the States disregarded it. Exhibit 686, p. 15. As to the return of confiscated property to British subjects, the American peace commissioners successfully insisted that they had no power to bind the States to such an obligation, and the provision of the treaty (Article V) was stated as merely a recommendation by Congress to the States. Exhibit 761, p. 793; Tr. 2410-11.

While as we have seen international law fully recognized the individual sovereignty of states conducting their foreign affairs solely by means of a confederation, it is the fact, though not at all necessary to sustain the position of the Common Counsel States in this proceeding, that the States individually did engage in substantial conduct of the type plaintiff associates with external sovereignty. Virginia had agents in Europe and carried on "diplomatic activities . . . so extensive as to necessitate the setting up of a special office, a 'Clerkship of Foreign Correspondence.'" Levitan, *op. cit.* at 487. Other States were also active abroad in various ways. As to the conduct of the war, also, it would

be absurd to say that the States were inactive and relied solely on Congress to defend them. The States individually had their own armies and navies (not subject to orders from Congress or its commanders), conducted individual campaigns, and were active in every phase of war operations. *Ibid.;* see also Exhibit 700, p. 290; Exhibit 757, pp. 540-42. The Articles of Confederation did not prohibit individual States from dealing directly with foreign powers, making war, sending ambassadors or concluding treaties, but merely required the consent of Congress therefor, and provided that individual States could make war *without* the consent of Congress in case of emergency (Article VI).

Nor is it the case, as plaintiff contends, that Europe was oblivious to the States and was aware of the existence only of Congress. A host of documentation could be produced to show the falsehood of that allegation. For example, John Adams wrote in 1780 of great curiosity throughout Europe "to see our new constitutions," by which he meant the State constitutions. Exhibit 759, p. 527. Later the same year, Adams requested copies of the constitutions with which to satisfy the European interest, and said as an afterthought that "it would be proper to print the Confederation in the same volume." Exhibit 760, pp. 67-68. The constitutions were accordingly published by order of Congress, in a volume entitled *The Constitutions of the Several Independent States of America* (1781). See also Greene, *The Foundations of American Nationality* 547 (1922).

When a court of commissioners appointed by Congress, pursuant to a power conferred by the Articles of Confederation, adjudicated a boundary dispute between Connecticut and Pennsylvania, Robert R. Livingston, Secretary of Foreign Affairs, reported the decision to LaFayette in the following striking terms:

> "The great cause between Connecticut and Pennsylvania has been decided in favor of the latter.

> It is a singular event. There are few instances of independent states submitting their cause to a court of justice. The day will come when all disputes in the great republic of Europe will be tried in the same way, and America be quoted to exemplify the wisdom of the measure." 6 Wharton, *Revolutionary Diplomatic Correspondence of the United States* 202 (1889).

Plaintiff claims the use in diplomatic instructions and treaties of the terms "both nations" and "both countries" as proof that the States were not sovereign. But similar terms were used in 17th-century treaties made with various countries by the kings of Great Britain at times when, beyond question, England and Scotland were separate states, being linked only by a joint personal sovereign. Exhibit 674, p. 361 ("both sides," "both Parties"); Exhibit 674, pp. 711, 714, 733, 734 ("either Party"). Moreover, while plaintiff admits at P.R.B. pp. 124-25 that the Dutch confederacy was composed of units which were "sovereign and independent under international law," the Treaty of 1654 between England and The Netherlands uses the terms "either side," "neither republic," "either republic," "either State," "the respective States," "either party," and "both parties." 3 Parry, *Consolidated Treaty Series* 248-52. The British-Dutch Treaty of 1674—England and Scotland still being separate sovereign states, and the Dutch confederacy still consisting by plaintiff's own admission of units "sovereign and independent under international law"—uses the terms "both parties," "both sides," "both nations," "either party," and "the two nations." 13 Parry, *Consolidated Treaty Series,* 136-39. This type of usage, which could doubtless be found in many other treaties as well, makes it wholly clear that the use of such terms was in no way inconsistent with the fact that a contracting party consisted, and was well known to consist, of more than one sovereign state.

Professor Morris alleged that there was a common United States citizenship during the revolutionary and Confederation periods. Tr. 2378. He placed his sole reliance on a letter from Jay to Franklin of May 13, 1781, and Franklin's reply of August 20, 1781. U.S. Exhibit 388. Professor Morris' interpretation of these letters is incomprehensible. Jay's letter declared, "though a person may by birth or admission become a citizen of one of the States, I cannot conceive how one can either be born, or made a citizen of them all." Franklin replied that he thought "your objections reasonable." This shows how far John Jay, that great nationalist, was from thinking of the United States as an entity distinguishable from, let alone superior to, the thirteen States of which they consisted. For Jay, as for everyone else during this period, the United States simply had no existence apart from its constituent sovereigns. Even the 1787 Constitution did not create any federal citizenship, but merely provided (Article IV, Section 2), as the Articles had done, that the citizens of each State were entitled to all the privileges and immunities of citizens in the several States.

The government established by the Constitution was not the same government which existed under the Articles, and the new government was in no sense the legal successor of the old one or the inheritor of any powers from it, except that debts of the old Congress were assumed (Article VI). With that one exception the Constitution does not even refer to the old government or to the Articles. It was a new compact among the States, and the government it established derived all its power and authority from a new act of delegation by the people of the States.

Innumerable writers have demonstrated that the 1787 Constitution had the nature of a compact entered into by independent sovereigns. The extent to which the States retained their sovereignty *after* the Constitution came into

force has long been debated, but few have been so reckless as to deny the compact theory of its inception. The 1787 Convention was "an international conference." Scott, *The United States: a Study in International Organization* 145, 148-56 (1920).

It has sometimes been contended that the preamble to the Constitution ("We, the people of the United States") suggests that the Constitution was the act of, or was to be adopted by, the people collectively. In fact, the preamble, as it unanimously passed the Convention on August 7, 1787, was in these words: "We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution," etc. 1 *Elliot's Debates* 224, 230-31 (2d ed. 1836); Scott, *The United States of America: a Study in International Organization* 541, 552 (1920). The change to the final phraseology was made by a subcommittee on style, and was obviously not intended to affect the substance. The reason for the change was that there was no assurance that every State would ratify the Constitution, and it would plainly have been inappropriate for it to go into effect purporting to be the act of States which remained outside it. Scott, *Sovereign States and Suits* 71-72 (1925). In fact two States did remain outside for quite some time; if they were not independent sovereigns during that period, it is difficult to know what status to assign them. See Tr. 2669-70. And it was never suggested that the United States had any right to coerce them if they did not choose to come in voluntarily.

Plainly, the framers regarded the people of each State, in their conventions which were regarded as the direct expression of their sovereignty, as those on whom adherence or non-adherence of each State to the Constitution, and therefore its legitimacy as a governmental charter, de-

pended. Article VII of the Constitution, providing that the ratification by nine States "shall be sufficient for the establishment of this Constitution between the States so ratifying the same," confirmed the nature of the Constitution as a compact between sovereigns; the word *between* was put in on special motion, which shows how closely words were watched at the time. 1 *Elliot's Debates* 277. And the final act of the 1787 Convention made it clear that the delegates regarded themselves as acting on behalf of the States: "done in convention, by the unanimous consent of the *States present*, the 17th day of September, in the year of Our Lord 1787." *Id.* at 317. "On the question to agree to the Constitution, enrolled in order to be signed, all the States answered, 'Ay.'" *Id.* at 318.

At the Convention, as in the Continental Congress, each State had a single equal vote, and the vote on each article of the Constitution was recorded by State, individuals not even being mentioned. *Id.* at 155-318. A great wealth of additional evidence could be adduced from the proceedings in the State ratifying conventions, and from many other contemporary and later sources, confirming the nature of the Constitution as a compact among sovereigns.

Even after the 1787 Constitution, the theory was that the States preserved their participation in the international act of treaty-making through the requirement of ratification by the Senate, senators being regarded as representatives of their States. Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555, 572 (1938).

In 1837 the Senate adopted, by a large majority, a resolution declaring "that in the adoption of the Federal Constitution the States adopting the same acted, severally, as free, independent and sovereign States." *Congressional Globe and Appendix*, 25th Cong., 2d Sess., p. 98. Again in 1860, the Senate resolved "that, in the adoption of the Federal Constitution, the States adopting the same, acted

severally as free and independent sovereignties, delegating a portion of their powers to be exercised by the Federal Government for the increased security of each against dangers, domestic as well as foreign." *Congressional Globe,* 36th Cong., 1st Sess., pt. 3, p. 2321.

We will not discuss the views which political figures have taken from time to time on this question, except to make one observation about Daniel Webster. Webster's reply to Calhoun is perhaps the most famous denial in American history that the Constitution was a compact among sovereigns. But Webster very materially changed his views in his later life. In arguing to the Supreme Court in *Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519 (1839), Webster declared:

> "I am not prepared to say that the States have no national sovereignty [as distinguished from 'municipal sovereignty']. The laws of some of the States — Maryland and Virginia, for instance — provide punishment for treason. The power thus exercised is, certainly, not municipal. Virginia has a law of alienage: that is, a power exercised against a foreign nation. Does not the question necessarily arise, when a power is exercised concerning an alien enemy—enemy to whom? The law of escheat, which exists in all the States, is also the exercise of a great Sovereign power.
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> "The States of this Union, as States, are subject to all the voluntary and customary laws of Nations. [Mr. Webster here referred to, and quoted a passage from Vattel (p. 61), which, he said, clearly showed that states connected together as are the States of this Union, must be considered as much component parts of the law of nations as any

> others.]" 13 Pet. at 559-60. (Bracketed matter in original.)

(The Court fully accepted Webster's argument; see p. 404, *infra.*) And in giving legal advice to foreign bankers, Webster declared

> "Every State is an independent, sovereign, political community, except in so far as certain powers, which it might otherwise have exercised, have been conferred on a general government, established under a written Constitution, and exerting its authority over the people of all the States. This general government is a limited government. Its powers are specific and enumerated. All powers not conferred upon it still remain with the States and with the people." 57 *Niles's National Register* 273.

On the basis of all the evidence, the vast majority of scholars in every period have agreed on "an all but unanimous conclusion" that during the revolutionary and Confederation periods the States individually possessed independence and full sovereignty, including external sovereignty, and were nations recognized as such by international law. David M. Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 488 (1946). These scholars include: James Sullivan, *History of Land Titles in Massachusetts* 60 (1801); Henry Baldwin (Justice of the Supreme Court of the United States), *A General View of the Origin and Nature of the Constitution and Government of the United States* 79-81 (1837); John Lothrop Motley, 1 *Rebellion Record* 210 (1861); 10 George Bancroft, *History of the United States* 421-22 (1874); Small, "The Beginnings of American Nationality," 8 *Johns Hopkins Studies in Historical and Political Science* 7-77 (1890); Henry Cabot Lodge, *A Fighting Frigate* 225 (1902); Van Tyne, "Sovereignty in the American Revolution: an Historical

Study," 12 *Am. Hist. Rev.* 525 (1907); James Brown Scott.[54] *The Declaration of Independence, the Articles of Confederation, the Constitution of the United States* iii-iv (1917); Robert M. Hughes, *Handbook of Admiralty Law* 9 (2d ed. 1920); James Brown Scott, *The United States of America, a Study in International Organization, passim, e.g.*, pp. 45, 50-51, 58-60 (1920); R.L. Schuyler, *The Constitution of the United States, an Historical Survey of Its Formation* 16-17 (1923); Samuel Eliot Morison, *Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution* xl (1923); Allan Nevins, *The American States During and After the Revolution 1775-1789*, pp. 660-61 (1924); James Brown Scott, *Sovereign States and Suits* 28-30, 35-80 (1925); James Brown Scott, "Treaty Making Under the Authority of the United States," 28 *Proceedings, Am. Soc. Int'l. L.* 2 (1934); Evarts Boutell Greene, *The Foundations of American Nationality* 460-61, 558-59 (1922); Andrew C. McLaughlin, *Constitutional History of the United States* 83, 106, 118-36 (1935); Julius Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 551 (1938); H.R.G. Greaves, *Federal Union in Practice* 23-32 (1940); C. Perry Patterson, *"In re* United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286 (1944); James Quarles, "The Federal Government: as to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?", 32 Georgetown L.J. 375 (1944); Robert E. Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev.

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[54] James Brown Scott (1866-1943) was Solicitor of the Department of State (1906-10), a delegate to the Paris Peace Conference of 1919, special advisor to the Department of State and Chairman of the Joint State and Navy Neutrality Board (1914-17); president of the American Society of International Law (1929-39), president of the Institut de Droit International (1925-27, 1928-29), editor in chief, American Journal of International Law (1907-24). He served as a member of many international commissions for the conciliation of disputes between nations. See also footnote p. 292, *supra*.

398 (1948); Ernest R. Bartley, *The Tidelands Oil Controversy* 29-30 (1953); Merrill Jensen, *The New Nation* (1965), Exhibit 703; Thomas A. Bailey, *A Diplomatic History of the American People* 52 (8th ed. 1968); 1 Julius Goebel, *History of the Supreme Court of the United States* (1971), Exhibit 694; Raoul Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev., 1, 28-33 (1972); Judge Philip C. Jessup (in his testimony in this proceeding, Tr. 644).

The United States have officially taken this position on at least two occasions in a diplomatic context. In the St. Croix River Arbitration under the Treaty Between Great Britain and the United States of November 19, 1794, the United States contended that on July 4, 1776 Massachusetts became "a free sovereign and independent State, . . . and in consequence thereof, was the legal successor of the said province of the Massachusetts Bay in New England," and that from 1783 to 1789 Massachusetts was in confederation with the other twelve States, "all which states were, and before had been, free sovereign and independent States." 1 Moore, *International Adjudications* 110 (1929). And in 1807, a treaty between the United States and Great Britain (never ratified) laid down a maritime boundary in Passamaquoddy Bay and provided that the islands and waters west of the line were "within the jurisdiction and part of Massachusetts, one of the . . . United States." 6 Moore, *International Adjudications* 344 (1933).

In opposition to the great weight of authority among scholars, Professor Morris adduced precisely four writers: Story in the early 19th century, and a group of three writers between 1865 and 1890: Pomeroy, von Holst and Burgess. Tr. 1728, 1732-34, 2369-72. Professor Morris conceded that he had been able to cite no constitutional scholar writing since 1890 who supports his position. Tr. 2375. We submit that the few writers cited by Professor Morris are wrong on the record and the evidence.

Story was too young to have any first-hand knowledge of the facts, and wrote before most of the sources became available. He "was thought to be capable, on occasion, of putting his erudition to work in furtherance of essentially political ends," and "was a staunch advocate of a thoroughly centralized legal system," culminating in his decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled, Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Robertson, *Admiralty and Federalism* 31 (1970).

The ulterior motive of Pomeroy, von Holst and Burgess is obvious; they were writing in an attempt to justify the Northern position during the War Between the States; the pro-secession argument had begun with sovereignty of the States prior to 1789; and the Reconstruction writers felt called upon to dispute that rather than confining themselves to arguments as to the status of the States *after* the Constitution, as they could have done. Pomeroy was quite frank about his motive: "grant that in the beginning the several States were, in any true sense, independent sovereignties, and I see no escape from the extreme positions reached by Mr. Calhoun." Pomeroy, *Introduction to the Constitutional Law of the United States* 39 (5th ed. 1880).[55]

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[55] Pomeroy, moreover, wrote a book on water law, in which he declared:

> "In England, the title to the alveus, or bed, of all navigable streams is vested in the crown. . . . To these sovereign rights the several states succeeded upon the establishment of American independence. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the several states respectively." Pomery, A Treatise on the Law of Water Rights 468 (1893).

The same was true, he said, of "tide-waters on the borders of the sea." *Id.* at 505.

Burgess, in addition, had other fish to fry: he was an extreme Hegelian, a devotee of German absolutist philosophy, whose example "we shall do well to imitate"; he regarded the centralized national state as the highest achievement of mankind, "the highest good," "the highest entity," possessed of "infallibility," which "can do no wrong"; he also held that the Teutonic race was uniquely qualified to govern, and was justified in denying inferior peoples political participation, and eliminating them if need be. 1 Burgess, *Constitutional Law* v, 1-4, 37-58 (1890). For Burgess, ultimate sovereignty resided not in the people, as our political tradition has always held, but in the national state, and consists of "original, absolute, unlimited, universal power over the individual subject and over all associations of subjects." *Id.* at 52. For an excellent summary of Burgess' views, see 21 *Dic. Am. Biog.* 132-34. "He repudiated the doctrine of natural law, social contract, and the federal state" (*id.* at 133)—*i.e.*, he repudiated precisely those doctrines most fundamental to the views of our revolutionary statesmen and to our constitutional history.

Von Holst was a German professor; his work had to be translated into English. These writers are far from the mainstream of the American tradition of political philosophy and constitutional law. Even Professor Morris could not bring himself to assert the contrary. Tr. 2371.

Moreover, Burgess, Pomeroy and von Holst each declared that, while Congress was sovereign in the early revolutionary period, that sovereignty collapsed and disappeared on the entrance into force of the Articles of Confederation in 1781, and was not resurrected until 1789. Burgess, *op. cit.* at 101; Pomeroy, *Introduction to the Constitutional Law of the United States* 40-42 (9th ed. 1886); 1 von Holst, *Constitutional and Political History of the United States* 27-29 (1876); Tr. 2370, 2372. Story came at

least close to agreeing: "Congress in peace was possessed of but a delusive and shadowy sovereignty. . . . It has been justly observed that 'a government authorized to declare war, but relying on independent states for the means of prosecuting it, capable of contracting debts, and of pledging the public faith for their payment, but depending on thirteen distinct sovereignties for the preservation of that faith, could only be rescued from ignoring and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature.' " 1 Story, *Commentaries on the Constitution* 174, 177 (5th ed. 1905). Thus even Professor Morris' few favorite authorities desert him on a point which is fatal to his contention that the States never possessed sovereignty and independence.

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL AND PROPRIETARY GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED.

The Revolution was in substantial part fought and won to vindicate the colonial charters. Parliament's attempt to alter the Massachusetts charter in 1774—by the Massachusetts Government Act,one of the "intolerable acts," as was the Quebec Act — was the immediate cause for the convocation of the first Continental Congresss in that year. Greene, *The Foundations of American Nationality* 428-29 (1922). The Declaration of Rights and Grievances of the first Congress insisted on the rights of the colonies both to the common law and to the provisions of the charters. 1 *Journals of the Continental Congress* 67; McIlwain, *The American Revolution: a Constitutional Interpretation* 18 (1923). The bill introduced by Lord Chatham in Parliament in 1775—the last attempt by the colonies' friends in England to ward off the Revolution—provided that "the

colonies in America are justly entitled to the privileges, franchises and immunities granted by the several charters or constitutions, which ought not to be invaded or resumed, unless for misuse, or some legal ground of forfeiture." See also Adams, *Political Ideas of the American Revolution* 97, 155-56 (1939).

President Monroe's special message of 1822 declared as follows:

> "And that the power wrested from the British Crown passed to the people of each colony the whole history of our political movement from the emigration of our ancestors to the present day clearly demonstrates. What produced the Revolution? The violation of our rights. What rights? Our chartered rights. To whom were the charters granted, to the people of each colony or to the people of all the colonies as a single community? We know that no such community as the aggregate existed and of course that no such rights could be violated." 6 Hamilton, *The Writings of James Monroe* 225 (1902).

It cannot be questioned without frivolity that, whatever the locus of the abstract concept of "external sovereignty," at independence the States succeeded individually to their boundaries, their charter rights, and their common law, all as enjoyed by the antecedent colonial and proprietary governments, and in addition assumed the territorial and property rights of the crown. Tr. 837-45. Professor Morris conceded that the States succeeded individually to their public lands, which prior to independence had belonged to the proprietors or to the crown, and that the boundaries among the States were determined by their charters. Tr. 2303-07. Professor Henkin further conceded that the States succeeded individually to property *outside* their boundaries

which had belonged to their antecedent colonial governments. App. 543.

Article IX of the Articles of Confederation expressly provided that "no State shall be deprived of territory for the benefit of the United States." As Professor Smith testified, "it is hard to imagine any language which could more conclusively or expressly negative any notion of an implied transfer of territorial rights." App. 346. This language was not non-controversial or *pro forma;* to the contrary, it represented the victory of the adherents of State sovereignty in a hard, most bitterly fought battle which divided the revolutionary statesmen both during the war itself and thereafter. This was, of course, the dispute over the western lands. While no one ever attempted to take from the States for the benefit of the United States their rights in the marginal sea and seabed, there was a concerted effort on the part of the States not possessing western lands by their charters to appropriate the western lands of the other States, without consent or cession by those States, for the benefit of the entire Confederation. That effort was repeatedly, decisively and categorically rejected.

The landless States, led by Maryland, during the debate on the Articles repeatedly attempted to insert provisions which would have stripped the other States of their western lands or would have given Congress the power to revise the boundaries of the States. All these attempts were voted down. Exhibit 744; see also Exhibit 703, pp. 23-25.[56] It was for that reason that Maryland withheld adoption of the Articles for three long years of wartime, from 1778 to 1781.

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[56] Dickinson's original draft of the Articles had given Congress the power of "limiting the bounds of those colonies, which by charter or proclamation, or under any pretence, are said to extend to the South Sea." Burnett, The Continental Congress 217 (1941). This was promptly stricken. *Id.* at 250.

The other landless States had long since conceded defeat; and when Delaware, in adhering to the Articles, attached resolutions grumbling about that defeat, Congress permitted the paper to be filed only with an express proviso "that it shall never be considered as admitting any claim by the same set up or intended to be set up." Exhibit 744, pp. 427-30.

The subsequent history of the controversy is summarized by Professor Smith at App. 346-47. See also Exhibit 707, pp. 693-94; 6 *Journals of the Continental Congress* 1077-79, 1082-83; 19 *id.* at 208-13; 26 *id.* at 118-21. Professor Morris testified that on September 13, 1783 Congress passed a resolution declaring the western lands "without the boundaries of the several States" and appropriating them to the United States "as one undivided and independent nation," Tr. 1772-73; the resolution in question, without its context, is U.S. Exhibit 356. On cross-examination Professor Morris, after considerable sparring and with great reluctance, was compelled to admit that he was entirely mistaken, and that the resolution in question was not *adopted* but was *rejected.* Tr. 2397-2402. In fact the resolution obtained the votes only of three States. Exhibit 708, p. 559; see also Tr. 2394.[57]

Instead, Congress accepted a voluntary cession by Virginia of some of its western lands[58] and rejected an

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[57] Professor Morris' attempted use of this resolution is far more significant than merely showing a careless mis-reading of the record. The fact that he believed Congress ever could or would have adopted such a resolution demonstrates a profound ignorance of the entire congressional attitude towards the western-lands question throughout the revolutionary and Confederation periods.

[58] Virginia never ceded its western lands south of the Ohio River, and retained them until parts of them became the States of Kentucky and West Virginia. To this day, Virginia, as well as North Carolina and

amendment by New Jersey providing that by such acceptance Congress was not necessarily recognizing Virginia's charter claims to its western lands. Exhibit 709, pp. 112, 116-17; Tr. 2403. Virginia had imposed certain conditions on its cession; Congress accepted some of these and Virginia withdrew the others, but even those withdrawn were tacitly accepted and complied with. Exhibit 662, pp. 272, 365. The entire history of the western-lands dispute shows a steady refusal by Congress, even at times when the result was substantial impairment of the unity of purpose of the alliance in wartime, to cast the slightest doubt on the validity of charter claims, or to admit the possibility of any acquisition by the United States of any territorial or property rights other than those voluntarily ceded by the States which owned them.

There is also substantial evidence that, even after the western lands were ceded, it was the general opinion that the United States had no constitutional power to hold permanently any territories not within one of the States, but that territory acquired by the United States collectively was held only temporarily until it could be erected into new States. App. 347; Tr. 2432; *The Federalist*, No. 38, pp. 248-49 (Madison) (Cooke ed. 1961). That view found substantial support in Supreme Court decisions. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4-5 (1955); *Dorr v. United States*, 195 U.S. 138, 148 (1940); *Snow v. United States*, 85 U.S. (18 Wall.) 317, 319-20 (1873); *Scott v. Sanford, 60 U.S. (19 How.) 393 (1856); United States v. Nelson*, 30 F. 112 (Ore. Cir. 1887); *Ex parte Morgan*, 20 F. 298, 304-05 (W.D. Ark. 1883).

Georgia, retain territories which would have been taken from them if Professor Morris were correct that the Proclamation of 1763 or the Quebec Act of 1774 had curtailed their boundaries. See U.S. Exhibit 368, last page.

In *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 221, 222-24, 229-30 (1845), the Court combined this doctrine with the doctrine that the federal title to the western lands derived from the acts of cession by the States within whose charter boundaries they lay, and applied both principles to the bed of navigable waters, including the seabed:

> "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana.
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> "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories.
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> "By the 16th clause of the 8th section of the 1st article of the Constitution, power is given to Congress to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection

> of forts, magazines, arsenals, dock-yards, and other needful buildings. Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description are united in the government of the union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists.
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> "In the case of *Martin and others v. Waddell,* 16 Pet., 410, the present chief justice, in delivering the opinion of the court, said: When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution. Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States. . . .
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> * * *
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> "For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof." 3 How. at 221, 222-24, 229-30.

When, in the late 19th century, the United States began to acquire far-flung territories not adjacent to the con-

tinental United States, for which statehood was not envisaged, the problem was resolved by a doctrinal distinction between "incorporated" territories, which had the potentiality of statehood and to which the Constitution fully applied, and "unincorporated" territories, which were not thought of as future states. *Granville-Smith v. Granville-Smith, supra; Balzac v. Porto Rico,* 248 U.S. 298, 305-11 (1922); *Hawaii v. Mankichi,* 190 U.S. 197, 218-19 (1903). Up until the Spanish-American War, no doctrine of "unincorporated" territories was necessary, because the United States was universally understood to hold no territory other than States and potential States. This evolution of doctrine respecting territories in our constitutional law is wholly inconsistent with the notion that from the time of the Constitution, or even earlier, the United States possessed in its own right territorial and property rights in the marginal sea and seabed which were not part of or the property of any State. See Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 298, 423-26 (1948).

It has always been established doctrine that the original States were the owners of their public lands, except to the extent that they had alienated them or ceded them to the United States, and that the title of the United States to the western lands did not derive directly from the crown, but rather depended on the acts of cession by the States which owned them. The United States has officially taken this position. Donaldson (U.S. Public Land Commission, Committee on Codification), *The Public Domain* (1884), Exhibit 684. *Accord,* 2 Shalowitz, *Shores and Sea Boundaries* 442 (1964). The Supreme Court so held in *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 586 (1823), and *Harcourt v. Gaillard,* 25 U.S. (12 Wheat.) 523 (1827); see pp. 358-62, *infra.*

The sanctity-of-charters position was fully maintained during the negotiations preceding the Peace of Paris. The

instructions of 1779 to John Adams, sole peace commissioner, defined "the boundaries of these States" as including both the western lands and all islands within 20 leagues of the coast, and demanded that Britain evacuate all those areas, yielding "to the powers of the States to which they respectively belong." Exhibit 745, pp. 225, 227.

Professor Morris made much of a letter of instructions from Congress to John Jay dated October 4, 1780, U.S. Exhibit 386; Tr. 1800-02, which he contends indicated that the United States claimed the western lands under a common title rather than by virtue of the individual colonial charters. The letter in fact said nothing about a common title; it invoked the provisions of the Peace of Paris of 1763, to which Spain had been a party, in contending that Spain had renounced any claim to the western lands in favor of Britain. While Professor Morris has attempted to describe this letter as an instruction to the peace commissioners, it was actually a letter to Jay in his capacity as minister to Spain; Adams was the sole peace commissioner until Jay and others were added to the delegation on June 15, 1781. Tr. 1783.[59] In 1780 Spain was claiming certain lands east of the Mississippi which it had occupied during the war. Obviously an argument based on the colonial charters would have carried no weight with Spain, which was wholly unconcerned with and not bound by a purely municipal deed from the British crown to some of its subjects. As against Spain, the United States' title depended on the Peace of Paris of 1763, by which Spain and France had renounced the lands in question. Professor Morris' argument that by relying on the 1763 treaty vis-a-vis Spain the United States were somehow asserting a common title, or repudiating the colonial charters, has no substance whatsoever. See also Tr. 2407-09.

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[59] Professor Morris was well aware of this when he wrote The Peacemakers, pp. 215-16 (1965).

On October 17, 1780, Congress wrote again to Jay, amplifying its prior instructions and setting out the reasons therefor. Exhibit 661, pp. 127-35; Exhibit 745, pp. 326-39. In this letter, drafted by Madison, Congress went out of its way to refer frequently to the charters and to the rights of the States individually, to an extent quite extraordinary given the fact that the recipient of the letter was the minister to Spain, which could legitimately reply that the charters were of no concern to it. Congress wrote:

> "[I]t must be observed that it is a fundamental principle in all lawful governments and particularly in the constitution of the British Empire, that all the rights of sovereignty are intended for the benefit of those from whom they are derived and over whom they are exercised. It is known also to have been held for an inviolable principle by the United States whilst they remained a part of the British Empire, that the sovereignty of the King of England with all the rights and powers included in it, did not extend to them in virtue of his being acknowledged and obeyed as king by the people of England or of any other part of the empire, but in virtue of his being acknowledged and obeyed as king by the people of America themselves; and that this principle was the basis, first of their opposition to, and finally of their abolition of, his authority over them. From these principles it results that all the territory lying within the limits of the States as fixed by the sovereign himself, was held by him for their particular benefit, and must equally with his other rights and claims in quality of their sovereign be considered as having devolved on them in consequence of their resumption of the sovereignty to themselves." Exhibit 661, p. 128.

> "If the occupation by the King of Great Britain of posts within the limits of the United States as defined by charters derived from the said king when constitutionally authorized to grant them, makes them lawful objects of conquest to any other power than the United States, it follows that every other part of the United States that now is or may hereafter fall into the hands of the enemy is equally an object of conquest." Exhibit 661, p. 129.
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> "As this territory [the western lands] lies within the charter limits of particular States and is considered by them as no less their property than any other territory within their limits, Congress could not relinquish it without exciting discussions between themselves and those States concerning their respective rights and powers which might greatly embarrass the public councils of the United States and give advantage to the common enemy." Exhibit 661, p. 130.

See also Tr. 2349-55. As Irving Brant, one of the authors relied on by plaintiff, has recognized, this letter, which was written by Madison, rejected any "claim that the king's title had devolved on the United States collectively." U.S. Exhibit 391, p. 81. Professor Morris' allegation that the charter arguments were ever "dropped," Tr. 2354, is utterly without foundation.[60]

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[60] At the hearings Professor Morris read a passage from his book The Peacemakers briefly describing the October 17 letter, though not mentioning its repeated references to the charters. Tr. 2346-48. (There he gives the date as October 16; the letter was presented to Congress on that day, and approved on the 17th. Exhibit 661, p. 127.) When shown a copy of that letter from the Secret Journals, he questioned the authenticity of the text and asserted that the passages damning to his position were "dropped" before the letter was sent. Tr. 2349, 2354. We thereafter presented as Exhibit 661 the text of the letter from Hutchinson and

Brant's chapter on the instructions to Jay is well worth reading in its entirety. 2 Brant, *James Madison* 70-88 (1948). He shows in detail that the instructions represented yet another victory for the sanctity-of-charters position; Congress was unwilling, as Marbois wrote, to "let the least doubt of the validity of the charters appear." *Id.* at 74. And Madison used the charter claims to refute the theory that "France ceded the land in 1763 to the king, not to the colonies," and therefore that Spain had a right to conquer it as a belligerent against Britain. *Id.* at 80.

In August 1782 Congress considered the matter of instructions to the peace commissioners for the last time. Before Congress was a report by a committee consisting of Daniel Carroll, Randolph and Montgomery. This report is included in the record from the *Secret Journals* of Congress as Exhibit 746, pp. 161-201, and from the *Journals* at Exhibit 707, pp. 482-521. The report, in its *Journals* version, which Professor Morris regards as authoritative (Tr. 2349), devoted 29 pages, Exhibit 707, pp. 488-516, to an exhaustive argument that by virtue of the colonial charters, which were described at length and were repeatedly asserted to be in full force and effect with respect to boundaries, the States whose charter boundaries included western lands, "considered as independent sovereignties, have succeeded to those rights." *Id.* at 490. At the very end of the report, in a final brief paragraph occupying half a page, it was suggested that "if the vacant lands cannot be deman-

Rachal's Madison Papers, which Professor Morris considers "very accurate," Tr. 2349, and indeed is the source he cited in The Peacemakers, pp. 239, 511 n. 67. The passages quoted above are taken from this source, and were never "dropped." Professor Morris' response was to present the letter to Jay of October 4, 1780 (p. 360, *supra;* U.S. Exhibit 386) as the one he really meant to rely upon. Plainly that letter is not the one referred to in the passage from The Peacemakers which Professor Morris read; in any event, (1) nothing was "dropped," since the October 17 letter came later, and (2) the October 4 letter did not rely on any common title.

ded upon the titles of individual States, they are to be deemed to have been the property of his Britannic Majesty, as sovereign of the thirteen colonies immediately before the revolution, and to be devolved upon the United States collectively taken." *Id.* at 516-17.

One would think that the Congress would have been willing to make any argument that might have been successful in extending the boundary of the United States to the Mississippi, and it would be difficult to argue that if it had accepted this report Congress would have prejudiced, as a matter of internal law, the claims of the individual States to their western lands. However, on presentation of the report the delegates of Virginia immediately moved to strike the offending paragraph on the ground that "the claim to the western territory rested solely on the titles of individual States. That Congress had no authority but what it derived from the States. The States individually were sovereign and independent, and upon them alone devolved the rights of the crown within their respective territories." U.S. Exhibit 374, p. 448. Because of these objections the report was not adopted, but was committed, and never received the approval of Congress. U.S. Exhibit 374, p. 449; Exhibit 707, pp. 523-24; see Tr. 2321-22, 2394-96. This episode graphically confirms that Congress was never at any time willing to admit the slightest implication, even a far-fetched one, which could derogate from the continuing validity of the territorial and property rights of each State individually as established by its charter.

Finally, in October 1782, Congress adopted resolutions to be given to the French minister to the United States which insisted on "the territorial claims of these States." Exhibit 761, p. 793. A motion was made to insert the word "United" before the word "States," and *the motion was rejected. Id.* at 795.[61]

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[61] In The Peacemakers, p. 440, Professor Morris was well aware that by this act Congress "avowed the territorial claims of the states."

In view of this history, it is not surprising that the peace negotiators in Paris contended that the right of the United States "to extend to the Mississippi was proved by our charters." 6 Wharton, *Revolutionary Diplomatic Correspondence* 31 (1889). Jay wrote that during the negotiations he had used every one of the arguments in the letter of October 17, 1780, which as we have seen included the charter claims and deliberately *excluded* any reliance on a common title. 2 Brant, *James Madison* 87 (1948).

The entire history of the western-lands question, both with respect to controversies among the States in Congress and with respect to the diplomatic negotiations leading to the Peace of Paris of 1783, can leave no doubt that, even where State charter claims were bitterly contested, they were upheld as part of our law. And *except* with respect to the western lands, nobody ever questioned for a moment at any time the proposition that each State succeeded to its charter boundaries and to all territorial and property rights formerly possessed by the crown and by the antecedent colonial or proprietary government. Thus any assertion that during the revolutionary period the crown and colonial rights to the marginal sea and seabed in the Atlantic somehow passed to the United States collectively is wholly frivolous.

James Sullivan of Massachusetts correctly stated the universal understanding in 1801:

> "The legal aspect of sovereignty and titles referred to by Samuel Adams was again stated by James Sullivan, in his History of Land Titles in Massachusetts published in 1801. Sullivan was a supreme court judge from 1776-1782, Attorney General 1790-1807, first president of the Massachusetts Historical Society, founded in 1791, Governor of Massachusetts 1807, and the leading

supporter in Massachusetts of Thomas Jefferson. He said, (p. 60)

> 'The thirteen original States claimed and had a cession of sovereignty and independence, each in its several capacity, by the mother country. They remained sovereign separate powers until the present constitution was formed. That constitution formed a nation; but it was a creature of 1789. It had then no public property, nor did the people, whose authority gave it existence, make it the proprietor of any other lands, than such as had been ceded, under the old confederation, to the United Colonies.'

"The only property thus 'ceded', was (as pointed out by Sullivan) 'their remote territories' following an invitation to make such cessions from the Continental Congress.

> 'Massachusetts ceded all beyond a line, falling from the Lake Ontario to the State of Pennsylvania, which now forms the east line of what is called, in the general government, The Western Territory.'

"Massachusetts 'ceded' nothing else (see Sullivan 57-60).

"Sullivan's statement reflects the common understanding as well as the obvious meaning of Articles I and II of the Treaty of Peace." Wait, "The Muniments of Title of Massachusetts to Her Submerged Lands," 35 *Mass. L. Q.* 1, 19 (1950).

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS AND SHOW NO AMERICAN DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES OR 30 LEAGUES IN WIDTH.

Article III of the Peace of Paris of 1783 provided as follows:

> "It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova-Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground."

Agreement on this provision was preceded by extensive deliberations in Congress and negotiations with the British, which revealed an intense awareness on the part of the American statesmen of the importance of maritime rights.

General surveys of these developments are found at Exhibit 720, pp. 125-27, and Exhibit 748, pp. 68-71.

In 1776 and again in 1778, the Americans proposed that they and the French divide the Newfoundland and Canadian fisheries between them, excluding the British altogether, Exhibit 742, p. 199. The French failed to respond favorably. Thereafter the American position was to demand a common right of fishing in Newfoundland and Canadian waters. The French declined to support this American position, on the ground that "coastal fishing belongs by right to the proprietor of the coast"; since by this time it was understood that Britain would retain Canada and Newfoundland, the French recognized no American right to claim a share of the fisheries there. U.S. Exhibit 334, pp. 7-9; Exhibit 748, pp. 69-70.[62]

The American reply was based not on "freedom of the seas" arguments but on the contention that the historic practice of American fishing in Canadian waters had given rise to a vested, established right. U.S. Exhibit 375, p. 79. While ultimately, by virtue of John Adams' eloquence, the United States were able to obtain "liberty" of fishing right up to the Canadian coasts, in 1779 Congress was quite willing to accept a provision that would have reserved the fisheries out to three leagues for the British alone. Exhibit 745, pp. 202, 208, 230-32; U.S. Exhibit 347, p. 961.

The Peace of Paris carefully distinguished between the American "right" to fish on the outer banks of Newfoundland and other non-coastal waters, and the "liberty" to fish in coastal waters. This point of terminology was the

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[62] The French legal position was clear: the British crown was "the sole and undoubted proprietor of the Island of Newfoundland, and consequently of the fishery upon its coasts." Richard B. Morris, The Peacemakers 326 (1965). The French position extended both to "shore rights for drying fish" and to "fishing within coastal waters." *Id.* at 330.

subject of considerable discussion. Exhibit 720, p. 126. Of course no provision at all was needed unless the Americans believed that Britain had or would claim an exclusive right in the absence of a treaty provision to the contrary. In 1816 John Quincy Adams, then Minister to Britain, made that point in a letter to Lord Castlereagh:

> "If the United States would have been entitled, in virtue of a recognized independence, to enjoy the fisheries to which the word *right* is applied, no article upon the subject would have been required in the treaty. Whatever their right might have been, Great Britain would not have felt herself bound, without a specific Article to that effect, to acknowledge it as included among the appendages to their independence." 7 *British and Foreign State Papers* 105 (1834).

Adams regarded the 30-league exclusive-fishing limits in the treaties of 1713 and 1763 as evidence of what the British considered to be their exclusive right, and concluded: "that Great Britain would not have acknowledged these rights, as belonging to the United States in virtue of their independence, is evident." *Ibid.* In Adams' view, the American "right" was founded not "as a necessary result of their independence" (that is, by virtue of any principle of freedom of the seas), but rather as a vested right deriving from the established and historic use of fisheries: "a right which they have theretofore enjoyed, as a part of the British nation, and which, as an independent nation, they were to enjoy unmolested." *Id.* at 106.[63] Adams continued with the passage quoted at p. 228, *supra*, declaring the exclusive nature of both the coastal and the banks fisheries. Finally,

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[63] As Judge Jessup testified, in this period vested or established fishing rights in favor of a non-coastal nation were regarded as exceptions to the recognition of broad territorial waters and the concomitant exclusive rights of the coastal sovereign. App. 132-33, 227-29.

he recognized that fisheries were the subject of exclusive ownership under both British and American law:

> "It was precisely because they [the United States] might have lost their portion of this joint national property, to the acquisition of which they had contributed more than their share, unless a formal article of the treaty should secure it to them, that the article was introduced. By the British municipal laws, which were the laws of both nations, the property of a fishery is not necessarily in the proprietor of the soil where it is situated. The soil may belong to one individual and the fishery to another. The right to the soil may be exclusive, while the fishery may be free or held in common. And thus, while in the partition of the national possessions in North America, stipulated by the Treaty of 1783, the jurisdiction over the shores washed by the waters where this fishery was placed, was reserved to Great Britain, the fisheries themselves and the accommodations essential to their prosecution, were, by mutual compact, agreed to be continued in common." *Id.* at 108.

In all this John Quincy Adams was faithfully adhering to the argument his father successfuly made in 1782. The senior Adams had said not a word about freedom of the seas, even as to the fisheries on the outer banks of Newfoundland, but by his own account claimed the "right" to those fisheries solely on the basis of occupation and use. U.S. Exhibit 375, p. 79; see also Greene, *The Foundations of American Nationality* 520 (1922).

In the report submitted to Congress in August 1782 regarding the peace negotiations, a committee set out arguments which the commissioners might use in seeking participation in the Newfoundland banks fisheries. The

report acknowledged that "a reasonable tract" of coastal fishery belong to the owner of the coast, and discussed the various doctrines and precedents of international law as to the distance to which that exclusive right extends: 100 miles, 60 miles, the 14 miles of Scottish "reserved waters," the 30 leagues of the treaties of 1713 and 1763, and the three leagues and 15 leagues applied to the St. Lawrence and Cape Breton fisheries by the 1763 treaty. Exhibit 707, pp. 482-85. The report is entirely devoted to the outer banks of Newfoundland, and its argument is that those banks, being 35 leagues from land at their closest point, were outside all the conventional limits used for the measurement of exclusive fisheries. *Id.* at 482, 485. Reliance was also placed on the long-established and therefore vested nature of the American right to the fishery. *Id.* at 485. While the report contains general language about the freedom of the seas, it is impossible to find any language in it contending that the 30-league/100-mile limit was discountenanced by English or international law; the argument was that the fishery to which the report related was outside that limit.

D. THE PEACE OF PARIS ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES.

As to the coastal waters of the United States themselves, the Peace of Paris provided (Article II) that the "boundaries" of the United States should be on land as defined, and "comprehending all islands within twenty leagues of any part of the shores of the United States." That formula was proposed by Congress in its first instructions to the peace commissioner in 1779, Exhibit 745, pp. 139, 226, and was accepted by the British without change and, so far as appears, without discussion. It seems highly improbable that the commissioners on either side were unaware that

ownership of islands to a certain distance in the sea had always been regarded as including the seas out to that distance; moreover, 60 miles (20 leagues) was one of the measurements then most in vogue in international law for the extent of territorial waters (p. 277, *supra*). The Americans were well aware of that, 60 miles in the exclusive-fishery context having been mentioned in the report to Congress of August 1782. Exhibit 707, p. 482. The record contains copies of the maps used by both the British and American commissioners in the negotiations, on which they marked the boundaries established by the treaty; both maps show a boundary line in the sea, obviously intended to be 20 leagues out, all along the coast of the United States. Exhibits 327, 339 (App., Vol. III); Exhibit 355; Tr. 1194-1206.

Quite plainly, as Judge Jessup and Professor Smith have testified, the treaty did establish, and was understood to establish, a boundary line 20 leagues out in the sea for some purposes other than mere ownership of islands. App. 134-36, 342-44; Tr. 1194-1206, 1271-77. As Judge Jessup has emphasized, in view of the long history of fisheries disputes, treaties and regulations in North Atlantic waters, it seems unquestionable that at the very least the provision was intended to recognize exclusive American fisheries out to the 20-league line. Tr. 1195. That conclusion is confirmed by the fact that the British copy of the map also shows, obviously for comparative purposes, the 30-league Treaty of Utrecht line, which dealt with exclusive fisheries.

It seems fairly apparent that in 1779 Congress picked one of the conventional distances in vogue for territorial waters and proposed it (in the conventional "islands" language) for inclusion in the treaty; the British, who were not users of the coastal fisheries off the United States, probably accepted it more or less without question. The retreat from the 100-mile boundaries of the charters to 60 miles for ex-

clusive fisheries was probably influenced by the freedom-of-navigation theories coming into vogue at this period among maritime powers. Plainly, seabed and subsoil rights would have been regarded as no more restrictive; and if we are correct that the reason for the retrenchment to 60 miles related to freedom of navigation, the provision carries no implication that the 100-mile charter boundaries did not remain in effect as to the seabed and subsoil, and perhaps as to surface rights other than navigation and exclusive fisheries. On the whole, therefore, the 20-league provision of the Peace of Paris is most reasonably regarded as a confirmation of the charter claims out to 60 miles, without impairing the charter boundaries of 100 miles with respect to the seabed and subsoil.

Professor Morris makes two arguments against the construction of the 20-league line as a sea boundary: first, that it did not appear on subsequent maps; second, that it would produce the preposterous result of leaving to Britain a 10-league belt between that line and the 30-league line of the Treaty of Utrecht. Tr. 1814-16. Both arguments are frivolous. As to the first, very few maps at any time in history have shown maritime boundaries, as a glance at any map or atlas of any period will show. Indeed, such boundaries on maps are virtually unheard of. Rather remarkably, an official British map of 1785 did show the 20-league boundary line, Exhibit 614 (App. Vol. III), as did a map published in 1876 in connection with the centennial celebration of American independence. Exhibit 822 (App. Vol. III).

As to the professor's second argument, it is based on a studied unwillingness to accept the elementary proposition that the right to territorial waters is dependent upon the sovereignty of a coastline; of course Britain lost its territorial waters off the coast of the United States when it lost sovereignty over the land. Moreover, the argument is based on the assumption that the 30-league line of the

Treaty of Utrecht extended south of Nova Scotia; by the terms of the treaty itself it did not do so, and the British view that a 30-league/100-mile line extended down the coast of the United States was obviously based on general English and international law. See pp. 212-13, 276-77, *supra*.[64]

Finally, Professor Morris contends that "the United States was negotiating for territory and other rights in collectivity and not for the individual and separate States." Tr. 1788-89. If he means that the commissioners were negotiating "in collectivity" as to the territorial waters of the United States, the argument is far-fetched in the extreme, and Professor Morris gives no evidence for it. His only argument is that the rights to the Canadian fisheries were negotiated for collectively; of course they were, since they were not within or appurtenant to the territories of any State, and all the States claimed equal rights to them. As we have seen (pp. 321-28, *supra*), the only occasion when negotiation "in collectivity" was ever proposed for any rights to which individual States had charter claims related to the western lands, and there the proposal was decisively rejected. There is not a word in Professor Morris' book *The Peacemakers* which suggests any negotiations "in collectivity."

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[64] If Britain did have a treaty right, as against France, to a 30-league exclusive-fisheries zone off the coasts of the United States, the succession of the defendant States to Britain as sovereigns of those coasts entailed, under established principles of international law, their succession to the treaty right also. The general rule is that a successor State inherits those treaty rights and obligations of its predecessor which pertained to, were for the benefit of, or constituted a burden upon, the territory subject to the State succession. 5 Hackworth, Digest of International Law 360-77 (1943); 2 Whiteman, Digest of International Law 936-1028 (1963); O'Connell, The Law of State Succession (1956).

VIII.

THE EXCLUSIVE RIGHT OF THE STATES TO EXPLORE AND TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF WERE NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION.

A. THE CONSTITUTION EXPRESSLY PRESERVES STATE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS.

Clause two of Article IV, Section 3 of the Constitution declares in the most explicit language that no constitutional provision may affect the claims of the States to territory or property. The clause provides as follows: ". . . nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State." Clearly prohibited would be the interpretation of the powers of the Federal Government over defense and foreign relations, or any other federal powers, in such a way as adversely to affect the claims of the States to the submerged lands off their shores.

The history of this provision of the Constitution demonstrates that the intent of the framers was to use the term "any claim" in a broadly inclusive sense. According to Madison's notes on the proceedings of the Federal Convention, the provision was debated only once, on August 30, 1787. On that occasion Daniel Carroll of Maryland proposed the following amendment:

> "Provided nevertheless that nothing in this Constitution shall be construed to affect the claim of the U.S. to vacant lands ceded to them by the Treaty of peace." 2 Farrand, *Records of the Federal Convention* 465 (1911).

Madison thought such a provision unnecessary but harmless, but proposed that "to make it neutral and fair, it ought to go farther & declare that the claims of particular States also should not be affected." *Id.* at 465. Since this was generally accepted, Carroll withdrew his amendment and substituted the following:

> "Nothing in this Constitution shall be construed to alter the claims of the U.S. or of the individual States to the Western territory, but all such claims shall be examined into & decided upon, by the Supreme Court of the United States." *Id.* at 465-66.

The Carroll substitute was thereupon postponed and the convention took up, and adopted, a similar amendment proposed by Gouverneur Morris of Pennsylvania:

> "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U - S - or of any particular State." *Id.* at 466.

The debate then continued over an amendment which provided that "all such claims" be examined and decided upon by the Supreme Court. It was eventually decided that such a provision was superfluous since the Supreme Court already had jurisdiction over suits to which the United States or a State was a party.

It is important to note that the Convention moved from a very specific provision, dealing with vacant lands ceded by the Treaty of Peace, to a very inclusive provision dealing with "any claims." The central purpose behind the substitution of the Morris amendment was to include all con-

ceivable claims of either the United States or of the individiual States. The substitution was activated by the same sentiments expressed by Madison: the desire to be inclusive and to make certain that the adoption of the Constitution would have no effect on any territorial or property claims.

B. SEVERAL OTHER PROVISIONS OF THE CONSTITUTION AND THE DEBATES AT THE FEDERAL CONVENTION INDICATE THE INTENTION NOT TO CHANGE OR TO AFFECT STATE BOUNDARIES OR THE OWNERSHIP OF PROPERTY.

It is inconceivable that any of the framers believed that territorial or property rights were being ceded implicitly and without discussion, in view of the long and critical debate over cessions during the Confederation period, and the full awareness by all participants of cession and territorial questions.

At one point during the Convention Rufus King of Massachusetts suggested that, if the debts of the states were to be assumed, then in return all unallocated lands of the States should be given up to the Federal Government. 2 Farrand, *Records of the Constitutional Convention* 328 (1911). Significantly, this proposal received almost no support among the delegates and was never even seriously considered.

Article IV, Section 3 of the Constitution provides, of course, that new States may be admitted to the Union by Congress, but that no new State shall be formed within the jurisdiction of any other State or States without the consent of those States. It is interesting to note that Roger Sherman of Connecticut opposed this provision as unnecessary; to him it was self-evident that "the Union cannot dismember a State without its consent." *Id.* at 455. However, the representatives of Maryland vigorously urged that the

provision be deleted for the opposite reason, namely, that Congress *should* have the right to dismember the larger States without their consent. *Id.* at 461-62. There was a full debate on this question and the provision was retained by a vote of 8 to 3. *Id.* at 462. Again Maryland attempted to delete the provision, *id.* at 463-64; and again the proposal was rejected by the same vote. *Id.* at 464.

Also of importance in ascertaining the intent of the framers is the provision of Article I, Section 8, giving Congress legislative powers over a federal district for the seat of government and over all places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings. The section expressly provides that the federal district and the other places mentioned may be acquired only with the consent of the legislatures of the States in question. The clause as first proposed, while providing that the federal district could be acquired only by the cession of particular States, did not require the consent of the legislatures for the purchase of places for forts, etc., over which federal legislative authority was to be exercised. This omission was promptly pointed out by Gerry of Massachusetts, who contended that "this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government." *Id.* at p. 510. The matter was immediately resolved by the addition of the words "by the Consent of the Legislature of the State," after which the clause was adopted unanimously.

These constitutional provisions, and the debates leading to their adoption, are inconsistent with any notion that the framers intended that the adoption of the Constitution involved the implicit transfer by the States to the Federal Government of any territorial or ownership rights whatever, in the seabed of the continental shelf or elsewhere. Article

IV, section 3 expressly protected the States against dismemberment and provided that nothing in the entire Constitution should be so construed as to prejudice any territorial or property claim of any State. It is difficult to imagine how the intent could be more clear.

The argument that the States' continental-shelf rights were transferred to the United States as a corollary of "external sovereignty" or of the foreign-affairs and defense powers is discussed at pp. 428-43, *infra*.

C. THE GREAT WEIGHT OF SUPREME COURT AUTHORITY HAS RECOGNIZED STATE SOVEREIGNTY IN THE PERIOD 1776-1789, AND STATE SUCCESSION TO ALL TERRITORIAL AND PROPERTY RIGHTS OF THE CROWN AND THE COLONIAL GOVERNMENTS WAS UNIFORMLY UPHELD UNTIL THE *CALIFORNIA* CASE.

We shall now summarize (and usually quote) all the language we have encountered in Supreme Court opinions which bears on the locus of sovereignty and State succession to territorial and property rights during the revolutionary and Confederation periods.[65] Professor Morris gave (Tr. 1729-32) a grossly distorted and incomplete version of the substance of the early Supreme Court decisions on these points.

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the question was whether the Supreme Court had jurisdiction over an action brought by a citizen of one State against another State. Since Article III of the Constitution expressly gave the Court jurisdiction over controversies between a State and citizens of another State, the issue does not seem to have been very difficult; even so, the Court's

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[65] Cases dealing specifically with State succession to tide waters and the bed and subsoil thereof are referred to at pp. 376-78, *infra*.

judgment was overruled by the Eleventh Amendment to the Constitution. Three of the opinions contain language relevant to the question here. Justice Iredell, dissenting, contended that the jurisdictional provision of the Constitution was not self-executing, and that in the absence of an act of Congress the Court should follow the common-law principle of immunity of the sovereign from suit. Iredell was at pains to point out the reception of the common law in all the States. His conclusion was that the States were successors to the immunity from suit of the crown along with other attributes of sovereignty:

> "No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered: each state in the Union is sovereign, as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them: of course, the part not surrendered must remain as it did before." *Id.* at 435.

Justice Wilson, who decided with the majority, and who as Professor Morris has pointed out was one of the most extreme nationalists prior to 1787, nonetheless sharply distinguished between the locus of sovereignty, at least in fact, during the Confederation period and under the Constitution:

> "With the strictest propriety, therefore, classical and political, our national scene opens with the

> most magnificant object, which the nation could present: 'The People of the United States' are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority: executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested." *Id.* at 463.

Chief Justice Jay, also in the majority, appeared to recognize both a national and a federal theory of the revolutionary and Confederation periods, without committing himself to one or the other:

> "The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within whose limits they were situated, but

> to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly; afterwards, in the hurry of war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present constitution." *Id.* at 470.

The other two justices writing opinions, Blair and Cushing, said nothing relevant to the pre-1789 constitutional situation. Thus in the *Chisholm* case we find three justices expressing relevant opinions: Iredell maintained that the States were fully sovereign prior to 1789 and had not lost that sovereignty in any essential sense; Wilson held that the States were sovereign before 1789 but had yielded the aspect of sovereignty at issue in the case; Jay alone cast any doubt on the pre-1789 sovereignty of the States, but only as a hypothesis, giving equal weight to the opposite hypothesis.

In *Penhallow v. Doane,* 3 U.S. (3 Dall.) 53 (1795), the Court held that the prize appeal court established by Congress in 1778 had possessed jurisdiction to reverse a decision of the admiralty court of New Hampshire. The case necessarily involved an inquiry into the powers of Congress prior to the effective date of the Articles of Confederation. All four justices who wrote opinions—Paterson,

Iredell, Blair and Cushing—relied heavily on the fact that New Hampshire had voted in favor of the act of Congress establishing the prize court, and that having so voted New Hampshire could not withdraw its consent without withdrawing from the Confederation, which all three justices believed it had a perfect right to do. Justice Paterson went on in vivid terms to affirm the *de facto* power of Congress, even prior to the Confederation, over external and military affairs:

> "Much has been said respecting the powers of congress. On this part of the subject, the counsel on both sides displayed great ingenuity and erudition, and that too in a style of eloquence equal to the magnitude of the question. The powers of congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must inquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government: congress conducted all military operations both by land and sea; congress emitted bills of credit, received and sent ambassadors, and made treaties: congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America. In congress were vested because by congress were exercised, with the approbation of the people, the rights and powers of war and peace. In every

government, whether it consists of many states, or a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, in whom, during our revolution war, was lodged, and by whom was exercised, this supreme authority? No one will hesitate for an answer. It was lodged in, and exercised by, congress; it was there, or nowhere; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the states, separately, had exercised the powers of war. For in such case, there would have been as many supreme wills as there were states, and as many wars as there were wills. Happily, however, for America, this was not the case; there was but one war, and one sovereign will to conduct it. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert or break the violence of the gathering storm; they accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul. As to war and peace, and their necessary incidents, congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount and supreme. The truth is, that the states, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now; the states collectively, under congress, as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which

> is applicable to all great national concerns, and in the exercise of which, other sovereigns would be more immediately interested; such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors." *Id.* at 80-81.

Paterson was quite clear, however, that the powers of Congress were derived from the delegation and acquiescence of the States:

> "Another circumstance worthy of notice, is the conduct of New Hampshire, by her delegate in congress, in the case of the *Sloop Active.* Acts of Congress, 6th March 1779. By this decision, New Hampshire concurred in binding the other states. Did she not also bind herself? Before the articles of confederation were ratified, or even formed, a league of some kind subsisted among the states; and whether that league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. The states, when in congress, stood on the floor of equality; and until otherwise stipulated, the majority of them must control. In such a confederacy, for a state to bind others, and not, in similar cases, be bound herself, is a solecism. Still, however, it is contended, that New Hampshire was not bound, nor congress sovereign as to war and peace, and their incidents, because they resisted this supremacy in the case of the *Susanna.* But I am, notwithstanding, of opinion, that New Hampshire was bound, and congress supreme, for the reasons already assigned, and that she continued to be bound, because she con-

> tinued in the confederacy. As long as she continued to be one of the federal states, it must have been on equal terms. If she would not submit to the exercise of the act of sovereignty contended for by congress, and the other states, she should have withdrawn herself from the confederacy." *Id.* at 81-82.

Justice Iredell, likewise, founded the authority of Congress squarely on the delegation and acquiescence of the States:

> "The powers of congress, at first, were indeed little more than advisory; but in proportion as the danger increased, their powers were gradually enlarged, either by express grant, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous, and ought to be intrusted as cautiously as possible, every man must admit, and none could take more pains, than congress, for a long time, did, to get their authority regularly defined by a ratification of the articles of confederation. But that previously thereto they did exercise, with the acquiescence of the states, high powers of what I may, perhaps, with propriety, for distinction, call external sovereignty, is unquestionable. Among numerous instances that might be given of this (and which were recited very minutely at the bar), were the treaties of France in 1778, which no friend to his country at the time questioned in point of authority, nor has been capable of reflecting upon since, without gratitude and satisfaction. Whether among these powers comprehended within their general

authority, was that of instituting courts for the trial of all prize causes, was a great and awful question; a question that demanded deep consideration, and not, perhaps, susceptible of an easy decision. That in point of prudence and propriety it was a power most fit for congress to exercise, I have no doubt. I think, all prize causes whatsoever ought to belong to the national sovereignty." *Id.* at 90.

"If congress, previous to the articles of confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province, in the first instance. When the obnoxious acts of parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal right to do so, as to join in general measures of resistance with the people of the other provinces, however unwise and destructive such a policy might, and undoubtedly would have been. If they had pursued this separate system, and afterwards, the people of each province had resolved that such province should be a free and independent state, the state, from that moment, would have become possessed of all the powers of sovereignty, internal and external (viz., the exclusive right of providing for their own government, and regulating their intercourse with foreign nations), as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed, or thought of forming, any sort of federal union whatever." *Id.* at 92-93.

Justice Blair, likewise, founded the Congressional authority in question on New Hampshire's express delegation of it, and held that New Hampshire could have withdrawn that

delegation by withdrawing from the Confederation. *Id.* at 112.

Cushing likewise regarded Congress' authority as derived solely by delegation of the States:

> "I have no doubt of the sovereignty of the states, saving the powers delegated to congress being such as were 'proper and necessary' to carry on, unitedly, the common defence in the open war, that was waged against this country, and in support of their liberties, to the end of the contest." *Id.* at 117.

In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the Court held unanimously that a Virginia statute of 1777, confiscating debts owed to British subjects, was superseded by the contrary provision in the Peace of Paris of 1783. Each justice assessed the validity of the Virginia statute under international law, thus recognizing that Virginia at the time was an international person whose act either complied with or violated international law. Only Justice Chase found it necessary to inquire further into the validity of the Virginia statute at the time it was enacted, and his analysis is an emphatic and unequivocal affirmation of State sovereignty:

> "I am of opinion, that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the legislature of that commonwealth. I shall hereafter consider, whether the law of the 20th of October 1777, operated to confiscate or extinguish British debts, contracted before the war. It is worthy of remembrance, that delegates and representatives were elected by the people of the several counties and corporations of Virginia, to meet in general con-

vention, for the purpose of framing a new government, by the authority of the people only; and that the said convention met on the 6th of May, and continued in session until the 5th of July 1776; and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had, therefore, an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive and a judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the commonwealth. This abolition of the old government, and this establishment of a new one, was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the separation; and was proper, to give notice of the event to the nations of Europe. I hold it as unquestionable, that the legislature of Virginia, established as I have stated, by the authority of the people, was forever thereafter invested with the supreme and sovereign power of the state, and with authority to make any laws in their

discretion, to affect the lives, liberties and property of all the citizens of that commonwealth, with this exception only, that such laws should not be repugnant to the constitution or fundamental law, which could be subject only to the control of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of the Virginia legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and in my opinion, on the courts of the United States. If Virginia, as a sovereign state, violated the ancient or modern law of nations, in making the law of the 20th of October 1777, she was answerable, in her political capacity, to the British nation, whose subjects have been injured in consequence of that law. Suppose, a general right to confiscate British property, is admitted to be in congress, and congress had confiscated all British property within the United States, including private debts. Would it be permitted, to contend, in any court of the United States, that congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode and manner. The same reasoning is strictly applicable to Virginia, if considered a sovereign nation; provided, she had not delegated such power to

congress, before the making of the law of October 1777, which I will hereafter consider.

"In June 1776, the convention of Virginia formally declared, that Virginia was a free, sovereign and independent state; and on the 4th of July 1776, following, the United States, in congress assembled, declared the thirteen united colonies free and independent states; and that, as such, they had full power to levy war, conclude peace. &c. I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth.

"Before these solomn acts of separation from the crown of Great Britain, the war between Great Britain and the united colonies, jointly and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon, all the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt, lib. 3, c. 18, § 292-95; lib. 3, c. 5, § 70, 72, 73." *Id.* at 222-24.

Chase held that the 1783 treaty could supersede Virginia's legislation because Virginia had delegated the power to make treaties by entering into the Articles of Confederation:

> "Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had delegated that power to Congress . . . . [I]f she had before parted with such power, it must be conceded that she once rightfully possessed it.
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> "If the legislature of Virginia could not, by ordinary acts of legislation, do these things, yet, possessing the supreme sovereign power of the state, she certainly could do them, by a treaty of peace; if she had not parted with the power of making such treaty. If Virginia had such power, before she delegated it to congress, it follows, that afterwards, that body possessed it. Whether Virginia parted with the power of making treaties of peace, will be seen by a perusal of the 9th article of the confederation (ratified by all the states, on the first of March 1781), in which it was declared, 'that the United States in congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in the two cases mentioned in the 6th article; and of entering into treaties and alliances, with a proviso, when made, respecting commerce.' This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must, of necessity, imply a power to decide the

> terms on which they shall be made: a war between two nations can only be concluded by treaty." *Id.* at 234, 235-36.

Thus for Chase, as indeed for every justice in these early opinions, Congress possessed what powers it had, both prior to and under the Articles of Confederation, solely by delegation from the States, which therefore possessed all sovereign powers individually prior to that delegation.

In *Sim's Lessee v. Irvine*, 3 U.S. (3 Dall.) 424 (1799), the Court upheld an interest in land created by Virginia in territory subsequently ceded to Pennsylvania pursuant to a compact of 1780 between the two States which contained a provision confirming antecedent property rights. Chief Justice Ellsworth's opinion referred to the laws of Virginia "passed subsequently to her independence." *Id.* at 456. Iredell held that at independence each State separately succeeded both to the property and territorial rights of the crown, subject to any lawful encumbrances thereon. *Id.* at 459. Iredell also expressed his opinion, *id.* at 464, that prior to the Constitution of 1787 the Pennsylvania legislature, being fully sovereign, had the power to ignore an obligation incurred by compact or treaty with another State, and that the courts would have upheld such legislation even though in violation of the compact.

Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800), dealt with a Georgia statute of 1782 which confiscated the property of several named persons. The plaintiff, one of the persons named in the act, sued to have the law overturned, arguing that it was a bill of attainder prohibited by the Constitution. The Court unanimously held that in 1782 Georgia was an independent sovereign and therefore had the power to pass such a law unless it was forbidden by its own constitution. Since the constitution of Georgia did not prohibit bills of attainder, the law was valid and the confiscation was upheld.

McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808), concerned a New Jersey law passed during the Revolution confiscating the property of hostile aliens. The Court held that each State became an independent sovereign upon the Declaration of Independence, or before that upon any declaration of independence of its own. At its independence each State acquired all the attributes of sovereignty possessed by any sovereign nation, including the powers of the crown as well as those which had been granted to the colonies by the crown. The Court expressly held that the Treaty of Peace of 1783 was a recognition of the sovereignty of the several States and not a grant of it.

Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810), involved a Maryland act of 1780 providing for the confiscation of all alien property. The Court construed the Maryland act as effecting a complete confiscation as of the date of its passage with no further steps being required. The Court held that the 1780 act was valid and that, since the confiscation was complete prior to the Treaty of 1783, the treaty did not nullify the confiscation.

Preston v. Browder, 14 U.S. (1 Wheat.) 114 (1816), concerned the validity of a treaty of 1777 between the State of North Carolina and a tribe of Indians. The Court upheld the treaty, noting that after the Declaration of Independence North Carolina was an independent sovereign and that the treaty between North Carolina and an Indian nation to settle hostilities between them was a customary exercise of sovereign power. The Court further held that the boundaries of North Carolina as an independent State were those provided in its colonial charter.

In *United States v. Bevans, 16* U.S. (3 Wheat.) 336 (1818) (Marshall, C.J.), the Court rejected the argument that the grant of admiralty jurisdiction to the federal courts in the Constitution had divested Massachusetts of territorial sovereignty over the waters of Massachusetts Bay. Marshall declared:

"Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

"It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts." 3 Wheat. at 389.

It can hardly be doubted that Marshall would have said, had the argument which was successful in the *California* case been presented to him, that the foreign-affairs and defense powers were no more intended to involve a cession of territory than was the admiralty jurisdiction.

In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), the Court unanimously held that title to land within the United States could not be acquired by purchase from the Indians. Chief Justice Marshall's most interesting opinion dealt with a number of points at issue in the present proceeding. Marshall traced the title to the soil of this country through the royal grants made in the colonial charters, pointing out in particular that the *quo warranto* proceeding at 1624 had not changed the boundaries of Virginia. *Id.* at 578. He noted the recognized principle of international law during the colonial period that title to lands inhabited by savages was acquired by discovery alone, not requiring occupation. *Id.* at 573. He affirmed the continuing legal status of the charters, and the constitutional incapacity of the crown to revoke proprietary charters without cause:

> "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and in some instances, even after the

> powers of government were revested in the crown, the title of the proprietors to the soil was respected. Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721, a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected until the revolution, when it was forfeited by the laws of war." *Id.* at 580-81.

Finally, since the lands in controversy in the litigation lay in the old Northwest territory, he traced the title to that territory of the United States to its cession by Virginia:

> "The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that 'all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of

> the United States as have become, or shall become members of the confederation,' &c., 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.' The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." *Id.* at 586.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall in the most unequivocal terms affirmed the sovereignty and independence of the States separately during the revolutionary and Confederation periods:

> "As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." *Id.* at 187.

Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827), involved a title dispute to land which one side claimed on the basis of a grant made in 1777 by the British governor of Florida. The land was in the Mississippi territory. Following the Peace of 1783 the area in question had been claimed by the United States, South Carolina and Georgia. While finding it unnecessary to decide between the claims of South Carolina and Georgia, the Court clearly preferred the former on the ground of its colonial charter rights:

> "The original title of South Carolina, under the grant to the lords proprietors, was unquestionable; and she contended, that she had never been legally divested of soil or sovereignty." *Id.* at 525.

> "And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory, was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit, by a solemn grant from the crown to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the crown." *Id.* at 527.

The Court rejected the claim of the United States in its own right on grounds that are decisive to the issues in this litigation:

> "There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear, could never have sustained it. The very ground on which she denied the capacity of Spain to conquer, or take by cession, the territory on the Mississippi, was fatal to the pretensions set up by her against

> Georgia and South Carolina, to wit, that Spain could not acquire, by conquest, a territory within the limits claimed by an ally in the war . . . .*There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states.*" *Id.* at 525-26. (Emphasis added.)

And the Court regarded the Peace of Paris as confirming individual State boundaries and territorial rights:

> "It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain, by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limites, were as much theirs, at the declaration of independence, as at this hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of right, on the part of Great Britain." *Id.* at 527-28.

In *Poole v. Fleeger*, 36 U.S. (11 Pet.) 184 (1837), the Court referred to the holding in *Harcourt v. Gaillard* as "a settled principle," and held that "the prerogative of the king, and the transcendent powers of parliament, devolved on the several states, by the revolution." 11 Pet. at 212a, 212i.

In *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), the Court held as follows regarding the status of the separate States as successors to the royal prerogative prior to the Constitution of 1787:

> "Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority (6 Wheat. 651; 8 Ibid. 584, 588); adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by this court as one of original jurisdiction. The states waived their exemption from judicial power (6 Wheat. 378, 380), as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified." *Id.* at 720.

The Court followed established doctrine in regarding every power of the Federal Government as deriving solely by delegation from the separate States:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation;' no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, is a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the

> consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger*, 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers." *Id.* at 724-25.

Finally, the Court reaffirmed the established doctrine that in 1783 the United States had no territory other than by virtue of the territorial boundaries of the several States:

> "Hence resulted the principles laid down by this court in *Harcourt v. Gaillard*, 12 Wheat. 526, that the boundaries of the United States were the external boundaries of the several states; and that the United States did not acquire any territory by the treaty of peace, in 1783." *Id.* at 729.

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588-92 (1839), the Court held that the States are subject to the same principles of comity in their relations among them-

selves as are prescribed by international law for independent nations. The States "are sovereign States," *id.* at 590. "We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this union." *Id.* at 592.

In *Martin v. Waddell,* 41 U.S. (16 Pet.) 367 (1842), the Court reaffirmed all the crucial constitutional doctrines established by the preceding half-century of litigation, and applied them to territorial and proprietary rights in the soil under tide waters. The issue was whether such rights, and specifically the exclusive right to oyster fisheries, had been retained by the proprietors of East Jersey in 1702 or surrendered by them to the crown along with governmental rights. The Court held in favor of surrender. In the course of its exhaustive opinion, the Court confirmed that in the colonial period title to new lands was acquired by discovery alone (*id.* at 409), and held that at independence the States individually succeeded to the sovereign and proprietary rights previously vested in the crown:

> "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 410.
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> "And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.

"This construction of the surrender is evidently the same with that which it received from all the parties interested at the time it was executed. For it appears by the history of New Jersey, as gathered from the acts, documents, and proceedings of the public authorities, that the crown and the provincial government established by its authority always afterwards in this territory, exercised the same prerogative powers that the king was accustomed to exercise in his English dominions. And, as concerns the particular dominion and propriety now in question, the colonial government from time to time authorized the construction of bridges with abutments on the soil covered by navigable waters; established posts; authorized the erection of wharves; and, as early as 1719, passed a law for the preservation of the oyster fishery in its waters. The public usages, also, in relation to the fisheries continued to be the same. And from 1702, when the surrender was made, until a very recent date the people of New Jersey have exercised and enjoyed the rights of fishery, for shell-fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors." *Id.* at 416-17.

"Neither is it necessary to examine the many cases which have been cited in the argument on both sides, to show the degree of strictness with which grants of the king are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them,

being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly —and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it. But in the case before us, the rivers, bays, and arms of the sea, and all prerogative rights within the limits of the charter undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters patent. The words used evidently show this intention; and there is no room, therefore, for the application of the rule above mentioned.

"The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke? Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit. And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration

and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description[.] It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.

"Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

"It is said by Hale in his Treatise de Jure Maris, Harg. Law Tracts, 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, 'that although the king is the owner of this great waste, and, as a consequence of his propriety, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some

particular subject hath gained a propriety exclusive of that common liberty.'

"The principle here stated by Hale, as to 'the public common of piscary' belonging to the common people of England, is not questioned by any English writer upon that subject. The point upon which different opinions have been expressed, is whether since Magna Charta, 'either the king or any particular subject can gain a propriety exclusive of the common liberty.' For, undoubtedly rights of fishery, exclusive of the common liberty, are at this day held and enjoyed by private individuals under ancient grants. But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public. And there is nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony. On the contrary, after enumerating in the clause herein before quoted, some of the prerogative rights annexed to the crown, but not all of them, general words are used, conveying 'all the estate, right, title, interest, benefit, advantages, claim, and demand' of the king in the lands and premises before granted. The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king as a prerogative right, passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with 'other

royalties,' and conveyed as such. No words are used for the purpose of separating them from the jura regalia, and converting them into private property, to be held and enjoyed by the duke, apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction, it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances, to the laws and statutes of England; and how could this be done if in the charter itself, this high prerogative trust was severed from the regal authority? If the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke for his own individual emolument? There is nothing we think in the terms of the letters patent, or in the purposes for which it was granted, that would justify this construction. And in the judgment of the Court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown." *Id.* at 411-14.

The cases thus far discussed set forth a historically sound, balanced and, for the most part, consistent ap-

proach. In 1936, Justice Sutherland introduced a bizarre and dangerous eccentricity into constitutional law with his opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304. Sutherland declared that external sovereignty and power over foreign relations had passed directly from the crown to the Federal Government, and that those federal powers in no way depend on the Constitution but existed prior thereto and independently thereof.

This view—which if consistently applied would, for example, permit a treaty to override the Bill of Rights—has been denounced by virtually every learned commentator who has discussed it as both historically preposterous and constitutionally reprehensible.[66] The theory would have been the ultimate heresy to the revolutionary statesmen, whose first article of faith, as we have seen, was that sovereignty was not "inherent" in *any* governmental body, but in the people of the States, and that sovereign powers

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[66] *See, e.g.*, Goebel, Exhibit 694, p. 768; Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1 (1972); Warmuth, "The Nixon Theory of the War Power: a Critique," 60 Calif. L. Rev. 623 (1972); Berger, "War-Making by the President," 121 U. Pa. L. Rev. 29 (1972); Bickel, "Congress, the President, and the Power to Wage War," 48 Chi-Kent L. Rev. 131 (1971); Bartley, the Tidelands Oil Controversy 30 and *passim* (1953); Kauper, "The Steel Seizure Case," 51 Mich. L. Rev. 141, 144-45 (1952); Levitan, "The Foreign Relations Power: an Analysis of Mr. Justice Sutherland's Theory," 55 Yale L.J. 467 (1946); Patterson, *In re* United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286 (1944); Quarles, "The Federal Government: as to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?," 32 Geo. L.J. 375 (1944); Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555 (1938); Lee, "Doctrine of Inherent Power," 3 John Marshall L.J. 293 (1937).

Among the recent manifestations of the theory are undeclared "presidential" wars and the burglary by federal agents of a doctor's office, justified as "well within the President's inherent constitutional powers" to protect national security. Washington Star-News, July 24, 1973, p. 1.

could be exercised only by their agents pursuant to delegation. "To conjure up an 'inherent' executive power in the teeth of this history is both to shut our eyes to the historical record and to abort the plainly manifested intention of the Founders to create a federal government of limited and enumerated powers." Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1, 33 (1972). "It is high time that the mischievous and demonstrably wrong dicta of Justice Sutherland be put to rest." *Id.* at 28. Berger's article contains an exhaustive and unanswerable demolition of Sutherland's theory from an historical point of view.

Even Professor Henkin, writing after he was retained by the United States in the present litigation, could bring himself to accord *Curtiss-Wright* only the most qualified and doubtful approbation:

> "Justice Sutherland's theory has not been unanimously acclaimed. His history, in particular, has been challenged, and surely it is not manifestly all his way: there is disagreement whether the Declaration of Independence declared a single sovereign entity or thirteen independent nation-states; there is evidence that, after independence, at least some of the erstwhile colonies, at least for some time and for some purposes, considered themselves sovereign, independent states; even under the Articles of Confederation it is not wholly clear that 'the United States' was a sovereign entity rather than a band of sovereigns acting together through the agency of the Congress. But Sutherland's view of the locus of sovereignty between 1776 and 1789 has strong support. . . ." Exhibit 700, p. 23.
>
> "That there were to be principal powers of government outside the Constitution is not inti-

> mated in the Constitution itself, in the records of the Convention, or in the Federalist Papers and other contemporary debates. The Sutherland theory, like the earlier cases finding power in sovereignty, carves a broad exception in the historic conception, often reiterated, never questioned and explicitly reaffirmed in the Tenth Amendment, that the federal government is one of enumerated powers only. It means that a panoply of important powers is to be determined from unwritten, uncertain, changing concepts of international law and practice, developed and growing outside the constitutional tradition and our particular heritage." Exhibit 700, pp. 24-25.

Professor Henkin recognized that Sutherland's theory constituted pure dictum, *id.* at 25, and indeed that the Justice strained to import it into a decision to which it was wholly unnecessary in order to give status to a private view which he had held long before he had become a member of the Court and in which he was most interested, *id.* at 288 n.6.

The theory has, moreover, been repudiated by several subsequent decisions of the Court.

In *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), Solicitor General Perlman relied on *Curtiss-Wright,* for the proposition that the President had "inherent" power to seize the steel mills during the Korean War, for military purposes, as commander in chief. 96 L. Ed. 1163. The Court's opinion did not mention *Curtiss-Wright* but flatly repudiated its theory: "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. Justice Jackson's concurring opinion dismissed Sutherland's theory in a footnote as dictum. 343 U.S. at 635 n.2.

In *Perez v. Brownell,* 356 U.S. 44, 57 (1958), Justice Frankfurter's opinion for the Court, while relying on the *holding* of *Curtiss-Wright,* repudiated Sutherland's *theory* by carefully and pointedly declaring the wholly different and traditional basis for the federal foreign-affairs power, *i.e.,* that it was delegated to the Federal Government by the States by the provisions of the Constitution of 1787:

> "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. See *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 318; *Mackenzie v. Hare,* 239 U.S. 299, 311-312. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations." 356 U.S. 57.

In *Zemel v. Rusk,* 381 U.S. 1 (1965), Chief Justice Warren cited the *Curtiss-Wright* case for the proposition that Congress ordinarily gives the Executive more authority over foreign affairs than over domestic matters; but he went on to observe: "this does not mean that simply because a statute deals with foreign relations, it can grant the Executive unrestricted freedom." The Court's rejection of the theory of inherent executive power was in keeping with the position taken earlier in *Reid v. Covert,* 354 U.S. 1 (1956). Responding to the argument that the Constitution had no application to foreign affairs, Justice Black in that case stated emphatically:

> "The United States is entirely a creature of the Constitution. Its powers and authority have no

> other source. It can only act in accordance with all the limitations imposed by the Constitution." 354 U.S. at 5-6.

"In short," one scholar has recently concluded after a review of the pertinent Supreme Court case law, "the dictum in *Curtiss-Wright* has neither paternity nor progeny." Warmuth, "The Nixon Theory of the War Power: a Critique," 60 Calif. L. Rev. 623, 697 (1972).

Finally, it remains only to observe that the *Curtiss-Wright* dictum has nothing whatever to do, either directly or by implication, with the issue in the present litigation. Even had Justice Sutherland been correct, and external sovereignty and the foreign-affairs power had passed directly from the crown to the Federal Government, there is nothing in those concepts which deprives the States of territorial and property rights in the continental shelf. This point will be discussed at pp. 428-43, *infra*.

IX.

THE EXCLUSIVE RIGHTS OF THE STATES TO THE CONTINENTAL SHELF HAVE NOT BEEN ABANDONED OR EXTINGUISHED SINCE 1787.

A. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN TIDE WATERS, INCLUDING THE MARGINAL SEA, AND THE BED AND SUBSOIL THEREOF, AND CONGRESS HAS REPUDIATED THE *CALIFORNIA* COURT'S DECISION TO THE CONTRARY.

It was universally recognized and understood throughout our history until the 1930's that the States individually retained their territorial and property rights in the marginal sea, and that the United States as a separate entity had no such rights therein. The United States never made any claim to exclude the States from those rights until 1937, when Secretary Ickes did so, reversing a position he had taken previously. App. 999; Bartley, *The Tidelands Oil Controversy*, 95-101, 128-35 (1953). Little need be said about the universal understanding, since the Court in the *California* case recognized and admitted it, if somewhat grudgingly, with respect to its own past decisions:

> "As previously stated, this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *United States v. California*, 332 U.S. 19, 36 (1947).

While many of the decided cases dealt with internal waters rather than with the marginal sea, they all relied on and were wholly consistent with the English law of property in land under water, and, as we have seen, that law never made any distinction between property rights in internal tide waters and those in the marginal sea. The *California* Court utterly misunderstood or ignored that English legal background when it said that the statements in prior Supreme Court decisions were "merely paraphrases or offshoots of the *Pollard* inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle." *Ibid.* The point is that English and American common law had never made any distinction whatever between "inland" and "ocean" waters with respect to property rights. There was no need for a "new" ocean rule; it had been there all along.

Moreover, *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), enunciated no "inland-water rule"; that decision expressly declared that "the territorial limits of Alabama have extended all her sovereign power into the sea." 3 How. at 230. It is beyond question that for the *Pollard* Court "navigable waters," title to the bed of which was in the States, included the marginal sea as well as inland waters, with no distinction between them, just as had always been the case in English law and practice.

The *California* Court recognized that there were a number of cases which did specifically affirm State rights in the marginal sea, 332 U.S. at 37-38. Its treatment of *Manchester v. Massachusetts,* 139 U.S. 240 (1891), was typical of an approach wholly contrary to both the letter and the spirit of those decisions. The Court observed that in *Manchester* "the illegal fishing charged was in Buzzard's Bay, found to be within Massachusetts territory." *Id.* at 37. While that is true, the *Manchester* Court said nothing about limiting the Massachusetts fisheries statute in

question, which extended to all of Massachusetts' waters, including its territorial sea. To the contrary, the Court held: "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 has been granted to the United States, this control remains with the States." 139 U.S. at 264. And the Court declared that Massachusetts had a right to territorial waters to a mininum of three miles from the coast. *Id.* at 257.

It is unnecessary to belabor the point, or to discuss other decisions, since as we have seen the *California* Court recognized that it was overruling a long tradition of law and practice which had many times been approved in its own prior decisions.

These decisions, and those of other courts, are adequately treated for our present purposes in the papers in the *California* and subsequent cases, and need not be rehashed here. See especially App. 905-62; U.S. Exhibit 6, pp. 672-73, 678-79, 697-98; U.S. Exhibit 8, 48-49; U.S. Exhibit 11, pp. 7-8, 24-40; U.S. Exhibit 12, pp. 10-16, 23; U.S. Exhibit 17, pp. 208-10. State-court cases are uniformly to the same effect; a few of them are cited at pp. 115-16 and 192, *supra.*

The two principal 19th-century learned authorities on the law of waters likewise had no doubt that the States had preserved their rights under English law and their own charters to all their waters, including the marginal seas. Angell, *Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* 50 and *passim* (1826); Gould, *A Treatise on the Law of Waters* 75-76 and *passim* (1900). *Accord,* Bartley, *The Tidelands Oil Controversy, passim* (1953); Whittlesey, *Law of the Seashore, Tidewaters and Great Ponds* xxviii-xxxi (1932); Williams (Regional Plan of New York and Its Environs), *Foreshore and Rights in Land Under Navigable Waters in the New York Region*

v. 202-03 (1928); Gerard, *Title of the Corporation and Others to the Streets, Wharves, Piers, Parks, Ferries and Other Land and Franchises in the City of New York* 1-17 (1872); Embrey (Virginia State Commission on Conservation and Development), *Waters of the State* 128-62, 198-211 (1931); Mershon, *The Major and the Queen* 65-66; Mershon, *English Crown Grants* 104-16; 1 Farnham, *The Law of Water and Water Rights* 48-52, 74-76 (1904).

There was likewise, throughout the period 1783-1947, a very considerable body of State legislative and administrative assertion and exercise of territorial and property rights in the marginal sea. Again we shall not deal with this in any detail, since we do not expect that the assertion will be contested. A large body of material on these points is found in U.S. Exhibits 1 through 17; that material has been supplemented to some extent by exhibits introduced by the Common Counsel States in this proceeding. The State powers in question are documented, and examples given, in Gould, *op. cit.* at 72-95.

We assume, for example, that it will not be contested that State statutes repeatedly regulated surface fishing and other marginal-sea activity. *E.g.*, New Jersey: App. 992-93; Massachusetts: U.S. Exhibit 9, pp. 90-91; Exhibits 519, 521, 522, 526, 544, 545, 552; see *Manchester v. Massachusetts, supra.* In *Louisiana v. Mississippi,* 202 U.S. 1, 52 (1906), the Court declared that "the maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

The States frequently enacted statutes regulating and in some instances leasing sedentary fisheries in the marginal sea. New Jersey: App. 991-93; Rhode Island: App. 991-92; Virginia: App. 992; *Commonwealth v. Newport News,* 158

Va. 521, 164 S.E. 689, 698 & n. 6 (1932); Georgia: App. 992; U.S. Exhibit 6, pp. 648-50; North Carolina: U.S. Exhibit 6, pp. 660-61; Massachusetts: U.S. Exhibit 9, p. 90; Exhibits 513, 514, 515, 516, 519, 520, 521, 544, 550, 551, 552. Such State jurisdiction was held to exclude federal jurisdiction within the State's territorial limits in *The Abby Dodge,* 223 U.S. 166 (1912).

As Professor Henkin conceded (Tr. 2662), the States habitually executed deeds of portions of the seabed of the marginal sea to the United States, which the United States requested and accepted, usually on the basis of a formal opinion by both federal and State counsel confirming the State's title. South Carolina: App. 997; Florida; App. 997-98; New Jersey: Exhibits 486, 487, 489; Delaware: App. 998; New York: Exhibits 488, 547, 548, 549; Virginia: App. 998. See also Bartley, *The Tidelands Oil Controversy* 122-28 (1953). The States also enacted statutes controlling the construction of wharves, etc., or transferring the title of the seabed, in the marginal seas. New Jersey: App. 994; New York: App. 995; U.S. Exhibit 12, pp. 7-9.

Several of the States during the 19th and early 20th centuries enacted statutes setting the limit of their full territorial sovereignty in the marginal sea as three miles from the coast. U.S. Exhibit 6, pp. 703, 706-07; U.S. Exhibit 11, pp. 47-48; see also Exhibit 494. At pp. 389-427, *infra,* we demonstrate that the three-mile limit for purposes of full territorial sovereignty was never regarded as incompatible with assertions of more limited rights of jurisdiction and property beyond that limit. The point here is that the three-mile statutes represent solid examples of the universal understanding that the States individually possessed whatever rights the nation as a whole possessed in the marginal sea, and thus are flatly contrary to the *California* decision. Territorial boundaries were, of course, regarded as carrying ownership in property with them.

Finally, when exploitable mineral resources of oil and gas began to be discovered, in the late 19th century and the early years of this century, in the seabed of the marginal seas of certain of the States, it was assumed as a matter of course for many years that it was the State government, not the federal, which had the exclusive right to explore and to exploit them. Bartley, *The Tidelands Oil Controversy, passim* (1953); Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939); *Boone v. Kingsbury,* 206 Cal. 148, 273 Pac. 797 (1928);[67] Calif. Stats. 1921, c. 303, p. 404; Calif. Stats. 1923, p. 593; Ireland, "Marginal Seas Around the States," 2 La. L. Rev. 252 (1940); U.S. Exhibit 7, pp. 70-71 n.10.

Bartley aptly described the reaction to the *California* line of cases, in the light of the universal understanding prior thereto, as follows:

> "It came as a considerable shock to the officials of coastal states to find that they did not have the authority over the area from low-water mark to the three-mile limit which they had assumed. The coastal states for nearly 150 years had utilized and controlled the marginal sea area as though they owned it—which in fact they thought they did. They had regulated the fisheries in the area, applying state laws to vessels licensed under national statutes and operated by out-of-state persons. They had prescribed the size of fish that might be taken, had directed the manner in which fish might be caught, and had even exercised suc-

[67] That decision held that California owned the soil of its marginal sea and had the right to license the exploitation of the mineral resources thereof. Review was sought in the Supreme Court of the United States, which denied certiorari and dismissed the appeal for want of a substantial federal question. Workman v. Boone, 280 U.S. 517 (1929).

> cessful though indirect control over the activities of floating canneries operating outside the three-mile limit. Oysters, shrimp, and sponges had been subjected to similar controls. The states had granted or leased areas in the marginal sea to private persons and corporations and to the national government itself. The purposes of these state grants were many and varied. Long before any person dreamed of black gold, the process of land reclamation and harbor development, on land granted or leased by the states, had begun. Breakwaters had been built and harbors dredged from below low-water mark and converted to useful commercial purposes. Later, with visions of wealth from petroleum royalties spurring them to action, the states of California, Texas, Louisiana, and, to a lesser extent, others, had leased the offshore lands for oil production. Immensely valuable property rights had been established in the marginal-sea areas, rights dependent upon grant or lease by a state made upon the unchallenged assumption that the state 'owned' the area it purported to grant or lease." *Op. cit.* at 5; see also *id.* at 27-42.

In *United States v. Louisiana*, 363 U.S. 1, 17-19 (1960), the Supreme Court frankly recognized the overwhelming opposition to its *California* decision, and set forth conclusive evidence showing that Congress disagreed with the decision and had acted to repudiate it:

> "It was strongly urged, both before and after the *California* decision that because the States had for many years relied on the applicability of the *Pollard* rule to the marginal sea, it was just and equitable that they be definitively given the rights which follow from such an application of the rule,

and the *California, Louisiana,* and *Texas* cases were severely criticized for not having so applied it.[17]

"[17] H.R. Rep. No. 1778, 80th Cong., 2d Sess., to accompany H.R. 5992, at 1, 2, 3, 16 (Apr. 21, 1948): 'H.R. 5992 is, in substance, the same as numerous bills introduced in the House . . . . [T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries . . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.'

"S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:

" 'The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court

jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.

" 'The present Court in the California decision did not expressly overrule these prior Supreme Court opinions but, in effect, said that all the eminent authorities were in error in their belief.

" 'For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier.'

"H.R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951):

" 'Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters. Therefore, title II recognizes, confirms, vests, and establishes in the States the title

to the submerged lands, which they have long claimed, over which they have always exercised all the rights and attributes of ownership.'

"S. Rep. No. 133, 83d Cong., 1st Sess., to accompany S.J. Res. 13, at 7-8 (Mar. 27, 1953):

" 'All of these areas of submerged lands have been treated alike in this legislation because they have been possessed, used, and claimed by the States under the same rule of law, to wit: That the States own all lands beneath navigable waters within their respective boundaries. Prior to the California decision, no distinction had been made between lands beneath inland waters and lands beneath seaward waters so long as they were within State boundaries.

" 'The rule was stated by the Supreme Court in the early case of *Pollard v. Hagan* . . . .

* * *

" 'The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.' "

In his separate opinion Justice Black, author of the *California* decision, likewise fully recognized Congress' conclusions and the facts on which they were based:

"[W]e must look to the claims, understandings, expectations and uses of the States throughout their history. This is because of the congressional expressions, stated time and time again that the

Act's purpose was to restore to the States what Congress deemed to have been their historical rights and powers. Nor can I accept the Government's argument that these States' interests in the marginal seas must be determined in accord with the national policy of foreign relations. Everything in the very extended congressional hearings and reports refutes any such idea. Instead, these sources indicate that Congress passed the Act to apply broad principles of equity—not as we see it but as Congress saw it.[8]

"[8]Under the heading, 'Equity best served by establishing State ownership,' the earlier Senate Report incorporated in the Report on the 1953 Act summarizes the equitable features involved:

" 'The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.

" 'The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the

Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.

" 'If these same facts were involved in a dispute between private individuals, an equitable title to the lands would result in favor of the person in possession . . . . ' S. Rep. No. 133, 83d Cong., 1st Sess. 67, reprinting S. Rep. No. 1592, 80th Cong., 2d Sess.

"To the same effect is the conclusion of the 1953 Report: 'By this joint resolution the Federal Government is itself doing the equity it expects of its citizens.' *Id.* at 24."

* * *

". . . The very last paragraph of the report on the bill referred to it as 'an act of simple justice to each of the 48 States in that it reestablishes in them as a matter of law that possession and control of the lands beneath navigable waters inside their boundaries which have existed in fact since the beginning of our Nation. It is not a gift; it is a restitution.' "[13]

"[13]*Id.*, at 24."

* * *

"It is admitted that prior to 1937 the United States never claimed any title to, or exercised any possession over, any part of these marginal lands, either within or without three-mile limits, except under grants from the States. On the other hand, each of the Gulf States began to exercise acts of possession, ownership, dominion and sovereignty over the marginal belt from the time of admission into the Union, without regard to any three-mile

> limit. The hearings of Congressional Committees show and their reports assert that very large sums of money have been spent by the States and their public agencies and grantees in the development and improvement of the marginal submerged lands adjacent to the States' borders. Not only have the States' possession, dominion and sovereignty over these marginal belts been open and notorious, but that is coupled with the fact that for much more than a century federal departments and agencies not only acquiesced in but unequivocally recognized the States' rightful claims to these belts. It is conceded that in many instances the Government itself has deemed it necessary to acquire title from these States before attempting to exercise any power of its own. There is nothing to indicate that the claims or uses of the marginal lands were ever limited to three miles." 363 U.S. at 90-91, 92, 94-95.

See also Exhibit 813, pp. 22-24, 32, 40-44 for still further proof that Congress repudiated the *California* line of decisions as incorrect.

The decisions have also been rejected by the vast preponderance of scholarly comment as unsound (p. 433, *infra*), and their rationale that federal ownership of submerged lands was required by the foreign-affairs and defense powers has been repudiated by the State Department, Congress and subsequent decisions of the Court; see pp. 433-39, *infra*. In view of all this, there is no merit in plaintiff's contention (Pl. Br. 25-29) that because of the *California* line of decisions the defendant States bear "a heavy burden" in order to prevail in this proceeding. If any one bears a heavy burden, it is surely the plaintiff.

B. THE UNITED STATES DID NOT ABANDON OR RELINQUISH THE RIGHTS OF THE STATES BY ADOPTING THE THREE-MILE LIMIT.

Plaintiff contends that any rights of the States in the continental shelf beyond three miles which existed in 1789 have since been extinguished through renunciation or abandonment by the United States. The United States makes no claim that there was ever any express or explicit abandonment of such rights; the argument is solely that such abandonment necessarily followed from the United States' adoption of and adherence to the three-mile limit of territorial waters. Tr. 2647-48.

The short answer to plaintiff's argument is that, even if it were the fact that the United States had at any time acted as though rights in the continental shelf had been abandoned by implication (to repeat: no express abandonment has been or could be alleged), the United States has long since changed that position and has, since 1945 by plaintiff's admission, been a vigorous advocate of exclusive continental-shelf rights, while continuing to adhere to the three-mile limit with respect to full territorial sovereignty. The legitimacy of the States' title should be judged in the light of the United States' present expressly asserted title against foreign nations, rather than in the light of an alleged implied position in past years inconsistent with that title. In a court of equity, certainly, it would be unconscionable to presume that the United States had extinguished State property rights through a course of conduct alleged to be inconsistent therewith, and that thereafter the United States by reversing that course of conduct had asserted and perfected those very same rights, not on behalf of the States but on behalf of itself. From an equitable point of view such a sorry argument is little better than a defense of larceny after trust. Equity aside, there is no reason in law why the States' claims as of today should not be weighed against the United States' present in-

ternational posture, rather than against some alleged prior inconsistent position of the United States which by plaintiff's admission was repudiated many years ago.

We think the foregoing answer to plaintiff's contention is conclusive. Nonetheless, we shall proceed to demonstrate that the United States' adherence to the three-mile limit was never understood to entail the renunciation of all rights of every kind out beyond three miles, and particularly was never understood as a renunciation of the right involved herein: the right of exclusive exploitation of the resources of the continental shelf. To the contrary, history and the record show that the three-mile limit was never absolute, and was well understood not to preclude the assertion of rights for certain purposes to greater distances. The three-mile limit was never applied by the United States to the seabed and subsoil of the continental shelf; it was regarded as applicable only to the surface of the marginal seas. This was in line with the purpose of the three-mile limit, which was to assure the greatest possible freedom of the seas for navigation, for naval operations and to some extent for surface fishing. Since the purposes of the rule had no application to the seabed, the rule did not apply there either.

Judge Jessup is the leading living scholar in this country, and probably in the world, on the history and nature of territorial waters and of the three-mile limit. Judge Jessup testified that the United States has never abandoned or renounced the property rights of the States in the continental shelf, and specifically that no such renunciation can be deduced from the United States' adoption of and adherence to the three-mile limit. App. 502-03, 524. Judge Jessup's entire testimony stands for, and demonstrates, the proposition that there is no inconsistency between the three-mile limit and its purposes, on the one hand, and, on the other, exclusive rights to the exploitation of continental-shelf resources to a much greater distance.

1. NO RENUNCIATION CAN BE INFERRED FROM MERE SILENCE.

It can hardly be supposed that a renunciation by the United States of vested State territorial and property rights would have occurred casually or implicitly, without discussion or protest. In the period when the renunciation allegedly occurred, it would almost certainly have been regarded as beyond the constitutional power of the Federal Government to accomplish without the consent of the affected States. Professor Henkin was at pains to argue that it might be held today that the United States does have the power to alter State boundaries or to renounce State territorial rights without such consent. Tr. 1914-15. But Professor Henkin conspicuously refrained from arguing that it would have been so held before recent times; and he conceded the existence of what he called "aging dicta that the United States cannot cede territory of a State without its consent." Tr. 1914. In fact it is easy to demonstrate that in the 19th century State consent to such a cession was regarded as essential.

That question arose in acute fashion in the dispute between the United States and Great Britain regarding the border between Maine and New Brunswick. At one time the dispute was arbitrated, but the United States rejected the arbitral award in 1831 because of objections by Maine and Massachusetts. The United States then negotiated an agreement with Maine to gain a free hand in negotiations with Great Britain (Exec. Doc. 431, 25th Cong., 2d Sess.), but it was never ratified. Subsequently Secretary of State Webster, in preparation for further negotiations, obtained the appointment by Massachusetts and Maine of representatives to participate in the negotiations. Maine's instructions to its delegates required compensation for any Maine lands given up in a negotiated treaty. Consequently, as part of the Webster-Ashburton Treaty of 1842, the United States obligated itself to pay Maine and

Massachusetts each $150,000 in return for the renunciation of claims to disputed land awarded to Great Britain as part of the agreement. See generally 1 Moore, *Arbitration Digest* 90-153 (1898); 22 *British and Foreign State Papers* 818-32 (1847); 7 Winsor, *Narrative and Critical History of America* 177-80 (1888). In 1833 the United States officially explained to the British that the Federal Government had no constitutional power to cede any territory of a State. 22 *British and Foreign State Papers* at 819. In view of this history, it is impossible to maintain that the rights of the Atlantic States in the continental shelf could have been renounced by the United States in the 18th or 19th century, not only without the consent of the affected States but without even any formal act or instrument to accomplish the alleged renunciation.

Nor may it be soundly contended that the rights of the States were lost through mere inaction or lack of assertion or exploitation. The fact is that from the foundation of the Union until very recent times there was no discovery or indication of any exploitable resources in the Atlantic continental shelf more than three miles from the coasts of the defendant States. There was therefore no occasion for the continued reiteration of the rights of the States; the problem simply did not arise. But this does not in any way imply that, if exploitable resources *had* been discovered in the continental shelf, the United States vis-a-vis foreign powers, and the States individually, would have refrained from asserting the exclusive right to their exploitation—a right which they did, of course, assert once exploitable resources were found or even suspected.[68] Obviously, if exploitable resources had been found during the 19th century

[68] It bears mentioning that under English law the right to an exclusive fishery is not abandoned by non-use, even over a long period of time. App. 862. Title to land, of course, is never lost by lack of occupation, exploitation or use, but only by the establishment of adverse possession by a new owner.

and the States had remained silent, allowing individual citizens and foreigners to reap the benefits thereof, a case for abandonment or renunciation of their exclusive rights could be made out. But no such case can be made out from the mere lack of constant reiteration of those rights when no occasion for their reiteration existed or arose.

2. The United States' Adherence to the Three-Mile Limit Has Not Been Consistent or Unqualified.

In view of plaintiff's heavy reliance on the three-mile limit, it is necessary to examine the circumstances of the United States' adoption of and adherence to that limit. Professor Henkin's position seems to be that the three-mile limit was established law even prior to the American Revolution and that the United States merely followed standard practice in adhering to it. Tr. 1899. This of course is the opposite position from that of the *California* decision, which was apparently written under the impression that international law permitted no territorial waters when the United States became independent and that the right to such waters arose only thereafter, largely through the acts of the United States. 332 U.S. at 32-33. The truth is that neither of these bizarre views is accurate, but rather, as we have already shown, that international law was perfectly clear in the late 18th century that every coastal state was entitled to territorial waters, that there was no general agreement on the extent of those waters, and that three miles was the least that any one had ever proposed for the extent of territorial waters and less than any nation had embraced up to that time.

Assertions of jurisdiction in the marginal sea must, of course, be carefully distinguished with respect to the type and purpose of the jurisdiction being asserted. The type of jurisdiction first asserted by the United States in the sea to

a specific distance[69] was the right of visitation and search of foreign vessels for customs and smuggling purposes. The extent of that right was established by statute in 1790 as four leagues (approximately 12 miles), and that jurisdiction has remained unimpaired from that day until this. Masterson, *Jurisdiction in Marginal Seas* 184-90 (1929); Swarztrauber, *The Three-Mile Limit of Territorial Seas* 93-94 (1972); Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 637-39 (1919). In *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234-35 (1804) (Marshall, C.J.), the Court held that international law did not limit the smuggling jurisdiction of coastal nations to the cannon-shot line (the three-mile limit was not even discussed), but that the jurisdiction is not "limited within any certain marked boundaries," and could well be broader on an open coast than in, for example, the English Channel.

The question of maritime jurisdiction next arose in the context of neutrality. The question was precipitated in 1793 by French seizures of British ships near the coasts of the United States. The United States government was forced, very much against its will, to commit itself as to the distance off its coasts to which it would enforce the right of neutrality. In the course of 1793, several views were advanced. Alexander Hamilton declared:

> "According to the general laws and usage of nations, the jurisdiction of every country extends a certain distance into the sea along the whole ex-

[69] Judge Jessup described a number of early American treaties, beginning with the treaty of 1778 with France, which contain provisions "which reveal an appreciation of the fact that states had rights and interests in sea areas off their shores. . . . I cannot define the exact milage which may have been in mind when the treaty terms were employed, but I submit that the drafters had in mind something less than the earlier claims to vast oceans but something definitely more than inland waters and, it is reasonable to assume, more than territorial waters *stricto sensu*." App. 127.

> tent of its coast. What this distance is remains a matter of some uncertainty, though it is an agreed principle that it at least extends to the utmost range of cannon shot, that is, not less than four miles. But most nations claim and exercise jurisdiction to a greater extent. Three leagues, or nine miles, seem to accord with the most approved rule, and would appear from Martin, a French author, to be that adopted by France, though Valin, another French author, states it at only two leagues, or six miles." Exhibit 697, pp. 27-28.

In the same year, Attorney General Randolph issued an opinion claiming all of Delaware Bay as territorial waters of the United States. Randolph's opinion contained the most interesting observation that "the necessary or natural law of nations (unchanged as it is, in this instance, by any compact or other obligation of the United States) will, perhaps, when combined with the Treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the range of cannon shot." Crocker, *op. cit* at 633. The reference to the Peace of Paris can only be to the provision giving the United States all islands within 20 leagues of the coast, since the treaty contains no other provision which Randolph could have had in mind. His opinion was confirmed and adopted by Jefferson. 1 *American State Papers (Foreign Relations)* 71, 72 (1819).

In June and August of 1793, Jefferson believed that captures made five miles off the coast of the United States violated the neutrality jurisdiction of this country. *Id.* at 119-22, 145.

Jefferson's letter of November 8, 1793, to the British minister fixed "provisionally" a three-mile belt for purposes of neutrality only. Swarztrauber, *op. cit.* at 57; Tr. 2427-28. Jefferson's note emphasized four times in one

paragraph that his decision was temporary only and did not preclude eventual determination on a broader distance. He said that "respectable assent among nations" had been given to neutrality belts of more than 20 miles, and that three miles was "the smallest distance . . . claimed by any nation whatever." He further pointed out that "the character of our coast . . . would entitle us, in reason, to as broad a margin of protective navigation as any nation whatever." Jefferson later explained to John Quincy Adams that he had carefully left the door open to claiming neutral waters out to the Gulf Stream. Swarztrauber, *op. cit.* at 58. Secretary of State Pickering likewise emphasized the provisional nature of the determination. Crocker, *op. cit.* at 637; see also Exhibit 813, pp. 107-19, 210-18.

The treaty of 1794 with Great Britain adopted cannon shot, not the three-mile limit, as the measure of neutral waters. App. 129; Crocker, *op. cit.* at 637. A treaty of 1795 with Spain committed both parties to enforcing neutral rights for vessels "which shall be within the extent of their jurisdiction by sea or by land," without stating any specific distance. App. 130. The cannon-shot rule, with no mention of three miles, was still applied in treaties of the United States as late as 1836. Exhibit 813, p. 115 n. 61.

In 1805 Jefferson told John Quincy Adams of his conviction that American neutral waters should extend to the Gulf Stream and indicated that he intended to claim that limit in the future. Crocker, *op. cit.* at 641-42. In 1806 Jefferson indicated to Monroe that the Gulf Stream proposal was already in effect for diplomatic though not yet for military purposes: hostilities within the Gulf-Stream line "are to be frowned on for the present, and prohibited so soon as either consent or force will permit us." Exhibit 702, p. 450. The edge of the Gulf Stream is the point where the continental shelf ends and a natural escarpment occurs.

In 1806 Secretary of State Madison proposed four leagues, or preferably the Gulf Stream, as the width of American neutral waters, and instructed Monroe and Pinckney to attempt to obtain that measure in a treaty with Great Britain. Crocker, *op. cit.* at 639-40. In the unratified treaty of 1806, the American negotiators, having ardently but unsuccessfully attempted to gain more, agreed that the limit of neutral waters should be five miles. Swarztrauber, *op. cit.* at 94; Crocker, *op. cit.* at 642; Masterson, *op. cit.* at 254-56; 3 *American State Papers (Foreign Relations)* 149 (1832).

Professor Morris contended (Tr. 1829-30) that because the boarding of the Chesapeake by the Leopard occurred three leagues off the American coast, it is clear that Great Britain did not regard that area as part of United States waters despite the 20-league provision of the treaty of 1783. What the professor overlooks is that in that period the British were claiming and exercising the right of impressment in American waters right up to the shoreline, and even within ports and harbors, without regard to any definition of territorial waters. Tr. 2423-26; 3 *American State Papers (Foreign Relations)* 83 (1832); 4 Brant, *James Madison* 254-56; 10 Ford (ed.), *Works of Thomas Jefferson* 439 (1905).

Some years later, Chancellor Kent regarded the three-mile limit as far too modest, and believed that American neutral waters should extend to at least four leagues from the coast and also should embrace waters within "lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi." Crocker, *op cit.* at 181. (Those are "quite distant" headlands indeed.) Most interestingly, Kent was fully aware that jurisdictional limits in the sea were proper

to different distances for different purposes, and specifically that sedentary fisheries and similar seabed resources were legitimate objects of property. *Id.* at 180. Kent concluded that "the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end." *Id.* at 181. Plainly, if a valuable and exploitable mineral resource had been discovered in Chancellor Kent's time four or ten or thirty miles off the American coast, he would have believed it wholly clear that the adjacent State had a right of exclusive exploitation thereof.

By the Treaty of Guadalupe Hidalgo between Mexico and the United States in 1848, the boundary between the territorial waters of the two countries was defined as extending three leagues from land. Swarztrauber, *op. cit.* at 91-92. This three-league territorial sea, which was confirmed by another treaty in 1853, and which was recognized and asserted by the United States on many occasions (Exhibit 812, pp. 92-107), formed the basis for Texas' claim to territorial waters of three leagues, which was accepted by the Supreme Court in the second Gulf States litigation as having been recognized and confirmed by the United States. *United States v. Louisiana,* 363 U.S. 1 (1960). In that case the United States vigorously argued, as it does here, that any State boundaries beyond three miles had been repudiated by the Federal Government's adherence to the three-mile limit. The Court squarely rejected this contention, holding that boundaries in the sea may exist for various limited purposes and that such boundaries for the purpose of continental-shelf ownership were in no way inconsistent with the national three-mile limit of full territorial sovereignty.

> "We think that the Government's contentions on this score rest on an oversimplification of the problem.

"A land boundary between two States is an easily understood concept. It marks the place where the full sovereignty of one State ends and that of the other begins. The concept of a boundary in the sea, however, is a more elusive one. The high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation. It is recognized, however, that a nation may extend its national authority into the adjacent sea to a limited distance for various purposes. For hundreds of years, nations have asserted the right to fish, to control smuggling, and to enforce sanitary measures within varying distances from their seacoasts . . . . [A]ssertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a 'national boundary.' " 363 U.S. at 33-34.

See also Exhibit 668; Exhibit 814, pp. 208-10.

Similarly, the Florida constitution of 1868, which was accepted by Congress in readmitting Florida to the Union, provided for territorial waters of three leagues off the Gulf coast and out to the Gulf Stream in the Atlantic. In 1935 a United States court held that provision sufficient to give Florida the right to regulate sponge fisheries beyond the three-mile limit. *Pope v. Blanton,* 10 F. Supp. 18 (N.D. Fla.

1935). In *Skiriotes v. Florida,* 313 U.S. 69 (1941), the Supreme Court held such regulation by Florida valid as to citizens and found it unnecessary to reach the question whether foreigners could be subjected to it. More recently, of course, the Supreme Court has accepted Florida's three-league Gulf boundary as giving it the right to the continental-shelf resources within those limits. *United States v. Florida,* 363 U.S. 121 (1960).

In 1863 the United States took the position that international law, "since the invention of Armstrong rifled cannon," fixed a neutrality belt of six miles. Exhibit 813, pp. 125-26. In 1874 the United States joined six other nations in a declaration advocating a territorial sea of three leagues. Crocker, *op. cit.* at 485; Swarztrauber, *op. cit.* at 104. As late as 1896, the United States favored territorial waters and a neutrality zone of six miles. *Op cit.* at 94.

The United States thus has hardly been a consistent and unqualified adherent of the three-mile limit as plaintiff now asserts.

That the three-mile limit was never regarded as an abdication of all rights or claims outside that limit is proved by the long history of the United States' jurisdiction over customs and smuggling extending four leagues from shore. As we have seen (p. 394, *supra*), that jurisdiction antedates the three-mile limit itself, and applies to foreign as well as to American ships. The jurisdiction has been repeatedly upheld by the Supreme Court; while at times other nations have questioned it, the United States has insisted upon it in the face of all opposition, and eventually succeeded in obtaining general acquiescence thereto. Enforcement of this twelve-mile jurisdiction was particularly active and important in the relatively recent period of the 1920's, because of the customs and smuggling problems caused by the prohibition of liquor in this country during that period. See generally, Masterson, *op. cit.* at 184-252, 304-74; 1 Hack-

worth, *Digest of International Law* 664-90 (1940). Doubtless because of the existence of this American jurisdiction, the United States did not protest when in 1910 Russia declared a twelve-mile belt as "the marine customs area, within the limits of which every vessel, whether Russian or foreign, is subject to supervision by those Russian authorities in whose charge is the guarding of the frontiers of the empire." Masterson, *op. cit.* at 286.

The United States will contend, of course, that the smuggling jurisdiction is an exception to the three-mile limit, and that the existence of one exception does not imply the existence of another. As we have seen, and shall see further below, it was by no means the only exception. But the point is that the three-mile limit was never regarded as precluding the existence of various rights beyond it—even rights which, like the smuggling jurisdiction, operated on the surface of the sea and most definitely interfered with free navigation, let alone rights to the mineral resources of the seabed, which have nothing to do with the freedom of the seas. The fact that there was no need to assert the latter exception, because the problem did not arise, in no way suggests that the assertion would not have been made had the occasion arisen.

3. The Three-Mile Limit Was Not Applied by the United States to the Seabed and Subsoil.

While the three-mile limit as originally declared by Jefferson, and as understood for some years thereafter, related purely to neutrality jurisdiction,[70] the three-mile belt later

[70] In 1800 France and the United States agreed by treaty that "neither party will intermeddle in the fisheries of the other on its coasts." Exhibit 742, p. 202; App. 130. The three-mile limit was not mentioned, and the extent of the exclusive right to coastal fisheries was left unspecified.

became considered as that maritime area over which the United States possessed full territorial sovereignty. However, that never meant, and was never said to mean, that the United States possessed no rights in the sea or seabed beyond three miles. Official United States articulation of the doctrine and the reasons therefor habitually based it on the principle of freedom of the seas for navigation. See, *e.g.*, Crocker, *op. cit.* at 653-56; innumerable similar statements could be mentioned. In the 19th and early 20th centuries the three-mile limit was the favored doctrine of the principal maritime powers, especially Britain and the United States, their motive admittedly being to maximize those maritime areas which were regarded as free for navigation and naval operations.

None of this has any bearing on the seabed, since there is no inconsistency between freedom of navigation and the exclusive right to exploit continental-shelf resources. While no such resources were discovered on the American continental shelf until this century, it can hardly be doubted that if that had occurred exclusive American rights would have been asserted and would not have been regarded as inconsistent with the three-mile limit or the principle of freedom of the seas. When the United States occupied the Philippines, it promptly prohibited unlicensed pearl fishing within three leagues of land. App. 193; Exhibit 345, pp. 213-17. Significantly, the United States, while often protesting against claimed extensions of surface territorial waters beyond three miles, never protested against the many claims by other coastal states to exclusive rights to continental-shelf resources in areas where such resources were discovered and exploitable.

The sole piece of evidence which plaintiff has been able to produce from all of American history, which it puts forward as indicating an abandonment or renunciation of exclusive continental-shelf rights, is a State Department letter

to private persons in 1918 to the effect that "the United States had no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast." Tr. 1921. The letter takes no position as to whether the adjacent coastal State has such jurisdiction; the letter is fully consistent with the position of the Common Counsel States in this proceeding. Even if the letter could be interpreted as denying State as well as federal jurisdiction, a single such letter by a State Department official to private persons, relating to the Gulf of Mexico, could hardly be regarded as a lawful or effective renunciation of the rights of the Atlantic coastal States to their continental-shelf resources.

The position taken by the United States in the Bering Sea fisheries dispute demonstrates that the United States has not construed the three-mile limit as precluding exclusive claims even to surface fisheries in some instances, let alone to seabed and subsoil resources.[71]

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[71] In the 1930's the United States took a similar position with respect to the Bering Sea salmon fisheries.

> "The American Government must also view with distinct concern the depletion of the salmon resources of Alaska. These resources have been developed and preserved primarily by steps taken by the American Government in co-operation with private interests to promote propagation and permanency of supply. But for the efforts, carried on over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development . . . . [T]he American Government believes that the safeguarding of these resources involves important principles of equity and justice. It must be taken as a sound principle of justice that an industry such as described which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries. . . ."

By legislation of 1869 Congress prohibited the killing of fur-bearing animals "within the limits of Alaska Territory, or in the waters thereof." Rev. Stat. § 1956. The Treasury Department interpreted that legislation as applying to all waters of the Bering Sea east of the maritime boundary established by the treaty of 1867 with Russia which ceded Alaska to the United States. Between 1886 and 1890, the Coast Guard seized British vessels fishing for fur seal in the Bering Sea at distances ranging from 15 to 115 miles from land. Exhibit 813, pp. 126-28; Swarztrauber, *op. cit.* at 87.

In 1889 the statute was amended to incorporate a declaration that it applied "to all the dominion of the United States in the waters of Bering Sea." 25 Stat. 1009.

In admiralty proceedings for the condemnation of the seized British fishing boats, and punishment of their officers, the juries were instructed that the territorial waters of Alaska included all the Bering Sea east of the treaty boundary, and the prisoners were found guilty and their vessels and cargoes confiscated. Crocker, *op. cit.* at 286. The Supreme Court declined to set aside the convictions in spite of vigorous arguments on behalf of the British that they violated international law and the three-mile limit. *In re Cooper,* 143 U.S. 472 (1892). The Court expressly held that in 1889 Congress had asserted dominion over the entire Bering Sea east of the treaty boundary and that the executive branch of the Federal Government had formally and officially taken that position. 143 U.S. at 498-99.

The federal admiralty courts, in decisions forfeiting both British and American ships for seal fishing far beyond the

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"The Alaska Salmon-Fishery Situation," 18 U.S. Dept. of State Press Releases (Jan. -June 1938) 412, 414, 416. By a proclamation of September 28, 1945, President Truman formally asserted exclusive United States control over these salmon fisheries. Borchard, "Resources of the Continental Shelf," 40 Am. J. Int'l L. 53, 54-55 (1946).

three-mile limit, held that international law did not prohibit the asserted jurisdiction and that, in any event, the courts could not question it. It was declared that "a nation having the power to do so may extend its dominion over the sea beyond the limits heretofore admitted by the powers of the earth to be lawful"; that probably territorial waters should be deemed extended because of the increased range of artillery; but that in any event the courts had no power to question on international-law grounds the acts of their government in asserting maritime sovereignty, dominion and jurisdiction. *United States v. The James G. Swan,* 50 F. 108, 110-11 (D. Wash. 1892). "[N]ations may prevent the violation of their laws by seizures on the high seas, in the neighborhood of their own coast, and . . . there is no fixed rule prescribing the distance from the coast within which such seizures may be made." *United States v. The Kodiak,* 53 F. 126, 128 (D. Alaska 1892), citing *Church v. Hubbart, supra. Accord, The Alexander,* 60 F. 914 (D. Alaska 1894).

The position taken by the United States in the subsequent arbitral proceeding with Great Britain is fully described in Judge Jessup's testimony. App. 215-27. While not claiming that the waters in question were within the territorial sea of the United States for all purposes, the United States vigorously asserted the right to regulate the seal fishery in those waters and to exclude foreigners therefrom. As Judge Jessup pointed out (App. 217), "the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state—which was not disputed—and unsuccessfully attempted to reason from that fact to a sovereign right over surface fisheries." The United States thus attempted to extend to surface fisheries precisely the doctrine of proprietary rights over resources which had uniformly been recognized as to seabed and subsoil resources whenever they were capable of exploitation:

"'These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other.'" App. 221.

"'It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed.'" App. 221.

While the United States nominally lost the case, on the ground that its interference with surface navigation and fishery was not justified in view of the adherence of both parties to the three-mile limit, the arbitral tribunal prescribed regulations for the fishery, and these were later extended and expanded by negotiation and treaty. 1 Hackworth, *Digest of International Law* 792-98 (1940). Fulton described the results as follows:

"Then the Tribunal, in terms of the treaty appointing them, prescribed the regulations above referred to, leaving to Great Britain the honours of the contest, and to the United States the advantage. The true lesson to be derived from this chapter of international diplomacy, is not that the high tribunal reaffirmed the three-mile limit as the legal boundary of the territorial sea, which they did not do (see letter from Baron de Courcel,

> the President, p. 661), but that that limit may be set aside and a much wider boundary fixed (in this instance 60 miles) if the protection and preservation of a marine fishery require it." *Op. cit.* at 696, n. 3.

The identify of the 60-mile line fixed by the tribunal and the 20-league boundary established by the Peace of Paris of 1783 in the Atlantic is notable.

In the Bering Sea arbitration we find both parties—Great Britain and the United States—recognizing that the three-mile limit did not prevent the establishment of exclusive rights to exploit the resources of the seabed beyond three miles. And we find the United States seeking to extend that accepted doctrine to surface fisheries as well, and succeeding to a substantial degree. Given this history, it is hard to understand how the United States in the present litigation can seriously maintain that its adherence to the three-mile limit was or is inconsistent with the rights asserted by the Common Counsel States herein.

C. THE STATES' CONTINENTAL-SHELF RIGHTS WERE NOT EXTINGUISHED BY ANY OBLIGATORY RULE OF INTERNATIONAL LAW IN THE PERIOD 1783-1945.

Plaintiff apparently concedes, as it must, that the continental-shelf rights claimed by the States in this proceeding have been fully consistent with, and affirmatively sanctioned by, international law since 1945 or thereabouts. Plaintiff contends, however, that the States' claims were inconsistent with principles of international law during the century and a half prior to 1945, and specifically with an obligatory rule thereof nullifying all territorial and proprietary seabed claims outside the three-mile limit except in a few special cases based on ancient use or prescription.

1. Even If Plaintiff Were Otherwise Correct, the International Law Against Which the States' Claims Should Be Judged Is Present Law, Not Past Law.

Even if plaintiff's contentions about international law were correct, they should not be held to wipe out the States' claims if, as is plainly the case, the States never renounced or surrendered those claims. Even if for some period of years the State claims were repugnant to international law, in the end it was international law which gave way. On plaintiff's theory, international law changed in or about 1945 and since then has sanctioned precisely the rights in the continental shelf which the States were granted in their charters, claimed in earlier centuries and continue to claim. Today, therefore, there is concededly no conflict between the State claims and international law. Even if, during the heyday of the three-mile limit, a court might have held that State claims were overridden thereby, that furnishes no reason for any infirmity in the States' claims once the international law has changed. No court has ever held, or would hold, territorial or property claims unlawful by applying, not contemporaneous international law, but rather the superseded international law of some earlier period. In the second Gulf States litigation, the Court measured the claims of the States against international law as it then existed. *United States v. Louisiana*, 363 U.S. 1, 33-34 (1960).

If the lawfulness of the United States' asserted exclusive rights in the continental shelf, as against other nations, were today to come before a tribunal applying international law, it would not concern itself with the international law of the 19th or early 20th centuries, but solely with the law of today.[72] There is no reason why any different treatment

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[72] The United States surely will accept this proposition; otherwise it will find itself arguing that its own claims are unlawful.

should be accorded to the claims of the States. If they can establish title under domestic law, no useful purpose or need is served by measuring that title against alleged international-law inhibitions of prior ages, when it is admitted that the international law of today presents no impediment to them.

Thus the Common Counsel States contend that it is unnecessary to examine the international law of the period 1783-1945. However, if that law is deemed relevant we submit that it furnishes no basis for rejecting the States' claims.

2. The Three-Mile Limit Never Became an Obligatory Rule of International Law.

Volumes have been written on the question of whether the three-mile limit, as applied to the surface of waters, ever became an obligatory rule of customary international law, binding even on those nations which declined to accept it. Judge Jessup, writing in 1927, believed that it had become such a rule, though he regarded the question as a most difficult one and was careful to point out that the three-mile limit was obligatory only as fixing a limit on full territorial sovereignty, not precluding exclusive rights in other portions of the sea for more limited purposes. App. 113-20. For an exhaustive argument that the three-mile limit never became an obligatory rule even in that limited sense, see Exhibit 813, pp. 82-83, 147-240; see also Exhibit 668; U.S. Exhibit 7, pp. 31-58; U.S. Exhibit 17, 3d vol., second pagination, pp. 14-15 (Memorandum of Charles Cheney Hyde). *Accord, e.g.*, Fulton, *op. cit.* at 663-64; Bartley, *The Tidelands Oil Controversy* 19-21 (1953).

A view frequently stated was that international law had crystallized to the extent of making it clear that claims of full sovereignty out to three miles were lawful, but had not crystallized on the question of whether more extensive

claims were lawful. See, *e.g.*, U.S. Exhibit 7, p. 34. The two nations most active in contending for the three-mile limit were Great Britain and the United States; however, even they were by no means consistent or uniform in their positions to that effect.

American courts in the late 19th century were far from certain that a three-mile maximum limit as applied to the surface of waters was an obligatory rule of international law:

> "The extent of these rights, that is to say, how much of the sea they cover, has been uncertain. Some nations claim a marine league; others more, even up to thirty leagues. Perhaps the best way of stating it is that every nation has the right to control so much of the seas adjacent to its shores as is necessary for all purposes of revenue or of defence." *The Hungaria*, 41 F. 109, 110 (D.S.C. 1889).

> "It has often been a matter of controversy how far a nation has a right to control the fisheries on its sea-coast, and in the bays and arms of the sea within its territory; but the limits of this right have never been placed at less than a marine league from the coast on the open sea; . . . . More extensive rights in these respects have been and are now claimed by some nations; but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast, ..." *Commonwealth v. Manchester*, 152 Mass. 230, 236, 25 N.E. 113, 114 (1890).

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

Manchester v. Massachusetts, 139 U.S. 240, 258 (1891).

"Appellant's contention is based upon the old rule which limited jurisdiction over the waters of the ocean to a strip extending one marine league from shore, and considered inland waters a part of the main sea, when inclosed by headlands more than two marine leagues across. These arbitrary distances were fixed upon at a period when it was assumed that a marine league was the effective range of a heavy gun, and it may well be doubted whether they will not be extended by the courts to conform to changed conditions. Certainly it may be expected that every maritime nation will insist upon the control of its own coast waters to the extent to which it is able to dominate them from the shore." *Middleton v. Compagnie Générale Transatlantique,* 100 F. 866, 867 (2d Cir. 1900).

See also the cases discussed at pp. 404-05, *supra*.

The heyday of the three-mile limit was brief. As we have seen, it was virtually unheard of until 1793, and then and for some years thereafter it was generally applied to neutrality only. As the 19th century advanced, the doctrine was extended to other aspects of jurisdiction over surface waters, including fisheries; but many nations never acquiesced in it, and other limits, such as cannon shot, six miles and three leagues, remained very much in vogue. Swarztrauber, *op. cit., passim.* As late as 1890-1910, Britain and the United States were both ignoring, or carving large exceptions out of, the three-mile limit whenever it suited their interests to do so. Fulton, writing in 1911, believed that the cannon-shot rule, but not the three-mile limit, had achieved obligatory status, and that the measure of cannon shot was not fixed but should increase as the range of artillery increased. Fulton, *op. cit.* at 573-603.

Many other writers took the same view; see Jessup, *The Law of Territorial Waters* 65 (1927). The eminent publicist Charles de Visscher, reviewing the evidence in 1968, concluded that "the three-mile measure, as outside limit of jurisdiction, doubtless never acquired universal authority," and "represents only the minimum that the riparian state can claim." De Visscher, *Theory and Reality in Public International Law* 220, 221 (1968).

Fulton regarded three miles as wholly inadequate for the purpose of exclusive fisheries, *op. cit.* at 604-49, and Jessup agreed, *op. cit.* at 462. "In all the history of fishing disputes there is no case where a state has permitted damaging fresh foreign invasion of its coastal fisheries even outside the three-mile limit in simple voluntary recognition of a foreign claim of international-law right." Bingham, *Report on the International Law of Pacific Coastal Fisheries* 6 (1938). It has long been recognized that even surface fisheries require much greater protection if these valuable resources are not to be wholly extinguished. *Id.* at 8. Raestad, an eminent publicist, believed it clear that exclusive-fishery claims which antedated the three-mile rule were not impaired by it. *La Mer Territoriale* 180-81 (1913). Many writers who adhered to the three-mile rule for other surface purposes rejected it as a limitation on exclusive fisheries.

By the 1920's acceptance of the three-mile rule had already passed its peak and a process of swift decline had set in. Swarztrauber, *op. cit.* at 131 *et seq.* An attempt to achieve recognition of the rule at the Hague Codification Conference in 1930 failed dismally; no rule limiting territorial waters could command a consensus. Bingham, *op. cit.* at 6; Riesenfeld, *Protection of Coastal Fisheries Under International Law* 120-24 (1942). In recent decades, of course, the three-mile limit has been virtually abandoned and no longer has any pretension to the status of any obligatory rule of customary international law.

> "To an unprejudiced student of history and of present world affairs, it is abundantly apparent (a) that there never has been and is not today [1938] any general agreement on the extent of territorial waters; (b) that no state ever has applied consistently a uniform limit for all purposes to the zone of its coastal sea jurisdiction, (c) that it always has been the opinion of realistic experts that if definite limits are set to marginal seas jurisdiction those limits should be different for different purposes, and (d) that there is no common or nearly common agreement on the matter of legality of control over coastal fisheries beyond a three-mile zone of marginal sea or other conceded territorial area." Bingham, *op. cit.* at 9.

During the period when the three-mile limit enjoyed its greatest vogue, its status as an obligatory rule was denied by the following respected publicists, among many others: Ullmann, *Völkerrecht* 181-82 (1898); Westlake, *International Law* 185 (1904); Cavarretta, *Diritto Interstatuale* 110 (1914); Hall, *Outline of International Law* 35 (1915); Anzilotti, *Rivista di Diritto Internazionale* 161 *ff.* (1917); Suarez, *Diplomacia Universitaria Americana* 155-75 (Suarez held that the limit of territorial waters was the edge of the continental shelf); Strupp, *Grundzuge des Positiven Völkerrechts* 70 (1921); Catellani, *Lezioni di Diritto Internazionale* 133 (1921); Hatschek, *Völkerrecht* 192 (1923); Bjorksten, *Das Wassergebiet Finnlands in Volkerrechtlichter Hinsicht* 68 (1925); 1 Fauchille, *Traite de Droit International Public* 180 (1925); Cavaglieri, *Corso di Diritto Internazionale* 314 (3d ed. 1934); Grey, "Des Eaux Territoriales," Revue de Droit International et de Legislation Comparée 123 (1927); Brierly, *The Law of Nations* 102 (1928); Masterson, *Jurisdiction in the Marginal Seas* xiii (1929); Sanchez de Bustamante y Sir-

ven, *The Territorial Sea* 106 *ff.* (1930); Longo, *Diritto Internazionale Pubblico e Privato* 118-19 (1930); Jaureguiberry, *La Mer Territoriale* (1932); 2 Hold-Ferneck, *Lehrbuch des Völkerrechts* 68 (1932); 3 Gidel, *Le Droit International Public de la Mer* 151 (1934); Baldoni, *Il Mare Territoriale nel Diritto Internazionale Comune* 77 (1934); Meyer, *The Extent of Jurisdiction in Coastal Waters* 520 (1937); Bingham, *Report on the International Law of Pacific Coastal Fisheries* 5-6 (1938); Riesenfeld, *Protection of Coastal Fisheries Under International Law* 278-82 (1942). Riesenfeld made an exhaustive survey of the literature, and found 114 writers who had dealt with the question between 1900 and 1942, of whom 41 believed the three-mile rule was obligatory, 21 favored different rules, and 52 believed that no limitation had achieved the status of a binding customary rule. *Id.* at 280. A thorough survey of state practice likewise led Riesenfeld to conclude that no binding limitation was in force. *Id.* at 127-263, 280-281.

3. No Obligatory Rule of International Law Prior to 1945 Barred the States' Seabed and Subsoil Claims.

The three-mile limit did not preclude territorial and property rights to the seabed and subsoil extending much farther than three miles. As already discussed at pp. 278-81, *supra,* the basic reason for the "narrow limit" rules of territorial waters, culminating in the three-mile limit, was the insistence by the maritime powers on the right of free navigation, including belligerent navigation not protected by the doctrine of innocent passage, to the maximum possible extent in the seas. It was also believed by some (quite erroneously, as others pointed out) that surface fisheries were inexhaustible and thus that no nation could reasonably claim an exclusive right to them. None of this had any application to seabed and subsoil resources, and the three-mile limit did not apply to them.

We have little to add to Judge Jessup's testimony on this point, and for this portion of our brief we incorporate his testimony at App. 111-13, 131-230, 490-527. See also Swarztrauber, *op. cit.* at 95-99. Much additional support could be adduced if necessary. Most writers have recognized that sedentary fisheries, as well as the mineral resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters or to the reasons therefor, but rather "require special treatment." Fulton, *op. cit.* at 612. Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." *Id.* at 697. *Accord,* the British Under-Secretary of State for Foreign Affairs, speaking in Parliament in 1923. *Parliamentary Debates,* May 30, 1923, cols. 1265-66. This has fairly consistently been the British view, as pointed out by Jessup in 1927. *Op. cit.* at 13-17.

In 1803 the continental-shelf doctrine was foreshadowed by Gérard de Rayneval:

> "The sea which washes the coasts of a state is considered to form part thereof. Its security and tranquility render this property necessary. The sea must take the place of a rampart for it. We may add that the seabed along the coasts can be considered as having formed part of the continent and for that reason is considered as still forming part thereof." Rayneval, *Institutions de Droit de la Nature et des Gens* 161 (1803).

Rayneval rejected the cannon-shot doctrine and denied that it had the force of an obligatory rule. *Ibid.* Many other 19th-century writers regarded the seabed of the continental shelf as a natural prolongation or appurtenance of the continent, and therefore as the property of the coastal state. 1 Nizze,

Das Allgemeine Seerecht des Civilisirten Nationen 31 (1857); 1 Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations* 91 (1856); 1 Masse, *Le Droit Commercial dans les Rapports avec le Droit des Gens et le Droit Civil* 113; 1 Cauchy, *Le Droit Maritime International Considéré dans Ses Origines* 39 (1862).

It is quite true that, as Professor Henkin has pointed out and as plaintiff's brief emphasizes, some writers have considered the three-mile limit as applicable to the seabed and subsoil, and have regarded the many cases of exclusive rights to sedentary fisheries claimed and exercised, usually without objection, by coastal states as exceptional in nature and based upon, in one sense or another, prescription or occupation. It is impossible, on the basis of these text writers alone, to derive a rule of customary law which ever had the required degree of acceptance and acquiescence by the international community to make it a binding and obligatory rule. In any event, plaintiff misconstrues the views of most of these writers.

The doctrine of occupation, properly understood, meant that, on the discovery of a new resource in the continental shelf, the coastal state must take steps to occupy or to exploit it; if it failed to do so, others could come in. But the doctrine of occupation, as applied in state practice, never meant that exclusive rights could exist only in those resources which had been known and exploited for centuries, and that on the discovery of a new resource an attempt by the coastal state to "occupy" it could be defeated by protests on the part of other nations that no *ancient* occupation, prior to the discovery, had been made of that portion of the seabed.

Edwin Borchard, an eminent international-law authority, writing in 1941 in defense of Florida's regulation of sponge fisheries beyond three miles, was far from regarding occupation as the sole criterion:

"But there is another type of claim—riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit. So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States, and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. The claim may be said to rest on several theories—the extension of the land to the shallow banks, the long historical use and presumption of acquiescence, the physical occupation, and the special fact that Palk's Bay, if not the Gulf of Manaar, which divides India from Ceylon, may be deemed a constituent portion of the British dominions. Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit."

* * *

"The Florida claim to control the manner of taking sponges at a distance up to nine miles from the shore could therefore be justified on the theories of historical assertion of jurisdiction and acquiescence therein, protective jurisdiction for the preservation of a natural resource, and

possibly occupation. The Florida statute escapes the more debatable but not necessarily unsustainable claims of licensing a national monopoly in the nine-mile zone or effective occupation of the bed of the sea. In any event, the Florida statute seems invulnerable to attack even if State sovereignty over the bed of the sea beyond three miles be denied." Borchard, "Jurisdiction over the Littoral Bed of the Sea," 35 Am. J. Int'l L. 515, 518-19 (1941).

If, contrary to our submission, superseded international law rather than present law should be used as a measure of the States' claims, the proper form in which to state the issue is: if in 1840 or 1920 an exploitable resource had been discovered in the continental shelf of one of the Common Counsel States more than three miles from the coast, and if the State had promptly asserted the exclusive right of exploitation (as it clearly would have done), and if no other nation had objected (and almost certainly no other nation *would* have objected), would a title valid in international law have been made out? We think the answer is plainly in the affirmative.

We think Judge Jessup's testimony has thoroughly exploded the notion that continental-shelf rights ever depended solely on occupation or prescription in the sense apparently urged by plaintiffs; that is, that only an anciently exploited resource, not a newly discovered resource, could validly be claimed by the coastal state. The fact is what *whenever* such a new resource has been discovered, it has been the coastal state which has successfully asserted the exclusive right to explore and to exploit. Professor Henkin conceded this:

"Q . . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?

"A. I don't know of any such examples." App. 541.

The body of state practice thus admitted is conclusive. As Judge Jessup has observed, no one would take the trouble to occupy a portion of the continental shelf *until* a valuable and exploitable resource was discovered there. App. 498-99. The question of occupation arises only on the discovery of the resource, and the requirement of occupation is met when the coastal state asserts and exercises its right promptly after the discovery. Never at any time has the doctrine of occupation or prescription as creating an exclusive right been applied in favor of any state other than the coastal state. It has always been that state alone which has been regarded as the state having the exclusive right to make, or to proclaim, an occupation of a newly discovered resource in its continental shelf. Any attempt by a state other than the coastal state to make an exclusive occupation would have met with immediate challenge and resistance by the coastal state; and no such attempt was ever made. And, as Professor Henkin conceded, the coastal state has never been willing to leave the resource to promiscuous exploitation by the world at large; it has always claimed an exclusive right for itself, and that right has been acquiesced in and thus vindicated by the international community.

Borchard summarized the law, after a review of the state practice on which it was based, as follows:

"As is apparent, foreign countries near whose coasts were located natural valuable resources, found no difficulty, whatever their views as to the marginal sea, and met with no foreign objection, in putting to their own use these resources . . . . The soil and subsoil wealth within reach of the shore was uniformly claimed by the riparian state and where resources were discovered, the rights of ownership exercised . . . .

"But as to contiguous subsoil minerals under the sea and as to the sedentary resources attached to the bottom of the sea both statute and decision have claimed and foreign countries have recognized the propriety of riparian control, if not ownership. The *Columbia Law Review*, in a study on the subject, lists judicial and legislative instances which have supported the littoral states' jurisdiction or control of submarine petroleum, gold, and coal and such sedentary fisheries as oysters, pearls, and chanks. Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question. Property by prescription would alone have sustained the right to a resource already exploited. Assertion of jurisdiction and acquiescence therein—without

> entering upon the abstruse question of title —must explain the coastal states' jurisdiction over unexploited resources in the continental shelf." Borchard, "Resources of the Continental Shelf", 40 Am. J. Int'l L. 53, 59-60 (1946).

While the Truman Proclamation was indeed an important step in the formulation of a general doctrine which clarified and made much more explicit and uniform the rights of coastal states in their continental shelves, it was no sharp reversal of prior law, but was rather the natural outgrowth, in the light of vastly expanded potential uses of continental-shelf resources, of the substantial body of state practice and customary law which had been applied for centuries to those resources whenever and wherever they had assumed practical importance. It is wholly unsound to say that customary international law ever at any time contained an obligatory rule which made it unlawful for a coastal state to claim and to exercise exclusive rights over a newly discovered, exploitable shelf resource. The exclusive right had always existed and was uniformly asserted whenever the occasion arose. The fact that such occasions became much more frequent in our century quite naturally gave rise to a legal principle stated in general terms where previously there had been some degree of doctrinal confusion. But we believe it clear that never at any time did international law prohibit claims of the type which the defendant States are asserting here. (Even if, contrary to our submission, it did contain such a rule at one time, that is no bar to recognition of the States' claims now that international law so clearly and conclusively sanctions them.)

If plaintiff's present position is correct, then President Truman and this country committed an internationally unlawful act by promulgating the Proclamation of 1945. See App. 524-25. That proclamation, asserting the exclusive right to explore and to exploit all the resources of the con-

tinental shelf of the United States, was not a mere proposal offered for comment, acquiescence or objection by other countries. To the contrary, it was self-executing and took effect immediately; hence it was unlawful if not countenanced by the international law then in effect. Contrary to the position now taken by the United States, we do not believe President Truman acted unlawfully at all; at most he was merely making more articulate, more systematic and more comprehensive what had always been the rights of coastal states.

To the extent that the law changed because of the Truman Proclamation and its aftermath, the principal change was that thenceforth shelf resources were recognized to be under the sole jurisdiction of the coastal state *even if* it took no steps to "occupy" and to exploit them, or even to claim them. This was a rather academic change, since as we have seen coastal states invariably *have* acted when an exploitable resource is discovered.

Lauterpacht's analysis quoted at Pl. Br. 249-51 expressly repudiates any requirement of "prescription" (Pl. Br. 249), and defends the lawfulness of the Truman Proclamation as fully consistent with principles of traditional international law (Pl. Br. 250-51). Lauterpacht regarded the alleged requirement of effective occupation as a requirement "to be applied only in a general and substantially figurative manner—as, indeed, it has been applied in the past . . ." (Pl. Br. 251). A fair reading of the quotations from Lauterpacht selected and relied on by plaintiff itself makes it clear, in our submission, that he believed that the Truman Proclamation was not inconsistent with traditional international law. That was also the thesis of Lauterpacht's earlier article quoted by Judge Jessup at App. 155-67. The "occupation" required by Lauterpacht, and by the other authorities quoted at App. 163-73, is "figurative" indeed, and is satisfied by the States' historic title deriving from their

charters and the other evidence set forth herein. Indeed, in marine areas not claimed by any other state, a valid title is made out by "the bare existence of a claim." App. 158.

None of the members of the International Law Commission quoted at Pl. Br. 253-56 regarded the Truman Proclamation as a reversal or sharp break with prior law; they regarded it rather as a natural clarification or adaptation of prior law, as plaintiff's own quotations show.

Plaintiff claims (Pl. Br. 257) that the United States delegate to the 1958 Conference on the Law of the Sea "brought to the attention" of the Conference "the nature" of the "departure" of the new doctrine "from the principles of international law which governed the seabed and subsoil beyond territorial waters prior to 1945." What the delegate actually said was that "prior to very recent years, the legal status of the continental shelf, outside the recognized territorial seas was, in considerable measure, undefined." *Ibid.* That is, a principle or definition had become recognized where before there was none. This view, which has been shared by many others, is radically different from a belief that a new principle represents a "departure" from, or contradiction of, an old one. And if prior to 1945, as this view asserts, international law was simply silent on the validity of continental-shelf claims, then it contained no rule which could make the States' claims defective. The first principle of international law is, of course, that a state may do anything it likes unless an obligatory rule prohibits it. App. 109-11; see p. 263, *supra.*

The opinion for the Court in the *North Sea Continental Shelf Cases* likewise regarded the Truman Proclamation as "the starting point of the positive law on the subject," where before there had been only "various theories." Pl. Br. 261. "Various theories" are, of course, the exact opposite of a customary rule enjoying the overwhelming consensus necessary to give it binding force. Thus plaintiff's assertion

that the Court regarded the continental-shelf doctrine as a "departure from previous law," in the sense that previously there had existed a different or inconsistent obligatory rule limiting the freedom of action of states, is wholly unsound. Nor can plaintiff derive any comfort from the Court's reference to "maritime expanses which, during the greater part of history, appertained to no-one." Pl. Br. 261. Those "expanses" had indeed belonged to no one if the coastal state had never claimed them; now they belong to the coastal state even in the absence of a claim. The Court's language had no application to those seabed areas which *had* been previously brought under the sovereignty and dominion of the coastal state. For Judge Jessup's comments on the Court's language, see App. 145-46, 499-500.

With the possible exception of Judge Ammoun's description of manifestations of the continental-shelf doctrine as "derogations" from the "freedom" of "the high seas," Pl. Br. 265, none of the language in the separate opinions quoted at Pl. Br. 263-67 states or implies that the continental-shelf doctrine reversed a prior inconsistent rule of positive law. Even Judge Ammoun, by plaintiff's own characterization, regarded the doctrine as a "progressive development of the law" rather than a break with prior inconsistent law. Pl. Br. 266.

The farthest one could possibly go in deprecating the States' title on international-law grounds would be to say that prior to the Truman Proclamation the States' title (fully perfected in domestic law) was inchoate and potential, and would have been perfected only upon the discovery of an exploitable resource and the steps the State would immediately have taken to establish control over it. That potential title was exclusive, since no one other than the coastal State could have perfected such a title. The effect of the Truman Proclamation, in these terms, was to perfect the States' title *in advance of* the discovery of exploitable

resources and establishment of control thereover which, even without the Truman Proclamation, would have perfected them sooner or later. As Judge Jessup testified, however, Lauterpacht believed that to call titles of this sort "inchoate" is useful only with drastic qualifications; he regarded the coastal state as having an inchoate, perfectible title *in the absence of any claim,* and as having a perfected title *once a claim had been made.* App. 164-66.

Professor Henkin contends (Tr. 1920, 1923-24) that no one besides Judge Jessup has ever founded the right to a portion of the continental shelf on a survival of the seabed and subsoil portions of earlier expansive claims to wide territorial seas. That contention was refuted in 1923 by Sir Cecil Hurst, who declared that, so far as Great Britain was concerned, rights of ownership in the seabed are "the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea," and that by virtue of those older claims, which have been eroded only so far as the principle of freedom of the seas required it, British property rights in the seabed beyond the three-mile limit may be "valid and subsisting." Hurst, "Whose Is the Bed of the Sea?", 4 *British Yearbook of International Law* 34, 43 (1923)[73] Oppenheim flatly declared that the reasons for "the abandonment of the former claims to occupy the waters of the open sea . . . do not apply to the sea-bed. . . ." 1 Oppenheim, *International Law* 575 (6th ed. 1947).

Exactly the same contention was made by the Gulf Coast States of this country, based on their historic boundaries in the sea; and while rejected by the Supreme Court those claims were upheld by Congress, to which the Court then deferred. Those claims were advocated and defended in a

[73] There is likewise, of course, a continuity as to sovereignty of surface waters: "the sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean." Maine, International Law 78 (1888).

joint memorandum in support of rehearing in *United States v. Texas,* App. 749-66, by ten of the most eminent international lawyers of that time: Joseph Walter Bingham, C. John Colombos, Gilbert Gidel, Manley O. Hudson, Charles Cheney Hyde, Hans Kelsen, William E. Masterson, Roscoe Pound, Stefan A. Riesenfeld and Felipe Sanchez Roman, and concurred in by another, William W. Bishop, Jr., who had been principally responsible for drafting the Truman Proclamation. App. 511. The qualifications of these scholars are set forth in summar form at App. 749-51; see also Bartley, *The Tidelands Oil Controversy* 208-10 (1953). It is beyond dispute, Professor Henkin to the contrary, that Judge Jessup's views have been shared by many others. We submit that those views are wholly sound.

The present international-law situation, after the Truman Proclamation, the Continental Shelf Convention of 1958, and the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf Cases,* is that the exclusive right of a coastal state to its continental-shelf resources is fully recognized out to the 200-meter depth mark as a minimum, and may extend considerably beyond that mark if the resources in question are exploitable and are determined to be "adjacent" to the coast. The exact outer limit of exclusive rights in the continental shelf is presently the subject of discussion and negotiation. For a recent survey, see Krueger, "An Evaluation of United States Oceans Policy," 17 McGill L.J. 603 (1971).

As it happens, on the Atlantic coast of the United States the 200-meter depth mark corresponds rather closely in most areas to the 100-mile limit which is generally the measure of the historic claims of the Common Counsel States. U.S. Exhibit 7, p. 80 n. 195; U.S. Dept. of the Interior, *Atlantic Continental Shelf and Slope of the United States,* Geological Survey Professional Paper 529-J (1972). No problem or question under international law can arise as to those portions of the shelf which the States claim. The

States freely recognize the authority of the Federal Government to determine, by treaty or otherwise, the extent of the continental shelf within which national rights are claimed.

As to portions of the shelf within both the 200-meter depth mark and the States' historic 100-mile boundaries, the States' claim rests on their historic title. As to portions of the shelf within the 100-mile boundaries but beyond the 200-meter depth mark, the States claim them conditionally on their eventually being determined by the Federal Government to be subject to national exclusive rights as a matter of international law and policy; if the Federal Government finally determines not to claim such areas as against other nations, the States' title will lapse. As to portions of the shelf within the 200-meter depth mark (or within such broader limit as the Federal Government may eventually adopt) but outside the 100-mile boundaries, the States claim them on the ground that the 100-mile limit was not regarded as precluding wider exclusive rights if exploitable resources were found outside it but still adjacent to the coast, and on the ground that, as to any portion of the shelf which becomes recognized as subject to national exclusive rights, it is the States rather than the Federal Government which have the better claim, as owners of their public lands and as residual sovereigns over the coast to which the shelf is an inherent appurtenance. See pp. 502-08, *infra*.

X.

THE FEDERAL FOREIGN-AFFAIRS AND DEFENSE POWERS DO NOT REQUIRE FEDERAL OWNERSHIP OF THE EXCLUSIVE RIGHT TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF, BUT MERELY THE SAME PARAMOUNTCY WHICH THE FEDERAL GOVERNMENT ENJOYS ON LAND.

A. THE *CALIFORNIA* COURT'S VIEW THAT EXCLUSIVE FEDERAL PROPRIETARY RIGHTS IN THE CONTINENTAL SHELF ARE REQUIRED BY THE FOREIGN-AFFAIRS AND DEFENSE POWERS WAS ALWAYS UNSOUND AND HAS BEEN REPUDIATED BY THE STATE DEPARTMENT, BY CONGRESS, AND BY SUBSEQUENT DECISIONS OF THE COURT.

In *United States v. California*, 332 U.S. 19 (1947), and the two cases which followed the principles it announced, the Supreme Court held that, as against a coastal State, the Federal Government possessed "paramount rights" in the offshore submerged lands seaward of the low-water mark and outside inland waters. *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). The controversy in the *California* case was limited to the three-mile belt off the coast. The Court's conclusion in that case was based partially on the finding that protection and control of the three-mile belt is a function of national external sovereignty. The Court discussed at some length the existence of a marginal territorial sea and justified it as a "necessity" for a government next to the sea. "[A coastal country] . . . must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its shores." *Id.* at 35.

There can be little disagreement so far, for all the Court was saying is that the United States can claim, as against

foreign nations, special dominion over the waters close to its shore. The difficulty came when the Court moved on from this proposition to a claim of "paramount rights," including property rights, in the offshore seabed for the United States as against the States. Two exceedingly vague arguments were presented as the means for jumping this logical gap. First, the Court declared that:

> "The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See *Chy Lung v. Freeman,* 92 U.S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." *Id.* at 35-36.

This statement reduces itself to the following argument: since wars may be fought in the ocean, and since the States possess neither navies nor large armies, therefore, the Federal Government must have property rights in the offshore seabed. The argument is a complete *non sequitur.* It also proves too much, since it would lead to the same conclusion as to the land territory of the United States. If that territory were invaded by a foreign power, it is the United States, not the States, which would defend it; but that has never been considered to mean that the United States must have title to all the land in the country, or even to all public lands.

The Court's second argument was as follows:

> "And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations . . . . The very oil about which the state and nation here contend might well become the subject of international dispute and settlement." *Id.* at 35.

In effect, the opinion declares that the Federal Government must itself own property rights in the continental shelf because those rights may be the subject of international dispute or agreement. Again the Court's argument cuts too wide a swath. Property or other rights within the land territory of the United States may be the subject of international negotiations or treaty, and of course a treaty supersedes conflicting State law. *Missouri v. Holland*, 252 U.S. 416 (1920). State action within State boundaries, ranging from the issuance of speeding tickets to diplomats to the adjudication by State courts of lawsuits involving foreign-owned property or interests, may have foreign-relations aspects or create international difficulties.

The federal foreign-affairs power entails the right to supervise all such State action and to prevent any conduct by State governments that would create international problems, interfere with foreign policy or cause in-

ternational embarrassment. *Zschernig v. Miller,* 389 U.S. 429 (1968); *South African Airways v. New York State Division of Human Rights,* 315 N.Y.S. 2d 651 (Sup. Ct. N.Y. Co. 1970). Similarly, the defense power is ample, if exercised by the proper federal authorities, to exercise whatever control is necessary over natural resources, wherever located, to ensure their efficient harnessing for national-defense purposes. See *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). But no one has suggested that to avoid such problems the Federal Government must itself exercise very governmental function within the United States, let alone own title to all real property throughout the country. Similarly, the foreign-affairs and defense powers simply bear no relationship to the question whether the States or the Federal Government have the right to explore and to exploit the continental-shelf resources secured to the United States by international law and agreement.

Neither the foreign-affairs and defense powers nor the concept of external sovereignty[74] can create property ownership in the Federal Government; rather, they merely give authority for such activities as may be necessary and proper for the carrying out of these federal responsibilities. The States readily concede to the Federal Government the same rights and authority over the continental shelf as are properly exercised on land. "The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation." *United States v. California,* 332 U.S. 19, 42-43 (1947) (Reed, J., dissenting).

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[74] It is difficult to understand why, if "external sovereignty" requires federal ownership of the seabed, it does not require such ownership of offshore islands as well. Each Atlantic State has such islands, some of which—*e.g.*, Nantucket—are more than three miles from the coast.

The majority in the *California* line of decisions may have been influenced by the fact that at the time of those decisions there was no international treaty which recognized and defined the exclusive continental-shelf rights claimed by the Truman Proclamation. In 1947-50, it was still possible that any property rights conceded to the States in the continental shelf might be objected to by other nations. While that possibility by no means required federal ownership, but only that State ownership be subject to the qualification that it might be defined, limited or even extinguished by federal action under the foreign-affairs power, the fact that in 1947-50 continental-shelf rights were a subject of considerable international controversy and uncertainty lent some faint color of reasonableness to the Court's holdings as of that time.

Any such justification, however, has long since disappeared. Since the conclusion of the Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. (Pt. 1) 471, let alone the International Court's decision in the *North Sea Continental Shelf Case*, [1969] I.C.J. 1, there has been complete international agreement on the existence and nature of continental-shelf rights, at least out to the 200-meter depth mark. State possession of such rights is no more likely today—indeed probably less likely—to give rise to international controversy than the police or judicial powers of the States within their own boundaries. And if any such problems were to arise—for example, problems concerning precisely which seabed and subsoil resources are subject to the States' exclusive rights—the States would of course be bound by any international agreement concluded on the subject by the Federal Government.

The *California* opinion failed even to mention two squarely inconsistent prior decisions which must have been either ignored or overruled *sub silentio*. In *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1907)

(Holmes, J.), the Court had held that Michigan had title, as against the United States, to the bed of the Sault Ste. Marie River, through which the international boundary passed. The Solicitor General had argued that the river was not part of the internal waters of the State because of the international boundary, and that State ownership would interfere with the "international obligations" of the Federal Government. 52 L. Ed. 882-83. The Court thought these arguments so insubstantial that it did not even mention them in its opinion. *Accord,* as to the bed of Lake Ontario, *Massachusetts v. New York,* 271 U.S. 65 (1926). These international-boundary waters are obviously far *more* affected with an international or foreign-affairs interest than the submerged lands involved in *California* or in the present proceeding, which do not abut on the territory of any foreign nation. Until *California,* obviously, the Court had never doubted that federal concerns in such waters could be fully accommodated to State titles in the bed and subsoil.

As a reaction to the *California* line of decisions,[75] the Congress in 1953 adopted the Submerged Lands Act, 67

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[75]Not only were the decisions unsupported by precedent and disavowed by Congress; they were also strongly opposed by the great weight of scholarly opinion. See, *e.g.,* Exhibits 668, 699, 738; Bartley, The Tidelands Oil Controversy: A Legal and Historical Analysis (1953); Hanna, "The Submerged Land Cases," 3 Stan. L.Rev. 193 (1951); Comment, "Constitutional Law—Relation of Federal and State Governments—Title of United States to Tidelands," 50 Mich. L.Rev. 114 (1951); Comment, "The Settlement of Conflicting State and Federal Claims to the Continental Shelf," 15 Albany L.Rev. 85 (1951); Note, "The Tidelands Decisions," 21 Tenn. L. Rev. 676 (1951); Hardwicke, Illig, & Patterson, "The Constitution and the Continental Shelf," 26 Tex. L.Rev 398 (1948); Naugjoks, "Title to Lands Under Navigable Waters," 32 Marq. L.Rev. 7 (1948); Comment, "United States v. California: Paramount Rights of the Federal Government in Submerged Coastal Lands," 26 Tex. L.Rev. 304 (1948); Note, "Real Property—Ownership of California Tidelands," 21 S. Calif. L.Rev. 207

Stat. 29, 43 U.S.C. §§1301-1315. The Act relinquished to the coastal states all the rights of the United States in submerged lands at least to a distance of three geographic miles from the shore, and in the case of a Gulf Coast State, in certain circumstances, relinquished rights to a distance of three marine leagues, or approximately nine geographic miles, from the shore (§3; 43 U.S.C. §1311).

Congress clearly believed that it was not necessary for the resources of the relinquished seabed to be owned by the United States. The Secretary of the Navy, Robert B. Anderson, said as much before the Senate Committee considering the Submerged Lands bill:

> "Senator Long: Do you see any impediment to obtaining oil in time of national emergency by virtue of private or State ownership of some of that land on which that oil is located?
>
> "Secretary Anderson: No, sir.
>
> "Senator Long: Is private industry going to produce oil regardless of whether the oil is under State ownership or privately owned lands or federally owned lands?
>
> "Secretary Anderson: I would certainly assume it would, Senator.
>
> "Senator Long: So, in any event, the oil would be produced by private enterprise.

(1948); Keeton, "Federal and State Claims to Submerged Lands Under Coastal Waters," 25 Tex. L.Rev. 262 (1947); Note, "Submerged Lands: Conflicting Claims of Federal Government and States to Title in the Bed of the Ocean," 35 Calif. L.Rev. 605 (1947); Borchard, "Resources of the Continental Shelf," 40 Am. J. Int'l L. 53 (1946). Bartley found 43 articles on the decisions in legal journals, of which all but three were critical. *Op. cit.* at 247-48 n. 1.

> "Secretary Anderson: I would certainly assume that. I doubt we would go into the drilling business." Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills p. 560 (83d Cong., 1st Sess.) (hereinafter cited as 1953 Senate Hearings).

The nation's experience during World War II, which was mentioned frequently during the hearings, indicated that an efficient and practicable system of production quotas, industry allocations, rationing, and price controls could easily be introduced during wartime over the petroleum industry, as indeed over the entire national economy. See Executive Order 9276, dated December 2, 1942 (7 F.R. 10091), as amended by Executive Order 9319, dated March 23, 1943 (8 F.R. 3687), which created the Petroleum Administration for War and defined its functions. No mention was made in the continental-shelf hearings of any disputes between State authorities and the Petroleum Administration for War. Certainly, if significant problems had arisen, they would have been used as an argument for keeping all the submerged lands under federal ownership.

Similarly, Congress must not have believed that exclusive State rights to the continental shelf out to three or ten miles was inconsistent with federal powers over foreign relations or that federal proprietorship of this area was a necessary incident of national sovereignty. In the consideration of various submerged-land bills, it was contended that the United States might be embarrassed in its dealings with other nations by permitting states to exercise rights in submerged lands beyond three miles. Mr. Justice Harlan's opinion in *United States v. Louisiana,* 363 U.S. 1, 30-31 (1960), explained why the Federal Government did not object to the bill on these grounds:

> "The first objection was laid to rest by the testimony of Jack B. Tate, Deputy Legal Adviser

> to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve."

The testimony referred to in the opinion was quite clear that ownership by the States of the entire continental shelf would cause no international difficulties, nor would it conflict with treaty obligations. Mr. Tate's testimony before the Senate Committee was as follows:

> "Mr. Tate. It depends upon what authority and jurisdiction you should grant. We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.
>
> * * *
>
> "Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the sea bed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by the

> President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?
>
> "Mr. Tate. The Chairman is correct in that statement." 1953 Senate Hearings 1067.

During the floor debate on the bill, Senator Cordon presented a statement by the sponsors which made the point crystal clear:

> "As shown by the evidence furnished by the State Department and by the Presidential proclamation and Executive order of September 28, 1945, the vesting or establishment of these proprietary rights in the States is a matter of domestic concern and will not interfere with international law or present and future international agreements and obligations, so long as they are vested or established subordinate and subject to the constitutional governmental powers of the national sovereign." 99 Cong. Rec. 4385.

The State Department did suggest that the United States might be embarrassed by Congress' recognition of State *boundaries* extending beyond the three-mile territorial sea. Congress rejected the argument, and it was put to rest by the Supreme Court's conclusion that a State territorial boundary beyond three miles for limited purposes is entirely consistent with the executive policy establishing a three-mile limit for the territorial waters of the United States. *United States v. Louisiana,* 363 U.S. 1, 35-36 (1960).

Similarly here, the Common Counsel States are asking only for those rights in the continental shelf which the United States claims as against other nations as a matter of international law. The congressional hearings and the review by the Supreme Court in the *Louisiana* case of the legislative history of the Submerged Lands Act demonstrate that Congress intended to overturn the underlying policy determinations in the *California* decision relating to defense and foreign policy.[76]

In *United States v. Louisiana*, 363 U.S. 1 (1960), and *United States v. Florida*, 363 U.S. 121 (1960), the Court held that Texas and Florida had proved boundary claims of three maritime leagues and thus had qualified under the proviso in the Submerged Lands Act. As stated above, Justice Harlan's opinion discussed and dismissed objections based upon foreign-affairs considerations to State property rights in the seabed beyond three miles. The Court no longer believed that federal ownership of the seabed was required by defense and foreign-affairs considerations. Missing completely from the opinions was any allegation that property rights are necessarily inseparable from sovereign powers. The Supreme Court made manifest in

[76] "Whether this jurisdiction ["jurisdiction and control over the resources of the continental shelf"] is exercised by a state of the United States or by the United States itself is purely a domestic matter." Restatement (2d), Foreign Relations Law of the United States (Tentative Draft No. 2, May 8, 1958, p. 22).

By Section 4(a)(2) of the Outer Continental Shelf Act, 43 U.S.C. §1333(a)(2) (1971), Congress also made the outer continental shelf subject to "the civil and criminal laws of each adjacent State . . . for that portion of the subsoil and seabed of the outer Continental Shelf . . . which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area."

the *Louisiana* and *Florida* cases that State property rights in the seabed under the marginal sea do not involve the foreign-affairs or defense powers and do not infringe on attributes of national sovereignty. Thus the authority of the *California* line of cases on those points has been destroyed by these more recent decisions.

B. THE RECORD DEMONSTRATES THAT NO DEFENSE OR FOREIGN-AFFAIRS DIFFICULTIES WOULD RESULT FROM RECOGNITION OF STATE PROPERTY RIGHTS IN THE SEABED AND SUBSOIL OF THE CONTINENTAL SHELF.

Professor Kirkpatrick, called on behalf of the Common Counsel States, testified that in his opinion upholding the claims of the States would not adversely affect in any way the conduct of the foreign relations of the United States. Professor Kirkpatrick reasoned that:

> "A succession of events since 1945 has made such State claims even more consistent with the federal power over international affairs. It is now internationally recognized that the exclusive right to develop the resources of the Atlantic Seaboard continental shelf resides in this country. The question whether development is by the Federal Government, the States, or private operators under the auspices of either, is an internal matter which would not affect the conduct of foreign relations." App. 5.

Professor Kirkpatrick also testified that this position—that the allocation of shelf resources between the Federal Government and the States does not involve foreign-relations matters—was explicitly adopted by the Department of State in the hearings on the Submerged Lands Act. App. 7. This assertion was unquestioned in cross-examination.

Professor Kirpatrick also pointed out that operational control over the resources beyond the three-mile/three-league limit is in the hands of private individuals, since the Federal Government carries on no exploration or drilling itself but rather leases submerged lands to private concerns. He found it hard to understand how the foreign relations of this country could be affected by the fact that these leases would run from the States rather than from the United States. App. 8-10. Again there was no significant questioning of this conclusion by the United States in cross-examination.

The thrust of the cross-examination of Professor Kirkpatrick relative to foreign relations dealt with whether the States or the Federal Government had paramount authority to regulate various matters relating to offshore development: who should define which resources constituted the natural resources of the continental shelf; who should delimit the safety areas around surface platforms and should issue regulations to enforce them; who should give permission for scientific exploration by foreign countries of the continental shelf. Professor Kirkpatrick's position throughout his testimony was that the Federal Government is vested with sufficient power to define the rights of the United States in the continental shelf and to regulate such activities as may touch and concern relations with other nations. However, he repeatedly emphasized that this was no more and no less power than the Federal Government has on land.

Professor Kirkpatrick ended this portion of his testimony by noting that during the extensive hearings on the Submerged Lands Act no mention was made of any significant foreign-policy objections to State ownership of seabed resources, and concluded that this was "powerful evidence that no such objection exists." App. 12. The record is wholly devoid of any examples of federal-State conflicts

with respect to the seabed of the three-mile/three-league continental shelf. Professor Henkin knew of no such conflicts:

> "Q. Since the Submerged Lands Act, do you know of any grievous international problems or embarrassment to the foreign relations of the United States that have been caused by the alleged gift of some of the continental shelf to the states?"
>
> "A. I don't know of any." Tr. 2647.

Turning to the question whether the national defense or other military interests of the United States require federal ownership of the continental shelf, Professor Kirkpatrick was definite that they do not. Drawing on over thirty years' experience in defense policy, he testified that:

> "The powers exercised by the Federal Government which I have already referred to are in my opinion adequate, whether the Federal Government or the States own and develop the submerged lands in question, both to authorize activities by the military authorities in the ocean above the continental shelf and to prohibit activities by the States or by American citizens that are contrary to the defense interests of this country. In time of war or national emergency, and even in peacetime to the extent necessary for defense, local and private interests yield to the military needs of the nation.
>
> "In this regard, undue emphasis should not be placed on the need for Federal power. In my experience, the States of this country have cooperated significantly of their own volition where activity in the interests of national defense

called for action or restraint by individual States." App. 15-16.

Professor Kirkpatrick specifically noted the cooperation between the States and the Federal Government since the enactment of the Submerged Lands Act. For example, although the States possess the seabed resources in the three-mile/three-league belt, the Secretary of the Army has absolute authority to prohibit placement of any structures in the coastal sea. Yet, this allocation of responsibilities between the States and Federal Government has not been a source of discord. App. 15-17. Professor Kirkpatrick concluded that there was every reason to believe that this cooperative approach, in the defense area, could operate as easily beyond the three-mile/three-league limit. App. 17. Neither his evidence nor his conclusion was questioned by the United States.

Cross-examination of Professor Kirkpatrick centered on questions relating to whether the Federal Government could continue to carry on military activities in the waters of the continental shelf if title to the seabed was in the coastal States. The Professor believed the United States has all the authority necessary for that purpose, as plainly it does. He minimized the extent of possible interference of military activity with exploration and exploitation by the States, and emphasized that federal military authority need be no different from that exercised by the Federal Government on land. See, *e.g.*, Tr. 257-258. No evidence in the record indicates that the States have ever interfered with military operations in the three-mile/three-league belt, and nothing in the record indicates that the States would in the future inhibit such operations in the continental shelf. In cross-examination, Professor Kirkpatrick minimized the possibility of State interference:

> ". . . I think we are speculating on a very unlikely possibility that the states would inhibit or try to prevent an action for defense." Tr. 260.

And if they did attempt to do so, the federal defense power is obviously adequate to prevail.

Recognition of State property rights in the seabed of the continental shelf would not result in embarrassment to the United States in the conduct of its foreign relations, nor would it inhibit military activities on the seabed or in the waters over the seabed. To carry out its constitutional powers over foreign affairs and defense, the Federal Government no more needs to own the continental shelf than it needs to own the three-mile belt, the three-league belt in the Gulf or for that matter every acre of land in the United States or the air superjacent thereto.

The States, on the other hand, have substantial interests in the development and regulation of their continental-shelf resources. Besides their obvious fiscal interest they have a duty to protect their waters and coastlines from pollution and other environmental damage which is threatened by irresponsible exploitation of continental-shelf resources, and which has occurred on a massive scale under federal leasing arrangements. Congress has expressed its preference for "local controls" with respect to exploitation of continental-shelf resources and its awareness of "the fixed, inflexible rules and the delays and remoteness which are inseparable from a centralized national control." Quoted in *United States v. Louisiana,* 363 U.S. 1, 98-99 n. 25 (1960) (Black, J.).

XI.

THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF TERRITORY OR PROPERTY.

Plaintiff appears to contend, though this is not altogether clear, that the legislation of 1953 furnishes an independent ground for extinguishing the States' claims even if they were valid until then.

It may be possible to view the Submerged Lands Act and the Outer Continental Shelf Act in such a way that neither unlawfully appropriates to the Federal Government property rights or territory belonging to the States. As to the belt of land lying between three miles and three leagues, the Submerged Lands Act gave to the Gulf States the right to qualify for a claim of up to three leagues. This was founded on Congress' belief that those States had an historic basis for the more extensive claim, and the exception written into the Act for their benefit underscores that Congress had no wish unlawfully to deprive them of territory or property. The fact that no such provision was made for the Atlantic States merely evinces Congress' lack of knowledge as to the strength of their claims; and in accordance with the policy of the Act, it seems only reasonable to interpret it in such a way that the Atlantic States may also quality. (See pp. 455-60, *infra*.) So far as the right to exploit seabed resources beyond three leagues and to the edge of the continental shelf is concerned, Congress did not intentionally attempt to transfer to the Federal Government rights which were vested in the States. The underlying purpose of the legislation was to reverse what was regarded as the Supreme Court's erroneous decision in the *California* case and to restore to the States all those submerged lands to which they had an historic title. See pp. 382-88, *supra*.

If, however, these statutes did purport to divest the Common Counsel States of the exclusive right to exploit their continental-shelf resources beyond three miles, they are *pro tanto* unconstitutional. The right to seabed resources may be seen as *proprietary,* in which case the statutes deprive the States of property without due compensation in violation of the Fifth Amendment; or as *territorial,* in which case they diminish the territory of the States in excess of the power granted to the Federal Government by the Constitution.

The rights possessed by the States are unquestionably property rights, though they have other aspects as well. The Federal Government has offered nothing in exchange for its attempted deprivation of these rights. Yet the Fifth Amendment explicitly states: "nor shall private property be taken for public use, without just compensation." It is well settled that the Fifth Amendment applies to State property taken by the Federal Government. While such property may indeed be taken under the power of eminent domain, the Federal Government is not relieved of its duty to pay just compensation. As the Court stated in *United States v. Carmack,* 329 U.S. 230, 242 (1946):

> "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."

See also *Oklahoma v. Atkinson Co.,* 313 U.S. 508, 534 (1941); *St. Louis v. Western Union Telegraph Co.,* 148 U.S. 92, 100-01 (1893); *Yalobusha County v. Crawford,* 165 F.2d 867, 869 (5th Cir. 1947); *Wayne County v. United States,* 53 Ct. Cl. 417, 423-24 (1918), *aff'd,* 252 U.S. 574 (1920).

Therefore, the purported divestiture of the States' rights, if there was such a divestiture, violates the Fifth Amendment.[77]

In reply, it may be urged that no compensation need be paid for the species of property involved here, *i.e.*, submerged lands belonging to a State, perhaps on some public-use or trust theory. Such a reply would invoke *Stockton v. Baltimore & N.Y. R.R. Co.*, 32 F. 9 (C.C.N.J. 1887), *appeal dismissed*, 140 U.S. 699 (1891). There the United States had authorized a railroad company to build a bridge across the Staten Island Sound, part of the internal waters of New Jersey. The Attorney General of New Jersey contended, *inter alia*, that because the piers of the bridge would rest on submerged lands belonging to the State just compensation was due. The court rejected the contention, holding that the submerged lands were held by the State in trust for public uses, and that when Congress pursuant to the commerce power used "a few square feet" (32 F. at 20) for the foundation of a bridge which was itself a public use, no compensation was due even if the submerged lands were "private property" within the meaning of the Fifth Amendment.

There are a variety of reasons why *Stockton* is not controlling and the above reply is inadequate. First, a very great difference exists between the "few square feet" of river bottom at issue in *Stockton* and the thousands of square miles of valuable submerged lands involved here.

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[77] Quite a different question would be presented, of course, if the United States, rather than attempting to take the States' continental-shelf rights for its own use and profit, renounced them by treaty or by acquiescence in a change in international law by which they would no longer be recognized. Such federal action, pursuant to the foreign-affairs power, would indisputably be valid and binding on the States; the hypothetical question whether compensation would be due is not involved in this proceeding. Any such renunciation by the United States in the future is in the highest degree improbable.

The *Stockton* opinion reveals some doubt as to whether any taking occurred by questioning whether the appropriation of a few square feet of river bed "is at all a diversion of the property" from its original use. *Id.* at 20. But the deprivation of rights to extremely valuable seabed resources is manifestly a taking of property, for which just compensation is required by the Constitution.

Second, a substantial difference in statutory purpose is involved. The statutes relating to the continental shelf purportedly grant the Federal Government the right to exploit natural resources such as oil and minerals; the purpose is fundamentally economic in character, since the Federal Government would gain, and the States would lose, a substantial amount of revenue. By contrast, the small amount of river bottom acquired in *Stockton* was taken for the public purpose of supporting the piers of a bridge.

Third, any public-trust theory that might be applicable to the continental shelf must be carefully distinguished from that which applies to inland waters and other State property. Rivers are often used for navigation, and Congress in the exercise of the commerce power may appropriate some small amount of river bottom to erect a bridge over the river. However, it is not even superficially plausible to suggest that submerged lands in the continental shelf are held for public use in navigation or commerce, save insofar as Congress might decide to authorize the erection of a lighthouse or the laying of a telephone cable. No public-use or trust doctrine exists that would justify depriving the States of the entire seabed, for ends unrelated to navigation or commerce, without just compensation.

Fourth, some slight authority exists for saying that in some circumstances if land is dedicated by a State to one public use (*e.g.*, as a park), the Federal Government can put it to another (*e.g.*, as a place for a post office), if the lat-

ter use is superior, without compensating the State or one of its subdivisions. *In re Certain Land in Lawrence,* 119 F. 453 (D. Mass. 1902). But no such doctrine has ever been applied to the seabed. Further, the Federal Government and the States propose here to put the land to the same use, so it can hardly be argued that the federal use is superior.

Fifth, the *Stockton* and *Certain Land* cases represent very much a minority view.

> "[T]he weight of authority is contrary to this view and supports the conclusion that the United States must make just compensation for any property taken by it under the power of eminent domain from a state or a political subdivision or agency thereof."

See Annotation, "Eminent domain: power of one governmental unit or agency to take the property of another such unit or agency," 91 L.Ed. 221, 224 (1947), and cases there cited.

The United States has recognized the obligation to pay just compensation for continental-shelf property it takes from the States. Under Section 6 of the Submerged Lands Act, 43 U.S.C. §1314 (1971), Congress provided as to the three-mile/three-league belt of land ceded to the States that the United States had the right to purchase undersea resources or portions of the ceded submerged lands, if required for national defense. The section explicitly provides that acquisition of the resources shall be "at the prevailing market price," and of the lands "by proceeding in accordance with due process of law and paying just compensation therefor."

The rights of exploitation possessed by the States should be seen alternatively, or additionally, as territorial. The power of Congress to diminish the territory of a State is very limited. Under Article I, Section 2, Clause 17, it may

acquire an area not to exceed ten square miles created by "cession of particular States" to serve as the seat of government, as well as lands purchased "by the Consent of the Legislature of the State in which the same shall be" for the erection of military bases and so on. No power is granted the Federal Government to deprive the States of thousands of square miles for use other than as the seat of the Federal Government, or other than for military or shipping purposes or the like. *A fortiori* no such power exists when the States have not consented or ceded land to the Federal Government. *Cf. Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845). In view of the Tenth Amendment and the doctrine that the Federal Government has only those powers enumerated in the Constitution, Congress' attempt to deprive the Atlantic States of their territory in the continental shelf is unconstitutional.

XII.

THE DEFENDANT STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO PART OR ALL OF THE CONTINENTAL SHELF ARE DEEMED TO HAVE SPRUNG INTO EXISTENCE DE NOVO IN 1945.

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE.

Let it be assumed that all the arguments advanced earlier fail and that prior to 1945 neither the Federal Government nor the States possessed any rights to exploit continental-shelf resources. Even under this assumption, the Atlantic States are still uniquely entitled to exploit those resources.

Likewise, if the States are held to have historic rights to part, but not all, of the continental shelf adjacent to their coasts, the considerations mentioned below are sufficient to give them the better right to the remainder as against the plaintiff.

Proclamation 2667, made by President Truman on September 28, 1945, declared that

> "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." 3 C.F.R. 67, 68 (1943-48 Compil.).

The position taken by the Truman Proclamation has since been confirmed by international law. Article 2 of the 1958 Geneva Convention on the Continental Shelf, for example, recognizes the rights of a state, by virtue of its sovereignty over the land, to exploit seabed resources in the continental shelf. Such rights have also been acknowledged by the International Court of Justice in the *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22, where they are characterized as "inherent" and "exclusive" rights. Hence, under settled doctrine of international law, rights of exploitation in the continental shelf off the United States unquestionably exist.

To whom, then, do these rights belong? Do they appertain to the Federal Government, or to the coastal States, or to both? This question was left open by the Executive Order accompanying the Truman Proclamation; for though the resources were placed under the control of the Secretary of the Interior, it was explicitly stated that

> "neither this Order nor the aforesaid proclamation shall be deemed to affect the determi-

> nation by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within *or* outside of the three-mile limit." Exec. Order 9633, 3 C.F.R. 437 (1943-48 Compil.).

Nor does international law answer the question; international law recognizes the rights on behalf of the United States considered externally, but cannot and does not determine whether those rights are allocated to the States or to the Federal Government by our constitutional system.

Under that system, it is submitted, these rights of exploitation belong to the Atlantic coastal States. In light of the Ninth and Tenth Amendments, and more basically in view of the nature of the American federal system, the Federal Government is a government of limited powers. It has only such powers, sovereignty and territory as have been granted to it by the States; all residual powers, sovereignty and territory are retained by the States. New rights in the continental shelf were, by hypothesis, acquired under international law after 1945. As argued earlier, these rights cannot be viewed as falling within the powers of the Federal Government to provide for defense and to conduct foreign affairs; and no other basis for federal ownership exists.

The United States will doubtless argue that continental-shelf rights were acquired by it for its own use, just as, for example, the Louisiana and California territories were acquired. There is, we submit, a profound difference. Continental-shelf rights were not acquired as new territory which bore no relation except that of geographical contiguity to the existing States. To the contrary, these rights were acquired through a development or crystalization of international law which recognized that the continental

shelf appertains inherently and naturally to the adjacent coastal area:

> "[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

The Truman Proclamation itself recognized the unique nature of the acquisition of continental-shelf rights by not even purporting to acquire them on behalf of the Federal Government as against the States, but rather leaving that question open for determination by operation of law.

Under our constitutional system it is the States which are the residual sovereigns of their territory. Moreover, so far as the Atlantic States are concerned they are the residual owners of the soil as well. None of the Atlantic States, of course, ever ceded its public lands within its boundaries to the United States; and it is undisputed that those States remain the owners of all property within their boundaries that has not been granted or deeded out either by them or by their predecessor sovereigns. The United States has not title to land within any of the Atlantic States except so far as it has acquired it from them with their consent; as to such land the title of the United States derives from and depends upon the original title of the state or its predecessor, just like the title of any other property owner.

It follows from these undoubted facts, we think, that it is the defendant States which—not as a matter of international law, but as a matter of analysis under our federal system—possess the sovereignty and dominion over

their land areas to which international law holds that the continental shelf appertains as "a natural prolongation." It follows, we submit, that it is the Atlantic States and not the Federal Government which possess exclusive rights of exploitation of the continental shelf, even on the assumption that those rights came into existence at the time of the Truman Proclamation or thereafter.

This argument is especially compelling when it is recognized that in fact such rights of exploitation plainly existed in the 17th and 18th centuries. Even if, as the United States contends, the United States allowed them to lapse or renounced them after formation of the Union, it cannot equitably be the beneficiary of its own inaction by now acquiring these rights for itself when they are again recognized as the subject of exclusive ownership.

The argument just made, in our submission, entitles the Common Counsel States to the exclusive right to exploit the resources of any portion of their continental shelf which is held to be outside their historic boundaries but is within the limits of the shelf as finally determined by the United States in the exercise of the foreign-affairs power.

* * *

The argument just made has consumed few pages in relation to the rest of our Brief, and it comes almost at the end of it. For these reasons it risks being lost in the shuffle, as a makeweight or an afterthought. That, we submit, would be unfortunate. We are persuaded that the argument is wholly sound. It can be stated briefly because the concept is simple and because there are no specific precedents or analogies, at least none that we have thought of, either for it or against it, which require lengthy analysis.[78]

[78] The closest analogy to the extension of territory by recognition of continental-shelf rights is the extension of a land territory by accretion or alluvion. Plaintiff will surely not deny that such extensions in this country accrue to the States, not to the Federal Government; a wealth

We submit, nonetheless, that as a constitutional matter, assuming a *tabula rasa* of continental-shelf titles or claims prior to 1945, the States' better right is clear and decisive.

Plaintiff has, by its own admission and indeed assertion, no claim whatever antedating 1945. The States have very substantial and deeply rooted historic claims. Even if, *arguendo,* the States' claims are found somehow to fall short of establishing a vested title, they are surely better than plaintiff's claim, which has no historic basic whatsoever.

Historic claims aside, the argument made in this section goes to the simple foundation of our entire constitutional system: that the Federal Government is a government of limited, delegated powers, and that all inherent and residual sovereignty and dominion rest with the separate States. If there is a single proposition that underlies our Constitution, our basis of government, our historic accommodation of unity and diversity, the pledge offered and accepted upon which whatever we have achieved as a ation has been founded, it is that.

If that underlying principle is now to be repudiated in law, as having somehow been rendered inoperative by the march of centralized power, then this nation and this government have renounced their roots, and are no better,

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of authority can be adduced for that proposition if it should be challenged. Professor Seidl-Hohenveldern, an eminent German publicist, used the alluvion analogy in arguing that in the German federal system continental-shelf rights accrue to the states. Annuaire Français de Droit International 723-24 (1964). *Accord,* Bohmert, Natur und Umfang der Bundesrepublik Deutschland am Kontinentalschelf Zustehender Rechte, im Internationales Recht und Diplomatie 128 (1967); Willeke, Der Festlandsockel Seine Volker und Verfassungsrechtliche Problematik in Deutsches Verwaltungsblatt 463 (1966). German law has accepted state ownership, and licensees of the states enjoy exclusive exploitation rights.

and have no better hope, than any squalid little dictatorship carried to power yesterday or last week on the ruins of whatever ephemeral system may have preceded it. That sort of usurpation accords ill with the genius that has made Anglo-American law the force for enlightened stability, for a sophisticated balance between the wisdom of the past and the needs of the present and the future, which has rendered it uniquely respected and envied throughout the world.

Under our constitutional system, if it still has any vitality in the courts, the separate States are the residual sovereigns of their coastlines and the owners in property thereof and of whatever seabed and subsoil rights depend thereon or are appurtenant or accrue thereto. The rights in dispute herein, never having been delegated, are plainly in that category. Therefore they belong to the States.

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION.

Even if every argument made hitherto is rejected, it is submitted that the Atlantic States should be allowed to establish ownership out to three leagues by proving historic boundaries on the same basis as the Gulf States, in order to avoid unconstitutionality of the Submerged Lands Act as discriminating among the States without rational basis.

All States have a right to be treated equally by the Federal Government in respect of their sovereignty and political rights. Though this doctrine of "equal footing" or "equal status" is not stated in so many words in the Constitution, that "equality of Constitutional right and power is the condition of all States of the Union, old and new" is well-established by judicial decision. *Escanaba Co. v. Chicago,* 107 U.S. 678, 689 (1882). As emphasized in *Coyle v. Smith,* 221 U.S. 559, 567 (1911):

> " 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

If equal status must be given all new States of the Union, it would be absurd to deny it to the original thirteen States.

The equal-footing doctrine has been said to apply to "political rights" rather than "property." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). Possibly it might have been lawful for Congress simply to make a gift of a greater portion of the continental shelf to Texas and Louisiana than to all other states. But that is not what Congress did; rather, Congress gave to the Gulf States, but not to the others, the political or legal right to establish the existence of historic boundaries extending beyond three miles as entitling them to exclusive continental-shelf rights. The Act allows to the Gulf States, but denies to all other coastal States, the right to qualify under the three-league provision. Section 2(b), 43 U.S.C. §1301(b) (1971). This is a "political" right and is embraced by the equal-footing doctrine. It is surely a sovereign or political right of the Atlantic States to be able to show that they qualify for the possession of rights of exploitation when the Gulf States are afforded the opportunity so to qualify.

No rational basis exists for the distinction drawn by the Act. Although Congress could perhaps treat States unequally if some States had a substantially different

historical background from all the others, it cannot do so when that difference is lacking—even though there was a misapprehension of the facts by Congress. *A fortiori* no rational basis can be found for statutory discrimination which allows *all* States to demonstrate that they possess a seaward boundary greater than three miles but permits only *some* States to enjoy rights of exploitation in consequence of any such demonstrated boundary. The three-league provision is thus underinclusive. It therefore violates the constitutional right of the Atlantic States to equal status.

It might be objected that the distinction drawn by Congress was reasonable because it was based on "the shallowness of waters in the Gulf and the alleged Spanish custom of claiming three leagues of territorial waters," *United States v. Louisiana,* 363 U.S. 1, 32 (1960), or on the "fact that the Gulf is very largely enclosed by land," *id.* at 32 n. 53. But even if the legislative history unequivocally supported such a view of why Congress allowed only the Gulf States to qualify, which it does not, it hardly endows the distinction with a rationality it has otherwise been shown to lack. Since the United States has claimed continental-shelf rights to a depth of at least 200 meters, it is hard to see what relevant difference obtains if the depth at which the rights of a State cease is ten meters, or 50, or 199; the "shallowness" of the Gulf is thus not in point. It is even more difficult to perceive why the fact that the Gulf is largely enclosed by land is germane, when the distance across it is still some hundreds of miles. And it is clear that the Gulf has never been regarded as an historic bay or something of that sort, which the United States could claim as internal waters or within which it could assert some other type of special status. 1 Hackworth, *Digest of International Law* 694 (1940). The reference to "Spanish custom" simply underscores congressional ignorance of the strength of the English-law claims of the Atlantic States; it is wholly inadequate to make rational the divergent treatment of the Atlantic and Gulf States.

It may also be contended that the equal-treatment claim has been resolved adversely to the Atlantic States by *Alabama v. Texas,* 347 U.S. 272 (1954). To this there are several responses. First, the Supreme Court did not pass on the merits of any of the claims advanced in that case; it merely refused to allow the protesting States to file a complaint. Second, the Court in *Alabama v. Texas* did not pass on the precise claim being made here. Though equal-treatment arguments of a sort may have been made in that case, if so they were submerged in a welter of contentions which had little or nothing to do with equal treatment. The general posture of *Alabama v. Texas* was in any event quite different; there the equal-treatment claim was aimed at depriving the Gulf States of land beyond three miles, while in this instance the claim seeks to provide an equal opportunity for the Atlantic States to obtain submerged lands in the belt between three miles and three leagues. Third, if *Alabama v. Texas* did resolve the present equal-status claim, that case was wrongly decided. This Court is free to correct prior errors of law, particularly when the statutory distinction was made in ignorance of the historic claims of the Atlantic States. Consequently, *Alabama v. Texas* cannot foreclose a decision in this case that the distinction drawn between the Gulf and Atlantic States was without rational foundation and therefore unconstitutional.

There remains for consideration the question of remedy. As Justice Harlan pointed out in *Welsh v. United States,* 398 U.S. 333, 361 (1970) (concurring in the result), where "a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Cf. Schacht v. United States,* 398 U.S. 58 (1970); *Skinner v. Oklahoma,* 316 U.S. 535, 543 (1942); *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239,

247 (1931). The issue here is thus whether the rights acquired by Texas and Florida should be extinguished, or whether all coastal States, not merely the Gulf States, should be given the opportunity to qualify under the three-league provision.

The broad severability clause of the Submerged Lands Act should be taken to grant the Court wide discretion to fashion relief consonant with the underlying policy of the underinclusive provision. Section 11 of the Act, 67 Stat. 33 (1953), contains, in addition to the language usual for such a clause, a clause emphasizing the intention of Congress to hold valid the basic granting provisions of the Act, *i.e.*, Sections 3(a), 3(b) and 3(c), should some provision included within them be held invalid. Although the absence of such a severability clause would not preclude the result we seek, see *United States v. Jackson,* 390 U.S. 570, 585 n. 27 (1968), its existence "discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained." *Champlin Refining Co. v. Comm'r,* 286 U.S. 210, 235 (1932). See also *Welsh v. United States,* 398 U.S. 333, 364-65 (1970) (Harlan, J., concurring in the result).

In this case, the better alternative is to leave the Texas and Florida three-league limit untouched and to allow the Atlantic States the opportunity to qualify under the three-league provision. As pointed out in Justice Harlan's opinion in *Welsh,* the relevant criteria are (1) the "intensity of commitment to the residual policy" and (2) the "degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." 398 U.S. at 365. In regard to the former, it is necessary to recall that Congress inserted the three-league provision for the Gulf States because it believed that owing to their history they might have some claim to the seabed beyond three miles.

The policy behind this provision was that any State having some special preadmission history that would entitle it to rights of exploitation beyond three miles ought to have the opportunity of perfecting those rights. While Congress was wrong in thinking that only the Gulf States might have such an historic claim, this misapprehension should not deter the Court from giving force to the residual policy of the three-league provision. The intensity of congressional commitment to this policy is evidenced by the special clause it inserted into the severability provisions of Section 11 whereby the basic granting clauses of the Act should to the greatest extent possible be upheld.

So far as Justice Harlan's second criterion is concerned, it is to be observed that abandoning the three-league provision altogether would not merely "disrupt" but would destroy the statutory scheme. Were that provision abrogated, Texas and Florida would be divested of the rights they acquired under the statute, in opposition to the directive contained in the severability clause. Moreover, all leases and other proprietary or contractual arrangements made by Texas and Florida with respect to submerged lands beyond the three-mile limit would lose their validity, thus creating uncertainty and confusion on the part of those who have rights under those arrangements. For all these reasons, the unconstitutional discrimination is best corrected by affording the Atlantic States the opportunity to qualify under the three-league provision.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to find that the Common Counsel States are entitled as against the United States to explore and to exploit the resources of the seabed and subsoil underlying the Atlantic Ocean adjacent to their coasts beyond three geographic miles therefrom.

Respectfully submitted,

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APPENDIX

BRITISH AND COMMONWEALTH LAW SINCE 1800

Post-1776 British law is, of course, not part of our law. If British law changed since 1776 in a fashion inimical to the Common Counsel States' contentions here, that would be irrelevant unless plaintiff could demonstrate that the same change occurred in our law as well. In fact, however, British law since 1776 has been generally faithful to the common law of maritime sovereignty and dominion as it existed prior to that date. An excellent summary of the subject is found at App. 963-87.

Our review of 18th-century British law (pp. 124-39, *supra*) has carried the history down to 1800; this Appendix will very briefly cover the period since then.

A. THE CROWN'S OWNERSHIP OF THE SEABED AND SUBSOIL OF BRITISH WATERS HAS CONTINUED UNCHANGED AND HAS BEEN APPLIED TO THE CONTINENTAL SHELF.

From 1800 to 1876, the British courts uniformly continued to apply the traditional law that the crown owns in property the seabed and subsoil of the marginal sea. For this point the Common Counsel States incorporate by reference App. 966-71 and pp. 129-30 of U.S. Exhibit 17, where most of the relevant case law is quoted and summarized. These cases relied without question on Hale and the other older authorities with respect to the English law of maritime sovereignty and dominion. None of these cases required a determination as to the outer limit of that sovereignty and dominion, and none of them mentioned the three-mile limit or the cannon-shot rule except for the *Whitstable* case, App. 970-71, which mentioned three miles but did not hold that the crown's ownership ended at that limit. In the *Gammell* case, App. 970, which dealt with surface fisheries, the

court held that the three-mile limit applied to such fisheries.

In *Attorney General v. Tomsett,* 2 Crompt. M. & R. 170, 5 Tyrwh. 514, 1 Gale 147 (1835), the question was raised in the Exchequer Court whether certain goods unshipped in the sea were unshipped within the United Kingdom as the term was used in a statute. The crown lawyers contended that they were, since "the narrow seas have always been considered as wholly within the kingdom of England." 2 Cromp. M. & R. at 172. Counsel for the defendant "submitted that the narrow seas are not part of the kingdom of England," whereupon Baron Alderson interjected that "the authority of Lord Hale is to the contrary: he says they are within the kingdom." *Id.* at 173. Defendant's counsel thereupon qualified his contention: "no doubt they are part of the dominions of the king of England, and so are the colonies; but it is submitted they are not within the kingdom of England. If they were, they would be within some county, but that is not pretended." *Ibid.* The court found resolution of the question unnecessary to decide the case.

For additional materials on the famous *Cornwall Mines* case, in which it was squarely held that the crown owned the mines and minerals lying below low-water mark under the open sea as part of the soil and territorial possessions of the crown, as against a claim by the Duke of Cornwall as first occupier, see App. 73; Exhibits 166, 167, 168, 169.

In *Officers of State v. Smith,* 8 Sess. Cas. (2d ser.) 711, 723 (1846), *aff'd sub nom. Smith v. Earl of Stair,* 6 Bell's App. Cases (House of Lords, 1849), Lord Cockburn declared:

> "I know nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas

belongs in property to the British Crown." U.S. Exhibit 17, p. 130.

In *Duchess of Sutherland v. Watson*, 6 Sess. Cas. (3d ser.) 199, 213 (1868), Lord Neaves said:

> "Coming to the question that we have here at issue, I think, in the first place, that the *solum* or *fundus* of the deep sea—that is, not only the part between highwater and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and does so as a patrimonial right. That it does so belong to the Crown, at least within narrow limits near the shore, such as are here in question, is clear; and that would be clearly seen if a question were raised as to any minerals which might extend under the sea, and which might be worked outwards from the shore to a point under the deep sea. I think that that right is a patrimonial one. It is not a right held by the Crown in trust for the public. There are rights held by the public that are burdens upon it so far. There is the public right of navigation; and there may or may not be rights of fishing in the public—rights to catch fish that float in the public *fundus* or *solum*. These may be public rights, but the right of property in the *solum* of the sea I consider to be a clear patrimonial right of the Crown. And that right may be granted to one of the lieges subject always to those rights of navigation of which I have spoken, and it may be constituted by explicit infeftment, so as to make it a feudal estate."

The British treatise writers between 1800 and 1876 likewise affirmed the sovereignty and dominion of the crown in the British seas, and its ownership in property of

the seabed and subsoil thereof. These writers included Schultes, Chitty, Hall, Woolrych and Jerwood. See App. 687-92, 855-62, 889-90, 974-77; Woolrych, *A Treatise on the Law of Waters* 4-5, 19-21 (1830); Jerwood, *A Dissertation on the Rights to the Sea Shores* 1-128 (1850). None of these writers believed that the crown's sovereignty and dominion were confined within a three-mile or cannon-shot limit. In general they adhered to the boundaries of the British seas as traditionally defined, and quoted Hale and the other older writers with approval. Schultes adopted Bodin's 60-mile limit, and mentioned pearls, coral and amber as among the subjects of maritime property. App. 889-90.

The case of *Queen v. Keyn*, in 1876, has many times been exhaustively analyzed. On this subject we incorporate as part of this brief Professor Horwitz's testimony at App. 48-89. Professor Horwitz has demonstrated that the holding of the case was limited to the thesis that the admiralty jurisdiction did not extend to foreigners in the English seas without a specific parliamentary enactment to that effect. App. 80. That holding was based on an erroneous analysis of the history of the admiralty jurisdiction. App. 53-58; see pp. 25-31, 92-98, 132-33, *supra*. All the judges acknowledged the existence of various crown rights in the marginal sea, and the majority of them believed that the marginal sea was part of the territory of England. App. 58-74, 80-81. The holding as to the admiralty jurisdiction was promptly overruled by Parliament, which pointedly declared that the jurisdiction "extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom and of all other parts of her majesty's dominions to such a distance as is necessary for the defense and security of such dominions." App. 75-76, 646-47. (Emphasis added.)

In *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891), the Supreme Court of the United States regarded

the *Keyn* decision as dealing only with the admiralty jurisdiction, and refused to apply it as in any way casting doubt on sovereign jurisdiction in territorial waters or on the right of coastal States to control sea fisheries. For other authoritative comments on the *Keyn* case, see App. 138-40, 890-92, 977-87; U.S. Exhibit 7, pp. 109-11.

In decisions rendered since 1876, the British courts have, likewise, uniformly refused to allow the *Keyn* dicta to cast any doubt on the traditional law, and have uniformly reaffirmed the maritime sovereignty and dominion of the crown in the marginal sea. The case law has been exhaustively analyzed, and there is no need to discuss it in detail here. See App. 77-80, 963-65, 971-73, 983-85; Exhibits 162, 163, 164, 165; Exhibit 747, pp. 141-142. These decisions, written between 1892 and 1916 — during the heyday of the three-mile limit, especially in British opinion — did not regard the crown's ownership of the seabed as necessarily limited to three miles. Rather, they used such formulas as "for some distance below low-water mark" (App. 972), or "whether within the narrow seas, or from the coast outward to the three-mile limit" *(ibid.)*, or carefully pointed out that the status of the sea beyond three miles was not at issue and therefore need not be decided, Exhibit 165, p. 199.[79]

In the most recent of these cases, *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916), the Privy Council relied on Hale in holding that islands rising in the sea belong to the crown because " 'they are part of that soil of the sea, that belonged before [*i.e.*, while under water] in point of propriety to the king.' " The Privy Council had this to say about the *Keyn* case:

[79] In cross-examining Professor Horwitz, plaintiff's counsel incorrectly suggested that one case, Lord Advocate v. Clyde Navigation Trustees, concerned Loch Lomand, which is an inland lake. In fact the case concerned Loch Long, which is an arm of the sea and a part of the Firth of Clyde. Exhibit 162. The decision did, however, treat Loch Long as internal waters and limited its holding to such waters.

> "The doubt raised upon this proposition has been substantially rested on certain dicta pronounced in the case of *Reg. v. Keyn.* The Crown, admitted to be owner of the foreshore, is, so it was there suggested, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it was said, extend further seaward. It should not be forgotten that that case had reference on its merits solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.
>
> "When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound." *Id.* at 199.

Thus in *Chelikani* the Privy Council, the highest court in Britain with respect to the colonies and dominions, squarely repudiated the dicta in *Keyn* and affirmed the traditional doctrine of crown ownership of the seabed.

In *Croft v. Dunphy*, (1933) A.C. 156, 162, the Privy Council upheld a statute authorizing seizures of ships in Canadian waters out to 12 miles from the coast. The court declared that "it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

In *Carr v. Francis Times & Co.*, (1902) A.C. 176, 181, it was declared:

> "For whatever purpose Queen v. Keyn was quoted, this, I think, is manifest: speaking of it as an authoritative judgment, I cannot forbear from saying that, somewhat unusually, the Legislature of this country in the next session but one passed an Act of Parliament reversing that judgment—that is to say, affirming in the strongest terms that the decision which had been arrived at by the majority (a very narrow majority) in that case was one that was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that that is and always has been the law of this country." U.S. Exhibit 17, p. 110.

The legal rule that the crown is *prima facie* the owner of the foreshore, which as we have seen derived from the crown's ownership of the seabed, and which Professor Thorne regarded as accepted only in a few cases of dubious authority in the 17th century, has remained in full force and effect, without a break, down to the present. Moore, *op. cit.* at 436-613. Likewise, the crown continued to regulate sedentary fisheries in the sea and, on occasion, to grant or to lease them to subjects. App. 685-87; Exhibit 728, p. xlix; Exhibit 729, p. 181. And British law continues to recognize the exclusive right to surface fisheries in the sea or arms thereof granted in earlier ages by the crown. *Lord Fitzhardinge v. Purcell*, (1908) 2 Ch. 139.

By the Continental Shelf Act, 1964, c. 29, s.1.(1), Parliament enacted that "any rights exercisable by the United Kingdom outside territorial waters with respect to the seabed and subsoil and their natural resources . . . are hereby vested in Her Majesty."

Two conclusions are inescapable: (1) English law has always, without exception and without any break except for temporary doubts raised by the dicta in *Keyn*, regarded the seabed and subsoil of the marginal seas around England as belonging to the crown in property; (2) English law has never limited those property rights to three miles from the shore.

B. VIS-A-VIS FOREIGN NATIONS, BRITISH ADHERENCE TO THE THREE-MILE LIMIT HAS NOT BEEN CONSISTENT AND HAS NOT BEEN GENERALLY APPLIED TO THE SEABED AND SUBSOIL.

In 1800, in the case of the *Twee Gebroeders*, the British prize court referred to the three-mile belt as "lying within the limits to which neutral immunity is usually conceded." Exhibit 747, p. 144. The prize courts have not held that the three-mile limit is a maximum limit even for neutrality purposes; neither have they ruled on the extent of territorial waters as such.

At various times during the 19th century the king's chambers, which of course were far more extensive than any three-mile limit, were regarded as still in effect for neutrality purposes, and were deemed to apply also for purposes of "exclusive property and jurisdiction." 1 Phillimore, *International Law* 213 (1854).

Diplomatically, the British position throughout the 19th and 20th centuries has usually (though not invariably) been to insist on the three-mile limit with respect to claims of various types by other nations relating to surface waters; but Britain has taken great care at most times not to commit itself to a three-mile maximum in its own waters.

In the first decade of the 19th century, the British refused to renounce their alleged right to impress foreign seamen

found within the British seas as historically defined. Exhibits 713, 763; U.S. Exhibit 379, p. 369.

Throughout the period Britain has maintained its traditional customs jurisdiction over maritime expanses far beyond the three-mile limit, extending at times as much as 100 leagues from the coast. Masterson, *Jurisdiction in Marginal Seas* 67-173 (1929).

In negotiations with the United States in 1814-15, Britain, while eventually agreeing to an exclusive-fisheries treaty limit of three miles in Canadian waters, did so only after prolonged hesitation, and carefully avoided committing itself to a three-mile limit as a matter of general law. 1 *British and Foreign State Papers* Part II, p. 1580; 7 *British and Foreign State Papers* 93 *ff.*

In the 1820's, Britain was successful in persuading the Netherlands government to prohibit Dutch fishermen from coming within two leagues of the Scottish coasts; in practice the Dutch have generally remained more than 12 or 14 miles from shore. Fulton, *op. cit.* at 604-06; Crocker, *op. cit.* at 606.

In the 1830's it was widely believed in Britain that a three-league limit of exclusive fisheries was in force; however, in a convention with France in 1839 Britain adopted the three-mile limit for exclusive-fisheries purposes in return for similar privileges on the French coast. This three-mile treaty limit was not applied to the French sedentary fisheries, as to which a wider exclusive right of the coastal state was recognized. Fulton, *op. cit.* at 611-12.

The Territorial Waters Jurisdiction Act of 1878, overruling the *Keyn* decision with respect to the admiralty jurisdiction, specified a three-mile limit for that jurisdiction. As Lord Cairns pointed out, that statutory definition was not regarded as an abandonment of wider claims: "we have never limited our claim to three miles from the coast.

The argument . . . is quite sound, that the improvement in modern artillery and other circumstances may entitle a country to protect and exercise rights over a larger margin of the high seas . . . . So far as concerned the procedure introduced by the [Territorial Waters Jurisdiction] Act, the power taken was limited to the three-mile line, but this in no way abandoned the larger claim . . . ." Exhibit 747, p. 205; Riesenfeld, *Protection of Coastal Fisheries Under International Law* 149 (1942). Lord Salisbury, when Foreign Minister, likewise declared that "great care had been taken not to name three miles as the territorial limit." Fulton, *op. cit.* at 731; see also Riesenfeld, *op. cit.* at 151.

The Fisheries Act of 1889, 52 and 53 Vict. c.23, provided for a closed season for herring trawling within the Moray Firth off Scotland, drawing a closing line of 80 miles between the two headlands. A subsequent act asserted jurisdiction over trawling in Scottish waters generally out to 13 miles. Riesenfeld, *op. cit.* at 156. Under these statutes foreigners were apprehended, tried and convicted for violating British fishing regulations far more than three miles out in Scottish waters, and the convictions were upheld. *Poll v. Lord Advocate*, (1897) 5 Scots L.T. 167, 3 British Int'l Law Cases 747 (1965); *Peters v. Olsen*, (1905) 4 Adam's Justiciary Reports 608, 3 British Int'l Law Cases 750; *Mortensen v. Peters*, (1906) 8 F. 93, 3 British Int'l Law Cases 754; Riesenfeld, *op. cit.* at 153-61; Crocker, *op. cit.* at 587-90; Fulton, *op. cit.* at 717-37. While the British government subsequently restored some of the fines imposed and released the prisoners, it did so only on extracting an agreement from the Norwegian government to prevent Norwegian trawling in the Moray Firth. Riesenfeld, *op. cit.* at 158-59.

Likewise, with respect to sedentary fisheries and other resources of the seabed and subsoil, British adherence to the three-mile limit has been subject to many exceptions and limitations. Only two of these need be mentioned. With

respect to the pearl fisheries of Ceylon, Britain has insisted on exclusive jurisdiction far beyond the three-mile limit. Since those fisheries have been exploited for many centuries, of course Britain has cited their historic character as one basis for the exclusive right. App. 182-87. Likewise, pursuant to the Irish Oyster Fisheries Act of 1856, 31 and 32 Vict. c. 45, § 67, and subsequent legislation, Parliament empowered the Irish Fishery Commissioners to regulate the dredging for oysters within 20 miles of the Irish coast, "and all such byelaws shall apply equally to all boats and persons on whom they may be binding." Exhibit 729, p. 295; Fulton, *op. cit.* at 716-17; Tr. 570-72.

In 1928, responding to the Preparatory Committee for the Conference for the Codification of International Law, the British government, while adhering to the three-mile rule as to the surface of territorial waters, continued as follows:

> "No claim is made by His Majesty's Government in Great Britain to exercise rights over the high seas outside the belt of territorial waters.
>
> "There are certain banks outside the three-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or *bêches-de-mer* on the sea bottom are practiced, and which have by long usage come to be regarded as the subject of occupation and property. The foregoing answer is not intended to exclude claims to the sedentary fisheries on these banks. The question is understood to relate only to claims to exercise rights over the waters of the high seas." Riesenfeld, *op. cit.* at 166.

While the British of course attempted to justify their exclusive sedentary fisheries beyond three miles on the

ground of "long usage," they carefully specified that they were refraining from expressing an opinion adverse to seabed claims generally, and that their insistence on the three-mile limit related "only to claims to exercise rights over the waters of the high seas."

Australia responded to the Preparatory Committee as follows:

> "They make no claim to exercise rights over the high seas outside the belt of territorial waters. This answer is made on the understanding that the question relates only to claims to exercise sovereign rights over the waters of the high seas, and does not relate to claims to exercise jurisdiction over sedentary fisheries for pearl oysters and *bêches-de-mer*, etc., on certain portions of the sea bottom outside the three-mile limit which, by long usage, have come to be regarded as the subject of occupation and property." Riesenfeld, *op. cit.* at 167.

While Australia likewise justified its claims on the basis of "long usage," that term could not with respect to Australia have been used in the sense of any ancient or immemorial occupation, since the Australian sedentary fisheries dated only from the late 19th century. App. 194. The Australian Pearl Fisheries Act of 1953 excluded foreign fishermen from the Arafura Sea and adjacent proclaimed waters. 4 Whiteman, *Digest of International Law* 804 (1965).

In 1942, three years before the Truman Proclamation, Britain and Venezuela by treaty divided between them the seabed and subsoil of the continental shelf, outside territorial waters, of the Gulf of Paria, and Britain unilaterally proclaimed that its portion of the seabed and subsoil "shall be annexed to and form part of His Majesty's dominions." 2 Whiteman, *op. cit.* at 1162-63 (1963); 4 *id.* at 789-92 (1965).

By the Continental Shelf Act of 1964, c. 29, Parliament asserted the exclusive right to explore and to exploit the resources of the seabed and subsoil of the continental shelf of the United Kingdom.

C. THE CANADIAN AND AUSTRALIAN CASES TURNED ON THE ALLOCATION OF POWERS IN LATE 19TH-CENTURY BRITISH CONSTITUTIONAL LAW BETWEEN THE IMPERIAL CROWN AND UNCHARTERED IMPERIAL PROVINCES, AND THUS HAVE NO RELEVANCE TO THE ISSUES IN THE PRESENT LITIGATION.

1. The Canadian Advisory Opinion

For an analysis of the Canadian advisory opinion, *Re Off-Shore Mineral Rights of British Columbia*, we adopt and incorporate by reference herein Professor Horwitz' testimony at App. 85-89. The case turned on the particular history of British Columbia — a 19th-century, unchartered British administrative unit — and thus has no application or relevance to the historic rights of the Common Counsel States.

The advisory opinion has not been accepted by the Atlantic provinces of Canada as extinguishing their ownership of seabed and subsoil rights; and the Canadian federal government has not attempted to extinguish those rights, though the prime minister has opined that the principles of the advisory opinion are applicable to the east coast. The Atlantic provinces have asserted seabed and subsoil ownership and have, since the date of the advisory opinion, granted both exploration permits and licenses for exploitation of continental-shelf mineral resources. Exhibit 827.

That the Atlantic provinces' position is well founded is strongly suggested by the decision of the Quebec King's Bench in *Re Quebec Fisheries*, 35 D.L.R. 1 (1917), which held that the province of Quebec owned the soil of both its

internal waters and its territorial sea, and in consequence had the right to grant exclusive fisheries in the waters thereof. The Privy Council had previously reached a contrary result with respect to British Columbia, holding that the fisheries of that province were the property of the dominion government because of British Columbia's particular history. *Id.* at 4-6. The dominion government then contended, just as the prime minister has recently asserted with respect to continental-shelf rights, that the principles held applicable to British Columbia should be applied to other provinces as well. *Id.* at 13.

But in the *Quebec* case, it was squarely held that the crown's ownership of the *solum* of internal waters and of the territorial sea and the fisheries of the waters thereof had passed to the province of Quebec prior to the creation of the dominion government in 1867, and had never been transferred.[80] The court refused to apply the *Keyn* dicta:

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[80] This was the view of three of the five judges. Cross, J., dissented; Archambeault, C.J., declined to express an opinion on the territorial-sea issue on the ground that the Privy Council had previously regarded it as "a question of international law upon which the national or municipal Courts should not express an opinion," at least where the imperial government had not been made a party. *Id.* at 8. Subsequently the Privy Council made the same holding in the *Quebec* case. Attorney General for Canada v. Attorney General for Quebec, (1921) 1 A.C. 413, 431. This in no way impeaches the authority of the *Quebec* case for our purposes: (1) today there is no doubt about the relevant international law; (2) the United States is a party here; (3) our courts have never been subject to the doctrine of judicial restraint applied by the Privy Council with respect to international-law questions.

The Privy Council also held that Quebec did not have the right to grant exclusive surface fisheries, on the ground of the public right to such fisheries since Magna Carta. (See p. 40, *supra.*) *Id.* at 428. But the Council affirmed the Quebec court's holding that the soil under tidal waters was vested in the province and therefore that the province had the right to grant exclusive fisheries requiring the affixing of "engines" to that soil. *Id.* at 428, 431-32.

"The Crown is owner of the soil and, consequently, the fisheries there belong to the province. Nevertheless a serious problem arises with reference to the area within the 3-mile limit. Although there is a controversy with regard to ownership by the Crown, it seems to me more logical to conclude in the affirmative, at least with reference to the profits of the fisheries. The weight of the authorities seems to me to be in that sense, notwithstanding the judgment in the case of (*Reg. v. Keyn* (1876) 2 Ex. D. 63) where the Judges were, nevertheless, divided. (Vol. 28, Hals. Laws of England, vo. Waters and Watercourses, p. 360, No. 653 and notes).

"The doctrine is there summed up as follows: The soil of the sea between the low-water mark and *so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown*, is claimed as the property of the Crown although outside the realm. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up the same as the tide flows, is *prima facie* the property of the Crown. The Crown also claims to be entitled to the mines and minerals under the soil of the sea within these limits." *Id.* at 19.

"Moreover, shortly after the judgment in *Reg. v. Keyn*, the Imperial parliament passed a declaratory Act, called 'The Territorial Jurisdiction Act.' 1878, 41-42 Vict., ch. 3, completely destroying the effect of that judgment." *Id.* at 20.

"The question is, moreover, of no importance even according to those who maintain that it is merely a matter of jurisdiction and not of proprietary right with regard to the soil; *there is*

no controversy respecting the ownership of the fisheries. Even in England, where the King cannot exclude his subjects from that fishing, aliens are nevertheless excluded. (14 Hals. Laws of England, p. 633, No. 1411 and note)." *Ibid.*

"That question of the 3-mile limit must, like the others, be decided in the affirmative [*i.e.*, in favor of the province]. It in nowise affects the rights of the federal government with respect to trade and navigation, nor respecting the regulation of the fisheries, even if we agree to decide for the case now before us, whether the fisheries in those territorial seas belong to the province as a domain which can be exploited to its own profit. Whatever alternative may be chosen, it seems to be that it must be said that they belong to it according to the spirit at least of the Confederation Act interpreted by the judgment of 1898, which says that the Dominion has no rights of ownership in the fisheries except in such as may be carried on in public harbours. This conclusion, naturally, does not exclude the Dominion's jurisdiction for all purposes within its competence. It seems to me, therefore, that it may be legitimately concluded that all existing rights in the fisheries, even within the three-mile limit, belonged to the province before Confederation and that the B.N.A. [British North America] Act has not had the effect of taking them away from it." *Id.* at 21.

If and when the continental-shelf question is determined by the Canadian courts, it would appear that the federal government will have considerable difficulty, in light of the *Quebec* decision, in achieving the application of the advisory opinion to the Atlantic provinces without a critical

examination of the historic rights of those provinces. Moreover, the *Quebec* reasoning is a square precedent in favor of the position herein of the Common Counsel States, which like Quebec owned their marginal sea and seabed before their federal government was created and have never transferred or renounced them.[81]

The issue in the *Quebec* case concerned only internal waters and the three-mile belt. Interestingly, the court found no need to examine whether international law had recognized such a belt prior to the formation of the dominion government. The court's theory was that, since sea and seabed ownership was fully established in municipal law prior to that date, the province's ownership extended out as far as was allowed by international law at any particular time. Present, not past, international law was the only limiting factor. It seems plain that this reasoning would today vest continental-shelf rights beyond three miles in the provinces, and in the Common Counsel States, even if it were believed that such rights first arose by a recent change in international law.

If and when the continental-shelf rights of the Canadian Atlantic provinces are litigated, the provinces will also be able to derive substantial support from the opinion of Currie, J., in *Re Dominion Coal Co.*, 40 D.L.R. (2d) 593, 606 (1963) (Nova Scotia Supreme Court). The case involved the right of the municipality of Cape Breton County to tax

[81]The British North America Act of 1867, which created the dominion government, preserved the pre-existing boundaries of the Atlantic provinces, just as the Constitution of the United States preserved the boundaries of the States. The act also (§109) preserved to the Atlantic provinces "all lands, mines, minerals and royalties" belonging to them. In Attorney General for Canada v. Attorneys General for Provinces, (1898) A.C. 700, the Privy Council held that by that section the provinces preserved their proprietary rights with respect to fisheries and submerged lands, except for certain rights expressly transferred by other sections to the dominion government.

subsea coal mines. A majority of the court found it unnecessary to reach the question whether the mines in question were within the boundaries and dominion of the province of Nova Scotia; but Currie, J., did reach those questions and, rejecting the *Keyn* dicta, held as follows:

> "In my opinion the law is as stated in the more recent *Chelikani* case, which decides that the Crown owns the territorial waters and the subjacent land, the proprietary rights of which may be vindicated like other rights of property." *Id.* at 617.
>
> "Before leaving *The Queen v. Keyn*, mention may be made of the *Territorial Waters Jurisdiction Act* passed by the Parliament of Great Britain, 1878 (U.K.), c. 73 the preamble of which would indicate that Parliament regarded the majority opinion as being in error that sovereignty of the Crown stops at low-water mark. The Act was passed to correct the unsatisfactory situation created by *The Queen v. Keyn*." *Ibid.*
>
> "I have come to the following further conclusions:
>
> "1. The Crown in the right of Great Britain, as expressed by many acts of Parliament, Crown grants, etc., exercised property rights and jurisdictional rights over the three-mile zone of the coast, territorial and inland waters. This, I think, was the common law. . . ." *Id.* at 619-20.
>
> "2. Prior to Confederation of Canada, Nova Scotia exercised jurisdiction over an area of territorial waters three miles in width measured from its coasts, bays and rivers. See particularly the 'hovering' Act, 1836, 6 Wm. IV, c. 8, approved by the King in Council, thus recognizing

that the control and administration of these waters reposed in the Province of Nova Scotia.

"3. By virtue of s. 109, *B.N.A. Act,* all property rights held by Nova Scotia before Confederation were retained: *Re Provincial Fisheries* (1896), 26 S.C.R. 444; (1898) A.C. 700. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the *B.N.A. Act. . . .*" *Id.* at 620.

"4. Since Confederation Nova Scotia has exercised exclusive jurisdiction and administration over the submarine coal areas of the Province, as is evidenced by the many statutes, leases, grants, etc." *Ibid.*

2. Bonser v. La Macchia

For an analysis of this case the Common Counsel States adopt and incorporate by reference herein Professor Horwitz's testimony at App. 83-85.

As there shown, *Bonser v. La Macchia* did not purport to resolve, and did not resolve, any questions concerning either the territorial boundaries of the Australian states in the marginal sea or the ownership of the seabed and subsoil of the marginal sea as between the Australian states and the federal government. The federal government has introduced legislation on the latter subject, but no such legislation has yet been enacted. Exhibit 823. On the question whether the territorial limits of the Australian states extend below low-water mark, *Bonser v. La Macchia* is wholly inconclusive: two judges (Kitto and Menzies) held in the affirmative, two (Barwick and Windeyer) held in the negative, and two (McTiernan and Owen) found it unnecessary to decide the question. The question of continental-shelf ownership was not addressed at all.

By agreement between the Australian federal government and the states, the states have exclusive management and licensing authority over all petroleum exploitation in the Australian continental shelf, both within and without territorial waters. Lumb, "The Off-Shore Petroleum Agreement and Legislation," 41 Australian Law Journal 453 (1968).

Both the territorial-limits issue and, aside from petroleum, the continental-shelf issue are still entirely open as a matter of Australian law. On May 31, 1973, the states of Tasmania and Queensland petitioned the Queen to refer the continental-shelf question to the Privy Council for decision. Exhibits 823, 824, 825. The other Australian states have joined in these petitions. Exhibit 826. The states have received large numbers of applications for mineral licenses with respect to portions of the continental shelf, but have refrained from acting on them pending resolution of the legal issue.

In 1964, in language strongly reminiscent of the Territorial Waters Jurisdiction Act of 1878, the Queensland legislature declared that its exclusive jurisdiction over subsea mining extends and applies, and shall be deemed always to have extended and applied, to the adjacent seabed and subsoil out to the 200-meter depth mark or beyond that limit as far as exploitation is possible. Mineral Resources (Adjacent Submarine Areas) Act of 1964.

* * *

It is notable that in the present proceeding plaintiff has placed its primary reliance on four decisions in four different common-law jurisdictions: *United States v. California, Queen v. Keyn, Re Offshore Mineral Rights* and *Bonser v. La Macchia.* Not one of these decisions, to the extent that it dealt with the subject at all, has been regarded as finally and correctly determining the ownership of seabed and subsoil rights. The result in *United States v. California*

was overruled by act of Congress and its reasoning was repudiated by subsequent decisions of the Supreme Court. The holding of *Queen v. Keyn,* which was with respect to the admiralty jurisdiction, was overruled by act of Parliament. Both Congress and Parliament went out of their way to declare in pointed language their opinion that the *California* and *Keyn* decisions, respectively, had been erroneous when decided. Subsequent British decisions have refused to apply the dicta in *Queen v. Keyn* as in any way altering or casting doubt on the traditional English law of maritime sovereignty and dominion. The Canadian advisory opinion has been ignored by the Atlantic provinces, and the federal government has not felt confident enough of its position to attempt to extinguish their rights. *Bonser v. La Macchia* determined no seabed and subsoil issues; those issues, as between the federal government and the states, have been resolved as to petroleum primarily in favor of the states; otherwise they are still open for decision and have recently been presented by the states in seeking a determination by the Privy Council.