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Public Trust or Equal Footing: A Historical Look at Public Use Rights in American Waters

*Sean Morrison**

> To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which, cannot, perhaps, be now even anticipated.[1]

* Harvard Law School, J.D. (expected 2015). With deep gratitude to Professor Joseph William Singer for his wisdom, insight and encouragement, the editors of the *West-Northwest Journal of Environmental Law and Policy* for their help and patience, and my family and friends in Montana.

1. Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn.1893).

I. Introduction

In 2003, the State of Montana brought a lawsuit in state court seeking to recover $41 million in rent from the owner of several hydroelectric dams that the state claimed lie on state-owned riverbeds.[2] The dams in question belong to PPL Montana, LLC and lie on portions of the Missouri, Madison, and Clark Fork Rivers.[3] Under the "equal footing doctrine," if a body of water is navigable, the submerged land belongs to the state.[4] If it is nonnavigable, the submerged land belongs to the private riparian landowners.[5] The State of Montana argued that navigability should be determined for the whole river, while PPL Montana argued that each segment of the river should be tested for navigability to determine ownership.[6] Both parties agreed the question is a matter of federal law.[7] In a unanimous opinion, the U.S. Supreme Court rejected the "whole river approach."[8] Ensuing academic scholarship offers a range of nuanced thoughts about the impact this decision may have on natural resource management.[9] A less discussed but perhaps more important part of the Supreme Court's opinion is the attempt to define the relationship between the "public trust doctrine" and the "equal footing doctrine."

2. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1231 (2012). The suit is was in fact initiated by parents of schoolchildren who claimed that the dams sit on state school trust land. *Id*. at 1225.

3. Landon Newell, PPL Montana: *The Supreme Court's Modern Day City Slicker Approach for Determining the Navigability for Title Test*, 33 UTAH ENVTL. L. REV. 273, 274 (2013).

4. *Id*. at 275.

5. *See, e.g.*, United States v. Oregon, 295 U.S. 1, 14 (1935) ("[I]f the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new state.").

6. Newell, *supra* note 3, at 274.

7. *See* Brief for Respondent at 2, PPL M*ont*., 132 S. Ct. 1215 (No. 10-218); Reply Brief of Petitioner at 3, PPL M*ont*., 132 S. Ct. 1215 (No. 10-218).

8. PPL M*ont*., 132 S. Ct. at 1232.

9. Some academics credit the Court for clarifying the legal rule for title of riverbeds and ensuring that more rivers are protected by federal ownership. *See* Amy Wegner Kho, *What Lies Beneath Troubled Waters: The Determination of Navigable Rivers in* PPL Montana, LLC, v. Montana, 132 S. Ct. 1215 (2012), 15 U. DENV. WATER L. REV. 489, 500 (2012); *see also* Rachael Lipinski, *The Dividing Line: Applying the Navigability-For-Title Test After* PPL Montana, 91 OR. L. REV. 247, 271 (2012). Others argue that the decision makes it "more difficult to manage, preserve, and/or protect" rivers by fragmenting responsibilities. *See* Newell, *supra* note 3, at 291.

The State of Montana impressed upon the Court that denying the state title to the underlying bed for portions of rivers would transfer from state ownership to private ownership submerged lands protected by the state public trust doctrine.[10] This, the State argued, warranted "the caution [the Court] typically exercises in matters impeding state sovereignty."[11] The Court however dismissed this concern, stating that the "suggestion underscores the State's misapprehension of the equal footing and the public trust doctrine."[12] "Unlike the equal-footing doctrine, which is the constitutional foundation for the navigability rule of riverbed title," the Court asserted, "the public trust doctrine remains a matter of state law . . . . Under the accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."[13] In other words, the Court's decision suggests that submerged lands might be both privately owned and protected by the state's public trust doctrine.

When the PPL M*ontana* opinion was announced, another suit was underway in Montana over public rights in privately owned rivers and streams.[14] In 2005, the Public Lands Access Association filed suit in state court claiming that electric fences on the private property of Jim Kennedy, the billionaire heir and Chairman of Cox Media,[15] obstructed public access to the Ruby River from the Seyler Lane Bridge and the Lewis Lane Bridge.[16] Kennedy argued that the public had no right to access the river at all. He asserted that, in light of the PPL M*ontana* opinion, the Montana Supreme Court had wrongly "transformed the public trust doctrine from a shield protecting public land from alienation into a sword through which the State can take a few citizens' private property rights for public use."[17] In essence,

10. Brief for Respondent, *supra* note 7, at 24.

11. I*d*. at 27.

12. PPL M*ont.*, 132 S. Ct. at 1234.

13. I*d*. at 1235.

14. Public Lands Access Ass'n, Inc. v. Bd. of Cnty. Comm'rs, 321 P.3d 38 (Mont. 2014).

15. Profile of Jim Kennedy in T*he Richest People in America List*, FORBES.COM, http://www.forbes.com/profile/jim-kennedy (last visited Oct. 19, 2014).

16. P*ublic Lands Access Ass'n*, 321 P.3d at 40-41.

17. Brief of Appellee and Cross-Appellant James C. Kennedy at 39-41, P*ublic Lands Access Ass'n*, 321 P.3d 38 (No. 12-0312) ("Under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.") (criticizing Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984)); *cf*. Stephen D. Osborne et al., L*aws Governing*

Mr. Kennedy reasoned that since federal law determines title to the underlying streambed, the state could not use the public trust doctrine to infringe on that title.

Each side of the Montana public access and private property rights debate thought PPL M*ontana* supported their position. James Huffman, former dean of the Lewis & Clark Law School, said that PPL M*ontana* was a "judicial smackdown . . . [that] called into question the legal underpinnings of Montana's 30-year-old stream-access law."[18] The import of the decision, in Huffman's view, is that, under the equal footing doctrine, the title does not belong to the state and the state cannot "enlarge what it got at statehood, i.e., the beds of navigable rivers only."[19] Huffman believes the Supreme Court's PPL M*ontana* decision is a warning to the State that "[c]laiming more would result in the expropriation of long vested private-property rights."[20] By contrast, Jack Tuholske, a professor at Vermont Law School, and Bruce Farling, the executive director of Montana Trout Unlimited, reasoned that PPL M*ontana* leaves states to define the scope of the public trust doctrine "free from interference by the federal government."[21]

To some degree, the "public trust doctrine" and the "equal footing doctrine" obfuscate a simple underlying legal question: What are the public and private property interests in any given body of water? Does, for example, an owners' title to submerged land include the right to exclude the public from the water? Does the public's interest in the water include a right

Recreational Access to Waters of the Columbia Basin: A *Survey and Analysis*, 33 ENVTL. L. 399, 413 (2003) (concluding from a survey of how the public trust doctrine is applied to access rights in other Columbia River Basin states that "[w]hatever its scope in a particular state, the public trust doctrine can protect water bodies from significant impairments, thus providing a measure of protection for recreational uses").

18. James Huffman, Op-Ed, *Is Stream-Access Law on the Way Out?*, DAILY INTER LAKE (May 25, 2013, 10:00 PM), http://www.dailyinterlake.com/opinion/article_a9f9e404-c5a6-11e2-ba39-0019bb2963f4.html.

19. *Id.*

20. *Id.* It may be worth noting that PPL Montana, in its brief to the Supreme Court, denied that the PPL M*ontana* case would have any impact on public access and use rights in privately owned waters. *See* Reply Brief of Petitioner, *supra* note 7, at 3 ("Montana's invocations of sovereignty, the public trust, and the mystical qualities of Montana and its trout streams do nothing to justify its massive land grab. This case is not about 'the paramount right of public use' of rivers. . . . The relevant river segments have long been and will continue to be open for fishing, recreational pursuits, and other beneficial uses.").

21. Jack Tuholske & Bruce Farling, Op-Ed, *Stream Access Law Protective, Honorable*, MONT. STANDARD (June 12, 2013), http://mtstandard.com/news/opinion/Stream-access-law-protective-honorable/article_d1d6b3d4-d30d-11e2-89ce-001a4bcf887a.html.

to incidental contact with the underlying land?[22] There is a wide range of possible answers—Mr. Kennedy claimed that "title to the streambed entailed the right to control access to fish, wade or boat on the waters above . . . ."[23] On the other extreme, title to the submerged land may give the private owner neither the right to exclude the public from traveling along the bed and banks or from fishing in the water (as is the case in Montana and many other states).[24] The problem with the Supreme Court's formulation in PPL M*ontana* is that it suggests under these two doctrines both the state courts and the federal courts have say in the matter. As a consequence, PPL M*ontana* provides no instruction as to whether these questions should be answered by reference to state or federal law.

In January 2014, the Montana State Supreme Court rejected Mr. Kennedy's challenge to public use rights,[25] finding that the public use right "is not a property right, or an interest in the landowners' . . . Rather, it amounts to a recognition of the physical reality that in order for the public to recreationally use its water resource, some 'minimal' contact with the banks and beds of rivers is generally necessary."[26] Further, "[t]hat use does not amount to an easement or any other 'interest' in land" and therefore cannot constitute a taking.[27] In other words, the Montana Supreme Court attempted to define public rights grounded in the state's public trust doctrine as something other than interests in property. At least one elected official has called for the case to be appealed to the U.S. Supreme Court.[28]

22. S*ee, e.g.*, Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 170 (Mont. 1984) (suggesting that the public trust doctrine is applicable to surface waters because the State owned the water under the Constitution and the Constitution and the public trust doctrine establish public use rights); *cf.* Arkansas v. McIlroy, 595 S.W.2d. 659, 665 (Ark. 1980) (finding public use rights in surface waters in a common law riparian regime).

23. Brief of Appellee and Cross-Appellant James C. Kennedy, *supra* note 17, at 43.

24. S*ee id.* at 38–40.

25. Public Lands Access Ass'n, Inc. v. Bd. of Cnty. Comm'rs, 321 P.3d 38, 50 (Mont. 2014).

26. I*d.* at 52 (citation omitted).

27. I*d.* at 53.

28. Debby Barrett, S*tream Access Decision Sets New, Negative Precedent for Montana Landowners*, NW. MONT. NEWS SOURCE ONLINE, (Jan. 21, 2014, 10:25 AM), http://www.flatheadnewsgroup.com/hungryhorsenews/article_9e753af0-82b8-11e3-9fd2-0019bb2963f4.html ("The Montana Supreme Court has had a run of bad luck in their decisions being challenged at the federal level lately. The aforementioned unanimous overturning of their decision in the PPL case . . . and another unanimous overturning of their ruling on Montana's campaign finance law,

This could be a tempting test case for a Supreme Court willing to recognize a judicial taking because the taking would be affected not by a state supreme court changing its state laws of property, but rather by a state supreme court contravening a federal concept of property found in the "equal footing doctrine."[29]

The equal-footing and the public trust doctrines have sparked extensive scholarship devoted to the doctrines' legal history[30] and common parentage.[31] It is reasonable to speculate that some of the scholarship aims to prove the superiority of one doctrine or the infirmity of the other.[32] The public trust doctrine, which evolved—controversially to some—from a presumption against alienation of public property to obligations on states to manage and protect public resources, has garnered more attention than battles over streambed title.[33] Perhaps thoroughly discrediting one of the two doctrines would resolve the riddle posed by the PPL *Montana* case. On the other hand, as was proposed, the doctrines themselves may be red herrings. The legal question is whether state or federal law should determine the extent of public and private property interests in bodies of water and the land beneath them. By focusing on the federal and state case law, this article explains how courts have addressed that question long before either "public trust" or "equal footing" became principles of American law.

Under English common law—or at least as the law stood at the time of the American Revolution—the Crown enjoyed presumptive title to lands underlying navigable waters, which included the sea and all waters subject

indicate[s] a problem with [their] interpretation of constitutional rights. This case may move their already-poor record to 0 for 3.").

29. *See* Josh Patashnik, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 260 (2012) (noting that *Stop the Beach Renourishment*, a 2010 Supreme Court decision, "seems to offer a promising avenue of relief for a property owner who believes that a judicial opinion has changed the law in a way that deprives her of a property right she formerly held"); *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010)).

30. *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 715 (1986); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisprudence*, 47 FLA. L. REV. 557, 563–66 (1995).

31. James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1 (1997).

32. *See* James Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007).

33. *See, e.g.*, Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

to the ebb and flow of the tide (the sea and its arms).[34] By contrast, the title of each riparian landowner adjacent to nonnavigable waters extended to the center of the river or stream—*ad filum aquae*.[35] Although American states incorporated the English common law into their judicial canons,[36] many states found the tidal definition of navigable waters unsuited for their unique geography and accordingly invented new definitions of "navigable" that expanded state title to submerged lands. At the same time state courts were redefining "navigable waters" for purposes of title, federal courts were wrestling with the question of what constituted "navigable waters" for purposes of admiralty jurisdiction under Article III of the U.S. Constitution.[37] Eventually the federal courts rejected the English rule, extending admiralty jurisdiction to all waters that were "navigable in fact."[38] The definition of navigable waters as applied by states to determine title to submerged lands was not synonymous with the federal definition for purposes of Article III jurisdiction.[39] Some states in fact retained the English rule, limiting state ownership of submerged lands to waters subject to the ebb and flow of the tide, while other states defined navigable waters more broadly than the federal courts.[40]

This distinction between federal and state law survived—both in the federal and state courts—for well over a century. It wasn't until the 1920s that the federal courts decided that the equal footing doctrine made "navigable waters" for purposes of title a federal, as opposed to state law, question.[41] In the aftermath of this transformation, state courts continued to assert public rights in waters that failed the federal definition of

34. Rasband, *supra* note 31, at 9–11.

35. S. F. D., *Codification and Reform of the Law-No. III*, 16 AM. JURIST & L. MAG.59, 69 (1836).

36. Kathleen Keffer, *Choosing a Law to Live by Once the King Is Gone*, 24 REGENT U. L. REV. 147, 157–59 (2011).

37. *See infra* Part III.

38. The Daniel Ball, 77 U.S. 557 (1870) (overruling The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1851)).

39. Barney v. City of Keokuk, 94 U.S. 324 (1876); *see infra* text accompanying notes 125–30.

40. S. F. D., *supra* note 35, at 70. The authors of *Codification and Reform of the Law* in 1836 noted that "whatever opinion may be entertained on this point, no one would contend, that a distinction should exist, between proprietors above, and those below, the uncertain line, where the tide ceases to ebb and flow, merely because of that circumstance." *Id.*

41. United States v. Holt State Bank, 270 U.S. 49 (1926); *see infra* text accompanying notes 175–84.

"navigable" by adopting a different question of "navigable" for public use.[42] By expanding definitions of navigable waters for use (as opposed to title) and by recognizing the right of the public to incidental contact with the submerged lands of "navigable" waters, some states have managed to provide the public with use rights similar to what the public would have with title to the submerged land.[43] The "public trust" doctrine is one tool state courts have relied on in their efforts to expand public rights in private waters.[44] This article explains how federal and state court precedents have led to the present day impasse of the PPL M*ontana* case and exposes some underlying legal myths that helped to usher us into this predicament.

II. The English Common Law in Early American Courts

Mr. Carson must have been a bit upset when, on April 10th, 1803, a man "trod down his grass," entered the fishery adjacent to the 228 acres he owned along the Susquehanna River, and proceeded to haul off with a thousand fish.[45] Under the English common law rule, if a river was not subject to the ebb and flow of the tide, it was not navigable.[46] As a consequence, title of the riparian landowner—and the exclusive right of fishery—extended to the middle of the river, *ad filum medium aquae*.[47] The plaintiff insisted on this point, arguing that "there is no flow and reflow of the tide . . . therefore, although navigated by boats of a certain description . . . [the Susquehanna] does not come within the legal definition of a navigable river."[48] The Pennsylvania Supreme Court, however, rejected the English rule as "highly unreasonable when applied to [Pennsylvania's] large rivers."[49] Chief Justice Tilghman concluded that "the owner of land on the banks of the S*usquehanna*, has no exclusive right to fish in the river immediately in front of his lands, but that right to fisheries in that river is

42. S*ee infra* Part VI.A (discussing Brown v. Chadbourne, 31 Me. 9 (1849) and Shaw v. Oswego, 10 Or. 371 (1882)).

43. S*ee infra* text accompanying notes 239–45 (discussing Arkansas v. McIlroy, 595 S.W.2d 659 (Ark. 1980)).

44. S*ee infra* Part VI.B.

45. Carson v. Blazer, 2 Binn. 475, 475 (Pa. 1810). The fish taken were American shad, *id.*, which return upstream each spring to their birthplace to spawn. Rich Remer, F*ishtown and the* S*had* F*isheries*, PA. LEGACIES, Nov. 2002, at 20, 20. Thus the fishery constructed by Mr. Carson's brother was presumably the birthplace for the shad taken by Mr. Blazer. C*arson*, 2 Binn. at 477.

46. Rasband, *supra* note 31, at 9–11.

47. C*arson*, 2 Binn. at 483–84.

48. I*d*. at 479.

49. I*d*. at 478.

vested in the state, and open to all."[50] Pennsylvania was perhaps the first state to openly question the adequacy of the English "ebb and flow" standard for navigable waters in the United States, but other states shortly followed with their own consideration—and often rejection—of the English rule.[51]

A. New Jersey Before and After *Martin v. Lessee of Waddell*

To address whether federal or state law determines the definition of "navigable waters" for the purpose of title, New Jersey offers important cases for consideration. In two cases, forty-six years apart, the New Jersey Supreme Court remained steadfast in its conviction that defining navigable waters for purposes of title was fundamentally a state law question. In between these two New Jersey cases, the U.S. Supreme Court decided *Martin v. Lessee of Waddell*, a case cited by Justice Kennedy in PPL *Montana* as fundamental in establishing a federal definition of navigable waters for purposes of title.[52] The New Jersey Supreme Court's decisions—one preceding and one following *Martin*—demonstrate state resistance to the imposition of a federal definition for waters which the states had traditionally defined.[53]

50. *Carson*, 2 Binn. at 495.

51. *See, e.g.*, Peck v. Lockwood, 5 Day 22, 25–26 (Conn. 1811) (rejecting a call for "any train of reasoning as to what is most or least reasonable" and accepting the English common law rule); Cates' Ex'rs v. Wadlington, 12 S.C.L. (1 McCord) 580, 580 (1822) (finding no "legislative act declaring which, or whether any of our rivers are to be considered as public or navigable rivers," but still rejecting the English common law rule "in this state, where our rivers are navigable several hundred miles above the flowing tide."); Wilson v. Forbes, 13 N.C. (2 Dev.) 30, 34–35 (1828) (dismissing the English common law rule as "entirely inapplicable to [North Carolina's] situation, arising both from the great length of our rivers, extending far in the interior, and the sand-bars and other obstructions at their mouths.").

52. PPL Mont., LLC v. Montana, 132 S.Ct 1215, 1227 (2012); *see* Jas. Jeffrey Adams & Cody Winterton, *Navigability in Oregon: Between a River Rock and a Hard Place*, 41 WILLAMETTE L. REV. 615, 620 n.28 (2005) ("[*Martin v. Waddell*] is central to the equal footing doctrine. The court stated the rule controlling ownership of shorelines, beds and banks of navigable-for-title watercourses in relation to the original 13 states."). Other scholars also identify *Martin* as an important step in the development of a federal definition of navigable waters. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 828 (2004).

53. Arnold v. Mundy, 6 N.J.L. 1, 1 (1821); Cobb v. Davenport, 32 N.J.L. 369, 371–72 (1867).

The first New Jersey case, A*rnold v.* M*undy*, decided twenty-one years before M*artin*, confirmed the English common law definition of navigable and, more interestingly, planted the seed of what would become the public trust doctrine years later.[54] In A*rnold*, the plaintiff claimed that the defendant "enter[ed] upon the plaintiff's oyster bed" and carried off with his oysters.[55] Whether the plaintiff had exclusive possession to the submerged lands hinged on whether the title to the adjacent land, which could be traced back to a grant conveyed by King Charles II, did (or even could) include title to the underlying bed.[56] Chief Justice Kirpatrick's majority opinion included two essential findings: first, it affirmed the English rule that title to submerged lands of tidal waters was presumptively owned by the sovereign[57] and second, it found that the sovereign could not have conveyed that title.[58] In oft-quoted language, Kirkpatrick proclaimed:

> I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens . . . ; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but the for the use of the citizen, that is, for his direct and immediate enjoyment.[59]

The first finding of his decision—that the sovereign holds presumptive title to the land underlying navigable water—is simply a restatement of the English common law rule. The second finding of Justice Kirkpatrick's decision—that the lands beneath navigable waters could not be conveyed into private ownership—became the fundamental tenet of the public trust

54. A*rnold*, 6 N.J.L at 10–12.

55. I*d*. at 9.

56. Huffman, *supra* note 32, at 37–39.

57. A*rnold*, 6 N.J.L at 10. ("[A] grant of land to a subject or citizen, bounded upon a fresh water stream or river, where the tide neither ebbs nor flows, extends to the middle of the channel of such river; but that a grant bounded upon a navigable river, or other water, where the tide does ebb or flow, extends to the edge of the water only, that is to say, to high water mark, when the tide is high, and to low water mark, when the tide is low, but it extends no farther. . . . All pretence of claim, therefore, to this bed, founded upon the possession of the adjacent land, must fail.").

58. I*d*. at 11–12; *see also*, *e.g.*, Huffman, *supra* note 32, at 38.

59. A*rnold*, 6 N.J.L. at 11–12.

doctrine.[60] It is important to note that the oyster beds at issue in A*rnold* were subject to the ebb and flow of the tide; therefore, there was no real question as to whether the oyster beds were, according to the English common law definition, navigable waters. The only real dispute in A*rnold* was whether the sovereign—the state or the Crown—could convey title to navigable waters.

Shortly after A*rnold*, New Jersey passed a statute allowing landowners of tidal-influenced riparian land to lease portions of the adjacent submerged land from the state for use as private oyster beds.[61] In M*artin v. Lessee of* W*addell*, the plaintiff had complied with the statute and sought to eject the defendant, who claimed to have a superior title to the submerged lands granted by King Charles II.[62] To reconcile these facts, the U.S. Supreme Court reviewed the New Jersey Supreme Court's decision in A*rnold*—that the Crown could not convey submerged lands.[63] The plaintiff argued that "[p]rivate rivers are presumed to be owned by the adjacent proprietors. Not so with public rivers; they are, at common law, in the king."[64] Thus, the Crown could not have transferred the seabed into private ownership.[65] Directly noting that the case required passing judgment on the A*rnold* decision,[66] the plaintiff asserted that the issue was solely a matter of state law and that the federal courts, sitting in diversity jurisdiction, must decide the matter consistent with the state law: "[I]t is state law [the federal courts] are to apply, not to review, alter or remodel . . . . The federal courts follow, and do not lead; their jurisdiction is occasional. Perhaps, not one part in ten thousand of the public waters in question, are under the jurisdiction of this court at all."[67] Chief Justice Taney, writing for the majority, determined that the decision rested not on state law or federal law but rather English law. The essential issue was whether the Crown's title to the navigable waters, and the soils under them, "were intended to be a trust for the common use . . . or private property to be parceled out and sold to individuals . . . ."[68] The Court reasoned that this inquiry would require consideration of "[t]he laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century or more which has since

60. *See* BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY 45–57 (1998).

61. Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 379 (1842).

62. I*d*. at 378–80.

63. Huffman, *supra* note 32, at 44.

64. M*artin*, 41 U.S. at 383.

65. Arnold v. Mundy, 6 N.J.L. 1, 4 (1821).

66. M*artin*, 41 U.S. at 389.

67. I*d*. at 389–90.

68. I*d*. at 411.

elapsed."[69] From these sources, the Court found that "the shores, and rivers and bays and arms of the sea, and the land under them [were] held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery."[70] Additionally, the Court acknowledged in dicta that it was universal throughout the colonies to "enjoy in common, the benefits and advantages of the navigable waters, for the same purposes, and to the same extent, that they have been used and enjoyed, for centuries, in England."[71]

At the time of the M*artin* decision, many states had considered and expanded by judicial opinion the English doctrine for determining title to submerged lands.[72] These states had treated the issue of what was "navigable" for purposes of title as a state law issue.[73] M*artin* was a departure from this only in the sense that it was a decision by the Supreme Court. Therefore, the emphasis, should be placed on the fact that the Court addressed whether the crown could convey title in trust lands. In rejecting the view that this was a matter of state law, the Supreme Court, if anything, was suggesting that the trust doctrine—not the definition of navigable waters—was a federal law question.[74]

Importantly, the Court decided M*artin* by reference to English common law—not the law as it was evolving in the states. If determining title for a conveyance from the Crown prior to a state's succession as sovereign requires application of the common law of England, conveyances made by the federal government prior to the admission of a state to the union might require application of some Federal common law. It is worth noting that many states that were not one of the original thirteen colonies redefined navigable waters as a matter of state law, such as Tennessee in 1845,[75] Iowa in 1856,[76] and Minnesota in 1893[77] and these decisions effected proprietors who had obtained grants of land from the federal government prior to

69. M*artin*, 41 U.S. at 411.

70. I*d*. at 413.

71. I*d*. at 414.

72. S. F. D., *supra* note 35, at 70.

73. I*d*.

74. S*ee* Herbert Pope, T*he* E*nglish* C*ommon* L*aw in the* U*nited* S*tates*, 24 HARV. L. REV. 6, 6 (1910) (noting that at least for some period of time, "the common law" was thought to be universal and was assumed to be "or ought to be the same in all the states where the common law is supposed to prevail"); *cf.* Hardin v. Jordan, 140 U.S. 371, 381–84 (1891) (discussing the relationship between state, federal, and common law).

75. Elder v. Burrus, 25 Tenn. (6 Hum.) 358 (1845).

76. McManus v. Carmichael, 3 Clarke 1 (Iowa 1856).

77. Lamprey v. Metcalf, 53 N.W. 1139 (Minn.1893).

statehood. Thus, state courts continued immediately and long after *Martin* to treat the definition of navigable waters as a matter of state law without reference to either English or Federal common law.

Three years after *Martin*, the Supreme Court decided *Pollard v. Hagan*,[78] another case in the narrative of establishing a federal definition of navigable waters for purposes of title.[79] *Pollard* arose from facts quite similar to those in *Martin*, except that Alabama, where the facts of *Pollard* took place, was admitted to the Union after the original thirteen colonies. Therefore, while *Martin* turned on English law because the title claim included a grant from the Crown, the plaintiffs in *Pollard* claimed that the United States had inherited its sovereignty over the territory that became Alabama from the King of Spain.[80] Spain, being a civil law country, did not adhere to the same "public trust" doctrine under common law followed by the Court in *Martin*.[81] The plaintiff reasoned that the United States government had the sovereign capacity, just as the King of Spain had, "to grant to a subject the soil under navigable waters."[82] Evoking the equal footing language, the Supreme Court held that Alabama must be accepted to the Union with the same "sovereignty and jurisdiction" of the states preceding it.[83] "To maintain any other doctrine," the Court reasoned, "is to deny that Alabama has been admitted into the union on an equal footing with the original states."[84]

The ensuing question, of course, is what should be considered as governing the "sovereignty and jurisdiction" provided under equal footing? The Court determined this to be the English common law "as modified by our own institutions."[85] The most literal reading might be that this rejected the English common law rule in favor of the developing (but not uniform) rule of navigable waters in the American states. However, since the submerged land in question was not outside the scope of the English common law, another explanation may be offered for the "modification" recognized by the Supreme Court. In this instance, the Court seems to have been concerned with what the state could or could not do with the submerged lands of navigable waters. In rebuking the claim that the federal government could convey submerged land prior to admitting a state to the Union, the Court proclaimed:

78. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

79. Robert Barrett, *History of an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761, 783–84 (1997).

80. *Pollard*, 44 U.S. at 225.

81. *Id.* at 228–29.

82. *Id.*

83. *Id.*

84. *Id.* at 229.

85. *Id.*

> This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.[86]

Perhaps no more persuasive proof that the M*artin* decision was not meant to displace state sovereignty over which waters are public can be offered than by reference to the New Jersey Supreme Court's 1867 opinion in C*obb v*. D*avenport*, which clearly reiterated that the issue was a matter for the state to decide.[87] The C*obb* opinion also made clear, if it was not done so in A*rnold*, that New Jersey was satisfied to adopt the limited English rule.[88] The plaintiff in C*obb* asserted an exclusive right to fish on Green Pond based on the English common law definition of "navigable waters"[89] but also acknowledged that "[t]here are American cases to the contrary . . . which go upon the grounds that the beds of the large navigable rivers were never granted to the riparian owners."[90] The defendant, on the other hand, argued for a navigability-in-fact standard: "Are the waters *actually navigable*? That is the practical test. The tidal test contains no principle, and has not been adopted here as part of the common law."[91] Pointing out that Green Pond was "a natural lake, three miles long and nearly one mile wide," the defendant's counsel argued that it should be treated as an inland sea, subject to the same principles that determined that the submerged land belonged to the state in A*rnold* and M*artin*.[92] The New Jersey Supreme Court, however, found "nothing in topography or location [of New Jersey] that requires a departure from the rules of the common law," and declined to expand the English definition of navigable waters beyond those subject to the ebb and flow of the tide.[93] The court preferred the English rule, which

86. P*ollard*, 44 U.S. at 230.

87. Cobb v. Davenport, 32 N.J.L. 369, 383–84 (N.J. 1867).

88. I*d*. at 378–79.

89. I*d*. at 370.

90. I*d*. at 371–72.

91. I*d*. at 374 (emphasis in original).

92. I*d*. at 374.

93. C*obb*, 32 N.J.L. at 380.

was uniform and clear, over the navigable-in-fact standard, which the court found "wanting in that accuracy and certainty at which the law aims."[94]

B. Other State Law Decisions after *Martin* and *Pollard v. Hagan*

After *Martin*, other state courts continued to define navigable waters for purposes of title under state law. Only three years after the *Martin* decision, Tennessee adopted the broader definition of "navigable" for purposes of title.[95] The Supreme Court of Tennessee contrasted the common law of Great Britain, based in part on "[t]he insular position of Great Britain, the short courses of her rivers, and the well-known fact there are none of them navigable above tide-water but for very small craft" with the civil law of continental Europe, which provides that "all rivers, even above tide-water, provided are navigable for shops or boats, are considered as public property."[96] Considering the geography of Tennessee, the court concluded that "to adopt the English principle . . . would be . . . an absurdity too monstrous to be thought of."[97] Furthermore, the court found that Tennessee had no obligation to adopt the English rule because the State had not incorporated those parts of English common law that were "repugnant to, or inconsistent with, the freedom and independence of this State, and the frame of government therein established."[98] Since the English common law rule for navigability was "so obviously at war with the position of our country and its best interests," the court concluded that the English rule "had never been in force and use in [Tennessee]."[99]

One of the last state court opinions defining "navigability" for purposes of title comes from Minnesota in 1893.[100] *Lamprey v. Metcalf* is an impressive opinion that deserves to be discussed at length, not only because the Supreme Court of Montana cited it nearly a century later,[101] but also because of the clarity with which it handles the question of public versus private ownership. The dispute in *Lamprey* concerned the title to dry land that had been submerged beneath a nonnavigable lake at the time of

94. *Cobb*, 32 N.J.L. at 379–80.

95. Elder v. Burrus, 25 Tenn. 358, 359–62 (1845).

96. *Id.* at 366.

97. *Id.*

98. *Id.* at 367

99. *Id.* at 367–68.

100. Lamprey v. Metcalf, 53 N.W. 1139 (Minn.1893).

101. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 169 (Mont. 1984) (quoting *Lamprey*, 53 N.W. at 1143).

conveyance by the federal government prior to Minnesota's statehood.[102] The riparian owners asserted title against objection by the State, which claimed that "the former bed of the lake belongs to the state, in its sovereign capacity."[103] The court considered two issues: first, whether the riparian owner had title to the bed before the lake dried up and, second, if not, whether the riparian gained title to the dry land as the lake disappeared.[104] The Minnesota Supreme Court acknowledged that, although it may have previously thought that federal law would control the issue, the United States Supreme Court had not explicitly adopted such a stance.[105] Thus, the Court concluded that "whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota."[106]

Just like the Supreme Court of Tennessee a half-century prior and the Supreme Court of Pennsylvania almost a century earlier, the Minnesota Supreme Court began its analysis with consideration of the English rule.[107] And just as those courts that had considered the English rule as ill-fit to their geography, the Minnesota court compared itself favorably to England, where "there are but few lakes."[108] The court also differentiated itself from the English rule temporally, noting that:

> In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed.[109]

After considering the policy merits of public versus private ownership of lake beds, the court framed the question in a broader way than earlier state court decisions: "The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters . . . the line of division being largely determined by its conditions and habits."[110]

102. *Lamprey*, 53 N.W. at 1140.

103. *Id.*

104. *Id.*

105. *Id.* at 1141 ("We therefore approach the question in this case untrammeled by the binding authority of any federal decisions, or even by any direct decisions in this state, in which this is still an open question.")

106. *Id.* at 1140.

107. *Id.* at 1141; *see supra* notes 46–47 (discussing the English Rule).

108. *Lamprey*, 53 N.W. at 1141.

109. *Id.* at 1143.

110. *Id.*

"But," the court posed, "if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred."[111] After contemplating the myriad different interests and uses the public might have over time, the court stated that "[t]o hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time"[112] Thus, the court adopted a rule that reflected the public uses at the time: "[S]o long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the spirit of the common-law rule."[113] This definition of navigable would eventually be referred to as the "recreational use" test, later adopted by many states seeking to protect public use of state waters as well as states protecting public use of beaches.[114]

III. The Development of a Federal Definition of Navigable Waters for Purposes of Admiralty Jurisdiction

What can be said with confidence after reviewing the state law cases—but is perhaps underappreciated—is that for more than the first century of American history, states, as sovereigns, freely modified the common law rule regarding public waters as they saw fit for their circumstance. But federal courts at this time were concerned with the definition of navigable waters for a very different purpose—to determine the admiralty jurisdiction of the courts under Article III, Section 2 of the Constitution.[115]

In an 1825 case, *The Steamboat Thomas Jefferson*,[116] the U.S. Supreme Court decided that admiralty jurisdiction would be limited to navigable waters as defined by the "ebb and flow" rule of English common law.[117] The dispute in *The Thomas Jefferson* arose far inland on the Missouri River, in an area not subject to the tide, and, as a result, the Court ruled that it did not have jurisdiction to consider the case.[118] In 1845, Congress enacted legislation extending the admiralty jurisdiction of the federal courts to the Great

111. *Lamprey*, 53 N.W. at 1143.

112. *Id.*

113. *Id.* at 1144.

114. *See infra* notes 239–45 (discussing Arkansas v. McIlroy, 595 S.W.2d. 659 (Ark. 1980)).

115. *See The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 430 (1851).

116. *Id.*

117. Mary Garvey Algero, *Ebb and Flow of the Tide: A Viable Doctrine for Determining Admiralty Jurisdiction or a Relic of the Past?*, 1 LOY. MAR. L.J. 47, 50–51 (2002).

118. *The Thomas Jefferson*, 23 U.S. at 430.

Lakes.[119] That legislation was challenged as being beyond the constitutional limit of admiralty jurisdiction in *The Propeller Genesee Chief v. Fitzhugh*.[120] Perhaps recognizing the error of applying a tidal limit in an increasingly inland nation, the Court upheld the statute and overturned its decision in *The Thomas Jefferson*.[121] The Court surmised:

> It is evident that a definition that would at this day limit public rivers in this country to tidewater rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tidewater, which does not apply with equal force to any other public water used for commercial purposes and foreign trade.[122]

Extension of admiralty jurisdiction eventually evolved into what has become known as the "navigable in fact" standard. In *The Daniel Ball*,[123] an 1870 decision, the U.S. Supreme Court explained that federal admiralty jurisdiction extended to all waters that are navigable in fact and "they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[124] It is clear from the opinion in *The Daniel Ball* that navigable waters for purposes of admiralty jurisdiction remained a separate question from navigable waters for purposes of title to submerged lands, as defined by the states.

Barney v. City of Keokuk,[125] which followed *The Daniel Ball* by only six years, further eliminated any confusion between the state law definitions of navigable for purposes of title and the definition of navigable for purposes of admiralty jurisdiction. In *Barney*, the City of Keokuk had extended the shore of the Mississippi River by about two hundred feet to build a railroad. The railroad line, however cut off the homeowner on Water Street from access to the river. No doubt upset about this, the homeowner argued that title to the artificially reclaimed portion of the River was his as the

119. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 443 (1851).

120. *Id.* at 446–47.

121. Algero, *supra* note 117, at 52.

122. *The Genesee Chief*, 53 U.S. at 457.

123. The Daniel Ball, 77 U.S. 557 (1870).

124. *Id.* at 563.

125. Barney v. City of Keokuk, 94 U.S. 324 (1876).

riparian.[126] In a paragraph too long to cite in full, but worth parsing carefully, the Court began by noting that artificially reclaimed portions of navigable waters, under the English common law rule, belonged to the crown.[127] The Court then pointed out that "the only waters recognized in England as navigable were tide-waters," and lamented that the:

> [C]onfusion of navigable with tide water . . . had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of navigable waters above tide-water at variance with sound principles of public policy.[128]

Clearly, the Court differentiates between "navigable" as it relates to admiralty jurisdiction and "navigable" as it relates to ownership. Further, it notes that ownership of navigable waters is decided by state law.[129] If there is any doubt, the Court went on to say that the question of title to submerged lands "properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."[130]

IV. The Continued Reliance on State Law Definitions of Navigable Waters for Purposes of Title

Both the U.S. Supreme Court and state courts accepted this distinction between navigable waters for federal admiralty jurisdiction (a question of federal law) and navigable waters for purposes of title (a state law question) well into the 20th Century with one exception—*Illinois Central Railroad Co. v. Illinois*.[131] In light of the Court's prior decision in *Hardin v. Jordan*[132] and the Court's subsequent decisions,[133] *Illinois Central* was clearly an exception to the well-established rule for a single reason: The dispute involved title to one of the Great Lakes—America's inland seas.

126. *Barney*, 94 U.S. at 327.

127. *Id.* at 337–38.

128. *Id.*

129. *Id.* at 334.

130. *Id.* at 338.

131. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

132. Hardin v. Jordan, 140 U.S. 371 (1891); *see* Kearney & Merrill, *supra* note 52, at 919; *see also* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849, 868–69 (2001).

133. *See infra* Part IV.B.

A. The Great Inland Seas Exception: H*ardin* and I*llinois Central*

Considering that I*llinois Central* has become a rather infamous case in American legal discourse,[134] it is surprising how little attention is given to H*ardin*.[135] But H*ardin* shows that the Supreme Court in I*llinois Central* was not creating a new federal rule to determine title to all submerged lands. Rather, H*ardin* makes clear that the Supreme Court in I*llinois Central* treated the Great Lakes as an exception to the general rule that title to submerged lands is a question of state law.

H*ardin* did not in fact involve a dispute over the Great Lakes, but rather involved a title dispute for a relatively small lake.[136] The Court affirmed that the question of title to submerged lands "depends on the law of each state" and proceeded to decide the case exclusively under Illinois state law.[137] Noting that "some of the states" had extended the English rule to navigable rivers, the Court observed that Illinois had adhered to the narrower English rule "that the beds of all streams above the flow of the tide, whether actually navigable or not, belong to the proprietors of the adjoining lands."[138] The Court added that these "observations do not apply to our great navigable lakes, which are really inland seas."[139] The conclusion of H*ardin* was that since Illinois adhered to the common law rule (and had not expanded the definition of navigable waters above the tide), the lake in questions belonged to the riparian owners and not the state.[140]

134. S*ee, e.g.*, Grant, *supra* note 132, at 868–69.

135. Hardin is referenced, if at all, only for the premise that the Great Lakes should be treated like seas for purposes of the public trust doctrine. S*ee, e.g.*, Kenneth K. Kilbert, T*he* P*ublic Trust* D*octrine and the* G*reat* L*akes* S*hores*, 58 CLEV. ST. L. REV. 1, 27 (2010).

136. H*ardin*, 140 U.S. at 372.

137. I*d.* at 382; *see* Janice Lawrence, L*yon and* F*ogerty*: U*nprecedented* E*xtensions of the* P*ublic Trust*, 70 CALIF. L. REV. 1138, 1141 (1982) (suggesting that the Court's choice of state law undermines the concept of a Federal public trust doctrine, not the validity of the equal footing doctrine).

138. H*ardin*, 140 U.S. at 383 (citing Beckman v. Kreamer, 43 Ill. 447 (1867)).

139. I*d.* at 391.

140. I*d.* at 397. After first pronouncing this a matter of state law, the Court found that Illinois adhered to the common law and, not finding persuasive precedent in Illinois state law otherwise, asserted that the Supreme Court is "not without express authority, in addition to that of Lord Coke, as to the rule of the common law." I*d.* at 391.

Illinois Central, by contrast, was a dispute over title to the submerged lands of Lake Michigan along the shore of Chicago.[141] The State of Illinois had conveyed title of the submerged portion of Lake Michigan to the Illinois Central Railroad Company in 1870 and repealed the conveyance three years later.[142] When the railroad company refused to quit the submerged lands, the Attorney General brought suit seeking to quiet title in the state.[143] The Court began its opinion by noting that when Illinois entered the United States in 1818, it had done so "on an equal footing with the original states . . . [with] no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise"[144] Further, the Court noted, "[i]t is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found."[145] The Court, without any reference to the state law of Illinois, went on to reject the tidal ebb and flow limits of the English common law, noting that this doctrine "is now repudiated in this country as wholly inapplicable to our condition."[146] This would be a sudden departure from the holding in *Hardin*, except that the Supreme Court in *Hardin* made clear that the Great Lakes present an exceptional case. *Hardin* and *Illinois* read together hold that while states may generally define navigability for purposes of title, this prerogative does not apply to the Great Lakes—America's "inland seas."[147]

B. After Illinois Central: *Shively v. Bowlby* and *Donnelly v. United States*

The issue of title to submerged lands came before the Supreme Court again only two years after *Illinois Central* in *Shively v. Bowlby*,[148] a dispute over title to the tidal lands below the high-water mark of the Columbia River in Oregon. In this case, the Court directly confronted the issue of how conveyances made prior to statehood should be treated,[149] but it cannot be said that this was a novel problem. *Hardin*, in fact, was a dispute over a conveyance made by the federal government in which "all the justices

141. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 433–34 (1892).

142. *Illinois Central*, 146 U.S. at 448–49.

143. *Id.* at 433–34.

144. *Id.* at 434.

145. *Id.* at 435.

146. *Id.*

147. Hardin v. Jordan, 140 U.S. 371, 391 (1891).

148. Shively v. Bowlby, 152 U.S. 1 (1894).

149. *Id.* 57–58.

agreed that the question must be determined by the law of Illinois."[150] Also, as noted, the *Lamprey* opinion involved a conveyance made prior to statehood.[151] The *Shively* opinion provides an incredibly thorough review of both federal and state court treatment of navigable waters. Although the Court affirmed Oregon's sovereignty over the matter, the decision was not difficult in part because the controversy was over tidal waters. Even still, the Court made sure to reference the law of Oregon regarding title to submerged lands in its opinion.[152] There could be little doubt at the end of the 19th century that states enjoyed the right and responsibility as sovereigns to determine, within their own borders, what bodies of water would be considered navigable and, consequently, whether the title to the submerged lands of these waters rested with the public or private riparian proprietors.

No federal case is more cited by states in support of the proposition that they "may adopt their own definitions of navigability" than *Donnelly v. United States*.[153] And perhaps no other case in the lexicon of "navigable" waters concerns murder. In a federal proceeding, Donnelly was indicted, convicted of murder, and sentenced to life in prison for shooting a Chickasaw Indian "in or near the edge of the water of the Klamath river" in California.[154] Donnelly challenged the jurisdiction of the federal courts.[155] If he was within the limits of the Extension of the Hoop Valley Reservation, he was in the jurisdiction of the federal government.[156] If, on the other hand, Donnelly was on state land, the federal court lacked jurisdiction to convict him.[157] It seems accepted that Donnelly was "upon the Klamath river."[158] The question then was whether the Klamath River was part of the reservation or owned by the state. In deciding this question, the Court noted that under the equal footing language articulated in *Pollard*, "the state had the same rights, sovereignty, and jurisdiction over the navigable waters as the original states . . . and that the title of the navigable waters, and the soil beneath them, was in the state, and subject to its sovereignty and jurisdiction." Citing now familiar cases such as *Barney*, the Court concluded that "what shall be deemed a navigable water within the meaning of the

150. *Shively*, 152 U.S. at 45.

151. *See supra* text accompanying notes 102–03 (discussing Lamprey v. Metcalf, 53 N.W. 1139 (Minn.1893)).

152. *Shively*, 152 U.S. at 55–59.

153. Arkansas v. McIlroy, 595 S.W.2d. 659, 663 (Ark. 1980) (citing Donnelly v. United States, 228 U.S. 243 (1913)).

154. *Donnelly*, 228 U.S. at 252.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

local rules of property is for the determination of the several states."[159] Examining the local law, the Court found that California had adopted the English rule and that the "subsequent judicial history of the state" showed that this "operated . . . as a transfer to all riparian proprietors, including the United States, of the property of the state, if any she had, in the non-navigable streams and the soil beneath them."[160] Given the emphasis of the Supreme Court that the "appropriate authorities of California" determine title to the river,[161] it should not be surprising that D*onnelly* has been cited as recently as 1980 for the right of states to determine "navigable waters."[162]

V. The Switch from a State to Federal Definition of Navigable Waters for Purposes of Title

The phrase "equal footing" appears to have entered the American lexicon through the Northwest Ordinance, the predecessor to which had been drafted by Thomas Jefferson and reflected his desire that new states "be politically equal to the original 13 states."[163] The Supreme Court, in P*ollard*, S*hively*, and several other cases related to the nature of sovereign control of states over navigable waters invoked this language to support the principle that each state inherited title to the submerged lands of navigable waters upon entering the union.[164] To borrow the language from I*llinois C*e*ntral*: "The state of Illinois was admitted into the Union in 1818 on an equal footing with the original states, in all respects . . . . There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits."[165]

This could be read to mean that the question of navigable waters for purposes of title is a question of federal law. That conclusion not only runs counter to the preceding history, which demonstrates that defining "navigable" waters for purposes of title was a question of state law, but also contradicts the holding in H*ardin* only a year prior to I*llinois C*e*ntral*, wherein the Court reaffirmed that the definition of "navigable" waters was essentially a question of state law. A better explanation of the Supreme Court's

159. D*onnelly*, 228 U.S. at 262.

160. I*d*. at 263–64.

161. I*d*.

162. S*ee infra* text accompanying notes 230–38, 246–51 (discussing Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) and Arkansas v. McIlroy, 595 S.W.2d. 659 (Ark. 1980)).

163. Rasband, *supra* note 31, at 32.

164. Pollard v. Hagan, 44 U.S. (3 How.) 212, 216 (1845); Shively v. Bowlby, 152 U.S. 1, 27 (1894).

165. I*llinois C*e*ntral*, 146 U.S. at 434.

reference to the equal footing doctrine in these early title cases is for the more limited principle that each new state entered the union with nothing less than the title to the submerged lands encompassed by the English rule. That would explain at least *Martin*, *Pollard*, and *Shively*, since all three concerned tidal waters. The odd case out appears to be *Illinois Central*, but as also was shown in the prior discussion, U.S. courts treated the Great Lakes as inland seas and, even if not subject to the ebb and flow of the tide, within the spirit of the English rule. It seems noteworthy that not one case in the first 150 years of the new American republic invoking the equal footing language denied a state's claim to title of submerged lands. A 1921 article in the Harvard Law Review capably sums up the generally accepted position:

> Whether ownership of riparian lands extends to the middle thread, or stops with meander lines or with low-water lines, are local questions determined by state law, which is binding on the federal courts, even to the latest decision changing the local rules. And this applies to claims of title under federal grants, and to accretions and made land in national streams like the Mississippi.[166]

A series of three cases from 1922 to 1931 changed the question of title from local to federal law and should be recognized today as the actual starting point of the "equal footing doctrine" as applied to questions of title.

A. The *Brewer-Holt-Utah* Trilogy

The first case in the trilogy, *Brewer-Elliott Oil & Gas Co. v. United States*, involved a dispute over title to the bed and banks of portions of the Arkansas River.[167] The United States, acting as trustee for the Osage Tribe of

166. Merritt Starr, *Navigable Waters of the United States—State and National Control*, 35 HARV. L. REV. 154, 164 (1921). Starr also declared that:

> The shores and beds of navigable waters in the original states were not granted to the national government, but were reserved to the states. And upon the admission of new states to the Union the beds of navigable rivers within their boundaries passed to the states, so that they have the same rights, sovereignty, and jurisdiction over the shores and beds as have the original states. The status of this land is determined by the law of each state.

Id. at 162. Starr could have meant by "status" either that the alienability of the land (public trust doctrine) or the original title to the land (equal footing doctrine) is a matter of state law. The phrase quoted in the text makes clear that, at least to the latter point, Starr thought state law was controlling.

167. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922).

Indians, sought to enjoin the development of oil and gas leases granted by the state of Oklahoma in portions of the river crossing the Osage Reservation.[168] The state of Oklahoma, intervening on behalf of the lessees, argued that the relevant portions of the Arkansas River were navigable under state law and thus title to the submerged land rested with the state—not the U.S. government.[169] The Court did not outright deny the state court jurisdiction on the question of what constitutes navigable waters, but instead determined that the state court's opinion over navigable waters could not be binding on the federal government, which had not been party to the state court adjudication.[170] Referring to the H*ardin* decision, the Court accepted that "[i]n government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred."[171] The Court continued:

> Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river granted and vesting before statehood, depends for its validity on nonnavigability of the stream in fact. In such a case, navigability *vel non* is not a local question.[172]

In other words, the question of navigable waters for purposes of title is generally a local one, but not in cases where the title being asserted was granted prior to statehood. This principle is a little less controversial than asserting that the question of navigable waters for purposes of title is *always* a federal question (that comes later). But looking back at the preceding history, it is fairly clear that the status of grants made prior to statehood were determined by local law until B*rewer-*E*lliott*.

The Supreme Court in B*rewer-*E*lliott* declared that:

> [I]t is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what

168. B*rewer-*E*lliott*, 260 U.S. *at* 79.

169. I*d*. at 87.

170. I*d*. at 86.

171. I*d*. at 89.

172. I*d*.

> actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.[173]

Taken literally, each state should have succeeded only to the navigable waters defined by the English rule—as was the case in M*artin*. That holding, however, would have radically upset the established law in many states. Instead, the Supreme Court decided to use the navigable-in-fact rule, which it had previously applied only in cases regarding the admiralty jurisdiction of the federal courts.[174] Declaring navigable-in-fact as the proper rule for all states would have upset the state court decisions that had rejected the American rule in favor of the English rule such as New Jersey, Illinois and Connecticut. How far-reaching the consequences of the B*rewer-Elliott* decision might have been is not particularly clear. But the confusion would not matter because four years later, the Supreme Court expanded the applicability of the federal definition of navigable waters to all questions of title.

Considering the clear articulation in favor of state sovereignty by the Minnesota Supreme Court in L*amprey*, it may not be surprising that the monumental turning point, H*olt State Bank*,[175] involved a dispute over title to the bed and banks of a Minnesota lake. In 1926, the United States brought suit to quiet title to the formerly submerged land of a lake, which the United States claimed had not been navigable and therefore was part of an earlier secession of land by the Chippewa tribe to the federal government.[176] In deciding H*olt State Bank*, the Court affirmed two lower court opinions that found the lake to be navigable.[177] He rejected, however, the lower courts application of state law as opposed to federal law to reach that conclusion.[178] In the case below, the Eighth Circuit had stated that "[i]t is determined by the law of the state where . . . the waters are navigable, subject only to the paramount right of the United States to regulated and improve the navigation of those waters for commercial and public purposes."[179] The Circuit Court acknowledged B*rewer-Elliott* as an exception to the long established law but dismissed it as "not material in the

173. B*rewer-Elliott*, 260 U.S. at 88.

174. I*d*. at 85–86.

175. United States v. Holt State Bank, 270 U.S. 49 (1926).

176. Frank W. DiCastri, A*re All States Really Equal? The 'Equal Footing' Doctrine and Indian Claims to Submerged Lands*, 1997 WIS. L. REV. 179, 188–89 (1997).

177. H*olt State Bank*, 270 U.S. at 51.

178. I*d*. at 55.

179. United States v. Holt State Bank, 294 F. 161, 164 (8th Cir. 1923), *aff'd*, 270 U.S. 49 (1926).

consideration of this case."[180] Then, quoting *Lamprey* at length, the Circuit Court dismissed the United States' claim to title.[181] The Supreme Court held that this particular aspect of the lower courts' decisions was in error. In support of the proposition that the question of navigability "is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts," the Court cited *Brewer-Elliott*.[182] "Navigability," the Court directed, "when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts."[183] Although not calling too much attention to the sweeping change this decision made on the settled legal landscape, Justice Van Devanter offered some justification for the rule: "To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."[184] In *United States v. Utah*, which followed *Holt* by only five years, the United States successfully quieted title in itself "to the beds of the portion of the Colorado river and the San Juan river"[185] by arguing that the portions of the rivers in question were not navigable under the now recognized federal definition.[186] The title belonged to the riparian landowners along their banks—which happened to be the United States government.[187] Thus, the "*Brewer-Holt-Utah* trilogy . . . established that navigability for the purpose of determining title was a federal law question to be decided by federal courts."[188] This is the origin of the "equal footing doctrine" as applied today.

B. Considerations of the Equal Footing Doctrine as Applied to Navigable Waters

In a unanimous 2012 decision, the Court in PPL *Montana* asserted that "any ensuing questions of navigability for determining state riverbed title are governed by federal law" since title to these lands "was 'conferred not by Congress but by the Constitution itself'" under the equal-footing doctrine.[189]

180. *Holt State Bank*, 270 U.S. at 165–66.

181. *Id.* at 165 (quoting Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn.1893)).

182. *Id.* at 55–56.

183. *Id.*

184. *Id.* at 56.

185. United States v. Utah, 283 U.S. 64, 90 (1931).

186. *Id.* at 71–72.

187. *Id.*

188. Rick Best, *The Determination of Title to Submerged Lands on Indian Reservations*, 61 WASH. L. REV. 1185, 1191 (1986).

189. PPL *Mont.*, 132 S. Ct. at 1227.

The opinion summarized the preceding history, noting that "[s]ome state courts came early to the conclusion that a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide."[190] Although implicitly recognizing that states treated the question as a matter of state law, the Court claimed that "[t]he rule for state riverbed title assumed federal constitutional significance under the equal footing doctrine,"[191] and cites a string of 19th century cases, such as M*artin* and P*ollard*, for support.[192] A close examination of the cases cited by the Court affirms that B*rewer-*E*lliott* and H*olt* were the first cases to affirmatively assert federal law as the exclusive determination of title to submerged lands.

One might wonder whether it is sound policy or somehow better to have questions of riverbed title decided by federal as opposed to state law. The Court in PPL M*ontana* selected its view of the best policy for property laws and rejected the equally sound policy arguments of twenty-six states.[193] The Court expressed some sympathy for the states' view, but relied on its own conclusion that the size of the portions in question was large enough to be administrable by different sovereigns.[194] Furthermore, the Court in PPL M*ontana* adopted a different test for title than what has been established by the federal courts for federal regulatory jurisdiction. While the "navigable in fact" test applied for purposes of federal regulatory jurisdiction generously

190. PPL M*ont.*, 132 S. Ct. at 1227.

191. I*d.*

192. I*d.* ("In 1842, the Court declared that . . . the people of each State . . . 'hold the absolute right to all their navigable waters and the soils under them,' subject only to rights surrendered and powers granted by the Constitution to the Federal Government. In a series of 19th-century cases, the Court determined that the same principle applied to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution.") (quoting Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842) (citing Pollard v. Hagan, 44 U.S. 212, 228–29 (1845); Knight v. U.S. Land Ass'n, 142 U.S. 161, 183 (1891); Shively v. Bowlby, 152 U.S. 1, 26–31 (1894)).

193. Amicus Brief in Support of Respondent by Oregon et al., PPL M*ont.*, 132 S.Ct. 1215 (2012) (No. 10-218) (arguing that "[a] test for navigability that excludes segments of navigable rivers from a state's title would severely hamper public use of the river by creating segments under private control that could exclude the public").

194. PPL M*ont.*, 132 S.Ct. at 1231 (citing Michael A. Heller, T*he* T*ragedy of the* A*nticommons*, 111 HARV. L. REV. 621, 682–84 (1998)). Note that the Supreme Court, in making this point, cites a H*arvard* L*aw* R*eview* article regarding the consequences of "overdivision." This is a purely subjective analysis of policy concerns related to property law—what has always been a traditional domain of the state.

disregards portability,[195] the now separate "navigable-in-fact" test applied for purpose of title looks closely at the length of any given portage—effectively reducing the public domain in many states.

If H*olt* was the point at which the equal footing doctrine required a federal definition of navigable waters, it is proper to inquire what the doctrine meant for navigable waters prior to H*olt*. From the federal cases that reference the doctrine prior to H*olt*, there appears to be two ways to answer this question: Either the equal-footing doctrine assures that each state succeeded to nothing less than English common law formulation or it guaranteed to the states the power as sovereign to define navigable waters. One of the only cases in which the Supreme Court invoked the equal-footing doctrine outside of submerged lands provides a useful analog to understanding this latter theory.

In C*oyle v*. S*mith*, the Supreme Court rejected a bill that conditioned Oklahoma's admittance to the union on where the State placed its capitol.[196] The Court considered the right of the state to make this decision an inherent aspect of its sovereignty, protected by the equal-footing doctrine.[197] Invoking the equal footing doctrine to hold that every state must abide by the same common law definition of navigable waters for purposes of title would be like holding that since most states placed capitols along a well-travelled highway in the center of the state, all new states would have to do the same to be on an equal footing. The difference between equal footing as applied in C*oyle* and equal footing as applied to determine title of submerged lands is the difference between an equal right to self-determination and an equal outcome to an already decided question. Of course, one of the problems with concluding that the outcome had to be equal is that the states, prior to this reading of the equal footing doctrine, had not, as PPL M*ontana* suggests, developed a consistent rule for what were to be considered navigable waters. Understanding that the legal definition of "navigability" for purposes of title had been a state law question puts the "equal footing doctrine" on its head. Unlike their forbearers, new states were deprived of the right as sovereign to determine the most appropriate rule regarding public ownership of submerged lands for their own geography and culture. In this sense, new states were treated rather unequally under the equal-footing doctrine and all states found themselves constrained.

195. PPL M*ont.*, 132 S.Ct. at 1231 (citing The Montello, 87 U.S. 430 (1874)).

196. Coyle v. Smith, 221 U.S. 559, 579–80 (1911).

197. I*d.* at 563–66.

VI. The Persistence of Public Use Rights in Private Waters

The transformation of navigable waters for purposes of title from a state to federal question had two effects. The first, as noted, was that states suddenly found themselves losing disputes over ownership of submerged lands (as was the case in *Brewer-Elliot*, *Holt Bank*, and *Utah*). The second effect was that states began to protect public use of water through other legal doctrines that do not depend on the status of title to the underlying streambed. In 1961, the Wyoming State Supreme Court for example, decided that title to submerged land was irrelevant to the public's right to use public waters.[198] The recognition of public rights and interests based on state law in waters and submerged land that, under federal law, are privately owned leads to the federal/state law conflict identified but not resolved in PPL *Montana*.

While many state courts have invoked the public trust doctrine as a basis for recognizing public use rights in otherwise private waters, it is not the exclusive or oldest legal basis for doing so: "public use of navigable surface waters may be protected under variations of the public easement theory or the public trust doctrine even though the state has relinquished bed ownership, or perhaps without regard of subaqueous title."[199] Joseph Kinnicut Angell, a prominent author on American law in the early 19th century, identified three different types of waters: "First, where it is altogether private, as in the case of shallow streams; secondly, where it is private property but subject to public use; and, thirdly, where the use and property are both public."[200] The following section of this article reviews the middle category of mixed public use and private ownership. First, the section analyzes state court decisions that find a traditional "public use servitude"[201] in private waters; second, the section discusses the more recent decisions that have invoked the evolving "public trust doctrine."[202] Both sets of cases show courts willing to adapt the law to changing public needs—such as finding a "public highway" as necessary for the timber industry to float logs[203] to market or finding a "public trust right" to recreational use.[204]

198. Day v. Armstrong, 362 P.2d 137, 151 (Wyo. 1961).

199. Leighton L. Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 421 (1970); *see* R. Timothy Weston, *Public Rights in Pennsylvania Waters*, 49 TEMP. L.Q. 515, 516-39 (1976) (discussing the legal origins of public rights in surface waters).

200. JOSEPH K. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 204 (3rd. ed. 1840).

201. *See infra* Part IV.A.

202. *See infra* Part IV.B.

203. E.*g*. Brown v. Chadbourne, 31 Me. 9 (1849); Shaw v. Oswego, 10 Or. 371 (1882).

A. The Public Use Servitude

Angell noted in his earlier 1824 treatise that some rivers (such as the Thames) were "considered as public *highways by water*," and as such, private riparian owners—even in portions above the high-tide—would be liable for impediments to public use.[205] These rivers, Angell proclaimed, "are called public rivers not in reference to the *property* of the river, for that is in the individuals who own the land, but in reference only to the *public use*."[206] Several states that had adopted the limited English rule—that only waters subject to the ebb and flow of the tide were public—subsequently found a separate "public use servitude" over private streams that otherwise belonged to a riparian landowner.[207]

For example, in B*rown v. Chadbourne*, the Supreme Court of Maine sidestepped its previously held view that the riparian owns the property underlying a river not influenced by the tide by adopting a separate test to establish where a privately owned river is open to public use.[208] The Maine court distinguished its rule for title from that of Pennsylvania, where "the large fresh water rivers, in that State, are altogether public; not only their waters, but their beds,"[209] and found that the public had a right to use streams capable of being used "for the floating of vessels, boats, rafts, or logs."[210] Importantly, the court further found that this use right was not established as a prescriptive easement, dependent on showing public use for some period of time.[211] The court reasoned that "[i]f a stream could be subject to public servitude, by long use only, many large rivers in newly settled States, and some in the interior of this State, would be altogether under the control and dominion of the owners of their beds, and the

204. E.*g*. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719. *See* Brian A. King, *The Public Trust Doctrine and Mixed-Use Development: The Proposed Golden State Warriors Arena and the Implications for Future Development on the San Francisco Bay*, 20 Hastings W.-Nw. J. Envtl. L. & Pol'y 461 (2014) (discussing the public trust as related to development of San Francisco's waterfront in the context of the formerly proposed arena for the NBA's Golden State Warriors).

205. Joseph K. Angell, A Treatise on the Common Law in Relation to Water-Courses 15 (1824).

206. I*d*.

207. E.*g*., Brown v. Chardbourne, 31 Me. 9 (1849); Shaw v. Oswego, 10 Or. 371 (1882).

208. B*rown*, 31 Me. at 19.

209. I*d*. at 21.

210. I*d*.

211. I*d*.

community would be deprived of the use of those rivers, which nature has plainly declared to be public highways."[212] The test to establish a public servitude was then simply "whether a stream is inherently and in its nature capable of being used for the purposes of commerce" including log floating.[213]

Oregon adopted the same separate test to determine whether the public had use rights in private rivers in *Shaw v. Oswego*, a dispute in the late 1800's between a riparian who wanted to build a sawmill by diverting water from the Tualatin river and a riparian downstream.[214] The downstream plaintiff alleged that the permanent diversion of water caused him injury since he owned the bed and banks of the Tualatin River.[215] The mill-\owner argued, in his defense, that the river was a "public navigable stream" and, since the state legislature had authorized his diversion, the downstream riparian could not claim injury.[216] Having previously recognized that a river capable of being used to float logs could be used for that purpose, the court turned to consideration of the riparian's interest in a nonnavigable river capable of floating logs.[217] The Oregon court took a balanced approach. It quoted Lord Hale for the English rule, but recognized that some state "courts have held that upon the large fresh water rivers which are navigable in fact, the riparian owners do not take to the middle of the river, but that the state is the owner of the subjacent soil, and the public have an easement in the river."[218] Having surveyed both the English rule and American rule, the court decided that the Tualatin river was ill-suited to either conclusion.[219] Instead, the Oregon court looked favorably at the Maine holding in *Brown* and similar outcomes in Michigan and Wisconsin, finding that "where a stream is naturally and of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose."[220] Since the downstream riparian was in fact the owner of the submerged land, the court granted an injunction on the diversion.[221] Interestingly, the Oregon court suggested that its opinion should not be read as the final say on whether Oregon recognized an exception to the English rule regarding title to submerged lands: "It is, perhaps," the court noted, "proper to remark that

212. *Brown*, 31 Me. at 21.

213. *Id.*

214. Shaw v. Oswego, 10 Or. 371 (1882).

215. *Id.* at 372.

216. *Id.* at 373.

217. *Id.* at 375.

218. *Id.* at 376–77.

219. *Shaw*, 10 Or. at 382.

220. *Id.* at 382.

221. *Id.* at 383.

the facts of this case, not coming within the exception to the common law principle adopted by some of the courts of the Union, no opinion is intended to be expressed on that point."[222]

Just as Oregon and Maine adopted "log floating" tests when the timber industry was an important part of their local economies, courts in the mid- to late-20th century adopted "recreational use" tests when public recreational use was increasingly valued. Two cases in this line also reveal that at least some state courts had not necessarily ceded the argument over whether federal or state law determined title to the submerged land. Both the Missouri court in E*lder v. Delcour*[223] and the Wyoming court in D*ay v. Armstrong*[224] asserted that title to submerged lands was still a question of state law, but established public use rights regardless of the title to submerged lands. The Missouri Supreme Court noted that it previously "held to the more rigid [English] rule, and with some aggressiveness," and therefore could not conclude anything other than the river at issue was privately owned.[225] On the other hand, the Wyoming Supreme Court refused to decide on a rule for title to submerged lands because it found the question irrelevant to determine the extent of public rights in waters.[226] Both courts concluded that the public could make use of the rivers in question despite the fact that the riparian owner did have or might have title to the submerged land.

The Missouri court reached its conclusion in D*elcour* by noting that ownership of submerged lands did not give a riparian absolute "title and ownership."[227] Instead, ownership "was subject to the burdens imposed by the river," which included the fact that "he could not divert or obstruct the flow of the water without civil and criminal liability."[228] In other words, the court found that since the waters were public, then, under the appropriate inquiry, the title to the submerged land was "subject to an easement for public travel by boat and wading."[229]

While asserting the right of the state to set the rule for ownership, the Wyoming State Supreme Court in D*ay* also determined that ownership was

222. S*haw*, 10 Or. at 383 ("It is . . . perhaps proper to remark that the facts of this case, not coming within the exception to the common law principle adopted by some of the courts of the Union, no opinion is intended to be expressed on that point.").

223. Elder v. Delcour, 364 Mo. 835 (1954).

224. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

225. D*elcour*, 364 Mo. at 842–43.

226. D*ay*, 362 P.2d at 143.

227. D*elcour*, 364 Mo. at 844.

228. I*d.*

229. I*d.* at 843.

irrelevant to the public's right to use public waters.[230] In rejecting the assertion that the federal test of navigability demarcated the extent of public rights in waters, the court noted that although:

> There is an element of paramount control by the Federal government with respect to navigable waters . . . that superior right exists only where navigable waters may be used in either interstate or international commerce. . . . [T]he state may lay down and follow such criteria for cataloging waters as navigable or nonnavigable, as it sees fit, and the state may also decide the ownership of the submerged lands, irrespective of the navigable or nonnavigable character of waters above them.[231]

Although firmly establishing that "the right of every person over or through whose lands the waters belonging to the State are found or flow . . . is subject to the State's right to use and control its waters,"[232] the court notably provided an exception where "the title of the Federal government . . . was incumbered when that title passed from the Federal government to the State upon its admission to the Union."[233] Then, perhaps knowing that the right of the state to define navigable waters for purposes of title was in doubt, the Wyoming court declined to pass judgment on the "criteria used by courts of different states and of the United States to determine navigability of waters and ownership of land beneath them."[234] Instead, the court decided that ownership of the bed was irrelevant since the state owned the water overflowing it,[235] and announced that waters capable of floating were available to the public for such use.[236] Further, the court held that the public could scrape or touch the bottom of the river, as well as "disembark and pull, push or carry over shoals, riffles and rapids" as necessary to realize "the full enjoyment of the public's easement."[237] Unlike

230. D*ay*, 362 P.2d at 151.

231. I*d*. at 143 (citing Donnelly v. United States, 228 U.S. 243 (1913)).

232. I*d*. at 144

233. I*d*.

234. I*d*. at 143.

235. I*d*. at 144–45.

236. D*ay*, 362 P.2d at 147 ("Irrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of the State for floating usable craft and that use may not be curtailed by any landowner. It is also the right of the public while so lawfully floating in the State's waters to lawfully hunt or fish or do any and all things which are not otherwise made unlawful.").

237. I*d*. at 145–46.

some other states on this point, however, the court explicitly stated that "to wade or walk the stream remains un unlawful trespass."[238]

The right of states to define navigability for purposes of title—as noted so clearly in the D*ay* opinion—has not been relinquished without defiance. In A*rkansas v.* M*cIlroy*,[239] the Arkansas Supreme Court revisited its definition of "navigable waters" to ensure that the "finest white water float stream" in the state could be used by the public for recreation.[240] The State Supreme Court of Arkansas first recognized that according to its precedent, the "river is legally navigable if actually navigable and actually navigable if commercially valuable."[241] Conceding that the Mulberry River failed to meet this standard, the court applauded the language of its precedent anticipating that this definition was subject to change with the changing culture and needs of the state,[242] and adopted the view that if a river could "be used for a substantial portion of the year for recreational purposes," it was navigable and open to the public.[243] The court's opinion is somewhat opaque in terms of what effect the new definition had on title to the submerged land. The majority mentions "title" only in noting that navigability is a federal question in "title disputes between the state and federal governments" but "[o]therwise, the state may adopt their own definitions."[244] Reading the opinion closely, it appears that Arkansas' new rule was meant to affect title—not just use. For one, the court cited D*onnelly* to support its right to define navigable waters.[245] The question at issue in D*onnelly*, as previously discussed, was whether Mr. Donnelly, upon the water of the Klamath River, was on land belonging to the state or the tribe.[246]

238. D*ay*, 362 P.2d at 146.

239. Arkansas v. McIlroy, 595 S.W.2d. 659 (Ark. 1980).

240. M*cIlroy*, 595 S.W.2d.at 662.

241. I*d.* at 663.

242. I*d.* at 663–64 (quoting Barboro v. Boyle, 178 S.W. 378, 380 (Ark. 1915)) ("'It is the policy of this state to encourage the use of its water courses for any useful or beneficial purpose. There may be other public uses than the carrying on of commerce . . . . [T]he waters of the lake could be used for the purpose of flooding the rice fields and for other agricultural purposes . . . . [T]he banks of the lake may become more thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built . . . . [T]he water might be needed for municipal purposes. Moreover, the waters of the lake might be used to a much greater extent for boating, for pleasure, for bathing, fishing and hunting than they are now used.'").

243. I*d.* at 665.

244. I*d.* at 663 (citations omitted) (citing Donnelly v. United States, 228 U.S. 243 (1913)).

245. I*d.*

246. S*ee supra* text accompanying notes 154–61.

Second, the Arkansas court cited from its own precedent *Lutesville Sand & Gravel Co. v. McLaughlin*—a case which could not be more directly fought over ownership of the submerged land because it was a dispute over sand and gravel dredged from the bottom of the Spring River.[247] Finally, Chief Justice Fogelman recognized in his dissent that the adoption of the recreational use test would affect the title of submerged land. His dissent deserves to be quoted if only for the tenor of his disapproval: "The adoption of a so-called modern test changes a rule of property and apparently divests titles that have been vested under the prior test. In Arkansas, unlike communist states, it is the right of private property, not the rights of the public, that rises above constitutional sanction."[248]

B. The Public Trust Doctrine

Given the ubiquitous application of the public use servitude to protect and provide public use rights in otherwise privately owned streams, one might wonder what the "public trust" has to do with public use rights in waterways at all. Why do courts turn to this doctrine to find public use rights in public waters? The Wyoming Supreme Court in *Day*, for example, noted that the "waters themselves belong to the State and are held in trust by it for the benefit of the public."[249] Similarly, the Montana Supreme Court, in *Montana Coalition for Stream Access v. Curran*, determined that the private owner of a streambed could not prohibit the public from recreating in the water since "[t]he . . . public trust doctrine do[es] not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters."[250] On the other hand, the Arkansas Supreme Court in *McIlroy* only mentioned the public trust in reference to an Ohio opinion, placing the phrase in quotation marks that suggest a degree of skepticism: "Applying a 'public trust' to the Little Miami River, the Ohio court found that the State of Ohio holds these waters in trust for those Ohioans who wish to use the stream for all legitimate uses, be they commercial, transformational, or recreational."[251] In declaring its new rule for rivers with public use rights, the Arkansas court did not seem to think the public trust doctrine was a necessary element.

It might be helpful to start out by declaring what the public trust doctrine is exactly, but since the public trust doctrine is applied differently

247. Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 892–93 (Ark. 1930).

248. *McIlroy*, 595 S.W.2d. at 667–69 (Fogleman, C.J., dissenting).

249. Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961).

250. Mont. Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984).

251. *McIlroy*, 595 S.W. 2d. at 664.

by each state where it is recognized, finding one consistent definition is impossible.[252] Blumm generalized the trust doctrine into four applications:[253] First, the doctrine can be seen as a public easement, "a property right entitling the public to maintain access to water recourses."[254] Second, the doctrine is invoked as a defense to takings claims, wherein "the state need not compensate for limiting or restricting private development of trust resources because . . . there are no vested rights in trust property."[255] The third application is as a rule of statutory construction that directs courts to construe "statutes terminating public trust restrictions . . . narrowly."[256] Finally, the public trust doctrine also can provide a sort of "hard look" obligation, wherein the courts impose "procedural requirements in the name of the public trust."[257] To see how the doctrine is invoked to provide for public use rights in water and submerged land, it is helpful to look at a series of cases related to beaches and then review the 1984 Montana decision in *Curran*.

In three relatively recent cases, the New Jersey Supreme Court—where the public trust doctrine arguably originated some 150 years prior—expanded the uses protected by the public trust to include recreation, extended the reach of burdened property to include dry sand beaches, and found public rights protected by the public trust doctrine even in private property. The first case, *Borough of Neptune City v. Borough of Avon-By-The Sea*, was instigated by an oceanfront municipality's decision to "charge non-residents higher fees than residents for the use of its beach area."[258] The court concluded that the "common law right of access to the ocean in all citizens of the state" was safeguarded by the public trust doctrine.[259] In reaching this conclusion, the court recognized "recreation," in addition to

252. There is a public trust doctrine in federal common law relevant to determining the status of trust lands granted by the federal government to private owners prior to statehood. *See, e.g.*, United States v. Montana, 450 U.S. 544 (1981).

253. Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 578 (1989).

254. *Id.* at 580.

255. *Id.* at 577.

256. *Id.* at 587.

257. *Id.* at 592. The more expansive public trust doctrine can be traced to Joseph Sax and his 1971 book "Defending the Environment." *See* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT (1971). For examples of courts applying this version of the public trust doctrine see, e.g., Nat'l Audubon Soc. v. Superior Court, 658 P.2d 709 (Cal. 1983) and Robinson Twp. v. Pa., 83 A.3d 901 (Pa. 2013).

258. Borough of Neptune City v. Borough of Avon-By-The Sea, 294 A.2d 47, 48–49 (N.J. 1972).

259. *Id.* at 51.

traditional trust concerns such as fishing, navigation and commerce.[260] In the second case, *Matthews v. Bay Head Improvement Ass'n*, the New Jersey Supreme Court found that the public "may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore" in order to realize the benefit of trust resources.[261] Finally, in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*, the New Jersey Supreme Court concluded that the public trust doctrine required that a private club allow public access to an upland sand beach for a reasonable fee.[262]

Once the Montana court in *Curran* established that the state owned all of the surface water in the state,[263] it employed an analysis similar to the New Jersey beach cases: that the state's ownership is burdened by a public trust and that the state must ensure the public use of the waters, including recreation. "In sum," the court concluded, "we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for non-recreational purposes."[264] One could read the Montana approach as unique to western states that assert ownership of all surface waters, since the Montana court emphasized that "the waters [are] owned by the State under the Constitution."[265] Western states, which use a prior appropriation system to allocate water rights, claim sovereign ownership of the waters in their state constitutions and have defended that ownership as being recognized by the Desert Lands Act.[266] But the states that have the common law riparian regime for determining water rights have also found public use rights in surface waters

260. *Borough of Neptune City*, 294 A.2d at 53.

261. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363–64 (N.J. 1984).

262. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 113 (N.J. 2005).

263. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 170 (Mont. 1984).

264. *Id.* at 171 ("[A]ny surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.")

265. *Id.* at 170.

266. *See, e.g.*, Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 161–62 (1935) ("Congress must have known that innumerable instances would arise where lands thereafter patented under the Desert Land Act and other lands patented under the pre-emption and homestead laws, would be in the same locality and would require water from the same natural sources of supply. In that view, it is inconceivable that Congress intended to abrogate the common-law right of the riparian patentee for the benefit of the desert landowner and keep it alive against the homestead or pre-emption claimant.").

via the public trust doctrine,[267] so this aspect of the Montana opinion should not be overemphasized when discussing the issue more broadly.

Unlike the Wyoming *Day* decision, the Montana court did not assert a state right to define navigability for title. The court stated that "[n]avigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes."[268] Like the Wyoming court, however, the outcome of the Montana opinion is that title to the submerged lands is irrelevant for establishing public use. Nevertheless, the Montana court must have been aware that navigability for title was, at least for some time, a state law question. Not only did the *Curran* decision cite *Day*, wherein the Wyoming court articulated its right to define navigable waters for purpose of title, the *Curran* decision cited *Lamprey* at length.[269] The *Lamprey* opinion cannot be understood as anything but a case related to title of the submerged land since the fight was over the dry land the receding lake left behind.[270] The court's reliance on *Lamprey* and *Day*, in fact, provides a nice narrative of case law from 1893, where the issue of ownership was purely a matter of state law, to 1961, when the Wyoming court still thought title might be an issue of state law, but found the question irrelevant to determining public use rights.[271] The narrative concludes with *Curran*'s holding that title is a matter of federal law, but title is irrelevant to the question of public use rights.[272] In an opinion issued by the Montana court the same year as *Curran*, the court rejected an argument that permitting public use was a deprivation of a property right, stating simply that "ownership of the streambed is irrelevant to determination of public use of the waters for recreational purposes. Navigability for recreational use is limited, under the Montana Constitution, only by the capabilities of the waters themselves for such use."[273] The only dissenting justice of the seven involved in the *Curran* decision lamented that "[b]y adopting the recreational use test . . . this Court . . . may be creating a procedure whereby valuable property rights are condemned and taken without payment of compensation."[274]

267. *See, e.g.*, State ex rel. Brown v. Newport Concrete Co., 336 N.E.2d 453, 457 (Ohio Ct. App. 1975).

268. *Curran*, 682 P.2d at 170.

269. *Id.* at 169 (discussing Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn.1893)).

270. *See Lamprey*, 53 N.W. at 1139–40.

271. *Curran*, 682 P.2d at 48–52.

272. *Id.* at 56.

273. Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088, 1093 (Mont. 1984).

274. *Curran*, 682 P.2d at 173.

VII. Conclusion

Whatever "equal footing" meant when Thomas Jefferson and his colleagues put those words to an early draft of the Northwest Ordinance, [275] it was not a rule that new states were bound by a federal definition of public waters. Nevertheless, that is undoubtedly what the phrase has come to mean in the modern judicial lexicon. At the same time that federal law has become the authority for title to submerged lands, state law has expanded public use rights in the waters above these submerged lands both by use of the traditional "public servitude" doctrine and by invoking the public trust doctrine. As was evident from the reaction to the PPL M*ontana* decision, how these two bodies of law overlap create uncertainty for both private landowners and the public. Mr. Kennedy argued that C*urran* was a judicial taking because title to submerged land is a matter of federal law and the U.S. Supreme Court has recognized that a "landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[276] Further, Mr. Kennedy cited U.S. Supreme Court precedent to suggest that any incidental contact with the submerged land authorized by the state is a taking.[277] On the other hand, some commentators believe that the public trust doctrine, as a "background principle" of state property law, may be an effective defense to a taking challenge.[278]

There are really two different uncertainties. First, there is uncertainty as to the actual nature of property interests in waters that are not navigable-in-fact using the segment-by-segment approach. In Tennessee, state judicial opinions predating the B*rewer*-H*olt*-U*tah* trilogy clearly hold that temporary disruptions in an otherwise navigable body of water or any segment thereof do not result in private ownership.[279] The equal footing doctrine applied by the Supreme Court in PPL M*ontana* put that century-old principle of state property law in jeopardy. In Montana, a now-settled principle of state law—that the public may access any water susceptible to recreational use—has also been thrown into jeopardy. A second, more profound uncertainty is that property owners and members of the public do

275. S*ee* Barrett, *supra* note 79, at 765 n.26.

276. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

277. Brief of Appellee and Cross-Appellant James C. Kennedy, *supra* note 17, at 40 (noting that "where government requires an owner to suffer a permanent physical invasion of her property - however minor - it must provide just compensation" (citing Lingle v. Chevron, 544 U.S. 528, 538 (2005)).

278. S*ee* John D. Echeverria, T*he* P*ublic* T*rust* D*octrine as a* B*ackground* P*rinciples* D*efense in* T*akings* L*itigation*, 45 U.C. DAVIS L. REV. 931 (2012).

279. State v. W. Tenn. Land Co., 158 S.W. 746, 751–52 (Tenn. 1913).

not know whether they should refer to federal or state law to resolve these disputes. Imposing federal law into these title disputes unsettles a long-established separation of powers principle that property law is reserved for the states. Of these two uncertainties, the second seems the most problematic. Many state courts wisely withheld from pronouncing rigid, inflexible rules about private ownership in water and submerged land.[280] These courts recognized that water will always be of some interest to the public and that to give away that public interest without reserving the right to change the rule in the future could lead to dramatic consequences. As Singer notes, "we care about getting things right and that often requires us to reformulate rules when they lead to untoward results."[281]

In criticizing the decision of the Montana Supreme Courts, the Court in PPL M*ontana* quoted B*rewer-*E*lliott*: "It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission under" the equal-footing doctrine.[282] At the time most states entered the union, there was not a rigid rule for what constituted public waters—there were many different rules applied individually be each of the states. The only thing that was clear at the time was that state law—not federal law—determined what was or wasn't part of the public domain. Thanks to the "equal footing" doctrine, the future of public rights in water hinges on reference to something that never was.

280. *See* Joseph Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1374 (2013) (noting that "standards allow property rights to be adjusted when they conflict with the property rights of others or when the exercise of property rights cause externalities or systemic disturbances that undermine the infrastructure of the property system").

281. I*d.*

282. PPL M*ont.*, 132 S. Ct. at 1235.