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VIRGINIA AND THE CONTROL OF FISHING RIGHTS

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The power of the state to regulate fishing in her public waters has become an accepted doctrine in this country.[1] The doctrine purportedly emerged from the English common law which vested the ownership of *ferae naturae*[2] in the sovereign. While there is some dispute among the authorities whether the ownership theory became the common law of England in fact or by error in Blackstone's interpretation of the common law,[3] it was undoubtedly incorporated into the law of the United States in 1896 by the case of *Geer* v. *Connecticut*.[4]

The regulatory powers so extended to the several states were exercised as early as 1780 in Virginia. By act of that year the shores of all streams in eastern Virginia, not then granted, were reserved as fishing commons.[5] In 1785 Virginia entered into a treaty with Maryland for the regulation of fish and oysters in the Potomac River.[6]

In upholding the validity of a tax required by Act of Assembly approved March 3, 1898,[7] Judge Buchanan stated in *Morgan's* Case at page 814:

> "Neither is a license tax upon the residents of the State, for the privilege of fishing in the waters belonging to the State in violation of any provision of the Con-

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1 McCready v. Virginia, 27 Gratt. (68 Va.) 985 (1876), aff. in 94 U.S. 391 (1876); Johnson v. Haydel, 279 U.S. 16 (1928).

2 Fish are considered *ferae naturae*. Gratz v. McKee, 260 U.S. 123 (1922); Lincoln v. Davis, 53 Mich. 375, 19 N.W. 103 (1884).

3 *Governmental Problems in Wild Life Conservation*, Robert H. Connery, Columbia U.Press, 1935, pp. 56 to 63.

4 161 U.S. 519 (1896).

5 *Minor's Institutes*, Vol. 11, p. 14. See also Va. Code, 1873, ch. 62 §§1, 2. For a case involving this act see Garnson v. Hall, 25 Gratt. (66 Va.) 150 (1881).

6 Compact of 1785, 12 Hen.Stat. 50, I.R.C., p. 53, c. 18; Va. Code, §7-6 (1950).

7 Acts of Assembly, 1897-'8, p. 864.

stitution of the State or of the United States. The navigable waters of the State and the soil under them within its territorial limits are the property of the State . . . and it has a right to control them as it sees proper . . . If the State has the right to require a license tax of merchants and others engaging in business . . . it certainly has the right to require a license tax of those who use the property of the State in carrying on their business as do the fishermen mentioned in the statute." [8]

A consideration of case law which further delineates the power exercised by the state in regulating fishing within her public waters involves two areas of concern. First, what are the limits implied by the phrase "public waters" and what is the extent of power properly exercised by the state within these limits? Second, to what extent is the power of the state limited by the Federal maritime jurisdiction of the Federal government as a common sovereign for the states?

EXTENT OF POWER WITHIN PUBLIC WATERS

Public waters simply mean those waters which are navigable and the terms are interchangeable.[9] At common law in England navigable waters were those which rose and fell with the tide, regardless of their suitability for use by commercial vessels.[10] This rule of common law has been followed neither in Virginia nor, generally, in the United States; the navigability of a river is determined by the navigability in fact of the river.[11]

The rule which was adopted in the early law of Virginia was set forth by Minor as follows:

> *Public waters* mean *navigable* waters, and at common law they are waters wherein the tide *ebbs* and *flows*. In Virginia, however, any water is *navigable* (and therefore public) which is *capable of being navigated* by vessels employed in commerce (say of 20 ton

[8] Morgan v. Comm., 98 Va. 812, 35 S.E. 448 (1900).

[9] State v. Korrer, 127 Minn. 60, 148 N.W. 617, L.R.A. 1916 c. 322 (1914).

[10] 47 A.L.R. 2d S.2a.

[11] Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907).

> burden or more), whether the tide ebbs or flows therein or not, and whether connected with the sea or not.[12]

The more recent test in Virginia is whether or not a stream provides a useful channel for commerce. The test is substantially the same as that stated by Minor and is followed in many other American jurisdictions.[13]

The regulatory power of the state over fishing, however, is not limited by the determination that a body of water is *not* navigable. Rather the power extends to all waters which allow the fish passage to other fishing grounds of the state.[14] The title to soil under private waters in which the fish have ingress and egress to public waters is in the riparian owner,[15] subject to fishing regulations imposed by the state.[16] Since the general test of state control of fish in private waters is the ability of the fish to migrate, only a privately-owned body of water isolated from public waters—such as a lake or pond—should be excluded from regulations by the state. The regulatory power of the state in privately owned waters is based almost as much upon the migratory nature of the fish as upon the physical characteristics of the body of water. Further, regulation by the state is not limited to public waters in the sense of navigable waters, but desirably enough, extends to waters in which there is a public interest.

A second, more pronounced limitation exists in favor of riparian owners adjacent to navigable or public streams. In an 1870 decision, *Yates* v. *Milwaukee*,[17] the United States Supreme Court held that:

> The owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.

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[12] *Minor's Institutes*, Vol. 11, p. 13 (1877), citing Warring v. Clark, 5 How. 441 (1846); Jackson v. James, 20 How. 296 (1857); The Dan'l Ball, 10 Wall. 563 (1870).

[13] Springs Lumber & Mfg. Co. v. Rivercomb, 106 Va. 176, 55 S.E. 580 (1906); Gratz v. McKee, 260 U.S. 127 (1922).

[14] State v. So. Coal, etc., Co., 71 W.Va. 470, 76 S.E. 970 (1912).

[15] Hampton v. Watson, 119 Va. 95, 89 S.E. 81 (1916); L.R.A. 1916 f 189 (1916).

[16] Va. Code, §62-2 (1950).

[17] 10 Wall. 497 (1870).

The regulatory power of the state, therefore, was not absolute. The opinion continued to state that . . .

> These rights are valuable and are property, and can be taken for the public good only when due compensation is made.

These rights were held to be subject to the general acts of the legislature for the protection of public rights. Included among them were free access to the navigable part of the stream and the right to erect landings, wharves and piers.

A confusion of terminology, if not law, has resulted from the application by state courts of the above rule of riparian rights. As pointed out in *Yates* v. *Milwaukee*,[18] Wisconsin had adopted an even broader rule which gave the riparian *title* to the center of the stream subject to a public easement for navigation.

An 1876 case in Virginia, *Norfolk City* v. *Cooke*,[19] cited *Yates* v. *Milwaukee* in stating that a riparian owner had property *in the soil* up to the line of navigability. While the rights involved were not increased, the language of the Virginia court appeared to extend the *Yates* decision. In the *Yates* case, abstract rights were held to have property value; here the landowner was given property in tangible soil beneath the stream since ". . . the wharf, pier or bulkhead can only be built on the soil." [20] This language, as well as the reason which justified it, was unnecessary to the result reached in the *Cooke* case. The two cases reached identical results by different language.

In *Alexandria & Fred. Railway Co.* v. *Faunce*,[21] in 1879, the riparians' property right was held to apply to the right of fishery in the Potomac River. Again *Yates* v. *Milwaukee* was cited, but here the court reiterated the precise language of its precedent. Fortunately, subsequent decisions have either ignored or overlooked the language of the *Cooke* case. The apparent conflict never matured. Undoubtedly, the ownership of soil beneath

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[18] *Id.* at page 504.

[19] 27 Gratt. (68 Va.) 430 (1876) at p. 435.

[20] *Ibid.*

[21] 31 Gratt. (72 Va.) 761 (1879).

navigable rivers is in the state;[22] and the Virginia Code which so provided in express terms, is declaratory of the common law.[23] Hence, by the *Faunce* case, state control of fishing in public waters was merely limited to require compensation for injury to existing fishing rights. No title to the river bed, water nor the fish therein was vested in the riparian owners.

The decision in the *Faunce* case also asserted the limitation imposed by riparian rights in navigable streams which were subject to the ebb and flow of the tide (as opposed to inland streams which were the subject of the Yates case.) At early common law in Virginia the title of landowners adjacent to the waters ended at high-watermark.[24] The Code of 1873 extended the landowners' property to low-watermark,[25] and a similar provision was included in the 1950 Code.[26] It was held in 1899 that a grant to high-watermark vested title to low-watermark unless a contrary intention was made manifest upon the face of the deed.[27] In 1902 it was held that the boundary of a grantee to low-watermark shifted with deposits made by accretion.[28] The title acquired by a grantee to low-watermark has been held to be a fee simple title.[29] Further, the term "low-watermark" means ordinary low-watermark[30] and is not broken by a dip or "gut" made in marsh land, preventing an appearance of low-watermark at its normal line.[31]

While the fee of the riparian has been extended to low-watermark, the regulatory power of the state has undergone no significant change as a result of the extension. By definition, the area between high-watermark and low-watermark at high tide,

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[22] Taylor v. Comm., 102 Va. 759, 47 S.E. 875 (1904); Grinels v. Daniels, 110 Va. 874, 67 S.E. 534 (1910).

[23] Va. Code §62-1 (1950). And see Meridith v. Triple Island Gunning Club, 113 Va. 80, 73 S.E. 721 (1912).

[24] Minor's Institutes, Vol. 11, p. 14; 2 Hen.Stat. 456 (1679).

[25] Va. Code, 1873, c. 62, §§1, 2.

[26] Va. Code, §62-2 (1950).

[27] The Waverly Water-Front Improvement Co. v. White, 97 Va. 176, 33 S.E. 534 (1899); French v. Bankhead, 11 Gratt. 136 (1854).

[28] C. & O. Ry. Co. v. Walker, 100 Va. 69, 40 S.E. 633 (1902).

[29] Taylor v. Comm., 102 Va. 759, 47 S.E. 875 (1904) aff. in Hampton v Watson, 119 Va. 95, 89 S.E. 81 (1916).

[30] Scott v. Doughty, 124 Va. 358, 97 S.E. 802 (1919).

[31] Whealton v. Doughty, 112 Va. 649, 91 S.E. 802 (1911).

just as the water of an inland stream from which fish have free passage, should be considered part of the public waters of the state. Logically, the regulatory power of the state should be the same in both bodies of water, subject (in the case of navigable waters) to the limitations imposed by the *Yates* case and the *Faunce* case.

The qualified rights of tidewater riparians do not end with their fee title at low-watermark. Numerous Virginia cases in addition to the *Faunce* case have extended them into the territorial waters[32] of the state beyond that point. The nature of such rights beyond low-watermark has further defined the regulatory power of the state in its public waters. A fourth limitation of the power exercised by the state has been established thereby.

Groner v. *Foster*[33] in 1897, citing *Norfolk City* v. *Cooke*, the *Faunce* case and *Yates* v. *Milwaukee*, restated the rights established in those cases and added . . .

> . . . the right to have the extent of such enjoyment upon the line of navigability determined and marked, and its boundaries defined . . .

concluding that . . .

> . . . a court of equity is the proper tribunal to make the apportionment and determine and establish the boundary lines of the coterminous owners.

The language of the court provided a definiteness not previously voiced. While the specific rights might, by implication, vary in each case, the prerogative of the landowner to have set aside marked areas within which state regulation was subordinated to his riparian rights was firmly established.

Prior to 1904, Virginia decisions had only hinted as to the ownership of soil beneath territorial waters of the state. A few cases previously cited indicated that riparian owners had title to

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[32] For purposes of the tidewater riparian, it is sufficient to designate "territorial waters" as that body of water extending from low-watermark to an unknown point in the sea.

[33] 94 Va. 650, 27 S.E. 493 (1897).

soil up to the line of navigability,[34] while all of them held only that riparians enjoyed certain uses which constituted valuable property. The determination of title to this soil was held unnecessary in *Groner* v. *Foster.*

In *Taylor* v. *Commonwealth*[35] in 1904, the plaintiff's bill alleged fee simple ownership of soil in the bed of the York River between low-watermark and the line of navigation. The plaintiff sought to maintain the right to lease an oyster fishery in water up to the line of navigability by leasing a one-acre fishery in a part of those waters which the Commonwealth had attempted to make the subject of a commercial grant.

The allegation was rejected by the court. The title to water and the soil beneath it beyond low-watermark . . .

> . . . is in the state, but the riparian owner has certain rights . . . but these rights of the state and of the riparian owner must be exercised, if possible, so that the one shall not necessarily disturb or impair the enjoyment of the other. A riparian who is not disturbed in the enjoyment of an existing or contemplated use . . . cannot complain . . . [of state action].

It was further said that . . .

> Whatever the soil beneath such navigable water contains belongs to the State, and it alone has the right to develop these hidden sources of wealth for the common benefit of all its citizens.

Whatever doubts existed concerning state ownership of tide-waters after the decision in *McCready* v. *Commonwealth*[36] in 1876 were extinguished by the 1904 decision of *Taylor* v. *Commonwealth.*[37]

McCready's case, as the decision was popularly known, upheld an act of the state legislature which prohibited the planting of oysters within the waters of the state by non-residents in

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[34] Norfolk City v. Cooke, 27 Gratt. (68 Va.) 430 (1876).

[35] 102 Va. 759, 47 S.E. 875 (1904).

[36] 27 Gratt. (68 Va.) 985, aff. in 94 U.S. 391 (1876).

[37] 102 Va. 759, 47 S.E. 875 (1904).

order to reserve a fishing common to the citizens of Virginia. The power of the state to pass this act was based upon ownership by the state of fish within its public waters. In effect, it was held that Virginia owned the fish in trust for her citizens, and the act of legislature was merely regarded as a regulatory action under such trust for the benefit of the public. In spite of the language of the court, the facts of the case did not imply absolute ownership by the state to the detriment of the public right of fishery.

Yet, the authority vested in the state after *McCready's Case* and the *Taylor* case was more absolute than at any previous date in the history of Virginia law. The state not only owned the public waters and the fish therein, but was, as well, the owner of the soil beneath the waters and whatever the soil contained.

Paradoxically, while the ownership established in *Taylor* v. *Commonwealth* was said to be for the benefit of all citizens, the result was to deny a riparian owner the right of fishery, since it had not previously been exercised or contemplated. This result presented a contrast to the result in *McCready's Case* which denied rights to non-residents. In the strictest sense, plaintiff's fishery was not an existing fishery of the type protected in the *Faunce* case, since it was not located in the precise area which had been granted by the state. By analogy, however, it is doubtful that the state would have been permitted to make a grant from a riparian's low-watermark seaward simply because the riparian had not previously contemplated an exercise of his rights in those waters.

Considered as a whole, the decision in *Taylor* v. *Commonwealth* could not be classified as unreasonable or harsh. It was, however, indicative of a trend toward discrediting the theory of ownership of fish by the state in trust for the public.

In *Hampton* v. *Watson*[38] in 1916 it was held that since tidal waters were owned by the state, a municipal corporation had the right to use such waters for sewage disposal even though injury to existing oyster beds resulted. The opinion of the court which mentioned the public trust imposed upon the state ownership of fish in public waters included the following statement:

[38] City of Hampton v. Watson, 119 Va. 95, 89 S.E. 81 (1916).

> The title of the state to the sea coast and the shores of the tidal rivers is different from the fee simple . . . and . . . a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself . . . except for some public purpose, or some reasonable use, which can fairly be said to be for the public benefit.[39]

The opinion continued as follows:

> . . . we are of opinion that . . . Hampton has the right to use the waters . . . for the purpose of carrying off its refuse and sewage to the sea so long as such use does not constitute a public nuisance and as such be discontinued by the legislature . . .[40]

Despite the public interest involved in efficient sewage disposal,[41] the *Watson* case allowed considerable disparity in contrast to prior decisions such as *McCready's Case*, the *Faunce* case and the *Taylor* case. First, an exception was made to the trust doctrine; second, actual injury was allowed to an existing right of fishery.

In 1932 the executive branch of the state, having determined that the legislature had abused its trust of the right of fishery, sought to enjoin the City of Newport News from emptying raw sewage into Hampton Roads. In *Commonwealth* v. *Newport News*,[42] the court held that the extent to which the waters were used for fisheries or sewage disposal was within the discretion of the legislature and subject to no trust not imposed by the Constitution of Virginia.[43]

Since the Constitution of Virginia contains but one trust provision[44] which imposes a trust upon the ". . . natural oyster

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[39] *Ibid.* at p. 100. Notice that the court cited a New York case for this exception to the trust doctrine. Coxe v. State, 144 N.Y. 396, 39 N.E. 400 (1895).

[40] *Ibid.* at p. 100, and p. 101, citing a Massachusetts case. Haskell v. New Bedford, 108 Mass. 208, 214 (1871).

[41] *Ibid.* at p. 102.

[42] 158 Va. 521, 164 S.E.2d 689 (1932).

[43] *Ibid.* at p. 556. The holding was preceded by a lengthy criticism of the trust doctrine and a citation, among others, of the case of Hampton v. Watson, *supra*.

[44] Va. Constitution §175.

beds, rocks and shoals . . ." in the tidal waters of the state, the long-recognized trust doctrine appears to have been otherwise discarded.

The rule initiated in *Hampton* v. *Watson* in 1916 was affirmed by the Supreme Court of the United States in the case of *Darling* v. *Newport News*[45] in 1918. The rule recited in *Commonwealth* v. *Newport News* in 1932 was substantially identical but more emphatically stated.

While those decisions dealt with the unique problem of sewage disposal—a vital public interest itself—their effect upon the public right of fishery was not made less harmful by virtue of their uniqueness. Further, they constituted an undeniable departure from the *Faunce* case, *McCready's Case* and even *Taylor* v. *Commonwealth* (which was an intermediary decision) to the extent that the right of fishery constituted a common link of similarity among the cases. By those decisions, also, the power of the state to regulate fishing in its coastal, public waters became virtually unlimited.

The cases are susceptible of an interpretation which does not require the regulations by the state to be for the public interest in its ordinary sense. The single limitation, if it can be considered a limitation at all, is the benevolence of legislative discretion.

LIMITATION OF POWER BY FEDERAL MARITIME JURISDICTION

It has been consistently held in the courts of Virginia that

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> The navigable waters beyond low-watermark . . . within the territorial limits of a State are the property of the State to be controlled by the State.[46]

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[45] 123 Va. 14, 96 S.E. 307, aff. in 249 U.S. 540 (1918). For a complete discussion of this rule and its application in other jurisdictions, see 3 A.L.R. 762.

[46] Taylor v. Com., 102 Va. 759, 47 S.E. 875 (1904) citing McGready's case, 31 Gratt. (68 Va.) 985 (1876); French v. Bankhead, 11 Gratt. (52 Va.) 136 (1854).

It is, also, generally conceded that the state may regulate fishing within her limits where not restricted by the United States Constitution.[47]

The extent afforded the territorial limits or waters of a state, however has been the subject of perpetual diversity of opinion in courts throughout the United States. A precise statement of the area encompassed by the phrase "territorial waters" is difficult. Due to the multitude of purposes for which jurisdiction is invoked in those areas, a precise statement might be undesirable, since an adequate coverage of the many issues requires flexibility.

The public right of fishery has been held to extend to high-watermark in spite of the riparian's ownership in fee to low-watermark.[48] The main source of conflict has arisen from the attempt to determine the distance jurisdiction should extend from high-watermark seaward. Some authorities have stated that sovereign jurisdiction should extend a reasonable distance from the shore—once the distance reached by a cannon shot.[49] A reasonable distance was considered that distance which was reasonable for the particular purpose invoking jurisdiction. It could be increased as the range of cannon increased.[50] Similarly, the right to fish and regulate fishing normally implies a reasonable use of waters.[51]

A lucid analysis of the problems which cloud the definition of territorial waters was made in *Manchester* v. *Massachusetts*[52] in 1890. In that case, the validity of a Massachusetts statute, regulating the taking of fish for menhaden in Buzzard's Bay, was questioned. Argument for the plaintiff in error, who sought to evade the jurisdiction of Massachusetts courts, stated, in part, as follows:

> At the time of the treaty of Paris, in 1783, the territorial domain of England extended upon her coast to low

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[47] Boggs v. Comm., 76 Va. 989 (1882); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

[48] Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895); State v. So. Coal, etc., Co., 71 W.Va. 470, 76 S.E. 970 (1912).

[49] 1 Kent. 29.

[50] Hall, *International Law*, 157.

[51] Diversion Lake Club v. Heath, 126 Tex. 129, 58 S.W.2d 566 (1933).

[52] 139 U.S. 240 (1890), citing 10 Peters 367 (1842).

watermark, including all bays, harbors, and inlets within the '*fauces terrae*', where a man can reasonably discern from shore to shore . . . Within these limits was 'the body of the country'. Within them the title to tide waters and the soil beneath was in the crown.

Without these limits were the 'high seas', the common property of all nations. Over them England, as one of the common sovereigns of the ocean, had certain rights of jurisdiction and dominion derived from and sanctioned by the agreement of nations . . . These rights belonged to England as a member of the family of nations, and did not constitute her the possessor of a proprietary title in any part of the high seas nor add any portion of these waters to her realm. In their nature they were rights of dominion and sovereignty rather than of property . . . The law of England was introduced and established in the colonies . . .

Such, then, was the territorial domain and such the extraterritorial right of jurisdiction which Massachusetts possessed and could have exercised as an independent State when she adopted the federal Constitution . . . As an independent nation she could have undoubtedly enacted a statute like the one under discussion, which her own courts would have enforced and which other nations would have recognized . . .

Whatever of such rights Massachusetts possessed previous to the formation of the federal government she possessed wholly by virtue of an agreement between herself as a nation and other nations . . .

When she became a State in the Union she not only on general principles merged her nationality in that of the United States, but by express concession she agreed to these clauses of the Constitution. Article I., section 10. 'No State shall enter into any treaty, alliance or confederation.' 'No State shall without the consent of Congress enter into any agreement or compact with another State or with a foreign power.'

Thus, Massachusetts was cut off from entering into such agreements with foreign nations as make up the body of international law. Not only could she enter into no new agreement, but the continuance of existing agreements was terminated . . .

The control over the fisheries of the ocean, resting as it did upon such agreement and usage, was surrendered with the power to contract with the sovereign States.

> This was not a surrender of territory that belonged to her, but of dominion over the common territory of the nations.[53]

The opinion of the court, which rejected the foregoing argument, was delivered by Mr. Justice Blatchford. Citing *Cooley* v. *Board of Port Wardens*,[54] he concluded that while the jurisdiction of the state as a sovereign in bays and waters adjacent to its coasts might have been granted to the United States, control of fishery therein remained in the state absent affirmative control by Congress. The court expressly declined to determine the power of Congress to regulate fishery within the territorial waters of a state. Numerous authorities were cited, however, which held that the territorial jurisdiction of a nation extended one marine league (three miles) from its coast and included bays less than two marine leagues in width at the mouth.[55]

It is at least arguable on the basis of *Manchester* v. *Massachusetts* that the territorial waters of a state, extending three miles seaward from the coast line, are subject to the concurrent jurisdiction of the state and federal governments—that the states, upon joining the Union ceded their territorial waters as nations to the United States. The United States, in turn, by silence permitted the states to exercise sovereign power over these waters.

This argument for concurrent jurisdiction is tenable in spite of such cases as *Dunham* v. *Lamphere*[56] and *McCready's Case*[57] which were cited in *Manchester* v. *Massachusetts* and expressly negatived any grant of power over fisheries to the United States. Control of fishery was an attribute of British sovereignty which was gained by the independent states in their sovereign capacity. Certainly a cession of their sovereign power to the United States should have included a cession of their control over fishery. The argument was not overcome by the holding in *Manchester* v. *Massachusetts*—it was skirted by invoking the rule of *Cooley* v. *Board of Port Wardens*.

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[53] *Ibid.* at p. 246.

[54] 12 How. 299 (1851).

[55] Manchester v. Mass., *op. cit. supra*, at p. 258.

[56] 3 Gray 268 (1855).

[57] 94 U.S. 391 (1876).

The argument was never a clear issue in either *Dunham* v. *Lamphere* or *McCready* v. *Commonwealth.* In the former case it was held that the regulation of fisheries was left to the states by the United States Constitution since not expressly delegated to the United States—the power could scarcely be left to the states if they never possessed it in their capacity as states. The latter case merely held that specific fishing regulations imposed by Virginia violated neither the commerce clause[58] nor the privileges and immunities clause of the United States Constitution. The precise argument presented by the plaintiff-in-error in the *Manchester* case was that Great Britain herself had no regulatory power beyond her low-watermark except in her sovereign capacity. It presented a question of the general maritime jurisdiction of the Federal government as a common sovereign for the states.

Despite the argument, the law, as applied, was neither controverted nor criticized until a series of cases culminating with *United States* v. *Texas*[59] in 1950 and known as *Tidelands* decisions.[60]

It was held in *United States* v. *Louisiana,* decided on the same day as *United States* v. *Texas* and concerning the rights of the United States in the coastal waters of Louisiana, that:

> If the property, whatever it may be, lies seaward of low-watermark, its use, disposition, management, and control involve national interest and national responsibilities, thereby giving rise to paramount national rights in it.[61]

The complaint in *United States* v. *Texas* alleged that the United States was . . .

> . . . the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the

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[58] The regulation of fishery in a reasonable manner does not constitute an interference with interstate commerce sufficient to fall within the Constitutional prohibition. State v. Harrub, 95 Ala. 176, 10 So. 752 (1892); Ex Parte Fritz, 86 Miss. 210, 38 So. 722 (1905).

[59] 339 U.S. 707 (1950).

[60] United States v. Cal., 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

[61] United States v. La., 339 U.S. 699 (1950) at p. 701.

> lands, minerals and other things . . . lying seaward of the ordinary low-watermark on the coast of Texas and outside of the inland waters, extending seaward to the outer edge of the continental shelf . . .[62]

The complaint was upheld. The court had found in the *Louisiana* case that Louisiana, like the original thirteen colonies, had never owned the marginal or coastal seas beyond low-water-mark. In the *Texas* decision it was stated:

> We assume that as a Republic she [Texas] had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she ceased to be an independent nation . . . In external affairs the United States became the sole and exclusive spokesman for the nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.[63]

The decisions in the *Louisiana* and *Texas* cases were the exact opposite of those in *McCready's Case* and the *Manchester* case. If a comparison was to be made, it was between the argument favoring the expansion of Federal maritime jurisdiction in the *Manchester* case and the basis of decision in the *Texas* case. Of course, the *Texas* decision did not specify that fishery in territorial waters fell within the regulatory power of the Federal government. Federal regulation in similar instances has thus far been limited to situations in which an international interest was involved.[64] Even this regulation met strong opposition which led to the proposed Bricker Amendment to the Federal Constitution.

Conceivably, fishery could have been distinguished and excluded from the *Texas* decision, but such a distinction was un-

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[62] United States v. Tex., *op. cit. supra,* at p. 709.

[63] *Ibid.* at p. 717.

[64] See, for example, the leading case of Missouri v. Holland, 252 U.S. 416 (1920).

likely in view of dominant trends in the current Supreme Court decisions. Those trends were limited in 1953 by the Submerged Lands Act[65] which fixed the territorial limits of each coastal state at a point three miles from its coast. Thus, Congress attempted to restore the law which existed before the *Tidelands* decisions.

That law itself left doubt concerning the ownership of fish and regulation of fishing in coastal waters. The doubt cannot be resolved solely by the courts. Currently, such jurisdictional questions involve as many political as legal issues.[66] The extent of Federal power must ultimately be determined in accordance with the balance of power established between the Supreme Court and Congress, in the first instance, and between those bodies and the individual state, in the second. Until some more definite balance of power is established, the states must be deemed free to exercise regulatory powers over fishery in their territorial waters —at least while Congress remains silent.

[65] 43 U.S.C.A. 1301.

[66] The *Tidelands* decisions are discussed as they relate to the *Segregation* cases and other much-criticised decisions by the Supreme Court in 42 A.B.A.J. 730 (1956). See also, 42 A.B.A.J. 727 (1956), for a suggested limitation of power in the Supreme Court by the interposition of state sovereignty. Regulation of fishing in the high seas beyond the three-mile limit and its relationship to International Law are discussed in 42 A.B.A.J. 235 (1956).