The Doctrine of Historic Bays: Applying an Anachronism in the Alabama and Mississippi Boundary Case

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THE DOCTRINE OF HISTORIC BAYS: APPLYING AN ANACHRONISM IN THE ALABAMA AND MISSISSIPPI BOUNDARY CASE

Since its inception in 1953, the Submerged Lands Act has given rise to numerous disputes between the federal government and the coastal states. Recently, the Supreme Court ruled that the States of Mississippi and Alabama owned title to Mississippi Sound based on the doctrine of historic bays. The soundness of this decision is questionable considering the imprecise nature of the doctrine.

INTRODUCTION

On February 26, 1985, the United States Supreme Court decided United States v. Louisiana (Alabama and Mississippi Boundary Case).1 This case highlights a series of disputes between the federal government and coastal states over ownership of subsoil and subsurface resources beneath the navigable waters within national boundaries.2 The question of ownership seemed unimportant until the advent of offshore oil wells. Today, the primary interest of the parties focuses upon the potential tax revenue derived from oil and natural gas leases granted to private firms for offshore exploitation.

Prior to 1953, the Supreme Court held that rights to coastal subsurface resources vested exclusively in the federal government.3

3. United States v. California, 332 U.S. 19 (1947). The Court in a subsequent decree stated:

The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of

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However, in 1953, Congress enacted the Submerged Lands Act (SLA), effectively overruling the Supreme Court’s position. The purpose of the SLA is outlined in its title:

To conform and establish the titles of the States to lands beneath navigable waters within state boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

Under the SLA, each coastal state owns all submerged lands and subsurface resources within three miles measured seaward from its coastline or from the seaward limit of its inland waters. The SLA is vague in defining a number of crucial terms, including “inland waters.” In the Alabama and Mississippi Boundary Case, the Court was called upon to determine whether Mississippi Sound was part of the States’ inland waters, or part of the territorial sea. As inland waters, the Sound would be delimited, and the adjacent states of Alabama and Mississippi would own paramount title to the submerged lands beneath the Sound. If the Court found that the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

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332 U.S. at 805.
4. Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982). The passage of the SLA was not without controversy. Many academicians and political leaders were reluctant to disturb the Supreme Court’s 1947 California decision. Representative Radwan, of New York, before the House of Representatives on March 5, 1953, stated:

[For the Congress to recognize and confirm a title that the Supreme Court has six times stated never existed is a most grave encroachment by the legislative body upon the judicial branch . . . . Present legislation before the Congress is likewise unconstitutional because the Supreme Court has decided that the rights of the federal government to these offshore lands are paramount.]

5. 67 Stat. 29 (1953).
7. The Mississippi Sound is a body of water directly south of the mainland of Alabama and Mississippi. The Sound extends from Mobile Bay to Lake Borgne, a distance of approximately 100 miles. To the south, the Sound is bounded by a group of sandy barrier islands forming part of the Gulf Islands National Seashore. These protective islands, including Isle Au Pitre, Cat Island, Ship Island, Horn Island, Petit Bois Island, and Dauphin Island all lie approximately 10 miles off the coast. See 19 Encyclopedia Americana 251 (1980).
8. There are three legally distinct zones of navigable sea. First, there is the high seas, commonly called international waters, which no state may assert jurisdiction over. Second, there is the territorial sea, which is subject to the sovereignty of a nation but in which the right of innocent passage is permitted. The territorial sea is a 12-mile limit adopted by the community of nations. Finally, there is the internal, or inland waters, which are under the complete dominion and control of a nation. See Louisiana Boundary Case, 394 U.S. at 22 (1969); see also Comment, Right Title and Interest in the Territorial Sea: Federal and State Claims in the United States, 4 Ga. J. Int’l & Comp. L. 463 (1974).
Sound was part of the territorial sea, the federal government could claim ownership of a substantial portion of the submerged lands under the Sound. The Supreme Court, applying the doctrine of historic bays, declared the Sound inland waters.9

This Comment challenges the wisdom of that decision. The doctrine of historic bays,10 developed as an international law concept, remains controversial. Three Law of the Sea Conferences have failed to develop an acceptable working definition of historic bays.11 As applied today, the doctrine is based upon the prescriptive rights12 of a sovereign over a body of water; historic bays are waters claimed by one coastal sovereign as exclusive maritime territory, following a period of continuous and unchallenged use.13

This Comment discusses the application of this doctrine, albeit international in flavor, to domestic disputes.14 In addition, this Comment analyzes the cases arising from the SLA, and the historical development of the delimitation of bays.

Ironically, the victorious litigants, the States of Alabama and Mississippi both filed Exceptions to the Report of the Special Master15

10. See infra notes 39-83 and accompanying text.
11. See infra note 75 and accompanying text.
12. There are two main forms of prescription: (1) "extinctive prescription," or loss of a claim by failure to litigate within a reasonable time, and (2) "acquisitive prescription," which means title is acquired through a lapse of time. Our concern here is primarily with acquisitive prescription. See U.S. DEPT OF STATE, PUB. NO. 7553, 2 DIGEST OF INTERNATIONAL LAW 1062 (M. Whitman ed. 1963).
13. Historic rights pertain not only to bays, but also to maritime areas which do not constitute bays, such as the waters of archipelagos, straits, estuaries, and other similar bodies of water. The term "historic bays" is sometimes referred to as "historic waters," however, they are not synonymous, the latter term having a broader scope. Nonetheless, the term "historic bays" has been more frequently used to describe historical rights over a maritime area. See Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law, 1954 BRIT. Y.B. INT'L L. 371, 381.
14. The United States courts may apply international law as their own, in appropriate circumstances. Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 423 (1963). The Court in Paquete Habana, 175 U.S. 677 (1899), stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." See generally Sprout, Theories as to the Applicability of International Law in the Federal Courts of the United States, 26 AM. J. INT'L L. 280 (1932).
15. See United States v. Louisiana, Report of Walter P. Armstrong, Jr., Special Master, April 9, 1984 (October term 1983, No. 9 Original) [hereinafter referred to as 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 his findings of fact and conclusions of law.
advocating alternative methods of delimitation. The objections of the States, in effect, suggest the questionable soundness of the doctrine.

**DELIMITATION OF BAYS**

"**Bays**" Defined

A bay is a well marked indentation in such proportion to the width of its mouth that it contains land-locked waters, and which is more than a mere curvature of the coast. A bay may be considered a port, sound, estuary, fjord, or simply an arm of the sea. The size and shape of a bay depends upon a number of factors including the geological composition of the surrounding landmass, climatic conditions of the area, past and present glacier activity, presence of river mouths, and human intervention in the bay environment. A bay has both political and economic importance. Bays provide protection for maritime activities, facilitate transportation for persons living on the bay, and may sustain marine life used to supplement the local food supply.

Over the years, coastal nations have found it necessary to delimit

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17. See United States v. Louisiana, Reply Brief of the United States, August 2, 1984 (October Term 1983, No. 9 Original) [hereinafter referred to as Reply Brief of the United States]. Counsel for the United States commented:
   As the unsuccessful party, we have naturally enough, challenged both rulings [of the Special Master]. The surprise is that the States [of Alabama and Mississippi] have also filed Exceptions to the Master's report, together with elaborate supporting arguments. We are perhaps entitled to derive some comfort from this unusual circumstance. Of course, Alabama and Mississippi are entirely free to quarrel with the Master because he rejected some of their contentions, albeit he reached the same result for other reasons. But one may ask why those who have prevailed on two arguments insist that they should also win on as many as three additional grounds. The only apparent explanation is that the States are not sanguine about the soundness, and therefore the viability, of their tentative victory if it must rest on the Master's Report.
   Id. at 1-2.
18. A. Shalowitz, Shore and Sea Boundaries 297 (1962). Land-locked waters are indentations along the coast that are nearly cut off from access to the sea; almost completely surrounded by land.
21. The geography of a coastal area is constantly changing. Soil deposits may reduce the water area in a bay, and erosion or a heavy storm may wash away a headland. Moreover, a former headland may become an island or an island may completely disappear as a result of a storm. See generally G. Mangone, Law For The World Ocean 1-5 (1981); L. Cuyvers, Ocean Uses and their Regulation 2-12 (1984).
bays to meet the needs of their citizens. Delimitation is the process of designating and enclosing a body of water as inland (or internal) waters. This practice, however, illustrates the conflict between two traditional principles of international law—the territorial jurisdiction asserted by a coastal nation, and *mare liberum*, or freedom of the seas. A sovereign enclosing a bay generally asserts complete dominion and control over the bay, as if the water body were part of its land territory. Such jurisdiction prohibits the passage of all vessels. Since their inception, the international law of bays and the practice of delimitation have evolved and expanded considerably. Various methods which have been developed to delimit bays include the doctrine of *inter fauces terrarum*, the “cannon-shot” rule, the range of vision from headland to headland rule, the six-mile and ten-mile

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22. The doctrine of the “freedom of the seas” generally means that the sea is equally “free” for all nations to use. Hugo Grotius, in 1609, coined the term to give credence to the Dutch right to navigation and commercial activity with the East Indies, notwithstanding the Portuguese claim to a monopoly. The term, however, over the years has become a contrivance to permit superpowers to expand their political and economic control. See generally R. Magoffin, Grotius On The Freedom of the Seas (1916).

23. See M. Strohl, supra note 19, at 95. The author discusses the development of the international law of bays, from the fall of Rome up to the 20th Century; citing navigation, economics and defense as major influences.

24. Various writers have commented that the proliferation of delimitation is part of a process called “creeping jurisdiction.” This phenomena represents “the extension of national and international rules and regulations, and rights and duties over and under the sea, in straits and coastal zones, on and under the seabed, and in vast stretches of the high seas.” See K. Booth, Law, Force and Diplomacy at Sea 38 (1985); see also Krauss, Creeping Jurisdiction and Customary International Law, 15 Ocean Dev. & Int’l L. 209 (1985).

25. 2 H. Grotius, De Jure Belli as Pacis 209, translated in The Classics of International Law (1925). *Inter fauces terrarum*, between the jaws of the land, defines a bay as an arm of the sea enclosed between two promontory points. This doctrine, accepted by the International Court of Justice in Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (1951) [hereinafter cited as Anglo-Norwegian Fisheries], considers the relationship between the bay and the contiguous land mass.

26. The cannon-shot rule represents the maximum effective range of a 19th century cannon to determine the limit of territorial waters. This distance is approximately three miles or one marine league. As weapon technology increased, the rule was discredited. Nonetheless, the rule has been applied in a number of state decrees enclosing bays. The rule illustrates the importance of defense. See generally T.W. Fulton, The Sovereignty of the Sea 566 (1911); see also P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 5-8 (1927).

27. The Massachusetts Supreme Judicial Court adopted this rule in Commonwealth v. Peters, 53 Mass. 387 (1847). The court stated that “[a]ll creeks, havens, coves, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the country.” Id. at 392. See A. Shalowitz, supra note 18, at 29-30.
The Territorial Sea Convention codifies the international standards by which sovereigns may assert jurisdiction over such coastal waters. Article 7 outlines a two-part test by which a bay may be designated as the inland waters of a coastal nation. First, the indentation must meet the semicircle test. That is, the body of water to be enclosed as a bay must have an area as large, or larger than that of a semicircle whose diameter is represented by the line joining the entrance points of the indentation. The semicircle test assures that the configuration of the indentation has the characteristics of a bay and is not a mere curvature of the coast. Second, the maximum distance between the natural entrance points of the bay cannot exceed twenty-four nautical miles. If a body of water meets this two-part

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28. For a discussion on the development of the six-mile and ten-mile rules, see M. Strohl, supra note 19, at 5.


30. Article 7 of the Territorial Sea Convention states:
   1. This article relates only to bays the coasts of which belong to a single state.
   2. For the purpose 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 semicircle whose diameter is a line drawn across the mouth of that indentation.
   3. For the purpose of measurement, the areas of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semicircle 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.
   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.

31. Id. art. 7(2).

32. Id. art. 7(4). The 24-mile closing rule represents the theory that the breadth of a nation’s sovereignty over a bay should not exceed twice the distance of its 12 mile territorial limit. This closing line in respect to the “natural entrance points” is somewhat relaxed by article 7(5) which allows drawing a closing line within the bay to encompass the maximum area of water possible. See A. Shalowitz, supra note 18, at 222-25.
test, it is considered a juridical bay. If a body of water fails to meet this test, a nation may still apply two special exceptions to delimit a bay. The juridical bay rules of article 7 may be circumvented by applying the straight baseline system provided under article 4, or a body of water may qualify as a bay under the doctrine of historic bays.

Article 4 of the Territorial Sea Convention allows a coastal nation to draw straight baselines in localities where the coastline is deeply indented or fringed with islands. The drawing of the coast, and the outlying waters must be sufficiently linked to the land mass to be considered internal waters. This method, in effect, permits a coastal nation to evade the twenty-four mile closing line rule of article 7. However, if a coastal nation applies the straight baseline method of article 4, it must also grant foreign vessels the right of innocent passage pursuant to article 5(2). This facilitates the free

33. See Territorial Sea Convention, supra note 29, art. 7(6).
34. Article 4 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 regime 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 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.
Id. art. 4.
35. Id. See Territorial Sea Convention, supra note 29, art. 7(6). See supra note 30.
36. See Territorial Sea Convention, supra note 29, art. 4(1). See supra note 34.
37. See Territorial Sea Convention supra note 29, art. 4(2). For the text of art. 4(2), see supra note 34. See also Fisheries (U.K. v. Nor.) 1951 I.C.J. 116 (1951).
38. 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 areas which have been considered as part of the territorial sea or the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.
Id. art 5(2).
movement of innocent maritime activity while protecting the economic and political interests of a sovereign.

The Doctrine of Historic Bays

Definition

The second exception, found in article 7(6), pertains to waters characterized as historic bays. Though not defined by the Territorial Sea Convention, a survey of international scholars establishes three essential elements for historic bays:

1. The coastal nation must claim the body of water as within its sovereignty,
2. The coastal nation must effectively exercise its sovereignty over a long period of time, and
3. There must be a peaceful and continuous exercise of sovereignty at the acquiescence of foreign nations.

Issues related to the claim requirement concern the scope of the sovereign's authority, the acts by which this authority is exercised, and the effectiveness of the sovereign's authority over the body of water. The scope of authority exercised by the State must be commensurate with the claim. With respect to the burden of proof, Professor Gidel argued that "the coastal State which makes the claim of 'historic waters' is asking that they should be given exceptional treatment; such exceptional treatment must be justified by exceptional conditions." Moreover, this element is satisfied only if the authority asserted is exercised effectively.

The precise length of time necessary to establish continuity is not defined. General standards in international law, however, require the exercise of authority over a period of time sufficient to be considered usage. In this context, the term "usage" means a uniform course of conduct, or a repeated activity by the sovereign in the contested

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39. See Territorial Sea Convention, supra note 29, art. 7(6). For the text of article 7(6), see supra note 30.
42. G. Gidel, Droit International Public de la Mer 635 (1934), quoted and translated in Juridical Regime, supra note 41, at 7.
43. The effectiveness of authority exercised must "be expressed by deeds and not merely by proclamations." M. Bourquin, Les Baies Historiques in Mélanges Georges Sausser-Hall 41 (1952), quoted and translated in Juridical Regime, supra note 41, at 15.
44. See Juridical Regime, supra note 41, at 15.
area. Historical claims made by Norway, France, India, and the United States exemplify the requisite period of time. However, it is a matter of subjective judgment in determining when sufficient time has elapsed for usage to manifest; it varies according to the facts of each case. With respect to continuity, the Norwegian Government during the Anglo-Norwegian Fisheries case stated:

A historic title can never be acquired unless it is supported by long usage. In such a title, the essential factor is duration. Admittedly, a usage which has acquired validity with the passage of time must also have been peaceful and continuous. If it had not been, it would never have acquired validity. But, as the word itself shows clearly enough, a 'historic' title derives its force from history, that is to say, from the passage of time.

Arguably, historic title does not vest when a coastal nation decides to assert it. Rather, it gradually ripens when recognized by the community of nations after a long and open exercise of sovereignty. The acquiescence of foreign governments to a coastal nation's assertion of sovereignty is also required to establish a valid historic title. Acquiescence has been described as the "inaction of a state which is faced with a situation constituting a threat to or infringe-

45. The International Court of Justice in the Anglo-Norwegian Fisheries case, held that Norway was entitled historical rights to a group of bays based on "the immemorial character of the claims" and by the "very ancient and peaceful usage" of the waters. Anglo-Norwegian Fisheries, 1951 I.C.J. at 155.

46. The French assert exclusive control over the Bay of Cancale (or Granville Bay) basing their claim on the exploitation of its oyster fisheries over a long period of time. The Treaties of 1839 and 1867 between Great Britain and France recognized the fisheries as within the complete domain and control of the French. See P. Jessup, supra note 26, at 385-86.

47. The Indian High Court in Annakumar Pillai v. Muthupayal, 27 Indian L. R. 551 (Madras 1903), upheld the sovereign's claim to title over maritime territory off the Ramad coast based on historical evidence of marine resource exploitation dating to the 9th century. For an analysis of this decision, see P. Jessup, supra note 26, at 14-16.

48. On October 28, 1862, the American vessel Alleghanian, with a cargo of Peruvian guano was set on fire and sunk by confederate forces in Chesapeake Bay. In 1885, the Second Court of Commissioners of Alabama Claims, held that the Bay was internal waters of the United States when the questions of jurisdiction was considered. In finding the element of continuity, the court stated that "from the earliest history of the country it [Chesapeake Bay] has been claimed to be territorial waters, and the claim has never been questioned." See J.B. Moore, Digest of International Law 741-42 (1906); P. Jessup, supra note 26, at 388-91.

49. Scelle stated that the period of prescription "is indeterminate and must in each case be submitted to the test of reasonableness." 2 G. Scelle, Droit International Public 435 (1946-1947), quoted and translated in Memorandum by the Secretariat supra note 40, at 35.


51. See Juridical Regime, supra note 41, at 16.
Acquiescence may also mean that foreign governments "have simply been inactive." By contrast, in order to prevent historic title, foreign governments must protest the claimant nation's assertions of sovereignty. Professor Bourquin illustrates the relationship between acquiescence and protest, stating: "if their reactions prevent the peaceful and continuous exercise of sovereignty, no historic title can be formed." In Bourquin's view, the opposition to the claim must be effective.

Historic claims are often asserted on the basis of economic necessity, national security, or other "vital interests" of the coastal sovereign asserting control. While vital interests may logically support the establishment of a maritime protection zone, an assertion of historic bay based upon vital interests alone completely disregards the historical time elements otherwise required to perfect the claim. Professor Bourquin opposed any reference to vital interests when applying the doctrine of historic bays. He argued:

[W]hy should this factor be considered strictly within the context of "historic title"? However widely the concept of a "historic title" is construed, surely it cannot be claimed in circumstances where the historic claim is absent. The "historic title" is one thing; the "vital interest" is another.

Professor Bourquin's point is well taken. Historic title is a process which requires both the passage of time and the continuous assertion of sovereignty. Historical evidence can only derive its shape and substance over time. By recognizing historic title on the basis of national defense or economic necessity, the doctrine of historic bays is diluted. Claims based upon vital interests alone subject the practice of delimitation to fabrication and abuse.

Classic examples of historic bays include the Sea of Azov, the

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55. See Juridical Regime, supra note 41, at 19. The concept of vital interests encompasses a potpourri of interests important to the claimant state. The coastal state may have a number of interests at stake, including but not limited to: demographic factors, customs and traditions, military position and defense requirements, resource consumption and needs, and economic infrastructure.
Before focusing attention onto historic bays for the protection of vital interests, policy makers might do well to remember that there are other and possibly more functional concepts available for the protection of vital interests without making a fiction of history or a distortion of the past.
58. The Sea of Azov is situated within the southern territory of the Union of Soviet Socialist Republics, and is ten miles wide across the entrance. See Memorandum by the Secretariat, supra note 40, at 3; P. Jessup, supra note 26, at 383.
Bay of Chaleur, they are less than 12 miles in width at its entrance. The Supreme Court of Canada declared the bay within the complete dominion and control of Canada. 

59. The Bay of Chaleur is situated between the Canadian Provinces of Quebec and New Brunswick and is less than 12 miles in width at its entrance. The Supreme Court of Canada declared the bay within the complete dominion and control of Canada. Mowat v. McFee, 5 S.C.R. 66 (1880). Canadian sovereignty over this bay was accepted by the United States in Article 2 of the Treaty of 20 July 1912.

60. The Delaware Bay is about 10 miles wide at the entrance and is situated between the States of Delaware and New Jersey. In 1793, the French frigate L'Embuscade seized the British vessel Grange inside the bay. When jurisdiction of the waters was questioned, the United States declared historic title to the Bay. The Grange was subsequently released and both France and Great Britain accepted United States sovereignty over the waters. For a discussion of this incident, see J.B. Moore, supra note 48, at 735-39, and P. Jessup, supra note 26, at 395-97.

61. See generally Memorandum by the Secretariat, supra note 40 at 11-47.

62. The Soviet Union on July 20, 1957, declared historic title to the Bay of Peter the Great adjoining the Sea of Japan. The closing line of this water area is 108 miles in length. The consequence of this declaration is that the consent of Russian authorities is required to navigate in this bay. The United States, France, Sweden, United Kingdom, Holland, Germany and Japan protested. This protest illustrates that the acquiescence of foreign nations, an essential element of historic title, was absent. For the United States protest over the Soviet Union's decree, see 37 Dep't St. Bull. 588 (1957), and 38 Dep't St. Bull. 461 (1958).

63. In 1961 Uruguay and Argentina enclosed the estuary of the Rio de la Plata. The distance between the headlands is about 120 miles, while the penetration into the land is 160 miles. The United States and the United Kingdom protested, claiming the enclosure is not justified by the Territorial Sea Convention. See L. Bouchez, supra note 40, at 164-67.

64. The Hudson Bay in northeastern Canada is approximately 900 miles in length with a maximum width of 520 miles. In 1906, the Canadian Parliament passed a fishing regulation which, in effect, declared the Hudson Bay as internal waters for Canada. See 4 Whiteman, supra note 20, at 236-37; P. Jessup, supra note 26, at 411-12; L. Bouchez, supra note 41, at 239.

65. See infra notes 66-71 and accompanying text.

resulted in the downing of two Libyan planes by United States Navy jet fighters. In March of 1986, the Sixth Fleet again conducted military maneuvers in the Gulf of Sidra. When the United States entered the contested area, crossing Colonel Qaddafi’s “line of death,” Libya fired six Soviet-built SAM-5 surface-to-air missiles at American aircraft. The United States retaliated by destroying two missile patrol boats and disabling a missile radar facility. The United States suffered no casualties or property damage and ended the exercises shortly after the incident.

**History of the Doctrine**

The doctrine of historic bays was first recognized as an established category of international law in the *North Atlantic Fisheries Arbitration of 1910*. The doctrine has been extensively addressed by international legal scholars and is the subject of two United Nations studies. Nonetheless, numerous efforts to codify a definition have proved unsuccessful. Much of the disagreement between na-
tions is undoubtedly based upon political rivalries and potential embarrassment for past delimitation actions. This is illustrated by the Peter the Great Bay incident. During a discussion on historic bays at the First Conference on the Law of the Sea, Japan proposed a definition similar to customary international standards. The Japanese delegate, referring directly to the Soviet Union, argued:

> In the past, there have actually been a number of cases where a state has claimed vast sea areas as territorial, on the pretext of historic bays, without the slightest historic elements whatsoever. In order to avoid recurrence of such claims, it is essential that a definition of historic bays should be provided for in the article.

The committee rejected the proposal on the basis of incomplete information on the subject, and initiated a study to examine the doctrine further.

Though there was much discussion at several committee hearings, the Second and Third Conferences on the Law of the Sea also failed to adopt a suitable definition of historic bays. This lack of con-
sensus indicates the political complexities of the doctrine. Further it suggests the impossibility of formulating and applying general principles of law to the unique and particular characteristics of each bay in question. It is uncertain whether a single definition can ever be codified that considers the political, historical, and geographical peculiarities of the different regions of the world.\footnote{83}

**DOMESTIC APPLICATION**

The Submerged Lands Act\footnote{84} was enacted in 1953. In enacting the SLA, Congress granted to each coastal state all subsoil and subsurfaces resources three miles seaward from its coastline. The SLA defines the term coastline as “the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.”\footnote{85} The SLA, however, does not define “inland waters.” Consequently, the Supreme Court has adopted the definition of inland waters contained in article 7 of the Territorial Sea Convention for the purposes of the SLA.\footnote{86} The Court adopted article 7 in its entirety, including paragraph 6 which acknowledges the doctrine of historic bays as an exception to the general rules on the delimitation of bays.\footnote{87}

\footnote{83} Discussing the complexities of codification, De Visscher noted: Proven long use, which is the [historic bays] foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given state. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide in concerto on the existence or nonexistence of a consolidation by historic titles.

C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 200 (1957).


\footnote{85} 43 U.S.C. § 1301(c). Low-water mark is the intersection of the plane of average low tide with the shore. The plane of average low tide serves as the mean or reference from which the depth of water is indicated on nautical charts. See A. SHALOWITZ, supra note 18, at 97-99. The Supreme Court in the Texas Boundary Case held that the term “coast line” means the modern, ambulatory coastline of Texas and not the 1845 coast line that over the years has eroded. 394 U.S. 1 (1969). Moreover, the Court in United States v. California stated that, “[t]he coast line is to be taken as heretofore or hereafter modified by natural means . . . .” 382 U.S. 449 (1966). (Supplemental Decree).

\footnote{86} The Court, in United States v. California, stated: Congress, in passing the Act, left the responsibility for defining inland waters to this Court. We think that it did not tie our hands at the same time. Had Congress wished us simply to rubber-stamp the statements of the State Department as to its policy in 1953, it could readily have done so itself. It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act.

381 U.S. at 164-65 (second California decision).

\footnote{87} See Territorial Sea Convention, supra note 29, art. 7.
In adopting the doctrine of historic bays, the Court accepted the general view that the three essential elements, discussed above, are required. The Court, however, imposed three modifications to tailor application of the doctrine to federal-state disputes over submerged lands. First, the claim of historic bay status is to be treated as if it were asserted by the federal government and opposed by foreign nations. The Court stated:

The [Territorial Sea] Convention was, of course, designed with an eye to affairs between nations rather than to domestic disputes . . . [I]t would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. The only fair way to apply the convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation.

The second modification requires that both state and federal activities and assertions of sovereignty against foreign nations be considered in applying the doctrine. Factors to be given weight include: the extent foreign vessels are excluded from the disputed waters; the extent foreign vessels are subject to legislation or regulations; and the continuous enforcement of regulations which pertain to the area. It does not matter whether these factors are asserted by the federal or state governments, or both.

Third, the Court considers a “disclaimer” by the federal government decisive unless the claimant state establishes historic evidence that is “clear beyond doubt” and which has “already ripened because of past events.” In all submerged lands cases, the United States essentially disclaims all state assertions that the maritime areas in question are historic waters. However, the Court recognized that in those cases where conclusive proof of historic title was present, permitting the federal government’s disclaimer would approach an “impermissible contraction of territory.” The states, nonetheless, must clearly beyond doubt prove historic title in order to over-

88. See supra note 40 and accompanying text. See also Louisiana Boundary Case, 394 U.S. at 23-24 n.27.
89. See Louisiana Boundary Case, 394 U.S. at 77.
90. Id.
91. Id. at 77-78.
92. See supra notes 41-43 and accompanying text.
93. A “disclaimer” by the United States is a repudiation and a denial by the federal government that a disputed maritime area is historic waters or a historic bay.
94. Louisiana Boundary Case, 394 U.S. at 77.
95. Id. n. 104.
ride the disclaimer of the federal government.

In not one case prior to the *Alabama and Mississippi Boundary Case*, had the Court found sufficient evidence of historic title to satisfy the "clear beyond doubt" standard of proof. For example, in the *Louisiana Boundary Case*, the Court held that state laws and regulations relating to transportation and navigation were insufficient exercises of dominion to perfect a claim to historic inland waters. Because article 17 of the Territorial Sea Convention permits the innocent passage of foreign vessels, a characteristic typically associated with territorial seas rather than inland waters, the Court found the state's exercise of authority not commensurate in scope with the nature of the title claimed. In *United States v. Alaska*, the enforcement of fish and wildlife regulations was also considered an insufficient exercise of sovereignty. The exercise of sovereignty, reasoned the Court, must be an assertion of power to exclude all foreign vessels and navigation. In *United States v. Florida*, the Special Master found that the State of Florida had failed to satisfy this burden of proof, stating: "[it] seems clear from the evidence that the State of Florida has never, before or since 1968, seized a foreign vessel in the disputed area beyond the three-league limit for violating its law." The Court, accepting the reasoning of the Special Master, simply concluded that there were no historic bays on the coast of Florida.

With respect to the acquiescence requirement, the Court requires something more than a mere failure to protest; foreign governments must first be given actual or constructive notice of the sovereign's claim. In *United States v. Alaska*, Justice Blackmun stated:

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96. In United States v. Alaska, however, the District Court and the United States Court of Appeals for the Ninth Circuit held for the State of Alaska contending the evidence was conclusive. The Supreme Court reversed the decision of the lower courts. 352 F. Supp. 815 (1972), aff'd per curiam, 497 F.2d 1155 (9th Cir. 1974), rev'd, 422 U.S. 184 (1975).
98. Id.
99. Article 17 of the Territorial Sea Convention states: Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation. Territorial Sea Convention, supra note 29, art. 17.
100. See *Louisiana Boundary Case*, 394 U.S. at 24-26.
102. Id. at 197.
103. Id. at 197-200.
106. Id. at 45.
108. 422 U.S. 184, 200 (1975).
"[t]he failure to protest is meaningless unless it is shown that the
governments of those countries knew or reasonably should have
known of the authority asserted."

In sum, the Supreme Court recognizes and applies the three essen-
tial elements required to establish historic title, subject to three mod-
ifications in applying the doctrine to domestic disputes. There must
be an open, notorious and effective exercise of sovereignty, exercised
for a sufficient period of time to establish usage, and done so with
the acquiescence of foreign nations. The activities of both the state
and federal governments are to be taken into consideration, and
viewed as if the claim is between the federal government and foreign
nations. The exercise of authority, according to the Court, must be
an assertion of power to exclude all foreign navigation. Furthermore,
the historical evidence presented by the state must be clear beyond
doubt to override the inevitable disclaimer of the federal
government.

*Alabama and Mississippi Boundary Case*

In the *Alabama and Mississippi Boundary Case*, the Special
Master's recommendation characterized Mississippi Sound as both a
juridical and an historic bay, under article 7 of the Territorial Sea
Convention. The Special Master found the Sound met both the
semicircle test and the twenty-four mile closing-line rule of article 7,
thus, qualifying it as a juridical bay. The United States filed ex-
ceptions to the Master's findings opposing both the juridical bay and
historic bay determinations. Alabama and Mississippi also filed
exceptions to the Master's report claiming that alternative grounds
for delimiting the Sound were available. The Court, nonetheless,

109. Id.


111. Id. at 12-18. In reaching the juridical bay conclusion, the Special Master first
determined that Dauphin Island was an extension of the mainland. The basis for this
conclusion is the depth and utility of the intervening waters and the short distance be-
tween the Island and the mainland. By treating Dauphin Island in this manner, the
Master concluded that water gaps between the barrier islands was less than the 24-mile
maximum of article 7 of the Territorial Sea Convention. Counsel for the United States
protested this determination, stating sarcastically: "[T]he Master's reasoning is flawed in
that he mistakenly treated water as land because it was inland." See United States v.
Louisiana, Exceptions of the United States and Supporting Brief 8, June 25, 1984 (Octo-
ber Term, 1984 No. 9 Original) [hereinafter referred to as Exceptions of the United
States and Supporting Brief].

112. See generally Exceptions of the United States and Supporting Brief, supra
note 111.

113. See generally Exceptions of the State of Mississippi, supra note 16; Excep-
ignored the Special Master's juridical bay findings as well as the exceptions introduced by the parties, and based its conclusion on the doctrine of historic bays. The Court held in favor of the States of Alabama and Mississippi, granting them paramount title to the Mississippi Sound.

The Court, following the modifications outlined in the *Louisiana Boundary Case*, held that development of the Sound for intracoastal waterway purposes, construction of a military fortification, erection of a lighthouse, and a statement in a 1906 case that the Sound is "an inclosed arm of the sea," were activities sufficient to assert exclusive jurisdiction over the disputed waters. The Court found that this evidence, in effect, put foreign nations on notice that the Sound was deemed inland waters by both the state and federal governments, and that there was effective and continuous exercise of sovereignty over the disputed waters.

The United States questioned the viability of the historic evidence used by the Court, arguing, for example, that Fort Massachusetts on Ship Island was constructed primarily to suppress the civil insurrection, not to exclude foreign navigation. They also argued that construction and maintenance of a military installation was, in itself, inconclusive evidence to prove that the United States was exercising sovereignty over adjoining waters. Referring to the federal government's Naval bases in Cuba and the Azores, counsel for the United States commented: "Surely it cannot be suggested that continuous maintenance to these [overseas military] installations transforms all the intervening water into our historic bays." More importantly, the United States argued that because the uncompleted fort was

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116. 105 S. Ct. 1074, 1081. The House of Representatives on February 8, 1817, initiated a project to develop the Sound for intracoastal waterway purposes. H.R. Doc. No. 427, 14th Cong., 2d Sess. (1817).
120. *Alabama and Mississippi Boundary Case*, 105 S. Ct. at 1087.
121. *Id.* at 1082 n.6.
122. *See* Exceptions of the United States and Supporting Brief, *supra* note 111, at 29.
123. *Id.* at 29 n.10.

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abandoned fifteen years after construction began, any claims to the Mississippi Sound as inland waters ceased to exist.\textsuperscript{124}

The United States also argued that the language in \textit{Louisiana v. Mississippi}, a 1906 lateral-boundary dispute case between those two states, characterizing the Sound as "an inclosed arm of the sea," failed to establish Mississippi Sound as "inland waters."\textsuperscript{125} The United States reasoned that it could not be bound by the ruling since it was not a party to the litigation.\textsuperscript{126} Moreover, the United States contended that the decision could not be used as evidence because the Court twice dismissed the case as having no bearing on federal-state disputes over submerged lands.\textsuperscript{127}

The Court retreated from its previous decisions regarding the extent of authority necessary to establish sovereignty,\textsuperscript{128} rejecting the United States contention that exclusion of foreign navigation from the disputed waters was required to prove historic bay status. The United States argued that the evidence was weak compared to that presented by the States of California, Louisiana, and Alaska in previous litigation; in those cases, it was shown that foreign fishermen were arrested.\textsuperscript{129} The United States claimed that "the Master disregarded the very heavy burden resting on the proponents of such a claim" and that the evidence "does not remotely show that, at any time during American sovereignty, the exclusion of peaceful foreign vessels was attempted, much less accomplished in such a notorious way, and for such a substantial period, as to ripen into an accepted usage."\textsuperscript{130} The Court, nonetheless, stated that concrete action to enforce the laws of a state was not the only mode of asserting sovereignty; the assertion of power or the exercise of effective sovereignty is possible through less extreme types of action.\textsuperscript{131} This rationale,
however, contradicts the requirement established in United States v. Florida that a "ship must be seized." The Court also invalidated the United States disclaimer of the Sound as inland waters. The Special Master reasoned that the disclaimer, simply a set of maps published by the federal government delineating certain waters, was nothing more than a tactic used to prevent the recognition of a legitimate historic claim.

Responding to the Court's finding that no foreign government has ever challenged the inland water status of the Sound, the United States argued that more than a failure to protest was required to establish acquiescence by foreign nations. Despite the United States contention that no foreign nation could have reasonably construed the federal government's activities as asserting inland water rights to the Mississippi Sound, the Court reasoned that the United States "publicly and equivocally" asserted sovereignty over the Sound, and that foreign nations had reasonable notice of the claim, acquiescing to United States sovereignty over the disputed waters.

In finding Mississippi Sound an historic bay, the Court gave substantial weight to the concept of vital interests in reaching its conclusion. Such factors as defense needs, economic interests, and geographical configuration were all considered by the Court. Justice Blackmun stated that: "The historic importance of Mississippi Sound to vital interests of the United States, and the corresponding insignificance of the Sound to the interests of foreign nations [as an international waterway] lend support to the view that Mississippi Sound constitutes inland waters." The concept of vital interests, however, is not recognized in international law and has been scrutinized as a contradiction to the doctrine of historic bays.

[u32. 425 U.S. at 791. See supra notes 105-06 and accompanying text.
133. Alabama and Mississippi Boundary Case, 105 S. Ct. at 1085-86.
134. The publication of these maps in 1971 by the U.S. State Department was in response to domestic and foreign demand for documents delimiting the boundaries of the United States.
135. See Exceptions of the United States and Supporting Brief, supra note 111, at 21.
136. Id. at 33.
137. Alabama and Mississippi Boundary Case, 105 S. Ct. at 1085.
138. Id. at 1081.
139. See supra notes 55-57 and accompanying text.]
IMPLICATIONS

There are a number of problems with the Court's formula for inland waters as applied in the Alabama and Mississippi Boundary Case. First, the application of the doctrine of historic bays, a principle of ownership based upon acquisitive prescription, has always been controversial in international law. Second, the Court misapplies the doctrine of historic bays by referring to certain vital interests as elements for consideration. Third, by modifying the doctrine for the purpose of domestic submerged lands disputes, the complexity of evidentiary considerations increases substantially. Finally, by developing a formula with potential foreign relations repercussions, the Court interferes with the power of the executive branch.

Prescriptive Rights and Historical Evidence

The doctrine of historic bays is based upon the principle of acquisitive prescription. The elements of prescriptive rights, particularly those requiring the effectiveness and continuity of the claim, are difficult to measure. Consequently, the substance and validity of historical evidence is often dependent upon the perspective of the historian. The historian's examination and description of the past is significantly influenced by present political and social realities. The validity of historical evidence hinges upon a number of subjective issues. For example, what constitutes an effective exercise of authority? Does failure to continually exercise authority destroy the claim? How long must the claim be in effect before title ripens? The responses of the claimant nation to these questions are usually self-serving. To deny this phenomena would ignore geopolitical realities. Such subjectivity renders the doctrine susceptible to misapplication and abuse. Thus, the common interests of the world community are compromised when a body of water is delimited without sufficient historical evidence.

Concept of Vital Interests

In reaching its conclusion, the Court reviewed the "vital interests" of the federal government, in applying the doctrine of historic bays. Consideration of vital interests, however, undermines the time requirement of the doctrine. Delimitation of historic bays on

141. 105 S. Ct. at 1081.
the basis of vital interests has been the subject of many international disputes. Libya and the USSR, for example, have claimed historic title to vast bodies of water based upon economic and defense considerations. However, the concept of vital interests is not recognized in international law; reliance upon economic and defense interests in applying the doctrine of historic bays increases the potential for abuse and international conflict. Furthermore, judicial pronouncements which rely upon vital interests in the practice of delimitation interfere with American diplomacy, requiring the executive branch to accept assertions of sovereignty based upon economic and defense considerations.

**Domestic Evidentiary Considerations**

In analyzing *domestic* submerged lands disputes between a state and the federal government, the Court modifies the doctrine of historic bays—it considers both federal and state exercises of authority and views the claim as if made by the federal government and opposed by foreign nations. These modifications substantially increase the complexity of evidentiary considerations.

The Court's modifications are unworkable where the exercise of authority by a state contradicts that of the federal government. There can be no "effective and continual exercise of sovereignty" when the state and federal governments have each asserted control over the disputed waters. For example, during the Civil War, the fort on Ship Island was stormed and occupied by the Confederates for a period of three months. The insurgents manned and armed the garrison on behalf of the Confederate States of America. This assertion of sovereignty by the rebels disrupted United States control over the disputed waters, destroying the continuity of a United States claim.

A recent incident in Alaska also illustrates the difficulty of the Court's modifications when state and federal interests conflict. In early 1962, a Japanese fishing fleet entered Cook Inlet, a body of water claimed by the State of Alaska as inland waters based on historic rights. Alaska officials requested that the federal government take action. The federal government, however, did nothing. On April 15, 1962, Alaska law enforcement officials arrested the fleet's captains and charged them with violating state fishing regulations. Subsequently, the State of Alaska settled the matter with the Japanese company. Japan, in the meantime, protested the incident. The

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142. See *supra* notes 62 & 65 and accompanying text.
144. See United States v. Alaska, 422 U.S. 184, 201 (1975).
145. *Id.* at 201-02.
United States took no formal position on the issue and declined to support Alaska's assertion of sovereignty. This lack of support, in effect, illustrates the United States dissatisfaction with Alaska's exercise of authority. The state and federal governments had opposing views regarding the scope of authority of each entity. Where there are inconsistent assertions of sovereignty by the federal and state governments, the Court's modifications are difficult, if not unworkable, to apply.

Separation of Powers Considerations

The Executive Branch has consistently challenged the applicability of the doctrine of historic bays and the Territorial Sea Convention to domestic disputes. It contends that when the SLA was enacted, there was no definition of inland waters in the international community. The original draft of the SLA defined inland waters as including "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the sea." Congress, however, ultimately complied with a State Department request to forgo a legislative definition to avoid future foreign relations problems. When the language was struck from the original draft, Senator Cordon, the acting chairman of the Committee on Interior and Insular Affairs, remarked: "[I]n our attempts to take care of a purely domestic matter we might be putting the United States on record with a precedent which we intended only to apply domestically but which might be applied internationally." Similarly, to promote United States interests in foreign relations, the Court must abide by Executive Branch policy. Judicial interpretation of international law inconsistent with that of the Executive Branch interferes with the federal government's ability to alter its

146. Id. at 202.
147. See United States v. California, 381 U.S. at 164; see also Reply Brief of the United States, supra note 17, at 5.
149. See United States v. California, 381 U.S. at 189-90 (Black, J., dissenting).
150. Id.
152. "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative - 'the political' - departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).
position; such flexibility is an important tool in foreign policymaking. Foreign nations frequently monitor United States Supreme Court decisions and, despite their domestic nature, use them as negotiation tactics. Thus, the State Department may have difficulty justifying its interpretations of law when they differ from those of the Supreme Court.

The delimitation of waters directly affects the territorial boundaries of the United States. Such boundary issues are political questions properly decided by the executive or legislative branches of the government, rather than the judiciary. Under the doctrine of separation of powers, the judiciary is obligated to exercise judicial restraint and defer to the position of the executive branch on such political issues. Supporting deference in the context of historic bay determinations, the United States, in *United States v. Alaska* argued:

> Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle . . . has always been upheld by this court, and has been affirmed under a great variety of circumstances.

The Court, however, has assumed that by enacting the SLA without a definition of inland waters, Congress purposefully left the re-

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153. Many authors believe that world public order is based on the logic of reciprocity. In respect to this phenomena, Falk states that "[t]he unreasonable national claim prompts imitation and retaliation. If the Soviet Union restricts the travel of American diplomats then the United States will restrict the travel of Soviet diplomats. If the United States claims sovereignty over its continental shelf then Argentina follows with a parallel claim." See R. Falk, The Status of Law in International Society 651 (1970).

154. The rationale of the political question doctrine is that certain issues are better resolved by the political branches of the government rather than the judicial branch. The Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), outlined the criteria for determining whether an issue is a political question or not. Justice Harlan writing for the majority stated:

> 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 manageable 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 expressing 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.

155. The separation of powers argument is derived from the perspective that the judicial branch should have a restricted governmental role and avoid interfering with the political branches of the federal government. Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985).

156. 422 U.S. 184 (1975).

sponsibility for interpretation to the judiciary.\textsuperscript{158} Congressional response to the Court's first California decision illustrates contrary legislative intent.\textsuperscript{158} By passing the SLA Congress effectively overruled the Court's 1947 holding in \textit{United States v. California,}\textsuperscript{160} which vested title to subsurface coastal resources exclusively in the federal government. In his dissent, Justice Black highlights this argument, stating: "It seems to me the height of irony to hold that an act passed expressly to escape the effect of this Court's opinion in this field is now construed as leaving us free to announce principles directly antithetic to the basic purpose of Congress of deciding that question for itself once and for all."\textsuperscript{161} Nonetheless, the Court adopted its own formula, modifying and applying international law to define inland waters for the purposes of SLA application. Because the political question involved has possible foreign relations repercussions, the judiciary should have exercised judicial restraint on this issue.

\textbf{PRACTICAL CONSIDERATIONS}

\textit{Domestic}

Congress should develop an exclusively domestic definition of inland waters for purposes of the SLA. The legislature is the only forum where both state and federal interests are adequately represented. The definition should consider the peculiar characteristics of disputes involving domestic offshore submerged lands. More importantly, the definition should eliminate the doctrine of historic bays as a method of acquiring title to inland waters. Past codification efforts, both domestic and international, illustrate the difficulties inherent in the doctrine.\textsuperscript{162} State and federal interests would be better accommo-

\begin{itemize}
  \item \textsuperscript{158} See \textit{United States v. California}, 381 U.S. 139, 164-65 (second California decision).
  \item \textsuperscript{159} See supra note 4.
  \item \textsuperscript{160} 332 U.S. 19 (1947). See supra note 3.
  \item \textsuperscript{161} \textit{California}, 381 U.S. at 210 (second California decision).
  \item \textsuperscript{162} The Court in Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 428 (1963), noting the sensitivity of political question issues, observed: [T]he degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for

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dated by excluding a principle based on prescriptive rights as a mode of adjudicating offshore submerged lands cases. The doctrine of historic bays is simply an unmanageable legal standard. Thus, Congress should develop a definition of inland waters which incorporates language from articles 4 and 7 of the Territorial Sea Convention, because minus the doctrine of historic bays, articles 4 and 7 are reasonable, and manageable, methodologies for delimiting maritime areas.

**International**

The community of nations should eschew the doctrine of historic bays as obsolete in modern international law. It is a doctrine dangerously susceptible to abuse and misapplication. This is especially true with the increased reference to the concept of vital interests.

Codification is often the end of a long process of developing and fine tuning legal standards. Internationally codified rules reflect stabilized, customary international practice. The inability of the community of nations to agree on a general definition illustrates the unmanageable nature of the doctrine. Thus, it can be realistically concluded that the doctrine of historic bays neither supports nor reflects the mutual interests of the community of nations.

Furthermore, with the development of alternative methods of regulating maritime activities, the concerns of all interested nations are protected. The 1982 United Nations Convention on the Law of the Sea recognizes, for example, the Exclusive Economic Zone, the exclusivity in the political branches.

163. The Executive Branch, however, rejects the use of the straight baseline method contained in article 4 and the Court consistently defers to this position. See *Louisiana Boundary Case*, 394 U.S. at 72-73; United States v. California, 381 U.S. at 167-68.


166. LOS Convention, supra note 166, art. 55-75. In the EEZ, a coastal state has sovereign rights over the exploitation of subsurface resources, including fisheries, oil and gas and other economic resources. The outer limits of the EEZ is 200 nautical miles from...
Contiguous Zone,\textsuperscript{168} the Doctrine of Archipelagos,\textsuperscript{169} and the Regime of Islands,\textsuperscript{170} each allocating limited exclusive rights to the seas and its resources. The doctrine of historic bays, however, defeats the efforts of these programs. As an ad hoc exception, the doctrine of historic bays permits a claimant nation to circumvent established rules governing delimitation. Thus, the elimination of the doctrine will avoid future polemic discussion over unsupported historic claims and claims based upon self-serving vital interests.\textsuperscript{171}

\section*{Conclusion}

As international law, the doctrine of historic bays is problematic at best. Moreover, the controversial nature of historic rights renders the United States Supreme Court's modification and application of the doctrine to domestic disputes even more questionable. After three Conferences on the Law of the Sea, the community of nations has yet to codify a workable and definitive article addressing the issue. The lack of accord diminishes the validity and sensibility of this doctrine. The unwillingness to codify the doctrine illustrates that it does not reflect the mutual interests of the international community. Nonetheless, the doctrine of historic bays, controversial and untrust-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{168} LOS Convention, \textit{supra} note 166, arts. 46-54. The doctrine of archipelagic baselines permits a archipelagic State to delimit its surrounding waters using a straight baseline system.
\item \textsuperscript{169} Id. art. 121. The LOS Convention provides that the maritime limits of islands that sustain human habitation, shall be measured in a fashion similar to other land territory.
\item \textsuperscript{170} An historic claim of the archipelagic state of Tonga, for example, to an expanse of approximately 150,000 square miles of the Pacific Ocean, will never arise. See Statement of Mr. Tupoutoa (Tonga), reprinted in II Third United Nations Conference on the Law of the Sea Official Records 107 (1974). Tonga's claim to its territorial sea was based on the Royal Proclamation of King Tupou I in 1887. The 1887 decree referred to four coordinates in the form of a rectangle covering a total area of sea and islands of approximately 150,000 square miles. Tonga insisted this assertion was necessary to protect the territorial integrity and unity of its 150 islands. Tonga was, however, willing to review its claim in order to accommodate the goals of the Conference. \textit{See also} Statement of Mr. Tupoutoa, \textit{reprinted in I UNCLOS III Official Records} 108-09 (1974).
\end{enumerate}
\end{footnotesize}
worthy by international standards, has been adopted by the Court as a viable principle of domestic law.

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