No. 13, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

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### JURISDICTION

The jurisdiction of this Court rests upon Article III, sec. 2, cl. 2, of the Constitution.

### QUESTION PRESENTED

Whether, as against the State of Texas, the United States has paramount rights in, dominion over, and ownership of the lands, minerals, and other things underlying that portion of the Gulf of Mexico which is seaward of the ordinary low-water mark along the coast of Texas and outside of the inland waters of the State.

STATEMENT

This suit was instituted for the purpose of establishing the rights of the United States, as against the State of Texas, in the bed of that portion of the Gulf of Mexico adjacent to the coast of the State of Texas which lies outside the inland waters of the State and which extends seaward from the low-water mark on the open coast.[1] The United States filed its motion for leave to file the complaint on December 21, 1948.

Texas opposed the Government's motion for leave to file its complaint, on the grounds that the Attorney General was not authorized to bring the suit and that the suit should be brought, if at all, in a district court. The State also sought to preserve, without argument, the objection that it could not be sued without its own consent. The State's objections, set forth in opposition to the motion for leave to file, were argued orally on May 9, 1949, and thereafter, on May 16, this Court overruled the State's objections and granted leave to file the complaint. 337 U. S. 902. It was ordered that process issue, returnable September

[1] No claim is here made to any lands under inland waters or to so-called tidelands, *i. e.*, those lands lying between the ordinary high- and low-water marks. The joint resolution under which Texas was admitted to the Union required the State to cede all its ports and harbors to the United States. 5 Stat. 797 (App. *infra*, p. 82). Possible rights of the United States under that provision are not within the scope of the present suit.

1, 1949. Instead of filing an answer to the complaint on the return date, Texas filed (i) a motion to dismiss on the ground that the Court is without jurisdiction; and (ii) a motion for a more definite statement or a bill of particulars. The United States thereupon moved for judgment as prayed in the complaint, and suggested that the case be set for argument at an early date on the issues raised by the complaint. On October 10, 1949, the Court denied both sets of motions, and the State was allowed thirty days from October 10 within which to file an answer to the complaint. The answer was filed on November 8, 1949. On November 29, 1949, the United States moved for judgment, and on December 5, 1949, the Court ordered the case set down for argument on that motion. Supreme Court Journal, 1949 Term, p. 85. After the case had been ordered set down for argument, Texas moved for leave to file an amended answer. The United States filed a memorandum not opposing that motion, with the express understanding, however, that the amended answer, when filed, was to be subject to the motion for judgment theretofore filed by the United States. On January 16, 1950, the Court allowed the filing of the amended answer, and reassigned the case for argument. Supreme Court Journal, 1949 Term, pp. 120–121.

1. It is alleged in the complaint that the United States owns in fee simple or possesses paramount rights in and full dominion and power over

these submerged lands; that Texas claims some right, title or interest in these lands, and has by statute (Act of July 23, 1919, General Laws, 2d Called Session, 1919, page 51, as amended) undertaken to provide for the leasing of these lands for the exploitation of petroleum and other deposits; that under that law the State has executed leases to various persons and corporations; that such lessees have drilled wells upon the land, producing and converting to their own uses quantities of petroleum, gas and other hydrocarbon substances for which they have paid to the State substantial sums of money (pp. 6–7). The Government asks for a decree declaring the rights of the United States as against the State of Texas in the area in question, and enjoining the State and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State to account to the United States for money derived by it from the area subsequent to June 23, 1947 (p. 9).[2]

In its amended answer, Texas denies that this Court has jurisdiction of this cause under Article III of the Constitution; denies the claim of ownership, proprietary, and paramount rights asserted by the United States over the area in controversy;

[2] June 23, 1947, is the date of this Court's decision in *United States* v. *California*, 332 U. S. 19, declaring the paramount rights of the United States in lands underlying the open sea below low-water mark.

admits that Texas claims rights in the area and that its claims are adverse to those asserted on behalf of the United States; admits that the State has, by general law, authorized the leasing of the lands in question for the development of petroleum deposits, that leases for such development have been executed by the State, and that the lessees thereunder have entered upon the lands and have drilled wells, some of which have been producing petroleum substances which the lessees have removed, paying to the State royalties thereon; admits that the State has not paid to the United States either the value of or any royalties on the petroleum substances so removed and denies that the United States is entitled to such payment; admits that Texas claims full and complete ownership of the lands underlying the area in controversy and that the State will continue to claim such ownership, but denies that the acts of the State or any of its lessees constitute a trespass upon said lands or a violation of any rights of the United States.

The amended answer also contains three "Affirmative Defenses." The First Affirmative Defense alleges that the Republic of Texas, from 1836 to 1845, had open, adverse, and uninterrupted possession of and exercised jurisdiction and control over the lands underlying the Gulf of Mexico within its established boundaries; that this claim was recognized and acquiesced in by

the United States and other nations of the world; that under the terms of its annexation Texas' claim to such lands was preserved; that the State of Texas, as successor to the Republic, not having relinquished this claim, has continued to assert its rights thereunder for more than 100 years; and that the United States has recognized and acquiesced in this claim of the State during such period and is thereby precluded from asserting any right or interest adverse to the rights of Texas as so asserted and recognized.

The "Second Affirmative Defense" (a) recites that Texas established its independence in 1836 and provided that its Gulf boundary should be three leagues from land, and that the Republic was recognized by the United States and three other nations with knowledge of these declared boundaries; (b) alleges the terms of the Congressional Acts of March 1, 1845, and December 29, 1845, under which Texas was admitted to the Union, and certain provisions of the Joint Resolution of the Congress of the Republic of Texas of June 23, 1845, and of the first Constitution of the State of Texas, and (c) concludes that there existed a binding agreement between the Republic of Texas and the United States that upon annexation the State would retain all rights to the lands, minerals, and resources lying beneath the portion of the Gulf within the Republic's original boundaries, and that the United States is estopped to claim any rights in derogation of the terms of this "binding agreement between two equal sovereign nations."

The "Third Affirmative Defense" alleges that the boundaries established by the Republic of Texas were confirmed by the Treaty of Guadalupe Hidalgo in 1848, by the Gadsden Treaty of 1854, and by certain later agreements between the United States and Mexico; that thereby the United States acknowledged and confirmed the three league boundary of the Republic and the State, and acknowledged and confirmed the State's right to the submerged lands and resources here in question; and that the United States is therefore estopped from claiming any paramount or proprietary rights to such lands and resources.

2. The basic historical facts in the background of this controversy are as follows:—On March 2, 1836, Texas declared its independence from Mexico (1 Laws, Republic of Texas, pp. 3–7), and on March 17, 1836, the Constitution of the Republic of Texas was adopted (1 Laws, Republic of Texas, pp. 9–25). By the Act of December 19, 1836 (App. *infra,* p. 81), the first Congress of the Republic defined the gulfward boundary of Texas as being "three leagues from land."[3] By

[3] One marine league consists of three nautical or geographical miles, equal to 3.45 English statute miles. The traditional three-mile maritime belt is three marine miles or one league in width.

No question is here raised as to the *boundary* of Texas, although a very serious question exists as to whether Texas may have a boundary that is farther seaward than the 3-mile limit. See *infra*, pp. 72–75. The issue here relates to rights in the submerged lands, whether they be within or without that boundary.

the first two sections of a joint resolution approved March 1, 1845 (App. *infra,* pp. 82–84) (referred to herein as the annexation resolution), the Congress of the United States consented that "the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union." Among the other provisions of this annexation resolution were the following:

> Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments * * *. Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas, shall retain * * * all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharg-

> ing said debts and liabilities, to be disposed of as said State may direct * * *.[4]

This proposal for annexation was accepted by the Republic of Texas. Joint Resolution approved June 23, 1845, Laws, Ex. Sess., 9th Cong., Republic of Texas, p. 4, App. *infra,* pp. 84–85. It was likewise approved by a special convention assembled for that purpose (Ordinance of July 4, 1845, 1 Paschal, Ann. Dig. Laws of Texas, 4th ed. (1873), p. 45, App. *infra,* p. 86), which also adopted a constitution for the State (*id.*, p. 47). These acts of acceptance were transmitted to Congress by President Polk on December 2, 1845. 1 Senate Docs., 29th Cong., 1st sess., No. 1, pp. 3–5, 85, 98, 117–137; 1 House Docs., 29th Cong., 1st sess., No. 2, pp. 3–5, 76, 86, 104–125. By Joint Resolution approved December 29, 1845 (App. *infra,* pp. 87–88) (referred to herein as the admission resolution), Congress declared that Texas had complied with the terms of the Joint Resolution of March 1, 1845, and was admitted into the Union as a state "on an equal footing with the original States in all respects whatever."

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[4] The third section of the Joint Resolution gave the President the option to negotiate with the Republic of Texas for annexation on different terms. The President did not take advantage of that option, but submitted to the Republic the specific terms contained in the first two sections of the Joint Resolution. 1 Senate Docs., 29th Cong., 1st sess., No. 1, pp. 32, 35, 48–49, 54, 85, 98; 1 House Docs., 29th Cong., 1st sess., No. 2, pp. 125–126, 127–128, 34–35, 41–42, 76, 86.

By joint resolution approved April 29, 1846 (App. *infra,* pp. 88–89), the legislature of the State of Texas declared that "the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas * * * is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation * * *."

By an act approved July 23, 1919 (App. *infra,* pp. 89–90), Texas provided that the portion of the Gulf of Mexico within the jurisdiction of Texas should be subject to lease by the Commissioner of the General Land Office to any person, firm or corporation for the production of oil and natural gas.

By Act of May 16, 1941 (App. *infra,* pp. 91–95), reciting that the gulfward boundary of the State had theretofore been three leagues seaward of low-water line, Texas undertook to remove that boundary outward to a line twenty-seven miles seaward of the low-water line, and declared that the waters and bed of the Gulf of Mexico included therein were under the sovereignty of the State, subject only to the Federal Government's admiralty jurisdiction and control over commerce, and were owned by the State, and that the bed of the Gulf was set apart for the Permanent Public Free School Fund. That statute was

amended by the Act of May 23, 1947 (App. *infra,* pp. 96–97), one month before the decision by this Court in the *California* case, to remove the gulfward boundary to the outer edge of the continental shelf.

## SUMMARY OF ARGUMENT

### I

The principles of *United States* v. *California,* 332 U. S. 19, govern this case. There, the Court held that, because of the marginal sea's close relationship to the federal functions of national defense and the conduct of foreign affairs, the United States has paramount rights in, and power over, the part of the marginal sea lying within a State's declared boundaries, including full dominion over the resources of the underlying soil. This general holding, and the principles on which it rests, apply, in terms, to the cases of the original thirteen and all the remaining States—unless a particular State can show special reason for different treatment. Here, therefore, the starting point must be the postulate that the United States is *prima facie* entitled to judgment, and Texas' defense stands or falls with the merits of its claim to an exceptional status.

### II

Texas' alleged special reasons for different treatment of the marginal sea off its coast do not validly differentiate its case.

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A. 1. Its principal reliance is presumably upon the reservation to the State, in its terms of admission, of "all the vacant and unappropriated lands lying within its limits," but the lands underlying the marginal sea do not fall into this class. The purpose of the reservation—explicitly stated in the annexation resolution and borne out by the negotiations with the Republic—was to enable the new State to pay the Republic's debt, which it was to assume, by selling the land. Lands under the sea were clearly not valuable or salable, in 1845 or within the then foreseeable future, or otherwise suitable for disposal for this purpose, and both this Court and the Texas Supreme Court have stressed the need for reading comparable grants and reservations in the light of the parties' purpose. *Pollard's Lessee* v. *Hagan,* 3 How. 212, 224; *City of Galveston* v. *Menard,* 23 Tex. 349, 394, 396–404. Moreover, the phrase "vacant and unappropriated lands" was regarded as the equivalent of the more usual term "public lands," and this Court and the Texas courts have long held that the latter term normally does not include tidelands or submerged lands, but only fast land subject to disposition or sale under the general land laws. And neither the Republic of Texas nor the State of Texas appears to have included the marginal sea area within Texas' public land system, until very recently.

Cognate provisions of the annexation and admission resolutions relating to national defense and foreign affairs, and the new division of powers and responsibilities between the State of Texas and the United States, also show that the maritime belt was not retained by the State as "vacant and unappropriated lands." On admission, all defense and foreign affairs functions passed from the Republic to the United States, and, by the specific terms of the annexation resolution, "all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas" were thereafter to belong to the Federal Government. In particular, "ports and harbors"—contiguous to, and merging with, the marginal sea—were to pass to the United States because of their importance to the national security. Since, as the Court held in *California,* the marginal sea is inextricably tied to the defense and foreign affairs functions of external sovereignty, and the State's admission terms were thus drawn so as carefully to preserve these responsibilities and the means of fulfilling them to the United States, it is highly unlikely that the simple reservation of "vacant and unappropriated lands" was designed to cover the significant area now in dispute. Similarly, the "boundary" clause, expressly reserving to the Federal Government all interna-

tional boundary questions, weighs against Texas' construction of the "lands" clause.

2. In addition, the State's reliance on this clause is unavailing because the Republic of Texas—from which the State must trace the title to all lands it seeks to "retain"—did not have valid ownership of, or even possess rightful jurisdiction over, the offshore lands; and legally acceptable claims alone can be recognized in this proceeding, for the annexation and admission resolutions cover only "territory properly included within, and rightfully belonging to the Republic of Texas." In 1845, the conception of a maritime belt was very immature, and it did not achieve general recognition and formulation until later in the 19th century. This was true of the notion of the marginal sea as part of a nation's territorial jurisdiction and subject to its control, and it was, of course, even more plainly the case with the idea that the nation *owned* the bed under the sea. At most, the Republic had a potential, but dormant, claim to paramount control and ownership, which a government with national sovereignty might conceivably assert in the future; and with the assumption by the United States of national external sovereignty over Texas that potential claim passed to the Federal Government, to be asserted and vindicated only by, and on behalf of, the United States. In fact, the Republic does not appear ever to have claimed ownership of these lands,

and, further, the indications are that even the claim which it made to territorial jurisdiction over a three-league belt pertained only to its national external sovereignty and international relations, and not to its internal or domestic jurisdiction. Moreover, it is very doubtful that this claim to a three-league belt can be called "rightful" or "proper," so far as the United States is concerned, in view of the conflicting treaties of 1819 and 1828 with Spain and Mexico—agreements made by this country which were recognized by the Republic of Texas as binding, in 1838—which appear to have established Texas' boundary on the shore of the Gulf of Mexico.

B. Aside from the "vacant and unappropriated lands" clause (which we believe to be irrelevant for the foregoing reasons), the State does not rely, to our knowledge, on any provision in its admission terms, but it does seem to seek independent support for its position from its existence as a separate nation before entering the Union. However, under the Federal Constitution, and the terms of Texas' admission, which are admittedly controlling, this fact is immaterial to the present controversy—whatever view one takes as to the relation of the Republic to the marginal sea:—

(1) If the Republic did not have proprietary rights in, and rightful control over, the belt, as we urge above, there is not the slightest basis

for asserting ownership in the State as its "successor".

(2) Even conceding that the Republic did properly have some *control* (but not ownership) over the area, the State cannot justify a claim of present *ownership*. First, the Republic's interest in the marginal sea did not pertain to its internal and domestic sovereignty, to which the State can be said to have succeeded, but only to its national external sovereignty which has passed to the United States. Second, a claim of ownership (on the part of the State) simply does not follow from one of mere control (on the part of the Republic); there is an unbridgeable gap.

(3) But if the Republic did have full ownership and control over the belt, then Texas gave up any such rights to the United States on admission. Full paramountcy and dominion over this portion of the sea appertain to national sovereignty, as the *California* case has established, and the new sovereign therefore succeeded to these rights, if they existed in mature form at that time, or to any potential claim which might later ripen into full ownership or dominion or whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea. The "equal footing" clause of the admission resolution confirms this conclusion. It operated not only to raise the new State to the level of the previously admitted States

but also to cut down special privileges, powers, or rights emanating from its prior unique status as an independent nation. Since the other States did not, and do not, have ownership of the marginal belt, or the underlying soil, Texas must have relinquished all such rights in order to be "on an equal footing with the original States in all respects whatever."

C. Nor is the maintenance of this suit barred by any alleged adverse possession or so-called rights based upon prescription. Apart from the absence of any assertion of rights in the *submerged lands* over a long period of years by Texas, this defense is completely answered by *United States* v. *California,* 332 U. S. 19, 39–40. Moreover, it has long been established that prescription and adverse possession do not run against the United States.

## III

Texas recently has sought to extend its boundary, and its title to the submerged lands, far beyond the three-mile or three-league limit. But it is clear that regardless of the validity of the attempted extension of the State's *boundary,* the United States has, as against the State, at least the same paramount rights in, and dominion over, the lands underlying the Gulf of Mexico outside the marginal sea, as it has with respect to the marginal sea (which is itself within the State's *boundaries*). *United States* v. *California*

recognizes the patent fact that the ocean outside of the marginal belt is of national concern, and obviously that portion of the ocean is even less closely related to the interests of the coastal State and more directly related to the national defense, the conduct of foreign affairs, and the carrying on of international commerce. This is so even if the State properly can include a large part of the ocean within its territorial limits. For this reason, it is unnecessary, in this suit, to determine the validity of the Texas boundary-extension statutes, but we may point out, in passing, that it would seem to be solely within the province of the Federal Government to establish external territorial limits.

Finally, it should be noted that the United States has affirmative interests and rights in the ocean in and beyond the marginal sea, not only as against the State, but in its capacity as a member of the family of nations. Presidential Proclamation No. 2667 (September 28, 1945) declares the resources of the continental shelf as within this country's jurisdiction and control, and there have been previous exercises of dominion and control over certain areas beyond a three-mile or nine-mile belt, and in some instances over the underlying resources. The Government of the United States is therefore justified in claiming rights, which it seeks to vindicate in this Court, in the sea and underlying land up to the "outer edge of the continental shelf"—at least as against the State of Texas.

## ARGUMENT

## I

### THE PRINCIPLES OF UNITED STATES *v.* CALIFORNIA GOVERN THIS CASE

This case presents basically the same issue decided by the Court in *United States* v. *California,* 332 U. S. 19, and the principles of that decision dispose of the present suit. There, California asserted ownership of submerged lands and their resources lying between the low-water mark on its coast and a boundary claimed by the State as three English miles from shore. Here, as there, "the point of difference is as to who owns, or has paramount rights in and power over * * * land under the ocean off the coast," and "involves the conflicting claims * * * as to which government, state or federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land" (332 U. S. at pp. 24–25). In resolving the California dispute, the Court held that (a) the thirteen original colonies did not acquire ownership of the marginal sea, or the underlying soil, and the "equal footing" clause of her admission statute gave California no greater rights (332 U. S. at 30–33, 38–39) (see also *Toomer* v. *Witsell,* 334 U. S. 385, 402); (b) the United States has asserted and has acquired national dominion and control over the marginal sea (332 U. S. at 33–34); (c) protection of the three-mile belt has

been and is a function of national external sovereignty, because of the belt's close relationship to national defense and the conduct of foreign affairs, which are federal powers and responsibilities (332 U. S. at 34–36); and (d) for these reasons, a State may exercise local police power functions in the part of the marginal sea properly within its declared boundaries, but the United States has paramount rights in and power over the area, including full dominion over the resources of the underlying soil (332 U. S., at 36–37, 38–39).

These principles are universal in their formulation and application, not limited to the test suit against California and its individual facts, and they control the cases of the original thirteen and all the remaining States—unless a particular State can show special reason for different treatment. Texas and California came into the Union at about the same time (1845 and 1850); both entered "on an equal footing with the original States in all respects whatever" (9 Stat. 108, *infra,* p. 88; 9 Stat. 452); and simultaneously with their admission both claimed the marginal sea within their boundaries. At the very least, therefore, the starting point of this suit must be the *prima facie* postulate that the case is governed by the *California* decision, and the United States is entitled to judgment.[5]

[5] In the litigation involving the marginal sea off its coast, California claimed a seaward boundary of only three English miles from its shore line, and therefore asserted ownership of lands lying wholly within the marginal sea as recog-

## II

### TEXAS' ALLEGED SPECIAL REASONS FOR DIFFERENT TREATMENT OF THE MARGINAL SEA OFF ITS COAST DO NOT VALIDLY DIFFERENTIATE ITS CASE

Texas' assertion of title to the lands under the marginal sea off its coast appears to rest on a claim to be on a better footing than California by reason of the particular terms of the joint resolutions under which the State of Texas was admitted to the Union, and also, as an independent ground, by reason of asserted former ownership of the lands by the Republic of Texas.[6] Neither basis can sustain the State's claim to a superior position.[7]

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nized in international law and by the United States. At the present time, Texas claims a boundary at the outer edge of the continental shelf. *Supra*, pp. 10–11; *infra*, pp. 91–97. The Republic of Texas claimed a marginal sea of three leagues, that is, nine marine miles. In general, the United States claims, as against foreign countries, a marginal sea three miles in width.

The Government takes the position that the decision in the *California* case is controlling not only as to the marginal sea but as to the area beyond. See Point III, *infra*, pp. 68–80. Since it is the Government's view that, as against Texas, its rights outside the marginal sea are at least as great as within it, it is unnecessary to determine whether the marginal sea off Texas is three or nine marine miles, or greater.

[6] These contentions are made in the body of the State's amended answer, and in its Second and Third Affirmative Defenses.

[7] Texas also makes various contentions based upon alleged adverse possession, prescription, and other related defenses. See Amended Answer, pp. 9–11, 16–17. However, similar contentions raised by California (see Answer of California, pp. 13 *et seq.*) were rejected by the Court. See also *infra*, pp. 63–65.

A. *The reservation to the State, in its terms of admission, of "all the vacant and unappropriated lands lying within its limits" does not support its claim of present title to the marginal sea.*

The Joint Resolution of March 1, 1845 (*infra*, pp. 82–84)—"for annexing Texas to the United States"—provided, as one of the conditions of Congressional consent to the admission of Texas, that the State was to "retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct * * *." These seem to be the only provisions that give color to the State's contention that it has superior rights in the marginal sea. Apparently characterizing the land beneath the marginal sea as such "vacant and unappropriated lands lying within its limits," Texas now urges that these terms of admission irrevocably confirmed its title to the areas now in dispute. This contention is unacceptable for several reasons.

1. *The marginal sea is not within the class of "vacant and unappropriated lands."* Regardless of any rights the Republic of Texas may have had with respect to the marginal belt,[8] the ex-

[8] We discuss below, at pp. 44–52, the claims that the Republic of Texas had jurisdiction over, and ownership of, the lands underlying the marginal belt.

clusion of this area from the category of *State*-retained "vacant and unappropriated lands lying within its limits" is affirmatively required by (a) the clause's purpose, the circumstances of its inclusion, and the generally accepted meaning of the phrase both in Texas and in federal usage, as well as by (b) the cognate provisions of the annexation and admission resolutions and the incidents of the newly-established relationship between Texas and the United States.

a. *Purpose of the reservation:* The purpose stated in the annexation resolution for the new State's retention of the "vacant and unappropriated lands" was that these lands were "to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct." *Infra,* p. 83.[9] The lands contemplated were obviously those which were suitable for sale and disposal for sums which would reduce the Republic's debt—in other words, lands entirely comparable to the "public lands," as then understood both in the United States and in Texas, which were frequently used for a similar purpose.

[9] The joint resolution also expressly provided that the new State was to "retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic * * * but in no event are said debts and liabilities to become a charge upon the Government of the United States * * *." *Infra,* pp. 82–83.

This is fully borne out by the diplomatic exchanges between the United States and the Republic at the time annexation was under serious consideration. Thus, on March 10, 1845, Secretary of State Buchanan, writing to Mr. Donelson, the American chargé d'affaires in Texas, suggested that, separately from acceptance by Texas of the terms of the joint resolution of March 1, 1845, arrangements should be worked out for Texas to cede her public lands to the United States in return for assumption of the Texan debt (1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 37; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 129):

> The *public lands* of Texas ought unquestionably to belong to the United States. This is equally due to the prosperity of Texas and to that of the other States within whose limits there are public lands. Our land system has worked admirably in practice, and has met the approbation of the world. Equal and exact justice to all the States requires that *all the public lands* should be subject to the control of the federal government, and that they should be administered under a uniform system. Besides, the peace of the whole country, as well as the security of Texas, demands that this government alone should possess the power of extinguishing the Indian title within her limits, and have the absolute and exclusive control over the Camanches and other fierce and warlike tribes which

> now roam over her territory. The United States must incur the expense and bear the burden of wars with these tribes, and they ought, therefore, to possess the power of preserving peace, and regulating all our relations with them. In short, it is indispensable that our Indian policy should be extended over Texas. [Italics supplied.]

On March 31, 1845, Mr. Donelson, in transmitting the annexation proposal to Mr. Allen, the Attorney General of Texas, then conducting its foreign affairs, referred to possible defects in the terms of Congress' proposal, saying in part (1 Sen. Docs., 29th Cong., 1st sess., No. 1, pp. 50–51; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 36):

> So, also, on the part of the United States it was objected that the cession of the unappropriated lands ought to have been made by Texas for a fair consideration, to enable the federal government to extend their Indian policy over the various tribes within her limits. The right to extinguish *the Indian title to these lands* seems almost a necessary consequence of the obligation to regulate the trade and intercourse with them, and to keep them at peace with each other and with us; and the absence of any provision to this effect in the terms proposed, constituted a serious obstacle in the minds of many sincerely friendly to the measure. Yet, so strong was the desire to put the question beyond the possibility

> of defeat, and to leave with Texas the means of discharging her national debt, that they nevertheless recorded their votes in its favor. [Italics supplied.]

Writing further to Mr. Allen on June 13, 1845, Mr. Donelson advanced Secretary Buchanan's suggestion (1 Sen. Docs., 29th Cong., 1st sess., No. 1, pp. 78–79; 1 H. Docs., 29th Cong., 1st sess., No. 2, pp. 67–68);

> So also in respect to *the public lands which are left by the provisions of the joint resolution without cession to the United States.* This was done because it was believed that the public debt of Texas could not be extinguished if she parted with her lands. And the assumption of that debt was impracticable, because it would have been setting a dangerous precedent, not warranted in the judgment of a large portion of Congress, by the constitution of the United States. Hence nothing could be settled differently from what it is in the resolution on this subject.
>
> Both honor and justice forbade the United States from touching the only resource, which, after admission into the Union, would be left to Texas to pay the debt contracted in the war for her independence. Although in many points of view the reasons were urgent for insisting on the operation within her limits *of the same land system* which has been introduced with so much advantage to the other States of the Union, yet they were given up

rather than endanger the passage of the bill, or leave doubtful the ability of Texas to discharge the highest and most sacred of all public obligations, the payment of the means which have been borrowed and expended to advance the cause of liberty and independence. It is, however, not the less true, if an agreement can be made for the payment of this debt by a pledge of these lands for the purpose, that the prosperity of Texas, like that of the other States of the Union, would be promoted. The *land system now in force in the United States has worked* admirably well, and has contributed greatly to the prosperity of the new States, by giving uniformity to the surveys, and that general accuracy in the establishment of metes and boundaries which are so useful in preventing litigation and protecting the rights of the hardy tillers of the soil. Even those States that surrendered the territory out of which the large addition to the republican family has been made, have found that they have been more than compensated in relief from any system they could have enforced separately for the preservation, survey, and sale of the lands. It cannot be doubted that the like causes would produce the like effects in Texas.

Under these views of this subject, and seeing that equal and exact justice to all the States of the Union would require that *all their public lands* should rest on the same footing, and be administered under the

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> same uniform system, the only question to solve is, how can this be done without leaving Texas unable to discharge her public debt, and without means to put into efficient operation her State government? [Italics supplied.]

These excerpts confirm the conclusion that the reason for leaving to Texas the "vacant and unappropriated" lands was to allow the State to dispose of them, and with the proceeds to discharge the debts of the Republic. The disadvantages of that course to the United States were said to be that it interfered with the federal public land and Indian policies. These statements of the advantages to Texas and the disadvantages to the Federal Government, as well as the frequent explicit references to "public lands", show that the parties plainly had in mind salable "public lands," of the type then normally administered by the Federal Government. In 1845, however, lands under the sea were clearly not regarded as valuable or salable, or as suitable for disposal to secure monies for reduction of the public debt. Cf. *United States* v. *California,* 332 U. S. 19, 38, 39.[10]

[10] "As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the [nineteen] thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt." (332 U. S. at 39).

"The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there." (332 U. S. at 38).

Reserving these off-shore lands to Texas would in no wise have furthered the joint purpose of Congress and of Texas to give the new State the means for liquidating the Republic's liabilities, and there is therefore no warrant in the legislative purpose to read the phrase "vacant and unappropriated lands" as including the marginal belt.

There is, we may add, high authority for construing this phrase in the light of the parties' fundamental aim. Early in Texas' history, the State Supreme Court interpreted a grant of land on Galveston Island in Galveston Bay, for the purpose of building the city of Galveston, as covering the shore and certain tideland flats—although "viewed as an ordinary grant of land" or "by the strict letter of the legislative grant" it would not do so (*City of Galveston* v. *Menard,* 23 Tex. 349, 394, 404 (1859))—because the needs of the city-to-be required the inclusion. "This was not an ordinary sale, or donation of land * * * for indefinite purposes; but it was a specific grant, directly made by the government, for a specific object; and it must be understood and construed, with reference to such object." 23 Tex. at 397.

Even more pointed is this Court's holding in *Pollard's Lessee* v. *Hagan,* 3 How. 212, 224, that Alabama had title to lands underlying *inland* navigable waters—despite the express retention by the United States in the Alabama admission

act of all rights in "waste or unappropriated lands"—because, in part, the purpose of this reservation would not be served by including these submerged lands. In its comments on *Pollard's Lessee* in the *Menard* case, *supra,* the Texas Supreme Court put the point in words precisely applicable, in converse form, to the present dispute: "The object in retaining such waste lands, was for sale [by the Federal Government]; and as these flats were not of a character of property ordinarily sold by a government, but usually held in trust for the public, it could not be supposed that they were intended to be retained [by the United States]." 23 Tex. at 396.[11]

b. *Equivalence of "vacant and unappropriated lands" and "public lands."* In addition, as we have already suggested, the critical phrase in the annexation resolution was considered the equivalent of the more usual term "public lands," which has long been normally confined to land above ordinary high tide. This Court's decisions

[11] The Texas court went on to say that, in *Pollard's Lessee*, "the right in the waste lands was retained [by the Federal Government], and upon a strict literal interpretation, lands covered with tide-water, such as the flats, would have been also retained. But by considering the character of the contracting parties, and the object of the party, in retaining the waste lands, and the uses and purposes to which such property, as land covered with tide-water, like the flats, is to be applied, and its immediate connexion with the common interest, of which the government is the protector; the conclusion was arrived at, that it was not intended to be retained." 23 Tex. at 396.

respecting general legislation involving the disposition of "public lands" appear to hold that the term does not include tidelands or submerged lands but only fast land, which are subject to sale or disposition under general land laws. *Newhall* v. *Sanger,* 92 U. S. 761, 763; *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17.[12]

The Texas courts, since admission to the Union, have followed the same usage in construing legislation granting rights in the state public domain, at least until the present controversy began. *City of Galveston* v. *Menard,* 23 Tex. 349, 376 (1859), as has already been noted (*supra,* pp. 29–30), considered "waste or unappropriated lands" to be only those lands ordinarily sold by a government. In *De Merit* v. *Robison,* 102 Tex. 358 (1909), the State Supreme Court refused to read a statute opening to sale "all public school,

[12] The California admission act specified that the State would never interfere "with the primary disposal of the public lands within its limits" and would not question the "title of the United States to, and right to dispose of, the same." 9 Stat. 452. In the *California* case, the United States recognized, however, that this Court's decisions cited above made it doubtful whether the Government's claim to the California marginal sea could rest on this express provision (Brief for the United States, No. 12, Original, Oct. T. 1946, pp. 62–63), and the Court's opinion in that case does not mention the "public lands" clause or base its decision on it. Yet, if the submerged lands adjacent to California were "public lands," the entire case should have been disposed of on that ground, for the act of Congress admitting California to the Union explicitly reserved the "public lands" to the United States.

university, asylum and public lands" containing certain mineral deposits, as applying to tidelands in San Jacinto Bay. Citing *Mann* v. *Tacoma Land Co.*, 153 U. S. 273 (*supra*, p. 31), the court held that under the general law "a grant of land bordering on the coast where the tide ebbs and flows conveys title only to the line of ordinary high tide, unless there be something to indicate an intention to extend the grant beyond that line" (p. 361). The legislature, the court said, used the words "public lands" in that sense, and the claimant had no right to purchase the soil lying below the line of ordinary high tide. "In contemplation of law it was not land, but water" (p. 362).[13]

Moreover, as we point out *infra* at p. 47, the Republic of Texas apparently did not include the marginal sea area in its public land system.[14] When the annexation joint resolution provided that the State should retain its "vacant and unappropriated lands" to be sold to discharge the debts of the Republic, it is reasonable to assume that the phrase would most naturally be understood to contemplate a continuation of the same

[13] To the same effect, see *City of Galveston* v. *Mann*, 135 Tex. 319, 330 (1940); *Lorino* v. *Crawford Packing Company*, 142 Tex. 51, 56 (1943).

[14] At pp. 47–49, *infra*, we also discuss the Republic's county system, and show that its coastal counties were bounded by the shore. This strongly indicates, that, at best, the Republic's claim to the marginal sea did not pertain to its internal jurisdiction but rather to its national external sovereignty.

general program of land disposal instituted by the Republic, rather than to intend the addition, without express mention, of a wholly different type of land, the disposal of which had never theretofore been contemplated or provided for, and for which no market existed at that time.

It is equally significant, as a practical construction, by the State itself, of the phrase "vacant and unappropriated lands," that until recent years the Commissioner of the State's General Land Office has not included lands under the Gulf, in accounting for the disposition of the public domain. Thus, his 1880 report showed the total area of the State's domain as 172,604,160 acres, comprising 151,811,390 acres already granted or reserved for specified purposes, 1,722,-880 acres of bays, and 19,069,890 acres subject to location. *Infra,* p. 100. His report in 1936 estimated the total area as 170,936,080 acres, comprising 165,852,244 acres already surveyed and granted or reserved for specified purposes, 1,500,-000 acres unsurveyed in "coastal areas, river beds and vacancies," and excesses in surveys, less loss due to conflicts, estimated at 3,500,000 acres.[15] *Infra,* p. 101. Neither tabulation included lands below the low-water mark in the Gulf. Such lands were not within any of the enumerated grants or reservations; neither were they included

[15] These items total 170,852,244 acres. The discrepancy of 83,836 acres between that figure and the 170,936,080 acres given as the total area remains unexplained.

in lands subject to location. *City of Galveston* v. *Mann,* 135 Tex. 319, 330, *supra,* p. 32. The 1880 item for "bays" was neither adequate nor appropriate to include the marginal sea area, and obviously "coastal areas" in the smaller 1936 item for "coastal areas, river beds and vacancies" could not have embraced more than bays and tidelands. However, in his "History and Disposition of Texas Public Domain" included in the *Report of the Second Texas Surveyors' Short Course,* published by the General Land Office in 1941, the Commissioner gave 170,926,000 acres as the total area of the State to the three-mile limit,[16] and the total area to the three-league limit as 172,-687,000 acres, of which 3,250,000 acres are in the submerged coastal areas. *Infra,* pp. 101–102. This appears to be his first inclusion of the Gulf lands in any itemization of the State's public domain. Thus, the State's attempt to include the Gulf lands in its public domain seems to be a relatively recent innovation, reflecting an enlargement of its original understanding of the reservation of vacant and unappropriated lands.

[16] The significance of the three-mile limit, from the State's point of view, is not apparent. *Supra,* pp. 10–11; *infra,* pp. 47, 81, 91–97. Comparison of this 1941 tabulation with that for 1936 shows that retention of approximately the same total for the area to the three-mile limit (170,926,000 acres) as the 1936 total for inland area (170,936,080 acres) is accounted for largely by a reduction of the item for excesses in surveys from 3,500,000 to 1,000,000 acres.

c. *Significance of the transfer of defense and foreign affairs functions from Texas to the United States:* The Joint Resolution of March 1, 1845, also contained two specific provisions which indicate that the resolution's general reservation to the State of "vacant and unappropriated" lands could not have been designed to include submerged lands in the Gulf. The first is the requirement that the State cede to the United States "all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas * * *." *Infra*, pp. 82–83. This provision has a direct bearing, first, because it indisputably demonstrates and confirms the transfer of *all* defense and foreign relations functions to the United States, secondly, because it compels the cession of "all other property and means pertaining to the public defence belonging to said Republic of Texas," whether listed or not, and, finally, because it expressly requires "ports and harbors"—contiguous to and merging into the marginal sea—to be ceded to the Federal Government. The second pertinent clause of the annexation resolution is that which gives to the Federal Government the right to adjust "all questions of boundary that may arise with other governments." *Infra,* p. 82.

(i) No one denies that the annexation of Texas to the Union resulted in transferring the conduct

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of its defense to the Federal Government, as the "defence" clause confirms. This has been recognized by Texas itself from the beginning. Mr. Donelson, writing to Secretary of State Buchanan on May 6, 1845, shortly after negotiations were begun, reported receiving from the Texas acting Secretary of State "an earnest expression of the wish of the government of Texas that, as soon as their assent is given to the terms contained in the joint resolution for their admission as a State, the troops of the United States may be marched to some suitable point on the western frontier, for the purpose of guarding the inhabitants against Mexican or Indian incursion." 1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 57; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 44. That was agreed to by President Polk (1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 41; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 133), and immediately upon approval of annexation by the Texas convention, federal troops were ordered into Texas to defend the border. 1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 97; 1 H. Docs., 29th Cong., 1st sess., No. 2, pp. 84–85. Equally obviously, the annexation resulted in transferring to the United States all conduct of foreign affairs. This also has been recognized by Texas from the outset. Thus, when Captain Elliot, the British chargé d'affaires in the Republic of Texas, sent to the Texas Secretary of State, on January 4, 1846, a reminder that Britain would expect strict per-

formance of Texas' treaty obligations, despite the annexation to the United States, the Texas Secretary of State replied that "after the organization of the State government shall have succeeded to that of the republic, the settlement of all questions growing out of her existing treaty relations with foreign powers must, so far as Texas is concerned, be necessarily referred to the government of the United States." 7 Sen. Docs., 29th Cong., 1st sess., No. 375, p. 3.

It follows that the United States, rather than Texas, must have been deemed vested, on annexation, with such claims or potential claims to the marginal sea as then existed, and the general reservation to the State of "vacant and unappropriated lands" did not cover that area. For the rights claimed by littoral nations in their marginal seas have from their inception been recognized as pertaining to their national defense. "The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location." *United States* v. *California,* 332 U. S. 19, 35. It was for that reason, as well as because of the belt's importance in foreign relations generally, that this Court held in the *California* case that paramount rights in land under the marginal sea are in the Federal Government, which is charged with the conduct of those matters. *Supra,* pp. 19–20. Possession by the United States of supreme rights in the land underlying the terri-

torial waters in the Gulf of Mexico was a defense necessity, and it is most improbable that the joint resolution, all inclusive in its designation of the defense property to be handed over,[17] was intended to permit this prime tool and shield of defense, without specific mention, to pass to, or remain with, the State. On the contrary, it is reasonable to suggest that the territorial sea was ceded expressly (if owned by the Republic) as "other property and means pertaining to the public defence." Certainly, if the general phrase, "vacant and unappropriated lands" had been thought to include the marginal belt, the obvious objection, from the United States' point of view, to letting Texas retain the submerged lands, would have been that such lands were essential to the United States in its conduct of national defense and foreign relations; yet, as we have seen (*supra,* pp. 24–28), no such objection to the proposed terms of annexation was suggested by the representatives of the United States, who were concerned mainly with the extension of the Federal public land policy and with our relations with the Indian tribes. See also *infra,* pp. 56–63.

(ii) The special mention of "ports and harbors" among the defense facilities transferred to

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[17] "* * * all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas * * *." *Infra,* pp. 82–83.

the United States further emphasizes the exclusion of the marginal sea from the category of retained "vacant and unappropriated lands." Ports and harbors lie side by side with, and shade into, the marginal sea involved here. Both ports and harbors and the marginal sea directly concern the national defense. It would be extremely strange, if not verging on the capricious, to apportion ports and harbors to the United States because of their close connection with defense,[18] while at the same time withholding from the United States paramount rights in the potentially more important adjoining belt further out to sea.

(iii) The "boundary" clause of the annexation resolution—"said State to be formed, subject to the adjustment by the government of all questions of boundary that may arise with other governments"—does more than merely reserve to the United States one specific matter involving foreign affairs. Against the broad background of a pos-

[18] It is clear from the wording of the annexation resolution that the transfer of "ports and harbors" was directly connected with the assumption by the United States of defense functions. *Supra*, pp. 35, 38.

As pointed out in the Government's brief in the *California* case, pp. 67–70, 143–153, this Court has ruled that the individual States own the lands underlying their inland navigable waters, including ports and harbors, and the Government, in the interest of stability of titles does not contest those results, although it feels that such results are highly questionable. Accordingly, except for the express cession of ports and harbors by Texas, they would probably remain as the property of the State.

sible war with Mexico over the annexation of Texas, and with the special boundary issues stemming from the treaties between this country and Spain and Mexico in the foreground (*infra,* pp. 49–52), the incorporation of the "boundary" clause cautions that the balance should weigh against including areas of potential international controversy under the "vacant and unappropriated lands" clause, unless the strongest reasons exist for doing so. In 1845, as today, the marginal sea was the potential subject of a grave international dispute which might be settled by various international undertakings and commitments bearing directly on rights in, and the control and use of, that very area. Cf. *United States* v. *California,* 332 U. S 19, 34–35.[19] On the other hand, as we have shown, there are certainly no reasons compelling the "vacant" lands proviso to be read so as to cover the maritime belt.[20]

[19] Nor is this argument neutralized by the fact that Texas owns the bed of the Rio Grande River which likewise could be, and in fact was, the subject of an international boundary dispute. For, its title to the bed of that river is founded on the rule of *Martin* v. *Waddell,* 16 Pet. 367, and *Pollard's Lessee* v. *Hagan,* 3 How. 212, rather than upon the "vacant and unappropriated lands" clause, and is no more decisive of the issue of ownership of the marginal sea than was State ownership of inland waters in the *California* case.

[20] The "equal footing" clause—that Texas was "admitted into the Union on an equal footing with the original States in all respects whatever," (*infra,* p. 88) likewise supports the view that the "vacant and unappropriated" lands phrase should be interpreted as excluding the marginal belt. This argument is developed, in a somewhat different connection, below at pp. 61–63.

(iv) This line of reasoning—drawn from the implications of the "defence" and "boundary" clauses of the annexation resolution—parallels that followed by this Court in holding in *Pollard's Lessee* v. *Hagan,* 3 How. 212, that Alabama and the other states own the navigable tidewaters, and the soil under them, as an inseparable attribute of state sovereignty. This decision was rendered despite Alabama's express disclaimer, in its admission statute, of "all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States." Act of March 2, 1819, c. 47, 3 Stat. 489, 492. Such a disclaimer was made by an ordinance appended to the constitution of the State. Ormond, Bagby and Goldthwaite, Code of Alabama (1852), 28, 47. The United States claimed to have retained, by that provision, title to land under inland navigable waters, but this Court held otherwise. It held that title to such land was an incident of municipal sovereignty, and that since the United States had no power under the Constitution to retain any municipal sovereignty within a State, it could not retain any of the incidents thereof, including land under navigable inland waters.

Texas' case is the exact converse of Alabama's. The latter gave up its "waste or unappropriated lands", but nevertheless retained possession of land underlying inland navigable waters because of the demands of municipal state sovereignty.

Texas, on the other hand, retains its "vacant and unappropriated lands," but cannot claim the marginal sea because of the demands of national external sovereignty. In *California,* 332 U. S. 19, 36, the Court pointed out that if the rationale of the *Pollard* case "is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." [21] Under the Federal Constitution, and the terms of its admission, Texas, as a State, could not possess any elements of national, as distinguished from municipal, sovereignty. Consequently, the reservation to Texas of "vacant and unappropriated lands"

[21] In the Brief for the United States in the *California* case, it was urged (pp. 143–153) that the *Pollard* rule that the states own the land underlying inland waters rested on the unsound doctrine that ownership of submerged lands is an attribute of sovereignty, and should therefore not be extended to the marginal sea. But the Government also contended, in the alternative, that, in any event, the necessary implication of that doctrine is that the United States, rather than the states, has full dominion and control over the marginal belt, because ownership of those submerged lands, if an attribute of sovereignty, is an attribute of national rather than local sovereignty (pp. 72–91). In its opinion in *California*, the Court stated that it was "not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern" (336 U. S. at 32), and continued with the sentence quoted above in the text.

does not include land under the Gulf, just as in the *Pollard* case the reservation to the United States of "waste or unappropriated lands" did not apply to lands under navigable inland waters.[22]

In sum, Texas, which was so eager to recognize that annexation put on the Federal Government the responsibility of defense and the conduct of foreign relations (*supra,* pp. 36–37), must likewise recognize that it necessarily gave to the Federal Government all the appurtenances of that responsibility including, as this Court held in the *California* case, paramount rights in the lands underlying the marginal sea. The retention of "vacant and unappropriated" lands avails the State nothing; it was never intended to cover lands in the marginal sea. As the Supreme Court of Texas pointed out in 1859, in resolving intergovernmental land-grant disputes of this type one must consider the "character of the contracting parties," the "object of the party" seeking rights to the land, the "uses and purposes to which such property * * * is to be applied," and "its immediate connexion" with the interest "of which the government is the protector." *City*

[22] As we have already pointed out, a further ground of the holding in the *Pollard* case was that since the "waste or unappropriated" lands were to be held for sale, the clause could not be deemed to cover beds of river, bays, etc.; the analogy to the present case, based on that ground of the holding, is indicated *supra* at pp. 29–30. Below, we make a further comparison with the *Pollard* case. *Infra*, pp. 62–63.

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*of Galveston* v. *Menard,* 23 Tex. 349, 396, quoted at fn. 11, *supra,* p. 30. By this test, there can be only one answer to the present controversy.

2. *In addition, the Republic of Texas did not have either rightful jurisdiction over, or ownership of, the offshore lands.* The fundamental premise of the State's argument based on the "vacant and unappropriated lands" clause is, of course, that the Republic of Texas had *proprietary* rights in the marginal sea lands. Even full territorial jurisdiction in the Republic would not be enough to support the State's contention; it must show, as the starting point of its claim of present title, that whatever claims the Republic had to these lands had ripened into full ownership. Otherwise, the State of Texas would clearly have no right to *"retain"* this area as "vacant and unappropriated lands lying within its limits." There is the gravest doubt, however, whether the Republic had, or ever asserted, any valid claim to ownership; and there is also a serious question even as to the logically antecedent issue of jurisdiction, *i. e.,* whether the Republic rightfully had any control or sovereignty over the marginal sea. Absence of a *rightful* claim to control and sovereignty, or to ownership, would be decisive here, for the joint resolutions of annexation and admission covered only the "territory properly included within, and rightfully belonging to the Republic of Texas" (*infra,* pp.

82, 87), and only such legally recognized territory could be said to fall within the class of "vacant and unappropriated lands lying within [the State's] limits." Cf. *United States* v. *Texas,* 162 U. S. 1, 39, 91.

a. As the Court pointed out in *United States* v. *California,* 332 U. S. 19, 32–33, the conception of a maritime belt was not generally accepted at the time this country won its independence from England, and only gradually won acquiescence largely as a result of the efforts of our statesmen; in fact, "as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen* v. *Keyn,* 2 Ex. D. 63." And the 19th and 20th century materials collected in the Government's brief in the *California* case (Oct. T. 1946, No. 12—Original, pp. 30–58) indicate that the general international acceptance of the concept came about in the latter portion of the period, the notion of a three-mile territorial belt, both in its territorial and its property sense, being very immature, if not foetal, in 1845. Texas' treaties clearly did not affirm jurisdiction over, or property rights in, the marginal sea (*infra,* pp. 49–52), and there is nothing else from which to infer any international acceptance of a territorial belt along the Republic's coast. There is good reason, therefore, to doubt whether Texas, while independent, rightfully had any control or sovereignty over the marginal sea that was recognized by the family of nations,

let alone a valid and recognized claim to full ownership.

In any case, the unformed character of the marginal sea concept in the 1840's—to which we have just referred (p. 45)—indicates that at that stage of development it is unlikely that nations could be considered to *own* the bed under the marginal sea, even if they could properly assert some kind of territorial sovereignty over the strip. Thirty years later, in *The Queen* v. *Keyn,* L. R. 2 Exch. Div. 63, 198–199 (1876), Lord Cockburn doubted the Crown's ownership of the bed of the sea beyond low-water mark; and in 1914 Viscount Haldane asserted that a conclusion had not yet been reached "on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes." *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914) A. C. 153, 174–175; Cf. *Secretary of State for India* v. *Chelikani Rama Rao,* L. R. 43 Ind. App. 192 (1916). It is impossible to say, we think, that the idea of state ownership of the subsoil existed in 1845 in any sense of which Texas can now take advantage.

At most, the Republic had a potential, but dormant, claim to paramount control and ownership, which a government endowed with national and external sovereignty might conceivably assert at

some future time, as against the other nations of the world. When the Republic's national sovereignty passed to the United States in 1845 (*supra,* pp. 35–37; *infra,* pp. 58–61), that potential claim—inextricably tied to national rather than State sovereignty (*supra,* pp. 37–44; *infra,* pp. 58–63)—passed to the United States, and could be asserted and vindicated only by, and on behalf of, the United States.

b. It should be noted, in this connection, that the Republic of Texas itself does not appear to have made any claim to *ownership* of the marginal sea. Although its Act of December 19, 1836 (*infra,* p. 81) defined the boundary of the Republic as running "along the Gulf of Mexico three leagues from land," Texas did not administer lands under the marginal sea as part of its public lands. The Act of December 14, 1837 (2 Laws, Republic of Texas, p. 62) organized the General Land Office on a county basis and, as pointed out below (pp. 48–49), the coastal counties stopped at the shore of the Gulf. Lands in the marginal sea were not included.

On the other hand, all the indications are that the Republic, far from asserting proprietary rights in its maritime belt, recognized that its claim to the area did not pertain even to its internal or domestic jurisdiction, but at most affected, in a rather nebulous way, only its national external sovereignty and its international relations. The Republic's constitution required that

"the republic shall be divided into convenient counties" (Art. IV, sec. 11; 1 Laws, Republic of Texas, p. 14), yet coastal counties were described by acts of the Texas Congress as bounded by the shore. Act of December 18, 1837, 2 Laws, Republic of Texas, p. 84 (Liberty County: "* * * along said Gulf [of Mexico] with all its meanderings * * *"); Act of December 21, 1837, 2 Laws, Republic of Texas, p. 110 (Jefferson County; "* * * along the Gulf of Mexico * * *"); Act of May 15, 1838, 3 Laws, Republic of Texas, p. 12 (Galveston County: "* * * with the coast of the Gulf * * *"); Act of January 20, 1841, Laws, 5th Congress, Republic of Texas, p. 45 (Galveston County: "* * * along the Gulf shores * * *").[23] Similarly, although the constitution required that "the republic of Texas shall be divided into convenient judicial districts" (Art. IV, sec. 2, 1 Laws, Republic of Texas, p. 13), the judicial districts established consisted only of specified counties, thus again omitting any provision for the area of the marginal sea. Act of December 22, 1836, 1 Laws, Republic of Texas, p. 198, as amended by the Act of May 24, 1838, 3 Laws, Republic of Texas, p. 30; Act of January 29, 1840, Laws, Republic

[23] By its Act of May 25, 1947, c. 287, General and Special Laws, 1947, p. 490, Texas for the first time undertook to extend its counties bordering on the Gulf, to make them coterminous with the then boundaries of the State, under State laws.

of Texas, 4th Congress, p. 176; Act of January 18, 1844, Laws, Republic of Texas, 8th Congress, p. 24.

c. As for territorial jurisdiction, there is no doubt that the Republic openly claimed the marginal sea within its *boundaries* (Act of Dec. 19, 1836, *supra,* p. 47, *infra,* p. 81), but there is nothing to show, as we have said, that the claim secured international recognition during the Republic's life. On the contrary, a grave, if not fatal, defect in this unilateral declaration stems from its apparent conflict with the binding treaties of 1819 and 1828, defining Texas boundaries, between the United States and Spain and the United States and Mexico, to which Texas expressly adhered in 1838. By the Treaty of Amity, Settlement, and Limits, of February 22, 1819, with Spain (8 Stat. 252), the United States renounced all claim to any part of the territory which is now the State of Texas (8 Stat. 256). Article 3 fixed the boundary line between the two countries west of the Mississippi as beginning

> *on the Gulph of Mexico, at the mouth of the river Sabine, in the sea,* continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing

> the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the Southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. [8 Stat. 254–256; *United States* v. *Texas,* 162 U. S. 1, 27; italics supplied.] [24]

Thus, the 1819 treaty fixed the boundary *at* the Gulf of Mexico, and not three miles or three leagues from shore.

After Mexico established its independence from Spain, this country and Mexico entered into a "Treaty of Limits," on January 12, 1828, which expressly reaffirmed the boundary limits set by the 1819 Treaty, repeating them in terms—including the opening phrase: that the line was to "begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea"—and requiring both nations to regard this boundary as "still in force and binding." 8 Stat. 372, 374.[25]

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[24] Article 4 also provided that to fix the boundary with more precision, a commission was to be appointed to run and mark the line "from the mouth of the Sabine to the Red river, and from the Red river to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas," in conformity with Article 3, and "the line of latitude 42, to the South Sea" (8 Stat. 256).

[25] The 1828 Treaty also provided for a commission to run and mark the line "from the mouth of the Sabine" (8 Stat. 374), but the commission never was appointed, due to the secession of Texas from Mexico and recognition of the new republic by the United States.

By its Convention of April 25, 1838, with the United States, the Republic of Texas recognized that the 1828 Treaty was binding on it. Like the predecessor agreements, the Convention provided for the designation of commissioners to "proceed to run and mark that portion of the said boundary *which extends from the mouth of the Sabine, where that river enters the Gulph of Mexico,* to the Red river" (italics added). 8 Stat. 511; *United States* v. *Texas,* 162 U. S. 1, 29–31. In 1840, the joint commission met and actually marked the beginning of its survey on the shore of the Gulf of Mexico. S. Doc. 199, 27th Cong., 2d Sess., p. 59; H. Doc. 51, 27th Cong., 2d Sess., p. 63.

The sum of these international agreements, to which this country was a party and which were accepted as binding by the Republic of Texas, is that, whatever Texas' internal statutes may have provided or intended, the Republic had solemnly bound herself to the United States to regard her boundary as commencing "*on* the Gulf of Mexico * * * in the sea," and not "*along* the Gulf of Mexico three leagues from land." Later, after Texas' admission, and in sharp contrast, the Treaty of Guadalupe Hidalgo between the United States and Mexico (signed February 2, 1848, proclaimed July 4, 1848), did set the international boundary "*in* the Gulf of Mexico, three leagues from land."

9 Stat. 922, 926 (all italics added), *infra,* p. 99.[26] But in 1845, when Texas joined the Union, there is firm ground for saying that, under its own treaties, and at least insofar as the United States was concerned, the marginal sea was not "properly included within" or "rightfully belonging to" its territory.[27]

B. *The fact that Texas was an independent nation before it entered the Union is immaterial.*

Texas also appears to find support for its claimed special position in the fact that, unlike California, it was an independent nation before it joined the Union. The argument seems to be that the Republic of Texas was possessed of the marginal belt, and the State automatically succeeded to its rights. To the extent that this contention differs from the assertion that the Republic owned the belt and the State retained it by virtue of the "vacant and unappropriated lands" clause of the annexation resolution—the

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[26] The British Minister to the United States objected to the boundary clauses of the Treaty of Guadalupe Hidalgo of 1848 because of the three-leagues provision. *Supra*, p. 51. Secretary of State Buchanan wrote in reply that the treaty "can only affect the rights of Mexico and the United States." Crocker, *Extent of the Marginal Sea* (1919), p. 649.

[27] It is an indication, at the least, that the Republic's internal designation of its boundaries was inconclusive in this country's eyes, that the annexation resolution specifically provided that the new state was to be formed "subject to the adjustment by this Government [*i. e.*, the Federal Government] of all questions of boundary that may arise with other governments" (*infra*, p. 82). See *supra*, pp. 39–40.

argument which we have just discussed in Point II, A, *supra,* pp. 22–52—it is equally erroneous.

The initial premise for any consideration of a claim growing out of the Republic's independent status must be the complete acknowledgment that it is not the Republic's constitution and laws but the Constitution of the United States, and the terms of Texas' admission, which authoritatively determine the present relationship between the State of Texas and the Federal Government, including the nature and incidents of their respective sovereignties, and the ownership and control of the marginal sea. This fundamental principle Texas has admitted. Very soon after coming into existence, the State gave formal expression to its recognition that the nature of its rights in the land within its boundaries was to be determined by reference to the Federal Constitution as well as the joint resolution for annexation. By Joint Resolution of April 29, 1846 (*infra,* pp. 88–89), the legislature of the State declared that "the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas * * * is now vested in and belongs to the State, *excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation* * * *." [Italics supplied.] The Republic's laws and claims of title are relevant, therefore, only insofar as the State can

properly succeed to them under the Federal Constitution and the terms of its admission.

On this basis, our argument in this subpoint (II, B), is, *first,* that the Republic of Texas did not own the marginal sea, and the State therefore has no title acquired by succession; *second,* that the Republic did not have control over the marginal sea, and the State can therefore base no claim on such control; *third,* that even if the Republic did control (but did not own) the maritime belt, the State's claim to ownership does not follow; and, *lastly,* that, taking at full value the assertion that the Republic of Texas owned and controlled the marginal sea, the State of Texas does not stand in its place.[28]

1. It is, of course, a necessary condition of the State's claim that the Republic of Texas had proprietary rights in, or had control over, the marginal sea. If it did not have valid ownership or control, there is not the slightest basis for asserting ownership rights in the State as its "successor." *United States* v. *California,* 332 U.

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[28] We assume, throughout Point II, B, that the "vacant and unappropriated lands" clause is inapplicable for any or all of the reasons given in Point II, A, *supra.* See fn. 29, *infra,* p. 55.

There is no other specific clause of the annexation and admission resolutions upon which, to our knowledge, Texas rests its claim, or on which it can rely. Aside from the "vacant and unappropriated lands" clause, the State's argument builds on an asserted general right of succession by the State to the Republic's rights.

S. 19, has determined conclusively, at the very minimum, that admission to the Union did not bestow title to the marginal sea upon States which had no prior claim to the area. Absent ownership or full control by the Republic, Texas' position would be exactly the same as that of California, and we do not believe the State will claim otherwise.[29] But, as we urged in Point II, A (*supra,* pp. 44–52), it is very doubtful whether the Republic did rightfully own, or even lay claim to ownership of, the territorial belt.

2. Even the Republic's lesser claim to rightful control of the marginal sea as within its boundaries is likewise feeble, as we have also argued (*supra,* pp. 45–52).[30] Without at least such prior rightful control, the State obviously stands in a still worse position.

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[29] The State may possibly claim that even if the Republic did not own or control the marginal sea, the State does own it because the "vacant and unappropriated lands" clause affirmatively endowed it with the area. We have shown (*supra*, pp. 22–52), that this claim is unsupportable because (a) the clause was intended to cover no more than lands already owned by the Republic at the time of annexation, which the State was to "retain," and (b) in any event, the clause was not intended to, and does not, include the marginal belt. In this subpoint (II, B), we assume that the "vacant and unappropriated lands" clause does not help Texas' claim. See fn. 28, *supra.*

[30] As already noted, the annexation and admission resolutions only consented to the reception of "the territory properly included within, and rightfully belonging to the Republic of Texas * * *." *Infra*, pp. 82, 87; *supra*, pp. 44–45.

3. But even conceding, for the moment, that the Republic did properly have some *control* over the marginal belt, the State of Texas is not aided in its claim of present *ownership,* for two separate reasons:

First, the Republic's interest in the belt did not pertain to its internal and domestic sovereignty, to which the State can be said to have succeeded, but only to its national external sovereignty, to which the United States has plainly succeeded. *Supra,* pp. 35–37; *infra,* p. 58. We have shown (pp. 47–49) that the Republic did not include the marginal sea in dividing up its counties, although its constitution required it to be "divided into convenient counties," and likewise did not include this belt in its division of the country into judicial districts. In thus failing to establish the machinery of domestic government over the area of the marginal sea, the Republic plainly recognized that that area was of concern primarily in relation to its external sovereignty and national affairs. This recognition is all the more striking because unnecessarily broad. Some domestic police power can properly be exercised even by a State of the United States over the area of the marginal sea. *Toomer* v. *Witsell,* 334 U. S. 385, 393; *United States* v. *California,* 332 U. S. 19, 36. The Republic of Texas, having both domestic and external sovereignty, was under no compulsion to distinguish or separate the two and might naturally have been expected to im-

plement fully its unitary sovereignty throughout its territorial jurisdiction. Its failure to do so emphasizes the primarily national and external character of its interest in the marginal sea. See also *supra,* pp. 32, 47 (non-inclusion of the marginal sea in the Republic's public land system).

Secondly, the fullest exercise by the Republic of *control*—but not ownership—over the marginal sea, internally and externally, would not justify the State in asserting a title as successor *owner.* There is an open gap, which cannot be leaped, between territorial-jurisdiction, alone, on the part of the Republic, and full ownership by the State. If the Republic, in December 1845, had no more than territorial jurisdiction and control over the belt, then the State, on December 29, 1845, could not have acquired the greater interest of a full-fledged property right and title. Certainly, no special clause in the annexation and admission resolutions converts prior non-ownership into future ownership,[31] and the *California* decision—again reading it narrowly in the State's favor—indisputably holds that neither the "equal footing" provision nor the Federal Constitution grants ownership of the marginal sea to new states. There is, thus, nothing on which to peg a claim of future title. It is noteworthy that California, like Texas, claimed the three-mile belt

[31] See fn. 29, *supra*, p. 55.

within its territorial jurisdiction in 1849, before its admission. The fact that Texas was an independent nation while California was an unorganized territory cannot have even slight bearing on the claim of sudden conversion, upon admission, of nonownership into ownership.

4. Finally, the Government denies that the State of Texas has any proprietary rights in the marginal sea, even if the Republic of Texas had full ownership and control. On admission, Texas necessarily gave up any such rights to the United States.

a. Upon Texas' admission, it clearly abandoned, under the Constitution, the external sovereignty it previously had as an independent country, and thereafter for the people and State of Texas the United States alone was fully possessed of national external sovereignty and charged with the carrying on of international relations and the conduct of external defense. *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 316–317; *United States* v. *California,* 332 U. S. 19, 35–36. This transfer of national sovereignty, required by the Constitution, was also marked—as we have shown above—in the very provisions of the annexation resolution,[32] and contemporaneously recognized by Texas officials. *Supra,* pp. 35–37.

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[32] We refer particularly to the boundary adjustment clause, and the clause requiring the cession of all defense "property and means." *Supra,* pp. 35–40; *infra,* pp. 82–83, 87.

The principle of the *California* case is that the Federal Government rather than the State has paramount rights in and power over the belt (including full dominion over the oil and other resources of the soil underlying that water area) because protection and control of the marginal sea "has been and is a function of national external sovereignty," and because "national interests, responsibilities, and therefore national rights are paramount" in that area. 332 U. S. at 34, 34–36, 38–39; *supra,* pp. 19–20. So far as national external sovereignty and national interests and responsibilities are concerned, Texas' coast is no different from California's. The needs of national defense and the conduct of foreign affairs are equally closely related to both maritime belts.[33] It cannot be supposed that the national security, which everywhere else requires that the United States have paramount rights in the land and resources under the marginal sea, requires less in the case of Texas, or that along the shores of Texas, alone of all the maritime States, the Federal Government should lack the means essential to performance of its sovereign functions and preservation of its own existence. As in the *California* case, the "very oil about which the state and nation here contend might well become the subject of international dispute and settle-

[33] In the case of Texas, the annexation resolution specifically recognized this direct connection by requiring the cession of "ports and harbors." *Supra*, pp. 38–39.

ment." 332 U. S. at 35. Hence, when Texas came into the Union, the United States acquired the same right and duty of "protection and control" of the marginal sea off Texas as it has in the marginal sea off the coasts of other maritime States. It follows that it necessarily acquired the same paramount rights in, and dominion over, the Texas marginal sea.

If the Republic of Texas was ever possessed of ownership, paramount rights in, and full dominion over the marginal sea off its shore, as an incident of its national sovereignty, the State of Texas in entering the Union necessarily relinquished to the United States all attributes of this external sovereignty, including, of course, the responsibility for protection and control of the marginal sea and the paramount rights therein. In the absence of any contrary provision in the resolution under which Texas was admitted to the Union—and there is none [34]—the United States likewise succeeded to all incidents of such paramount powers, one of which is full dominion and control of the resources of the bed of the marginal sea.

Similarly, if the Republic's claim to ownership and paramountcy was no more, in 1845, than a potential one, which could possibly ripen into full and recognized title in the future, the claim passed to the United States together with the Re-

[34] See fn. 28–29, *supra*, pp. 54–55.

public's national sovereignty. See *supra,* pp. 46–47.

b. The "equal footing" clause governing Texas' admission into the Union stoutly confirms this conclusion.[35] The clause is the classic expression of the constitutional equality of all states. "Equality of constitutional right and power is the condition of all the States of the Union, old and new." *Escanaba Co.* v. *Chicago,* 107 U. S. 678, 689. This is a union of "States, equal in power, dignity and authority * * *," and "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle* v. *Oklahoma,* 221 U. S. 559, 567, 580.

Hitherto, in the general controversy over the marginal sea, the "equal footing" clause has been cited by the individual States to warrant the claim of title asserted by the post-Revolution States to the three-mile belt, on the assumption that the original thirteen held such title; in *California,* this Court destroyed that reliance by finding that the original States did not acquire ownership of the belt or the soil under it. 332 U. S. at 31–32. See also *Toomer* v. *Witsell,* 334 U. S. 385, 402. In our view, the present pertinence of the clause is that it not only gives a new

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[35] The clause provides:

"That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever." *Infra,* p. 88.

State such additional governmental rights, powers, and privileges, as may be required to raise it to the level of the previously admitted States, but, at least in the absence of express preservation of a superior status, it also cuts down any special privileges, powers, or rights—over and above those possessed by the other States—which a new State may have possessed prior to admission because of a unique position, such as Texas' national independence. Equality of States means that they are not "less *or greater,* or different in dignity or power." *Coyle* v. *Oklahoma,* 221 U. S. 559, 566 (italics supplied). Whatever their previous status—be it organized territory, unorganized territory, independent nation, or portion of a foreign country—all new States are thereafter the same in powers and rights, and the "equal footing" provision is designed to effect that result.

Contrary to this doctrine, Texas today demands a special status simply because it was an independent nation in 1845, before its admission. The plain answer is that if its claim were allowed, it would not be "on an equal footing with the original States in all respects whatever," but on a "superior" footing, because the original States, and their successors, do not own the marginal sea, and do not have paramount rights in and power over that belt.

c. The controlling principle is the converse of that in *Pollard's Lessee* v. *Hagan,* 3 How. 212,

and the succeeding line of cases. There, the Court has held that, under the Constitution, ownership of land under inland navigable waters is an incident of a State's internal sovereignty. Accordingly, title to such land automatically passes, without specific mention, from the United States to a new State, on its admission, where the United States formerly held the title when the State was a territory. *United States* v. *Utah,* 283 U. S. 64, 75; *Scott* v. *Lattig,* 227 U. S. 229, 242–243; *Oklahoma* v. *Texas,* 258 U. S. 574, 583; *United States* v. *Holt Bank,* 270 U. S. 49, 55; see *United States* v. *California,* 332 U. S. 19, 30.

Since, as the *California* case holds, the Federal Government's paramount rights in, and power and dominion over, the marginal belt is an incident of federal sovereignty, the same principle leads to the conclusion that, on the admission of Texas, in 1845, there passed from Texas to the United States any title to, or paramount rights in or control over, the marginal sea off its coast which Texas may previously have had.[36]

C. *This suit is not barred by prescription or adverse possession.*

The State's "First Affirmative Defense", in its amended answer, appears to urge that the present suit is precluded because of prescription and adverse possession of the land here involved. Cali-

[36] Discussion of other implications of the *Pollard* decision is set forth at pp. 29–30, 41–43.

fornia raised a similar defense, and recited many incidents in support of the claim that the Federal Government had recognized its title, but the Court rejected it in terms which are just as apt here (332 U. S. at 39–40):

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Furthermore, it is a settled rule of federal land law that prescription and adverse possession do not run against the United States, and possession of its lands, though "open, exclusive and uninter-

rupted" over a long period of time, creates no impediment to a recovery of such lands by the United States. *Oaksmith's Lessee* v. *Johnston,* 92 U. S. 343, 347. See also *Jourdan* v. *Barrett,* 4 How. 168, 184; *Burgess* v. *Gray,* 16 How. 48, 64; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Morrow* v. *Whitney,* 95 U. S. 551, 557; *Sparks* v. *Pierce,* 115 U. S. 408, 413; *Hays* v. *United States,* 175 U. S. 248, 260; *Northern Pac. Ry. Co.* v. *McComas,* 250 U. S. 387, 391.[37]

D. *The annexation and admission resolutions affirmatively indicate that Texas has no rights in the marginal sea lands, but that the United States has paramount rights in, and full dominion and power over, that belt.*

Our argument has been mainly keyed to disproving Texas' claim to special status, and to that end we have extensively discussed the various relevant terms of the State's admission to the Union. *Supra,* pp. 22–63. But so that this structure of the argument may not obscure the specific affirmative indications, in the admission terms, of the correctness of the Federal Government's claim, we collate at this point the pertinent clauses, for better perspective and by way of résumé.

[37] Compare the rule that statutes of limitations, except as expressly prescribed by Congress, have no application to proceedings instituted by the United States, and that the defense of laches is unavailable. *E. g., United States* v. *Summerlin,* 310 U. S. 414, 416; *United States* v. *Michigan,* 190 U. S. 379, 405.

1. *The "defence" clause.*—"Said State" shall cede "to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas." *Infra,* pp. 82–83. The pith of this clause is, of course, that the United States is charged with all matters related to national defense. In particular, the reference to "ports and harbors" indicates the federal concern with maritime defense, and the sweeping inclusion of "all other property and means pertaining to the public defense" is broad enough to cover the marginal sea. See discussion *supra,* pp. 35–39.

2. *The "equal footing" clause.*—"That the State of Texas" is "admitted into the Union on an equal footing with the original States in all respects whatever." *Infra,* p. 88. Since the original States have never owned the marginal belt, Texas cannot do so and remain on an "equal footing." Similarly, since the United States has paramount rights in the marginal sea off the coast of the other States, it must likewise have the same rights in Texas' belt if that State is to be on an equal footing. See discussion *supra,* pp. 61–63.

3. *The "boundary adjustment" clause.*—"Said State to be formed, subject to the adjustment by this government [*i. e.,* the Federal Government] of all questions of boundary that may arise with

other governments." *Infra,* p. 82. This provision indicates, at the least, that matters of national defense and foreign relations are to be the function solely of the United States; and, in our view, it also suggests, particularly in the troubled circumstances of that time, that the rights to develop and determine the extent of the marginal sea, as well as to exercise control over it, are specifically vested in the Federal Government. See discussion *supra,* pp. 39–40.

4. *The "proper territory" clause.*—"That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State * * *." *Infra,* pp. 82, 87. Only if the marginal sea was properly included within the Republic's boundaries, and rightfully belonged to it, under the then existing treaties and international law, could there be any claim of inclusion within the State's boundaries, let alone a proprietary claim. As we have shown, the Republic's claim was dubious at best. *Supra,* pp. 44–52.

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The words, connotations, and implications of these four clauses—a substantial portion out of the short list of admission terms—affirmatively prove, at a minimum, that Texas is far from showing any such special status as would take her out of the *California* rule. On the con-

trary, they strongly tend to demonstrate, by themselves alone, that the United States has precisely the same rights in the marginal sea off Texas as it has in that adjacent to California. And, as we have shown in this Point II, there is nothing in the body of the State's amended answer, or in its three affirmative defenses, indicating that Texas has any greater rights than California.

## III

### THE UNITED STATES HAS, AS AGAINST TEXAS, AT LEAST THE SAME PARAMOUNT RIGHTS IN, AND DOMINION OVER, THE LANDS UNDERLYING THE GULF OF MEXICO OUTSIDE THE MARGINAL SEA, AS IT HAS WITH RESPECT TO THE MARGINAL SEA

Unlike California, Texas asserts rights outside the three-mile belt, and even beyond the three-league belt claimed by the Republic prior to the State's admission. Texas' claim is embodied in its statutes of May 16, 1941 (*infra,* pp. 91–95), and May 23, 1947 (*infra,* pp. 96–97). By section 1 of the Act of May 16, 1941, the State purported to extend its boundary to a line in the Gulf of Mexico twenty-four marine miles beyond the three-mile limit recognized generally in international law and by the United States, and in section 3 the State asserted ownership of the bed of the Gulf within the area so extended. By section 1 of the Act of May 23, 1947, the 1941 act was amended to put the extended boundary at

the outer edge of the continental shelf.[38] In its complaint in this case, the United States asserts that it "is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Texas and outside of the inland waters, *extending seaward to the outer edge of the continental shelf* * * *" (Complaint par. II, italics supplied).

A. 1. Regardless of the validity of the State's attempted extension of its *boundaries* beyond three miles or three leagues, it is hardly doubtful that the United States has, as against Texas, at least the same rights in, and control and dominion over, the seas and the land lying outside the three-mile or three-league belt, as it has within the belt. Obviously, the ocean seaward of the marginal belt is even less closely related to the interests of the coastal State, and more directly connected with the national defense, the conduct of foreign affairs, and the carrying on of international commerce. The basic ground of

[38] The edge of the continental shelf along the Texas coast varies from approximately 70 miles seaward of the mouth of the Rio Grande to approximately 140 miles offshore at the Texas-Louisiana boundary. See Hearings before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 5991 and H. R. 5992, 81st Cong., 1st sess., p. 105.

the Court's decision in *United States* v. *California*—that the Federal Government's paramount rights in, and dominion over, the marginal sea (within California's boundaries) flow directly from its interest in, and responsibility for, maintaining the country in peace, protecting it at war, promoting its world commerce, and dealing with foreign countries—applies *a fortiori* to the waters and submerged lands outside of the marginal sea. To the extent that the enlarged belt which Texas has sought to create differs from the original marginal sea, the difference is wholly against the State and in favor of the Federal Government.

The *California* opinion itself discloses explicitly that, as between the United States and a State, the same considerations govern rights in the area beyond the marginal sea. The Court refers to the absence of reason for State control "over *any part of the ocean* or the ocean's bottom" (332 U. S. at 34), and goes on to say that "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." (332 U. S. at 35.) Again, the

Court says, "The *ocean, even its three-mile belt,* is thus of vital consequence to the nation * * *" (332 U. S. at 35), and it refuses to transplant "the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into *the soil beneath the ocean, so much more a matter of national concern*" (332 U. S. at 36; all italics supplied).[39] The express words, as well as the whole tenor of the opinion, compel the conclusion that, as against a State, the rights of the United States are at least as great in the ocean proper as in the protective belt.

2. Texas' asserted special status is of no aid to its claim outside the three-mile or three-league area. If, as we argue in the earlier portion of this brief, Texas has no special claim to the marginal sea, the additional claim as to the outer area necessarily falls with it. And even if its claim to the marginal sea were sustained, Texas would be in no better position. The grounds on which Texas asserts better rights than California in the lands under the marginal sea—that these lands were owned by the Republic of Texas and were reserved to the State by the terms of its admission to the Union—are plainly irrelevant as to lands lying outside the original marginal belt. Those lands were never owned by the Republic

[39] See also the Court's discussion of *The Abby Dodge*, 223 U. S. 166:—"And there was no argument there, nor did this Court decide, whether the Federal Government owned or had paramount rights *in the soil under the Gulf waters*" (332 U. S. at 38, italics supplied).

of Texas (*supra,* p. 49), and, since they were not within the limits of the State when it was admitted, plainly they were not reserved to the State on its admission.

B. The 1941 and 1947 Texas statutes (*supra,* pp. 68–69) raise grave questions of the State's power to extend its boundaries, but that issue need not be determined here, for, as we have shown (*supra,* pp. 69–72), the claim of the United States must prevail even if the extensions are proper. As in the *California* case, the issue here is not one of the State's *boundaries,* but of its rights and those of the United States in the ocean belt adjoining the coast, together with the underlying soil and the resources of the soil. On that issue, the matter of boundaries has no bearing, and the United States does not controvert that Texas possesses, with respect to the lands in the area described in the complaint which are validly within its boundaries, "governmental powers which it has with respect to other lands of the United States within the lawful territorial jurisdiction of the State." (Complaint, par. VI).[40]

[40] The United States never challenged the fact that the three-mile belt was within California's territorial boundaries, and conceded "that the State has legislative jurisdiction over the area from the low-water mark to the outer boundary of the State just as the State has jurisdiction over many areas of dry land which are owned by the United States." See Brief for the United States, No. 12, Original, Oct. Term 1946, pp. 4–5, 61.

Nevertheless, it is appropriate to sketch the constitutional barriers presented by this recent Texas boundary legislation.[41] In the first place, we believe that the United States alone can establish external territorial limits, since the "assertion of national dominion" over a coastal area, as well as its protection and control "has been and is a function of national external sovereignty" which the States do not possess. *United States* v. *California,* 332 U. S. at 34, 35–36; cf. *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304,

[41] The Texas statute of 1941 was discussed in a note in 20 Texas Law Review 490. The writer concluded that, in the absence of congressional approval, the State's attempt to extend its boundary in the Gulf could not be given effect except as a regulation of activities of its own citizens in the extended area. A similar Louisiana statute, on which the Texas act of 1941 was modeled (Act 55 of 1938, approved June 30, 1938, Louisiana Acts 1938, p. 169, 6 Dart, Louisiana General Statutes (1939), secs. 9311.1–9311.4), has drawn the attention of at least three contemporary writers. One concludes that the statute is valid. Borchard, *Resources of the Continental Shelf*, 40 Am. Jour. Int. Law 53 (1946). However, he bases his conclusion upon the very questionable assumption that the right to annex territory by occupation is in the State, and on the view, subsequently exploded by this Court's decision in *United States* v. *California*, 332 U. S. 19, that the State is owner of the bed of the marginal sea. 40 Am. Jour. Int. Law, at pp. 62, 64. On the other hand, the statute has been found to be beyond the power of the State by two others. Note, *Power of a State to Extend its Boundary Beyond the Three Mile Limit* (1939), 39 Col. Law Rev. 317; Ireland, *Marginal Seas Around the States* (1940), 2 La. Law Rev. 252.

316–317.[42] In the case of Texas, this exclusive federal control over all questions of external boundaries of the State was expressly recognized by an explicit provision of the annexation resolution: "Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments." *Infra,* p. 82, *supra,* pp. 39–40, 66–67.

Secondly, the State frankly purports to *annex* all the lands lying between its original marginal belt and the outer edge of the continental shelf, although "the power of annexation clearly vests exclusively in the national government." Burdick, *Law of the American Constitution* (1922), p. 279. This power has been most frequently grounded upon the constitutional grant of federal power to declare and carry on war and to make treaties (*Stewart* v. *Kahn,* 11 Wall. 493, 507; *United States, Lyon et al.* v. *Huckabee,* 16 Wall. 414, 434; *American Insurance Co.* v. *Canter,* 1 Pet. 511, 542), but it has also been attributed to the power to admit new States into the Union, and to the authority, "as a Sovereign State, to acquire territory by discovery and occupation or by any other methods recognized as proper by interna-

[42] The matter has been stated thus by an eminent authority: "It [the State] can have no authority upon the high seas beyond State lines, because there is the point of contact with other nations, and all international questions belong to the national government." 1 Cooley, *Constitutional Limitations,* 8th ed., p. 249.

tional usage." 1 Willoughby, *The Constitution of the United States* (2d ed.), pp. 407–425. It is elementary that none of these powers is possessed by an individual State of the Union. On the contrary, since, as the Court declared in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, the federal powers to make treaties and to declare and carry on war do not depend upon their enumeration in the Constitution, and would be possessed by the United States in any event "as necessary concomitants of nationality," the power of annexation can aptly be designated as an exclusive incident of national sovereignty.

C. It remains to add, as has already been suggested, that the United States has affirmative interests and rights in the ocean beyond the marginal sea, not only as against the State, but in its capacity as a sovereign member of the family of nations—rights which the Court should vindicate by its decree. "The ocean, even its three-mile belt, is thus of vital consequence to the nation * * *," and control of the soil beneath the ocean is "a matter of national concern" (*United States* v. *California*, 332 U. S. at 35, 36).

1. In recognition of this interest, Presidential Proclamation No. 2667, September 28, 1945, declares that 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 coast of the United States as appertaining to the United States, subject to its

jurisdiction and control * * *"[43] Since the subject matter of the proclamation lies in the field of external policy and foreign affairs, the President properly recognized the role of Congress in that field by providing in Executive Order No. 9633 of the same date (10 F. R. 12305, 3 CFR, 1945 Supp., p. 123) that the resources be under the jurisdiction and control of the Secretary of the Interior "for administrative purposes, pending the enactment of legislation in regard thereto."[44]

This assertion of national dominion over the continental shelf is binding upon the Court and the State. *United States* v. *California,* 332 U. S. at 34; *Jones* v. *United States,* 137 U. S. 202, 212–214; *In re Cooper,* 143 U. S. 472, 503. Cf. *Galveston* v. *Menard,* 23 Tex. 349, 391 (1859), where the court, after observing that the claim of the Republic of Texas to a marginal sea three leagues wide might well be questioned by other nations,

[43] 10 F. R. 12303, 3 CFR, 1945 Supp., p. 39. The pertinent text of this proclamation appears in the Appendix, pp. 97–98, *infra.*

[44] The Executive Order also provided:

"Neither this Order nor the aforesaid proclamation [*i. e.*, Proclamation No. 2667] shall be deemed to affect the determination 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."

This *caveat* does not affect the fact that national dominion has been asserted by the United States, as against the rest of the world, over the continental shelf.

declared that "as between her own citizens, in respect to the rights to the soil, which they might respectively acquire, the boundaries, prescribed and claimed by the government, is conclusive."

2. Moreover, the political agencies of the Government have previously exercised dominion and control over areas beyond the three-mile or nine-mile belt, and in some cases over the resources of the sea and underlying soil. In *Manchester* v. *Massachusetts,* 139 U. S. 240, 258, this Court declared that "* * * all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit." Thus, Congress, to counteract smuggling, established a line for customs waters twelve miles from the coast. Act of March 2, 1799, sec. 25, 1 Stat. 627, 648; Act of September 21, 1922, sec. 581, 42 Stat. 858, 979. Such acts have been held constitutional. *Gillam* v. *United States,* 27 F. 2d 296, 299–300, certiorari denied, 278 U. S. 635. And by section 1 of the Anti-Smuggling Act of August 5, 1935, 49 Stat. 517, 19 U. S. C. 1701, the President was authorized to include the high seas within one hundred nautical miles of the coast within customs enforcement areas. In execution of the federal power conferred by Art. 1, sec. 8, cl. 10 of the Constitution, Congress early provided for punishment of crimes "committed upon the high seas." Act of April 30, 1790, sec. 8, 1 Stat. 112, 113; Act of March 3, 1825, sec. 4, 4 Stat. 115; 18 U. S. C. 451.

Where accommodation of foreign interests has been necessary to establishment of this country's rights in waters beyond the three-mile limit it has been accomplished by treaty. Thus, Article 1 of the Treaty of June 15, 1846, 9 Stat. 869, fixed the boundary between this country and British territory as the middle of the Strait of Juan de Fuca, the strait being from fifteen to twenty miles wide. Webster's New International Dictionary, 2d ed. (1948), p. 3074.

A very pertinent example of exercise of federal power beyond the three-mile limit is embodied in the Act of August 18, 1856, sec. 1, 11 Stat. 119, R. S. 5570, 48 U. S. C. 1411, providing that where a citizen of the United States discovers a guano deposit on any island not within a foreign jurisdiction and not occupied by the citizens of any other government, the island, at the discretion of the President, may be considered as appertaining to the United States. And by the Act of March 4, 1909, sec. 272, 35 Stat. 1088, 1142, 18 U. S. C. 451, Congress provided for the punishment of crimes committed on such islands.[45] The 1856 statute further provides for the exclusive occupation and right of removal of the guano by the discoverer, "at the pleasure of Congress,"

[45] Sections 308 and 309 of the same Act, 18 U. S. C. 499–500, provide punishment for certain offenses committed on any island within a wide area of the Pacific Ocean, when such island is not in the possession of or under the protection of a civilized power.

requires the guano so removed to be taken for the use of American citizens or residents only (48 U. S. C. 1414, 1415), and authorizes the President to employ the land and naval forces of the United States to protect the property right so declared (48 U. S. C. 1418). That such right is asserted and maintained without actually annexing such islands is revealed by the further provision reserving the right of the United States to abandon any such island after the natural resources have been removed (48 U. S. C. 1419). This statute, a clear assertion of *a property* right beyond the three-mile belt, was sustained by this Court. *Jones* v. *United States,* 137 U. S. 202, 212–214.

Other nations have also for long periods deemed the three-mile concept no obstacle to claiming certain resources of the bed of the ocean outside that limit. Typical examples are Great Britain's claim to coal beneath the seas off England's coasts and to the pearl fisheries off Ceylon. Hurst, *Whose is the Bed of the Sea?,* 4 British Yearbook of International Law (1923–1924), pp. 39, 40–41; Fulton, *The Sovereignty of the Sea* (1911), p. 376; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 14–16; see also I Oppenheim, *International Law,* 7th ed. (1948), sec. 287c, pp. 576–578.

3. It is possible that the advancement of this country's claim to the resources of the bed of the sea outside the marginal sea may ultimately necessitate international negotiation and settle-

ment. But that was true in the *California* case, where this Court observed that "The very oil about which the state and nation here contend might well become the subject of international disputes and settlement." 332 U. S. at 35. It is likewise true here that "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" (332 U. S. at p. 35). In the present suit between the United States and one of its constituent states, the United States' assertion of dominant interest in the continental shelf, as against other countries, must be accepted as binding.

## CONCLUSION

The motion for judgment should be granted.

Respectfully submitted.

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FEBRUARY 1950.

# APPENDIX

## 1. Act approved December 19, 1836, 1 Laws of the Republic of Texas, p. 133:

AN ACT To define the Boundaries of the Republic of Texas.

SEC. 1. *Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled,* That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning: and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, so soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty.

**2. Joint Resolution approved March 1, 1845, 5 Stat. 797:**

JOINT RESOLUTION For annexing Texas to the United States.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First,* Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second,* Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence

belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States. *Third,* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

3. *And be it further resolved,* That if the President of the United States shall in his judgment and discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then

*Be it resolved,* That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the Governments of Texas and the United States; And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two houses of Congress, as the President may direct.

**3. Joint resolution approved June 23, 1845, Laws, Ex. Sess., 9th Cong., Republic of Texas, p. 4:**

JOINT RESOLUTION, Giving the consent of the existing Government to the annexation of Texas to the United States.

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the People and Territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the two first sections of the joint resolution of the Congress of the United States.]

And whereas, by said terms, the consent of the existing government of Texas is required—Therefore,

*Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled,* That, the Government of Texas doth consent, that the People and Territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a Republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union, and said consent is given on the terms, guarantees and conditions set forth in the Preamble to this Joint Resolution.

SEC. 2. *Be it further resolved,* That the Proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention, at Austin, on the fourth day of July next for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

SEC. 3. *Be it further resolved,* That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their accredited Minister near this Government, with a copy of this Joint Resolution; also to furnish the Convention to assemble at Austin, on the fourth of July next, a copy of the same—And the same shall take effect from and after its passage.

**4. Ordinance of July 4, 1845, 1 Paschal, Ann. Dig. Laws of Texas, 4th ed. (1873), p. 45:**

AN ORDINANCE

Whereas the congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the president of the United States on the first day of March, one thousand eight hundred and forty-five; and whereas, the president of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the states of the said Union; and whereas the existing government of the republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows:

[The two first sections of the joint resolution of the Congress of the United States are here quoted.]

Now, in order to manifest the assent of the people of this republic, as required in the above-recited portions of the said resolutions, We, the deputies of the people of Texas in convention assembled, in their name and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions, and guaranties contained in the first and second sections of the resolution of the congress of the United States aforesaid.

**5. Joint resolution approved December 29, 1845, 9 Stat. 108:**

JOINT RESOLUTION For the admission of the State of Texas into the Union.

Whereas the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new State, to be called *The State of Texas,* with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the States of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said joint resolution; and whereas the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a constitution, and erect a new State with a republican form of government, and, in the name of the people of Texas, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in said first and second sections of said resolution: and whereas the said constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said joint resolution; Therefore

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

SEC. 2. *And be it further resolved,* That until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two representatives.

**6. Joint Resolution approved April 29, 1846, Laws, First Texas Legislature, p. 155:**

JOINT RESOLUTION Declaring the exclusive right of the State of Texas as to the jurisdiction over the soil included within the limits thereof.

SECTION 1. *Be it resolved by the Legislature of the State of Texas,* That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic, that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation, subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes, resident within the limits of the State to any portion of the soil thereof, and that we recognize no right in the government of the United

States to make any treaty of limits with the said Indian tribes, without the consent of the government of this State.

SEC. 2. *Be it further resolved,* That his excellency the Governor, be requested to communicate this resolution to the government of the United States, and to our senators and representatives in congress.

**7. Act approved July 23, 1919, c. 19, General Laws of Texas, 36th Legislature, 2d Called Session, p. 51:**

PROVIDING FOR LEASING OF SALT WATER LAKES, BAYS, ETC., AND OF UNSURVEYED PUBLIC FREE SCHOOL LANDS FOR THE PRODUCTION OF OIL AND GAS.

S. B. No. 56.] Chapter 19.

An Act to lease islands, salt water lakes, bays, inlets, reefs and marshes owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of the State of Texas, and the unsurveyed public free school lands, for the production of oil and natural gas; authorizing the Commissioner of the General Land Office to adopt necessary rules and regulations in relation thereto; prescribing the terms upon which leases may be issued; providing for the advertisement of the areas before they are leased; prescribing the requirements for applications; providing for the recognition or abandonment of former surveys; prescribing how and when royalty shall be paid; appropriating the proceeds to the public free school

fund and the general revenue fund; creating a first lien in favor of the State; providing for offset wells; providing against pollution of water and authorizing the Game, Fish & Oyster Commissioner to enforce rules against such pollution; providing that leases may be transferred or relinquished to the State; providing for forfeiture of lease if the owner should fail or refuse to comply with the law and rules and regulations adopted relative thereto; providing for opening of roads as ways of ingress and egress to and from leased areas; providing for the protection of valid rights heretofore acquired and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. All islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, and the unsurveyed public free school lands shall be included herein and shall be subject to lease by the Commissioner of the General Land Office to any person, firm, or corporation for the production of oil and natural gas that may be therein or thereunder in accordance with the provisions of this Act, and such rules and regulations as may be adopted by said Commissioners as being necessary to the proper execution of its purposes.

* * * * *

**8. Act approved May 16, 1941, c. 286, General and Special Laws of Texas, 47th Legislature, Regular Session, p. 454:**

SOVEREIGNTY OF TEXAS ALONG ITS SEACOASTS

S. B. No. 30. Chapter 286.

AN ACT declaring the sovereignty of Texas along its seacoast; fixing its present seacoast boundary and ownership; and declaring an emergency.

Whereas, Dominion, with its consequent use, ownership and jurisdiction over its marginal waters by a State has found support because it is the duty of a State to protect its citizens whose livelihood depends on fishing, or taking from said marginal waters the natural products they are capable of yielding; also, has found support in that sufficient security must exist for the lives and property of the citizens of the State; and

Whereas, According to the ancient principles of international law, it was generally recognized by the nations of the world that the boundary of each sovereign State along the seacoast was located three (3) marine miles distant in the sea, from low water mark along its coast on the open sea; and

Whereas, The seaward boundary of each sovereign State as so fixed is generally known as the three (3) mile limit of such State; and

Whereas, The said three (3) mile limit was so recognized as the seaward boundary of each sovereign State, because at the time it became so fixed three (3) marine miles was the distance of a cannon shot,

and was considered the distance at which a State could make its authority effective on the sea by the use of artillery located on the shore; and

Whereas, Since the said three (3) mile limit was so established as the seaward boundary of each sovereign State, modern cannon have been improved to such an extent that now many cannon shoot twenty-seven (27) marine miles and more, and by the use of artillery located on its shores a State can now make its authority effective at least twenty-seven (27) marine miles out to sea from low water mark; and

Whereas, The first Congress of the Republic of Texas passed an Act (1 Gammel's Laws, 1193) defining the boundaries of the Republic of Texas and declaring that its boundaries began at the mouth of the Sabine River and ran West along the Gulf of Mexico three (3) leagues from land to the mouth of the Rio Grande, then up the principal stream of said river to its source; and the Congress of the United States (5 U. S. Statutes at Large, 797) proposed to the Republic of Texas that it be admitted into the Union, and that Texas should retain all vacant and unappropriated land lying within its limits; and the Congress of the Republic of Texas thereafter passed a Joint Resolution accepting the terms of annexation proposed by the United States (2 Gammel's Laws, 1200), and such action of the Congress of the Republic of Texas was ratified by popular vote of the people of Texas, and Texas was admitted to the Union by virtue of a Resolution of Congress passed December 29, 1845, under which the State

of Texas retained all of its public lands (9 U. S. Statutes at Large, 108); and the first Legislature of the State of Texas declared: "That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of said Republic; that such exclusive right is now vested in and belongs to the State, (Acts, First Legislature, 1846, page 155); and under the treaty of Guadalupe Hidalgo, the boundary line between the Republic of Mexico and the United States was defined as commencing in the Gulf of Mexico, three (3) leagues from land, opposite the mouth of the Rio Grande; it is clear that the Republic of Texas and the State of Texas have from the earliest days asserted title to the ownership of that portion of the Gulf of Mexico, and the soil at the bottom thereof, out to the limit of three (3) marine leagues from shore."

Whereas, Therefore, the gulfward boundary of Texas is already located in the Gulf of Mexico, three (3) leagues distant from the shore, a width of marginal area made greater by the above Act and agreement, than the well-accepted and inherent three (3) mile limit; and

Whereas, A State can define its limits on the sea; and

Whereas, The State of Texas owns the waters of the sea and the waters of the arms of the sea, and the seashore and the shores of all arms of the sea as far inland as the high water mark within the territory of the State of Texas; and

Whereas, The State of Texas, including all parts thereof and all territory that may

be added thereto, forms a part of the United States of America, over which the said United States is authorized to exercise, and exercises, such powers and jurisdiction as the said United States is authorized by the Constitution of the United States to exercise thereover;

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. That the gulfward boundary of the State of Texas is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three (3) mile limit, as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four (24) marine miles further out in the Gulf of Mexico than the said three (3) mile limit.

SEC. 2. That, subject to the right of the government of the United States to regulate foreign and interstate commerce under Section 8 of Article 1 of the Constitution of the United States, and to the power of the government of the United States over cases of admiralty and maritime jurisdiction under Section 2 of Article 3 of the Constitution of the United States, the State of Texas has full sovereignty over all the waters of the Gulf of Mexico and of the arms of the Gulf of Mexico within the boundaries of Texas, as herein fixed, and over the beds and shores of the Gulf of Mexico and all arms of the said Gulf within the boundaries of Texas, as herein fixed.

SEC. 3. That the State of Texas owns, in full and complete ownership, the waters of the Gulf of Mexico and of the arms of the said Gulf, and the beds and shores of the

Gulf of Mexico, and the arms of the Gulf of Mexico, including all lands that are covered by the waters of the said Gulf and its arms, either at low tide or high tide, within the boundaries of Texas, as herein fixed; and that all of said lands are set apart and granted to the Permanent Public Free School Fund of the State, and shall be held for the benefit of the Public Free School Fund of this State according to the provisions of law governing the same.

SEC. 4. That this Act shall never be construed as containing a relinquishment by the State of Texas of any dominion sovereignty, territory, property or rights that the State of Texas already had before the passage of this Act.

SEC. 5. The fact that the land included within the boundaries hereinabove fixed belongs to the Permanent Public Free School Fund of this State, and that the same is believed to be oil bearing land, and that the development of same in accordance with the provisions of law governing the sale or lease of minerals belonging to said Permanent Free School Fund is a major duty of the Legislature, and requires prompt and immediate attention, creates an emergency and an imperative public necessity that the Constitutional Rule requiring all bills to be read on three several days in each House be, and the same is hereby suspended, and that this Act take effect and be in full force from and after its passage, and it is so enacted.

**9. Act approved May 23, 1947, c. 253, Texas General and Special Laws, 50th Legislature, Regular Session, p. 451:**

STATE OF TEXAS—SOVEREIGNTY ALONG GULFWARD SEACOAST

S. B. No. 400. Chapter 253

AN ACT declaring the sovereignty of Texas along its Gulfward seacoast; fixing its present Gulfward seacoast boundary and ownership; amending Section 1 of Senate Bill No. 30, Chapter 286 of the 47th Legislature; and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. That Section 1 of Senate Bill No. 30, Chapter 286, Acts of the 47th Legislature, be and the same is hereby amended so as to hereafter read as follows:

"SECTION 1. The Gulfward boundary of the State of Texas is hereby fixed and declared to be a line beginning in the Gulf of Mexico at the mouth of the Sabine River; thence on a grid bearing S. 35 degrees 55 minutes and 22 seconds E. to the farthermost edge of the continental shelf from the Gulf Shore line; thence in a Westerly and Southerly direction with the edge of the continental shelf to a point opposite the mouth of the Rio Grande River; thence to the mouth of the Rio Grande River."

SEC. 2. The fact that the land included within the boundaries hereinabove fixed belongs to the Permanent Public Free School Fund of this state, and the state has never by statute embraced all of same within the boundary of Texas, and that the same is believed to be oil bearing land, and that the development of same in accordance with the provisions of law governing the sale or

lease of minerals belonging to said Permanent Free School Fund is a major duty of the Legislature, and requires prompt and immediate attention, creates an emergency and an imperative public necessity that the Constitutional Rule requiring all bills to be read on three several days in each House be, and the same is hereby suspended, and that this Act take effect and be in full force from and after its passage, and it is so enacted.

**10. Presidential Proclamation No. 2667, September 28, 1945, 10 F. R. 12303, 3 CFR 1945 Supp., p. 39:**

Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures

to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources:

Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, 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. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

* * * * *

**11. Article V of the Treaty of Guadalupe Hidalgo, 9 Stat. 922, 926, provided in pertinent part:**

> ARTICLE V. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

## 12. Report of the Commissioner of the General Land Office of the State of Texas for the Fiscal Year Ending August 31, 1880, p. 16:

EXHIBIT D.

Showing the Liabilities of the State on the Public Domain.

The Liabilities of the State have been increased as follows:

| | |
|---|---|
| By Special Act Certificates | 5,760 |
| Veteran Donation Certificates | 128,000 |
| Certificates issued to Counties under act March 13, 1875 | 159,408 |
| Certificates issued to Irrigation Companies | 5,760 |
| Certificates issued to Railroad Companies | 2,896,640 |
| Alternate Sections, set apart for the benefit of Common Schools | 2,896,640 |
| Lands surveyed for building of new Capitol | 3,050,000 |
| Lands surveyed for State University | 1,000,000 |
| Lands in 80 mile reserve from 100th Meridian west to the Rio Grande | 6,323,200 |
| Lands north of 80 mile reserve, and west of 100th Meridian | 4,822,000 |
| Increased liabilities | 21,287,408 |
| Liabilities heretofore reported | 130,523,982 |
| Total present liabilities | 151,811,390 |

| | | |
|---|---|---|
| Estimated area of the State | 172,604,160 | |
| Deduct for area of bays | 1,722,880 | |
| | | 170,881,280 |
| Liabilities as above | | 151,811,390 |

| | |
|---|---|
| Number of acres of Public Domain, against which there are no outstanding claims, and which are subject to locations, except tracts of 640 acres and less situated in organized counties, reserved from location by certificates, and only subject to pre-emption or sale for the liquidation of the Public Debt of the State | 19,069,890 |

Greer County, containing 2622 square miles, is included in the estimated area of the State. If this be deducted, say 1,678,080 acres, there will remain subject to location, only 17,391,810 acres.

## 13. Report of the Commissioner of the General Land Office [Texas], 1934–1936, p. 7:

DISTRIBUTION OF THE PUBLIC DOMAIN.

Estimated Area 170,936,080.

| | | *Acres* |
|---|---|---|
| Grants by Spain and Mexico | | 26,280,000 |
| The State University, by the Republic | | 221,400 |
| The State University, (1876) Constitution | | 1,000,000 |
| The State University, (1883) Legislature | | 1,000,000 |
| Kiamasha Road | | 27,000 |
| To build the Capitol | | 3,050,000 |
| Parker County courthouse | | 320 |
| Palo Pinto County courthouse | | 320 |
| San Jacinto Veteran donation | | 1,169,382 |
| Disabled Confederates | | 1,979,852 |
| To pay public debt | | 1,660,936 |
| Homestead donations (preemption) | | 4,847,136 |
| Internal Improvements (irrigation, etc.) | | 4,061,000 |
| Counties for school purposes | | 4,229,166 |
| Headright and bounties | | 36,876,492 |
| Colonies (Peters, Mercer et al.) | | 4,494,806 |
| Railroads | | 32,153,878 |
| Asylums (four) | | 400,000 |
| Public Free School | | 42,400,556 |
| Total surveyed | | 165,852,244 |
| Unsurveyed (coastal areas, river beds and vacancies) | | 1,500,000 |
| Excesses in surveys (estimated) | 5,500,000 | |
| Loss by conflicts (estimated) | 2,000,000 | |
| Net | | 3,500,000 |
| | | 170,852,244 |

## 14. Bascom Giles, "History and Disposition of Texas Public Domain", *Report of the Second Texas Surveyors' Short Course,* General Land Office, Austin, Texas (1941), p. 5, at p. 16:

# DISPOSITION OF THE PUBLIC DOMAIN OF TEXAS UNDER THE GOVERNMENTS OF THE REPUBLIC AND THE STATE

| | | |
|---|---|---|
| Total area of the State to 3 mile Coastal Limit | | 170,926,000 |
| Additional area to 3 League Coastal Limit | | 1,761,000 |
| Total area | | 172,687,000 |
| | Acres | Sub-totals |
| Grants to promote citizenship and to induce immigration | | |
| By Governments of Spain and Mexico | 26,280,000 | |
| Headrights and Bounties | 36,876,492 | |
| Colonies-(Peter's, Mercer's, et. al.) | 4,494,806 | |
| Homestead Donations (Pre-emptions) | 4,847,136 | |
| | | 72,498,434 |
| Donations to Veterans | | |
| San Jacinto veterans—Act of 1879 and 1881 | 1,169,382 | |
| Confederate veterans—Act of 1881 | 1,979,852 | |
| | | 3,149,234 |
| Sold to pay Public Debts by Republic | 1,329,200 | |
| 50c Sales Scrip Act of 1879 and $2.00 Sales Scrip Act of 1887 | 1,660,936 | |
| | | 2,990,136 |
| Internal Improvements | | |
| State Capitol Building | 3,025,000 | |
| Irrigation, Drainage, Iron Works, Kiamasha Road and sundry | 4,088,640 | |
| | | 7,113,640 |
| To acquire Transportation Facilities | | |
| Grants to Railroads | 32,153,878 | |
| | | 32,153,878 |
| For Education | | |
| State University and A. & M. | 2,329,168 | |
| County School purposes | 4,229,166 | |
| Eleemosynary Institutions (4) | 410,600 | |
| Public Free School | 42,500,000 | |
| | | 49,468,934 |
| Total Surveyed Land | | 167,374,256 |
| Less conflicts (Estimated at ½ of 1%) | | 837,256 |
| Net as per original surveys | | 166,537,000 |
| Excess (estimated at approximately 1.1%) | | 1,800,000 |
| River Beds and Vacancies (estimated) | | 1,100,000 |
| Submerged coastal areas to 3 League Limit | | 3,250,000 |
| Total | | 172,687,000 |

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