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I. INTRODUCTION

There has been a great deal of conflict between the central and peripheral governments of federal systems regarding jurisdiction over offshore submerged lands. This conflict, known as the tidelands controversy,[1] has occurred in the United States, Canada, and Australia.[2] The focus of this conflict has been the control of valuable offshore energy resources. This Article analyzes the Australian tidelands controversy and compares it to the United States and Canadian disputes.

Beginning in the 1950s, Australia sought to develop its offshore petroleum resources to meet its growing energy needs. In 1967, the Australian Commonwealth ("Commonwealth") and state governments negotiated a common mining agreement that was designed to preclude the lengthy litigation that had plagued offshore energy development in the United States and was threatening to erupt in Canada.[3] This political settlement did not, however, prevent litigation. In 1973, the Commonwealth asserted jurisdiction over the territorial sea and continental shelf by establishing the Seas and Submerged Lands Act.[4]

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1. ERNEST BARTLEY, THE TIDELANDS OIL CONTROVERSY (1953); William K. Metcalfe, *The Tidelands Controversy: A Study in Development of a Political-Legal Problem*, 4 SYRACUSE L. REV. 39 (1953); HUBERT MARSHALL & BETTY ZISK, THE FEDERAL-STATE STRUGGLE FOR OFFSHORE OIL (1966). The tidelands controversy was misnamed. Ownership of the tidelands, which is the area between the high- and low-water marks, has never been in question. Rather, the conflict focuses on the submerged lands seaward of the low-water mark.

2. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209 (1988) [hereinafter Fitzgerald, *Tidelands Controversy*]; Edward A. Fitzgerald, *The Newfoundland Offshore Reference: Federal-Provincial Conflict Over Offshore Energy Resources*, 23 CASE W. RES. J. INT'L L. 1 (1991) [hereinafter Fitzgerald, *Newfoundland*].

3. This agreement was known as the Agreement Relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and Certain Other Resources, of the Continental Shelf of Australia and of Certain Territories of the Commonwealth and of Certain Other Submerged Land. It was executed October 16, 1967. Michael Crommelin, *Offshore Oil and Gas Rights: A Comparative Study*, 14 NAT. RESOURCES J. 457, 478 n.148 (1974).

4. Seas and Submerged Lands Act 1973, No. 161, 1973 AUSTL. ACTS P. 763.

The states challenged the Commonwealth's offshore jurisdictional claim. In 1975, the High Court of Australia, in *New South Wales v. Commonwealth*,[5] held that the states' jurisdiction terminated at the low-water mark.[6] As such, the Australian High Court found that the Commonwealth's external affairs authority under section 51(xxix) of the Australian Constitution established federal jurisdiction over the territorial sea and continental shelf.[7]

This Article demonstrates that the Australian High Court's decision in *New South Wales* was erroneous. During the nineteenth century, the Crown held sovereign and proprietary rights over the territorial sea. When the Australian colonies became self-governing, they were granted jurisdiction over the territorial sea and the right to the continental shelf resources. The colonies maintained their offshore jurisdiction upon their 1901 federation. The recognition of continental shelf rights under international law did not bolster the states' jurisdictional claims, but simply legitimized these claims under international law. The Commonwealth's external affairs authority under section 51(xxix) of the Australian Constitution did not establish federal jurisdiction over the territorial sea or the continental shelf. The Australian High Court erroneously relied on flawed decisions of the United States and Canadian Supreme Courts in arriving at its decision.[8] In 1979, a political settlement partially rectified the Australian High Court's decision.

II. BACKGROUND ON THE DEVELOPMENT OF AUSTRALIA'S OFFSHORE PETROLEUM RESOURCE LEGISLATION

Australia's dependence on oil imports from Indonesia and the Middle East, prior to 1960, made it vulnerable to supply interruptions and resulted in balance of payment deficits.[9] Australia attempted to develop a domestic petroleum industry through federal and state incentives.[10] For example, the federal government subsidized exploration operations in 1957 under the Petroleum Search Subsidy Scheme, which extended to exploratory drilling and geophysical surveys be-

5. 135 C.L.R. 337 (1975) (Austl.).

6. *Id.* at 368.

7. *Id.* at 364.

8. Fitzgerald, *Tidelands Controversy*, *supra* note 2; Fitzgerald, *Newfoundland*, *supra* note 2.

9. Andrew R. Thompson, *Australia's Off-Shore Petroleum Common Code*, 3 U.B.C. L. REV. 1 (1968).

10. Crommelin, *supra* note 3, at 481; Thompson, *supra* note 9, at 1.

yond existing production areas.[11]

In 1960, the question of federal-state jurisdiction over offshore energy development became a salient public policy concern. That year, Broken Hill Proprietary Company, through its subsidiary, Hematite Petroleum Proprietary Limited, acquired permits from the states of South Australia, Tasmania, and Victoria to develop over 66,000 square miles of offshore lands.[12] In 1962, the Commonwealth and state ministers commenced negotiations to develop a regulatory scheme for offshore energy development.[13] The negotiators sought to develop a stable statutory and regulatory framework that would encourage private industry to invest the large capital necessary for offshore energy development. The negotiators also sought to avoid the litigation that had characterized United States offshore energy development and was then threatening to erupt in Canada.[14]

On October 16, 1967, the Commonwealth and state governments announced an agreement regarding offshore energy development. The agreement, known as the Agreement Relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and Certain Other Resources, of the Continental Shelf of Australia and of Certain Territories of the Commonwealth and of Certain Other Submerged Land ("1967 Agreement"), centered on a common mining code, which was to be implemented through "mirror legislation" enacted by both the Commonwealth and state governments.[15] Offshore lands were divided into adjacent areas, which included the territorial sea and continental shelf, but excluded state internal waters.[16] State law applied to each state's adjacent area, while federal law applied to all adjacent areas.[17] The 1967 Agreement designated the states to regulate exploration and development in their adjacent areas. The states were required to consult with the Commonwealth on matters of fed-

11. Initially, offshore energy exploration and development fell under state jurisdiction because no federal statute governed such action. Crommelin, *supra* note 3, at 478.

12. *Id.*

13. *Id.*; Thompson, *supra* note 9, at 3-4, 8-26; A.N. Dakin, *Future Patterns of Legislation for the Petroleum Industry*, 6 MELB. U. L. REV. 403 (1968).

14. Elliot Treby, Comment, *The Role of the Political Idiom in Jurisdictional Conflicts Over Off-Shore Oil and Gas*, 5 MAR. L. & COM. 281, 287 (1974).

15. Crommelin, *supra* note 3, at 478 n.148.

16. Agreement Relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and Certain Other Resources, of the Continental Shelf of Australia and of Certain Territories of the Commonwealth and of Certain Other Submerged Land, Oct. 6, 1967, pmbl. [hereinafter 1967 Agreement].

17. *Id.* pt. II, para. 2.

eral importance, such as shipping, navigation, external affairs, taxes, lighthouses, fisheries, communications, and foreign and interstate trade.[18] All legal processes were duplicated for the federal and state governments so that no legal vacuum existed over the offshore areas.[19]

Under the 1967 Agreement, offshore energy development was separated into exploration and development stages. The offshore areas were divided into a system of graticular blocks, which varied in size from twenty-five to thirty square miles. A company could apply for a six-year permit, which would allow for exploratory drilling within a given area during that time.[20] Although the permit was renewable for five-year periods, a company was required to surrender one-half of its exploration area upon each renewal.[21] The maximum area that a company could hold for exploration was 400 blocks, or 10,000 square miles.[22]

Once petroleum was discovered, a company had to inform the designated authority and apply for a production license. One graticular block had to be identified as the central block of a nine-block location. The company would then nominate five out of the nine blocks for a production license. It was required to pay a ten percent royalty on the value of the well-head production, with sixty percent given to the state and forty percent to the Commonwealth.[23] The remaining tracts would be retendered. The company discovering the petroleum was given the first option for purchasing licenses on the surrendered tracts at the rate of the highest bidder.[24] Alternatively, the company could take a production license on more than five blocks and pay an override royalty to the state at the rate of one to two and one-half

18. *Id.* pt. III.

19. *See* Crommelin, *supra* note 3, at 478-83; Thompson, *supra* note 9; Dakin, *supra* note 13; Treby, *supra* note 14; R.D. Lumb, *The Offshore Petroleum Agreement and Legislation*, 41 AUSTL. L.J. 453 (1968); C.W. Harders, *Australia's Offshore Petroleum Legislation: A Survey of Its Constitutional Background and Its Federal Features*, 6 MEL. U. L. REV. 415 (1968); John L. Taylor, *The Settlement of Disputes Between Federal and State Governments Concerning Offshore Petroleum Resources: Accommodation or Adjudication*, 11 HARV. INT'L L.J. 358, 378-83 (1970); Andrew R. Thompson, *Australian Petroleum Legislation and the Canadian Experience*, 6 MELB. U. L. REV. 370 (1968); Colin Warbrick, Comment, *Offshore Petroleum Exploitation in Federal Systems: Canadian and Australian Action*, 17 INT'L & COMP. L.Q. 501, 508-13 (1968).

20. Thompson, *supra* note 9, at 9-13.

21. *Id.*

22. *Id.*

23. *Id.*; Crommelin, *supra* note 3, at 479-83.

24. Thompson, *supra* note 9, at 9-13; Crommelin, *supra* note 3, at 479-83.

percent on all blocks.[25]

The 1967 Agreement was not legally enforceable and therefore relied solely upon the goodwill of the parties.[26] The agreement could not be repealed or amended, nor could any action be taken without the unanimous consent of all parties.[27] The parties were required to enact legislation implementing the agreement.[28] The Commonwealth's bill was introduced on October 18, 1967, and received royal assent on November 22, 1967.[29] The Commonwealth Senate enacted the bill on the condition that a select committee be established to investigate "whether the constitutional conception underlying the legislation is consistent with the proper constitutional responsibility of the Commonwealth and the States."[30]

A. Offshore Jurisdiction Under Australia's Seas and Submerged Lands Act

Despite the 1967 Agreement's express purpose to avoid constitu-

25. Thompson, *supra* note 9, at 9-13; Crommelin, *supra* note 3, at 478-83; *see also* Dakin, *supra* note 13; Treby, *supra* note 14; Lumb, *supra* note 19; Taylor, *supra* note 19, at 378-83; Thompson, *supra* note 19; Warbrick, *supra* note 19, at 508-13. After the 1973 increase in the price of petroleum, the value of the economic rents from offshore development also increased dramatically. Only the Commonwealth benefited from this increase. Section 90 of the Australian Constitution grants the Commonwealth exclusive authority over customs, excise, and bounties. AUSTL. CONST. § 90. This prohibited the states from taking the increase in economic rents from licensees as either an excise or sales tax.

Not being subject to the same limitations as the states, the Commonwealth imposed an excise duty on crude oil ("Crude Oil Levy"). This excise constituted the total increase in economic rents and made the price of Australian crude commensurate with world oil prices. The revenues went entirely to the Commonwealth. Furthermore, the Commonwealth maintained the royalty at the pre-1973 level by requiring that the Crude Oil Levy be subtracted from the market well-head value. By 1981, however, the states were able to benefit from these revenues through general revenue sharing grants. Richard Cullen, *Canada and Australia: A Federal Parting of the Ways*, 18 FED. L. REV. 53, 69-71 (1989) [hereinafter Cullen, *Canada and Australia*]; *see also* Richard Cullen, *Bass Strait Revenue Raising*, 6 J. ENERGY & NAT. RESOURCES L. 213, 223-26 (1988) [hereinafter Cullen, *Bass Straight*].

26. 1967 Agreement, *supra* note 16, pt. IV, cl. 26 ("The Governments acknowledge that this Agreement is not intended to create legal relationships justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof.").

27. *Id.* pt. IV, cl. 25 (stating that the 1967 Agreement "shall not be capable of being varied or revoked or of being determined by any Government except by agreement between all of the Governments for the time being parties thereto").

28. *Id.* pt. III.

29. Petroleum (Submerged Lands) Act 1967, No. 118, 1967 AUSTL. ACTS P. 862, *amended by* Petroleum (Submerged Lands) Act 1968, No. 1, 1968 AUSTL. ACTS P. 1; *see* Crommelin, *supra* note 3, at 488.

30. K. Beauchamp et al., *Jurisdictional Problems in Canada's Offshore*, 11 ALTA. L. REV. 431, 455 (1973); Thompson, *supra* note 9, at 27-28.

tional litigation, the offshore jurisdiction question emerged tangentially in 1969. In *Bonser v. La Macchia*,[31] the defendant was prosecuted for violating the Commonwealth Fisheries Act of 1952, which applied to "Australian waters beyond territorial limits."[32] The defendant, whose offense occurred six and one-half miles offshore, alleged that the Commonwealth lacked jurisdiction to prosecute because "Australian waters beyond territorial limits" only consisted of the three mile territorial sea.[33] The Australian High Court held that the defendant's offense occurred within Australian waters.[34]

Several justices addressed the issue of jurisdiction over the territorial sea. Chief Justice Barwick held that the territorial limits of Australia were restricted to Australia's land mass.[35] In doing so, he relied on the 1876 decision of *Regina v. Keyn*,[36] which held that common law jurisdiction ended at the low-water mark.[37] Chief Justice Barwick asserted that international recognition of the territorial sea occurred sometime after the *Keyn* decision. The Crown initially claimed that the territorial sea off the coast of Australia was owned by the United Kingdom.[38] When Australia attained self-government in 1931, the Crown's rights in the territorial sea were granted to the Commonwealth.[39] While Chief Justice Barwick acknowledged that some nineteenth century law officers declared that the Crown held the territorial sea in right of the colonies, he found these opinions erroneous.[40] Nevertheless, Chief Justice Barwick ultimately held that the Commonwealth lacked jurisdiction over fisheries within the territorial sea.[41]

Justice Windeyer held that the grant of state authority over fisheries in the territorial sea under the Commonwealth Fisheries Act was not premised on any constitutional grounds.[42] Rather, he stated, it was based on "a misconception as to the areas of Commonwealth and State power which has unquestionably been prevalent for a long time,

31. 122 C.L.R. 177 (1970) (Austl.).
32. *Id.*; Fisheries Act 1952-1966, No. 7, § 4, 1955 AUSTL. ACTS P. 864.
33. *Bonser*, 122 C.L.R. at 177-78.
34. *Id.*
35. *Id.* at 184-89.
36. 2 Ex. D. 63 (1876) (Eng.).
37. *Id.*
38. *Bonser*, 122 C.L.R. at 187.
39. *Id.* at 189.
40. *Id.* at 192, 197.
41. *Id.* at 198.
42. *Id.* at 232.

or simply as a matter of policy."[43] Justice Windeyer found that the colonies never possessed jurisdiction over the territorial sea,[44] and that "[s]overeign rights in respect to these waters resided in the Imperial Crown."[45] When Australia became a nation, the Commonwealth "succeeded to the Imperial rights and interests formerly existing in and under the territorial waters."[46] Nevertheless, Justice Windeyer decided that the states' authority to act for "peace, order and good government" permitted state regulation of the fisheries within the territorial sea.[47]

Justice Kitto maintained the minority position in *Bonser* and questioned the validity of *Keyn*.[48] He stated that if the issue of jurisdiction over the territorial sea were before the High Court, "this Court should hold . . . that the seaward boundaries of the States are set by the three mile rule."[49]

In 1971, the Senate Select Committee issued its report on the constitutional conception underlying the 1967 Agreement.[50] The report arrived at the following conclusions:

> (1) The constitutional conception underlying the legislation is inconsistent with what should be the proper constitutional relationship between the Parliament and the executive.
>
> (2) In the context of broad constitutional responsibilities there is a challenge to the exercise of the functions of Parliament in the conception of uniform legislation drafted by the executive arms of the seven Australian Governments being presented to the Parliaments as a *fait accompli* requiring formal legislative approval. This cannot be regarded as strictly inconsistent with the "proper constitutional responsibilities" of the Commonwealth and the States as the power always lies with the Parliaments of the Commonwealth and the States to reject or amend the legislation.
>
> (3) The Committee does not regard the legislation as being inconsistent with the "proper responsibilities" of the Commonwealth and the States because, as a result of the decision to avoid litigation

43. *Bonser*, 122 C.L.R. at 232.
44. *Id.* at 222.
45. *Id.*
46. *Id.* at 223.
47. *Id.* at 225-26.
48. *Bonser*, 122 C.L.R. at 201-02.
49. *Id.* at 202.
50. REPORT FROM THE SENATE SELECT COMM. ON OFF-SHORE PETROLEUM RESOURCES (Parliament of the Commonwealth of Australia, Canberra, 1971) [hereinafter SENATE SELECT REPORT], *cited in* Beauchamp et al., *supra* note 30, at 452 n.89.

> which would have resolved the matter, it cannot say what is the measure of those proper constitutional responsibilities.
>
> (4) The Committee considers that, notwithstanding the advantages to the national interest which the legislation and its underlying conception has produced, the larger national interest is not served by leaving unresolved and uncertain the extent of State and Commonwealth authority in the territorial sea-bed and the Continental Shelf.[51]

In its report, the Senate Select Committee commented on the High Court's decision in *Bonser*.[52] The Committee stated that the issue of jurisdiction had been clarified "so that it may now be argued that the Commonwealth has, and has always had, legislative power over the natural resources of the territorial sea-bed and Continental Shelf."[53] Nevertheless, the report concluded:

> [T]he constitutional authority of the Commonwealth and the States in respect of the natural resources of the offshore seabed is still a matter of contention and doubt. Whatever the illumination which recent decisions have given to the areas of darkness, there would appear to be no way of resolving the issue of authority without an actual decision of the High Court.[54]

Before the release of the final report, the Gorton Liberal Party introduced a bill to declare Commonwealth sovereignty over the territorial sea and continental shelf. The bill lapsed in 1972 as a result of opposition.[55] When the Labor Party government returned to power in 1972, Prime Minister Whitlam and other radical nationalists, who viewed the federal system as an impediment to the realization of their economic and social policies, reintroduced the Gorton bill.[56] The Seas and Submerged Lands Act ("SSLA") was subsequently enacted into law in 1973.[57] The SSLA implemented the Conventions on the Territorial Sea and Continental Shelf and declared Commonwealth

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51. SENATE SELECT REPORT, *supra* note 50; *see also* Beauchamp et al., *supra* note 30, at 455; Rowland J. Harrison, *The Offshore Mineral Resources Agreement in the Maritime Provinces*, 4 DALHOUSIE L.J. 245, 262-63 (1978).

52. SENATE SELECT REPORT, *supra* note 50.

53. *Id.*

54. *Id.*

55. R.D. LUMB, THE LAW OF THE SEA AND AUSTRALIAN OFF-SHORE AREAS 214 (2d ed. 1978).

56. *Id.*; *see also* W.G. MCMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA 195 (1979).

57. Seas and Submerged Lands Act 1973, No. 161, 1973 AUSTL. ACTS P. 763.

jurisdiction over the territorial sea and continental shelf.[58] In 1974, the states brought suit challenging the SSLA.

The Australian High Court found the SSLA constitutional in *New South Wales v. Commonwealth*[59] and determined that state jurisdiction ended at the low-water mark.[60] The High Court found that rights over the territorial sea had been held by the Crown in right of Great Britain and were never granted to the colonies.[61] Even if the colonies once possessed rights over the territorial sea, these rights, which were an attribute of external sovereignty, were surrendered to the Commonwealth at federation.[62] In addition, according to the High Court, decisions by the United States and Canadian Supreme Courts confirmed that external sovereignty established jurisdiction over offshore submerged lands.[63] Since international law recognized continental shelf rights, the Commonwealth could claim these rights as an external sovereign.[64] Finally, the implementation of the Conventions on the Territorial Sea and Continental Shelf, under the SSLA, established Commonwealth jurisdiction over these areas.[65] The High Court held that the SSLA was a valid exercise of the Commonwealth's external affairs authority under section 51(xxix) of the Australian Constitution.[66]

III. Territorial Sea Jurisdiction and Dominion Rights

The Australian High Court majority in *New South Wales* deter-

58. Section 6 of the SSLA declares that "the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth." *Id.* § 6. The Governor-General can declare the limits of the territorial sea, as long as the declaration is "not inconsistent[] with the Territorial Sea Convention." *Id.* Section 11 states that "the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth." *Id.* § 11. The Governor-General can prescribe the continental shelf limits of Australia, as long as they are not inconsistent with the Continental Shelf Convention. *Id.*

59. 135 C.L.R. 337 (1975) (Austl.).

60. There was no single majority opinion in the case. References in this Article to the majority opinion refer to Chief Justice Barwick's opinion at 135 C.L.R. at 366-71. Chief Justice Barwick wrote the leading opinion in the case. This means that, of the majority, his opinion stated the Commonwealth's case most comprehensively. *See* Cullen, *Canada and Australia*, *supra* note 25, at 73 n.108.

61. *New South Wales*, 135 C.L.R. at 368-71.

62. *Id.* at 372.

63. *Id.* at 373-74.

64. *Id.* at 374-75.

65. *Id.* at 360-66.

66. *New South Wales*, 135 C.L.R. at 360-66.

mined that the Crown held jurisdiction and dominion over the territorial sea, and that the Crown never surrendered its rights to the colonies.[67] According to the High Court, colonial grants were limited to land territory above the low-water mark.[68] The 1855 Imperial statute, which surrendered the Crown's wastelands to the colonies when they achieved self-government, did not include the territorial sea.[69] The High Court found that the 1876 decision of *Regina v. Keyn*[70] confirmed the limitations imposed upon colonies regarding offshore jurisdiction.[71] In addition, the High Court maintained that no colonial ministers advised the Crown on matters regarding the territorial sea,[72] and that nineteenth century law officers were wrong in recognizing colonial jurisdiction over the territorial sea.[73]

According to the High Court, even if the colonies had possessed sovereign and proprietary rights over the territorial sea, they relinquished these rights upon the establishment of the Australian Commonwealth in 1901.[74] The territorial sea was an attribute of external sovereignty, and all aspects of external sovereignty were surrendered to the Commonwealth at federation. This was confirmed by the emergence of Australia as an independent nation in the twentieth century.[75]

The majority's position regarding the territorial sea was dubious.[76] In the nineteenth century, the Crown held sovereignty and dominion over the territorial sea. When the Australian colonies attained self-government, the Crown's rights in the territorial sea passed to the colonies. The High Court erred in relying on *Keyn*, as it was an anomaly, addressing only admiralty jurisdiction.[77] Colonial ministers did advise the Crown on matters affecting the territorial sea, and nineteenth century law officers correctly acknowledged colonial jurisdiction over the territorial sea. The Australian states did not surrender

67. *Id.* at 367-69.
68. *Id.* at 368-69.
69. *Id.* at 369-70.
70. 2 Ex. D. 63 (1876) (Eng.).
71. *New South Wales*, 135 C.L.R. at 368-70.
72. *Id.* at 365, 370.
73. *Id.* at 371.
74. *Id.*
75. *Id.* at 374-75.
76. The minority opinions of Justices Gibbs and Stephen explain more cogently the status of the territorial sea under the Australian Constitution. *See New South Wales*, 135 C.L.R. at 382-416 (Gibbs, J.), 416-58 (Stephen, J.).
77. *See infra* text accompanying notes 115-37.

their jurisdiction over the territorial sea to the Commonwealth upon federation.

A. British Recognition of the Territorial Sea

English jurists of the seventeenth through twentieth centuries recognized that the Crown possessed jurisdiction and property rights over the sea, seabed, and subsoil.[78] They made no distinction between the Crown's imperium and dominion over offshore areas.[79]

1. British Recognition in the Nineteenth Century

In the nineteenth century, the Crown focused its offshore claims on the territorial sea.[80] Great Britain championed a three-mile territorial sea throughout this period, as evidenced by international agreements,[81] domestic legislation,[82] and the writings of British publicists.[83] British courts also recognized Crown rights in the three-mile territorial sea.

In several early cases, the British High Court of Admiralty expressly acknowledged the three-mile territorial sea.[84] In the 1821 case of *Blundell v. Catterall*,[85] Justice Holyrod affirmed the King's property rights "in the main sea itself, adjacent to his dominions."[86] In the 1828 case of *Gifford v. Lord Yarborough*,[87] Justice Best referred to

78. For a complete overview of the development of the concept of the territorial sea, see D.P. O'Connell, *The Juridicial Nature of the Territorial Sea*, 1971 BRIT. Y.B. INT'L L. 303.

79. D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 535 (1982).

80. *See infra* text accompanying notes 329-344.

81. The Fisheries Convention of 1818, which settled the United States-British conflict over fishing rights off Newfoundland and Nova Scotia, barred United States fishermen from fishing three miles off the shores of Canadian provinces. In 1839, Britain and France concluded a fishing agreement, which precluded each from fishing three miles from the other's shore. In 1855, a United States-British claims commission invalidated the British seizure of the United States schooner *Washington* in the Bay of Fundy, on the ground that the ship was on the high seas and not within the three-mile territorial sea of Nova Scotia. SAYRE A. SWARTZRAUBER, THE THREE MILE LIMIT OF THE TERRITORIAL SEAS 51-88 (1972).

82. In 1868, British county courts were granted admiralty jurisdiction over maritime affairs occurring three miles from shore. In 1876, Britain repealed all of its hovering legislation and established a three-marine league custom zone for British vessels and a one-marine league (three mile) custom zone for foreign vessels. *Id.* at 66-71.

83. Sir Robert Phillimore and Sir Edward Creasy asserted that jurisdiction over the three-mile territorial sea was based on the cannon shot rule. Later British publicists, such as Sir Travis Twill, William Edward Hall, and Thomas Joseph Lawrence, accepted the three-mile rule on its merits. *Id.* at 68-71.

84. *Id.* at 60-61.

85. 106 Eng. Rep. 1190 (P.C. 1821) (Eng.).

86. *Id.* at 1199.

87. 130 Eng. Rep. 1023 (H.L. 1828) (Eng.).

the *fundum maris* as the property of the King.[88] A year later, in *Benest v. Pipon*,[89] Lord Wynford, relying on *Blundell* and *Gifford*, stated that the sea "is the property of the King and so is the land beneath it."[90]

Several mid-nineteenth century British court decisions recognized the Crown's rights in the three-mile territorial sea. The 1854 case of *Attorney-General v. Chambers*[91] discussed the ownership of coal seams that were contiguous to the seashore. Lord Cranworth stated, "The Crown is clearly in such a case, according to all the authorities, entitled to the '*litus maris*' as well as to the soil of the sea itself adjoining the costs [sic] of England."[92]

In 1856, in *The "Leda,"* portions of the Merchant Shipping Act of 1854,[93] which addressed salvage and stranded vessels within the limits of the United Kingdom, came under scrutiny.[94] *The "Leda"* involved salvage services rendered to a vessel within the three-mile territory. Dr. Lushington stated that the expression "within the limits of the United Kingdom," as used in the Merchant Shipping Act of 1854, could only mean "the land of the United Kingdom and three miles from shore."[95]

In 1856, the arbitrator in *The Cornwall Mines Case*[96] held that the Duchy of Cornwall owned the mines to the low-water mark, while the mines beyond the low-water mark belonged to the Crown.[97] The arbitrator further found that the Crown's right to the seabed was a "territorial right," and that the seabed was "part of the Realm."[98]

The 1860 case of *General Iron Screw Collier Co. v. Schurmann*[99] addressed the issue of whether the Merchant Shipping Act of 1854

88. *Id.* at 1024.

89. 12 Eng. Rep. 243 (P.C. 1829) (Eng.).

90. *Id.* at 246.

91. 43 Eng. Rep. 486 (P.C. 1854) (Eng.).

92. *Id.* at 489. According to Black's Law Dictionary, "*litus maris*" is the "sea-shore." BLACK'S LAW DICTIONARY 934 (6th ed. 1990).

93. 17 & 18 Vict., ch. 104, § 458 (1854) (U.K.); *see also* O'Connell, *supra* note 78, at 367.

94. The *"Leda"*, 166 Eng. Rep. 1007 (P.C. 1856) (Eng.).

95. *Id.* at 1008.

96. 21 & 22 Vict., ch. 109 (1856) (U.K.). *The Cornwall Mines Case* involved a dispute between the Crown and the Duchy of Cornwall as to who owned the mines located three miles offshore. O'Connell, *supra* note 78, at 324.

97. O'Connell, *supra* note 78, at 324.

98. *Id.*; G.V. LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION 94, 98 (1969); Cecil J.B. Hurst, *Whose Is the Bed of the Sea?*, 4 BRIT. Y.B. INT'L L. 34-36 (1923).

99. 70 Eng. Rep. 712 (P.C. 1980) (Eng.).

covered the collision between a British and foreign ship within three miles of the coast of Great Britain.[100] Sir Page Wood stated that "every country may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shores."[101]

In *Gammell v. Commissioners of Woods and Forest*,[102] an 1861 case, the court adjudicated whether the Crown held exclusive rights to the salmon fishery off the coast of Scotland.[103] According to Lord Wensleydale,

> It would be hardly possible to extend [fishing] seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country, that which is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession.[104]

In *Gann v. Free Fishers of Whitstable*,[105] an 1865 case, Ex-Lord Chancellor Chelsford stated that "the three mile limit depends upon a rule of international law, by which every independent State is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore."[106] In 1866, Justice Blackburn, in *Ipswich Dock Commissioners v. Overseers of St. Peter*,[107] referred to the sea as "a part of the great waste, both land and water, of which the king is lord."[108]

In 1868, in *Duchess of Sutherland v. Watson*,[109] the Court of Session considered rights over the mussel scallops on Scotland's foreshore.[110] Although it was unnecessary to address the Crown's interest below the low-water mark, several of the justices concluded that the seabed adjoining the coast belonged to the Crown.[111]

The British courts, following Hale's doctrine,[112] determined that

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100. *Id.*
101. *Id.*; *see also* SWARTZRAUBER, *supra* note 81, at 68.
102. 3 H.L. Rep. 419 (1859) (Eng.).
103. *Id.*
104. *Id.* at 465-66.
105. 11 Eng. Rep. 1305 (P.C. 1865) (Eng.).
106. *Id.* at 1316.
107. 7 B. & S. 310 (1866) (Eng.).
108. *Id.* at 344.
109. 6 Sess. Cas. 199 (1868) (Scot.).
110. *Id.*
111. *Id.* at 209, 213.
112. Hale stated, "In this sea the King of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership." *See* O'Connell, *supra* note 78, at 362.

the Crown held property rights in the sea, seabed, and subsoil. D.P. O'Connell, an esteemed scholar, noted that these cases affirmed that "all the writers of the law of England agree in this, that as the King is Lord of the sea, that flows around our coast, and also owner of all the land to which no individual has acquired the right by occupation."[113] This position was supported by thirty of the thirty-six writers who addressed the issue of the territorial sea from 1836 through 1876.[114] Consequently, until the latter part of the nineteenth century, the dominant view was that the Crown's jurisdiction over the territorial sea was based on the Crown's proprietary interests.

2. *Regina v. Keyn*

In the 1876 case of *Regina v. Keyn*,[115] the Court of Crown Cases Reserved broke with judicial precedent by refusing to acknowledge any Crown rights, either proprietary or sovereign, in the territorial sea.[116] In *Keyn*, a German steamer, the *Franconia*, ran into a British steamer, the *Strathclyde*, two and one-half miles off the English shore, killing a British citizen. The captain of the *Franconia*, Fernindad Keyn, a German national, was convicted of manslaughter.[117] His conviction was overturned by a vote of 7-6 in the Court of Crown Cases Reserved.[118] Specifically, the court held that the Central Criminal Court lacked jurisdiction over offenses committed on the high seas by foreign nationals, even if the offenses were committed within three miles of the English coast.[119]

The Court of Crown Cases Reserved first examined the nature of the common law and admiralty jurisdiction.[120] The court found that the criminal jurisdiction of the common law courts was limited to the county, which included waters *inter fauces terra*,[121] or to the realm,

113. *Id.* at 365 (citations omitted).

114. *Id.* at 327; *see also* Price Daniel, *Sovereignty and Ownership in the Marginal Sea*, 3 BAYLOR L. REV. 243, 267-311 (1951).

115. 2 Ex. D. 63 (1876) (Eng.).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. The opinion referred to is that of Justice Cockburn, which was joined by Justices Pollack and Field. *Keyn*, 2 Ex. D. at 159-239.

121. According to the United States Supreme Court, "[W]aters '*inter fauces terrae*' or landward of an opening 'between the jaws of land' could be subject to the jurisdiction of the littoral county rather than the Admiral if the jaws were close enough to satisfy a somewhat ambiguous line-of-sight test." United States v. Maine, 475 U.S. 89, 92 (1986).

which ended at the coastal low-water mark.[122] Admiralty jurisdiction, which included offenses committed on the seas outside of the realm, had been transferred by statute to the county courts.[123] Since Keyn's offense occurred outside of county boundaries, the Crown had to demonstrate admiralty jurisdiction over the nature or location of the offense in order to legitimize the Central Criminal Court's jurisdiction.[124]

In examining the nature of the offense, the Court of Crown Cases Reserved found that admiralty jurisdiction, with the exception of piracy, was restricted to offenses committed aboard British vessels, which were considered an extension of British territory.[125] Since this crime was committed by a German national aboard a German ship, no admiralty jurisdiction existed over the offense.[126]

The Court of Crown Cases Reserved, in reviewing the location of the offense, also rejected the earlier position espoused by English jurists that the "bed of the sea is part of the realm of England and part of the territorial possession of the Crown."[127] The court held that since there was no historic claim over the territorial sea, the Crown's jurisdiction had to rest on international law.[128] Although the court acknowledged the emerging principle of the territorial sea in international law, it also noted that the publicists disagreed "in the practical application of the rule, in respect of the particular distance, and also in the still more essential particular of the character and degree of sovereignty and dominion to be exercised."[129] In light of these uncertainties, the court determined that Britain could exercise jurisdiction over the territorial sea only through an act of Parliament.[130] Legislation pertaining to international relations, customs, fisheries, and navigation was insufficient.[131] The court concluded that since Parliament never formally extended the Crown's jurisdiction over the territorial sea, the Central Criminal Court lacked jurisdiction to try Keyn for his

122. *Keyn*, 2 Ex. D. at 161-62.
123. *Id.*
124. *Id.*
125. *Id.* at 168-69.
126. *Id.*
127. *Keyn*, 2 Ex. D. at 195; *see also* O'Connell, *supra* note 78, at 303-24.
128. *Keyn*, 2 Ex. D. at 195; John McEvoy, *Atlantic Canada: The Constitutional Offshore Regime*, 8 DALHOUSIE L.J. 284-92 (1984).
129. *Keyn*, 2 Ex. D. at 191.
130. *Id.* at 193, 204.
131. *Id.* at 214.

offense.[132]

The minority in *Keyn* accepted the proposition that international law was the received law of England.[133] The minority asserted that the concept of the territorial sea in international law, which was established by the "common agreement or acquiescence of jurists," enabled nations to exercise jurisdiction three miles seaward from the low-water mark.[134] This three-mile zone was "a part of the territory of the adjacent nation, as much and as completely as if it were land,"[135] and constituted the nation's "territorial waters, subject to its rights of property, dominion and sovereignty."[136] Thus, English criminal law applied to the three-mile zone, even in the absence of a statute. Admiralty jurisdiction, which was residual in nature, encompassed national territory that was not part of the realm or the county. Since Keyn's offense occurred within three miles of the English shore, admiralty jurisdiction existed over the offense. Consequently, the minority reasoned that the Central Criminal Court, as the successor of admiralty jurisdiction, possessed jurisdiction to try the offense.[137]

Two 1877 cases affirmed the *Keyn* rationale. Both addressed disputes in the territorial sea and were decided by several of the dissenting justices in *Keyn*. In the first case, *Harris v. Owners of Franconia*,[138] Lord Coleridge stated that the rationale of *Keyn* "is, that, *for the purpose of jurisdiction* (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at the low-water mark."[139] Justice Denman stated that, according to *Keyn*, "the moment you get beyond [the] low-water mark you get beyond the jurisdiction within which the Queen's writs run."[140]

In the second case, *Blackpool Pier Co. v. Fylde Union*,[141] the court discussed the extent of the realm as it relates to the imposition

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132. *Id.* at 231.

133. Justice Brett authored the minority opinion to which this Article refers. *Id.* at 124-49.

134. *Keyn*, 2 Ex. D. at 142-43.

135. *Id.*

136. *Id.*

137. *Id.* at 145-46.

138. 2 C.P.D. 173 (1877) (Eng.).

139. *Id.* at 177 (emphasis added); *see also* New South Wales v. Commonwealth, 135 C.L.R. 337, 431 (1975) (Austl.) (Stephen, J.) (Justice Stephen stated that "with the case of *Harris v. Owners of Franconia*, as subsequently understood, began what I regard as the later misinterpretation of Keyn's case.").

140. *New South Wales*, 135 C.L.R. at 432 (Stephen, J.) (quoting *Harris*, 2 C.P.D. at 178).

141. 36 L.T.R. 251 (1877) (Eng.).

of parish taxes.[142] Lord Coleridge, together with Justice Grove, held that a pier extending 500 feet beyond the low-water mark was outside of the realm, and thus not taxable.[143] While both *Harris* and *Blackpool Pier Co.* examined the geographical limits of the common law courts' jurisdiction, they did not address Crown ownership of such territory.[144]

Responding to the *Keyn* decision, the British Parliament enacted the Territorial Waters Jurisdictional Act[145] ("TWJA") in 1878. John Bassett Moore stated that Parliament "considered it imperative to adopt legislation nullifying the decision's effect for the future besides declaring it wrong as to the past."[146] The TWJA restored the Crown's rights "as they always existed."[147] By enacting the TWJA, Parliament extended admiralty jurisdiction to all offenses committed by foreigners on the territorial sea. Territorial waters were defined in the TWJA as one marine league seaward from the low-water mark off Great Britain and the British provinces.[148]

Lord Coleridge, referring to the TWJA in *Regina v. Dudley and Stephens*,[149] stated, "[T]he opinion of the minority in the *Franconia Case* . . . has been since not only enacted but declared by Parliament to have been always the law."[150] Similarly, the Earl of Halsbury, L.C., in *Carr v. Fracis, Times, and Co.*,[151] held that the TWJA reversed the *Keyn* decision and "affirmed in terms that the judgment of the majority of the judges in *Reg. v. Keyn* was not the law of England."[152]

The *Keyn* case, which was an anomaly, rested on a very narrow foundation. *Keyn* addressed the issue of the Central Criminal Court's admiralty jurisdiction, and not the Crown's property rights over offshore lands. In 1891, the United States Supreme Court, in *Manchester v. Massachusetts*,[153] noted that in *Keyn* "the question was not as to the extent of the dominion of Great Britain over the open sea

142. *Id.*
143. *Id.*
144. *New South Wales*, 135 C.L.R. at 433 (Stephen, J.).
145. 41 & 42 Vict. (1878) (U.K.), *cited in* McEvoy, *supra* note 128, at 297 n.58.
146. *See* Daniel, *supra* note 114, at 282 (citing 7 MOORE'S COLLECTED PAPERS 294).
147. Territorial Waters Jurisdictional Act, ch. 73, § 2.
148. *Id.*; *see also* McEvoy, *supra* note 128, at 297-98.
149. 14 Q.B.D. 273 (1884) (Eng.).
150. *Id.* at 281.
151. 85 L.T.R. 144 (1901) (Eng.).
152. *Id.* at 146.
153. 139 U.S. 240 (1891).

adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offenses committed on the open sea."[154] The United States Supreme Court further stated, "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast."[155]

O'Connell found the scope of the *Keyn* decision very limited, and he asserted that the case's rationale was that common law jurisdiction was limited to the realm.[156] The realm, which defined a court's jurisdiction, included county waters and the areas to the low-water mark.[157] The realm did not define the extent of the Crown's property, which amounted to more than the sum of the counties.[158] The territorial sea was part of the Crown's lands, but not part of the realm.[159] According to O'Connell, "[T]he true *ratio decidendi* in *R. v. Keyn* was that the common law jurisdiction terminated at the low-water mark, and that nothing more fell to be decided, although it is clear that a majority of the Court thought they were deciding more."[160]

3. British Recognition in the Twentieth Century

The British courts soon abandoned the *Keyn* rationale and returned to a proprietary view of the territorial sea.[161] Between 1891 and 1916, four cases recognized the Crown's ownership of the seabed of the territorial sea. In these cases, the Privy Council merged the feudal doctrine of Crown lands with international law regarding the territorial sea. In 1891, in *Lord Advocate v. Clyde Navigation Trustees*,[162] the Privy Council barred Clyde Navigation from disposing of dredgings in the Long Loch channel, finding that the Crown held title to the seabed of the loch and to the seabed three miles from the coast.[163] The court determined that "there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the

154. *Id.* at 257.
155. *Id.* at 258.
156. O'Connell, *supra* note 78, at 365-77.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 377.
161. LA FOREST, *supra* note 98, at 95.
162. 19 R. 174 (Sess. 1891) (Scot.).
163. *Id.* at 177.

shore."[164] Further, the Crown's proprietary right was "a right which may be the subject of trespass, and which may be vindicated like other rights of property."[165]

In 1900, the Privy Council decided another case involving a dispute over the ownership of coal in the seabed beyond the low-water mark, *The Lord Advocate v. Wemyss*.[166] In *Wemyss*, Lord Watson stated, "I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown."[167]

In the 1908 case of *Lord Fitzhardinge v. Purcell*,[168] the Privy Council again addressed this issue and upheld a lord's title to the foreshore of a navigable river, but found that the title was subject to the public's right of fishing and navigation.[169] Justice Parker, commenting on the nature of the land, stated that "[c]learly the bed of the sea, at any rate for some distance, below the low water mark and the beds of tidal navigable rivers, are, *prima facie* vested in the Crown . . . ."[170]

In 1916, in *Secretary of State v. Chelikani Rama Rao*,[171] the Privy Council determined the ownership of three small islands that appeared within three miles of the coast of Madras between 1840 and 1860.[172] The board, quoting statements from the aforementioned cases, held that islands arising in the King's sea were the property of the King.[173] In criticism of *Keyn*, the board stated:

> It should not be forgotten that *Regina v. Keyn* had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offenses by foreigners on board foreign ships whether within or without the limit of 3 miles from shore.[174]

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164. *Id.*
165. *Id.*
166. 1900 App. Cas. 48 (P.C.) (Eng.).
167. *Id.* at 66.
168. 99 L.T.R. 155 (P.C. 1908) (Eng.).
169. *Id.*
170. *Id.* at 164.
171. 32 L.T.R. 652 (P.C. 1916) (Eng.).
172. *Id.*
173. *Id.* at 655.
174. *Id.* at 653.

The Privy Council never formally resolved the issue of jurisdiction over the territorial sea, even though it had opportunities to do so in several Canadian fisheries cases.[175] The Privy Council was reluctant to address the issue because the fisheries disputes could be decided independently. In *Attorney-General for British Columbia v. Attorney-General for Dominion of Canada*,[176] the Privy Council found that the concept of the territorial sea was still in controversy.[177] The Privy Council asserted that the status of the territorial sea should not be decided by a municipal tribunal, but rather by an international agreement.[178] In *Attorney-General for Canada v. Attorney-General for Quebec*,[179] the Privy Council reiterated its position, stating that "[i]t is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law."[180] However, the Privy Council inferred that if rights in the territorial sea were recognized, the provinces would hold such rights.[181] Furthermore, in the 1915 case of *Attorney-General of Southern Nigeria v. J. Holt & Co. (Liverpool)*,[182] the Privy Council referred to "the Crown as owner of the sea and its bed within territorial limits, and/or foreshore."[183]

Politically, Great Britain continued to support and adhere to a three-mile territorial sea after the *Keyn* decision. This was manifested in international conventions,[184] domestic legislation,[185] and international pronouncements.[186] In 1912, the International Court of Justice

175. *See, e.g.*, Attorney-General for British Columbia v. Attorney-General for the Dominion of Canada, 110 L.T.R. 484 (P.C. 1914); Attorney-General for Canada v. Attorney-General for Quebec, 124 L.T.R. 517 (P.C. 1921).

176. 110 L.T.R. at 484.

177. *Id.* at 490.

178. *Id.*

179. 124 L.T.R. at 517.

180. *Id.* at 521.

181. Roberts, *Re Dominion Coal Co. LTD: Constitutional Law—Property Rights in the Solum of Canada's Territorial Sea*, 22 U. TORONTO FAC. L. REV. 203, 207-09 (1964).

182. 1915 App. Cas. 599 (P.C.).

183. *Id.* at 611.

184. In 1882, Great Britain signed the North Sea Fisheries Convention, which recognized each signatory's exclusive fishing rights within its territorial sea. A year later, Britain triumphed in the Bering Sea Arbitration, which held that the United States possessed no rights to hunt fur seals beyond its three-mile territorial sea. In 1911, an international convention prohibited the signatories, including Britain, from hunting sea otters beyond their three-mile territorial seas. SWARTZRAUBER, *supra* note 81, at 85-88, 117-18.

185. *Id.* at 86-88. Great Britain enacted the Seas Fisheries Act in 1883, criminalizing fishing by foreign ships within Great Britain's three-mile territorial sea. *Id.*

186. *See id.* at 110-11. In 1905, Great Britain protested Uruguay's seizure of the British

settled the *North Atlantic Fisheries Arbitration* by recognizing Great Britain's and the United States' exclusive fishing rights within their territorial seas.[187] These judicial and political events caused Captain Swartzrauber, a leading commmentator, to conclude that "the greatest years for the three-mile limit were those years from 1876 to 1926."[188]

The codification of international law regarding the territorial sea began in 1924 with a resolution of the League of Nations.[189] The 1930 Hague Codification Conference recognized that coastal states possessed full sovereignty over their maritime belts, which included the superadjacent air, the seabed, and the subsoil.[190] The conference failed to produce a treaty because of a disagreement over the width of the territorial sea.[191] Nevertheless, after 1930, most nations recognized that the sea was part of a nation's territory under customary international law.[192] The concept of the territorial sea was later codified in the 1958 Geneva Convention on the Territorial Sea.[193]

B. The Australian Territorial Sea

In the pre-federation nineteenth century, English common law recognized the Crown's sovereignty and dominion over the territorial sea. Justice Gibbs, in *New South Wales v. Commonwealth*,[194] emphasized that for the states to prevail in their offshore claims, they had to demonstrate that "the right to the beneficial use of the land or its proceeds [had] been appropriated to the colony and [were] subject to the control of its legislature."[195] Additionally, the states had to show

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vessel, *Agnes G. Donohoe*, beyond Uruguay's three-mile territorial sea, and objected to claims by Spain and Portugal to six-mile territorial seas. *Id.*

187. *Id.* at 117-18.

188. *Id.* at 130.

189. Reference Re Mineral and Other Natural Resources of the Continental Shelf, 145 D.L.R.3d 9, 21 (1983) (Can.) [hereinafter *Natural Resources Reference*]. This League of Nations resolution was referred to as the Progressive Codification of International Law and was adopted by the Assembly on September 24, 1924. *Progressive Codification of International Law* (1924), *reprinted in* LEAGUE OF NATIONS, THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW (Shabtai Rosenne ed., 1972).

190. *Hague Codification Conference*, League of Nations Doc. C.351(b) M.145(b) 1930 V (1930).

191. *Natural Resources Reference*, 145 D.L.R.3d at 22.

192. *Id.*

193. United Nations Conference on the Law of the Sea, U.N. Doc. A/CN 13/L.52 (1958). *See generally* Eliezer Ereli, *The Submerged Lands Act and the Geneva Convention on the Territorial Sea and the Contiguous Zone*, 61 TUL. L. REV. 555 (1967).

194. 135 C.L.R. 337 (1975) (Austl.).

195. *Id.* at 403 (Gibbs, J.).

that "the right of dispositing of the land [could] only be exercised by the Crown under the advice of the Ministers of that colony."[196] Justices Gibbs and Stephen, both in the minority, determined that jurisdiction over the territorial sea had been transferred to the colonies prior to federation.[197]

1. The Territorial Sea as a Crown Perogative Right

The territorial sea could be considered either a prerogative right of the Crown or Crown property.[198] Crown prerogative rights were "the residue of the King's undefined powers after striking out those which ha[d] been taken away by legislation or fall[en] by desuetude."[199] In *New South Wales*, Justice Jacobs noted:

> [T]he King's rights in or over the open seas adhered to him as a ius regale in right of his Crown of England. These rights adhered to him by virtue of his kingship in its national rather than its feudal aspect. The royal right was a prerogative recognized by the common law . . . but it did not have its source in [the common] law.[200]

Settlers of the Australian colonies adopted English law, including the common law and sovereign prerogative rights.[201] The Privy Council, in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*,[202] held that "the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain."[203] In the case of *In re Batamen's Trust*,[204] the Privy Council stated that "the Queen's prerogative is as extensive in *New South Wales* as it is here in this county of *Middlesex*."[205]

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196. *Id.* (Gibbs, J.). In 1919, Viscount Haldane had stated, "The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States." Theodore v. Duncan, 26 C.L.R. 276, 282 (1919) (Austl.).

197. *New South Wales*, 135 C.L.R. at 382-458.

198. *Id.* at 438-39 (Stephen, J.).

199. Attorney-General for New South Wales v. Butterworth and Co., 38 N.S.W. St. R. 195, 227 (1938).

200. *New South Wales*, 135 C.L.R. at 487.

201. *Butterworth and Co.*, 38 N.S.W. St. R. at 238 ("If this prerogative exists in England, it existed also in this State immediately prior to the formation of the Commonwealth."); *see also* The King v. Kidman, 20 C.L.R. 425, 435 (1915) (Austl.) ("It is clear law that in the case of the British Colonies acquired by settlement the colonists carry their law with them so far as it is applicable to the altered conditions.").

202. 1892 App. Cas. 437 (P.C.).

203. *Id.* at 441.

204. 15 L.R.-P.C. 355 (P.C. 1873).

205. *Id.* at 361.

Initially, the Governor-General exercised the prerogative rights of the Crown upon the advice of Imperial ministers.[206] When the colonies attained self-government, they advised the Crown on prerogative rights.[207] In *Toy v. Musgrove*,[208] the Victorian Supreme Court noted that the Victorian Constitution established "a complete organic system of responsible government coextensive as regards all the functions of administration of affairs by Government."[209] The Australian High Court, in *South Australia v. Victoria*,[210] determined that once self-government was attained, the Crown granted its executive authority to the colonies, including the right to dispose of public lands.[211] In *Bonanza Creek Gold Mining Co. v. The King*,[212] the Privy Council held that the grant of executive and legislative authority to the colonies upon self-government included the Crown's prerogative rights.[213] The Crown's prerogative rights were not incorporated into six separate codes of law. Rather, the rights became identical law applicable to all six political entities unless specifically repealed by the colonial legislatures.[214]

2. The Territorial Sea as Crown Property

Alternatively, the territorial sea could have been considered Crown property.[215] A fixed principle of English law stated that the Crown was the proprietor of all land for which no subject could show title.[216] When the Australian colonies were settled, this feudal principle was "extended to the land over sea."[217] The Crown assumed control over Australian land, which was considered Crown property, and held title to it in right of the colonies. There was no transfer of such title to the Crown in right of the United Kingdom. This could only be accomplished by a specific overt act.[218]

The Crown and the colonies disputed the control of Australian

206. Municipality of Randwick v. Rutledge, 102 C.L.R. 54, 71 (1959) (Austl.).
207. *New South Wales*, 135 C.L.R. at 404 (Gibbs, J.), 438-40 (Stephen, J.).
208. 14 V.L.R. 349 (1888) (Vict.).
209. *Id.* at 386; *see also Butterworth and Co.*, 38 N.S.W. St. R. at 241-42.
210. 12 C.L.R. 667 (1911) (Austl.).
211. *Id.* at 710.
212. [1916] 1 App. Cas. 566 (P.C.).
213. *Id.* at 585-87; *see also Butterworth and Co.*, 38 N.S.W. St. R. at 242-43.
214. *Butterworth and Co.*, 38 N.S.W. St. R. at 239-40.
215. *New South Wales*, 135 C.L.R. at 439 (Stephen, J.).
216. *Id.* (Stephen, J.)
217. *Id.* (Stephen, J.) (quoting Williams v. Attorney-General for New South Wales, 16 C.L.R. 404 (1913) (N.S.W.)).
218. *Williams*, 16 C.L.R. at 442. Justice Isaacs stated, "It is a mere truism to say that the

territory.[219] Before 1831, the Governor-General administered and disposed of colonial lands upon the advice of the colonial office. The English government changed its policy in 1831. Beginning in 1831, Crown lands could only be disposed of by auction, after a minimum bid was established. The notice declaring this policy stated that "all the lands in the Colony not hitherto granted and not appropriated for public purposes will be put up for sale."[220] Land already appropriated for public service was reserved.[221]

The Crown retained the right to dispose of colonial lands. The preamble to the Colonial Act of 1836[222] ("Colonial Act") stated that colonial governors were authorized "to grant and dispose of the waste lands."[223] The purpose of the Colonial Act was to validate territorial grants made in the Governor's name instead of the Crown's.[224] Additionally, a Select Committee of the House of Commons was established in 1836 to review the laws pertaining to colonial land disposition. In 1840, the governor's report declared that Crown lands were held in trust for the colonies and the British Empire collectively.[225]

In 1842, the Imperial Parliament passed a statute regulating the sale of wastelands belonging to the Crown in the Australian colonies.[226] The statute defined crown wastelands as "any lands . . . vested in Her Majesty . . . which have not been already granted . . . and which have not been dedicated and set apart for some public use."[227] Crown wastelands could only be conveyed or alienated by sales complying with statutory regulations, and the proceeds from the sales had to be used for public administration in the colonies. Imperial officials dispersed the sale receipts and allocated half to defray the cost of immigration. The colonies had no authority over the disposal of Crown lands.[228]

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title of the King to the lands of the Colony was in right of his Sovereighty of the Colony, in other words in right of the Colony." *Id.*

219. *Id.* at 438-60; *see also* Municipality of Randwick v. Rutledge, 102 C.L.R. 54, 71-75 (1959) (Austl.).

220. *Municipality of Randwick*, 102 C.L.R. at 72.

221. *Id.* at 72-73.

222. 6 Wm. IV, No. 16 (1836).

223. *Id.* pmbl.; *see also Municipality of Randwick*, 102 C.L.R. at 71.

224. *Municipality of Randwick*, 102 C.L.R. at 71.

225. *Williams*, 16 C.L.R. at 450.

226. 5 & 6 Vict., ch. 36 (1842) (U.K.).

227. *Id.* § 23; *see also Williams*, 16 C.L.R. at 424-25.

228. *Williams*, 16 C.L.R. at 424; *Municipality of Randwick*, 102 C.L.R. at 73.

The Imperial Parliament amended the 1842 statute in 1846 to allow the Crown to lease or license Crown lands for fourteen-year periods.[229] The amendments also regulated the occupation of waste lands, the ejection of intruders, and the protection of government officers.[230] Yet, the colonies remained powerless over Crown lands, even after subsequent amendments in 1850.[231]

3. Australian Colonial Authority over the Territorial Sea

The colonial Constitution Act of 1855 significantly changed colonial authority over Crown lands.[232] The repeal of the 1842 statute and the 1846 and 1850 amendments governing the disposal of Crown lands released the colonies from tutelage regarding the administration, disposal, and use of Crown lands.[233] Although the Australian colonies did not acquire title to the Crown's waste lands held by the Crown in right of the colonies, they gained control over Crown lands as a matter of governmental administration.[234]

When the colonies achieved self-government, the Crown's prerogative or proprietary rights in the territorial sea came under colonial jurisdiction. The Australian colonies were granted the beneficial uses and proceeds derived from the territorial sea. In addition, colonial legislators advised the Crown on the control and disposition of rights in the territorial sea.[235]

The majority in *New South Wales* held that since colonial boundaries did not include the territorial sea, the colonies lacked jurisdiction over the territorial sea.[236] Colonial boundaries did not specifically extend to the territorial sea,[237] but this omission was not

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229. 9 & 10 Vict., ch. 104 (1846) (U.K.).

230. *Williams*, 16 C.L.R. at 424-27, 449-53.

231. 13 & 14 Vict., ch. 59 (1850) (U.K.); *Williams*, 16 C.L.R. at 452-53.

232. 18 & 19 Vict., ch. 54 (1855) (U.K.).

233. *Williams*, 16 C.L.R. at 424-27, 453-57.

234. In St. Catherine's Milling and Lumber Co. v. The Queen, [1888] 14 App. Cas. 46 (P.C.), the Privy Council stated:

> In construing these [British North America Acts], it must always be kept in view that wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial uses or its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Id. at 56.

235. *New South Wales*, 135 C.L.R. at 405 (Gibbs, J.), 439 (Stephen, J.).

236. *Id.* at 370 (Barwick, C.J.), 382 (McTiernan, J.), 458-68 (Mason, J.).

237. Queensland contended that its grant was unique because its letters of patent granted the colony not only land territory, but "'all and every the adjacent islands, their members

critical. Several justices in *New South Wales* inferred that colonial boundary descriptions included the territorial sea, which is appurtenant to the land territory.[238] Additionally, in *Merchant Service Guild v. Commonwealth Steamship Owners Ass'n*,[239] Justice Isaacs stated that "the grant of powers of self-government to a component portion of the Empire connotes, primarily, restriction of their exercise to the limits of the local territory and its adjacent sea limit as recognized universally and by the statute."[240]

Colonial governments exercised sovereign and proprietary rights over their territorial seas.[241] They enacted statutes providing for

> the establishment of harbours and the construction of wharves, jetties and breakwaters, the control of navigation and pilotage, the maintenance of lighthouses and lightships, the regulation of fishing, whaling and prawning, and of diving for pearl shell and bêche-de-mer, the grant of oyster leases and licenses to get marine fibres and sponges, and the grant of leases to enable mining to be carried out below low-water mark, and for customs and quarantine purposes.[242]

Imperial authorities never questioned the validity of these colonial laws. Many imperial law officers who were distinguished attorneys consistently affirmed colonial sovereignty and dominion over the territorial sea in their legal opinions.[243] Furthermore, in the 1866 case of *Rolet v. The Queen*,[244] the Privy Council recognized colonial jurisdiction over the territorial sea, by declaring that the jurisdiction of the colony of Sierra Leone extended three miles from its coast.[245] The Privy Council reasserted this position in 1901, in *Carr v. Fracis, Times, and Co.*,[246] and again in 1916, in *Secretary of State v. Chelikani Rama Rao*.[247]

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and appurtenances in the Pacific Ocean' . . . . 'Members' covers physical additions to the islands such as land and reefs. 'Appurtenances' means the territorial sea and seabed." *Id.* at 351. Similarly, Tasmania asserted that its letter of patent gave it not only land, but " 'all islands and territories.' 'Territories' means the seabed." *Id.*

238. *Id.* at 406-07 (Gibbs, J.), 441 (Stephen, J.).

239. 16 C.L.R. 664 (1913) (Austl.).

240. *Id.* at 690.

241. *New South Wales*, 135 C.L.R. at 402-06 (Gibbs, J.), 442-43 (Stephen, J.).

242. *Id.* at 404 (Gibbs, J.).

243. *Id.* at 404 (Gibbs, J.), 435, 441-42 (Stephen, J.); *see also* D.P. O'CONNELL, OPINIONS ON IMPERIAL CONSTITUTIONAL LAW 123-25, 154-55, 159-60, 190-97 (1971).

244. 1 L.R.-P.C. 198 (1866) (Eng.).

245. *Id.* at 214.

246. 85 L.T.R. 144 (P.C. 1901) (Eng.).

247. 32 T.L.R. 652 (P.C. 1916) (India).

The lack of the colonies' extraterritorial competence during the nineteenth century made colonial jurisdiction over the territorial sea particularly important.[248] Failure to consider the territorial sea as colonial land would have invalidated the exercise of offshore colonial jurisdiction. In the twentieth century, courts began to accept the exercise of extraterritorial colonial jurisdiction to the extent it was necessary for the "peace, order, and good government" of the colony.[249] Noted scholar Enid Campbell pointed out that the exercise of colonial extraterritorial jurisdiction for peace, order, and good government was a post-hoc rationalization, developed by the courts to justify the actions of colonial governments and was "unknown to the nineteenth-century courts."[250]

The Crown also recognized colonial jurisdiction over the territorial sea. The Imperial Parliament approved leases for mining off the coast of New South Wales.[251] The 1885 Federal Council of Australasia Act granted the council jurisdiction over both "fisheries in Australian waters beyond territorial limits" and "[t]he custody of offenders on board ships belonging to Her Majesty's government beyond territorial limits."[252] The Act defined the territorial limit as the territorial sea.[253] The Queensland Pearl Shell and Bêche-de-mer Fisheries (Extra-territorial) Act of 1888 and the Western Australian Pearl Fisheries (Extra-territorial) and Bêche-de-mer Shell Act of 1889 both construed the territorial sea as falling within colonial jurisdiction.[254] In 1901, the Australian Constitution incorporated the terms of the Federal Council of Australasia Act.[255] Specifically, section 51(x) of the Australian Constitution granted the Commonwealth authority to make laws with respect to "[f]isheries in Australian waters beyond territorial limits."[256] By granting the colonies authority to make laws beyond their territorial limits, the Australian Constitution recognized

248. *New South Wales*, 135 C.L.R. at 400-05 (Gibbs, J.), 448 (Stephen, J.); *see also* Barry H. Dubner et al., *Demarcation of Authority Over Coastal Waters*, 10 STETSON L. REV. 228, 255-56 (1981). Lord Halsbury, in *MacLeod v. New South Wales*, stated that the colonies' "jurisdiction is confined within their own territory." MacLeod v. New South Wales, 1891 App. Cas. 455, 457-58.

249. *See* Croft v. Dunphy, 1933 App. Cas. 156 (P.C.).

250. Enid Campbell, *Regulation of Australian Coastal Fisheries*, 1 TASMANIA L. REV. 405, 421 (1960).

251. *New South Wales*, 135 C.L.R. at 405 (Gibbs, J.).

252. *Id.* at 402-03 (Gibbs, J.), 442-43 (Stephen, J.).

253. *Id.*

254. *Id.*

255. AUSTL. CONST. § 51(x).

256. *Id.*

colonial rights in the territorial sea.[257]

4. Australia's Federation and Authority Over the Territorial Sea

The status of the territorial sea did not change upon federation in 1901. Sections 106 and 107 of the Australian Constitution afforded the states the same rights that they had possessed as colonies.[258] The Australian Constitution contained no explicit or implicit provisions requiring the Australian states to surrender jurisdiction over the territorial sea to the Commonwealth. The Commonwealth's external affairs authority, under section 51(xxix) of the Australian Constitution, did not establish federal jurisdiction over the territorial sea because the territorial sea was not external to Australia. At federation, the territorial sea of the colonies became the territorial sea of the states, which, in turn, became the territorial sea of the Commonwealth.[259]

The Australian Constitution divided power between the Commonwealth and state governments. In *Federal Commissioner of Taxation v. Farley*,[260] Justice Evatt commented that the division of legislative power between the Commonwealth and the states was determined by which level of government exercised Crown prerogatives.[261] Noting the difficulty in classifying Crown prerogative rights, Justice Evatt proposed a division between (1) executive prerogatives, (2) privileges and immunities, and (3) proprietary prerogatives.[262] He concluded that "those prerogatives which, prior to federation, were exercisable through the King's representative in the area of a colony, are, so far as they partake of the nature of proprietary rights, still exercisable by the executives of the various States and for the benefits thereof."[263] According to this scheme, the territorial sea remained under state jurisdiction.

If the territorial sea was held by the Crown in right of Great Britain, as the majority held, the territorial sea would have remained Crown property after federation. The Commonwealth would not have acquired jurisdiction over the territorial sea until either the Balfour Declaration in 1926 or the Statute of Westminster in 1931.[264]

257. *New South Wales*, 135 C.L.R. at 402-03 (Gibbs, J.), 442-43 (Stephen, J.).
258. *See* AUSTL. CONST. §§ 106, 107.
259. *New South Wales*, 135 C.L.R. at 407-08 (Gibbs, J.), 443-49 (Stephen, J.).
260. 63 C.L.R. 270 (1940) (Austl.).
261. *Id.* at 319-23.
262. *Id.*
263. *Id.* at 322.
264. *New South Wales*, 135 C.L.R. at 402 (Gibbs, J.).

This position is contrary to several decisions of the High Court of Australia prior to 1926, which recognized that Australian territory included the territorial sea. In the 1906 case of *Robtelmes v. Brenan*,[265] Justice Griffith stated that "it is equally clear that the legislature of the Commonwealth cannot make any laws which have effect as laws beyond its own territorial limits, that is to say three marine miles from the coast."[266] In 1908, in *Merchant Service Guild of Australasia v. Archibald Currie and Co.*,[267] Justice Barton declared, "[T]he jurisdiction of that Court, as of any other Commonwealth Court, must, of course, be confined within the territorial limits over which the laws of the Commonwealth extend . . . [and] those laws can have no operation beyond the three miles sea limit around Commonwealth territory."[268] In the 1913 case of *Merchant Service Guild v. Commonwealth Steamship Owners Ass'n*,[269] Justice Isaacs recognized "the *prima facie* correspondence of powers with [sic] Commonwealth territory, including, of course, the marine league."[270]

Several state court decisions also considered the territorial sea to be state territory.[271] In 1941, Justice Webb, in *D. v. Commissioner of Taxation*,[272] held that the territorial sea was part of the State of Queensland.[273] Justice Webb concurred with Lord Shaw's decision in *Secretary of State v. Chelikani Rama Rao*[274] that the *Keyn* decision only pertained to the extent of admiralty jurisdiction.[275] Furthermore, Justice Webb found support for the states' property rights in the territorial sea in Lord Kyllachy's decision in *Lord Advocate v. Clyde Navigation Trustees*.[276]

The *New South Wales* majority held that the colonies relinquished any property rights in the territorial sea at federation because

265. 4 C.L.R. 395 (1906) (Austl.).

266. *Id.* at 404.

267. 5 C.L.R. 737 (1908) (Austl.).

268. *Id.* at 744.

269. 16 C.L.R. 664 (1913) (Austl.).

270. *Id.* at 692.

271. Bruce v. Moore, 1911 St. R. Qd. 57, 62-63 (Austl.); Chapman and Co. v. Rose, 1914 St. R. Qd. 302, 313, 319, 320, 325 (Austl.); Comm'r of Taxation v. Cam and Sons Ltd., 3 C.S.R. 544, 549 (1936) (N.S.W.).

272. 1941 St. R. Qd. 218 (Austl.).

273. *Id.* at 220-21.

274. 32 T.L.R. 652 (P.C. 1916) (India).

275. *D. v. Comm'r of Taxation*, 1941 St. R. Qd. at 220-21 (citing *Chelikani Rama Rao*, 32 T.L.R. at 652).

276. *Id.* (citing Lord Advocate v. Clyde Navigation Trustees, 19 R. 174 (1891)).

these rights were an attribute of external sovereignty.[277] This position confused international and domestic law, as well as notions of dominion and imperium. Although the Commonwealth became the external sovereign of Australia upon federation, this did not affect the distribution of power between the Commonwealth and state governments.[278] The Australian Constitution established a federal system, apportioning government powers between the federal and state governments.[279] In *Broken Hill South Ltd. v. Commissioner of Taxation*,[280] Justice Evatt stated, "Sovereignty is not attributable to one authority more than to the others; it is divided between [the governments] in accordance with the demarcation of functions set out in the Commonwealth Constitution."[281] According to Justice Evatt, the status of the Australian states was "equal to, or co-ordinate with, that of the Commonwealth itself."[282] The federal government only possessed delegated authority. Any residual power remained with the states.[283] Since the Australian Constitution did not require the states to surrender or grant jurisdiction over the territorial sea to the Commonwealth, the Australian states retained jurisdiction over the territorial sea after federation.

IV. AUSTRALIA'S EXTERNAL AFFAIRS AUTHORITY AND THE TERRITORIAL SEA

The *New South Wales* majority held that the Commonwealth possessed broad authority over external affairs under section 51(xxix) of the Australian Constitution.[284] The Commonwealth's external affairs authority superseded inconsistent state laws and was not limited by the reserved powers of the states. The SSLA was a valid exercise of the Commonwealth's external affairs authority. Offshore submerged lands below the low-water mark were external to Australia,

277. *New South Wales*, 135 C.L.R. at 372-75.

278. *Id.* at 407-08 (Gibbs, J.), 444-50 (Stephen, J.).

279. *See* AUSTL. CONST.

280. 56 C.L.R. 337 (1937) (N.S.W.).

281. *Id.* at 378.

282. *Id.*; *see also Farley*, 63 C.L.R. at 312 (stating that the Australian Constitution meant "to establish two governments, State and Federal, side by side, neither subordinate to the other"); Attorney-General for the Commonwealth v. Colonial Sugar Refining Co., 17 C.L.R. 644, 653 (P.C. 1913).

283. *Broken Hill South Ltd.*, 56 C.L.R. at 378; *see also New South Wales*, 135 C.L.R. at 446-47 (Stephen, J.).

284. *New South Wales*, 135 C.L.R. at 360-66. According to the Australian Constitution, "The Parliament shall . . . have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . External affairs . . . ." AUSTL. CONST. § 51(xxix).

thus beyond state jurisdiction. As external sovereign, the Commonwealth was authorized to sign the Conventions on the Territorial Sea and Continental Shelf.[285] The exercise of these "[s]overeign rights at least impl[ies] exclusive and paramount rights to exploit together with all the power necessary to secure the principal rights."[286] The *New South Wales* court further found that the Commonwealth did not have to rely on section 122 of the Australian Constitution, regarding the acquisition of new territory, because the Crown had transferred its sovereign and property rights over the territorial sea directly to the Commonwealth.[287]

The majority's interpretation of the Commonwealth's external affairs authority under section 51(xxix) was without limits. Justice Gibbs and Justice Stephen pointed out that the Commonwealth's external affairs authority enabled the Commonwealth to enter into treaties with other nations.[288] The Commonwealth's external affairs authority was not a general grant of power to deal with the subject matter of the treaty, but was limited to the enactment of legislation to implement the provisions of the treaty.[289] The SSLA was valid insofar as it implemented the Conventions on the Territorial Sea and Continental Shelf, but the establishment of federal jurisdiction over these offshore areas was beyond the scope of either treaty.[290] Federal–state jurisdiction over offshore areas was an issue that should have been determined under constitutional law, not international law.[291] Consequently, the Commonwealth's external affairs authority under Section 51(xxix) did not establish federal jurisdiction over the territorial sea or the continental shelf.

The Commonwealth has broad authority over external affairs under section 51(xxix) of the Australian Constitution. This power enabled the Commonwealth to govern the "relations between Australia

285. *New South Wales*, 135 C.L.R. at 364.

286. *Id.*

287. *Id.* at 366. Section 122 of the Australian Constitution provides:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

AUSTL. CONST. § 122.

288. *New South Wales*, 135 C.L.R. at 389-91 (Gibbs, J.), 444-45 (Stephen, J.).

289. *Id.* at 450-51 (Stephen, J.).

290. *Id.* at 451 (Stephen, J.).

291. *Id.* at 445-51 (Stephen, J.).

and other countries, including other countries within the Empire."[292] The Commonwealth's external affairs authority permitted the Commonwealth Parliament to enact laws to implement international treaties and agreements.[293] In *New South Wales*, Justice Gibbs stated that "the external affairs power authorizes the Parliament to make a law for the purpose of carrying out or giving effect to a treaty, at least if the treaty is in reference to some matter indisputably international in character."[294]

A. The Australian Constitutional Limit on External Affairs Authority

The Commonwealth's authority over external affairs is not unlimited, but is circumscribed by the federal nature of the Australian Constitution.[295] Justice Starke stated in *The King v. Burgess*[296] that the Commonwealth's external affairs authority "must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which restrain generally the exercise of Federal powers."[297] The Commonwealth cannot circumvent the restrictions of federalism by means of an international agreement. As Justice Gibbs pointed out in *Commonwealth of Australia v. Tasmania*,[298]

> The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity.[299]

Justice Gibbs further cautioned that "no single power should be con-

292. The King v. Burgess, 55 C.L.R. 608, 643 (1936) (Austl.) (Latham, J.).

293. *Id.* at 687; *New South Wales*, 135 C.L.R. at 389-91 (Gibbs, J.), 444-45 (Stephen, J.).

294. *New South Wales*, 135 C.L.R. at 390 (Gibbs, J.).

295. *Id.* at 444-51 (Stephen, J.); *Burgess*, 55 C.L.R. at 642 (Latham, J.).

296. 55 C.L.R. at 608.

297. *Id.* at 658 (Starke, J.). Other justices also commented on the constitutional limitation established by section 51(xxix). Justice Latham stated, "The Executive Government of the Commonwealth and the Parliament of the Commonwealth are alike bound by the Constitution and the Constitution cannot be indirectly amended by means of an international agreement made by the Executive Government and subsequently adopted by Parliament." *Id.* at 642. Justices Evatt and McTiernan stated, "The legislative power in sec. 51 is granted 'subject to this Constitution' so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained." *Id.* at 687.

298. 57 C.L.R. 450 (1983) (Austl.).

299. *Id.* at 475 (Gibbs, J.).

strued in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particularly carefully defined powers to that Parliament."[300]

The *New South Wales* court concluded that since the territorial sea and continental shelf were the subjects of international conventions signed by the Commonwealth, the Commonwealth possessed jurisdiction over these offshore areas.[301] If this principle were carried to its logical extreme, the Commonwealth could assert proprietary and jurisdictional rights over all state lands that were the subjects of international conventions. This would violate the essence of federalism. It would also contradict the Privy Council's holding that the federal government's ability to enter into treaties did not establish federal jurisdiction over the subject matter of the treaty.[302] Jurisdiction was determined by the subject matter of the treaty.[303]

B. External Affairs Authority Is Limited to Implementing Treaty Terms

The Commonwealth's external affairs power is not a general grant of authority over the subject matter covered by a treaty, but is limited to implementing its terms.[304] In *Burgess*, the High Court of Australia determined that the Commonwealth had authority under section 51(xxix) of the Australian Constitution to enact regulations implementing the Air Navigation Convention of 1919.[305] However, the regulations in question were invalidated because they did not include many of the provisions of the Air Navigation Convention and varied from its terms.[306] The justices set forth similar tests to determine whether the regulations were authorized by the Air Navigation Convention. Justice Latham stated that the regulations "must in substance be regulations for carrying out and giving effect to the convention."[307] Justice Dixon declared that the regulations must be "a

300. *Id.* (citing Bank of New South Wales v. Commonwealth, 76 C.L.R. 1, 184-85 (1948) (Austl.)).

301. *New South Wales*, 135 C.L.R. at 360-66.

302. Attorney-General for Canada v. Attorney-General for Ontario, 1937 App. Cas. 326, 352-53 (P.C.); Joseph J. Arvay, *Newfoundland's Claim to Offshore Mineral Resources: An Overview of the Legal Issues*, 5 CAN. PUB. POL'Y 32, 39-40 (1979).

303. *Attorney-General for Canada v. Attorney General for Ontario*, 1937 App. Cas. at 352-53; Arvay, *supra* note 302, at 39-40.

304. *New South Wales*, 135 C.L.R. at 390-91 (Gibbs, J.), 449-51 (Stephen, J.).

305. *Burgess*, 55 C.L.R. at 608.

306. *Id.*

307. *Id.* at 646.

faithful pursuit of the purpose, namely, a carrying out of the external obligation."[308] Justices Evatt and McTiernan stated that the regulations must be "sufficiently stamped with the purpose of carrying out the terms of the convention."[309] Similar limitations on the scope of the Commonwealth's external affairs authority were set forth in *Airlines of New South Wales v. New South Wales*.[310]

The SSLA was a valid exercise of the Commonwealth's external affairs authority insofar as it implemented Australia's obligations under the Conventions on the Territorial Sea and Continental Shelf.[311] There was, however, little need for domestic legislation to implement the Conventions on the Territorial Sea and Continental Shelf.[312] Only the legal enforcement of conditions not authorized under domestic law required domestic legislation. Articles 1 through 13 of the conventions did not require domestic legislation, because they only dealt with relationships between nations, and articles 14 through 24, which may have needed domestic legislation, were not addressed by the SSLA.[313] Furthermore, establishing federal jurisdiction over offshore lands was beyond the scope of the Commonwealth's external affairs authority. The Conventions on the Territorial Sea and Continental Shelf did not provide for this condition, nor was it necessary to carry out the Commonwealth's international obligations under the conventions. Consequently, the SSLA exceeded the Commonwealth's external affairs authority by establishing conditions not included in the conventions and failing to implement the provisions in the conventions.

The Australian High Court was correct to conclude in *New*

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308. *Id.* at 674.

309. *Id.* at 688.

310. Airlines of New South Wales v. New South Wales, 113 C.L.R. 54 (1964-65) (Austl.). Chief Justice Barwick stated:

> But where a law is to be justified under the external affairs power by reference to the existence of a treaty or a convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this Court to determine whether the particular provisions, when challenged, are appropriate and adopted to that end. The Court will closely scrutinize the challenged provisions to ensure that what is proposed to be done substantially falls within the power.

Id. at 86; *see also id.* at 102 (McTiernan, J.), 117 (Kitto, J.), 126 (Starke, J.), 140-41 (Menzies, J.).

311. *New South Wales*, 135 C.L.R. at 451 (Stephen, J.).

312. *Id.* at 451-55 (Stephen, J.).

313. *Id.* (Stephen, J.).

South Wales that section 122 of the Australian Constitution, which deals with the acquisition of new territory,[314] was not germane to the case.[315] Section 122 presumes that newly-acquired lands will eventually acquire representation in Parliament. Since offshore submerged lands were not subject to such representation, they did not fall within the scope of section 122.[316] Additionally, offshore submerged lands could not be considered newly-acquired territory because such lands, being appurtenant to existing territory,[317] were under state jurisdiction. The Commonwealth could acquire rights over the offshore submerged lands, but it would have to pay a fair and equitable price for such rights under section 51(xxxi) of the Australian Constitution.[318]

V. THE CONTINENTAL SHELF

A. Australia's External Affairs Authority and the Continental Shelf

The Australian High Court in *New South Wales v. Commonwealth*[319] unanimously determined that the Commonwealth had jurisdiction over the continental shelf.[320] The High Court held that the Australian colonies had not asserted any claims of sovereignty or dominion over the continental shelf prior to federation. The Federal Council of Australasia Act of 1885 granted the Commonwealth jurisdiction over the fisheries beyond territorial limits. Legislation passed pursuant to the Australasia Act, granting the colonies limited fisheries jurisdiction beyond the territorial sea, demonstrated that the Crown's approval was needed before colonial jurisdiction could be exercised beyond the territorial sea. The continental shelf was not considered

314. AUSTL. CONST. § 122.

315. *New South Wales*, 135 C.L.R. at 366.

316. *Id.* at 390 (Gibbs, J.), 455 (Stephen, J.).

317. In the *Norway-Sweden Boundary Arbitration* in 1909, the Permanent Court of Arbitration held that, "in conformity with the fundamental principles of law of nations, both ancient and modern . . . the maritime territory is an essential appurtenance of land territory . . . ." *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute Between Norway and Sweden*, 4 AM. J. INT'L L. 226, 231 (1910) [hereinafter *Norway-Sweden Boundary Dispute*].

318. Section 51(xxxi) of the Australian Constitution provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . [t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

AUSTL. CONST. § 51(xxxi).

319. 135 C.L.R. 337 (1975) (Austl.).

320. *Id.* at 374-75, 415-16 (Gibbs, J.), 457-58 (Stephen, J.).

part of Australia. Continental shelf rights, which became recognized under international law, accrued to the Commonwealth and not the states. Accordingly, on September 11, 1953, the Commonwealth proclaimed sovereignty over the continental shelf off Australia, for the purpose of exploring and exploiting natural resources.[321] The Australian High Court held that the Commonwealth's assertion of jurisdiction over the continental shelf was a legitimate exercise of its external affairs authority under section 51(xxix) of the Australian Constitution.[322]

The High Court should have adopted a different position regarding the continental shelf. Before the nineteenth century, the Crown made broad proprietary and sovereign claims over offshore submerged areas.[323] Although the Crown's offshore interest focused on the territorial sea during the nineteenth century, its prerogative rights beyond the territorial sea did not fall by desuetude.[324] Instead, the Crown exercised its prerogative rights beyond the territorial sea, whenever commercially or technologically possible.[325] If oil and gas development on the continental shelf had been commercially or technologically possible in the nineteenth century, this enterprise would have been considered a prerogative right of the Crown and the offshore energy resources would have been Crown royalties.[326] The Crown's prerogative rights, including those beyond the territorial sea, were granted to the Australian colonies when the colonies attained self-government. They were not surrendered upon federation.

The recognition of continental shelf rights under international law in the twentieth century did not bolster the Australian states' jurisdictional claims, but legitimated these claims under international law. International law did not, in and of itself, create state rights over the continental shelf. Rather, the continental shelf was considered appurtenant to the coastal nations' land mass under international law.[327] Thus, coastal nations' rights over the continental shelf existed *ab initio* and *ipso facto*.[328] The states' jurisdictional claims were based

321. L.F.E. Goldie, *Australia's Continental Shelf: Legislation and Proclamations*, 3 INT'L & COMP. L.Q. 535, 539 (1954).

322. *New South Wales*, 135 C.L.R. at 374-75, 457-58 (Stephen, J.).

323. *See infra* text accompanying note 329.

324. *See infra* text accompanying notes 340-45.

325. *See infra* text accompanying notes 332-37.

326. *See infra* text accompanying notes 338-39.

327. *Norway-Sweden Boundary Dispute*, *supra* note 317.

328. The International Court of Justice stated:

> [T]he most fundamental of all the rules of law relating to the continental shelf . . . [is]

on their grant of the Crown's prerogative rights under the Australian Constitution. Furthermore, since this was a constitutional issue, international law did not resolve the federal–state jurisdictional question.

B. Crown Prerogative and the Contential Shelf

Before the nineteenth century, the Crown asserted broad claims over the "narrow sea" surrounding Great Britain. Early common law writers maintained that "the great waste of the sea" belonged to the Crown.[329] In the nineteenth century, the Crown abandoned its broad claim over the narrow sea and focused on the territorial sea. The Crown's concern with the territorial sea did not signal its abandonment of its claims to resources beyond the territorial sea. According to noted commentator Thomas W. Fulton, sedentary fisheries and mineral resources of the seabed and subsoil were not subject to the narrow limits of the rules applicable to surface waters. Instead, they "require[d] special treatment"[330] because the resources of the seabed and subsoil belonged to the adjacent coastal state, even when they were located more than three miles from shore.[331]

In the nineteenth century, the Crown and the colonies exercised jurisdiction beyond the territorial sea whenever commercially and technologically possible.[332] In 1811, the Crown allowed the colony of Ceylon to regulate pearl fisheries beyond the three-mile limit.[333] In 1858, the Cornwall Submarine Act recognized that the Crown's rights in minerals and mines lying below the low-water mark off Cornwall were not limited by the territorial sea.[334] In 1867, Nova Scotia issued leases for coal mines, both within and beyond the territorial sea.[335] A year later, the Imperial Parliament enacted a statute regulating the

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> that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 2, 3 (Feb. 20) [hereinafter *North Sea Cases*].

329. LA FOREST, *supra* note 98, at 105; Hurst, *supra* note 98, at 43; *see also* O'Connell, *supra* note 78, at 362; *New South Wales*, 135 C.L.R. at 387-488.

330. THOMAS W. FULTON, THE SOVEREIGNTY OF THE SEA 612, 697 n.5 (1911).

331. *Id.*

332. Hurst, *supra* note 98, at 40.

333. *Id.*

334. *Id.* at 34-47.

335. Nova Scotia issued the leases to William Sword on June 1, 1867. *Id.*

dredging of oyster beds and banks situated within twenty miles of the coast of Ireland.[336] In 1927, Philip C. Jessup stated:

> Of the coral, chank and pearl fisheries, Fulton says, "They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself. This is recognized in municipal law, and international law also recognizes in certain cases a claim to such fisheries when they extend along the soil under the sea beyond the ordinary territorial limit." Vattel asserted that these resources near the shore may be taken advantage of by the littoral state and subjected to its ownership, apparently without regard to the limit of cannon range. "Who can doubt," said Vattel, "that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership? Apparently the British Government does not doubt it for they have asserted dominion over the Ceylon pearl banks far beyond the three mile limit which they so stoutly uphold."[337]

The exercise of commercial rights beyond the territorial sea was a prerogative right of the Crown. If offshore energy development on the continental shelf had been commercially and technologically feasible in the nineteenth century, it would have been considered a prerogative right of the Crown. Offshore energy resources would have become Crown royalties. The Privy Council held in *Attorney General for Ontario v. Mercer*[338] that Crown royalties were the equivalent of "regalities" and included the "territorial revenues" derived from the Crown's prerogative rights.[339] The Crown's prerogative rights, including those beyond the territorial sea, were granted to the Australian colonies when they achieved self-government and were not surrendered by the colonies at federation.

Although the Australian colonies did not engage in offshore en-

336. Hurst, *supra* note 98, at 40.

337. PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 14 (1927).

338. [1883] 8 App. Cas. 767 (P.C.).

339. *Id.* at 778-79. The Privy Council, referring to section 109 of the British North America Act, which grants the provinces "all Lands, Mines, Minerals, and Royalties," stated that "the general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights, for the purposes of revenue and government, to the provinces in which they are situated, or arise." *Id.* Similarly, Clement, in his 1916 Canadian Constitution, stated that there was nothing "to indicate a territorial limitation in the phrase 'in the province' different from or greater than the essential territorial limitation which exists in the case of any modern state. The words do not connote any dividing line between federal and provincial authority." *Id.*

ergy development on the continental shelf, this Crown prerogative right did not fall by desuetude. In *Toy v. Musgrove*,[340] Chief Justice Higinbotham declared that the non-use of the prerogative "in modern times in England is no evidence that the right itself has become extinct."[341] In *Universities of Oxford and Cambridge v. Richardson*,[342] Lord Eldon held that "[h]ere there is no such thing as a law going into desuetude; and modern usage cannot be regarded as of equal authority with the judgment of this Court."[343] Justice Maitland, in his *Constitutional History*, pronounced, "[W]e have no such doctrine as that a prerogative may cease to exist because it is not used."[344] Justice Evatt, in *Certain Aspects of Royal Prerogative*, stated, "[I]t is fundamental that no prerogative of the King disappears merely as a result of non-use[]."[345]

C. The Convention on the Continental Shelf

National rights over the continental shelf were first recognized as a principle of customary international law.[346] In 1942, Great Britain and Venezuela signed a treaty acknowledging each other's sovereignty over the submerged areas in the Gulf of Paria, which separated Venezuela and Trinidad.[347] On September 18, 1945, the United States issued the Truman Proclamation, which proclaimed exclusive jurisdiction and control over the natural resources of the seabed and subsoil of the continental shelf.[348] The Truman Proclamation stated that coastal nations had jurisdiction over their continental shelf resources because (1) the continental shelf, which extended off the coastal state's land mass, was naturally appurtenant to it; (2) the util-

340. 34 L.Q.R. 152 (1888).

341. *Id.* at 159.

342. 14 V.L.R. 349 (1802) (Vict.).

343. *Id.* at 378.

344. *See* Attorney-General for New South Wales v. Butterworth and Co., 38 N.S.W. St. R. 195, 227 (1938).

345. *See id.*

346. Principles of customary international law are established by concordant practice by a number of states, regarding an issue within the domain of international relations. This is done over a considerable period of time, upon the belief that the practice is required by international law. There must also be general acquiescence to the practice by other states. D.P. O'CONNELL, INTERNATIONAL LAW 17 (1965).

347. Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland, 5 D.L.R.4th 385, 411-12 (1984) (Can.) [hereinafter *Newfoundland Reference*].

348. Reference Re Ownership of Off-Shore Mineral Rights, 1967 S.C.R. 792 (Can.) [hereinafter *Mineral Rights Reference*] (quoting the Truman Proclamation); *see also* Ann L. Hollick, *United States Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1977).

ization and conservation of offshore resources required the coastal state's cooperation; (3) the continental shelf resources often commingled with the resources of the land territory; and (4) national defense precluded one nation from developing continental shelf resources off another nation's shore.[349]

Following the Truman Proclamation, other nations declared jurisdiction over the continental shelf.[350] By 1949, continental shelf rights were recognized as a principle of customary international law. Hersch Lauterpacht, a noted international scholar and former justice on the International Court of Justice, pointed out that the length of time required for a practice to evolve into a principle of customary international law is irrelevant.[351] Custom is not another expression for prescription. A consistent and uniform practice could develop over a short period of time. The length of time necessary for the crystallization of custom is proportionate to the degree and intensity of the change that the custom purports to accomplish. Since the recognition of continental shelf rights did not constitute a drastic change in international law, a prolonged period of time to establish such rights as a rule of customary international law was unnecessary.[352]

Lauterpacht also pointed out the importance of the status of the nations instituting a change in international law.[353] The recognition of continental shelf rights by the United States and Great Britain, the leading maritime powers, was significant because both nations strongly supported freedom of the seas and restrictive claims regarding the territorial sea.[354] The United States' and Great Britain's acceptance of continental shelf rights constituted strong evidence of an emerging new principle of customary international law.[355]

This new principle of customary international law was based on geographical unity and contiguity.[356] Both of these factors corresponded to physical reality. The continental shelf could be viewed as: (1) the extension of the continental land mass; (2) the result of accretion from or accession to the coastal nation's land mass; or (3) an

349. *Mineral Rights Reference*, 1967 S.C.R. at 818-19.

350. *Newfoundland Reference*, 5 D.L.R.4th at 412; Henry H. Holland, *The Juridicial Status of the Continental Shelf*, 30 TEX. L. REV. 586, 591-94 (1952).

351. Hersh Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 393 (1950).

352. *Id.*

353. *Id.* at 394.

354. *Id.*

355. *Id.* at 394-95.

356. *Id.* at 423.

area of the coastal nation experiencing marine transgression.[357] Furthermore, the principle of contiguity as the basis of a nation's claim over offshore areas was already recognized in international law.[358] Lauterpacht asserted that contiguity, which rests upon geographical unity, "provides a legal basis of utility and reasonableness which is most consistent with the technical realities of the situation, with the security of states, and with the requirement of international stability."[359] O'Connell, concurring with Lauterpacht's position, stated that "economic necessity . . . is the generating impulse of the [continental shelf] doctrine, and contiguity is relied on as the test for establishing the limits within which economic considerations will be permitted to operate."[360]

The modern doctrine of continental shelf rights is not based on occupation.[361] Offshore submerged lands could not be occupied in the same manner as land territory.[362] International law had moved away from occupation as the basis of title.[363] Additionally, a nation did not have to issue a proclamation to claim continental shelf rights, because proclamations were not "a *source* of a title or a means of acquiring it."[364] Continental shelf proclamations declared, but did not constitute, continental shelf rights. Since continental shelf rights arose by right under international law, nations could issue proclamations at their discretion.[365]

There was international acquiescence to national claims over the continental shelf. Lauterpacht interpreted this lack of protest to mean that the nations accepted the claims as conforming to the existing law.[366] In addition, this absence of initial protests may have estopped certain nations from asserting later challenges to the principle of continental shelf rights.[367] Nations had a duty to voice their objections if they felt continental shelf claims violated international

357. *Id.* at 430-31.

358. *Norway-Sweden Boundary Dispute*, *supra* note 317.

359. Lauterpacht, *supra* note 351, at 431.

360. O'CONNELL, *supra* note 346, at 577-78.

361. Lauterpacht, *supra* note 351, at 415-23.

362. *Id.*

363. Clipperton Island Arbitration, 6 Annual Digest of Public International Law Cases 105 (1931); Legal Status of Eastern Greenland, O.C.I.J. Series A/B, No. 53, at 45-46; Lauterpacht, *supra* note 351, at 415-23.

364. Lauterpacht, *supra* note 351, at 418-19.

365. *Id.* at 394.

366. *Id.* at 395.

367. *Id.* at 397.

law. Otherwise, a claimant was entitled to rely on their acquiescence and plan the development of continental shelf resources.[368]

By the end of 1950, sixteen nations had asserted claims to the continental shelf.[369] Nevertheless, there was extensive controversy regarding the status of continental shelf rights under international law. The International Law Association and the International Law Commission adopted the position that continental shelf rights were not yet a principle of customary international law, although they noted that this question was in dispute.[370] Lord Asquith's 1951 decision in the *Abu Dhabi Arbitration*[371] provides some insight into the status of continental shelf rights.

In 1939, the Sheik of Abu Dhabi entered into an agreement with Petroleum Development (Trucial Coast) Limited, a member of the Iraq Petroleum Company, granting the company the exclusive rights to develop and export oil from Abu Dhabi. In June 1949, the Trucial Shiekdoms and a number of Middle Eastern states declared their jurisdiction and control over "the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely as occasion arises . . . ."[372] Following this proclamation, the Sheik transferred the rights to develop and export oil from the newly acquired offshore lands to Superior Oil Company of California.[373] A conflict ensued when Petroleum Development (Trucial Coast) Limited asserted that the Sheik had transferred such rights to it as part of the 1939 agreement. Pursuant to the terms of the agreement, the parties submitted the dispute to arbitration.[374]

As arbitrator, Lord Asquith determined that the rights the Sheik

368. *Id.* This would be the case, unless the action of the state making such claims was "so wrongful in relation to any particular state or so patently at variance with General International Law as to render it wholly incapable of becoming the source of a legal right." *Id.*

369. *Id.* at 381-82; ZDEŇEK SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF, A STUDY IN THE DYNAMICS OF CUSTOMARY RULES OF INTERNATIONAL LAW 56 (1968).

370. J.P.R. Feith, *Rights to the Seabed and its Subsoil*, 1950 ILA DIGEST 87, 132; Holland, *supra* note 350, at 595.

371. Arbitration Award of the Right Hon. Lord Asquith of Bishopstone in the *Matter of an Arbitration Between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheikh Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi and its Dependencies*, 1 INT'L & COMP. L.Q. 247 (1952) [hereinafter Arbitration Award]; *see also* Edwin J. Cosford, Jr., *The Continental Shelf and the Abu Dhabi Award*, 1 MCGILL L.J. 109 (1953).

372. Cosford, *supra* note 371, at 110 (quoting Arbitration Award, *supra* note 371, at 255).

373. *Id.*

374. *Id.*

granted in 1939 were confined to the area landward of and including the territorial sea.[375] Lord Asquith found that continental shelf rights were not recognized in 1939, but were instead of recent origin.[376] Lord Asquith maintained that the draft articles of the 1951 International Law Commission were not declarations of existing international law, but were merely proposals for future principles of international law.[377] Since nations were making diverse claims to the resources below, on, and above the continental shelf of varying distances, Lord Asquith held that continental shelf rights did not exist *ipso jure* in 1950.[378] Nevertheless, Lord Asquith recommended the development of international principles supporting continental shelf rights resting on the doctrine of contiguity.[379]

Scholars question Lord Asquith's decision regarding the status of continental shelf rights in international law. O'Connell points out that a principle of international law "may be vague as to extent and application, but that is not to conclude, as Lord Asquith did, that it lacks judicial character."[380] He asserts that principles of international law begin as inchoate practices of states which are later given judicial construction.[381] According to O'Connell, "When it is observed that some 30 nations have claimed their continental shelves, including the major Powers with a preponderant interest in both freedom of the seas and the protection of coastal resources, it is legitimate to assert that the continental shelf concept is one of law."[382]

The International Law Commission's work on the development of continental shelf rights culminated at the 1958 Law of the Sea Conference in Geneva.[383] Many of the delegates attending the Conference viewed their role not as developers of international law, but as codifiers of existing international law.[384] Of the fifty-five participating

375. *Id.*

376. *Id.* at 127.

377. *Id.*

378. Lord Asquith stated, "[T]here are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law." *Id.*

379. *Id.* at 122.

380. O'CONNELL, *supra* note 346, at 577.

381. *Id.*

382. *Id.*

383. Shigeru Oda, *A Reconsideration of Continental Shelf Doctrine*, 32 TUL. L. REV. 27, 30 n.31 (1957); L.F.E. Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court*, 16 N.Y.L. FORUM 335, 337-38 (1970).

384. Goldie, *supra* note 383, at 347-48.

delegations, twenty nations asserted that customary law recognized continental shelf rights, while twelve denied the existence of such rights and twenty-three expressed no opinion on the issue.[385]

The Law of the Sea Conference drafted the Convention on the Continental Shelf,[386] which codified the existing customary international law.[387] The Convention first declared that coastal states have exclusive rights to explore and exploit the natural resources of the continental shelf adjacent to their coasts.[388] Such rights exist *ipso jure*, by right of law, thus eliminating the need for a proclamation or occupation. Second, according to the Convention, continental shelf rights do not affect the status of the superadjacent waters. The exploration and exploitation of the natural resources of the continental shelf must not interfere with navigation, fishing, scientific research, or the conservation of living resources.[389] Forty-six states signed the Convention and by the summer of 1964, twenty-two states had ratified or acceded to it.[390]

D. The North Sea Continental Shelf Cases

The International Court of Justice ("ICJ") decision in the *North Sea Continental Shelf Cases*[391] further articulated the status of continental shelf rights under international law. Great Britain negotiated agreements that delimited the continental shelf in the North Sea with Germany, Denmark, and Norway, whose coasts were all adjacent to the North Sea.[392] These agreements were based on the equidistance principle of article 6 of the Convention on the Continental Shelf, which provides that the countries draw a median line between each country, with all points on the line equidistant from the shores of the opposite countries.[393] Denmark, Germany, and Norway, after unsuccessful attempts to determine their lateral continental shelf bounda-

385. SLOUKA, *supra* note 369, at 91.

386. Convention on the Continental Shelf, April 29, 1958, 49 U.N.T.S. 311, 316, *reprinted in* 52 AM. J. INT'L L. 858 (1958).

387. *Natural Resources Reference*, 145 D.L.R.3d 9, 40 (1983) (Can.).

388. Convention on the Continental Shelf, *supra* note 386, arts. 1-2.

389. *Id.*

390. SLOUKA, *supra* note 369, at 90.

391. 1969 I.C.J. 3 (Feb. 20). Pronouncements by the International Court of Justice "form the living law and fuse with diplomatic practice to produce a rule governing the reflections of authors, the opinions of governmental legal advisers, and the decisions of other judges." O'CONNELL, *supra* note 346, at 30.

392. *North Sea Cases*, 1969 I.C.J. at 3.

393. Convention on the Continental Shelf, *supra* note 386, art. 6.

ries, referred the issue to the ICJ.[394]

The ICJ, by an eleven to six vote, found articles 1, 2, and 3, but not article 6, to be binding principles of international law.[395] The ICJ determined that delimitation of the continental shelf should be accomplished by equitable agreements that consider "all the relevant circumstances" and grant to each party those parts of the continental shelf that "constitute[] a natural prolongation of its land territory into and under the sea," without encumbering the natural prolongation of the land territory of another.[396]

The ICJ's decision in the *North Sea Continental Shelf Cases* is significant for several reasons. First, by recognizing the continental shelf as the natural extension of a nation's territory, the ICJ legitimized the principle of contiguity.[397] Continental shelf rights were considered an appurtenancy based on the coastal state's sovereignty over its land territory.[398] This principle, derived from the Truman Proclamation, was advocated by many prominent scholars.[399]

Second, the ICJ determined that the Convention on the Continental Shelf was declaratory, not constitutive, of continental shelf rights. The court viewed the Convention as "reflecting, or as crystallizing, received or at least emergent rules of customary international law."[400] Several justices clearly indicated that the Convention on the Continental Shelf merely codified existing principles of customary in-

394. Myron H. Nordquist, *The Legal Status of Articles 1-3 of the Continental Shelf Convention According to the North Sea Cases*, 1 CASE W. INT'L L.J. 60, 63 (1970).

395. The ICJ stated that Article 12 of the Geneva Convention on the Continental Shelf permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"—these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf.

North Sea Cases, 1969 I.C.J. at 39; Nordquist, *supra* note 394, at 67-68.

396. *North Sea Cases*, 1969 I.C.J. at 53.

397. The ICJ stated:

[W]hat confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.

Id. at 31.

398. R.Y. Jennings, *The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment*, 18 INT'L & COMP. L.Q. 819, 821-25 (1969); Phrand, *Continental Shelf Redefinition*, 4 MCGILL L.J. 536, 538-40 (1963); 1 L. OPPENHEIM, INTERNATIONAL LAW 633 (Hersh Lauterpacht ed., 8th ed. 1955); Lauterpacht, *supra* note 351, at 394-95, 423, 430-31.

399. *See North Sea Cases*, 1969 I.C.J. at 39; Nordquist, *supra* note 394, at 67-68.

400. *North Sea Cases*, 1969 I.C.J. at 39.

ternational law.[401]

Third, the ICJ held that continental shelf rights exist *ipso facto* and *ab initio*,[402] thereby obviating any need for occupation or proclamation.[403] Furthermore, since continental shelf rights exist *ab initio*, such rights apply retroactively.[404] O'Connell stated:

> [T]he expression ab initio suggests a relation back in time, perhaps in geological time, for what the Court appears to mean is that no history of events can be utilized to negate any coastal state's inherent rights to the seabed, even though, when the events occurred, the continental shelf doctrine was not imagined.[405]

The recognition of continental shelf rights under international law did not *affect* the status of the continental shelf between the Commonwealth and state governments, but simply *recognized* continental shelf rights between nations. In *New South Wales*, Justice Stephen noted that when the Convention on the Continental Shelf addressed coastal state rights, it referred to those international nation–states with coastlines.[406] International law did not establish the rights of the Australian coastal states over the continental shelf, nor did it determine whether the Commonwealth or state governments had jurisdiction over the continental shelf. These were questions of constitutional law. Since continental shelf development was a prerogative right of the Crown, this right was granted to the Australian colonies when they achieved self-government and was not surrendered at federation. If continental shelf development was not a prerogative right of the Crown, the Australian states had no constitutional basis for their jurisdictional claim. International law could not cure this constitutional shortcoming. If this were the case, the Commonwealth's assertion of jurisdiction over the continental shelf would have been a

401. Nordquist, *supra* note 394, at 65-71; *North Sea Cases*, 1969 I.C.J. at 59, 96, 97, 120.

402. *North Sea Cases*, 1969 I.C.J. at 22.

403. The ICJ stated:

> In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

Id.

404. O'CONNELL, *supra* note 346, at 578.

405. D.P. O'Connell, *The Federal Problem Concerning Maritime Domain in Commonwealth Countries*, 1 J. MAR. L. & COM. 389, 407 (1970).

406. *New South Wales*, 135 C.L.R. at 458.

legitimate exercise of its external affairs authority under section 51(xxix) of the Australian Constitution.[407]

VI. UNITED STATES AND CANADIAN TIDELANDS CONFLICTS COMPARED WITH THE AUSTRALIAN TIDELANDS CONTROVERSY

The dispute between central and peripheral governments over the control of offshore submerged lands arose in other federal systems prior to the Australian controversy. The offshore jurisdictional struggle arose in the United States in 1947,[408] and in Canada in 1967.[409] Both the United States and Canadian Supreme Courts determined that offshore lands outside the low-water mark were beyond state–provincial jurisdiction.[410] The federal governments' authority over international affairs provided the basis for federal jurisdiction over offshore lands.[411] Although the Australian High Court, in *New South Wales v. Commonwealth*, cited these decisions with approval,[412] both the United States and Canadian Supreme Court decisions were flawed.[413] Consequently, the *New South Wales* decision was also defective.

A. The United States Tidelands Controversy

The first offshore jurisdictional conflict occurred in the United States when the United States government brought suit against the State of California, challenging California's assertion of title to offshore lands beyond the low-water mark.[414] The United States Supreme Court, focusing on the international aspects of the conflict, declared that the federal government's sovereign interests in navigation, national defense, international relations, and commerce established paramount rights over the submerged lands below the low-

407. *Id.* at 416.

408. United States v. California, 332 U.S. 19 (1947); *see* Fitzgerald, *Tidelands Controversy*, *supra* note 2.

409. *Mineral Rights Reference*, 1967 S.C.R. 792 (Can.).

410. *See id.*; *United States v. California*, 332 U.S. at 19.

411. *Mineral Rights Reference*, 1967 S.C.R. at 792; *United States v. California*, 332 U.S. at 19.

412. *New South Wales v. Commonwealth*, 135 C.L.R. 337, 374-75 (Barwick, C.J.), 470 (Mason, J.), 505-06 (Murphy, J.) (1975) (Austl.).

413. Fitzgerald, *Tidelands Controversy*, *supra* note 2; Fitzgerald, *Newfoundland*, *supra* note 2.

414. *United States v. California*, 332 U.S. at 19.

water mark.[415] One aspect of these paramount rights was dominion over the resources located in the submerged lands.[416] The United States Supreme Court also rejected California's contention that the "equal footing clause" of the Northwest Ordinance granted it the same rights as the original Atlantic states because the original Atlantic states never held title to their offshore submerged lands.[417]

The United States Supreme Court's decision was historically inaccurate and confused dominion with imperium.[418] Dominion refers to ownership, while imperium refers to control.[419] Although the federal government did have predominant sovereign rights over offshore lands, these rights could not be construed as a claim of ownership.[420] The United States Supreme Court had never held that the power to regulate constituted a grant of title.[421] If such a principle had been established, the federal government could have claimed title to all United States land. The Supreme Court had also never determined that United States rights under international law distinguished property rights between the federal and state governments.[422] In *United States v. California*, the Supreme Court confused property rights, which were determined by domestic law, with sovereignty, which was determined by international law. Furthermore, the Supreme Court failed to recognize that, since the original Atlantic states held title to their offshore lands under colonial charters, coastal states subsequently admitted into the Union could make similar claims under the equal footing clause.[423]

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415. *Id.* The theory of paramount rights was derived from United States v. Curtiss-Wright Export Corp., 229 U.S. 304 (1936).

416. *United States v. California*, 332 U.S. at 29-41.

417. *Id.* at 36. The equal footing clause appears in the Northwest Ordinance, which dealt with the admission of new states into the Union after independence. Article 5 of the Ordinance provides: "[W]henever any of the said states shall have sixty thousand free inhabitants, therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states, in all respects whatever . . . ." The equal footing clause appears in every enabling statute admitting states into the Union, except that of Texas. Comment, *The Tidelands Oil Controversy*, 10 DEPAUL L. REV. 116, 119 (1960).

418. *United States v. California*, 332 U.S. at 43-46 (Frankfurter, J., dissenting).

419. *Id.* at 43-44 (Frankfurter, J., dissenting).

420. *Id.* (Frankfurter, J., dissenting).

421. United States v. Bevans, 16 U.S. (3 Wheat.) 336, 388 (1818); Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C. Wash. 1823) (No. 3,230).

422. *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941); United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823).

423. David H. Flaherty, *Virginia and the Marginal Sea: An Example of History in the Law*, 58 VA. L. REV. 694 (1972); Robert E. Hardwicke et al., *The Constitution and the Continental*

In 1950, the United States Supreme Court again adopted the paramount rights rationale, in *United States v. Texas*[424] and *United States v. Louisiana*.[425] *United States v. Texas* is of particular interest, because from 1836 through 1845, Texas was an independent republic with a three marine league territorial sea. The United States Supreme Court rejected Texas' claim that, when Texas entered the Union, Texas surrendered its imperium, but not its dominion, over its offshore lands.[426] The Supreme Court adopted a novel interpretation of the equal footing clause by recognizing Texas' imperium and dominion over its offshore lands as that of a sovereign nation, but holding that Texas relinquished authority over its offshore lands to the federal government because of the overriding concerns of national defense and international affairs.[427] The Court held that the equal footing clause precluded the extension of state sovereignty into the "domain of political and sovereign power of the United States from which the other States have been excluded."[428] Therefore, property rights were subordinate to political rights.[429]

The United States Supreme Court was mistaken. When Texas was admitted into the Union, it surrendered its imperium, not its dominion, over its offshore lands. This was manifested in the annexation agreement in which Texas granted the federal government limited property for national defense and reserved for itself all "vacant and unappropriated lands lying within its limits."[430] Furthermore, the equal footing clause, which was not included in the Texas annexation agreement, did not require Texas to cede its property to the federal government.[431] The equal footing clause addressed political and sovereign rights, not economic and property rights.[432] This was the first case in which the equal footing clause was interpreted to deprive a state of "property which it had theretofore owned."[433]

The United States government soon abandoned the equal footing

Shelf, 26 TEX. L. REV. 398 (1948); Carl Illig, *Offshore Lands and Paramount Rights*, 14 U. PITT. L. REV. 10 (1952).

424. 339 U.S. 707 (1950).

425. 339 U.S. 699 (1950).

426. *United States v. Texas*, 339 U.S. at 719-20.

427. *See id.*

428. *Id.*

429. *Id.* at 717-20.

430. *Id.* at 722 (Reed, J., dissenting).

431. Illig, *supra* note 423, at 15-21.

432. *United States v. Texas*, 339 U.S. at 722 (Reed, J., dissenting).

433. *Id.* (Reed, J., dissenting).

approach. In 1953, Congress enacted the Submerged Lands Act, which granted coastal states dominion and imperium over offshore lands three miles or three marine leagues offshore.[434] In 1954, in *Alabama v. Texas*,[435] the United States Supreme Court upheld the Submerged Lands Act. According to the Supreme Court, its prior decisions had never asserted federal ownership of offshore submerged lands, but only paramount rights over such lands.[436] Paramount rights were equivalent to property rights, which Congress could relinquish without interfering with United States sovereign interests.[437] The Supreme Court held that jurisdiction over offshore lands was a domestic dispute over the congressional disposition of property.[438] Congress was not required to grant the same amount of offshore property to each coastal state,[439] and could establish different boundaries for different coastal states, because the equal footing clause referred only to political and sovereign rights, not to property rights. Most importantly, the Supreme Court recognized that dominion and imperium could be separated; thus, property rights did not flow from sovereignty.[440] This decision implicitly repudiated the paramount rights rationale relied upon by the Supreme Court in its earlier decisions.[441]

In the 1975 case of *United States v. Maine*,[442] the United States Supreme Court revived the paramount rights rationale, denying the Atlantic states' claims of title over their offshore lands. The Supreme Court held that the Atlantic states never held title to offshore submerged lands below the low-water mark.[443] The first claim over such lands was made by the federal government through its adoption of a three mile territorial sea following the ratification of the United States Constitution.[444] The federal government's sovereign interests provided the basis for its paramount rights over offshore submerged lands. The Submerged Lands Act merely relinquished federal claims

434. Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982 & Supp. IV 1986).

435. 347 U.S. 272 (1954).

436. *Id.*

437. *Id.*

438. *Id.* at 274.

439. *Id.* at 274-76 (Reed, J., concurring).

440. *Alabama v. Texas*, 347 U.S. at 274.

441. Dort S. Bigg, Comment, *Inability of Complainant States to Test the Validity of an Act Ceding Proprietary Rights in Submerged Lands to Coastal States*: Alabama v. Texas, 34 B.U. L. REV. 504, 507 (1954).

442. 420 U.S. 515 (1975).

443. *Id.* at 523-26.

444. *Id.*

over offshore lands three miles from the Atlantic states' coastlines.[445] Notably, the Supreme Court refused to reconsider the rationale of its earlier decisions.[446]

The United States Supreme Court's decision in *United States v. Maine* was erroneous for several reasons. First, the doctrine of paramount rights did not establish federal jurisdiction over offshore lands. That position was negated by the Submerged Lands Act and subsequent cases.[447] Second, the Atlantic states' claims over offshore submerged lands were derived from colonial charters, which granted the colonies all of the territory claimed by the Crown. In the seventeenth century, the Crown claimed territorial sovereignty over the seabed and seabed resources 100 miles from shore. The Crown's title passed directly to the coastal states, not to the federal government.[448] Legal developments from 1783 through 1945 did not extinguish the coastal states' offshore rights. The Submerged Lands Act simply affirmed the coastal states' title to submerged lands within their historic boundaries and granted them an additional three mile or three marine league belt.[449] Since all of the submerged lands granted under colonial charters were beneath state inland waters, such offshore lands belonged to the Atlantic states.[450] Consequently, the boundaries of the Atlantic states should have been three miles from the end of their inland waters, which were established by colonial charters and royal practice in 1787.[451]

B. The Canadian Tidelands Controversy

Offshore petroleum development also generated conflict between the federal and provincial governments in Canada. Offshore energy exploration first occurred off the coast of Prince Edward Island in 1943 under provincial jurisdiction.[452] British Columbia began issuing permits for offshore energy exploration in 1949 and federal licensing of offshore energy operations started in 1960, two years after the pro-

445. *Id.*

446. *Id.*

447. *See* 43 U.S.C §§ 1301-1305.

448. For a general discussion of Great Britain's territorial sovereignty and the territorial sea, see O'Connell, *supra* note 78.

449. *See* 43 U.S.C. §§ 1301-1305.

450. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

451. Fitzgerald, *Tidelands Controversy*, *supra* note 2, at 238-40.

452. Ian T. Gault, *Jurisdiction Over the Petroleum Resources of the Canadian Continental Shelf: The Emerging Principle*, 23 ATLA. L. REV. 78, 80 (1985).

mulgation of the Convention on the Continental Shelf.[453] Federal regulations declared provincial permits invalid and instructed holders of provincial permits to apply for federal licenses.[454] The provinces did not accede to this usurpation of provincial authority; rather, they continued to exercise jurisdiction over offshore lands.[455] The Canadian government sought to resolve the conflict by referring the jurisdictional question to the Canadian Supreme Court.[456] Accordingly, the Governor-in-Council, by order of the council, asked the Canadian Supreme Court to determine whether the submerged lands beneath the territorial sea were the property of British Columbia or Canada, and whether British Columbia or Canada had the right to explore and exploit the seabed and subsoil of the continental shelf.[457]

In November 1967, the Canadian Supreme Court rejected British Columbia's claim of jurisdiction over the territorial sea and continental shelf, in *Reference Re Ownership of Off-Shore Mineral Rights* ("*Mineral Rights Reference*").[458] The court, relying on *Regina v. Keyn*, held that the provincial boundary terminated at the low-water mark.[459] The Imperial Parliament could have extended the provincial boundary, but did not. Since the territorial sea was outside of British Columbia, the province lacked jurisdiction over the area.[460] According to the Canadian Supreme Court, after British Columbia confederated with Canada in 1871, the Crown's rights in the territorial sea, originally claimed for British Columbia, became Crown rights held for Canada. The Crown's rights were then granted to Canada upon its independence, which occurred between 1919 and 1931.[461] The Canadian Supreme Court determined that, because those rights in the territorial sea and the continental shelf were sovereign rights recognized under international law, Canada's signing of the Conventions on the Territorial Sea and Continental Shelf, as external sovereign,

453. *Id.* at 80.

454. *Id.*

455. Elliot Treby, *The Role of the Political Idiom in Jurisdictional Conflicts Over Offshore Oil and Gas*, 5 J. MAR. L. & COM. 281, 292 (1974).

456. Gerald Rubin, *The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law*, 6 MCGILL L.J. 168 (1959-60); Peter H. Russell, *The Jurisdiction of the Supreme Court of Canada: Present Policites and a Programme for Reform*, 6 OSGOODE HALL L.J. 1, 10-11 (1968).

457. *Mineral Rights Reference*, 1967 S.C.R. at 792.

458. *Id.*

459. *Id.* at 817.

460. *Id.* at 821.

461. *Id.* at 815-16.

established federal jurisdiction over these areas.[462]

A brief review of Canadian history demonstrates that the Canadian Supreme Court erred in its conclusion. In the nineteenth century, the Crown held all property and sovereign rights over British Columbia's territorial sea and exercised prerogative rights beyond the territorial sea whenever commercially feasible. Resources beyond the territorial sea were Crown royalties. These rights were granted to British Columbia prior to its confederation with Canada in 1871.[463]

The province of British Columbia was established in stages. In 1849, Great Britain granted Vancouver Island the rights to the Hudson Bay Company. In 1858, the Imperial Parliament established the government of British Columbia. Finally, in 1866, the Imperial Parliament unified the colonies of Vancouver Island and British Columbia.[464] When the province of British Columbia was established, the Crown in right of the colony held title and jurisdiction over all unalienated land, including the mines and minerals located therein, as well as the territorial sea.[465] In *Attorney-General of British Columbia v. Attorney-General of Canada*,[466] the Privy Council stated:

> The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of those lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province before its admission into the federal Union.[467]

Even if British Columbia did not possess offshore rights prior to confederation in 1871, it was granted the Crown's rights over the territorial sea and continental shelf under the British North America Act of 1867 ("BNAA").[468] Term 10 of the Terms of Union of British Columbia with Canada placed British Columbia on the same footing as the original four provinces that constituted the dominion of Canada, and also granted British Columbia the same property rights as the original provinces.[469] The BNAA, which established the domin-

462. *Mineral Rights Reference*, 1967 S.C.R. at 817-21.

463. Reference Re Ownership of the Bed of the Straight of Georgia and Related Areas, 1 B.C.L.R. 97, 99-103 (1976) (Can.) [hereinafter *Bed of Straight Reference*].

464. *Id.*

465. *Id.*

466. [1889] 14 App. Cas. 295 (P.C.).

467. *Id.* at 301.

468. 30 & 31 Vict., ch. 3 (1867) (U.K.).

469. *See* Terms of Union of British Columbia with Canada (1871). Term 10 provides:
The provisions of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be

ion of Canada, divided governmental powers between the dominion and provincial governments. Section 109 of the BNAA states that the provinces retained "[a]ll Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada . . . ."[470] Term 10 of the Terms of Union applied section 109 of the BNAA to British Columbia. As a result, British Columbia received beneficial use and control over the Crown's offshore resources, including the territorial sea and continental shelf.[471]

In *Mineral Rights Reference*, the Canadian Supreme Court, relying on *Regina v. Keyn*,[472] held that provincial territory ended at the low-water mark, unless extended by Imperial legislation. Because such legislation did not exist, British Columbia lacked jurisdiction over the territorial sea.[473] The court failed to recognize that there was also no Imperial legislation extending dominion jurisdiction over the territorial sea. According to the court's rationale, Canada also lacked jurisdiction over its own territorial sea until 1959, when it ratified the Convention on the Territorial Sea.[474] Yet, in the 1931 case of *May v. The King*,[475] the Canadian Supreme Court held that "[i]t is a well recognized principle, both in this country and in the United States, that the jurisdiction of a nation is exclusive and absolute within its own territory of which its territorial waters within three marine miles from shore are as clearly a part, as the land."[476]

The Canadian Supreme Court's holding that the federal govern-

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specifically applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so are as the same may be varied by this Minute) be applicable to British Columbia, in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been on of the Provinces originally united by the said Act.

Id.

470. Section 109 of the BNAA provides in full:

All Lands, Mines, Minerals and Royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

30 & 31 Vict., ch. 3, § 109.

471. St. Catherine's Milling and Lumber Co. v. The Queen, [1888] 14 App. Cas. 46 (P.C.).

472. 2 Ex. D. 63 (1876) (Eng.).

473. *Mineral Rights Reference*, 1967 S.C.R. at 804-08.

474. Canada signed the Convention on the Territorial Sea on April 29, 1959. The Convention came into force on September 10, 1964, when it was ratified by a sufficient number of nations. *Id.* at 808.

475. 3 D.L.R. 15 (1931) (Can.).

476. *Id.* at 20-21.

ment's ability to enter into treaties regarding the territorial sea and continental shelf established federal jurisdiction over these areas ignores the distinction between treaty making and treaty implementation. In 1937, the Privy Council determined that the federal executive had the exclusive power to negotiate treaties on behalf of Canada.[477] Nevertheless, the Privy Council held that treaties did not become incorporated into the law of Canada unless they were adopted and implemented by the appropriate legislature, which was determined by the treaty's subject matter.[478] When the subject matter was within the jurisdiction of the province, the province had to implement the treaty before it became binding on Canada.[479] Ivan Head, a noted Canadian scholar, emphasized that the Canadian Supreme Court "failed to appreciate that 'the Crown in right of Canada' vis à vis other nation states in the international community is a different legal entity from 'the Crown in right of Canada' vis à vis the provinces in the federal community."[480] Head concluded that the Canadian Supreme Court could not have intended this result, as the Court's statement on this matter contravened the Privy Council's earlier determination.[481]

In addition, the Canadian Supreme Court's characterization of offshore rights as external sovereign rights was irrelevant to the analysis. Although the federal government was, in fact, the external sovereign of Canada, this did not establish federal jurisdiction over offshore lands. Otherwise, the federal government would have property rights over all Canadian lands. The jurisdiction over offshore lands off the coast of British Columbia was governed by the Terms of Union and the BNAA.

The Canadian Supreme Court failed to follow decisions of the provincial supreme courts that recognized provincial jurisdiction over the territorial sea. For example, in 1875, the Newfoundland Supreme Court held that provincial jurisdiction extended three miles seaward from a closing line drawn across the mouth of Conception Bay.[482] The Newfoundland Supreme Court reaffirmed Newfoundland's juris-

477. Attorney-General for Canada v. Attorney-General for Ontario, 1937 App. Cas. 326, 347 (P.C.).

478. *Id.* at 348.

479. *Id.* at 352.

480. Ivan L. Head, The Canadian Offshore Minerals Reference: *The Application of International Law to a Federal Constitution*, 18 U. TORONTO L.J. 131, 155 (1968).

481. *Id.* at 156.

482. Anglo-American Tel. Co. v. Direct United States Cable Co., 6 Nfld. L.R. 28 (1875).

diction over the territorial sea in 1888, and again in 1889.[483] Other provincial courts recognized provincial jurisdiction over the territorial sea. In 1932, the New Brunswick Supreme Court upheld a conviction for possessing intoxicating liquor within the province, one and three-quarters miles from shore.[484] The New Brunswick Supreme Court stated that the territorial sea "is now so generally admitted in international law that [we] do not think that it is open to question that the legislative authority of the province extends over that area."[485]

In 1984, the Canadian Supreme Court resolved the offshore jurisdictional conflict between the federal government and the Atlantic province of Newfoundland, by holding that Newfoundland lacked jurisdiction over the territorial sea and continental shelf.[486] The Canadian Supreme Court erroneously relied on the flawed logic of *Attorney-General for British Columbia v. Attorney-General for Canada*.[487] The court also failed to recognize that, because Newfoundland was a dominion prior to confederating with Canada, Newfoundland was entitled to all of the rights recognized by international law at that time, including jurisdiction over the territorial sea and continental shelf.[488]

Prior to 1926, Newfoundland was a self-governing colony, exercising jurisdiction over its territorial sea through customs, fishing, and hovering acts.[489] When Newfoundland became a dominion in 1926, it received all of the rights held by the Crown and, thus, possessed the same degree of sovereignty as Canada and Australia.[490] Newfoundland continued to exercise jurisdiction over its offshore lands and did not surrender its jurisdiction during the Commission government which ruled Newfoundland from 1934 through 1949.[491] Throughout this period, Great Britain and other nations continued to recognize Newfoundland's sovereignty.[492] Even if Newfoundland had lost its

483. Rhodes v. Fairweather, 7 Nfld. L.R. 321 (1888); The Queen v. Delephine, 7 Nfld. L.R. 378 (1889).

484. Rex v. Burt, 5 M.P.R. 112 (1932) (N.B.).

485. *Id.* at 118.

486. *Newfoundland Reference*, 5 D.L.R.4th 385 (1984) (Can.).

487. [1889] 14 App. Cas. at 295.

488. *See generally* Fitzgerald, *Newfoundland*, *supra* note 2.

489. *Natural Resources Reference*, 145 D.L.R.3d 9, 20-36 (1983) (Can.); DEPT. OF MINES AND ENERGY, NEWFOUNDLAND AND LABRADOR, HERITAGE OF THE SEA: OUR CASE ON OFFSHORE MINERAL RIGHTS 2 (1982).

490. *Natural Resources Reference*, 145 D.L.R.3d at 26.

491. *Id.* at 31-33.

492. *Id.* at 32.

sovereignty, Term 7 of the Terms of Union of Newfoundland with Canada[493] ("Terms of Union") would have revived its dominion status immediately prior to confederation.[494] This entitled Newfoundland to all rights recognized by international law, including jurisdiction over the territorial sea and continental shelf.

When Newfoundland confederated with Canada in 1949, it retained all property held by the Crown in right of the province. Term 37 of the Terms of Union granted Newfoundland common law property rights and Crown property rights to the beneficial use, control, disposition, and management of the Newfoundland territory.[495] These rights were not restricted to Newfoundland's land territory[496] and Newfoundland was not required to surrender any of its property to be placed on equal footing with the other Canadian provinces.[497]

When litigation failed to resolve the dispute, there was a political settlement. On February 11, 1985, Newfoundland and Canada signed the Atlantic Accord, which regulated offshore petroleum management and provided for revenue-sharing in the offshore area from the low-water mark to the continental shelf margin.[498] The Atlantic Accord established joint federal and provincial administration and ensured that the pace and manner of offshore development would optimize social and economic benefits. The Atlantic Accord was designed to provide a stable offshore management regime to en-

493. Term 7 of the Terms of Union of Newfoundland with Canada states:

> The Constitution of Newfoundland as it existed immediately prior to the 16th day of February, 1934, is revived at the date of Union and shall, subject to these Terms and the Constitution Acts, 1867 to 1940, continue as the Constitution of the Province of Newfoundland from and after the date of Union, until altered under the authority of the said Acts.

Schedule Terms of Union of Newfoundland with Canada, No. 32 (1949), *reprinted in* R.S.C. app. (1985) [hereinafter Terms of Union].

494. *Newfoundland Reference*, 5 D.L.R.4th at 406-07.

495. Term 37 grants:

> All lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect hereof, and to any interest other than that of the Province in the same.

Terms of Union, *supra* note 493, term 37; *see also St. Catherine's Milling and Lumber Co.*, [1888] 14 App. Cas. at 46.

496. *Natural Resources Reference*, 145 D.L.R.3d at 34-46.

497. *Id.* at 20, 34-35.

498. C.P. MacDonald & R.S.G. Thompson, *The Atlantic Accord: The Politics of Compromise*, 24 ALTA. L. REV. 61 (1985); Robert M. Sinclair, *The Atlantic Accord: Joint Management of Offshore Oil and Gas Resources Off Newfoundland and Labrador*, 2 BUS. & L. 52 (July 1985); Douglas Day, *Maritime Boundaries, Jurisdictional Disputes, and Offshore Hydrocarbon Exploration in Eastern Canada*, 23 J. CAN. STUD. 60, 77-81 (1988).

courage offshore energy development.[499]

C. Australian Political Settlement in the Tideland Controversy

The High Court of Australia failed to resolve the tidelands controversy in *New South Wales*. The Australian litigation, like its counterpart in the United States and Canada, generated political negotiations between the Commonwealth and state governments which, in turn, led to a political settlement.

In November 1975, the Whitlam Labor government, which possessed a strong nationalist orientation, was voted out of office.[500] That December, four days before the Australian High Court's decision in *New South Wales*, the Fraser Liberal-National government assumed power.[501] The Fraser government adopted a new policy of federalism, calling for greater state responsibility, which was applauded by the states.[502]

Negotiations between the Commonwealth and state governments regarding offshore submerged lands soon commenced. In 1976, the Standing Committee of Attorney-Generals agreed to investigate the opportunities for Commonwealth-state cooperation, regarding offshore development. In 1977, the state premiers convened to discuss offshore issues.[503] As a result of the federal-state negotiations, which continued over the next two years, the Commonwealth relinquished control over the territorial sea to the state governments.[504] In 1979, the following "Agreed Arrangements" were announced:

> 1. The area reverting to predominantly state control would be limited to a territorial sea of 3 nautical miles irrespective of whether Australia subsequently moved to a territorial sea of 12 nautical miles.
> 2. The Commonwealth Parliament would pass legislation to give each state the same powers with respect to the territorial sea (including the seabed) as it would have had if the territorial sea had been within the limits of a state.
> 3. The Commonwealth Parliament would pass legislation to vest

499. MacDonald & Thompson, *supra* note 498; Sinclair, *supra* note 498; Day, *supra* note 498.

500. W.G. McMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA 194-97 (1979); RICHARD CULLEN, FEDERALISM IN ACTION: THE AUSTRALIAN AND CANADIAN OFFSHORE DISPUTES 104-08 (1990).

501. McMINN, *supra* note 500, at 194-97; CULLEN, *supra* note 500, at 104-08.

502. McMINN, *supra* note 500, at 194-97; CULLEN, *supra* note 500, at 104-08.

503. CULLEN, *supra* note 500.

504. *Id.*

in each state proprietary rights and title in respect of the seabed of the territorial sea.

4. The Commonwealth Parliament would make consequential amendments to the Seas and Submerged Lands Act 1973 to ensure that state laws relying on the legislation mentioned in 2. and 3. would not be invalidated by that Act.

5. Offshore petroleum operations outside the territorial sea would be regulated by Commonwealth legislation alone, consisting of an amended Petroleum (Submerged Lands) Act 1967 (Cth.), although day-to-day administration would continue to be in the hands of each state.

6. Offshore petroleum operations in the territorial sea would be regulated by state legislation alone although the Common Mining Code would be retained as far as practicable.

7. Arrangements would be made to institute a regime for the mining of offshore minerals other than petroleum in the same format as described in 5. and 6.

8. New arrangements would be introduced to enable single fisheries to be regulated by one set of laws, Commonwealth or state as agreed between the parties.

9. The Historic Shipwrecks Act 1976 (Cth.) would be amended so that it would be applicable to waters adjacent to a state or the Northern Territory only with the consent of that State or territory.

10. The Great Barrier Reef Marine Park Act 1975 (Cth.) would continue to apply to the whole of the Great Barrier Reef region as defined in that Act and the rights and title to be vested in respect of the seabed of the territorial sea would be subject to the operation of that Act. Other marine parks would be the subject of Commonwealth/state consultation.

11. An agreed scheme of complementary Commonwealth/state legislation would be put in place to ensure that an appropriate body of Australian criminal law would be applicable offshore.

12. The regulation of shipping and navigation would be divided between the states and the Commonwealth with the Commonwealth being responsible for trading vessels on interstate or overseas voyages, drilling vessels, and the implementation of an Australian shipping register. The parties would also implement the Uniform Shipping Laws Code published in the Commonwealth Gazette on 28 December, 1979.

13. Commonwealth legislation would continue to control ship-sourced marine pollution.

14. The Northern Territory would be treated as a state for the pur-

poses of the settlement.[505]

The legislative scheme implementing the Agreed Arrangements[506] posed some interesting constitutional issues. The Coastal Waters (State Title) Act of 1980 transferred the Commonwealth's title over the submerged lands beneath the territorial sea to the individual states. Even if Australia's territorial sea is widened, it will still not expand state title. The Coastal Waters (State Title) Act of 1980 bypassed potential problems under section 123 of the Australian Constitution, which prohibits the expansion of a state's boundary without a state referendum.[507] Since neither the Commonwealth nor the state governments wanted a referendum, the Act did not alter state boundaries. Instead, it simply placed submerged lands beneath the territorial sea beyond state boundaries over which the states held title.[508]

Since the offshore submerged lands were outside of the states' boundaries, the states questioned their ability to regulate the area comprehensively. The Coastal Waters (State Powers) Act addressed this problem by utilizing section 51(xxxviii) of the Australian Constitution. Section 51(xxxviii) allows the Commonwealth Parliament to make laws with respect to the local exercise of any legislative power which, before federation, could only be exercised by the Imperial Par-

505. *Id.* at 108-09.

506. The Commonwealth legislation included: Crimes at Sea Act 1979, No. 17, 1979 AUSTL. ACTS P. 154; Coastal Waters (State Powers) Act 1980, No. 75, 1980 AUSTL. ACTS P. 790; Coastal Waters (Northern Territory Powers) Act 1980, No. 76, 1980 AUSTL. ACTS P. 793; Coastal Waters (State Title) Act 1980, No. 77, 1980 AUSTL. ACTS P. 796; Coastal Waters (Northern Territory Title) Act 1980, No. 78, 1980 AUSTL. ACTS P. 799; Seas and Submerged Lands Amendment Act 1980, No. 79, 1980 AUSTL. ACTS P. 802; Petroleum (Submerged Lands) Amendment Act 1980, No. 80, 1980 AUSTL. ACTS P. 804; Petroleum (Submerged Lands) (Royalty) Amendment Act 1980, No. 81, 1980 AUSTL. ACTS P. 846; Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980, No. 83, 1980 AUSTL. ACTS P. 852; Petroleum (Submerged Lands) (Pipeline Licence Fees) Amendment Act 1980, No. 84, 1980 AUSTL. ACTS P. 854; Petroleum (Submerged Lands) (Production Licence Fees) Amendment Act 1980, No. 85, 1980 AUSTL. ACTS P. 856; Fisheries Amendment Act 1980, No. 86, 1980 AUSTL. ACTS P. 858; Navigation Amendment Act 1980, No. 87, 1980 AUSTL. ACTS P. 871; and Historic Shipwrecks Amendment Act 1980, No. 88, 1980 AUSTL. ACTS P. 912. *See* CULLEN, *supra* note 500, at 109 n.133.

507. Section 123 of the Australian Constitution states:

> The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation of any State affected.

AUSTL. CONST. § 123.

508. Cullen, *Canada and Australia*, *supra* note 25, at 75.

liament.[509] Because the Imperial Parliament initially held jurisdiction over the territorial sea, the Commonwealth Parliament, at the request of the states, could surrender such jurisdiction to the states.[510] Such jurisdiction could not be unilaterally terminated because authority under section 51(xxxviii) could only be granted and repealed at the request of the states. Furthermore, since the coastal states were granted title, section 51(xxxi) of the Australian Constitution requires the Commonwealth to pay fair compensation to purchase the lands from the states.[511]

In the 1989 case of *Port MacDonnell PFA Inc. v. South Australia*, the Australian High Court upheld the constitutionality of the Coastal Waters (State Powers) Act.[512] *Port MacDonnell* involved an agreement between the Commonwealth and State of South Australia regarding the management of rock lobster fishing adjacent to South Australia. The Australian High Court determined that section 51(xxxviii) should be broadly interpreted for several reasons. First, the section was designed to fill in the policy gaps with regard to Commonwealth and state legislative powers. Second, section 51(xxxviii) does not enhance Commonwealth power at the expense of the states, but expands the potential and actual power of state legislatures.[513] Section 5(c) of the Coastal Waters (State Powers) Act, confirming and expanding the scope of state legislative authority, comported with section 51(xxxviii), because the Imperial Parliament exercised exclusive authority over fisheries beyond state coastal waters at the time of federation.[514] Consequently, the Australian High Court found the Coastal Waters (State Powers) Act valid. Although the Court addressed only part of the Agreed Arrangements, it is likely that other legislative elements of the Agreements will be endorsed in the

509. Section 51(xxxviii) of the Australian Constitution provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . .
> (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

AUSTL. CONST. 51 (xxxviii).

510. Cullen, *Canada and Australia*, *supra* note 25, at 75-76.

511. *Id.* at 77; *see also supra* note 318 and accompanying text.

512. Port MacDonnell PFA Inc. v. South Australia, 63 Austl. L.J. Rep. 671 (1989).

513. *Id.* at 683-84.

514. *Id.* at 684-86.

future.[515]

VII. CONCLUSION

Australia, like the United States and Canada, experienced conflict between the federal and state governments regarding jurisdiction over offshore submerged lands rich in petroleum resources. Australia sought to avoid the litigation that plagued offshore energy development in the United States and Canada by enacting a common mining code.[516] This political compromise did not preclude litigation. In *New South Wales*, the Australian High Court determined that the Commonwealth had jurisdiction over the offshore submerged lands below the low-water mark.[517] The court found that state jurisdiction ended at the low-water mark and that, even if the states had at one time possessed rights in offshore submerged lands beyond that point, such rights were relinquished upon federation.[518] According to the Australian High Court, the Commonwealth's jurisdiction over the territorial sea and continental shelf was based on its external affairs authority under section 51(xxix) of the Australian Constitution.[519]

The Australian High Court failed to recognize that the Crown held sovereignty and dominion over the territorial sea under the common law of the nineteenth century. The case of *Regina v. Keyn*, upon which the *New South Wales* court based its decision, was an anomaly that addressed only the extent of admiralty jurisdiction, not the Crown's dominion over offshore lands.[520] This limitation was manifested in the TWJA[521] and in subsequent cases that considered the territorial sea to be either a prerogative right of the Crown or Crown property granted to the Australian colonies when they achieved self-government.[522]

The Australian High Court erroneously followed the reasoning used by the United States and the Canadian Supreme Courts in their

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515. Richard Cullen, Port MacDonnell PFA Inc. v. South Australia, 16 MONASH U. L. REV. 128, 136 (1990).

516. For a discussion of this code, see *supra* note 3 and accompanying text.

517. New South Wales v. Commonwealth, 135 C.L.R. 337, 374-75 (1975) (Austl.). For a discussion on the High Court of Australia's majority opinion in *New South Wales*, see *supra* notes 67-77 and accompanying text.

518. *New South Wales*, 135 C.L.R. at 374-75.

519. *Id.*

520. Regina v. Keyn, 2 Ex. D. 63, 161-62 (Eng.); *see also supra* notes 115-37, 153-60.

521. 41 & 42 Victs. (1878) (U.K.); *cited in* McEnvoy, *supra* note 128, at 297 n.58; *see also supra* notes 145-52 and accompanying text.

522. *See supra* notes 198-231 and accompanying text.

tidelands decisions.[523] According to the United States Supreme Court, (1) coastal state jurisdiction ended at the low-water mark, (2) the federal government's jurisdiction over navigation, national defense, international affairs, and commerce established paramount rights beyond the low-water mark, and (3) an aspect of these paramount rights was dominion over the resources located therein.[524] In so holding, the United States Supreme Court confused dominion with sovereignty and failed to acknowledge the Atlantic states' historic claims over offshore areas were traceable to the Crown.

The Canadian Supreme Court, relying on *Regina v. Keyn*, determined that provincial jurisdiction ended at the low-water mark.[525] According to the Canadian Supreme Court, the Crown's rights over the territorial sea were initially granted to the federal government when it achieved independence.[526] The federal government then asserted its jurisdiction over the territorial sea by signing the Conventions on the Territorial Sea and Continental Shelf.[527] The Canadian Supreme Court, like the Australian High Court, failed to recognize the Crown's proprietary and sovereign rights over the territorial sea in the nineteenth century. These rights were transferred to British Columbia under Term 10 of the Terms of Union of British Columbia with Canada and section 109 of the BNAA.[528] Moreover, like the Australian High Court, the Canadian Supreme Court ignored the decisions of provincial courts acknowledging provincial jurisdiction over the territorial sea. In 1984, the Canadian Supreme Court failed to attribute the proper significance to Newfoundland's exercise of sovereignty and dominion over its offshore submerged lands when it held that Newfoundland lacked jurisdiction over the territorial sea and continental shelf.[529] Furthermore, the Canadian Supreme Court, like the Australian High Court, erroneously determined that provincial extra-territorial jurisdiction had only been exercised for the peace, order, and good government of the province.[530] Both courts failed to realize that the justification of exercising colonial extra-territorial ju-

523. *See supra* notes 408-99 and accompanying text.

524. United States v. California, 332 U.S. 19, 29-41 (1947).

525. *See Mineral Rights Reference*, 1967 S.C.R. at 792-817.

526. *Id.* at 815-16.

527. *Id.* at 817-21.

528. 30 & 31 Vict., ch. 3 § 109 (1867) (U.K.); *see also supra* notes 469-70 and accompanying text.

529. *Newfoundland Reference*, 5 D.L.R.4th 385 (1984) (Can.).

530. *Id.*

risdiction for peace, order, and good government was unknown in the nineteenth century.

The Australian High Court held that even if the states did possess rights over submerged offshore lands, these rights were surrendered to the Commonwealth because they were aspects of external sovereignty. This decision equalized all the Australian states with respect to their offshore claims.

The United States and Canadian Supreme Courts, similar to the Australian High Court, also placed all states on an equal footing at federation. For example, in *United States v. Texas*, the United States Supreme Court required Texas to surrender all rights in submerged lands beyond the three-mile limit, in order for it to be equally situated with the other coastal states.[531] The Supreme Court failed to acknowledge that there was no equal footing clause in the Texas Annexation Agreement and that the equal footing clause applied not to property rights, but to political rights.[532] This was the first time the United States Supreme Court applied the equal footing clause to deprive a state of property upon entering the Union.[533]

The Canadian Supreme Court adopted the equal footing rationale in the 1984 Newfoundland case. The court held that even if Newfoundland had possessed rights over offshore submerged lands prior to federation, it relinquished those rights upon federation.[534] The Canadian Supreme Court failed to recognize that there was no equal footing clause in the Terms of Union of Newfoundland with Canada or the BNAA.[535] Furthermore, under the BNAA, the Canadian provinces were not treated alike with regard to the ownership of natural resources.[536]

The Australian High Court's finding that the Commonwealth's capability, as external sovereign, to enter into treaties regarding offshore submerged lands provided the basis for the Commonwealth's offshore jurisdiction[537] exaggerated the scope of the Commonwealth's

531. United States v. Texas, 339 U.S. 707 (1950).

532. *Id.* at 722 (Reed, J., dissenting).

533. *Id.*

534. *Newfoundland Reference*, 5 D.L.R.4th at 385.

535. *See* Terms of Union, *supra* note 493.

536. 30 & 31 Vict., ch. 3 (1867) (U.K.). Alberta, Saskatchewan, and Manitoba were Canadian provinces for many years before they gained control over their natural resources in 1930. Separate agreements provided that the provinces be placed in the same position as the original provinces. *Natural Resources Reference*, 145 D.L.R.3d 9, 34 (1983) (Can.).

537. *New South Wales*, 135 C.L.R. at 374-75.

external affairs authority.[538] The Commonwealth could enter treaties as external sovereign, but this power did not determine whether the federal or state governments had authority over the subject matter of the treaty. This was a constitutional question.[539] The Commonwealth's external affairs authority did not grant the Commonwealth complete authority over the subject matter of the treaty.[540] As such, the Commonwealth could only enact legislation to implement the provisions of a treaty. Federal jurisdiction over offshore submerged lands was not mandated by either the Convention on the Territorial Sea or the Convention on the Continental Shelf. Further, if the logic of the court were carried to its extreme, the Commonwealth could circumvent the federal nature of the Australian Constitution by entering international treaties.

The United States and Canadian Supreme Courts also magnified the extent of the federal government's external affairs authority. The United States Supreme Court held that the federal government's power over international affairs established paramount rights over the offshore resources.[541] The Canadian Supreme Court determined that the federal government's authority to act for the peace, order, and good government of Canada established federal jurisdiction over offshore lands.[542] In addition, the Canadian Supreme Court, like the Australian High Court, failed to distinguish between treaty making and treaty implementation.[543]

The Australian High Court's holding that continental shelf rights were a new principle of international law failed to recognize that the Crown had previously exercised commercial rights beyond the territorial sea whenever possible.[544] If outer continental shelf ("OCS") energy development had been commercially or technologically possible in the nineteenth century, it would have been considered a prerogative right of the Crown, and OCS energy resources would have been Crown royalties.[545] This prerogative right of the

538. *See supra* notes 304-18 and accompanying text.

539. *New South Wales*, 135 C.L.R. at 445-51 (Stephen, J.).

540. *See* AUSTL. CONST. § 51(xxix).

541. *See, e.g., United States v. Texas*, 339 U.S. at 707; United States v. Louisiana, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. at 19; *see also supra* notes 414-29 and accompanying text.

542. *See Mineral Rights Reference*, 1967 S.C.R. at 792; *see also supra* notes 458-62 and accompanying text.

543. *See supra* notes 477-81 and accompanying text.

544. *New South Wales*, C.L.R. at 360-66; *see supra* notes 78-114 and accompanying text.

545. *See supra* notes 325-26 and accompanying text.

Crown was granted to the colonies when they achieved self-government.[546] The Australian High Court was correct, however, in its assertion that the recognition of continental shelf rights under international law did not provide the basis for state jurisdictional claims.[547]

The United States Supreme Court failed to acknowledge the Crown's sovereignty and dominion over offshore areas prior to its independence.[548] The Crown's offshore rights passed directly to the states under the Treaty of Paris in 1783 and were not transferred to the federal government under the United States Constitution.[549] The Submerged Lands Act, which was enacted in 1953, established an historic test to determine the extent of state offshore jurisdiction.[550]

The Canadian Supreme Court failed to recognize that Newfoundland was a dominion prior to federation with Canada.[551] By 1949, continental shelf rights were established as a principle of customary international law and existed *ab initio* and *ipso facto*.[552] Newfoundland, as a sovereign state, acquired such rights prior to federation and preserved them by the Terms of Union.[553]

The Australian High Court's decision, like those of the United States and Canadian Supreme Courts, generated subsequent political negotiations and settlements.[554] In Australia, negotiations between the federal and state governments resulted in the "Agreed Arrangements."[555] Subsequent statutory changes resulting from the arrangements granted the states title and jurisdiction over the territorial sea.[556] For example, the Federal Common Mining Code, which governs offshore development beyond the territorial sea, provides for royalty sharing and state administration.[557] In the United States, the

546. *New South Wales*, 135 C.L.R. at 405, 439; *see also* notes 232-57 and accompanying text.

547. *New South Wales*, 135 C.L.R. at 366; *Norway-Sweden Boundry Dispute*, *supra* note 317.

548. *See, e.g.*, United States v. Maine, 420 U.S. 515 (1975); *see also supra* notes 447-51 and accompanying text.

549. *See* O'Connell, *supra* note 78.

550. *See* 43 U.S.C. §§ 1301-1305.

551. *Newfoundland Reference*, 5 D.L.R.4th at 385; *see also* Fitzgerald, *Newfoundland*, *supra* note 2; *supra* notes 488-99 and accompanying text.

552. *See supra* notes 391-407 and accompanying text.

553. Terms of Union, *supra* note 493, term 37; *see also supra* note 495.

554. *See supra* notes 500-15.

555. CULLEN, *supra* note 500, at 108-09.

556. *See supra* note 506.

557. *See* Cullen, *Bass Strait*, *supra* note 25, at 223-26.

Submerged Lands Act grants the states title over the territorial seas.[558] The Outer Continental Shelf Lands Act establishes federal government jurisdiction over the outer continental shelf and provides for federal administration over OCS energy development with limited state input.[559] The Coastal Zone Management Act of 1972 also provides coastal states with control over offshore energy development.[560] In Canada, the Atlantic provinces have been successful in negotiating with the federal government for participation in the administration of offshore energy development and revenue sharing, as evidenced by the Nova Scotia Agreement and Atlantic Accord.[561]

The Australian High Court and the United States and Canadian Supreme Courts granted their federal governments jurisdiction over offshore submerged lands. The courts determined that the offshore submerged lands below the low-water mark were beyond state jurisdiction and thereby subject to the federal governments' external affairs authority. However, the courts failed to acknowledge the development of offshore rights under the common law and exaggerated the federal governments authority over external affairs. The courts confused dominion, which is based on domestic law, with sovereignty, which is based on international law. The courts' decisions also frustrated the design of federalism in all three constitutional systems. The courts should have relied on their respective common laws, rather than on emerging concepts of international law. The adoption of international law by the courts to resolve domestic constitutional disputes deprived coastal states of their petroleum-rich offshore lands.

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558. *See* 43 U.S.C. §§ 1301-1305.

559. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982 & Supp. IV 1986); *see also* Warren Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953).

560. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988); Edward A. Fitzgerald, Secretary of Interior v. California: *Should Outer Continental Shelf Lease Sales Be Subject to Consistency Review?*, 12 B.C. ENVTL. AFF. L. REV. 425 (1985) [hereinafter Fitzgerald, Secretary of Interior v. California]; Edward A. Fitzgerald, *Thresher Sharks Protect the Coastal Zone*, 14 B.C. ENVTL. AFF. L. REV. 561 (1987) [hereinafter Fitzgerald, *Thresher Sharks*]. *See generally* Jack H. Archer, *Evolution of Major 1990 CZMA Amendments: Restoring Federal Consistency and Protecting Coastal Water Quality*, 1 TERRITORIAL SEA J. 191 (1991).

561. Ian T. Gault, *Recent Developments in the Federal-Provincial Dispute Concerning Jurisdiction Over Offshore Petroleum Resources*, 21 ALTA. L. REV. 97 (1983); Ian T. Gault, *Jurisdiction over the Petroleum Resources of the Canadian Continental Shelf: The Emerging Principle*, 23 ALTA. L. REV. 75 (1985); G.J. Doucet, *Canadian-Nova Scotia Offshore Agreement: One Year Later*, 22 ALTA. L. REV. 132 (1984). The 1982 Nova Scotia Accord has been modified to comport with the Atlantic Accord. *See* Cullen, *Canada and Australia*, *supra* note 25, at 80; CULLEN, *supra* note 500, at 189-90.

As a result, subsequent political settlements were necessary to mitigate the adverse effects of these erroneous decisions. Nevertheless, coastal states have continued their struggle in the judicial and political arenas to participate in and share the revenues derived from offshore energy development.[562]

562. Cullen, *Canada and Australia*, *supra* note 25; Fitzgerald, Secretary of Interior v. California, *supra* note 560; Fitzgerald, *Thresher Sharks*, *supra* note 560; *see also* Edward A. Fitzgerald, California v. Watt: *Congressional Intent Bows to Judicial Restraint*, 11 HARV. ENVTL. L. REV. 147 (1987); Edward A. Fitzgerald, *Outer Continental Shelf Oil and Gas Revenues: Coastal States Should Be Entitled to a Share*, 16 COASTAL MGMT. 319 (1988).