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The Doctrine of Ancient Title: Unknown Origins Uncertain Future

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Ownership of our nation's coastal waters has been a source of constant litigation for the past four decades. Throughout these disputes the Supreme Court has grappled with a host of state claims that various coastal waters should be classified as the state's internal waters. Recently, the Supreme Court discussed the newest addition to the arsenal of theories upon which states have based their claims, when it considered a claim by Massachusetts based on the doctrine of ancient title. Ancient title's late arrival into the coastal delimitation battle is ironic since it is the oldest method of acquiring territory. Nevertheless, its introduction into a domestic dispute is controversial, with significant domestic and international ramifications. This Comment discusses the origins of ancient title doctrine and its application to such state claims. The Comment takes issue with the Supreme Court's implicit recognition of ancient title in a domestic dispute, but concludes that the doctrine is a legitimate vehicle for resolving international disputes.

INTRODUCTION

The Convention on the Territorial Sea and the Contiguous Zone (Territorial Sea Convention or the Convention),1 adopted April 29, 1958, has been the most productive attempt to codify international law on the ownership of the navigable waters off the world's many coasts.2 Since that date there has been a constant search to discover

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2. International law generally recognizes three distinct sea zones, distinguishable by the degree of control the contiguous nation may exert over each zone. Nearest to the coast is the zone referred to as inland or internal waters. The contiguous nation may exercise the same degree of sovereignty over its internal waters as it does over the land within its borders, including the right to exclude foreign traffic through and above this zone. Beyond the internal waters is the territorial or marginal sea, which begins at the seaward edge of the internal waters. The contiguous nation may exercise a high degree of regulatory activity in its territorial sea, but cannot deny foreign ships the right to pass through these waters. This is referred to as the right of innocent passage. Outside the territorial sea lies the zone referred to as high seas. No nation may exercise dominion over the high seas. United States v. Louisiana, 394 U.S. 11, 22-23 (1969) [hereinafter Louisiana Boundary Case].
and actualize the full scope of the first part of article 7(6) of the Territorial Sea Convention, — the so-called "historic bays savings clause." The historic bays savings clause provides an exception to the rigid methods of delimiting bays which the Convention codifies, placing the burden upon the proponent of the claim to establish its applicability.

The Juridical Regime of Historic Waters, Including Historic Bays (the Juridical Regime) took a major step in elucidating the historic bays concept. The Juridical Regime was a project organized by the United Nations, at the request of the International Law Commission, to make an in-depth study of the principles of historic waters. It focused primarily on the historic bays question, and ultimately elaborated on the doctrine of historic title. This doctrine enables a state to claim as internal waters that which would normally be defined as territorial sea or high seas by other sections of the Convention and international law.

In addition to its discussions of historic title — the primary method by which a state acquires title to waters off its coastline — the Juridical Regime briefly discussed ancient title. Ancient title is an alternative means of acquiring title to a bay which would not otherwise be considered a bay under the provisions of the Convention. The Juridical Regime dedicated several paragraphs to contrasting ancient title with historic title.

On February 25, 1986, the United States Supreme Court decided the case of United States v. Maine (Massachusetts Boundary Case). The question before the Court was whether Nantucket Sound qualified as internal waters of the Commonwealth of Massachusetts, pursuant to the Submerged Lands Act of 1953. The United States

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3. Territorial Sea Convention, supra note 1, art. 7(6).
4. United States v. Maine, Report of Walter E. Hoffman, Special Master, May 24, 1985 (October Term 1984, No. 35, Original) at 7 [hereinafter Report of the Special Master]. A Special Master, as a representative of the Court, is one to whom a matter is referred to hear and report findings of fact and conclusions of law.
6. Id. at 12.
7. 106 S. Ct. 951 (1986) [hereinafter Massachusetts Boundary Case].
8. Classification as internal waters gives a state the right to regulate surface and air traffic as well as the right to exploit the subsurface and subsoil resources of the internal waters, including the power to sell, lease and tax. See Comment, The Doctrine of Historic Bays: Applying an Anachronism in the Alabama and Mississippi Boundary Case, 23 SAN DIEGO L. REV. 763, 763-64 (1986).
9. The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1982), confirms to each state title to and ownership of the lands beneath the navigable waters within state boundaries. The Act also confirms to the state a seaward boundary three geographical miles distant from its coastline. A state bordering the Gulf of Mexico, however, may be entitled to an historic seaward boundary beyond three geographic miles and up to three marine leagues (nine geographic miles) distant from the coastline. United States v. Louisiana, 470 U.S. 93, 94-95 (1985) [hereinafter Alabama and Mississippi
claimed that these waters were partly territorial sea and partly high seas. The history of the dispute is a long one. It originated when the parties filed a Joint Motion for Supplemental Proceedings to the original case to determine the location of the Massachusetts coastline. After the Supreme Court appointed Walter E. Hoffman as Special Master, the parties agreed to a partial settlement. The status of Vineyard Sound and Nantucket Sound, "a dispute which gave rise to extensive hearings before the Special Master," was left unresolved. The Special Master ruled that Vineyard Sound was an historic bay and therefore a part of Massachusetts' internal waters, but that Nantucket Sound was not part of Massachusetts' internal waters — the latter decision to which the Commonwealth took exception. Although admitting that the doctrine of historic title was inappropriate to support its claim, Massachusetts continued to assert its claim based on the doctrine of ancient title.

The Supreme Court had never been faced with a claim to coastal waters based on the doctrine of ancient title. Because the case could be resolved on grounds other than the doctrine of ancient title, the Court was not forced to affirm or deny its

Boundary Case].

10. In 1969, the United States invoked the Supreme Court's original jurisdiction in an action to quiet title to the Atlantic Coast Seabed. United States v. Maine, 395 U.S. 955 (1969). In 1975, the Court affirmed the title of the United States to the seabed outside a zone three miles from the coastline. The states' title to the seabed three miles off the coastline was affirmed. United States v. Maine, 423 U.S. 1 (1975). See also United States v. Maine, 420 U.S. 515 (1975), which reserved jurisdiction invocable by any party with the filing of a motion with the Supreme Court for supplemental proceedings; Massachusetts Boundary Case, 106 S. Ct. at 952, n.1.


14. Id.

15. Id.

16. The question of the validity of the doctrine of ancient title and its applicability to the claims of the Commonwealth of Massachusetts were extensively discussed by the Special Master. Report of the Special Master, supra note 4, at 24-66. The Special Master explicitly recognized the existence and applicability of the doctrine of ancient title, thoroughly analyzing Massachusetts ancient title claims to both Vineyard Sound and Nantucket Sound in his Report. Id. The Master concluded "that Massachusetts ha[d] met its burden of proof" regarding ancient title, with respect to Vineyard Sound. Id. at 61. The Special Master rejected Massachusetts' claim to Nantucket Sound, under all theories, including ancient title. Id. at 64-66. The Commonwealth took exception to the Special Master's ruling that Massachusetts must prove its title by "clear beyond doubt" evidence of ancient title to the waters and seabed of Nantucket Sound. United States v. Maine, Exception of the Commonwealth of Massachusetts and Supporting Brief to the Report of the Special Master (October Term 1983, No. 35, Original) [hereinafter
validity.\textsuperscript{17} The Special Master, however, had relied on ancient title in evaluating Massachusetts’ claims to Vineyard Sound and Nantucket Sound.\textsuperscript{18} Hence, despite the Court’s unwillingness to discuss the “validity of and any limits to the ‘ancient title’ theory,”\textsuperscript{19} the Court’s use of the Special Master’s analysis in its opinion makes inroads toward a judicial application of the doctrine.

This Comment attempts to put ancient title into perspective, now that the Supreme Court specifically has acknowledged its existence, if not its validity. The first section of this Comment briefly summarizes the methods of delimiting internal waters of states from territorial sea and high seas under the Territorial Sea Convention.\textsuperscript{20} The second part of this Comment examines the doctrine of ancient title and its corollary, the doctrine of historic title, including the internal logic which demands recognition of both doctrines, if either is valid. Finally, this Comment examines the significance of applying ancient title to a domestic coastal dispute and discusses whether the separation of powers doctrine should require the judiciary to defer to the federal legislature on such issues.

**RECOGNIZED METHODS FOR DETERMINING INTERNAL WATERS**

The modern era of defining internal waters began with the Territorial Sea Convention.\textsuperscript{21} Article 1 states that “[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.”\textsuperscript{22} “Waters on the landward side of the baseline of the territorial sea...
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form part of the internal waters of the State."23 The Supreme Court has relied particularly on the Convention in fixing the coastline of the United States.24 "The Supreme Court has concluded that the Convention provides 'the best and most workable definition available' for defining the extent of internal waters, including bays."25 In electing to follow the Convention, the Court has given priority to the proposition that the United States should have a single coastline for both domestic and international relations.26 The Convention has propagated three basic rules and one exceptional rule for defining the internal waters of states: normal baselines,27 straight baselines,28 baselines of bays,29 and historic bays.30

Normal Baselines

The most basic of rules for determining internal waters is the normal baseline method.31 Article 3 of the Territorial Sea Convention states, with express exceptions, that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."32 From this basic definition, the Convention elaborates on constructing normal baselines regarding various geological phenomena.

A baseline can be drawn as a straight line "across the mouth of [a] river between points on the low-tide line of its banks," when it flows into the sea.33 An island’s baselines are determined in the same manner as mainland baselines.34 "Where a low-tide elevation35 is situated wholly or partly at a distance not exceeding the breadth of the

23. Id. art. 5(1).
24. See Massachusetts Boundary Case, 106 S. Ct. at 93. See also United States v. California, 381 U.S. at 161-67; Alabama and Mississippi Boundary Case, 470 U.S. at 93.
27. Territorial Sea Convention, supra note 1, art. 3.
28. Id., art. 4(1) and accompanying text.
29. Id., art. 7.
30. Id.
31. Id., art. 3.
32. Id.
33. Id., art. 13.
34. The Territorial Sea Convention defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." Id., art. 10(1).
35. "A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide". Id., art. 11(1).
 territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea." Other guidelines for atypical formations are provided by the Convention.

**Straight Baselines**

The second method of delineating the internal waters of a state is the "straight baseline" method. The straight baseline method was adopted by the Territorial Sea Convention as a codification of a decision by the International Court of Justice. A state may elect to use the straight baseline system when there are either deep indentations or a fringe of islands along its coast. The choice of straight baselines must be shown clearly and publicized on official coastal charts. These baselines cannot "cut off from the high seas the territorial sea of another State." Using straight baselines allows a nation to circumvent the twenty-four mile closing line rule of article 7. When a nation, however, elects to apply the straight baselines method in lieu of normal baselines, article 5(2) of the Convention requires that foreign vessels be given a right of innocent passage.

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36. *Id.*
38. Article 4(1) of the Territorial Sea Convention states:
   1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
   2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.
   3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.
   4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.
   5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.
   6. The coastal State must clearly indicate straight baselines on charts to which due publicity must be given.

Territorial Sea Convention, *supra* note 1, art. 4.
39. Fisheries (U.K. v. Nor.) 1951 I.C.J. 116 (1951) [hereinafter *Anglo-Norwegian Fisheries*]. The International Court of Justice (ICJ) held that the Norwegian system of straight baselines was not a violation of international law, and that Norway was entitled to internal waters rights over a group of bays based on their long use of this method of delimitation.
40. Territorial Sea Convention, *supra* note 1, art. 4(1).
41. *Id.*, art. 4(6).
42. *Id.*, art. 4(5).
43. See *infra* notes 48-50 and accompanying text.

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through affected waters. This rule allows foreign vessels to continue to navigate waters that otherwise would be closed, while allowing the claiming nation all other vestiges of sovereignty.

The Supreme Court has ruled that decisions regarding the proper implementation of straight baselines on the United States coastline are reserved for the federal government. The individual states cannot make decisions implementing straight baselines. The Supreme Court has reasoned that for states to be able to implement straight baselines on an individual basis consequently would give them the power to expand United States borders, a power reserved to the federal government.

**Baselines of Bays and Historic Bays**

The third set of the Territorial Sea Convention’s rules for determining internal waters contains the rules for determining the baselines of bays. Article 7 of the Convention provides separate rules

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44. Article 5(2) of the Territorial Sea Convention states: Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters. Territorial Sea Convention, supra note 1, art. 5(2).

45. The United States Constitution vests in Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2. This power is without limitation. Neither the courts nor executive agencies can proceed contrary to an act of Congress in this area of national power. United States v. California, 332 U.S. at 27.

46. United States v. California, 381 U.S. at 168; Alabama and Mississippi Boundary Case, 394 U.S. at 72.

47. United States v. California, 381 U.S. at 167-68. Only the federal government has the power to expand territory of the United States. Hence, only the federal government can elect to use straight baselines. See id. at 168.

48. Territorial Sea Convention, supra note 1, art. 7. Article 7 states:

1. This article relates only to bays the coasts of which belong to a single State.
2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.
for bays whose natural entrance point low water marks are less than twenty four nautical miles apart, and bays whose natural entrance point low-water marks are separated by more than twenty-four nautical miles. Article 7 does not apply, however, where the straight baseline system of article 4 of the Convention is used.

To qualify as a bay for the purposes of article 7, the coastline involved must be entirely within one state and satisfy the semicircle test. If an indentation qualifies as a bay under article 7(1) through 7(3), articles 7(4) and 7(5) of the Convention allow it to have a closing line up to twenty-four nautical miles, with the waters landward of that line being internal waters, and the waters immediately seaward being the territorial sea. When the natural entrance points are less than twenty-four nautical miles apart, the entire bay may be classified as the internal waters of the state. If the natural entrance points are separated by more than twenty-four miles, the state may draw a straight baseline of twenty-four nautical miles “within the bay . . . enclos[ing] the maximum area of water that is possible with a line of that length.”

Article 7 of the Convention also contains an exception for what it describes as “historic bays.” Although historic bays are not defined by the Convention, the Supreme Court has relied on the Juridical Regime to shed light upon this concept when asked to decide disputes which have risen between the states and the federal government.

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

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

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

Id., art. 7.

49. Id., art. 7(4).
50. Id., art. 7(5).
51. Id., art. 7(6).
52. Id., art. 7(1).
53. Id., art. 7(2).
54. Massachusetts Boundary Case, 106 S. Ct. at 954.
55. Territorial Sea Convention, supra note 1, art. 7(4).
56. Id., art. 7(5).
57. Id., art. 7(6). See infra notes 60-70 and accompanying text; see generally Comment, supra note 8.
58. Massachusetts Boundary Case, 106 S. Ct. at 954.
59. It is not unusual for the Supreme Court to apply international law when the Court deems it appropriate. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); The Paquete Habana, 175 U.S. 677 (1900). See generally Sprout, Theories as to the Applicability of International Law in Federal Courts of the United States, 26 AM. J. 776.
The Historic Bay Exception and Diplomatic Pacification

The drafters of article 7 of the Territorial Sea Convention refused to create rigid rules that might exclude from a state's internal waters bays which pragmatically should be included. The historic bay exception was intended to be the "catch-all" provision for claims which more accurately might be called "equitable bays." These are the bays which the sovereign, its citizens, and perhaps the rest of the world recognize as the sovereign's internal waters, despite the Territorial Sea Convention's more static rules.

Unfortunately, ex post facto codification of international law — by an organization whose power to codify derives from diplomatic accommodation rather than absolute authorization — tends to be problematic. Established rules must be set broadly enough not to offend the organization's chemistry, yet narrowly enough to retain effectiveness. These competing concerns tend to produce imprecise codification, leaving only historical principles and precedent as the guide for interpreting the new code. One such claim that exemplifies this inherent dilemma is the Soviet Union's claim in 1957 to the Bay of Peter the Great adjoining the Sea of Japan. Little or no evidence exists of a usage sufficient to establish the Soviet claim. The element of acquiescence is lacking. Yet, in order to preserve the delicate balance in the international community, this claim was not challenged broadly.

The historic bay exception has not escaped the inherent vagaries of these diametrically opposed forces. The elements of an historic bay claim are subject to historical interpretation. They take into consideration the actions of the state asserting the internal waters claim, as well as the actions of other nations. Ultimately, at the core of the doctrines which embody historic bays are two methods of acquisition

Intr'l L. 280 (1932).


60. Such refusal to create rigid rules, and hence exclude certain bays, was likely diplomatically expedient for the purpose of gaining sufficient multilateral support for the article's adoption.

61. The list of waters that might qualify as historic bays is long and subject to omissions. For a compilation of bays to which historic claims have been made, see U.S. Dep't of State, Pub. No. 1506, 1 Digest of International Law 698-712 (G. Hackworth ed. 1940) [hereinafter cited as 1 Hackworth].

62. The United States, France, Germany, Holland, Japan, Sweden and the United Kingdom all have protested the Soviet claim. For the United States protest, see 37 Dep't St. Bull. 388 (1957) and 38 Dep't St. Bull. 461 (1958).
of title — original and adverse possession. These methods are far more universal and accessible than the doctrines suggested as the appropriate tests for a state's internal waters claims under the historic bay exception.

In preparing the Juridical Regime, the objectives of the participating states initially were divided. Some states desired steadfast rules; others desired flexible principles which derived from individual historic bay claims; and still others wished to establish a list of all historic bays. After considerable debate, the delegates decided that the focus of the study would be to compile an amalgamation of the international legal principles governing historic waters. The delegation decided to examine a collection of cases of possible historic waters claims, submitted by the states, in order to determine common principles pervasive in many or all of the cases. A major concern, however, was discovering a method which would be fair, but would not accept every state's claim.

The Juridical Regime recognized that it would be difficult to arrive at a uniform set of principles to govern the determination of historic waters, yet remain faithful to the practices of all the states which were the source of these principles. The results were certain to exclude claims which, in part, had formed the basis for the rules.

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63. Original or nonderivative acquisition of property is the oldest method of acquisition. It involves discovery and occupation, although the degree of occupation required varies depending upon time and circumstances. See generally, U.S. DEP'T OF STATE, PUB. NO. 7553, 2 DIGEST OF INTERNATIONAL LAW 1028-61 (M. Whiteman ed. 1963) [hereinafter 2 Whiteman]; 1 Hackworth, supra note 61, at 393-409; 1 J. Moore, INTERNATIONAL LAW DIGEST 258-69 (1906).

64. An adverse or prescriptive acquisition of property displaces the claim of ownership by an owner who is first in time, but who has allowed the adverse possessor to occupy the claimed territory without protest for a period sufficient to allow the adverse possessor's claim to ripen to full title. The time element is judged on a case-by-case basis. See P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 355-426, 474-78 (1927).

65. Juridical Regime, supra note 5, at 2-5.

66. The term "historic waters" is a concession to those who preferred to discuss more than just bays, despite the fact that the initial focus of the Commission was to have been Article 7(6) of the Territorial Sea Convention, which mentions only historic bays.

67. The Juridical Regime states:

The purpose of the study should... be to discuss the principles of international law governing the regime of 'historic waters.' The question then arises how these principles can be ascertained. The proper inductive method would be to study the particular case of 'historic waters' and see what common principles can be abstracted from them. This procedure would, however, seem to require that the first step should be to establish a collection of cases which would be as complete as possible. That would mean that the Governments must be approached with a request to provide information. On the other hand, if not every governmental claim to 'historic waters' is to be accepted, some principles would be needed in the light of which the claims could be evaluated.

Juridical Regime, supra note 5, at 5.

68. Theoretically at least, there seems to be a dilemma here: in order to decide whether a claim to "historic waters is rightful, it is necessary to have principles of inter-
The solution chosen was to weigh existing claims, previous attempts to formulate principles, and the commentary of international legal scholars on the topic. The bulk of these materials already had been compiled in a United Nations Secretariat Memorandum on “historic bays.” These materials were analyzed and discussed until preliminary conclusions and propositions were resolved. These preliminary conclusions and propositions became the main text of the Juridical Regime.

ANCIENT TITLE AND HISTORIC TITLE: A COMPARISON

The Doctrine of Freedom of the High Seas

Historically, the doctrines of ancient title and historic title have been relatively devoid of bright line tests. In differentiating ancient title and historic title, however, one bright line does surface — the doctrine of freedom of the high seas. "The modern law governing the high seas has its foundation in the rule that the high seas are not open to acquisition by occupation on the part of states individually or collectively." The high seas are free for all to use.

The period between the end of the sixteenth century and the beginning of the nineteenth century marked a transition between the closed and the open sea. The doctrine of freedom of the high seas is associated with the emerging prominence of maritime powers and the declining strength of states favoring a closed sea. This doctrine becomes an important dividing line in the historic waters analysis.

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70. Juridical Regime, supra note 5, at 5-6.

71. Hugo Grotius coined the term mare liberum (open sea) to justify the Portuguese monopoly on East Indies trade in the 1600s. See P. Jessup, supra note 64, at 407.


73. "The 17th Century . . . saw a major international debate over the nature of national sovereignty over the high seas." The English protagonists, arguing for the doctrine of closed sea — high seas which could be claimed by a sovereign and closed off to foreign use or regulated by the claiming sovereign — were John Selden and Sir Mathew Hale, while Hugo Grotius represented the Dutch, who supported an open sea. "Grotius . . . argued for total freedom of navigation and seas open to all." Report of the Special Master, supra note 4, at 29-30.
Historic bay claims can be divided into two groups, one on either side of this line. Claims which arise after the emergence of the doctrine of freedom of the high seas are subject to scrutiny under the doctrine of historic title; claims which precede the doctrine are subject to scrutiny under the doctrine of ancient title.

**Historic Title**

The prevalent method of establishing a title claim under the historic bays savings clause has been through the doctrine of historic title, discussed extensively in the Juridical Regime. The Juridical Regime ultimately concluded that three elements were required as proof of the existence of a valid claim under the doctrine of historic title. These elements are: (1) authority exercised over the area by the state making the historic title claim; (2) a long, continuous and uninterrupted exercise of authority and usage; and (3) the peaceful acquiescence of other states.

**Exercise of Authority**

The first element to be considered, when determining whether a state has acquired historic title to waters off its coast, is whether that state has exercised authority over those waters. Although the concept of authority may seem indefinite, the Juridical Regime had little trouble elaborating a three part test for determining whether a

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74. Because a period of many years marked the shift of the prevailing attitude from a closed sea to an open sea, the dividing line is rather blurred.


76. See generally Juridical Regime, supra note 5.

77. Id. at 13-19. A fourth element, based “on other particular circumstances such as geographical configuration, requirements of self-defence or other vital interests of the coastal state” was also considered. Id. at 19. However, it was decided that giving states “the right to claim ‘vital bays’ would come near to destroying the usefulness of any provisions in the Convention regarding the definition or delimitation of bays.” Id. at 20.

78. The Juridical Regime was indecisive as to whether other states must acquiesce in the assertion of title by the claiming state, or whether an absence of opposition to the exercise of authority and usage is sufficient. Id. at 13. Subsequent decisions have sided with the requirement of acquiescence. See Massachusetts Boundary Case, 106 S. Ct. at 954; see also United States v. Alaska, 422 U.S. 184, 189 (1975).

79. Report of the Special Master, supra note 4, at 11-12. The Supreme Court has modified these three elements to make them applicable to a dispute between federal and state governments brought under the Submerged Lands Act. First, the claim to a historic bay must be treated as if it were asserted by the federal government, and opposed by a foreign nation. Second, both federal and state activities and assertions of sovereignty against the foreign nation(s) are weighed. Third, disclaimers or disavowals of sovereignty by the federal government are decisive unless the claiming state can show historical evidence that is clear beyond doubt and which has already ripened because of past events. See Louisiana Boundary Case, 394 U.S. at 77-79.

80. The Juridical Regime mentions such alternative expressions as “exclusive authority,” “dominion,” “sovereign ownership,” “sovereignty” and “jurisdiction,” which might be synonymous with authority. Juridical Regime, supra note 5, at 13.
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state had exercised authority. The first aspect of this test is the scope of authority. 

"[T]he authority which a State must continuously exercise over a maritime area in order to be able to claim it validly as [an] 'historic [bay]' is sovereignty." Claiming an historic bay is an assertion that the waters within that bay are a part of the national domain — a part of the sovereign. Thus, if an historic bay claim is a claim to sovereignty, the authority exercised, which is a basis for that claim, must be an act asserting sovereignty. The assertion of sovereignty does not require the state to exercise all the rights or duties of a sovereign. It merely requires that the state treat the bay in a similar fashion as the rest of the territory over which it is sovereign.

The second part of the "exercise of authority" test is an examination of the acts by which the authority is exercised. "It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence..." of an exercise of authority. A survey of scholars' views in the Juridical Regime exposed a variety of similar, if not conclusive, ideas on the necessary acts. Generally, these acts must be governmentally sponsored public assertions of jurisdiction. A claim based solely on the acts of private individuals is insufficient.

The third and final element deals with the effectiveness of the exercise of authority. "Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds not merely by proclamations." This element is fairly straightforward in its definition. It is not necessary for the state to have taken action to enforce its sovereignty; however, if action was required to maintain its authority

81. Id.
82. Id.
83. Id. (citing 3 G. Gidel, Droit International Public de la Mer 625-33 (1934)).
84. Id. at 13.
85. Id. at 14.
86. Id.
87. Id. (quoting 3 G. Gidel, supra note 83, at 633).
88. Id. at 15. The Juridical Regime mentions exceptions to the "not solely individual acts" standard, which may or may not have been applicable to the decision in the Massachusetts Boundary Case, 106 S. Ct. at 951. However, such an inquiry is beyond the scope of this Comment. It suffices to say that significant individual acts were found to have occurred in the waters of Nantucket Sound, although the Court implied that "the self-interested endeavors of every seafaring community" do not suffice to establish an historic bay claim. Id. at 958-59.
89. Juridical Regime, supra note 5, at 14 (citing M. Borquin, in Melanges Georges Sauser-Hall 43 (1952)).

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over the bay, such action must have been taken.\textsuperscript{80}

Continuous Usage

The second element required for a valid claim of historic title is that the exercise of sovereignty over the claimed area be for a long and continuous period.\textsuperscript{81} Although the amount of time required to satisfy the "long and continuous period" standard cannot be defined precisely, the upper limit is certain. Claims made under the doctrine of historic title originate from exercises of authority and usage which began after the advent of the doctrine of freedom of the high seas.\textsuperscript{82} If a claim originates from a period prior to the doctrine of freedom of the high seas, the historic title theory \textit{may} validate the claim;\textsuperscript{83} however, the less stringent theory of ancient title also would be applicable to such a claim.\textsuperscript{84}

The primary focus of this element is usage.\textsuperscript{85} Although many attempts have been made to describe and qualify usage,\textsuperscript{86} the term necessarily must remain ambiguous. It is sufficient for the purposes of this Comment to say that "[t]he activity from which the required usage must emerge is ... a repeated or continued activity of [the] same State."\textsuperscript{87} The amount of time this usage lasts must be considerable, with the advent of freedom of the high seas doctrine as the upper limit. However, "[i]t must remain a matter of judgement when sufficient time has elapsed for the usage to emerge."\textsuperscript{88} Each case must be examined individually to determine if the circumstances constitute a usage. In the words of the Juridical Regime, "Usage, in terms of a continued and effective exercise of sovereignty over the area by the State claiming it, is ... a necessary requirement for the establishment of a historic title to the area by that

\textsuperscript{80} This reference to taking action to maintain authority should be assumed to mean action against private or domestic threats to the state's sovereignty, since a separate element of a valid historic title claim is the acquiescence of other states. \textit{See infra} notes 100-104, and accompanying text.

\textsuperscript{81} Report of the Special Master, \textit{supra} note 4, at 25 (citing United States v. Alaska, 422 U.S. at 189).

\textsuperscript{82} \textit{See supra} notes 71-75 and accompanying text.

\textsuperscript{83} Report of the Special Master, \textit{supra} note 4, at 25.

\textsuperscript{84} \textit{See supra} notes 71-75 and accompanying text.

\textsuperscript{85} \textit{Juridical Regime, supra} note 5, at 15.

\textsuperscript{86} The Juridical Regime includes "continuous usage of long standing [usage continu et seculaire]" (Institute of International Law 1894). Examples of the definitions in the Secretariat Memorandum, \textit{supra} note 69, at 14-15, include: "international usage" (Institute of International Law 1928); "established usage" (Harvard draft 1930); "continued and well-established usage" (American Institute of International Law 1925); "established usage generally recognized by the nations" (International Law Association 1926); "immemorial usage" (Japanese International Law Society 1926); and "continuous and immemorial usage" (Schucking draft 1926).

\textsuperscript{87} \textit{Juridical Regime, supra} note 5, at 15.

\textsuperscript{88} \textit{Id.}
The Acquiescence of Other States

The third element required for a valid claim of historic title is the acquiescence of foreign states. Acquiescence in the exercise of sovereignty by the coastal state over the area claimed is necessary for the emergence of historic title. The necessity of acquiescence derives from the status of the high seas as community territory, as opposed to ownerless territory. Title cannot effectively be obtained through mere occupation, because the high seas are regarded as owned by all states.

A claim by historic title ripens in a manner similar to a claim by prescription. The state claiming the area is not a lawful owner; this distinction lies with the community of states. As long as the community of states objects to the claim, the claim will never ripen to maturity. Maturity requires acquiescence on the part of the community of states. The exact meaning of acquiescence was the subject of debate in the Juridical Regime. The argument, however, was narrowly focused with all parties agreeing that inaction on the part of foreign states is sufficient to permit the emergence of a historic right.

Ancient Title

The oldest method of acquiring territory is discovery and occupation. During the era of extensive exploration, discovery gave title to...
the sovereign whose explorers had made the discovery. Discovery, however, yielded only an inchoate title, which required something more than discovery, such as use and settlement, to perfect. Also, it was necessary for the government claiming the territory effectively to exclude the claims of other nations.

Hence, it was necessary for the claiming nation to make known to all other nations its intention to act as sovereign. Even the Supreme Court of the United States has stated that "[t]he power to acquire territory by discovery and occupation . . . exist[s] as inherently inseparable from the conception of nationality, which comes not from the Constitution, but from the law of nations." An historical survey of the law of discovery shows that an evolving degree of physical presence has been required to perfect title to discovered territory. A claim based on discovery and occupation, therefore, must be judged based upon the law prevailing during the period the discovery and occupation took place. Early claims require much less physical presence, even a mere formal ceremony of occupation, while subsequent claims require a more substantial occupation.

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105. Early international law allowed a civilized nation to discover, claim and ultimately settle new territories. The civilized nation's claims superseded any rights uncivilized inhabitants may have had. See generally, 1 J. Moore, supra note 63, at 258-69.
106. Id. at 258.
107. The exclusion of all others gave the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); see also 1 J. Moore, supra note 63, at 259.
108. 1 J. Moore, supra note 63, at 260. Some authors state the requirements of (1) making the intention to exercise dominion generally known to other nations, and (2) occupation, as alternative methods of perfecting a claim based on discovery of unclaimed lands. However, stating an intention without any affirmative action or presence upon the territory is not sufficient to maintain a claim according to the majority of scholars. See 1 Hackworth, supra note 61, at 393-409; 2 Whiteman, supra note 63, at 1028-61; and 1 J. Moore, supra note 63, at 258-69.
110. See generally 1 J. Moore, supra note 63.
111. "[I]nternational law underwent profound modifications between the end of the Middle-Ages and the end of the 19th Century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilized peoples. . . . [A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." 1 Hackworth, supra note 61, at 393 (quoting the Arbitral Award in the Island of Palmas Case (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 83, 100-01 (1932)).
112. Hackworth quotes a study which states in pertinent part that: throughout . . . a period of several centuries, no state appeared to regard mere discovery . . . as being in any way sufficient per se to establish a right of sovereignty over, or a valid title to, terra nullius . . . . [M]ere disembarkation upon any portion of such regions—or even extended penetration and exploration therein—was not regarded as sufficient itself to establish such right or title. Nor did merely giving names to regions [named after their physical features] have any such results . . . . [T]he term "discovery" . . . may have been intended to include the performance of a formal ceremony of taking possession . . . . [I]n such instances, more had occurred than a discovery in the sense of a mere visual apprehension. . . . [T]he formal ceremony of taking of possession,
cupation on the part of the claiming nation. No particular degree of civilization need be established for territory that is being acquired. It is merely necessary that the territory be *territoria nullius* — the property of no one.

Prior to the doctrine of freedom of the high seas, all open seas were considered *territoria nullius*. The doctrine of ancient title derives from this concept of the seas as sovereignless territory. Although the high seas are considered the property of the community of nations and not *territoria nullius*, areas of the sea contiguous to a claiming nation are still susceptible to claims of sovereignty. Although it seems sensible to apply discovery laws to internal waters, which are treated no differently than the land territory of a nation, ancient title might well have been an afterthought to the writers of the Juridical Regime. Ancient title is mentioned by the Juridical Regime merely to point out that the scope of historic title does not

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113. See 1 Hackworth, *supra* note 61, at 404.

114. Hackworth states that:

Areas which are *territoria nullius* and open to acquisition by Occupation may consist of:

1. Uninhabited lands; unless they are unsuitable for permanent habitation and are being used for the purposes for which they are suitable, or are islands which are situated within territorial waters, or have been formed by alluvium from occupied territory.

2. Lands inhabited by individuals who are not permanently united for political action.

3. Lands which have been abandoned by their former occupants.

4. Lands which have been forfeited because they have not been occupied effectively.

5. Seas that are almost or entirely surrounded by land which fulfils one of the above conditions.

6. The belt of the ocean bordering on land which fulfils one of the above conditions to a distance of at least three marine miles from the shore occupied, with possible extensions in the cases of bays and straits.

7. The soil beneath the bed of the open sea — by starting from beneath territorial waters.

8. Portions of the open sea adjoining the territorial belt—by accretions to the neighbouring land.

1 Hackworth, *supra* note 61, at 396-97.

115. See *supra* notes 71-75 and accompanying text.

116. See *supra* note 114, particularly parts (5)-(8).
include the concept of occupation. Occupation, however, is one of the central elements of a title claim to an area by the doctrine of ancient title.

Acquiring territory on the basis of occupation requires: 1) the state to be the first sovereign to make a claim to that particular area (or the last to have a recognized claim prior to advent of the freedom of the high seas doctrine); and 2) effective occupation by a standard contemporary to the claim. A claim based on a recent occupation would not be accepted under current international law. The doctrine of freedom of the seas establishes a claim on behalf of the community of states to all areas which were unclaimed prior to the advent of the doctrine. Therefore, any claim based on ancient title would have to originate from an occupation which took place prior to the advent of the doctrine — a claim that was based on the state's occupying the territory prior to freedom of the high seas.

In the United States, claims that date back to discovery and occupation came from the colonial powers: England, France, Spain and Holland. When the American Revolution took place, the people of each state, as a political unit, seized title. In the Massachusetts Boundary Case, Massachusetts asserted its ancient title claim based on a seventeenth century English royal charter.

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117. Th[e] doctrine that occupation is an original mode of acquisition of territory but one which is not applicable to the high seas seems to be generally accepted at the present time. A State could therefore hardly claim an area of water on the basis of occupation unless it affirmed that the occupation took place before the freedom of the high seas became part of international law . . . . [T]he State would . . . not assert an historic title but rather an ancient title right based on occupation as an original mode of acquisition of territory. The difference may be subtle but should in the interest of clarity not be overlooked: to base the title on occupation is to base it on a clear original title which is fortified by long usage. *Juridical Regime, supra* note 5, at 12.

118. The Juridical Regime offers two definitions of occupation: "[T]he act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State," and "the taking by a State, with the intention of acting as owner, of something which does not belong to any other State but which is susceptible to sovereignty." *Juridical Regime, supra* note 5, at 12 (citations omitted).

119. *See supra* notes 71-75 and accompanying text.

120. *See supra* note 117.

121. "The English possessions in America were not claimed by right of conquest, but by right of discovery." They were held "by the King . . . as the representative of the nation . . ." for whose benefit the discovery was made. "[W]hen the Revolution took place, the people of each state in their sovereign character, acquired "absolute right to all their navigable waters, and the soils under them . . . ."* Martin v. Waddall, 41 U.S. (16 Pet.) 367, 409-10 (1842).
Prior Applications of Ancient Title

The Supreme Court discussed two cases in which the doctrine of ancient title was applied. In *Anglo Norwegian Fisheries*, "Norway's primary argument was that it had never accepted a status of high seas for the waters off its coast, especially the waters lying between the mainland and the fringing islands... known as Skjaergard." The International Court of Justice (ICJ) recognized that Norwegian fishermen had fished in these areas "from time immemorial," and that fishermen from other states had been excluded by the King of Denmark and Norway from a period predating the doctrine of freedom of the high seas.

Thus, although Norway ultimately argued that it had always applied a straight baseline test to determine its coastline, the underlying premise was that it had exercised dominion and sovereignty over the waters in question since prior to the inception of any contrary international law.

An earlier ICJ case also illustrated how ancient title, although not specifically mentioned by name, has been accepted and applied in international law. In *Annakumaru Pillai v. Muthupayal*, the defendant was accused of stealing mollusks five miles off the Ramad coast. The ICJ upheld its jurisdiction and the defendant's liability based on historical evidence validating the state's claim to the waters from the sixth century B.C. The court stated "that for ages in this country, [mollusks] and pearl oysters ha[d] been owned and enjoyed by the sovereign as belonging... exclusively to him." Since these belonged to the sovereign, harvesting had always been a state controlled activity.

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122. *Anglo-Norwegian Fisheries*, 1951 I.C.J. at 116; *Annakumaru Pillai v. Muthupayal*, 27 Indian L.R. 551 (Madras 1903). *Anglo-Norwegian Fisheries* led ultimately to the adoption of the straight baseline for bays, discussed in Article 7(6) of the Territorial Sea Convention.
124. Report of the Special Master, supra note 4, at 26. Skjaergard or "rock rampart" is a chain of 120,000 islands and low-tide formations which fringe the northern Norwegian coast. *Anglo-Norwegian Fisheries*, 1951 I.C.J. at 127.
126. *Id.* at 142.
127. 27 Indian L.R. 551 (Madras 1903).
129. *Annakumaru Pillai*, 27 Indian L.R. at 557; see also *Massachusetts Boundary Case*, 106 S. Ct. at 957; P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 16 (1927).
of the high seas (here dating back to the sixth century B.C.) were not invalid merely because the law had subsequently changed.\(^{131}\)

It is comparatively simple to identify an established ancient title. Because ancient title is not an assertion of dominion over waters which are the property of the community of states, a state making an ancient title claim has a lesser burden than one asserting historic title. The Special Master noted in the *Massachusetts Boundary Case* that “[e]ffective occupation, from a time prior to the victory of the doctrine of freedom of the seas, suffices to establish a valid claim to a body of water under ancient title.”\(^{132}\) The element of acquiescence is not essential, but evidentiary at best. The requirement of a peaceful and continuous exercise of sovereignty is significantly less burdensome than requirements under a claim of historic title.

**Adverse Possession vs. Clear Original Title**

The major distinction between historic title and ancient title is that a claim of title based on occupation is one of clear original title, fortified by long usage.\(^{133}\) Historic title is prescriptive, resulting from an adverse claim by the coastal nation. This claim divests the title of the community of states to the waters in question. States have claimed, as a part of their nation, waters which would have been considered part of the high seas under traditional international law. The element of prescription is essential; the historic considerations only become relevant when the claim cannot be established by conventional means. Therefore, the claim must rely on an extraordinary factor, such as an historical right.\(^{134}\) “[T]his right essentially takes the form of a ‘validation in the international legal order of a usage which is intrinsically valid, by the continuance of the usage over a long period of time.’”\(^{135}\) Examples of claims based on historic title are the claims made by Alabama and Mississippi to Mississippi Sound.\(^{136}\)

By contrast, ancient title does not require such a divestiture. Prior to the advent of the doctrine of freedom of the high seas, pre-eighteenth century waters were susceptible to claims of sovereignty.\(^{137}\)

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131. Annakumaru Pillai, 27 Indian L.R. at 554-57.
133. *Juridical Regime*, supra note 5, at 12.
134. Some writers have suggested that economic and political necessities also may establish a claim to a bay, and they have coined the term “vital bay.” Such claims, however, can be linked at least in part to a misreading of Article 7(4) of the Territorial Sea Convention, which suggests that in using the method of straight baselines, the economic interests of a region may be taken into account. This passage may have been misapplied to Article 7(6) to derive the vital bay concept. In any case, the vitality of a bay to a nation is not evidence of usage necessary to establish a prescriptive claim.
135. *Juridical Regime*, supra note 5, at 8 (citations omitted).
137. See supra notes 71-75 and accompanying text.
During this period, states routinely claimed title to coastal waters by 
right of discovery. Assuming these claims were subsequently "fort-
tified by long usage," it seems internally logical that ancient title 
should be recognized.

The legitimacy of ancient title must derive, in part, from the ac-
ceptance of historic title. Moving beyond the question of the doc-
trine's elements, it does not seem plausible that one could be recog-
nized as a method of acquisition of the high seas without the other's 
recognition. After all, the nature of the seas prior to freedom of the 
high seas implies that, although the seas had no sovereign, they 
were susceptible to sovereignty. Therefore, there were two possible 
dispositions of title: Either title vested in the community of states via 
freedom of the high seas, or, prior to this, it was claimed by a state.

Whether it is expedient for the Supreme Court to recognize an 
ancient title or historic title claim is an open question — especially 
in light of the international ramifications. Regardless, both doc-
trines have a logical and historically valid position in international 
law. To maintain that a claim by a state may divest the title of the 
community's claim (historic title), but cannot predate the commu-
nity's claim (ancient title), seems untenable.

APPLYING ANCIENT TITLE: PRESENT AND FUTURE

The Massachusetts Boundary Case

The concept of occupation, as an original mode of acquisition, is 
not alien to United States law. Although ancient title has 
reemerged as a potentially viable method of claiming title to the 
coastal waters of a state, the international legal community has said 
little about this doctrine, at least to the extent that it applies to 
coastal waters. At one time or another, all territory under sovereign 
domain logically must have been taken by this method. In light of 
the dearth of precedent, the Supreme Court's discussion of ancient

138. See, e.g., Report of the Special Master, supra note 4, at 27-28, 38-43 (dis-
cussing whether England took title to the waters of Massachusetts by operation of the 
Royal Charters of 1664 and 1691).
139. See supra notes 71-75 and accompanying text.
140. SeeJuridical Regime, supra note 5, at 12.
141. See infra, notes 157-63 and accompanying text.
142. If anything, ancient title suffers from a lack of exposition, in terms of its 
elements. Certainly, a claim of original title must be based on some exercise of authority 
and usage. If this were not true, all self-proclaimed "rulers of the world" would find 
some measure of legitimacy.
143. See supra notes 107-08.
title in the *Massachusetts Boundary Case* takes on added significance, both for domestic and international purposes.

Despite the Court's statement in the *Massachusetts Boundary Case* that "the validity of and any limits to the 'ancient title' theory [would be] reserved for an appropriate case," the Court's discussion contains significant implications to future domestic and international boundary disputes. The first issue the Court addressed was a delimitation on the doctrine of freedom of the high seas. The Court did not find it necessary to choose a cut-off date after which the community of states asserted its claim based on freedom of the high seas. It did, however, rule that "effective 'occupation' must have ripened into 'clear original title,' 'fortified by long usage,' no later than the latter half of the 1700's."146 The Court also seemed to accept the Special Master's foundation test for an ancient title claim.147 In rejecting Massachusetts' claim to Nantucket Sound, the Court's analysis followed the proposition that "[e]ffective occupation, from a time prior to the doctrine of freedom of the [high] seas' is necessary 'to establish a valid claim . . . under ancient title.'" The Court also indicated that effective occupation may derive from an "exploitation of the marine resources . . . equivalent to a formal assumption of sovereignty." Finally, the Court stated its belief that "occupation requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over waters claimed."150

Although the Court did not recognize Massachusetts' claim of ancient title, the above analysis does provide a framework for future claims. First, all events necessary for title to ripen must have occurred prior to the mid-1700's. Second, there must have been acts by the sovereign which assert exclusive authority. Third, intensive and exclusive exploitation of the coastal region by individual inhabitants would not suffice as occupation, absent a linkage to a sovereign taking of the territory. Finally, a state must continue to treat the claimed territory in a manner consistent with the assertion of dominion over that area.151

145. *Id. at 955.*
146. *Id. at 955-56 n.11.
149. *Id. at 956.*
150. *Id.*
151. *Id. at 959.*
Choice of Law

"The Supreme Court has consistently followed principles of international law in fixing the coastline of the United States."\(^{152}\) The Court has drawn extensively upon the Territorial Sea Convention as "the best workable definitions available" for evaluating coastal waters claims.\(^{153}\) The Convention, however, is an international diplomatic work, susceptible to the vagaries of political pressure and compromise. Whether this is a proper choice of law for domestic disputes concerning the United States coastline is questionable. Certainly, determining the legal coastline in the same fashion for domestic and international purposes is a reasonable objective.\(^{154}\) Whether this objective should provide the states with a mechanism for appealing to the Supreme Court the definition of their legal coastlines is another matter. Quite possibly, in an attempt to settle a domestic dispute, the Court may have established precedent that will be applied internationally.

The Court previously has rejected a state's claim that it had a right to choose the straight baseline method for delimiting its coastal waters. It ruled that only the federal government had the power to make such a decision.\(^{155}\) A broad application of this concept — placing the definition of coastal boundaries solely in the hands of the federal government — would eliminate the need for judicial review of domestic coastal disputes. In United States v. California, the Court was unwilling to allow a state to extend its sovereignty to international waters by a domestic judicial assertion of international law. The Court felt that "unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent states so enlarging themselves."\(^{156}\) Although this statement deals with straight baselines, matters would be simplified considerably if it were applied to all coastal water disputes. There

\(^{152}\) Id. at 954. See United States v. California, 381 U.S. at 161-67. The Executive Branch has consistently challenged the Court's use of the Territorial Sea Convention in domestic disputes. Id. at 164.

\(^{153}\) Massachusetts Boundary Case, 106 S. Ct. at 954 n.8; see United States v. California, 381 U.S. at 165.

\(^{154}\) Report of the Special Master, supra note 4, at 5. See supra notes 24-26 and accompanying text.

\(^{155}\) United States v. California, 381 U.S. at 168. William Howard Taft stated that in connection with the assertion of territorial jurisdiction by the Executive Branch, Congress' decisions or the Executive's treaty making power upon such an issue would bind the courts, but in the absence of either's decision, the President's action is conclusive with the courts. W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 118 (1916).

\(^{156}\) United States v. California, 381 U.S. at 161-67.
may be some problems, however, with applying the Convention for
determining the United States coastal boundary for domestic and in-
ternational purposes, while at the same time recognizing that the re-
sponsibility for questions of external sovereignty lies ultimately in
the hands of the federal government.

The delimitation of United States coastal waters has a direct im-
 pact on its territorial boundaries. Determining the boundaries of the
nation is a political question, which lies in the domain of the exec-
utive and legislative branches of government. The judiciary must
limit itself to a review of the propriety of the executive or legislative
branches' decision to act, and should not concern itself with the sub-
stance of the actions. Deference is mandated by both the doctrine
of separation of powers and pragmatic diplomacy.

The Court must defer to the other governmental branches in order
to promote United States foreign relations policy. Decisions by the
Court that are inconsistent with executive policy making can serve
only to hinder the efforts of those charged with our nation's diplo-
mcy. Foreign nations most certainly will seize on such a decision
to reassert claims to certain waters. A notable example is Libya's
claim to the Gulf of Sidra. Analyzed under the tenets of historic

157. The political question doctrine essentially asserts that certain issues are best
left to the political branches of government, to the exclusion of the judiciary. The Court
in Baker v. Carr, 369 U.S. 186 (1962), set forth the criteria for determining political
questions:

Prominent on the surface of any case held to involve a political question is
found a textually demonstrable constitutional commitment of the issue to a
coordinate political department; or a lack of judicially discoverable and man-
ageable standards for resolving it; or the impossibility of deciding without an
initial policy determination of a kind clearly for nonjudicial discretion; or the
impossibility of a court's undertaking independent resolution without express-
ing lack of the respect due coordinate branches of government; or an unusual
need for unquestioning adherence to a political decision already made; or the
potentiality of embarrassment from multifarious pronouncements by various
departments on one question.

Id. at 217.

158. The separation of powers doctrine asserts that the judicial branch should have
a highly limited governmental role and avoid substantive issues handled by the political
branches of the federal government. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774

159. “The conduct of foreign relations of our Government is committed by the
Constitution to the Executive and Legislative . . . Departments of the Government, and
the propriety of what may be done in the exercise of this political power is not subject to

160. It is not unusual for dicta or footnotes of Supreme Court decisions to be
seized upon and applied extensively by subsequent courts and foreign governments. See

161. For a complete analysis and text of Declaration of October 10, 1973, see
Spinnato, Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra,
13 OCEAN DEV. & INT'L L.J. 65 (1983); see also Francioni, The Status of the Gulf of
title, the Libyan claim clearly fails, since it lacks the element of acquiescence of other nations. The Court’s discussion, however, in the Massachusetts Boundary Case would lend credence to a Libyan claim that acquiescence is irrelevant, based on the doctrine of ancient title. Simply put, the Court may have removed a major obstacle to the establishment of claims that the executive branch would prefer not to recognize. The Court would indeed be wise to consider such matters with pen in hand, judicially delimiting its opinions to domestic disputes.

CONCLUSION

Ancient title, like historic title and the various baseline methods before it, is a legitimate mechanism for resolving international disputes. It finds its support in international precedent, and conforms to the greater goal of peaceful and orderly resolution of coastal water delimitations. However, the Supreme Court’s rulings attempting to provide a unified coastline for domestic and international purposes pose dangerous problems. The Supreme Court should not allow the coastal states of the United States to assert ancient title claims against the federal government. By recognizing states’ standing to assert claims based upon theories of international law and diplomacy, the Supreme Court has entered a dangerous arena. The Court’s decision in the Massachusetts Boundary Case is an ill-advised application of international law, which creates the potential for a diplomatic backlash. International law, unlike its domestic counterpart, must be sensitive to its non-binding and volatile nature. International doctrine must be capable of pacifying a number of sovereign states, whose participation is based on congeniality, not obligation. By contrast, the United States is capable of negotiating or otherwise enforcing a single unified coastline among its states. How this is accomplished is of less consequence than the fact that, unlike matters of diplomacy, it can be done in a binding and conclusive fashion. The Supreme Court must take greater care either to strictly limit its decisions to domestic application, or to defer to the executive and legislative branches in determining the limitation of its coastal waters.

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162. See supra notes 76-104 and accompanying text.
163. For a complete account of the actions of various governments in protest of Libya’s claim, see Spinnato, supra note 161, and Francioni, supra note 161.