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The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water

Glenn J. MacGrady

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THE NAVIGABILITY CONCEPT IN THE CIVIL AND COMMON LAW: HISTORICAL DEVELOPMENT, CURRENT IMPORTANCE, AND SOME DOCTRINES THAT DON'T HOLD WATER

GLENN J. MACGRADY

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THE NAVIGABILITY CONCEPT IN THE CIVIL AND COMMON LAW: HISTORICAL DEVELOPMENT, CURRENT IMPORTANCE, AND SOME DOCTRINES THAT DON'T HOLD WATER

GLENN J. MACGRADY*

The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters,—a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits.

—*Lamprey v. Metcalf*¹

[W]hat are navigable waters? Will it be proper to adopt . . . an etymological derivation from *navis*, and to designate, as navigable waters, those only on whose bosoms ships and navies can be floated? Shall it embrace waters of which sloops and shallows, or . . . river craft, can swim; or shall it be extended to any water on which a batteau or a pirogue can be floated? These are all . . . navigable in a certain sense.

—*Jackson v. The Steamboat Magnolia*²

I. INTRODUCTION

In 1893 the Minnesota Supreme Court, using the words first quoted above, aptly summarized the general rationale which, historically, has underlain the concept of navigable waters. The latter words, angrily uttered in 1857 by a dissenting Justice Daniel, summarize with equal aptness the inherent difficulty in defining the meaning, scope, and effect of the navigability criterion.

The underlying rationale of the navigability concept is of ancient origin. All recorded legal systems of the western world, at least since the time of Rome, have recognized some sort of distinction between “private” water bodies and “public” water bodies. Historically, this distinction has served two different but related—and often confused—legal purposes. First, the distinction has served to determine whether public or private proprietary rights attach to the bed of a given water body. Secondly, it has served to allocate public and private usufructu-

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

2. 61 U.S. (20 How.) 296, 320 (1857) (Daniel, J., dissenting).

ary³ rights in the superjacent waters. History reveals that the concept of navigability has always been related in some manner to this public waters/private waters distinction. But, contrary to the Minnesota Supreme Court's assertion in *Lamprey v. Metcalf*, navigability has not necessarily *been* the distinction—for history also reveals that navigable waters and public waters have never been coextensive concepts in the civil or common law.

The general purpose of this article is to analyze the historical development of the distinction between public and private waters, and of the role played by the related navigability concept, in the civil law and common law. Because all legal systems have conceived the sea itself to be in some sense "public,"⁴ the discussion of the civil law and of the English common law will focus on two historically problematic areas: rivers and the foreshore.

Part II of this article examines the law relating to navigability, public waters, and the foreshore in primitive society, Rome, Spain, and France. The discussion is largely of antiquarian and comparative interest because although the civil law influenced early English writers such as Bracton and early works such as *Fleta* and *Britton*,⁵ and although it has had lingering effects in states such as Texas and Louisiana, it did not survive long in the feudal common law jungle. To this author's knowledge, however, nothing substantial has ever been written on the Roman law of public waters and navigability, and much of what has been written is either inadequate or somewhat misleading.

Part III explores the common law roots of two "doctrines" that have purportedly sprung from English legal soil. The first "doctrine"—now commonly known as the public trust doctrine—is that the shores and submerged beds of all navigable waters were held in trust by the English Crown for the benefit of all the people of the realm. The

3. In Roman law a usufruct was a rather technically defined type of servitude. Throughout this article, "usufructuary" is used in a more general sense as the adjectival form of the noun "use." Thus a right to use something is a usufructuary right.

4. *E.g.*, "[b]y natural law . . . the sea . . . [is] common to all," INSTITUTES 2.1.1, translated in R. LEE, THE ELEMENTS OF ROMAN LAW 110 (3d ed. 1952) [hereinafter all citations to the INSTITUTES will be from the translation given in R. LEE, *supra*, at 110-11, except where otherwise indicated]; "[t]he things which belong in common, to all the living creatures of this world, are . . . the sea," LAS SIETE PARTIDAS 3.28.3, translated in E. WARE, ROMAN WATER LAW § 395 (1905) [hereinafter cited as WARE]; "the sea, &c. according to the provisions of the common law, are as public and common, as they were among the Romans," J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 17 (1826).

5. Bracton is discussed at pp. 555-57 *infra*. The more modest works known as *Fleta* and *Britton*, written somewhere around 1290-1292, were based primarily on Bracton's treatise, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 265-66 (5th ed. 1956), and thus will not be referred to hereinafter.

second "doctrine" is that navigable waters in England were factually and legally coextensive with tidewaters. Although these "doctrines" have become conventional wisdom in America, it will be demonstrated that they are misconceptions and oversimplifications of English common law that were imported into American law on the most tenuous of authority by creative nineteenth century American treatise writers and judges.

The inherent difficulty in defining the meaning, scope, and effect of the navigability criterion is well illustrated by the judicial development of the concept of navigable waters in America. Today the importance of the navigability criterion in America is pervasive. On the federal level, a determination of navigability *vel non* has important effects in three primary areas: first, it controls whether federal admiralty courts have locational jurisdiction over a given water body; secondly, it controls whether the federal government has regulatory powers in a given water body; thirdly, it controls whether title to the submerged bed of a given water body vested in the state at the time that state was admitted to the Union. Although the tests of navigability that the federal courts have developed in these three areas are very similar, they are not identical. It is possible, therefore, for a water body to be navigable for one federal purpose but not for another. The development of the three federal tests of navigability is analyzed in part IVA of this article.

To complicate the American picture even further, each state has evolved its own definition of navigability and, because these state tests of navigability vary from state to state, there remains in the already complicated American law of navigable waters a sticky and largely ignored problem of federalism: where is the title to the submerged bed of a water body if the water body is navigable under the federal test but not under the state test—and vice versa? Part IVB of this article discusses some of the more significant state variations on the navigability theme, and offers an analysis of the proper roles to be played by federal and state navigability tests in determining submerged bed ownership.

II. ROMAN LAW AND THE CIVIL LAW

A. Pre-Roman Legal Conceptions

The science of irrigation is at least as old as the Assyrians, Egyptians, Persians, and Babylonians;⁶ and it is with respect to irrigation that

6. B. DOBKINS, *THE SPANISH ELEMENT IN TEXAS WATER LAW* 32-41 (1959); R. HUFFMAN, *IRRIGATION DEVELOPMENT AND PUBLIC WATER POLICY* ch. 2 (1953); WARE §§. 11-15.

one finds the first example of written water law. The Code of Hammurabi, written more than 4,000 years ago, has several provisions relating to the intentional and unintentional misuse of irrigation waters.⁷ Moreover, "it is quite probable that every proposition concerning irrigation had been settled long before [Hammurabi] was born or his empire organized."⁸

Whatever may have been the hydrological and legal accomplishments of these earlier civilizations, it has been suggested that the Romans "were the first to establish exclusive, individual property in land,"⁹ and that, prior to Roman times, property had always been held in a common or collective form of ownership.¹⁰ The great civilian Pothier (1699-1772), among others, referred to this form of collective property ownership as the "negative community." He described it as follows:

The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community, which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately reëntered into the negative community, and another could use them.¹¹

7. For example, the Code of Hammurabi, translated in WARE § 14, provides: "Any one negligently and maliciously found to be guilty of flooding his neighbor's tillable fields shall measure out to that neighbor 'gan' for every 10 'gur' of grain destroyed thereby."

8. WARE § 15. "Plato's writings include a detailed description of an elaborate and extensive system of irrigating canals in the sunken island of Atlantis. If this legendary island existed, irrigation was in practical use more than 12,500 years ago." R. HUFFMAN, *supra* note 6, at 7 (footnote omitted). See also L. WILCOX, IRRIGATION FARMING 1 (1895).

9. E. DE LAVELEYE, PRIMITIVE PROPERTY 163 (G. Mairriott transl. 1878).

10. *Id.* See C. LETOURNEAU, PROPERTY: ITS ORIGIN AND DEVELOPMENT (1912); J. LEWINSKI, THE ORIGIN OF PROPERTY AND THE FORMATION OF THE VILLAGE COMMUNITY (1913); G. VON MAURER, EINLEITUNG ZUR GESCHICHTE DER MARK-,HOF-,DORF-UND STADT-VERFASSUNG (1896); P. VIOLLET, CARACTÈRE COLLECTIF DES PREMIÈRES PROPRIÉTÉS IMMOBILIÈRES (1872). The conclusion that all property in pre-Roman times was collectively held has, however, been disputed. F. DE COULANGES, THE ORIGIN OF PROPERTY IN LAND (W. Ashley transl. 1904).

11. R. POTHIER, TRAITÉ DU DROIT DE PROPRIÉTÉ (circa 1762), translated in Geer v. Connecticut, 161 U.S. 519, 525 (1895).

If this idea of the negative community is historically valid, primitive civilizations must have conceived of *all* waters as part of the negative, collective community; thus no distinction between public and private waters and no concept such as "navigable" waters would have been socially or legally necessary. If Roman society was indeed the first to distinguish private from common property, it would also have been the first society to feel a legal compulsion to carve out an analogous distinction between private and public waters. Assuming all of this to be true, Pothier's description of the breakdown of the negative community may accurately reflect the historical evolution which eventually culminated in the Roman distinction between private and public waters.

The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community. . . .

. . . .
 These things [which remain in the negative community] are those which the juriconsults called *res communes*. Marcien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores.¹²

Whatever may be the historical validity of positing the existence of a negative, collective community in primitive times, and the subsequent breakdown of this negative community in the face of Roman conceptions of private property, one is forced to begin a substantive historical analysis of the private waters/public waters distinction, and of the related navigability concept, in Rome—because the Romans were the first to leave a written record of the law of public and private waters.

B. Roman Law

Although the Romans had made attempts at legal codification as early as the third century,¹³ it was, ironically, not until after the fall of the Western Empire in 476 that the Romans achieved their great-

12. *Id.*

13. "The work of codification began in the third century with the appearance of several private collections of laws. In A.D. 438 an official collection, the *Codex Theodosianus*, was issued." B. DOBKINS, *supra* note 6, at 45. See W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* (2d ed. 1950).

est legal triumph.¹⁴ In 528 the Emperor Justinian (527-565), sitting in Constantinople, ordered the great compilation, systematization, and consolidation of Roman law later known as the *Corpus Juris Civilis*.¹⁵ The *Corpus Juris Civilis*, compiled under the supervision of the great jurist Tribonian with 40 lawyers as assistants,¹⁶ was promulgated between 529 and 534. It comprises four main parts: the *Institutes*, a brief, elementary textbook of law intended for the use of law students, but having the force of law; the *Digest* (or *Pandects*), a 50-volume codification of the legal writings of the great Roman jurists; the *Code* (or *Codex*), a collection of imperial enactments; and the *Novels*, a collection of imperial legislation enacted after the *Code* was promulgated.¹⁷ Only the *Institutes* and the *Digest* are relevant to the subject matter of this article. And with regard to the *Digest*, the principal writers on water law are Ulpian, Paulus, and Pomponius.¹⁸

We are told by the *Institutes* that things (*res*) are divided into two classes:¹⁹ things susceptible to private ownership (*res quae in nostro patrimonio*) and things not susceptible to private ownership (*res extra nostrum patrimonium*).²⁰ Things *extra nostrum patrimonium* are further divided into those which are common to all (*res communes*),²¹ those which are public (*res publicae*),²² those which belong to corporate bodies of men (*res universitatis*),²³ and those which belong to no one (*res nullius*).²⁴

14. The promulgation of the *Corpus Juris Civilis* has been called the "most important single event for the subsequent history of Roman law in western Europe" A. VON MEHREN, *THE CIVIL LAW SYSTEM* 5 (1957).

15. *Id.*

16. WARE § 3.

17. See B. DOBKINS, *supra* note 6, at 45; A. VON MEHREN, *supra* note 14, at 5-6; WARE §§ 3-10.

18. WARE § 8.

19. INSTITUTES 2.1.

20. 2 A. YIANNPOULOS, *LOUISIANA CIVIL LAW TREATISE* 27 (1967). See INSTITUTES 2.1; W. BUCKLAND, *supra* note 13, at 182; B. DOBKINS, *supra* note 6, at 46.

21. INSTITUTES 2.1.1.

22. INSTITUTES 2.1.2.

23. INSTITUTES 2.1.6. We will not be concerned in this article with things *res universitatis*. But included within that classification are "things in cities, such as theatres, race-courses and the like, and any other things which are the common property of cities." INSTITUTES 2.1.6.

24. INSTITUTES 2.1.7. The *Institutes* strictly limits its definition of *res nullius* to "sacred things, religious things, sanctioned things; for a thing which is subject to divine law is owned by no one." INSTITUTES 2.1.7. Included among the things which are "subject to divine law" are sacred buildings, religious offerings, burial grounds, and city walls. INSTITUTES 2.1.8-10. But scholars of Roman law have interpreted the concept of *res nullius* to be more chameleon-like and expansive than the strict definition provided by the *Institutes*.

The phrase *res nullius* is used in various senses:—

With these classifications in mind, we can now turn our attention to the substantive Roman law concerning the two areas that are the principal foci of parts II and III of this article: rivers and the fore-shore.

1. *Rivers*.—Three interrelated problems concerning rivers need to be examined. First, how did the Romans distinguish between “public” (in the general, non-Roman sense of the word) rivers and “private” rivers? Secondly, who did the Romans regard as the owner of a river and its submerged bed? Thirdly, what, if anything, did the Romans mean by a “navigable” river? Of the secondary authorities consulted by this author,²⁵ none does a very good job of answering these questions²⁶ and, except for some passing references, none makes any attempt to analyze the question of navigable rivers.²⁷ Thus a relatively fresh look at the *Corpus Juris Civilis* itself must be undertaken.

a. “Public” v. “Private” Rivers.—This subpart concerns the broad question of whether the Romans classified rivers into those which are *in nostro patrimonio* (subject to private ownership) and those which

- (a) to include all things which according to Roman ideas are not susceptible of private ownership;
- (b) specifically, as above, of things sacred, religious and sanctioned;
- (c) of things which, though susceptible of ownership, are not at the moment owned, e.g., wild animals uncaptured, or things which have been abandoned by their owner (*res derelictae*).

R. LEE, *supra* note 4, at 107.

25. Although my search of secondary authorities exclusively concerned with Roman law was reasonably thorough, I do not pretend that it was exhaustive. The chief sources consulted were: J. ANGELL, *supra* note 4; W. BUCKLAND, *supra* note 13; J. GOULD, A TREATISE ON THE LAW OF WATERS (3d ed. 1900); W. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE (1876); R. LEE, *supra* note 4; H. LEMMON, PUBLIC RIGHTS IN THE SEASHORE (1934); R. MELVILLE, A MANUAL OF THE PRINCIPLES OF ROMAN LAW (3d ed. 1921); J. POMEROY, A TREATISE ON THE LAW OF RIPARIAN RIGHTS (1887); WARE, 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES (3d ed. 1911); 2 A. YIANNPOULOS, *supra* note 20; P. DANIEL, *Sovereignty and Ownership in the Marginal Sea and Their Relation to Problems of the Continental Shelf*, Aug. 30, 1950 (paper prepared for the Forty-fourth Conference of the International Law Association, Copenhagen, Denmark); O. DELOGU, *Comments on Public Water Use Rights*, in PROCEEDINGS: WATER RIGHTS LAW CONFERENCE, BOSTON, MASS., NOV. 10, 1966; G. MANN, *Panel Talk of G. C. Mann on Riparian Irrigation Rights as Declared and Enforced by the Courts, and Protected by the Statutes, of Texas*, in PROCEEDINGS: WATER LAW CONFERENCES, AUSTIN, TEXAS, NOV. 20-21, 1952, JUNE 10-11, 1954; ROBERTS, *Title and Boundary Problems Relating to Riverbeds*, 36 TEXAS L. REV. 299 (1958); TRELEASE, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957); Note, *Water Rights in Roman Law*, 20 S. AFR. L.J. 266 (1903); Comment, *Waters and Watercourses—Title to Stream Beds and Riparian Lands—Determinable Fees*, 12 TEXAS L. REV. 490 (1934); Comment, *Waters and Watercourses—Title to Bed of Stream, Under Mexican Grant*, 6 TEXAS L. REV. 524 (1928). Some of these sources are only tangentially concerned with Roman law.

26. This may be too harsh. As the subsequent discussion will show, see pp. 519-28 *infra*, answers are somewhat hard to come by.

27. This is not too harsh. See, e.g., W. HUNTER, *supra* note 25, at 168, stating that

are *extra nostrum patrimonium* (not subject to private ownership)—and if so, on what basis this classification was made. The narrower question of whether rivers, if *extra nostrum patrimonium*, are properly subclassified as *res communes*, *res publicae* or *res nullius* is discussed in subpart *b*.

The analysis of whether the Romans distinguished between “public” and “private” rivers must begin with an apparent textual contradiction. The *Institutes* tells us that “[a]ll rivers . . . are public,”²⁸ whereas Ulpian, in the *Digest*, says that “[s]ome rivers are public; others not,”²⁹ and that “a private river differs in no sense from any other private property.”³⁰

Ignoring this apparent contradiction for the moment, let us see how the *Digest* differentiates between private and public rivers. The relevant fragments provide:

(Ulpian.) A river [*flumen*] is distinguished from a brook [*rivus*], either by its size or the opinions of those living along it.³¹

(Ulpian.) Some rivers are perennial; some are torrential. A perennial river is one which flows continually. A torrential river is one which flows in cold weather. If, however, a river which has flowed perennially dries up during a certain summer, it is none the less perennial.³²

(Ulpian.) Some rivers are public; others not. *Cassius defines a public river as a perennial river. This definition, approved by Celsus, appears correct.*³³

(Ulpian.) . . . [A] private river differs in no sense from any other private property.³⁴

(Paulus.) Rivers which flow (perennially) are public, and their banks are also public.³⁵

Thus, according to the *Digest*, brooks, which are not rivers at all, and torrential rivers are both susceptible to private ownership; only

“[p]ublic rivers are of two kinds, navigable and not navigable,” without any citation and without any further analysis.

28. INSTITUTES 2.1.2 (emphasis added).

29. DIGEST 43.12.1.3, translated in WARE § 19 [hereinafter all citations to the *Digest* will be from the translation given in WARE 33-56].

30. DIGEST 43.12.1.4.

31. DIGEST 43.12.1.1. See W. HUNTER, *supra* note 25, at 168.

32. DIGEST 43.12.1.2.

33. DIGEST 43.12.1.3 (emphasis added).

34. DIGEST 43.12.1.4.

35. DIGEST 43.12.3.

perennial rivers are public rivers. Furthermore, lakes,³⁶ ponds,³⁷ and even canals³⁸ and artificial channels can be public.³⁹

Whether a watercourse is a brook, torrential river, or perennial river seems to be a question of fact. A brook can be established as such either *prima facie* by its size, or by opinion testimony of the abutting riparian proprietors. A torrential river seems to be a seasonal phenomenon, namely, a river that flows only during the winter (which, presumably, is the rainy season). A perennial river, on the other hand, is evidently a watercourse somewhat larger than a brook that flows year round, even though it may occasionally dry up during the summer.

The *Digest* contains at least 93 fragments concerning rivers,⁴⁰ most of which address themselves to legal rights and duties in public rivers. Typically, these rights and duties are announced and enforced by an interdict of the Praetor.⁴¹ For example, it was forbidden by Praetorial interdict to do anything in a public river "whereby the landing or the navigation is made worse"⁴²; to do anything in a public river "whereby the water is made to flow otherwise than as during the summer before"⁴³ (*i.e.* to divert the boundaries of the watercourse⁴⁴); or to do violence to anyone "who is doing a work in a public river . . . with the lawful purpose of protecting the banks . . ." ⁴⁵ These Praetorial interdicts are explained, elaborated upon, and added to by fragments extracted from the great Roman jurists.⁴⁶

To return to the unqualified declaration in the *Institutes* that "all rivers" are "public," commentators on Roman law tend to ignore the apparent contradiction; they seem to assume that the public river/

36. "A lake is a body of perpetual water." DIGEST 43.14.1.3.

37. "A pond is a temporary body of still water, which generally gathers in winter." DIGEST 43.14.1.4.

38. "A canal is an artificial channel for water." DIGEST 43.14.1.5.

39. "A lake, a pond, or a canal may be public." DIGEST 43.14.1.6. "If the channel through which a public river flows is artificial, the river is none the less public, and whatever is done therein is deemed to be done in a public river." DIGEST 43.12.1.8.

40. WARE reproduces 93 fragments. WARE §§ 16-108.

41.

A second element in Roman law was the *jus honorarium* or the *jus praetorium*, the law handed down by the praetors, who had authority to develop new remedies for new situations. The praetors in time came to issue at the beginning of their term of office an edict which set down the principles to be followed in making decisions. Eventually a standard edict developed that became mandatory throughout the empire.

B. DOBKINS, *supra* note 6, at 44.

42. DIGEST 43.12.1.

43. DIGEST 43.13.1.

44. See note 79 and accompanying text *infra*.

45. DIGEST 43.15.1.

46. See note 18 and accompanying text *supra*.

private river distinction drawn in the *Digest* represents the true state of Roman law. Such an assumption appears to be warranted. First, if one accepts the brief declaration in the *Institutes* at face value, then one must also be prepared to admit that most of the 93 fragments on public river law in the *Digest* are merely much to-do about nothing. Secondly, the *Institutes*, intended as a summary law treatise for the instruction of law students, is recognized as a far less important source than the *Digest*.⁴⁷ Thirdly, one can explain the use of the term "river" in the *Institutes* as incorporating the distinctions drawn in the *Digest*; *i.e.* when the *Institutes* uses the term "river," it implicitly excludes brooks and torrential rivers, and thus refers only to perennial rivers. In any event, it is not seriously contested that the Roman law does draw a distinction between public and private rivers. The real confusion arises concerning the question of who, given that some rivers are public and that some are private, owns the river and its submerged bed.

b. Ownership of a River and Its Submerged Bed.—Plainly, the classification of rivers into those which are *extra nostrum patrimonium* and those which are *in nostro patrimonio*, to revert to the more generic Roman terminology, reflects a Roman distinction between those rivers which, in a jurisdictional sense, are affected by the public interest and those rivers which are not. All of the Praetorial interdicts and prohibitions were aimed at regulating conduct in "public" rivers; thus it can be assumed that "private" rivers were not considered by the Romans to be affected by the interest of the public at large. As a consequence, it is probably safe to conclude that, subject to the Roman scheme of private servitudes and water rights, the owner of land through which a private stream flowed could do as he wished in and to the water.⁴⁸ And this conclusion would be consistent with Ulpian's

47. "The Digest . . . is for the history of western law by far the most important part of the *Corpus juris*." A. VON MEHREN, *supra* note 14, at 6.

48.

To the use of the water of a *rivus* flowing from or over private property no other person than the owner of the property himself was entitled, except in the following cases: (1) If a conventional servitude existed by which the right was granted to another to lead water from it; (2) if a servitude had been acquired by prescription on the part of a lower proprietor to lead water from the stream, which could only happen when the water was conveyed over the property by an artificial channel constructed by or for the lower proprietor; and (3) if water had been led on to a lower property by an artificial channel which had been constructed by any person whatever, and the origin of which was of an antiquity beyond the memory of man (*vetustas quae memoriam excedit*), and which had been used without interruption.

Note, *Water Rights in Roman Law*, 20 S. AFR. L.J. 266, 268 (1903) (footnotes omitted). On the subject of the Roman law of private water rights, see also W. BUCKLAND, *supra*

statement that "a private river differs in no sense from any other private property."⁴⁹

The foregoing observations do not, however, answer the question of who "owns" the river. To say that the public owns a public river, and that the riparian proprietors own a private river, is to overlook the somewhat confusing Roman subclassification of things *extra nostrum patrimonium*. In other words, it must be further asked whether a river is *res communes* (owned in common by all men), *res publicae* (owned by the public, *i.e.* by the State⁵⁰), or *res nullius* (owned by no one). But, here again, one is faced at the outset with an apparent textual contradiction. The *Institutes* tells us three different things about the ownership of a river:

By natural law the air, *flowing water*, [and] the sea . . . are common to all.⁵¹

All rivers and harbours are *public*; consequently the right of fishing in a harbour and in rivers is common to everyone.⁵²

The use of river-banks is *public* and *juris gentium*, like the use of the river itself⁵³

Thus we are told that "flowing waters," which presumably could include both public and private streams, are *res communes*; that "all rivers" are *res publicae*; and that the "use" of a river is *res publicae*.

This apparent textual schizophrenia has caused much consternation on the part of commentators. Lee, in apparent exasperation, bluntly states:

All this is very confused. The distinction between things common and things public is ill-defined, and has no practical value. . . . Rivers are said to be public. . . . Whether the river-bed belonged to the Roman People, or to the riparian owners, or to no one was never clearly defined.⁵⁴

note 13; B. DOBKINS, *supra* note 6, at 41-57; W. HUNTER, *supra* note 25; R. LEE, *supra* note 4; WARE; S. WIEL, *supra* note 25; Teclaff, *Private Water Rights in France and in the Eastern United States*, 11 AM. J. COMP. L. 560 (1962).

49. See notes 30, 34 and accompanying text *supra*.

50. Commentators seem to agree that *res communes* means ownership by the state. W. BUCKLAND, *supra* note 13, at 183; W. HUNTER, *supra* note 25, at 165. Cf. DIGEST 43.8.3: "(Celsus.) I think that the shores over which the Roman people hold sway belong to the Roman people."

51. INSTITUTES 2.1.1 (emphasis added).

52. INSTITUTES 2.1.2 (emphasis added).

53. INSTITUTES 2.1.4 (emphasis added).

54. R. LEE, *supra* note 4, at 106 (footnotes omitted).

Buckland merely points out the opposing views:

As to rivers themselves the texts contain differences of opinion as to the sense in which they are public. According to one view they are public, soil and all, but this can hardly be reconciled with the rules of *alluvio*, *insula nata*, etc. Accordingly it has been held that what was public was the river as such, not the water, which was common, or the soil of the bed which belonged to the riparians. Others have held that the river was public only *quoad usum*. Probably the earlier lawyers merely held that a river was public, without refinements.⁵⁵

Hunter, injecting the *res nullius* concept into the controversy, seems to feel that it really doesn't matter, in a practical sense, whether a thing is *res communes* or *res publicae*:

The distinction between public things and common things was not in the nature of the rights exercised over them, for in both the use of the things belonged to men generally; but the difference was that common things were regarded as having no owner (*res nullius*); whereas public things were regarded as belonging to the State, or, as in the case of river banks, to private individuals.⁵⁶

Other commentators have pointed to similar confusion with respect to the ownership of rivers.⁵⁷ What is surprising about such observations is not their relatively unilluminating character, but the fact that they declare the Roman scheme to be irreconcilable without any analytical attempt at reconciliation.⁵⁸

The question of river ownership in the Roman scheme can be reconciled. The first analytical step is to divide a river into three separate constituent parts: the submerged bed, the water itself, and the exposed banks.⁵⁹ The second step is to look to the *Corpus Juris*

55. W. BUCKLAND, *supra* note 13, at 185 (footnotes omitted).

56. W. HUNTER, *supra* note 25, at 165.

57. 1 S. WIEL, *supra* note 25, at 10-11; Teclaff, *supra* note 48, at 563-64.

58. Buckland and Lee reach tentative, but opposite, conclusions concerning the ownership of river beds. "As early as Cicero rules arose giving riparian owners rights, and there was a tendency among classical lawyers to regard them as owners of the soil, the public rights being merely of use." W. BUCKLAND, *supra* note 13, at 185 (footnotes omitted). "There was no doubt, a tendency, which became more pronounced as time went on, to regard all *res publicae* as the property of the Roman People, or, as we should say, of the State . . ." R. LEE, *supra* note 4, at 106-07 (footnote omitted).

59. In a collection of essays entitled *Land in the City of New Orleans, called the "Batture,"* Thomas Jefferson asserted: "In the channel, or hollow, containing a river, the Roman law has distinguished the *alveus*, or a bed of the river, and the *ripa*, or bank, the river itself being *aqua*, water." 29 CONGRESS OF THE UNITED STATES, AMERICAN STATE PAPERS 2, 90 (1834). See J. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 2 (5th ed.

Civilis to determine what type of "ownership" attached to each of these constituent parts. There are three "ownership" possibilities for each constituent part: (1) ownership by the state; (2) ownership by the private riparian proprietor(s); or (3) ownership in common (*i.e.* by no one in particular).

The most turbulent confusion among the commentators swirls around the question of bed ownership. Indeed, it takes some measure of crust to suggest that experienced commentators on Roman law have overlooked relevant source material. Nevertheless, *none* of the authorities encountered cite the following fragments from the *Digest*, which fragments seem dispositive:

(Ulpian.) In like manner if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly *the bed ceases to be public*. Also the *new channel* which the river has made, *although it was private*, begins, nevertheless, *to be public*, because *it is impossible that the channel of a public river should not be public*.⁶⁰

(Ulpian.) It is otherwise where a river has overflowed a certain piece of land, but has made *no new bed*, for in that case *what is covered by water does not become public*.⁶¹

These fragments, among others not cited by the above-mentioned authorities,⁶² seem conclusive on the issue of bed ownership of a public

1854) ("A watercourse consists of bed, banks, and water . . ."); L. HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS 3-4 & n.2 (1868).

60. DIGEST 43.12.1.7 (emphasis added).

61. DIGEST 43.12.1.9 (emphasis added).

62. DIGEST 41.1.30.3 (emphasis added):

(Pomponius.) Alluvion may restore that field which the current of a river has carried entirely away. Therefore if a field lying between a public road and a river becomes occupied by the river, either little by little or otherwise, it relapses to its former owner when the river retires. Rivers may therefore be likened to tax magistrates (*censitors*), in that they turn private property into public, and public into private.

Hence it follows that *the land was made public property when it became the bed of a river*, and now, being restored, should be the private property of its former owner.

DIGEST 7.4.24 (emphasis added):

(Javolenus.) If I have the usufruct of a garden, and a river floods it and retires, Labeo thinks the usufructuary right restored, because *the soil has remained all the time in the same legal status*. I consider this true if the river has merely inundated the garden, but if, *changing its channel*, it flows over the garden, I think the usufruct is lost, because *the site of the river has become public*, and

river. In the Roman scheme, the bed of a public river is not owned by the private riparian proprietors, nor is it *res communes* or *res nullius*; it is *res publicae*, owned by the state. If a public river leaves its bed, the old bed, formerly public, becomes subject to private ownership, and the new bed, formerly private, then becomes public. With regard to private rivers, it seems clear that the bed is owned by the private riparian proprietors, for "a private river differs in no sense from any other private property."⁶³ These conclusions square with the declaration in the *Institutes*, as we have interpreted it, that "all [perennial] rivers . . . are public."⁶⁴

There remains to be considered, however, the other two, ostensibly contradictory, statements in the *Institutes*: namely, that "flowing water . . . [is] common to all,"⁶⁵ and that "the use of river-banks is public and *juris gentium*, like the use of the river itself."⁶⁶ These declarations can be understood by focusing on the second constituent part of a river, the water itself. The reference to "flowing water" should be read from the perspective of *expressio unius est exclusio alterius*. Thus, when declaring "flowing water" to be *res communes*, the property of no one in particular, the *Institutes* is referring *only* to the water itself, and not to ownership of the bed or banks. The concept that flowing water is not susceptible to ownership is a natural one. As Joseph Angell states:

A water-course derives its origin from the law of nature. By the same law it moves in a certain direction, and by a certain bed or channel to the ocean. Thus moving and transient by nature, it can

cannot be restored to its former status.

DIGEST 41.1.30.1 (emphasis added):

(Celsus.) Celsus, Jr., asserts that if a tree grows on the river bank in front of my field the tree is mine because the soil is mine, although the use is in the public, and therefore when the river dries up *the bed* belongs to the abutting proprietors *because the public are able to use the river no longer*.

DIGEST 41.1.65.4:

(Labeo.) Labeo says in the same book: "If that which has been built in a public place or has grown up in a public place is public, then also an island which is born in a public river ought to be public."

But see DIGEST 41.1.65.2, 43.12.1.6, suggesting that an island formed in a public river belongs to the riparian proprietor(s). A rule that a newly emergent island belongs to the riparian proprietor(s) is not, however, inconsistent with the position that the land, when submerged, had been public. Indeed, such a rule would be consistent with the rules concerning alluvion. *See* Digest 41.1.30.3 *supra*; Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where Is the Boundary?*, 1 FLA. ST. U.L. REV. 596, 621-27 (1973).

63. See text accompanying note 30 *supra*.

64. See text accompanying note 52 *supra*.

65. See text accompanying note 51 *supra*.

66. See text accompanying note 53 *supra*.

admit of no permanent property. The only property of which it is susceptible is temporary and usufructuary.⁶⁷

This reading of the reference to flowing water is consistent with the third statement in the *Institutes*, to the effect that the "use" of a river is public.⁶⁸ Clearly this statement does not mean that the water itself is *res publicae* and owned by the state; it only means that, in a public river,⁶⁹ the public has the right to use the water.⁷⁰ And finally, these conclusions are consistent with the discussion of private rivers. A riparian proprietor, though he owns the submerged bed, does not own the superjacent flowing water because the water is *res communes*, incapable of dominion and ownership. The riparian owner does, however, subject to the Roman law of private water rights,⁷¹ have exclusive usufructuary rights in the flowing water. This is so because the *Institutes* does not give the public a right of user in private streams, and because the Praetorial interdicts in the *Digest* do not protect any public interest in such private streams.

There does not appear to be any dispute about ownership of the third constituent element of a river, the exposed banks. The "ownership of the banks and of the trees growing on them is vested in the riparian proprietors."⁷² But this private ownership of the banks and trees is subject to a usufructuary servitude in favor of the public, so that the public can "put in at the bank, . . . fasten ropes to trees growing on the bank, . . . [and] land a cargo . . ."⁷³

In sum, the question of river ownership under the Roman scheme, when separately analyzed from the viewpoints of bed, water, and bank, is not so hopelessly confusing as commentators would lead one to believe. Indeed, the Roman scheme is quite consistent. In a public

67. J. ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WATER-COURSES 5 (1824). *Accord*, 3 J. KENT, COMMENTARIES ON AMERICAN LAW 353 (1828): "[The riparian proprietor] has no property in the water itself, but a simple usufruct while it passes along."; 1 S. WIEL, *supra* note 25, at 1-2: "The water running [in a stream] unrestrained is the property of no one, but a portion of it taken out of the stream and confined in the possession of an individual becomes the taker's private property, belonging to him while under his possession and control"

68. See text accompanying note 53 *supra*.

69. That this fragment from the *Institutes* refers to public rivers is made clear from the type of public uses that the fragment goes on to describe: fastening ropes (from boats) to trees on the bank, putting in at the bank, and landing cargo. See note 73 and accompanying text *infra*. Such uses would not be possible in a private river.

70. See DIGEST 39.2.24: "(Ulpian.) The use of public streams is common to all, just the same as public roads and the shores of the sea."

71. See note 48 *supra*.

72. INSTITUTES 2.1.4.

73. INSTITUTES 2.1.4.

river the bed is *res publicae*, owned by the state; in a private river the bed is *in nostro patrimonio*, owned by the riparian proprietor(s). In all rivers the water itself is *res communes*, incapable of ownership; but in a public river (only) the use of the water is public. The banks of all rivers are *in nostro patrimonio*, owned by the riparian proprietor(s); but in a public river (only) certain uses of the banks are reserved to the public.

c. Navigable Rivers.—The question of what, if anything, the Romans meant by a navigable river has not caused confusion among the commentators, mainly because the question does not seem to have been analyzed.⁷⁴ It is true that the *Institutes* does not mention navigable rivers and that the *Digest* contains very little on the subject, but it is clear that the Romans did distinguish between navigable and non-navigable rivers, as the subsequent discussion will show.

Perhaps the best way to develop the Roman conception of navigable rivers is to center the analysis on two Praetorial interdicts:

(The Praetor's Interdict.) The Praetor says: "*Do nothing on the banks of a public river, or in the stream, neither put anything on the banks or in the stream, whereby the landing or the navigation is made worse.*"⁷⁵

(The Praetor's Interdict.) The Praetor says: "*I forbid that anything be done in a public river or on its banks, or that anything be put in a public river or on its banks, whereby the water is made to flow otherwise than as during the summer before.*"⁷⁶

Ulpian points out that the first interdict applies only to those acts by which "landing" or "navigation" is made worse.⁷⁷ He then concludes that "[t]he interdict therefore applies only to navigable rivers and does not concern others."⁷⁸ That Ulpian is correct is obvious: it would be impossible to make "landing" or "navigation" worse in a river already nonnavigable. Ulpian construes the second interdict to refer, not to acts which affect the quantity of water flowing in a public river, but to acts which affect "boundaries . . . of the river's course."⁷⁹ In other words, he construes the second interdict as prohibiting acts which divert the course of a public river. So construed, Ulpian concludes that

74. See note 27 and accompanying text *supra*.

75. DIGEST 43.12.1.

76. DIGEST 43.13.1.

77. DIGEST 43.12.1.12.

78. DIGEST 43.12.1.12.

79. DIGEST 43.13.1.3.

"[t]he interdict pertains to public rivers, whether they are navigable or not."⁸⁰

These fragments demonstrate not only that the Romans distinguished between navigable and nonnavigable rivers, but that the concept of navigable rivers was not coextensive with the concept of public rivers. From these fragments it is obvious that some public rivers were thought of as navigable, while other public rivers were thought of as nonnavigable; thus navigable rivers were conceived of as a subclass of public rivers. In other words, all navigable rivers were undoubtedly public, but not all public rivers were necessarily navigable.⁸¹

These two Praetorial interdicts, and Ulpian's glosses thereon, also demonstrate that navigable public rivers, undoubtedly because of their very capacity for navigation, were thought to need a higher order of regulation and protection than nonnavigable public rivers. Thus, although the second interdict prohibits the diversion of any public river, the first interdict only prohibits obstructive activity on the banks and in the water of *navigable* public rivers. Other fragments in the *Digest* also reflect this higher degree of regulation and protection afforded to navigable public rivers. For example, we are told that the Praetor ought not to license the taking of water from a navigable stream "in such quantity as that the stream becomes less navigable. . . ."⁸² This rule would obviously be inapplicable to a non-navigable public river because, by definition, an already nonnavigable stream cannot be made less navigable.

The higher order of protection against withdrawal of water afforded navigable streams is expanded upon in another fragment. Pomponius tells us that "[t]here is nothing to prevent anyone taking water from a public river. . . . But if the river is either navigable, or makes something else navigable, the water is not permitted to be so used."⁸³ This last fragment is especially interesting because it indicates that non-navigable tributaries of navigable rivers, like navigable rivers themselves, are susceptible to the higher degree of state regulation and protection—a result which has been reached by the United States Supreme Court in decisions addressing the regulatory power of the federal government in navigable waters.⁸⁴

80. DIGEST 43.13.1.2.

81. See DIGEST 43.12.1.18 (brackets in original): "(LABEO.) Labeo also thinks the same applies to something done in a public river not navigated as yet [but which becomes in its course larger and navigable]."

82. DIGEST 39.3.10.2.

83. DIGEST 43.12.2.

84. See note 438 and accompanying text *infra*.

Finally, it is of interest to ask how the Romans distinguished navigable rivers from nonnavigable rivers. What was the Roman "test" of navigability? There is no absolute answer to this question, but one fragment from the *Digest*, referring to the first Praetorial interdict quoted above, does give a very strong hint.

(Ulpian.) In the Praetor's interdict are the words, "*or the navigation is made worse.*" This refers to the *shipping*. *** Under the term "shipping" *rafts are also comprised*, because their use is often necessary. If a footpath may be impeded, no less so may the *path of a boat* be rendered more difficult.⁸⁵

This fragment indicates three crucial things: (1) the Roman test of navigability was related to a river's capacity to support the passage of boats ("path of a boat"); (2) more specifically, navigability was tested by capacity to support *commercial* boating ("shipping"); and (3) the capacity to float rafts, which undoubtedly were used for commercial purposes in Roman times, was sufficient. Although it may be presumptuous to reconstruct the Roman test of navigability from one fragment of Ulpian, there is no contrary evidence. Therefore the following definition is suggested as approximating the Roman test of navigability: A river is navigable if it has the capacity to be a path for commercial boating, including rafts. If this definition is accurate, then Ulpian, who died in A.D. 228, anticipated the United States Supreme Court's general federal test of navigability by more than 1,600 years.⁸⁶

2. *Ownership of the Foreshore.*—Where land abuts tidally affected waters there is always a strip of land that is alternately washed by the flow and reflow of the tides. This strip of land is known variously as the "shore," the "seashore," the "foreshore," or the "wet sand." More technically described, the foreshore has at various times been defined as the strip of land between the ordinary high-water and ordinary low-water marks,⁸⁷ as the strip of land between the ordinary high-tide and ordinary low-tide lines,⁸⁸ or as the strip of land between

85. DIGEST 43.12.1.14 (quotation from interdict emphasized in WARE; other emphasis added).

86. See part IV A *infra*.

87. M. HALE, DE JURE MARIS ET BRACHIORUM EJUSDEM cap. IV (circa 1667) [hereinafter cited as DE JURE MARIS]. Lord Hale's *De Jure Maris* can be found in three sources: R. HALL, AN ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM (2d rev. ed. 1875); 1 F. HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (1786) (known as *Hargrave's Law Tracts*); S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO (1888).

88. *Martin v. Busch*, 112 So. 274 (Fla. 1927).

the mean high-tide and mean low-tide lines.⁸⁹ Except to note that the last definition is the one currently approved by the United States Supreme Court,⁹⁰ the precise legal boundaries of the foreshore need not detain us.⁹¹ It is sufficient to observe that at high tide the foreshore is submerged and at low tide it is exposed; thus, geologically, it is a transitional zone, a gray area, neither always land nor always water. In the law, too, the foreshore has been a gray area. The problem is this: If the water abutting privately owned riparian land is navigable, and the public (or state) therefore owns the submerged bed, who owns the foreshore? The public (or state)? The private riparian proprietor? No one? The answer to this question can be vital in littoral areas such as Florida's, where, because of the negligible vertical slope of the land, the foreshore can be hundreds of feet in width.⁹²

Depending upon the translation used,⁹³ the *Institutes* defines the landward reach of the shore as "the limit reached by the highest winter flood,"⁹⁴ as "the winter high-water mark,"⁹⁵ or as "the highest point reached by the waves in winter storms."⁹⁶ Whatever the precise definition, it is clear that the Romans conceived of the shore as reaching as far landward as the maximum reach of the sea during the season of highest water (*i.e.* winter).⁹⁷ And it is also clear that such a definition would extend the Roman shore further landward than does the current

89. See *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

90. See *id.* See also *Hughes v. Washington*, 389 U.S. 290 (1967).

91. For an in-depth analysis of the problem of boundary lines along tidally affected shores, see Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where is the Boundary*, 1 FLA. ST. U.L. REV. 596 (1973).

92. For the curious, the general answer to the question in the United States today is that, absent a more generous state law, federal law gives the riparian proprietor ownership to the mean high-tide line; thus the state would own the foreshore. State law can, however, grant the riparian proprietor ownership down to the mean low-tide line—or, theoretically, even farther seaward—in which case the riparian proprietor would own the foreshore. See generally *id.*

93. The Latin, reproduced in H. LEMMON, *PUBLIC RIGHTS IN THE SEASHORE* 13 (1934), is as follows: "Est autem litus maris quatenus hybernus fluctus maximus excurrit."

94. *INSTITUTES* 2.1.3.

95. *INSTITUTES* 2.1.3, translated in H. LEMMON, *supra* note 93, at 13.

96. *INSTITUTES* 2.1.3, translated in W. HUNTER, *supra* note 25, at 164.

97. H. LEMMON, *supra* note 93, at 9:

The Romans did not attempt to use the phrase except in a very loose and general way when they described the "Litus maris" or seashore, as follows: "Est autem litus maris quatenus hybernus fluctus maximus excurrit." (Now the seashore is so far as the highest winter tide runs up.) It is essential, of course, to remember that the Mediterranean Sea, which bounded the early Roman Empire, was then, as it is now, practically tideless except for the unusual tidal waves that, occasionally and in season, rise and inundate the adjoining littoral, and that it was, and is, only during the winter months that any very appreciable tidal movement can be observed.

American definition, which holds that the landward reach of the shore is measured by the *mean* high-tide line.⁹⁸

Regardless of the exact boundaries of the Roman shore, it is the ownership of the shore with which we are primarily concerned. The *Institutes* tells us the following about the seashore:

By natural law the air, flowing water, the sea, and therefore the shores of the sea are common to all. Consequently, no one is forbidden to approach the shore, provided that he does not interfere with dwelling houses, monuments and buildings, for these are not subject to the *jus gentium*, as the sea is.⁹⁹

The use of sea-shores too is *public* and *jus gentium*, like the use of the sea itself, and so anyone may set up a hut to retire into, may dry his nets, and draw them up from the sea. *But ownership of the shore may be supposed to be vested in no one*, and to be governed by the same law as the sea and the sea-bottom.¹⁰⁰

These passages address both usufructuary and proprietary interests in the shore. It is clear, and there is no dispute among commentators,¹⁰¹ that the use of the Roman shore was public, free, and open to all. The *Digest* confirms this view.¹⁰² The *Institutes* also seems unambiguous about shore ownership: the shore is "common to all"; ownership is "vested in no one." Thus one is tempted to conclude from the *Institutes* that the Roman shore was not subject to private ownership (*in nostro patrimonio*) or to state ownership (*res publicae*), but that it always was in the nature of *res communes* or *res nullius*.¹⁰³

There are two reasons, however, why one must hedge such a conclusion. First, jurists in the *Digest* waver slightly on the question of seashore ownership, and there is one ambiguous fragment suggesting that the shore may be *res publicae* (owned by the state). Buckland summarizes all the fragments concerning ownership of the shore as follows:

Marcian and Justinian [by the latter he is referring to the *Institutes*] made the seashore common, but Celsus makes it public, at any rate where the land behind is Roman. Paul avoids either expression and

98. Compare note 92 and accompanying text *supra* with note 97 *supra*.

99. INSTITUTES 2.1.1 (emphasis added).

100. INSTITUTES 2.1.5 (emphasis added).

101. W. BUCKLAND, *supra* note 13, at 185; H. LEMMON, *supra* note 93, at 14; R. MELVILLE, A MANUAL OF THE PRINCIPLES OF ROMAN LAW 219 (3d ed. 1921).

102. DIGEST 39.2.24: "(Ulpian.) The use of public streams is common to all, just the same as public roads and the shores of the sea."

103. See note 104 and accompanying text *infra*.

says: "*nullius sunt, sed iure gentium omnibus vacant.*" Neratius also treats it as a sort of *res nullius* . . . For Marcian the *litus* is common, but not *iuris gentium* like the sea.¹⁰⁴

Clearly, none of the Roman sources suggests that the shore is owned by private riparian proprietors. And all except Celsus use language in the nature of *res communes* and *res nullius*—terms which, as has been indicated, represent a distinction without a real difference.¹⁰⁵ The dissenting fragment by Celsus, rather inaccurately characterized by Buckland, states: "I think that the shores over which the Roman people hold sway belong to the Roman people."¹⁰⁶ But even this rather tautologous statement (at least in translation) does not necessarily cut in the direction of state ownership of the shore; it requires no torturing of Celsus' words to interpret them as referring to ownership in common. Notwithstanding Celsus' statement to the contrary, most commentators agree that the Roman shore was not owned by the state.¹⁰⁷

The second reason why one must hedge the conclusion that the Roman shore was totally *res communes* is that Roman law evidently tolerated appropriations of the seashore in the nature of private ownership. An indication of this is found in the last-quoted extracts from the *Institutes*, which tell us that, although the shore is owned in common and not subject to private ownership, "anyone may set up a hut [on the shore] to retire into . . ." ¹⁰⁸ The *Digest* expands on this privilege of hut-building and makes it clear that private persons could erect buildings on the seashore.

(Neratius.) That which any one has built on the seashore is his . . .¹⁰⁹

(Ulpian.) If one builds in the sea or on the seashore, although not on his own land, yet nevertheless he by the *jus gentium* makes it his.¹¹⁰

104. W. BUCKLAND, *supra* note 13, at 184-85 (footnotes omitted). Buckland's reference to Paul and his two references to Marcian are not translated by Ware. In the introduction to his work, Ware claims that "the Pandects have been carefully gone over leaf by leaf, and everything upon the subject of water, *except as to the ocean*, has been taken out, translated, and arranged under its appropriate head. Nothing has been omitted that referred in the remotest manner to fresh water." WARE § 7 (emphasis added). Perhaps the emphasized words explain Ware's omission of Paul and Marcian.

105. See note 24 and text accompanying note 56 *supra*.

106. DIGEST 43.8.3.

107. W. BUCKLAND, *supra* note 13, at 184; W. HUNTER, *supra* note 25, at 164-65; R. MELVILLE, *supra* note 101, at 219.

108. See note 100 and accompanying text *supra*.

109. DIGEST 41.1.14-.15.

110. DIGEST 39.1.1.18.

(Ulpian.) The use of public streams is common to all, just the same as public roads and the shores of the sea. In these places it is therefore by public right permitted to any one to build up or to tear down, provided, however, that this is done without disadvantage to anybody else.¹¹¹

Thus, as suggested by Ulpian, the privilege of building on the seashore was thought to derive from the law common to all mankind (*jus gentium*) or from the usufructuary servitude imposed on the shore in favor of the public (building, evidently, being a public "use" of the shore). But building on the seashore evidently was not completely *ad libitum*. Some commentators state that the license or permission of the Praetor was a condition precedent to building on the shore,¹¹² and Ulpian tells us that the builder had to post a bond to protect against any damage that the structure might cause.¹¹³

In sum, the Roman seashore was, in general, owned by no one and common to all. The use of the shore was public, free, and open to all, and one of the permissible public uses was erecting buildings. Although some commentators suggest that the erection of a building did not affect the common ownership of the subjacent soil,¹¹⁴ it is plain that the Roman law, by allowing the de facto appropriation of land by a building, suffered the functional equivalent of private ownership along many parts of the shore.

C. Civil Law Countries: Spain and France

After the fall and disintegration of the Roman Empire the *Corpus Juris Civilis* was lost for several centuries. But the Roman influence was not entirely lost or forgotten during this period. Elements of Roman law persisted in memory or as custom and habit, and the Church preserved much of Roman civilization in its law and culture.¹¹⁵ In addition, there were in medieval Europe some more or less

111. DIGEST 39.2.24.

112. H. LEMMON, *supra* note 93, at 15.

113. DIGEST 39.1.1.18: "If any one, therefore, wished to prohibit him from building there, such one would not have the right to prohibit nor to declare it an encroachment unless on one account, which is to demand security for threatened injury to himself." DIGEST 39.2.24:

In these places it is therefore by public right permitted to any one to build up or to tear down, provided, however, that this is done without disadvantage to anybody else. For that reason a bond for security is given on account of the construction alone, and not for injury to the place; that is, the bond is given for the damage which the structure may cause.

114. H. LEMMON, *supra* note 93, at 16.

115. A. VON MEHREN, *supra* note 14, at 5.

formalized legal systems that addressed themselves to water law. The *Lex Romana Visigothorum*, a "rude, fragmentary, barbarized Roman law," was compiled in 506 for the Roman subjects of Alaric the Second.¹¹⁶ It "purposed to be, and indeed was, a more or less complete Code for the usage of the Roman populations of France and Spain."¹¹⁷ A later development of the Visigothic code, the *Fuero Juzgo*,¹¹⁸ provided:

No one shall for his own private benefit, and against the interests of the community, obstruct any stream of importance; that is to say, one in which salmon and other sea-fish enter, or into which nets may be cast, or vessels may come for the purpose of commerce.¹¹⁹

From this quotation, it would seem that the Visigoths' conception of "public" waters was based upon the capacity of the stream for fishing or for commercial navigation.

The Moors, who entered Spain from Africa in the eighth century, brought with them an extensive knowledge of irrigation and a legal system that took its central concepts from the Koran. "Mohammed taught that water was 'the perfect, indispensable, and priceless element of purification to obtain a state of grace.'"¹²⁰ One of the more important Moslem legal concepts was the right of thirst, which was the right to quench one's thirst and to water one's animals from a watersource. The law relating to the right of thirst, which right was accorded to both Moslems and non-Moslems,¹²¹ reveals a Moorish hierarchy of "public" and "private" waters.

Water was classified into three categories: (1) large bodies of water which were *res nullius* and in which the right of thirst could be exercised freely; (2) appropriated waters, waters belonging either to a group of individuals or privately held; the right of thirst was restricted in these cases to extreme need or the requirement of paying for the water; (3) wells and springs dug on land which was not privately owned. In this third case water rights were regulated on the basis of the needs of the parties involved and the labor invested.¹²²

116. *Id.*

117. P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 16 (2d ed. 1929), quoted in A. VON MEHREN, *supra* note 14, at 5.

118. "'Fuero juzgo' is a contraction of '*Fuero de los jueces*,' or the law of the judges." T. PALMER, *GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN* 28 (1915). See B. DOBKINS, *supra* note 6, at 72 n.36.

119. FUERO JUZGO 8.4.29, quoted in B. DOBKINS, *supra* note 6, at 73.

120. B. DOBKINS, *supra* note 6, at 65 (footnote omitted).

121. *Id.* at 66.

122. *Id.* (footnote omitted).

The real development of Continental civil law began, however, with the rediscovery of Roman law. It is said that a copy of the *Corpus Juris Civilis* was first rediscovered in 1147 in a monastery at Amalphi, Italy.¹²³ It is also said that Irnerius, at Bologna in the twelfth century, was the first to give lectures on the newly rediscovered *Digest*.¹²⁴ And "[w]ith the lectures of Irnerius at Bologna thus begins for western Europe the study of [Roman Law] as a coherent, systematic body of law."¹²⁵

Although it is beyond the scope of this article to analyze the water laws of all the civil law countries, it is relevant to an understanding of current law in some American states to inquire into the historical development of the public waters/private waters distinction in Spain and France. As refracted through the lens of Mexican law, Spanish law, particularly *Las Siete Partidas* and Escriche's commentaries, had an important influence on the development of law in Texas¹²⁶ and California¹²⁷; French law, especially as crystallized in the Code Napoleon and subsequent legislation, had an analogous influence on the development of law in Louisiana.¹²⁸

1. *Spanish Law*.—In the thirteenth century Spanish law was a melange of Visigothic law, Moorish law, and the various local laws of the municipalities and pueblos. The Spanish kings, eager to simplify the law and to increase their own power, reintroduced Spain to the newly rediscovered Roman law.¹²⁹ To further these goals, in 1256 Alfonso the Wise (Alfonso X) of Castile ordered the compilation known as *Las Siete Partidas*.¹³⁰ This work was completed in nine years¹³¹ and

123. WARE § 3.

124. A. VON MEHREN, *supra* note 14, at 6.

125. *Id.* at 8.

126. *See* B. DOBKINS, *supra* note 6. *See also* Manry v. Robison, 56 S.W.2d 438 (Tex. 1932); State v. Grubstake Inv. Ass'n, 297 S.W. 202 (Tex. 1927); W. HUTCHINS, *THE TEXAS LAW OF WATER RIGHTS* (1961); Davenport & Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 283 (1956); Roberts, *Title and Boundary Problems Relating to Riverbeds*, 36 TEXAS L. REV. 299 (1958); White & Wilson, *The Flow and Underflow of Motil v. Boyd* (pts. 1-2), 9 SW. L.J. 1 & 377 (1955); Comment, *Waters and Watercourses—Title to Stream Beds and Riparian Lands—Determinable Fees*, 12 TEXAS L. REV. 490 (1934); Comment, *Waters and Watercourses—Title to Bed of Stream, Under Mexican Grant*, 6 TEXAS L. REV. 524 (1928).

127. *See* Lux v. Haggin, 10 P. 674 (Cal. 1886); S. WIEL, *WATER RIGHTS IN THE WESTERN STATES* (3d ed. 1911).

128. *See* 2 A. YIANNPOULOS, *supra* note 20; Yiannopoulos, *Common, Public and Private Things in Louisiana: Civilian Tradition and Modern Practice*, 21 LA. L. REV. 697 (1961).

129. B. DOBKINS, *supra* note 6, at 74.

130. *Id.*; WARE § 4.

131. B. DOBKINS, *supra* note 6, at 74. *But see* WARE § 4 (*Partidas* completed in seven years).

consisted of seven books. In the original it was a literary acrostic, each book beginning with a letter of the king's name, A-L-F-O-N-S-O.¹³² Although completed by 1265, the *Partidas* was not formally recognized as the central common law of Spain until the *Ordenamiento de Alcalá* in 1348.¹³³ Eventually, it came to occupy a central place in Spanish jurisprudence and is still cited as authority.

But despite the fact that in Spain the *Partidas* holds a position of prestige and primacy equivalent to that of the Constitution in the United States, it has been said that "[t]he significance of the *Partidas* stems in large part from its reproducing and spreading the principles of Roman law rather than from its originality."¹³⁴ More damningly, it has been said that "[t]he *Partidas* bear the appearance of a compilation of a rude people, made from the laws of a former highly civilized race [the Romans]," and that the *Partidas* "are of but little value."¹³⁵ This latter comment has some merit; as compared to the approximately 378 fragments in the *Corpus Juris Civilis* concerning fresh water,¹³⁶ there are only 22 in the *Partidas*,¹³⁷ of which only five are pertinent to the subject matter of this article.¹³⁸ Moreover, with regard to the former comment, it is unquestionable that the pertinent fragments of the *Partidas* are summarizations and reformulations of law taken from the *Corpus Juris Civilis*.

A number of codes and collections of law other than the *Partidas* subsequently appeared in Spain, including the *Ordenamiento de Alcalá* of 1348, the *Leyes de Toro* of 1505, the *Nueva Recopilación* of 1567, and the *Novísima Recopilación* of 1805.¹³⁹ These newer codes and collections did not abrogate the older ones; thus it was necessary to examine all codes and collections in order to distill the law on any particular subject.¹⁴⁰ This task was undertaken by various writers, whose works the courts looked upon as authoritative.¹⁴¹ Probably the best known of these commentators was Joaquín Escriche y Martín, who

132. WARE § 4.

133. B. DOBKINS, *supra* note 6, at 77.

134. *Id.* at 74.

135. WARE § 394.

136. Ware's Table of Contents lists 19 fragments from the *Code* and 359 fragments from the *Digest* relating to water. In Book II, title I of the *Institutes*, there are 10 fragments relating to things *extra nostrum patrimonium*. See R. LEE, *supra* note 4, at 105-06.

137. WARE §§ 395-415.

138. LAS SIETE PARTIDAS 3.28.3, 3.28.6, 3.28.8, 3.28.31, 3.28.32, translated in WARE §§ 395-96, 398, 402a, 403.

139. B. DOBKINS, *supra* note 6, at 77.

140. *Id.* at 77-78.

141. *Id.* at 78.

published a general encyclopedia of legislation and court decisions in 1831, the *Diccionario Razonado de Legislacion y Jurisprudencia*.¹⁴² Eschriche's treatment of water law is found in four articles: *Agua*, *Acequia*, *Rio*, and *Ribera*.¹⁴³ It is to the *Partidas* and to Eschriche that we, like the courts of Texas,¹⁴⁴ shall look in order to ascertain the relevant water law of the central Spanish government.¹⁴⁵ Our discussion will generally track that of the section on Roman law above.

The *Partidas* nowhere makes the Roman distinction between public and private streams. It simply states that "[r]ivers, ports and public roads, belong to all men in common."¹⁴⁶ Eschriche, however, when defining a river, does advert to the Roman distinction between perennial and torrential streams:

A river is a mass of water united between two banks, which runs perpetually from time immemorial. It differs from a torrent in that this is the effect of the abundant rains or extraordinary meltings of snow, so that it runs only a certain time and leaves its bed dry the greater part of the year.¹⁴⁷

By defining rivers only in terms of perpetual streams, Eschriche, like the Romans, allows private ownership of torrential streams. Eschriche also defines public rivers in another way:

Waters which are not nor can not be private property belong to the public. Such are the waters of the rivers which by themselves or by

142. *Id.*

143. *Id.* See F. HALL, THE LAWS OF MEXICO 400-01 (1885); Davenport & Canales, *supra* note 126, at 166-68; White & Wilson, *supra* note 126, at 381-85.

144. See *Heard v. Town of Refugio*, 103 S.W.2d 728 (Tex. 1937); *Manry v. Robison*, 56 S.W.2d 438 (Tex. 1932); *State v. Grubstake Inv. Ass'n*, 297 S.W. 202 (Tex. 1927); *McCurdy v. Morgan*, 265 S.W.2d 269 (Tex. Ct. Civ. App. 1954).

145. It must be recalled that the *Partidas* and the subsequent codes and collections, upon which Eschriche and other writers commented, describe only the water law of the central government.

This body of [central government] law . . . was only a part of the law, for Spanish water law reflected that duality which seemed omnipresent in Spanish law. There was, it must be stressed, also the water law of the pueblos and municipalities, based on ancient customs and practices going back in many cases to the Moors The local water laws and customs, rooted in the concept that water belonged to the community or pueblo and could be used by all citizens subject to municipal rules and regulations, were more familiar to the people as a whole and of greater relevance than the laws of the central government.

B. DOBKINS, *supra* note 6, at 83.

146. LAS SIETE PARTIDAS 3.28.6, translated in WARE § 396.

147. F. HALL, *supra* note 143, at 416-17, quoted in Hawkins, *Title to Riverbeds in Texas and Their Boundaries*, 7 TEXAS L. REV. 493, 509 (1929), and in Roberts, *supra* note 126, at 300.

accession with others follow their course to the sea. These may be navigable or not navigable.¹⁴⁸

From this passage, it is apparent that Eschriche conceives of a public river as any (perpetual) stream which, either immediately or mediately, empties into the sea. As a matter of legal theory, it seems logical to conclude from Eschriche's comments that, in Spain, torrential streams and streams unconnected with the sea were subject to private ownership. As a matter of geological reality, however, it is unlikely that many streams exist that do not eventually link up with the sea.

The question of riverbed ownership under Spanish law was addressed by the Texas Supreme Court in two landmark decisions. *State v. Grubstake Investment Association*¹⁴⁹ addressed the broad question of who, under Spanish law, was the owner of riverbeds. In concluding that the sovereign (state), rather than riparian proprietors, held title to riverbeds, the court relied¹⁵⁰ on the following fragment from the *Partidas*:

Rivers sometimes take new courses, abandoning their former beds and leaving them dry. And as disputes may arise about the right of property to the ground thus left; we say it will belong to the owners of the adjoining lands, in proportion to the extent of their estates upon the banks. And the owners of the lands through which the river makes its new bed will lose the property in the soil it covers, which will now be of the same nature of the former bed, and will *like the river itself vest in the public*.¹⁵¹

That the Texas court's conclusion is a correct interpretation of the *Partidas* should not be open to doubt. What is more interesting is that the court, looking to the writings of Buckland, Gould, Kent, and others, was embarrassed to find that the Roman law of riverbed ownership was clouded with the "gravest doubt."¹⁵² Thus the court was forced to justify its reliance on the *Partidas* by construing it to be a departure

148. F. HALL, *supra* note 143, at 411, quoted in B. DOBKINS, *supra* note 6, at 78.

149. 297 S.W. 202 (Tex. 1927).

150. *Id.* at 203.

151. LAS SIETE PARTIDAS 3.28.31, translated in WARE § 402a (emphasis added). By contrast, the *Grubstake* court, 297 S.W. at 203, also relied on the following fragment:

Lands are sometimes covered with water, by the inundation of rivers, and remain so covered for many days; and though the owner, during that time, loses the possession of them, he nevertheless preserves his right to the property: for as soon as the waters retire to their former channel and leave the lands uncovered, he will enjoy them as before.

LAS SIETE PARTIDAS 3.28.32, translated in WARE § 403.

152. 297 S.W. at 204.

from the old civil law and a "modification" of Roman law "to fit conditions in Spain and Mexico."¹⁵³ Of course, as has been demonstrated above,¹⁵⁴ there are fragments in the Roman *Digest* that are even more conclusive on state ownership of riverbeds than the fragment from the *Partidas* relied on in *Grubstake*. In the later case of *Manry v. Robison*,¹⁵⁵ the Texas Supreme Court addressed a narrower question: In what types of rivers does the state have a proprietary interest? Relying on Escriche's perennial/torrential distinction,¹⁵⁶ The *Manry* court held that, under the Spanish-derived common law of Texas prior to 1840, "Texas owned the beds of all *perennial streams, regardless of navigability*."¹⁵⁷ In so holding, the Texas court ignored Escriche's "linked-to-the-sea" definition of public rivers.

It is plain that the *Manry* court, like the Romans, conceived public (perennial) rivers to be of a more encompassing class than navigable rivers. That this was the Spanish view is reinforced by Escriche, who, as quoted above,¹⁵⁸ states that public waters "may be navigable or not navigable." This view has also been accepted by the California Supreme Court, which has observed that, whereas "by the common law . . . innavigable streams were private," under Mexican law "innavigable streams were public property."¹⁵⁹ Escriche also demonstrates that Spanish law, again like Roman law, accorded navigable public streams greater protection and regulation than nonnavigable public streams.

If [public streams] are navigable, nobody can avail himself of them so as to hinder or embarrass navigation; but if they are not, the owners of the land through which they pass may use the waters thereof for the utility of their farms or their industry¹⁶⁰

Nobody can open into a navigable river an acequia or channel which embarrasses navigation; and that one which may now be made, whether new or old, must be closed up or destroyed at the

153. *Id.*

154. See notes 60-62 and accompanying text *supra*.

155. 56 S.W.2d 438 (Tex. 1932).

156. In reaching its conclusion the *Manry* court, *id.* at 446, cited Frederic Hall, Joseph Angell, and the *Grubstake* case. But *Grubstake* does not discuss the question of perennial vis-a-vis torrential streams, and Angell's comments on perennial streams concern Roman law, not Spanish, Mexican, or Texas law. See J. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 714 & n.1 (7th ed. 1877). This leaves only the citation to Hall as a valid source of Spanish law, and the cited sections of Hall are translations of Escriche. See F. HALL, *supra* note 143, at 416-17. Thus the textual statement that the *Manry* court relied on Escriche is correct.

157. 56 S.W.2d at 446.

158. See note 148 and accompanying text *supra*.

159. *Lux v. Haggin*, 10 P. 674, 720 (Cal. 1886).

160. F. HALL, *supra* note 143, at 411, quoted in B. DOBKINS, *supra* note 6, at 78.

cost of the owner, because public utility must be preferred to that of a private person: Law 8, title 28, partidas 3. But not being a navigable river, any resident of the town where it passes may extract a part of its water and construct an acequia in order to irrigate his lands or to run his mill¹⁶¹

There is no indication in the *Partidas* or Escriche of the Spanish test of navigability, but one suspects that it was a navigability-in-fact test.¹⁶²

With regard to ownership of the seashore, the *Partidas*, like the *Institutes*, tells us that the seashore "belong[s] in common, to all the living creatures of this world."¹⁶³ But as with Roman law, one must hedge the conclusion that the Spanish foreshore was owned by no one in particular. Escriche, like a latter day Celsus, says that although "[t]he laws of the *Partidas* place the '*playa*' among the common things which all men can use," nevertheless the *Partidas* "cannot be intended to treat [the *playa*] as independent of the nation to which it may pertain."¹⁶⁴ Furthermore, "[t]he shores of the sea pertain as to property to the *nation* of whose territory they are a part, and as to use to all."¹⁶⁵ Thus Escriche conceives of the Spanish seashore as being owned by the state, but subject to a public servitude for common use.

One must also hedge conclusions about ownership of the shore under Spanish law because the *Partidas*, like the *Corpus Juris Civilis*, recognizes a right to build on the shore.

Nevertheless, if there be a house on the sea shore, belonging to any one; it ought not to be pulled down, or used, in any manner, with-

161. F. HALL, *supra* note 143, at 414, *quoted in* B. DOBKINS, *supra* note 6, at 79. *See also* LUX v. Haggin, 10 P. 674, 710, 718 (Cal. 1886).

162. *See* LUX v. Haggin, 10 P. 674, 710 (Cal. 1886) (emphasis added): "Thus, it was the policy of Mexico to foster and protect navigation. The rivers *naturally adapted to the passage of water-craft* were devoted to the common use for purposes of navigation."

One might also suspect that the Spanish test of navigability, if one existed, was bottomed on the capacity of the river for commercial usage. This suspicion is based on the fragment of the *Partidas* that declares the use of river banks to be public. The public uses given as examples smack strongly of commerce:

And though the dominion or property, (*senorio*) of the banks of rivers belongs to the owner of the adjoining estate; nevertheless, every man may make use of them, to fasten his vessel to the trees that grow there; or to refit his vessel; or to put his sails or merchandise there. So fishermen may put and *expose their fish for sale* there, and dry their nets; or make use of the banks for all other like purposes, *which appertain to the art or trade, by which they live.*

LAS SIETE PARTIDAS 3.28.6, translated in WARE § 396 (all emphasis, except "*senorio*," added).

163. LAS SIETE PARTIDAS 3.28.3, translated in WARE § 395.

164. *Quoted in* LUX v. Haggin, 10 P. 674, 707 (Cal. 1886).

165. *Quoted in id.* at 707-08.

out the consent of the builder or owner. If, however, it be destroyed by the sea, or otherwise; or fall to ruin; then any person may build another in its place.¹⁶⁶

It is clear, then, that the Spanish, like the Romans before them, allowed the functional equivalent of private ownership on the shore by virtue of the privilege of building. And this, of course, should not be surprising, since the law of the *Partidas* concerning the seashore is merely a compression and reformulation of Roman law.

2. *French Law*.—The newly revived *Corpus Juris Civilis* influenced legal science in France during the period between 1100 and 1500, as it did throughout western Europe. The Roman influence was greater in southern France, the *pays de droit écrit*, than in northern France, the *pays de coutumes*.¹⁶⁷ But, basically, France did not have a unified body of law, Roman-influenced or otherwise, until 1804. Until the end of the fifteenth century the French legal system was fragmented by the struggle between the older, feudal system of courts and the emerging, centralized royal power.¹⁶⁸ From 1500 to 1804 French law was characterized by jurisdictional overlaps, conflicts between the Church and the developing state, and, as Portalis described it, "a confused and shapeless mass of foreign and French laws, of general and particular customs, of abrogated and non-abrogated ordinances, of contradictory regulations and conflicting decisions . . . a mysterious labyrinth . . . an immense chaos."¹⁶⁹ In short, during the *ancien régime* "[n]o institution existed with a sufficiently general and exclusive jurisdiction to permit the development of a body of common law."¹⁷⁰

Since the French legal system was so atomized during this period, it would be pointless to attempt generalizations about French water law. In 1694, however, Jean Domat (1625-1696), who had been a judge for 30 years, published a classic treatise on the civil law in an attempt to unify the various "civil laws" of France. Domat does not tell us much about the subjects heretofore discussed, the pertinent parts of his treatise being as follows:

Rivers, the banks of rivers, and highways are things public, the use of which is common to all particular persons, according to the respective laws of countries. And these kinds of things do not ap-

166. LAS SIETE PARTIDAS 3.28.3, translated in WARE § 395.

167. A. VON MEHREN, *supra* note 14, at 9.

168. *Id.* at 12.

169. *Id.*, quoting I P. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL at xciii (1836).

170. A. VON MEHREN, *supra* note 14, at 12.

pertain to any particular persons, nor do they enter into commerce, but it is the sovereign that regulates the use of them.¹⁷¹

The rivulets which are not of public use . . . are the property of particular persons, whose lands they run across . . .¹⁷²

Clearly, Domat sees rivers as public and "rivulets" as private. He also holds that the use of rivers is common to all. It is unclear who owns the riverbed. From the statements that rivers were "public" and that the "sovereign . . . regulates the use" of rivers, one might surmise that Domat thought the beds were owned by the state. But whatever the contribution of Domat, he was not the institution that unified French law.

One commentator suggests that "the French law of waters did not become settled until the Code Napoleon."¹⁷³ Indeed, it was the promulgation of the French Civil Code in 1804 that unified and systematized French civil law in general. And it is to the French Civil Code of 1804 and to the later statutory enactments that one must look for law on the subjects of public waters and navigability.¹⁷⁴

Although Domat, for one, distinguished between public rivers and private rivulets, prior to the adoption of the French Civil Code "views were divided as to whether all streams should be public or whether the small ones should become the property of adjacent landowners."¹⁷⁵ The controversy ended when article 538 of the French Civil Code of 1804 implicitly recognized a public stream/private stream distinction by declaring that "navigable" or "floatable" streams were a part of the "public domain."¹⁷⁶ Thus the French Civil Code of 1804 apparently treated the class of public streams as coextensive with the class of navigable streams—*i.e.* only navigable or floatable streams were public

171. 1 J. DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 150 (L. Cushing ed. 1850), quoted in WARE § 5.

172. 1 J. DOMAT, *supra* note 171, at 590, quoted in WARE § 5.

173. Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 CALIF. L. REV. 245, 256 (1918). Wiel attributes this statement to James Kent, but the passage of Kent that Wiel cites merely says that "the civil code very equitably qualified this [older French water law] doctrine." 3 J. KENT, *COMMENTARIES ON AMERICAN LAW* 439 n.(c) (12th ed. O. Holmes, Jr. 1884).

174. Teclaff, *Private Water Rights in France and in the Eastern United States*, 11 AM. J. COMP. L. 560, 561 (1962):

All the major changes in French water law since the Code Napoleon—such as that of April 29, 1845, giving the right to build irrigation ditches on someone else's land, or that of April 8, 1898, establishing the regime for small rivers, or that of October 16, 1919, concerning the use of streams for power—were made by statutes.

175. *Id.*

176. *Id.* at 562.

streams. Such a legal state of affairs would have been contrary to the Roman and Spanish positions, both of which conceived the class of public rivers potentially to encompass both navigable and nonnavigable streams, the division between public and private streams being based on the perennial or torrential nature of the watercourse.

As the French legal system developed in the nineteenth century, however, any theoretical equivalence between public streams and navigable streams degenerated, because French law moved away from a navigability-in-fact criterion for public streams. As early as 1835, streams began to be included in the public domain, not necessarily by virtue of their de facto navigability, but by force of administrative enumeration.¹⁷⁷ The historical development and current state of French law has been described as follows:

Article 538 of the French Civil Code stipulates that navigable and floatable streams are in the public domain, which means that they are destined for the use of the public and are not susceptible to private ownership. However, since 1910 the test of navigability and floatability has been for all practical purposes abandoned in favor of enumeration by the administration. According to the law of April 8, 1910, public streams are those which were previously declared such because of their navigability or floatability, or which enter the public domain as the result of public works or purchase by the state, irrespective of navigability or floatability. Once declared public these streams cannot be reclassified except by law.¹⁷⁸

As a consequence of administrative enumeration, public works and purchase by the state, it is likely that the domain of public waters in France presently includes many streams that are not navigable in fact.

With regard to bed ownership, it is clear that riparians in France do not own the beds of rivers that are part of the public domain; the state owns the bed of public streams.¹⁷⁹ Prior to 1898, however, there was a legal controversy as to the ownership of the beds of small, non-public streams. Advocates of complete state ownership of all water and streambeds relied on the *Institutes'* declaration that all "flowing water" is *res communes*; advocates of private ownership relied on the *Digest's* distinction between public (perennial) streams and private

177. "The public streams were enumerated for the first time in an annex to the ordinance of July 10, 1835, which implemented the law of April 15, 1829, concerning fisheries. This enumeration, which was repeatedly changed, was based on navigability and could be contested until 1910." *Id.* at 562 n.6.

178. *Id.* at 562 (footnote omitted).

179. *Id.* at 563. See generally Wiel, *supra* note 173; Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133 (1919).

(torrential) streams.¹⁸⁰ The French Civil Code did not specifically address the subject, but did provide that title to the *alluvia*, to emerged islands, and to abandoned stream beds would inure to the riparian proprietor(s).¹⁸¹ Relying on the logic that such Code provisions would be superfluous if beds could be privately owned, the judiciary and the majority of commentators concluded that all stream beds must be owned by the state.¹⁸² The Senate, however, silenced the debate by passing the law of October 16, 1898, which gave abutting riparian proprietors the ownership of beds of nonpublic streams.¹⁸³

Regardless of bed ownership, French law, like Roman law, theoretically recognizes that all flowing waters are *res communes* and that the public therefore has usufructuary rights in all streams.¹⁸⁴ Except for the riparian rights of access and view, the usufructuary rights of riparian proprietors in public streams are no different from the rights of the public at large.¹⁸⁵ And, as in Roman¹⁸⁶ and Spanish law,¹⁸⁷ a public servitude is imposed on the banks of public streams for purposes of public haulage and passage.¹⁸⁸ With respect to public usufructuary rights in nonpublic streams, however, the theoretical purity of the *res communes* idea is tainted by the fact of inaccessibility. French law accords the public no privilege of access to nonpublic streams through riparian lands,¹⁸⁹ and it imposes no public servitude of passage along the banks of nonpublic streams. Moreover, nonpublic streams are not likely to be navigable in any practical manner. Thus it is likely that, in the large majority of cases, the French public has no legal way of getting to a nonpublic stream in order to exercise its theoretical usufructuary rights in the water.¹⁹⁰

III. ENGLISH COMMON LAW ANTECEDENTS OF AMERICAN DOCTRINE

After the American Revolution, in a context of great national pride and antipathy towards Britain, there was a vigorous legal debate as to whether the English common law should be adopted in America—

180. Teclaff, *supra* note 174, at 563-64.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 563, 568.

185. *Id.* at 563. See generally Wiel, *supra* note 173; Wiel, *supra* note 179.

186. See note 73 and accompanying text *supra*.

187. See note 162 *supra*.

188. Teclaff, *supra* note 174, at 563.

189. *Id.* at 568.

190. See *id.*

and if so, to what extent.¹⁹¹ During the first 30 years of the nineteenth century, the most visible and vocal of the anti-common law forces were the advocates of codification. They proposed replacing the common law and its attendant judicial discretion—seen as despotic—with a more or less complete, thoroughly American codification of substantive law.¹⁹² But, as Professor Friedman puts it, “the common law had little to fear. It was as little threatened as the English language. The courts continued to operate, continued to do business; they used the only law that they knew.”¹⁹³ Consequently, as is axiomatic in hindsight to all lawyers and law students, most of America’s important legal doctrines are rooted in the English common law. And so it is with the American doctrines relating to navigability and to the ownership of submerged beds and the foreshore: they purportedly spring from English legal soil.

The general purpose of this part is to investigate the common law antecedents of one of the most important and far-reaching doctrines of American property law: namely, that title to the foreshore and submerged beds of all navigable waters is held in trust by each state for the use and benefit of the public.¹⁹⁴ This doctrine is now commonly

191. See generally L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); P. MILLER, *THE LIFE OF THE MIND IN AMERICA* (1965); R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

One of the attempted solutions to this problem was the enactment of “reception statutes” by state legislatures. These statutes adopted the decisional, and sometimes the statutory, law of England as of a certain date. See generally L. FRIEDMAN, *supra*, at 93-100. For example, FLA. STAT. § 2.01 (1973) provides:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

In *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), it was argued that the doctrine of contributory negligence had been a part of the English common law prior to July 4, 1776, that the doctrine had thus become part of Florida statutory law by operation of FLA. STAT. § 2.01 (1973), and that, therefore, the doctrine could only be repealed by the legislature. The Florida Supreme Court, finding that contributory negligence had not been recognized as a part of English common law until the 1809 case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), rejected the argument and adopted a system of comparative negligence. In dissent, Justice Roberts argued that contributory negligence had been a part of English common law as early as 1606.

192. See generally L. FRIEDMAN, *supra* note 191; C. HAAR, *THE GOLDEN AGE OF AMERICAN LAW* (1965); L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); P. MILLER, *supra* note 191; R. POUND, *supra* note 191; C. WARREN, *A HISTORY OF THE AMERICAN BAR* (1911).

193. L. FRIEDMAN, *supra* note 191, at 95.

194. See *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Waddell*, 41 U.S. 234, 16 Pet. 367 (1842).

known as the public trust doctrine. Specifically, the historical investigation of English common law will focus on two related questions: (1) who in England owned the foreshore in law and in fact; and (2) what were the relationships among navigability, the tidewater concept, and submerged bed ownership. With regard to the former question, it will be demonstrated that, on the most tenuous of authority, "conventional" English law evolved to a point where it contradicted contemporaneous English fact, and that American treatise writers and courts, apparently misconceiving the English experience, adopted a "common law" rule of foreshore ownership that never existed in England. With regard to the latter question, it will be seen that landmark American decisions addressing the issue of navigability, both in regard to locational admiralty jurisdiction and bed ownership, have misunderstood and confused the English doctrines on which they purport to rely.

A. *Ownership of the Foreshore*

The American treatise tradition, which began in the early 1820's, played a significant role in arresting the force of the codification movement. The primary complaint of the movement was the perceived irrationality and arbitrariness of common law adjudication.¹⁹⁵ By reducing substantive areas of the common law into seemingly coherent, intelligible, and logical systems, the early American treatises, many of which were written by eminent lawyers and judges, helped answer and dismiss this complaint. And it was the treatise writers who, by unearthing purported common law roots, were largely responsible for formulating the American doctrine of state ownership of the foreshore.

Joseph Angell's *Treatise on the Right of Property in Tide Water*, first published in 1826 and enlarged in 1847, was one of the earliest American treatises. Not only was it the first American treatise on tides, but it remained the premier American authority on the subject throughout the nineteenth century.¹⁹⁶ In his discussion of foreshore ownership under English common law, Angell states:

And although the property of *the soil* is in the Crown, to high-water mark; yet the shore, or the land which is between the high and

195. See generally L. FRIEDMAN, *supra* note 191; C. HAAR, *supra* note 192; L. LEVY, *supra* note 192; P. MILLER, *supra* note 191; R. POUND, *supra* note 191; C. WARREN, *supra* note 192.

196. John Gould's *A Treatise on the Law of Waters*, first published in 1883, was the first post-Angell treatise to deal with tides in any significant manner. This was followed by Henry Farnham's *The Law of Waters and Water Rights* in 1904.

low-water marks, is also of common right public. The maxim being, *Rex in ea habet proprietatem, sed populus habet usum ibidem necessarium*, the king has the property, but the people have the necessary use.¹⁹⁷

James Kent, who as a judge (1798-1814) and as Chancellor (1814-1823) in New York became one of the most eminent state court judges of the nineteenth century,¹⁹⁸ was also the author of the most influential general treatise on American law in the nineteenth century. His four volume *Commentaries on American Law*, first published 1826-30, went through 14 editions,¹⁹⁹ the last published in 1896. It was widely cited and was undoubtedly a law office "Bible." Agreeing in substance with Angell on the English foreshore doctrine, Kent, without citation, states:

It is a settled principle in the English law, that the right of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to high-water mark; and the shore below

197. J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 20 (1826) (footnotes omitted).

198. Dean Pound includes Kent as one of "the ten judges who must be ranked first in American judicial history." R. POUND, *supra* note 191, at 4.

In chronological order they are: John Marshall (1755-1835, Chief Justice of the United States for thirty-four years, 1801-1835), James Kent (1763-1847, on the bench for twenty-five years, 1798-1823, Justice of the Supreme Court of New York six years, Chief Justice ten years, and thereafter Chancellor of New York for nine years), Joseph Story (1779-1845, for thirty-two years a Justice of the Supreme Court of the United States), John Bannister Gibson (1780-1853, a judge for forty years, 1813-1853, three years on the Pennsylvania Court of Common Pleas, thirty-seven years in the Supreme Court of Pennsylvania, twenty-three of them as Chief Justice), Lemuel Shaw (1781-1861, for thirty-one years, 1830-1861, Chief Justice of Massachusetts), Thomas Ruffin (1787-1870, on the bench thirty-five years, 1818-1853, nine years as judge of the Superior Court of North Carolina, seven years as Justice of the Supreme Court of that state, and nineteen years as Chief Justice), Thomas McIntyre Cooley (1824-1898, for twenty-one years a judge of the Supreme Court of Michigan, 1864-1885, and for four years, 1887-1891, a member of the Interstate Commerce Commission, doing pioneer work upon what was to become a model of American administrative tribunals), Charles Doe (1830-1896, on the Supreme Court of New Hampshire thirty-five years, fifteen as a justice and twenty years as Chief Justice), Oliver Wendell Holmes (1841-1935, on the bench fifty years, seventeen years, 1882-1899, a justice of the Supreme Judicial Court of Massachusetts, Chief Justice of that Court for three years, 1899-1902, and Justice of the Supreme Court of the United States thirty years, 1902-1932), Benjamin Nathan Cardozo (1870-1938, Justice of the Supreme Court of New York, 1914-1917, designated to serve as judge of the Court of Appeals 1914, Associate Judge of the Court of Appeals, 1917-1932, after 1932 Justice of the Supreme Court of the United States).

Id. at 30 n.2.

199. The twelfth edition, published in 1873, was edited by one O. W. Holmes, Jr., who subsequently attained a measure of success as a judge and author.

common, but not extraordinary high-water mark, belongs to the public; and in England *the crown*, and in this country the people, have the *absolute proprietary interest* in the same, though it may, by grant or prescription, become private property.²⁰⁰

Thus Angell and Kent, writers of enormous prestige and influence during the nineteenth century, laid down as a categorical rule of substantive property law that the king, at English common law, was the absolute owner of the foreshore. It is not surprising, therefore, that early American decisions, when declaring title to the foreshore to be in the sovereign states (as successors to the king), relied on a similar view of the English common law.²⁰¹

The views of Angell and Kent regarding the common law of foreshore ownership do not comport with English law or English fact. If one examines Angell, Kent, or any American or English treatise or case announcing Crown ownership of the English foreshore, and if one traces their citations to earlier and earlier sources, the string of authority almost inevitably leads to and stops at Sir Matthew Hale's *De Jure Maris*.²⁰² This treatise was written by Lord Hale (1609-1676) around 1667,²⁰³ but it was not published until 1786 when it was included by Francis Hargrave in his *Law Tracts*.²⁰⁴ Hale says the following about ownership of the foreshore:

The shore is that ground that is between the ordinary high-water and low-water mark. This doth *primâ facie* and of common right

200. 3 J. KENT, COMMENTARIES ON AMERICAN LAW 344 (1828) (emphasis added).

201. *E.g.*, Commonwealth v. Inhabitants of Charlestown, 1 Pick. 180, 182 (Mass. 1822):

And this right of the sovereign extends to ordinary high-water mark; so that the shore, which is the space between high-water and low-water mark, belongs also to the sovereign; the property of the owner of the upland reaching only to that line which limits the waters in the ordinary course of the tides.

This view of the English common law was echoed in many Supreme Court opinions. In *Shively v. Bowlby*, 152 U.S. 1 (1892), the Court began its analysis of a problem concerning title to lands below the high-water mark with the following statement, apparently believed to be axiomatic:

By the common law, both the *title* and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands *below high water mark*, within the jurisdiction of the Crown of England, are in the King. . . . Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

Id. at 11 (emphasis added, Latin words italicized in original).

202. See note 87 *supra*.

203. S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO at xxxii (1888) [hereinafter cited as MOORE].

204. See note 87, *supra*, note 230 *infra*.

belong to the king, both in the shore of the sea and the shore of the arms of the sea.

[I]t is admitted, that *de jure communi* between the high-water and low-water mark doth *primâ facie* belong to the king, 5 Rep. 107. Constable's case. Dy. 326. Although it is true, that such shore may be and commonly is parcel of the manor adjacent, and so may be belonging to a subject, as shall be shewn, yet *primâ facie* it is the king's.²⁰⁵

Already having cited *Sir Henry Constable's Case*²⁰⁶ (1601), Hale then cites as support for his doctrine *The Prior of Tynemouth's Case*²⁰⁷ (1291) and *Attorney-General v. Philpot*²⁰⁸ (1631), all of which cases will subsequently be discussed, and concludes: "And this shall suffice for the king's right in the shore of the sea."²⁰⁹

One should immediately notice that the English rule of foreshore ownership announced by Hale is not the same as the rule articulated by Angell and Kent. Hale recognizes that the foreshore may be parcel of a manor or belong to a subject; thus he says only that the ownership of shore is "prima facie" in the king, leaving the impression that he is referring more to an evidentiary presumption than a rule of substantive law. In contrast, Angell and Kent, and American courts which have followed their views, announce a rule of substantive English property law when they categorically declare that absolute ownership of the foreshore has always been in the king. But more can be said about this after we have investigated the history of Lord Hale's "prima facie rule."

Suffice it to say that Hale's prima facie rule was quoted by such nineteenth century English treatise writers on water law as Hall,²¹⁰ Woolrych,²¹¹ Jerwood,²¹² and Phear,²¹³ and was adopted by nineteenth century English courts.²¹⁴ It is unquestionably the rule in England

205. DE JURE MARIS cap. IV, in MOORE 378-79.

206. 77 Eng. Rep. 218 (K.B. 1601).

207. 20 Edward I, Roll. 58 (1291).

208. Reported in MOORE 262-65; cited in *Attorney General v. Richards*, 145 Eng. Rep. 980 (Ex. 1795).

209. DE JURE MARIS cap. IV, in MOORE 380.

210. R. HALL, AN ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM (2d rev. ed. 1875). Hall's first edition was published in 1830.

211. H. WOOLRYCH, A TREATISE OF THE LAW OF WATERS (2d ed. 1851).

212. J. JERWOOD, A DISSERTATION ON THE RIGHTS TO THE SEA SHORES (1850).

213. J. PHEAR, A TREATISE ON RIGHTS OF WATER (1859).

214. E.g., *Attorney-General v. Emerson*, [1891] A.C. 649; *Gann v. Free Fishers of Whitsable*, 11 Eng. Rep. 1305 (H.L. 1865); *Malcomson v. O'Dea*, 11 Eng. Rep. 1155 (H.L.

today.²¹⁵ That *De Jure Maris* was (and still is) cited by treatise writers and courts as authority for this prima facie rule of Crown ownership of the foreshore should come as no surprise: Hale and his treatise have always been accorded preeminent esteem. In 1850 Jerwood wrote of *De Jure Maris*:

From the time of its publication up to the present . . . the work has been regarded as standard authority upon the subject indicated by the title, and as such it has been referred to by judges on the bench and quoted by text writers generally, without any apparent qualification or doubt as to its authenticity or soundness.²¹⁶

And it has been said of Hale himself: "[W]ith a mind beaming the effulgence of noonday, he sat on the bench like a descended god!"²¹⁷

Though Hale's reputation may explain the widespread citation to and reliance on *De Jure Maris* as authority for the prima facie rule, the more interesting question is why virtually no one ever cites to a source prior to *De Jure Maris*. Shadows begin to dim Hale's effulgence when this question is researched. The short answer to the question is that by the end of the reign of King John (1199-1216) virtually the entire English shore had, in fact, been granted to private owners; that prior to the reign of Elizabeth (1558-1603) no one had ever suggested that the Crown had any right in law to the foreshore; and that, with the exception of the highly suspect case of *Attorney-General v. Philpot*²¹⁸ (1631), the prima facie rule was not relied on by an English court until 1795 at the earliest, nine years after publication of *De Jure Maris*.

1863); *Attorney General v. Richards*, 145 Eng. Rep. 980 (Ex. 1795); *Le Strange v. Rowe*, 176 Eng. Rep. 903 (N.P. 1866).

215. See cases cited in note 214 *supra*; H. COULSON & U. FORBES, *THE LAW OF WATERS AND LAND DRAINAGE* 25-26 (6th ed. S. Hobday 1952); 33 H. HALSBURY, *LAW OF ENGLAND* §§ 859-63 (2d ed. D. Hailsham 1939); A. WISDOM, *THE LAW OF RIVERS AND WATERCOURSES* 20 (2d ed. 1970).

216. J. JERWOOD, *supra* note 212, at 31. In an appended note to *Ex parte Jennings*, 6 Cow. 518, 536 n.(a) (N.Y. 1826) (emphasis added), the reporter is even more encomiastic about *De Jure Maris* than was Jerwood:

The treatise of sir Mathew Hale, *De Jure Maris* has been so often recognized in this country, and in England, that it has become the text book, from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water. . . . In England, even on rights of prerogative, the courts scan his words with as much care as if they had been found in *Magna Charta*; and the meaning, once ascertained, they do not trouble themselves to search any farther.

217. Quoted in reporter's note to *Ex parte Jennings*, 6 Cow. 518, 536 n.(a) (N.Y. 1826) (quoting a Mr. Wirt).

218. See note 208 *supra*.

These are the conclusions of Stuart Moore in his valuable treatise, *A History of the Foreshore*, published in 1888.²¹⁹ Moore's treatise was the nineteenth century's most substantial treatment of the history of the English foreshore, and remains so today. Nevertheless, Moore remains relatively unknown; nothing of substance has been written concerning his research in over 50 years.²²⁰

Moore's treatise aimed to expose the prima facie rule of Crown ownership of the foreshore as a factual and legal myth. Moore argues that the prima facie rule was invented around 1568 by an obscure writer by the name of Thomas Digges, that it was adopted on the barest legal authority in *De Jure Maris*, and that it was eventually swallowed whole by the English courts. Of course, Moore's work, written in 1888, came too late; the prima facie rule had already become settled doctrine in England,²²¹ and, in America, state ownership of the foreshore had been established beyond question by the United States Supreme Court's 1842 decision in *Martin v. Waddell*.²²² With some additions, what follows is an analysis of the history of the English foreshore along the lines drawn by Moore.

Moore begins by analyzing several land grant charters of the Saxon and Norman kings. He observes that "the territories granted by them extended to the shore of the sea, to the mid-stream of non-tidal rivers, and in the case of tidal rivers *inter fauces terrae*, also to the mid-stream."²²³ The charters affecting rivers, both tidal and freshwater, expressly grant to midstream, using words such as "'up midne streame by halfen streame.'"²²⁴ Although Saxon and Norman grants of manors bordering on the sea very seldom expressly grant the shore (*littus maris*), a grant of the shore can be implied from construction of the boundary descriptions.²²⁵ Other commentators agree that most of the

219. See note 203 *supra*.

220. Between 1904 and 1922, a handful of American commentators recognized Moore's research: 1 H. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 39 (1904); Coudert, *Riparian Rights; A Perversion of Stare Decisis*, 9 COLUM. L. REV. 217 (1909); Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313 (1918); Parsons, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706 (1922); Riggs, *The Alienability of the State's Title to the Foreshore*, 12 COLUM. L. REV. 395 (1912); Thompson, *Title to Land Under Navigable Waters in New York*, 21 COLUM. L. REV. 680 (1921); Tillinghast, *Tide-Flowed Lands and Riparian Rights in the United States*, 18 HARV. L. REV. 341 (1905). Since 1922 Moore's views have received only summary mention, when mentioned at all. See, e.g., 1 *WATERS AND WATER RIGHTS* § 36.3 (R. Clark ed. 1967).

221. See authorities cited in notes 214-15 *supra*. Moore himself admits that the prima facie rule "must . . . be taken to be now established as law." MOORE at xl.

222. 41 U.S. 234, 16 Pet. 367 (1842).

223. MOORE 1.

224. *Id.*

225. *Id.* at 14.

English shore was alienated by the king, though the charters are now no longer in existence.²²⁶ Farnham's description of the early feudal attitude towards the ownership of submerged lands probably hits the mark:

[I]t appears that at the time when the land titles in England became vested in private owners, there was no acquaintance with any reason why the titles should not include land under the water as well as dry land. Grantees were interested only in obtaining the best bargains possible, and the Crown was willing to grant anything which it might be of advantage to him to grant. There was no public sentiment or rule of law to prevent his granting land covered by the water. The result is that, either directly or by the grantee acting upon the assumption that it did so, the upland title extended as far into the water as the grantee might consider it to his advantage to have it extend.²²⁷

Moore concludes that, by the end of the reign of King John in 1216, "the Crown had parted with and granted out almost every manor situate upon the sea-coast and the tidal rivers of the kingdom,"²²⁸ and that "no case has been found, and no case can be found, in which it is shewn that in any ancient grant the Crown has specifically or impliedly reserved the *jus privatum* in the shore."²²⁹ There seems to be no evidence to contradict Moore's conclusion. Indeed, Hale himself recognizes that private ownership of the shore is the *de facto* rule when he states in the original draft of *De Jure Maris*, first published by Moore, that: "I conceive that *littus maris* may questionles belonge to and bee parcell of a subjects manor The cases above and

226. See, e.g., H. LEMMON, *supra* note 93, at 31. In *Le Strange v. Rowe*, 176 Eng. Rep. 903, 905 (N.P. 1866), Chief Justice Erle said: "In a great number of cases the Crown has parted with it [the foreshore]. There are some manors that remain in the Crown—that are the property of the Crown . . . but I take it that in the great majority of cases the right to the foreshore between high and low water mark is in the lord of the manor."

227. I H. FARNHAM, *supra* note 220, at 171-72. Fraser's description of prefeudal English conceptions of property ownership is also of interest:

It must be remembered that settlement and occupation of the lands of England preceded the development of any adequate system of law. The tribes landing on the English shores, unlike the colonists of America, brought with them only the most primitive ideas of law. Their acts would determine law, rather than be determined by it. Claiming by conquest, they would own what they possessed, rather than possess what they owned. The feudal theory was as yet undeveloped. It is reasonable to suppose that a people under such circumstances would take possession of whatever was worth possessing.

Fraser, *supra* note 220, at 316 (footnotes omitted).

228. MOORE 24.

229. *Id.* at 27-28.

likewise ordinary experience prove that [the shore] is most ordinarily parcell of the adjoining land. . . ."²³⁰ And in *De Jure Maris* itself Hale declares that the shore "commonly is parcel of the manor adjacent."²³¹

Moore and others demonstrate to a reasonable certainty that virtually all of the English foreshore was de facto in private ownership by 1216. The question remains whether the Crown had any proprietary rights in the foreshore prior to Elizabeth's reign, and if so, by what authority. Research reveals no statute, case, or text according the Crown any such right until Thomas Digges' treatise, written in 1568 during the reign of Elizabeth.

There are no statutes or legislation that address Crown proprietary rights in the foreshore; the only tangentially relevant document is the Magna Charta. Chapter 33 of the original Charter of 1215 provides: "Henceforth all fish-weirs [or kydells] shall be completely removed from the Thames and Medway and throughout all England, except upon the sea coast."²³² (Kydells, or weirs, are permanent fishing structures fixed to the bottom.) This simple provision of the Magna Charta would not even bear mentioning in this discussion were it not for the fact that some writers and jurists have expanded it "almost unrecognizably" over the years.²³³ For example, Chief Justice Taney in the case of *Martin v. Waddell* wrote that, although the "question is not free from doubt," it "must be regarded as settled in England, against the right of the king, since Magna Charta, to make such a grant ['to a subject of a portion of the soil covered by the navigable waters of the kingdom']."²³⁴ Although he wrote in the context of a grant of private fishing rights, and although he qualified his dictum, Taney was wrong if he meant that the Magna Charta prevented the king from alienating submerged land. Plainly, the Magna Charta says

230. M. HALE, A NARRATIVE LEGALL AND HISTORICAL TOUCHINGE THE CUSTOMES cap. VI, in MOORE 364.

Concerning this "first treatise" of Hale, we are told in MOORE 318:

The first treatise here printed is from an original MS., in the undoubted handwriting of Sir Matthew Hale, preserved in MS. Hargrave No. 98. It is evidently the original draft of the works "De Jure Maris," "De Portubus Maris," and "Concerning the Customs," which were published by Hargrave in 1786. It treats shortly of all the subjects of Hale's work, but in a much more abbreviated form and in somewhat different language. It shews Hale's work as he first conceived it, and he must have put it aside when he wrote more fully the work which Mr. Hargrave printed.

231. DE JURE MARIS cap. IV, in MOORE 379.

232. Translated in J. HOLT, MAGNA CHARTA 325-26 (1965). Chapter 33 of the original Charter became chapter 23 of the revised Charter of 1225. *Id.* at 1.

233. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 767 (1970).

234. 41 U.S. 234, 263, 16 Pet. 367, 410 (1842).

no such thing. The only thing that chapter 33 commands is the removal of the private weirs that were cluttering the rivers of England.²³⁵ Furthermore, weirs located "upon the sea coast" are specifically exempted from the command. Although the Magna Charta has been judicially expanded to bar the king from granting private fisheries in tidal waters,²³⁶ no English court has ever held that it bars the king from alienating submerged land.²³⁷

The only notable pre-Digges text treating the law of the foreshore was Bracton's *De Legibus et Consuetudinibus Angliae*, England's first "general treatise" on law. It remained so until Blackstone's *Commentaries* was published in 1756. Bracton's work is usually dated between 1250 and 1256;²³⁸ thus Bracton was writing just a few years before Alfonso the Wise ordered the compilation of *Las Siete Partidas* in 1256.²³⁹ Many parts of Bracton's treatise, like the *Partidas*, were heavily influenced by Roman law.²⁴⁰ With a significant addition, Bracton's treatment of things common (*quaedam res sunt communes*) generally tracks that of the *Institutes* (with some of the *Digest* woven in):

By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore, provided he keeps away from houses and buildings [built there], for by the *jus gentium*

235. See Lauer, *The Common Law Background of the Riparian Doctrine*, 28 MO. L. REV. 60 (1963); Murphy, *English Water Law Doctrines Before 1400*, 1 AM. J. LEG. HIST. 103 (1957).

Chapter 33 of the Magna Charta is still on the English statute books. J. HOLT, *MAGNA CHARTA* 1 (1965). It grew from the privilege the City of London had won in its Charters of 1196 and 1199 to destroy all such nuisances affecting access to and from its port. *Id.* at 49.

236. *Malcolmson v. O'Dea*, 11 Eng. Rep. 1155 (H.L. 1862); S. MOORE & H. MOORE, *THE HISTORY AND LAW OF FISHERIES* 13 (1903).

237.

It has never been denied in the English cases that the crown might grant the fee in the foreshore or other tidal lands where it did not already subsist in the hands of a subject. On the contrary, it made grants of these lands down to the reign of Anne, when the power of the crown to make further grants was modified by act of parliament.

Fraser, *supra* note 220, at 434 (footnotes omitted). The parliamentary act referred to is 1 Anne, c. 7, § 5 (1702).

238. See 1 H. BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* at xlii (S. Thorne transl. 1968) [hereinafter cited as THORNE]; T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 259 (5th ed. 1956); 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 207 (2d ed. 1968).

239. See notes 130-33 and accompanying text *supra*.

240. The degree of Roman influence on Bracton has been variously estimated. See F. MAITLAND, *BRACTON AND AZO* (1895); T. PLUCKNETT, *supra* note 238, at 261-62; 1 F. POLLOCK & F. MAITLAND, *supra* note 238, at 207-08; 1 THORNE at xxiv-xlvi; Scrutton, *Roman Law in Bracton*, 1 L.Q. REV. 425 (1885).

shores are not common to all in the sense that the sea is, but buildings built there, whether in the sea or on the shore, belong by the *jus gentium* to those who build them. Thus in this case the soil cedes to the building, though elsewhere the contrary is true, the building cedes to the soil.²⁴¹

The statement that the shores of the sea are "common," obviously taken from the *Institutes*,²⁴² seems to cut against both Crown ownership and private ownership of the shore. Of course, Bracton may only have been asserting that the *use* of the shore is common. But his statement that "the soil cedes to the building" is a significant one. Neither the *Institutes* nor the *Digest* makes such a declaration about the soil, though they do recognize the privilege of building on the shore. Bracton clearly states what the Romans left in doubt: the soil of the shore can be privately owned, at least by building on it.

The contrast between the Bractonian view and the Roman view is sharpened even more by a portion of the *Institutes* that Bracton excludes. In his discussion of things public (*quaedam publicae*) Bracton generally tracks the portion of the *Institutes* dealing with the public character of rivers and river banks, but he *omits* the following sentences in the *Institutes* relating to the seashore:

The use of the sea-shores too is public and *juris gentium*, like the use of the sea itself *But the ownership of the shores may be supposed to be vested in no one*, and to be governed by the same law as the sea and sea-bottom.²⁴³

Moore concludes that Bracton omitted these sentences from the *Institutes* because he was well aware that proprietary rights in almost the entire English foreshore had in fact been granted to private holders.²⁴⁴ Modern scholarship supports Moore's theory of calculated omission. It is now recognized that Bracton was a far more accomplished Romanist than was previously thought,²⁴⁵ and that he picked and chose from Roman texts in order to bring Roman law into line with his notions of English law. Professor Samuel Thorne, probably the greatest living authority on Bracton, states:

. . . Bracton's principal task was not to copy or make an abstract of the [Roman] texts before him. To reproduce the teachings of

241. 2 THORNE 39-40 (footnotes omitted).

242. See note 99 and accompanying text *supra*.

243. INSTITUTES 2.1.5 (emphasis added).

244. MOORE 31-33.

245. 1 THORNE at xxxiii-xxxvii.

Justinian and Azo was not his aim, but to use the ideas and language he found in their books for English purposes. Departures from them were thus not distortions or perversions of the texts he was using, for a treatise on English law required some modifications of Roman material, some remodelling of Roman doctrines, some adaptations of Roman terms to English institutions.²⁴⁶

Whether Bracton omitted the above-quoted fragments of the *Institutes* because he recognized that the English foreshore was privately owned we will never know, but, considered with his statement that the shore "cedes to" a private building, the argument is appealing. In any event, there is no hint in Bracton that the king had a proprietary interest in the shore, *prima facie* or otherwise.

Since it is clear that no pre-Elizabethan legislation or text writer had even intimated a Crown proprietary right in the foreshore, the next question is whether any case had ever so intimated. Moore reviews dozens of cases and answers the question in the negative:

[F]rom the earliest times down to the end of the reign of Philip and Mary, we find no trace of any claim by the Crown to the foreshores of the kingdom as part of the rights of the prerogative; on the contrary, all the records which are forthcoming shew that the idea of such a claim did not exist. The Crown itself claimed the foreshore only when it was parcel of its own manor; and when it challenged the right of the subject to wreck of the sea taken upon his lands, that is, upon his foreshore, it tacitly admitted his right to the foreshore, and in no case traversed his claim that the wreck was his by virtue of a grant or prescription to take wreck *upon his lands*.²⁴⁷

It is true that, from the reign of Henry III (1216-1272) on, commissions were continually issued to make inquiry into any possible purprestures, encroachments, or usurpations of Crown rights. But no case is revealed in which the conduct of a subject on the "foreshore opposite his land was ever returned [by a commission] as a purpresture or encroachment upon the rights of the Crown to any interest of property in the foreshore."²⁴⁸ Moore concludes that the 1631 decision in *Attorney-General v. Philpot*,²⁴⁹ one of the three cases cited by Hale, was the first case to recognize a Crown proprietary right in the foreshore.

Moore reaches this conclusion despite the fact that the other two cases cited by Hale in support of his *prima facie* rule were decided

246. *Id.* at xxxiii (footnotes omitted).

247. MOORE 169.

248. *Id.*

249. See note 208 *supra*.

in the period prior to *Philpot*. The first case, the *Prior of Tynemouth's Case*,²⁵⁰ was decided in 1291. The prior owned riparian property abutting on the Tyne river in the port of Newcastle. Evidently, he had been preventing towing and had been driving towers off of the foreshore in front of his manor. The burgesses of Newcastle, who held a Crown franchise of port, brought suit against the prior in the king's name. Judgment was given against the prior on the ground that he was committing a purpresture (an encroachment on Crown rights). Moore tells us that the "pleadings and judgment practically admit the property of the foreshore to have been in the Prior," and concludes that the "purpresture therefore was a purpresture upon the franchise of the port, and not upon the soil of the King in right of his Crown, for that was not set up."²⁵¹ That the judgment in the case did not concern ownership of the soil of the shore is virtually admitted by Hale himself. In *De Jure Maris*, Hale, obviously trying to stretch the *Prior's Case* to support his prima facie rule, says that "judgment was given against the prior, but not in express terms for the soil, but implicitly."²⁵² And in his original draft treatise Hale admits: "but no particular judgment [was] given, as I remember, as to that point,"²⁵³ i.e. as to the soil. Thus one must agree with Moore that the *Prior of Tynemouth's Case* does not support Hale's prima facie rule, or any other rule giving the Crown a proprietary right in the foreshore.

The second pre-*Philpot* case cited by Hale is *Sir Henry Constable's Case*,²⁵⁴ decided in 1601. This case not only fails to support Hale's prima facie rule, but actually supports private ownership of the foreshore. The issue in the case was whether the admiral or the county had jurisdiction over wreck²⁵⁵ found on the foreshore. The court held

250. 20 Edward I, Roll. 58 (1291), extracted in MOORE 136-37.

251. MOORE 138.

252. DE JURE MARIS cap. IV, in MOORE 379.

253. MOORE 136.

254. 77 Eng. Rep. 218 (K.B. 1601).

255.

Wreck is a royal franchise belonging to the Crown, unless the right has been granted to a subject, who may only obtain a title to wreck by charter or prescription. . . . The right to wreck will not pass under the general terms of a grant. Nor will it pass by a grant of the seashore by itself, and whilst a royal grant of wreck to the lord of a manor gives him, as an incident, the right to pass over the foreshore to take wreck, it does not pass the right to the soil of the shore.

. . . "Wreck" includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water

In accordance with *Constable's Case*, "flotsam" is when a ship is sunk or otherwise perished and the goods float on the sea; "jetsam" is when the ship is in danger of being sunk and, to lighten the ship, the goods are cast into the sea, and afterwards, notwithstanding, the ship perishes; "lagan" is when the goods . . .

that the jurisdiction was mixed, the admiralty having jurisdiction when the shore is covered by tidal flow, and the county having jurisdiction when the shore is exposed by tidal ebb.²⁵⁶ In the course of the argument it was also "resolved by the whole court that the soil on which the sea floweth and ebbeth; *scil.* between high-water mark and low-water mark, may be parcel of the manor of a subject."²⁵⁷ Thus the part of the decision that addresses proprietary rights in the shore cuts in favor of private ownership.

The *prima facie* rule, unsupported by any legislation, text writer, or case, was "invented" by Thomas Digges in 1568 to give legal foundation to the widespread practice of "title hunting" on behalf of the Crown.²⁵⁸ During the reigns of Henry VIII (1509-1547) and Edward VI (1547-1553), the Crown coffers were being filled by the constant forfeitures of subjects' estates under attainders for treason, and by forfeitures of monastic lands and college lands throughout the kingdom.²⁵⁹ But titles were often obscure by the time of the sixteenth century, and many lands subject to forfeiture were unquestionably being concealed. Thus there was great difficulty in identifying the lands subject to Crown seizure. As a consequence, from the time of Philip and Mary (1554-1558), the Exchequer continually established commissions of inquiry to unearth concealed lands and to recover those lands for the Crown by process of information. The kingdom was searched from end to end to discover the minutest fragment of concealed land. During the four-year reign of Philip and Mary, more than 100 informations were filed. During the reign of Elizabeth (1558-1603), more than 700 informations were filed in the county of York alone.

These widespread inquiries into allegedly concealed lands brought into existence a class of private "title hunters," who made a regular profession of gathering information on titles in order to discover flaws. These title hunters would bring their information to the Ex-

are . . . cast into the sea . . . and the mariners . . . tie them to a buoy or cork or such other thing that will not sink, so that they may find them again. None of these goods which are called jetsam, flotsam or lagan, are called wreck so long as they remain in or upon the sea . . . "Derelict" is a term applied to a ship abandoned or deserted at sea without any hope of recovery.

To constitute wreck, goods must have touched the ground, though they need not have been left dry. . . . Property which comes ashore is wreck and belongs to the Crown or to a grantee of wreck; whilst at sea it belongs to the King in his office of Admiralty as derelict, flotsam, jetsam or lagan.

A. WISDOM, *THE LAW OF RIVERS AND WATERCOURSES* 30-32 (1970) (footnotes omitted).

256. 77 Eng. Rep. 218 (K.B. 1601), translated in J. ANGELL, *supra* note 197, at 143.

257. 77 Eng. Rep. 218 (K.B. 1601), translated in J. ANGELL, *supra* note 197, at 142-43.

258. See MOORE 180-211.

259. The historical discussion in this paragraph and the next is largely taken from MOORE 169-79. See also the authorities cited in note 220 *supra*.

chequer, which would issue a commission and, after a usually farcical hearing, would make return that the lands belonged to the Crown. At this point the Crown would patent the land in question to the title hunter in return for a goodly sum of money, and would also give the title hunter the power to cause processes and informations to be filed against the person in possession of the land. Many of these patents, called "fishing grants," concerned shore lands. The title hunter, in turn, would approach the occupant of the land in question and attempt to blackmail him into buying the patent by threatening to have forfeiture process issued against him. Many people who held indisputable titles would nevertheless submit to the blackmail and, in essence, buy back lands which they already owned. If a person resisted the blackmail and successfully defended his title in court, the Crown would often issue seriatim patents to new title hunters until the stubborn owner finally gave up. Moore states that the number of fishing grants on the Patent Rolls during the reigns of Elizabeth, James I (1603-1625), and Charles I (1625-1649) encompassed "at least half the lands in the kingdom."²⁶⁰

Thomas Digges, a mathematician, engineer, and astronomer, was one of the most active title hunters.²⁶¹ About 1568, he wrote a short treatise, *Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof*, in an attempt to give legal justification to the Crown claims to foreshore. Digges' general theory, which relied on no case support, was that the shore, like the sea itself, is part of the great waste of the kingdom that was never granted out, and that no one could hold title to the shore unless he could prove an express grant from the king. As discussed earlier, express grants of the shore were rarely made;²⁶² thus Digges' doctrine would be of enormous benefit to the Crown's title hunting activity. Moore summarizes the pertinent parts of Digges' treatise:

By this treatise was first invented and set up the claim of the Crown to the foreshore, reclaimed land, salt marsh, and derelict land in right of the prerogative. Mr. Digges boldly affirms that no one can make title to the foreshore or land overflowed by the sea, and says it is a sure maxim in the common law that "whatsoever land there is within the King's dominion whereunto no man can justly make property, it is the King's by his prerogative." He admits that some subjects may have it by grant, but "whosoever holds it otherwise than by the Prince's grant they intrude, and that no continuance of time

260. MOORE 171.

261. See MOORE 181-224.

262. See note 225 and accompanying text *supra*.

or prescription can serve their turn." He lays the claim of the prerogative as being in respect of the King's general ownership of the land of the whole kingdom—viz., that the foreshore is parcel of the great waste of the kingdom not granted out; "the fresh shore [he says] belongs to the lord of the soil adjoining, the salt shore to the general lord of all." Thus we see that from its inception until to-day the claim of the *primâ facie* title rests upon one basis—viz., that it is parcel of the waste of the kingdom and has never been *de facto* granted out, and that evidence of user and *longa possessio* avails not to give a title to it unless the grant be shewn. Upon this argument began the struggle between the Crown and the subject which has continued from that period to the present time.²⁶³

The newly invented prima facie rule was not accepted by anyone other than the Crown and title hunters for a long time, and efforts to apply the rule eventually led to a confrontation with Parliament. As mentioned, informations during Elizabeth's reign had skyrocketed. After James I acceded to the throne in 1603—a time when theories of divine right and royal prerogative were in vogue²⁶⁴—the efforts of the Exchequer "were redoubled."²⁶⁵ Evidently, this extortion of land titles became too much to be borne. In 1623 Parliament passed the first English statute of limitations, entitled "An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever,"²⁶⁶

263. MOORE 182.

264.

When James I ascended the throne in 1603, the doctrine of the divine rights of Kings received a decided impetus. Within a few years after his accession the canons of the English Church denounced as error the assertion that "all civil power, jurisdiction and authority were first derived from the people and disordered multitude, or either is originally still in them, or else is deduced by their consent naturally from them; and is not God's ordinance originally descending from Him and depending upon Him," and James I expressed his own opinion in a Star Chamber speech: "As it is atheism and blasphemy to dispute what God can do, so it is presumption, and a high contempt in a subject to say what a King can do, or to say that a King cannot do this or that."

Riggs, *supra* note 220, at 399 (footnotes omitted).

265. MOORE 170.

This aggressive [divine right] attitude of the Crown resulted incidentally in great activity in support of Mr. Digges' *prima facie* theory. Royal commissions were appointed to endeavor to gain possession of various salt marsh lands for the Crown. No case actually involving the title to the foreshore seems to have been determined. The theory of the divine right of Kings was reflected in the minds of the bench and bar of the time and never, perhaps, in the history of the common law, was the independence and learning of the English judges at a lower level. During this time, when the power of the Crown was evidenced by the removal of Sir Edward Coke from the bench for his refusal to be coerced by James, lawyers beyond all other classes were subservient to the Crown.

Riggs, *supra* note 220, at 399 (footnote omitted).

266. 21 Jac. I, c. 2 (1623).

which act provided that the Crown could not attack any title that had accrued for 60 years or more. This act practically put an end to title hunting above the high-water mark, "but the Crown does not appear to have considered itself bound by it in respect to land at any time overflowed by the sea"267 Consequently, attempts were made to recover the foreshore down to the time of the Great Rebellion of 1642. In 1641, while the Long Parliament was in session, the Grand Remonstrance was presented by leaders of Parliament to the king and nation. This document contains over 200 paragraphs specifying illegal acts and usurpations by the Crown. The twenty-sixth paragraph charges the king with "the taking away of men's right under colour of the king's title to land between high and low water mark."²⁶⁸ Thus the attempt to enforce the prima facie doctrine apparently was one of the causes of the Great Rebellion.

Digges' prima facie rule also ran into trouble with juries and courts. Subsequent to writing his treatise, Digges himself went to court several times to enforce his "fishing grants," but lost every jury verdict.²⁶⁹ Indeed, Moore tells us that, from the time Digges brought his first suit in 1574 to "the present day [1888], so far as I can discover, no jury has been found (with one exception) to give a verdict for the Crown against evidence of user on the part of the subject. In the exception mentioned, on a second trial the verdict was against the Crown."²⁷⁰

Moreover, from the time Digges wrote his treatise in 1568, no court accepted the prima facie rule as a matter of law until *Attorney-General v. Philpot*²⁷¹ in 1631, the third case cited by Hale. But the precedential value of this case is highly suspect because it was decided by the corrupt judges of Charles I.²⁷² The suit involved a tract of marshy land on the banks of the Thames river within the port of London. The land was surrounded by an embankment known as the Wapping Wall. Evidently, some mariners had built houses that extended beyond the wall and onto the shore of the river. The Attorney General, at the relation of the Earl of Carlisle, filed a suit claiming that the shore belonged to the king and that the buildings which protruded onto the shore were purprestures and nuisances. The case was heard twice. In 1629 Chief Baron Walter issued a decision which,

267. MOORE 176.

268. Quoted in Tillinghast, *supra* note 220, at 347, and in MOORE 310.

269. See MOORE 212-24.

270. *Id.* at 616.

271. See note 208 *supra*.

272. See MOORE 258-317.

except as to ports, completely rejected the prima facie doctrine of Digges by reversing the presumption. Walter ruled:

That *prima facie* and of common right those who have land adjoining to . . . any river which ebbs and flows, shall have all the land to the *low water mark*, and it shall be intended to belong to *those who have the land upon each side*. . . . But out of this general rule are excepted the ports of the realm, for . . . in them the King shall have the land to the high-water mark²⁷³

This decision, if it had remained the law, would clearly have dealt a death blow to the title hunting of the Crown.

Within a year, however, Baron Walter was removed from the bench by King Charles. The case was heard again in 1631. Walter's successor, Chief Baron Davenport, was a strong supporter of the king. The court, on rehearing, refused to provide a jury trial and gave judgment to the Crown. Baron Denman declared that

all the soil of this river, as far as it floweth and re-floweth at ordinary tides . . . is parcel of the river, and belongs to the King, for it is an arm of the sea (but query concerning this, for more than that it is within the port), and what was gained from the foot of the wall into the river is purpresture upon the land of the King²⁷⁴

Ten years after this decision all the judges who sat on the case, except Baron Denman, who had died, were impeached by the House of Lords for their corrupt decision in the infamous *Ship Money Case*.²⁷⁵ Thus, *Attorney-General v. Philpot*, though it does adopt a prima facie type doctrine of Crown ownership of the foreshore, is a highly suspect decision because of the strong probability of Crown influence and judicial corruption. The words of Baron Wood, written in 1811, illustrate the ignominiously low esteem in which cases decided in the reign of Charles I are held by the English judiciary itself:

I must say I have not much veneration for precedents taken from the arbitrary reigns of those monarchs; and I hope I shall not see such precedents revived in the present reign; or that, if they do take a temporary root, they will soon be eradicated.²⁷⁶

It was a very long time indeed before the supposed law of *Philpot*

273. Quoted in MOORE 263 (emphasis added).

274. Quoted in *id.* at 264.

275. *Rex v. Hampden*, 3 State Tr. 826 (1637).

276. *Attorney-General v. St. Aubyn*, 145 Eng. Rep. 1215, 1226 (Ex. 1811).

took root in another English case. The decree in *Philpot* itself was never enforced; the owners of the houses successfully resisted it in the courts until the whole matter was finally dropped due to the onset of the Revolution.²⁷⁷ In 1646, 15 years after *Philpot*, the case of *Johnson v. Barrett*²⁷⁸ was argued before Chief Justice Rolle, who had been appointed by the Parliament following the wholesale impeachments of the Crown judges in 1641.²⁷⁹ The action was one for trespass; a key (wharf) had been destroyed by Barrett. Chief Justice Rolle remarked during the argument that "if it [the key] were erected between the high water-mark and low water-mark then it belonged to *him that had the land adjoining*."²⁸⁰ Sir Matthew Hale himself was counsel for the defendant. He disputed Rolle, arguing that the shore "belonged to the King of common right."²⁸¹ The decision of the court is not reported, but Moore believes that Hale lost.²⁸² In addition to the remark made by Rolle and the possibility that Hale lost, it is significant that Hale did not cite the then recent *Philpot* decision to the court.²⁸³ Since Hale relied on *Philpot* in his *De Jure Maris*, he surely would have cited it to the court if he had felt that it would be persuasive to an impartial tribunal. In fact, with one tangential exception,²⁸⁴ the

277. MOORE 267.

278. 82 Eng. Rep. 887 (K.B. 1646).

279. MOORE 310-11.

280. 82 Eng. Rep. at 888 (emphasis added).

281. *Id.*

282.

Aleyn [the reporter] does not report the result, but it was probably in favour of the plaintiff, for we find that in Trinity, 1650, an information was filed by the Attorney-General on behalf of the Corporation of Yarmouth against Thomas Barrett and others for building a quay in Yarmouth Harbour, but in it there is no allegation of the *prima facie* title. The allegation is in the form that we find before the time of Elizabeth—viz., that it is injurious to the navigation.

MOORE 311.

283.

Serjeant Merewether in his speech [to the court in *Attorney-General v. London*, 50 Eng. Rep. 962 (Rolls Ct. 1849)] calls attention to [the *Johnson v. Barrett*] case, and remarks that the doctrine of the *prima facie* title is overruled by it, and that Hale did not refer to the case of *Attorney v. Philpot* as an authority in favour of the Crown. This is highly probable. The decision in that case had evidently been resisted successfully, and the fact must have been common knowledge. Hale, therefore, would have been rash to have quoted it to a Parliamentary judge within five years of the Grand Remonstrance; but the report is meagre and no one can say whether he did refer to it or not.

MOORE 311 n.1. Serjeant Merewether's famous speech in 1849, which was the first real attack on the factual and legal basis of the *prima facie* rule, but which did not prevail, is reproduced in R. HALL, *supra* note 210, app. at lxix.

284. *Whittaker v. Wife*, 84 Eng. Rep. 479 (K.B. 1671). Serjeant Merewether argued that the *Philpot* case was "repudiated [in *Whittaker v. Wife*] by the statement that it was contrary to [Sir Henry] Constable's case . . ." R. HALL, *supra* note 210, app. at cvii. See note 283 *supra*.

Philpot case was not mentioned or cited in any English decision until 1795, 164 years after it was rendered.

Between 1631 and 1795 the *prima facie* rule was not a factor in any court decision; suits that related to the foreshore or rivers were not framed as violations of the *jus privatum* (private proprietary interest of the Crown), but as violations of the *jus publicum* (public trusteeship interest of the Crown).²⁸⁵ Hale's *De Jure Maris*, written about 1667, lay dormant throughout most of this period because it had not yet been published. In the 1795 case of *Attorney General v. Richards*,²⁸⁶ decided just nine years after publication of *De Jure Maris*, a full-fledged *prima facie* rule was for the first time adopted by an impartial English tribunal. The case involved a wharf, two docks, and other buildings which had been erected between high and low-water marks, and which were interfering with navigation. The defendant argued that he held title to the shore by letters patent. The information stated that the shores of tidal waters, ports and havens "belong to his Majesty, and ought to be preserved for the use of his Majesty's vessels, and others, and that his Majesty has the right of superintendancy over them, for their preservation."²⁸⁷ In his opinion Chief Baron Macdonald declared:

It is clear that the right to the soil, between high and low water-mark, is *prima facie* in the crown. Then the onus of proving an adverse title is thrown upon the defendants.

. . . .

They next went on the evidence of possession. But it appears, that instead of [the defendants] having possession, the Crown has, by its subjects, had possession of the place in question; and its being open as a public passage from 1629, precludes any right now to question the title of the Crown. . . .

[T]he cases cited [including *Attorney-General v. Philpot*], and those which Lord Hale has given us, in the treatise *De Portibus Maris*, clearly prove, that where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it. . . . It is objected that these cases were in the time of Ch[arles] I.; but it must be remembered, that Lord Hale determined some of them, and approved the rest. Supported by

285. See Coudert, *supra* note 220, at 222-23. The *prima facie* rule was mentioned in dicta in four post-*Philpot* cases prior to 1795: *Attorney-General v. Farmer*, 83 Eng. Rep. 125 (K.B. 1676); *Whittaker v. Wife*, 84 Eng. Rep. 479 (K.B. 1671); *Kirby v. Gibs*, 84 Eng. Rep. 183 (K.B. 1667); *Bulstrode v. Hall & Stephens*, 82 Eng. Rep. 1024 (K.B. 1663). See MOORE 651 n.1; Riggs, *supra* note 220, at 402.

286. 145 Eng. Rep. 980 (Ex. 1795).

287. *Id.*

such authority, we do not hesitate to declare, that the soil is the property of the Crown; and of course, to decree, that these buildings be abated.²⁸⁸

Richards is important because it is the first case to articulate the prima facie rule in its now conventional form. It is also important for two other reasons. First, it further confirms the suspicion that *Philpot*, a case decided by the corrupt judiciary of Charles I, was never considered good law in England. Secondly, it is apparent that Hale's effulgence is virtually the sole authority for the court's recognition of a prima facie rule: it is Hale's treatise that is relied upon, and it is only because of *Hale's* approval of the Charles I cases—cases from no other reign being cited—that the court does not reject them.

It should be noted that some commentators view the decision in *Richards* as mere obiter dictum on the prima facie rule, presumably because the case involved a port and because there are *ius publicum* and public dedication aspects woven into the Attorney General's arguments and the court's decision.²⁸⁹ Other commentators²⁹⁰ believe that the prima facie rule was not adopted until the 1849 decision of *Attorney General v. London*,²⁹¹ and the most recent English treatise on the foreshore²⁹² declares that the rule was not "finally and firmly" established until the 1891 decision of *Attorney General v. Emerson*.²⁹³ But regardless of the exact date of its full judicial adoption, it is clear that the prima facie rule began to appear with ever increasing frequency in English judicial opinions after the 1795 decision in *Richards*.²⁹⁴

In summary, although the prima facie rule was originally invented by Thomas Digges in 1568, its ultimate adoption into English jurisprudence can be viewed as a posthumous triumph of the venerated Sir Matthew Hale. After its publication in 1786, 110 years after Hale's death, *De Jure Maris* was accepted without question by English courts and cited forever after, despite its resting on no legal authority other than the ambiguous *Prior of Tynemouth's Case*, the inapposite *Sir*

288. *Id.* at 983-84.

289. See MOORE 651 n.1. See also Coudert, *supra* note 220, at 223.

290. Thompson, *supra* note 220, at 688.

291. 50 Eng. Rep. 962 (Rolls Ct. 1849). This is the case in which Serjeant Merewether gave his famous speech attacking the prima facie rule, but lost. See note 283 *supra*.

292. H. LEMMON, *supra* note 93.

293. [1891] A.C. 649.

294. See, e.g., Lopes v. Andrew, 5 L.J.K.B. (o.s.) 329 (1826); Dickens v. Shaw, 1 L.J.K.B. (o.s.) 122 (1822); Attorney-General v. Burridge, 147 Eng. Rep. 335 (Ex. 1822); Blundell v. Caterall, 106 Eng. Rep. 1190 (K.B. 1821); Attorney-General v. Parameter, 147 Eng. Rep. 345 (Ex. 1811), *aff'd, sub. nom.* Parameter v. Gibbs, 147 Eng. Rep. 356 (Ex. 1813).

Henry Constable's Case, and the tainted *Philpot* decision. The adoption of the prima facie rule is thus an example of lawmaking by personal reputation and treatise writing.

American law concerning foreshore ownership was shaped by a similar lawmaking process. Recall that Angell and Kent, influential nineteenth century treatise writers, both declared it to be a substantive rule of property law in England that the king was the absolute owner of the foreshore.²⁹⁵ From these purported common law roots has sprung the American doctrine, recognized by the Supreme Court²⁹⁶ and by most states,²⁹⁷ that title to the foreshore is in the states as the successors to the English Crown. Whether the current American doctrine is ultimately a good one or a bad one is not the issue here. The point is that Angell and Kent, and the multitude of courts that have announced the American rule, have relied on an erroneous historical view of English fact and English law. First, as a matter of fact, the English shore was not owned by the king; by 1216 virtually the entire shore was de facto owned by private proprietors. Secondly, the English rule that was "invented" and eventually adopted falls far short of the absolute rule of substantive property law articulated by Angell and

295. See notes 197, 200 and accompanying text *supra*.

296. See *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Waddell*, 41 U.S. 234, 16 Pet. 367 (1842).

It is interesting to note that the Supreme Court in *Shively v. Bowlby*, *supra*, after declaring that the king under English common law owns the foreshore, stated:

The great authority in the law of England upon this subject is Lord Chief Justice Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches. Moore on the Foreshore. (3d ed.) 318, 370, 413.

152 U.S. at 11. Thus the Court relied on Moore's treatise as support for Hale's authorship of *De Jure Maris*, but ignored the fact that the whole substantive thrust of the treatise was an attack on the factual and legal bases of Hale's doctrine.

297.

Sixteen states use the mean high-water mark as the boundary between private uplands and coastal sovereignty lands: Alabama, Alaska, California, Connecticut, Florida, Louisiana (in some situations), Maryland, Mississippi, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas and Washington. F. Maloney & R. Ausness, *The Proposed Florida Coastal Mapping Act of 1973 and Its Relationship to Coastal Boundary Determination and Coastal Zone Management in Florida*, 1973, at 73 (unpublished report submitted to the Florida Legislature). Ten states use the low-water mark, or a variation thereof, as the coastal boundary: Delaware, Georgia, Louisiana (in some situations), Maine, Massachusetts, Minnesota, New Hampshire, Pennsylvania, Virginia and Wisconsin. *Id.* Hawaii, Illinois and Michigan have boundary standards peculiar to their jurisdictions. *Id.*

Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where Is the Boundary?*, 1 FLA. ST. U.L. REV. 596, 611 n.100 (1973).

Kent. As intimated by Hale and as made clear by subsequent English decisions, the title to submerged lands and to the foreshore in England was always a question of fact; thus the prima facie rule is merely a rebuttable evidentiary presumption.²⁹⁸ The prima facie rule, a legal inversion of English reality, presumes title to be in the Crown, thus putting the burden of proof on the private claimant. As was quickly recognized once the prima facie rule became fully established, the private claimant could rebut the presumption by proving either a grant, long continued user, or actual possession for the limitations period.²⁹⁹ And despite the prima facie rule, as of the date of Moore's treatise in 1888 no jury had given a verdict in favor of the Crown "against evidence of user on the part of the subject."³⁰⁰

Thus in today's England most of the shore is in private hands, while in America, as a matter of federal law,³⁰¹ the entire shore is owned by the state, except in those states whose law provides otherwise.³⁰² This is surely a strange state of affairs, considering that the American and English doctrines of foreshore ownership purportedly stem from common roots. But, as the foregoing discussion has demonstrated, the legal history of the English foreshore has been a strange admixture of fact, invention, and law. The extra ingredient added by American treatise writers and courts—namely an erroneous interpretation of the English experience—has sent the legal history of the American foreshore off in yet another direction. It is ironic to note, however, that the misconceptions of Angell and Kent, as developed in American courts, have accomplished in America what the Crown, Thomas Digges, title hunters, corrupt judges, Lord Hale, and the prima facie rule could not accomplish in England: the shore has been taken out of private hands.

298. See, e.g., *Blount v. Layard*, 4 T.L.R. 512 (C.A. 1888), quoted in *Smith v. Andrews*, [1891] 2 Ch. 678, 681 n.3, 689:

The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, and, if he owns the land on both sides, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river. . . . But these are presumptions of fact, which may be rebutted. They are not rules of law which must apply to every case, because the other facts of a particular case may show that in that instance the presumption does not obtain. . . . It is a question of fact, not of law, in whom the bed of the river *Thames* in any particular place is vested. . . . In each particular part of the river it is a question of fact, to whom the soil belongs.

299. See H. COULSON & U. FORBES, *supra* note 215, at 28-36; 33 H. HALSBURY, *supra* note 215, at §§ 864-75; A. WISDOM, *supra* note 215, at 21-23.

300. MOORE 616; see note 270 and accompanying text *supra*.

301. See cases cited in note 296 *supra*.

302. See note 297 *supra*.

B. Navigability and the Tidewater Concept

In the 1851 case of *The Propeller Genesee Chief v. Fitzhugh*³⁰³ the Supreme Court faced a difficult decision. The question was whether Lake Ontario, a nontidal but obviously navigable body of water, was within the locational admiralty jurisdiction of the federal courts. The difficulty lay in the fact that there was a series of prior Supreme Court decisions which had held admiralty jurisdiction in America, as in England, to be limited to tidewaters, that is, to waters affected by the ebb and flow of the tide.³⁰⁴ Justice Taney, writing for the Court, overruled the prior decisions, partially on the basis of the following historical analysis:

In England, undoubtedly the writers . . . and . . . courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, *because there was no navigable stream in the country beyond the ebb and flow of the tide* In England, therefore *tide-water and navigable water are synonymous terms, and tide-water . . . meant nothing more than public rivers*, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to *public navigable rivers*.

. . . The courts of the United States, therefore, naturally adopted the English *mode of defining a public river*, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water. . . . And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the *public character of the river* was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was [*sic*] limited by the tide. The *description of a public navigable river* was substituted in the place of the *thing intended to be described*. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true de-

303. 53 U.S. (12 How.) 443 (1851).

304. *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847); *The Steamboat Orleans v. Phoebus*, 36 U.S. 138, 11 Pet. 175 (1837); *Peyroux v. Howard*, 32 U.S. 204, 7 Pet. 324 (1833); *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). See Conover, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 ORE. L. REV. 34 (1958); Guinn, *An Analysis of Navigable Waters in the United States*, 18 BAYLOR L. REV. 559 (1966); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

scription of *public waters* [in America, which has many navigable rivers and lakes].³⁰⁵

Forty-six years earlier, in *Palmer v. Mulligan*,³⁰⁶ Chief Justice James Kent had been faced with a nuisance case involving some mill dams at a place in the Hudson River above the ebb and flow of the tide. Kent took occasion to address the common law relationship between navigability and tidewaters with respect to ownership of submerged river beds:

The *Hudson* at *Stillwater* is a fresh river, *not navigable* in the common law sense of the term, for the tide does not ebb and flow at that place. In the case of *The Royal Fishery, in the river Banne Davies' Rep.* 152. 155. 157. it was resolved, that by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil. This case was cited by Mr. Justice *Yates*, in *Carter v. Murcot*, 4 *Burr.* 2162. as a very good case, and a solid authority, and in that latter case recognised this distinction between rivers navigable and not navigable³⁰⁷

The historical picture painted by Taney and Kent is simple: at common law tidal rivers and navigable rivers were factually and legally equivalent; and tidality controlled both the locational extent of admiralty jurisdiction and Crown ownership of the submerged bed. These views have become conventional wisdom in America. But Taney and Kent were confused; the factual and legal picture in England was not nearly so simple and settled as they painted it.

1. *Navigable Waters in England.*—It must be noted how Taney finessed his way from a concept of tidewaters to a concept of “public navigable rivers.” He used a syllogism. His major premise was that, as a matter of original, underlying rationale, locational admiralty jurisdiction in England was “confined to public navigable rivers.” His minor premise was that, as a matter of English fact, all public navigable rivers were affected by the ebb and flow of the tide. His conclusion was that locational admiralty jurisdiction in England was spoken of as being limited to tidewaters because ebb and flow offered a convenient “mode of defining” public navigable rivers. Taney went on to say, in effect, that American courts had become so hypnotized by the phrase “tidewater” that they forgot the original, underlying premise upon

305. 53 U.S. (12 How.) at 454-55 (emphasis added).

306. 3 Cai. R. 307 (N.Y. S. Ct. 1805).

307. *Id.* at 318.

which locational admiralty jurisdiction had been based. Thus, by returning to the original English premise of public navigable waters, Taney found a historical basis upon which to extend admiralty jurisdiction to navigable bodies of nontidal fresh water in the United States. But Taney's syllogism is tainted. It is submitted that his major and minor premises are erroneous, and that even his conclusion—that English locational admiralty jurisdiction was measured by the ebb and flow of the tide—is misleading.

To begin with Taney's minor premise, it is not true that tidewaters and navigable waters in England were factually and legally equivalent. First, the evidence does not support Taney's blanket assertion that tidewaters and navigable waters were factually equivalent. Indeed, such an assertion is implausible on its face; it would be a phenomenal coincidence if tidal rivers were the only rivers in England that were navigable in fact. Although there may have been relatively few nontidal navigable streams in England as compared to the United States, the truth is that many nontidal streams in England were (and are) navigable in fact.³⁰⁸ As early as *Glanville* (c. 1187)³⁰⁹ the obstruction of "public" streams was recognized to be a purpresture.³¹⁰ Apparently, the streams in England, both tidal and nontidal, were being choked by kydells, weirs, and other fishing devices;³¹¹ and originally the complaint voiced against kydells, many of which were located in nontidal streams, was they interfered with navigation.³¹² The problem became so great that it was addressed in the Magna Charta. Chapter 33 of the Great Charter commanded the future removal of kydells not just from tidal waters, but from the Thames, Medway, "and *throughout all England.*"³¹³ Statutes were passed declaring various nontidal rivers to be public navigable waters³¹⁴ and commanding the removal of fishing

308. For a sound study, rather than conjecture, see T. WILLIAN, *RIVER NAVIGATION IN ENGLAND: 1600-1750* (1936).

309. Although this work was for many centuries attributed to Ranulph de Glanville, Chief Justiciar of England under Henry II, its actual author remains unknown. The work was written in the time of Glanville, and has long been known by his name. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 256-57 (5th ed. 1956).

310. *GLANVILLE* 193 n.2 (Beames transl. 1900). Unfortunately, *Glanville* does not tell us what is meant by a "public" stream.

311. See MOORE 148, 151-52; Lauer, *The Common Law Background of the Riparian Doctrine*, 28 *MO. L. REV.* 60 (1963); Murphy, *English Water Law Doctrines Before 1400*, 1 *AM. J. LEGAL HIST.* 103 (1957).

312. W. McKECHNIE, *MAGNA CHARTA* 344-45 (2d ed. 1914).

313. J. HOLT, *MAGNA CHARTA* 327 (1965) (emphasis added). See pp. 554-55 *supra*.

314. H. WOOLRYCH, *A TREATISE OF THE LAW OF WATERS* 40 (2d ed. 1851) (footnote omitted): "[V]ery many acts of Parliament have been passed to constitute those navigable rivers which were not so before." See A. WISDOM, *supra* note 215, at 58.

devices which disturbed the passage of ships and boats.³¹⁵ All of this legal concern suggests that there were many nontidal streams in England that were navigable in fact.

Lord Hale, who was surely familiar with river traffic in the seventeenth century, provides further evidence that there was never any factual equivalence between tidal rivers and rivers navigable in fact. In his *De Jure Maris*, Hale unambiguously tells us that rivers were navigable above the ebb and flow of the tide:

Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are publick rivers *juris publici*. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statute of *Magna Charta*, cap. 23.³¹⁶

Finally, it is clear that, long before Taney wrote his opinion in *The Genesee Chief*, there were in England many artificial bodies of nontidal water that were navigable in fact. During the reign of Elizabeth, river transport became increasingly important, and by the eighteenth century the number of nontidal navigable rivers in England had been multiplied by the process of canal building.

Beginning about 1600, "river navigation was 'in the air.' Members of parliament and country gentlemen discussed in the lobby of the house or the parlour of a country inn the merits and demerits of water transport." Numerous schemes were undertaken to improve the navigability of English rivers, and at least occasionally nontidal

315. MOORE 151-52:

In 25 Edward III; A.D. 1351, we have the first of the statutes after Magna Charta concerning weirs erected to the injury of navigation. It recites that the common passage of ships and boats in the great rivers of England are disturbed by the levying of weirs, mills, stanks, stakes, and kiddels, to the great damage of the people, and it is enacted that any such erections which were levied and set up in the time of Edward I, and afterwards, in such rivers, whereby ships and boats be disturbed so that they cannot pass as they were wont, shall be put out and utterly pulled down without being renewed, and writs shall be sent to the sheriffs to inquire and do execution.

316. DE JURE MARIS cap. III. See note 232 *supra*.

waters were involved. In the years after 1750, canal building began in earnest, markedly increasing the amount of navigable but nontidal waters. But throughout this period of the growth of internal navigation, admiralty jurisdiction was undergoing a steady decline.³¹⁷

From the foregoing observations it should be clear that there never was any *de facto* equivalence between navigable rivers and tidal rivers in England.

Nor was there ever any *de jure* equivalence between tidality and navigability in the English common law. First of all, as mentioned, nontidal rivers were sometimes declared to be navigable by statute.³¹⁸ Secondly, and more importantly, a review of English cases and commentators reveals that the navigability of streams in England was always treated as a question of fact—notwithstanding the conventional wisdom of Taney and Kent to the contrary.

For example, Lord Hale's declaration that nontidal rivers were protected as "common highways" and "juris publici" if they were of "common or publick use for carriage of boats and lighters"³¹⁹ is an implicit recognition that navigability in law meant navigability in fact. Recognition of a navigability-in-fact criterion was expressly announced in the 1888 case of *Blount v. Layard*,³²⁰ which declared: "We are dealing with the *Thames*, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river. . . ."³²¹ It is also clear that the English common law recognized that tidal waters could be nonnavigable in law if they were nonnavigable in fact. This is illustrated by the 1774 case of *The Mayor of Lynn v. Turner*,³²² in which Lord Mansfield stated:

Ex facto oritur jus [the law arises out of the fact]. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers³²³

The true role that was played by the ebb and flow of the tide in navigability questions was to provide *prima facie* evidence of navigability. In *Miles v. Rose* ³²⁴ (1814), Chief Justice Gibbs noted that the "flow-

317. Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1216 (1954) (footnotes omitted).

318. See note 314 and accompanying text *supra*.

319. See text accompanying note 316 *supra*.

320. 4 T.L.R. 512 (C.A. 1888), quoted in *Smith v. Andrews*, [1891] 2 Ch. 678, 681 n.3.

321. *Id.* at 689.

322. 98 Eng. Rep. 980 (K.B. 1774).

323. *Id.* at 981.

324. 128 Eng. Rep. 868 (C.P. 1814).

ing of the tide . . . is strong prima facie evidence of its being a public navigable river," and Justice Heath articulated an identical rule.³²⁵ Justice Bayley, writing in 1825, expanded on the role of tidality as an evidentiary presumption:

The strength of this prima facie evidence arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel.³²⁶

Finally, the state of the English law of navigability was summed up by Woolrych in 1851 in his *Treatise of the Law of Waters*. Published in the same year that Justice Taney was propounding his equation between tidality and navigability in *The Genesee Chief*, Woolrych's treatise states:

Waters flowing inland where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailling test to apply

. . . .
[W]here there are no circumstances from whence an extinguishment of the public right can be presumed . . . , the flowing of the tide is strong *prima facie* evidence [of navigability]

[But p]ublic user for the purposes of commerce is . . . the most convincing evidence of the existence of a navigable river³²⁷

Mansfield, Gibbs, Heath, and Woolrych all talked about navigability as a question of fact, the ebb and flow of the tides being merely a rebuttable evidentiary presumption. There is no hint of the Taney-Kent doctrine that tidality was equivalent to navigability as a matter of law.

It is also interesting to note that the common law test of navigability seemed to be bottomed on commercial usage of the watercourse. Hale speaks in terms of "common or publick use for carriage of boats and lighters," Bayley in terms of "calculated for the purpose of com-

325. *Id.*

326. *The King v. Montague*, 107 Eng. Rep. 1183, 1184 (K.B. 1825).

327. H. WOOLRYCH, *supra* note 314, at 40-42.

merce," and Woolrych in terms of "purposes of commerce." Thus the English test of navigability, being based on commercial usage, is similar to that of the Romans—and, as will be discussed, to that of later American courts.

Having demonstrated that the "true" English test of navigability was one of navigability in fact, the question arises as to what legal rights turned on such a finding. In other words, how were public and private rights affected by a finding *vel non* of de facto navigability? The answer to this question, analyzed in subpart 3, will involve further examination of the somewhat confusing common law development of the navigability and tidewater concepts, and will reveal the source of Kent and Taney's now conventional, but historically unsupportable, doctrine of equivalence between tidality and navigability. But first we shall return to Taney's concept of locational admiralty jurisdiction in England.

2. *Locational Admiralty Jurisdiction in England.*—It will be recalled that Taney's syllogistic "major premise" was that the original, underlying rationale of locational admiralty jurisdiction in England was one of relating river jurisdiction to "public navigable rivers." And, Taney tells us, because public navigable rivers in England were factually coextensive with tidal rivers, the ebb and flow of the tide became the "mode of defining" public navigable rivers and, therefore, of defining locational admiralty jurisdiction. But, as has been demonstrated, there was never any factual equivalence between navigable rivers and tidal rivers in England; some tidal rivers were nonnavigable and some nontidal rivers were navigable. Moreover, there is no support for Taney's assertion that admiralty jurisdiction was measured in England by a standard of "public navigable waters." This is Taney's invention, employed for the purpose of weaseling around the previous Supreme Court decisions that had limited American admiralty jurisdiction to tidewaters.

The Crown commissions to the admirals,³²⁸ the *Black Book of Admiralty*,³²⁹ and the English statutes³³⁰ and cases³³¹ addressing locational admiralty jurisdiction all define locational jurisdiction by using such terms as "upon the sea,"³³² "within the flow and reflow,"³³³ and "within

328. See 1 BENEDICT ON ADMIRALTY §§ 23-25 (7th ed. E. Jhirad & A. Sann 1974) [hereinafter cited as BENEDICT].

329. See *id.* at §§ 28-30.

330. See, e.g., 15 Richard II, c. 3 (1391), in 1 BENEDICT § 35; 13 Richard II, c. 5 (1389), in 1 BENEDICT § 33.

331. See, e.g., Sir Henry Constable's Case, 77 Eng. Rep. 218 (K. B. 1601).

332. 13 Richard II, c. 5 (1389).

333. BLACK BOOK OF ADMIRALTY, quoted in 1 BENEDICT § 30.

the flowing and ebbing of the sea.”³³⁴ Nowhere is admiralty jurisdiction defined in terms of navigable waters. In *Sir Henry Constable's Case*,³³⁵ cited by Angell for the proposition that “navigable rivers” must be measured by the ebb and flow of the tide for purposes of “the admiralty acceptance of that term,”³³⁶ neither the word “navigability” nor any reference to navigable waters appears. In fact, the word “navigability” appeared in none of the four major Supreme Court decisions addressing locational admiralty jurisdiction³³⁷ prior to *The Genesee Chief*. Nor did it appear in Joseph Story’s classic exposition on English admiralty jurisdiction in *De Lovio v. Boit*.³³⁸ Thus it should be no surprise that Taney cited no authority in equating tidal waters and navigable waters for purposes of admiralty jurisdiction. The fact is that locational admiralty jurisdiction in England never related to a concept of navigable waters; it related solely to the sea.³³⁹ It was over the high seas that the admiral had jurisdiction, and, because the tides are the one unique feature of the sea, the inland penetration of the sea was measured by the ebb and flow of the tide; navigability was irrelevant. Thus the English formula was that locational admiralty jurisdiction equalled tidewaters—period. The intervening term “navigable waters,” added to the English formula by Taney, was a red herring; it allowed Taney to transform historical English jurisdiction from one relating to tidewaters to one relating to navigable waters, and thence to extend American admiralty jurisdiction to all waters navigable in fact.

But even the universally repeated conclusion that admiralty jurisdiction in England was measured by tidewaters is misleading. As discussed, the debate in England did not concern whether admiralty jurisdiction should extend to all navigable rivers or only to tidal navigable rivers; navigability was immaterial. In fact, the debate never even reached as far inland as nontidal rivers; it concerned whether admiralty jurisdiction should extend to all tidewaters or only to those tidewaters *extra corpus comitatus* (outside the body of the county).

In the fourteenth century, the admiralty courts apparently began to assert jurisdiction over nonmaritime transactions and over places

334. Commission of the Admiral of England, *quoted in* 1 BENEDICT § 23.

335. 77 Eng. Rep. 218 (K.B. 1601).

336. J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 73 (2d ed. 1847).

337. *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847); *The Steamboat Orleans v. Phoebus*, 36 U.S. 138, 11 Pet. 175 (1837); *Peyroux v. Howard*, 32 U.S. 204, 7 Pet. 324 (1833); *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825).

338. 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

339. *See, e.g., Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 307-43 (1857) (dissenting opinions).

far inland, such as small rivers, streams, and ponds, thereby taking business and profits away from the common law and local courts.³⁴⁰ The parliamentary reaction was to enact a statute in 1389 that gave the admirals jurisdiction "only of a thing done upon the sea."³⁴¹ Two years later another statute was enacted which withdrew from the admirals jurisdiction over "all . . . things rising within the bodies of counties [*infra corpus comitatus*] as well by land as by water."³⁴² For the next four centuries a debate—indeed a legal war—raged between the admiralty courts and the common law courts over the construction of these statutes.³⁴³ The admiralty courts construed their locational jurisdiction as extending to all tidewaters.³⁴⁴ The common law courts, most notably under the leadership of Chief Justice Coke in the seventeenth century, construed the statutes as excluding from admiralty jurisdiction all tidewaters *infra corpus comitatus*,³⁴⁵ and issued writ after writ of prohibition against the admiralty courts.³⁴⁶ Ultimately the common law courts prevailed. Thus the conclusion, constantly reiterated in English and American decisions, that locational admiralty jurisdiction in England was measured by the ebb and flow of the tide must be qualified. The locational jurisdiction of the admiralty expanded and contracted across the geological spectrum of tidewaters. The common law courts eventually whittled away the admirals' powers to the point that, by the seventeenth century, there was no locational jurisdiction over tidal rivers *infra corpus comitatus*.³⁴⁷

3. *Fishing Rights and Submerged Bed Ownership: The Merger of the Navigability and Tidewater Concepts.*—It was earlier asked what legal rights turned on a finding of de facto navigability at English common law. The answer to this question will emerge from an analysis of another problem: where did Taney and Kent get their doctrine that navigable waters in England were legally coextensive with tidal waters? In post-*Genesee Chief* admiralty cases this "doctrine" has become a talismanic incantation whenever historic locational admiralty jurisdiction in England is discussed.³⁴⁸ Similarly, on the grounds that navigability in England was legally coextensive with tidality, state court after state

340. See *De Lovio v. Boit*, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815); 1 *BENEDICT* §§ 34-35; D. ROBERTSON, *ADMIRALTY AND FEDERALISM* 28-64 (1970).

341. 13 Richard II, c. 5 (1389).

342. 15 Richard II, c. 3 (1391).

343. See *De Lovio v. Boit*, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815); 1 *BENEDICT* §§ 41-54; D. ROBERTSON, *supra* note 340, at ch. 3.

344. *De Lovio v. Boit*, 7 F. Cas. 418, 426 (No. 3776) (C.C.D. Mass. 1815).

345. *Id.*

346. 1 *BENEDICT* §§ 41-54; D. ROBERTSON, *supra* note 340, at 28-64.

347. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 453 (1847).

348. See, e.g., *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296 (1857).

court, often citing Kent's decision in *Palmer v. Mulligan*, has held that the submerged beds of nontidal waters are not subject to state ownership.³⁴⁹ Even the Pennsylvania case of *Carson v. Blazer*,³⁵⁰ which was the first state court decision to declare state ownership of the beds of all rivers navigable in fact, accepted the historical validity of Kent's "doctrine"; the court refused to apply the doctrine simply because it concluded that the doctrine was inappropriate for Pennsylvania. Moreover, the United States Supreme Court has swallowed Kent's equation of tidality and navigability at English common law in several of its important decisions dealing with submerged land.³⁵¹ How could all of this have happened in America if navigability at English common law was plainly a question of fact and if navigability had nothing to do with locational admiralty jurisdiction?

In answering this question it is instructive to look at the authorities cited by Taney and Kent. In Justice Taney's case this is easy. He cited no authority for the proposition that, for purposes of English locational admiralty jurisdiction, tidal waters were equivalent to navigable waters. Indeed, there was none. Perhaps Taney made up this equation from the whole cloth, or perhaps he had been reading the state court cases, such as *Palmer v. Mulligan*, which concerned submerged bed ownership. One cannot be sure. We do know Kent's authorities, however; in *Palmer v. Mulligan* he cited Hale's *De Jure Maris*, *The Royal Fishery of the Banne*³⁵² and *Carter v. Murcot*.³⁵³ Analysis of these authorities³⁵⁴ reveals two curious things: first, Hale did announce Crown

349. *E.g.*, *Middleton v. Pritchard*, 4 Ill. 498, 3 Scam. 510 (1842). In this case the court, relying on Kent's decision in *Palmer v. Mulligan*, 3 Cai. R. 307 (N.Y. S. Ct. 1805), held that the Mississippi River was not navigable at law, because not tidal, and that it thus was privately owned. *See also* the cases cited in J. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES § 547 (7th ed. 1877); note 403 *infra*.

350. 2 Binn. 475 (Pa. 1810).

351. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892) ("In England the ebb and flow of the tide constitute the legal test of the navigability of waters."); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876) ("the only waters recognized in England as navigable were tide-waters").

352. 80 Eng. Rep. 540 (K.B. 1610).

353. 98 Eng. Rep. 127 (K.B. 1768).

354. Actually, Kent also cited *The King v. Wharton*, 88 Eng. Rep. 1483 (K.B. 1702), but the case says nothing about navigability or tidality, and, if anything, cuts against Kent's assertion that the King owned the beds of all tidal rivers. In its entirety, the case is as follows:

Indictment was for riot against Policarpum Wharton, and others; but the cause of the riot being the right of a private river.

Holt, Chief Justice. If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land; and may let it to the other, or to a stranger.

Secondly, if one see his neighbour erecting a thing which will be a nuisance,

ownership of the soil of tidally affected rivers, but not on the basis of any legal equivalence between tidal rivers and navigable rivers; secondly, the two cited cases do refer to a sort of equivalence between tidal rivers and navigable rivers, but only with respect to fishing rights—ownership of the submerged soil was not at issue.

One begins to suspect that two lines of English authority, one concerning submerged bed ownership and one concerning fishing rights, became entangled in Kent's *Palmer v. Mulligan* opinion, and then somehow crept over to the completely unrelated field of admiralty jurisdiction in Taney's *Genesee Chief* opinion. What follows is an attempt to reconstruct the historical development of these two lines of authority. Four things will be revealed: (1) about 1600, the English legal system began to face the questions of who had proprietary rights and who had fishing rights in the tidal rivers of England; (2) by some sort of cross-pollination process, the rhetoric of submerged bed cases and fishing cases began to merge; (3) this merger was far from complete in England in 1805, when Kent announced his equation between tidality and navigability in *Palmer v. Mulligan*; and (4) the cases involving fishing rights and submerged bed ownership were finally merged in England by the 1868 decision in *Murphy v. Ryan*, which adopted a tidality/navigability equation on the authority of James Kent.

Moore's treatise concerns itself exclusively with the ownership of the foreshore, but, unwittingly, Moore gives us the source material from which to reconstruct the history of riverbed ownership. As discussed, the charters of the Saxon and Norman kings frequently made express grants of land to the midstream of both tidal and nontidal rivers.³⁵⁵ Thus Moore's conclusion that, "[b]y the end of the reign of King John [1216] the Crown had . . . granted out almost every manor situated upon the sea-coast and the tidal rivers of the kingdom,"³⁵⁶ is even more compelling with regard to tidal rivers than to the seashore. It can be assumed that the common understanding of men was that tidal rivers, like fresh rivers, were owned by the riparian proprietors. The fact that riparian proprietors continuously attached weirs and other fixed fishing engines to the soil of tidal rivers can be taken as evidence of such an understanding.³⁵⁷

he cannot abate it till it become an actual nuisance; so the maxim of *praestat cautela quam medela* holds not in this case.

Thirdly, if one has a river, and for want of scouring it the neighbouring land is overflowed, he is indictable for it.

Fourthly, unlawful assembly, riot, and rout, are three different offences.

355. See notes 223-24 and accompanying text *supra*.

356. MOORE 24.

357. See MOORE 152.

In any event, there is no evidence to contradict such an understanding until the appearance of Thomas Digges' treatise in 1568. Moore, concentrating on Digges' declaration of Crown ownership of the foreshore, fails to note that Digges' arguments strongly imply Crown ownership of all soil beneath tidally affected rivers.³⁵⁸ Indeed, ownership of the submerged soil of tidal rivers is the logical and necessary concomitant of Digges' theory of Crown ownership of the foreshore. Digges argued that the king owns the soil of the sea, that the sea extends as far as the tide ebbs and flows, and, consequently, that the king owns the shore.³⁵⁹ Thus, if the king owns the shore of all tidal rivers, he must, *ex hypothesis*, always own the adjacent submerged riverbed, because it is ownership of the submerged bed that provides the theoretical justification for ownership of the shore. Otherwise, the subject would own down to the high-water mark and also the submerged bed below the low-water mark, leaving the king with only the narrow strip of shore. Such an ownership pattern would be theoretically illogical and intolerable in the Diggesian regime. Thus, it is submitted, the legal conception of Crown ownership of the beds of tidal rivers dates from the treatise of Thomas Digges in 1568.

The logical relationship between Crown ownership of the foreshore and of the beds of tidal rivers was recognized in *Attorney-General v. Philpot*. In addition to being the first case to accept Crown ownership of the foreshore, it is the first case to announce Crown ownership of the soil of tidally affected rivers. Indeed, the opinion is much more explicit on the issue of bed ownership than it is on the question of shore ownership. In the process of declaring Crown ownership of tidal river beds, Baron Denham gives us a distinction between navigable and nonnavigable rivers that seems to be related to tidality:

The King has an interest in a navigable river as high as the sea flows and re-flows in it, and the reason is, because the river partakes of the nature of the sea, and is called an arm of the sea as high as it flows, and the King has the sole interest in the soil of such rivers. And there are two sorts of rivers: i. navigable, and this is royal and public; ii. not navigable, as inland rivers.³⁶⁰

But the *Philpot* decision, in addition to being tainted by the corruption of the judges who decided it, simply disappears in future case law; it is never cited in a subsequent case dealing with rivers.³⁶¹

358. See MOORE 185-86, 191-92, 199-201 (reproducing Digges' treatise).

359. See note 263 and accompanying text *supra*.

360. Quoted in MOORE 264.

Thus it can largely be ignored for purposes of our historical development.

The important decision had been rendered 21 years earlier in the Irish case of *The Royal Fishery of the Banne* (1610).³⁶² This is the seminal case on fishing rights in tidal rivers, and was the prime authority upon which Kent based his declaration of Crown ownership of the beds of tidal rivers. But the opinion says nothing about ownership of the river's bed; it is concerned only with whether the Crown or the riparian proprietor has the right of fishery in the superjacent waters. In this context the court declared:

There are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; but in every other river not navigable, and in the fishery of such river, the ter-tenants on each side have an interest of common right.³⁶³

This case settled for all time that the king (and thus the public) has the fishery in the tidal portions of a navigable river, and that the riparian proprietors have the fishery in nontidal, nonnavigable rivers. There are, however, three important things that the case did not settle. First, the case said nothing about ownership of the soil of a tidal river; thus Kent and all others who cite it for such a proposition are in error. Secondly, the case did not necessarily equate tidality with navigability; indeed the inference is contrary to such an equation ("every navigable river, so high as the sea flows and ebbs *in it*"). Thirdly, the case did not answer the question of who has the fishery in nontidal but navigable portions of a river. In point of fact, none of these three things was settled for more than two centuries.

The next important decision concerning fishing rights is *Lord Fitzwalter's Case*³⁶⁴ (1674). That case, decided by Chief Justice Matthew Hale, declared: "In case of a private river, [the riparian proprietor] hath the right of fishing. . . . But in case of a river that flows and reflows, and is an arm of the sea, there, *prima facie* [the right of fishing] is common to all" ³⁶⁵ Not unnaturally, Hale's *De Jure Maris*

361. As mentioned, the only two subsequent cases that referred to *Philpot* are *Attorney General v. Richards*, 145 Eng. Rep. 980 (Ex. 1795), and *Whittaker v. Wife*, 84 Eng. Rep. 479 (K.B. 1671), both cases dealing with the foreshore.

362. 80 Eng. Rep. 540 (K.B. 1610).

363. *Id.* at 541, translated in J. ANGELL, *supra* note 197, app. at 37-38.

364. 86 Eng. Rep. 766 (K.B. 1674).

365. *Id.* at 766-67.

articulates a similar view.³⁶⁶ What is important to note about Hale's opinion is that it describes the locus of public fishery solely in terms of tidality; it does not refer to navigability. In contrast, Chief Justice Holt's opinion in the 1703 case of *Warren v. Matthews*,³⁶⁷ omits mention of tidality, and locates public fishing rights solely in terms of navigability: "The subject has a right to fish in all navigable rivers, as he has to fish in the sea"³⁶⁸ At this point in history, courts were unsure of how to describe the geographical locus of public fishing rights. It was clear that the public could fish in the sea; it was equally clear that the riparian proprietor had exclusive fishing rights in "private" nonnavigable rivers. But the three important decisions could not quite agree on the geographical locus of public fishing in the remainder of the river. The *Banne Fishery Case* admixed tidality and navigability without providing a clear rule; Hale talked in terms of tidality, Holt in terms of navigability.

Into this confusion came *Carter v. Murcot*³⁶⁹ (1768), the second case relied on by James Kent for his equation between tidal rivers and navigable rivers, and for his assertion of Crown ownership of the beds of all such rivers. But again, like the *Banne Fishery Case*, *Carter v. Murcot* only involved fishing rights, not ownership of the submerged bed. The defendant, obviously aware of the confusion in the earlier cases, attempted to cover all bases by pleading that the River Severn "is a navigable river; and also, that it is an arm of the sea, wherein every subject has a right to fish."³⁷⁰ Lord Mansfield held:

The Rule of law is uniform.

In rivers not *navigable*, the proprietors of the land have the right of fishery on their respective sides

But in *navigable* rivers, the proprietors of the land on each side have it not; the fishery is common: it is *primâ facie*, in the King, and is public.³⁷¹

Thus Mansfield adopted the navigability rhetoric of Hale. But the concurring opinion of Justice Yeats continued the confusion. He declared: "The cited cases prove only this distinction, 'that navigable rivers or arms of the sea belong to the Crown; and not (like private rivers) to the land-owners on each side'"³⁷² Two things can be

366. DE JURE MARIS cap. IV.

367. 91 Eng. Rep. 312 (K.B. 1703).

368. *Id.*

369. 98 Eng. Rep. 127 (K.B. 1768).

370. *Id.*

371. *Id.* at 128 (emphasis added).

372. *Id.* at 128-29 (emphasis added).

noted about Yeats' opinion. First, it is unclear whether Yeats was talking about bed ownership or fishing rights when he said "belong to the Crown." Secondly, it is possible that he was equating "navigable rivers" and "arms of the sea," but his words fall far short of compelling such a conclusion. In any event, it is clear that he was paraphrasing the *Banne Fishery Case*, for he cited it two sentences later as being "agreeable to this."³⁷³ Such was the state of English fishing rights law when Kent decided *Palmer v. Mulligan* in 1805; the judges had not yet agreed on their geography or their rhetoric—nor would they until 1868.

To return to the development of the law relating to Crown ownership of riverbeds, the first post-Digges authority to recognize a Crown proprietary right was Serjeant Robert Callis in his famous *Reading on the Statute of Sewers* (1622). Callis stated that "the soil of the sea and royal rivers do appertain to the King . . ."³⁷⁴ It is fairly clear that Callis was relying on the *Banne Fishery Case* for authority.³⁷⁵ But that case related only to fishing rights. The editor of the fourth edition of Callis' treatise construed "royal rivers" to mean "navigable" rivers.³⁷⁶

The next authority to recognize Crown ownership of tidal riverbeds was the 1663 case of *Bulstrode v. Hall & Stephens*,³⁷⁷ a rarely cited decision, in which the court affirmed that the soil of a river within the flux and reflux of the sea is owned by the king and not the riparian proprietors.³⁷⁸ *De Jure Maris*, Kent's third authority for his equation of tidal rivers and navigable rivers, and for his assertion of Crown ownership of the soil of such rivers, seems to agree with *Bulstrode*. Hale says that the king has "right and propriety in the sea and arms thereof,"³⁷⁹ and Hale defines an "arm of the sea" as "where the sea flows and reflows, and so far only as the sea so flows and reflows."³⁸⁰ Strangely, however, Kent did not cite this pertinent passage from *De Jure Maris*. Instead, he cited the passage in which Hale declares rivers to be "common highways" and "*publici juris*" whether they "flow and reflow or not," so long as the river is of "common or public use for carriage

373. *Id.*

374. R. CALLIS, *READING UPON THE STATUTE OF SEWERS* 115 (4th ed. 1810) (footnote omitted).

375. *See id.* at 77.

376. *Id.* at 115 n. (b).

377. 82 Eng. Rep. 1024 (K.B. 1663).

378. *Id.* The law-French is as follows (footnotes omitted): "Et in cest case fuit soven foits affirme & nient deny que le soil de tous rivers cy haut que la est fluxum & refluxum maris est in le Roy & nemy in les seigneurs des mannors &c. sans prescription."

379. *DE JURE MARIS* cap. IV.

380. *Id.*

of boats and lighters"³⁸¹—a passage which cuts directly against any equation of tidality and navigability. Nevertheless, on the whole Hale does support Kent's assertion of Crown ownership of the beds of tidal rivers, but rejects Kent's equation of tidality and navigability.

One might be tempted to conclude that by the time of *De Jure Maris* (1667), the common law recognized that Crown ownership of riverbeds was to be tested by a tidality criterion—despite the fact that such a legal posture was contrary to English fact, the beds of virtually all tidal rivers having been granted out. But the descriptive rhetoric in subsequent English submerged bed cases does not adhere to a tidality criterion any more than the fishing cases did. Justice Buller, in *Rex v. Smith*³⁸² (1780), declared that "*prima facie*, the soil of a navigable river belongs to the king."³⁸³ Other submerged bed cases used phrases such as "public navigable river"³⁸⁴ and "tidal navigable rivers."³⁸⁵ Treatise writers were no less confused. Writing in 1851, Woolrych believed the king to own the soil of rivers "where there is a common right of navigation exercised,"³⁸⁶ that is, in any river navigable in fact. Houck, an American, whose *Treatise on the Law of Navigable Rivers* was published in 1868 (the year in which *Murphy v. Ryan* was decided) agreed in substance with Woolrych.³⁸⁷ Phear probably summed it up best in 1859: "It is, too, perhaps not free from doubt, whether the land covered by non-tidal rivers which are navigable . . . does not by Common Law belong to the Crown."³⁸⁸

In light of the English rhetorical and geographical disagreement, both in fishing cases and in bed cases, how could Kent, writing in 1805, have concluded that navigable rivers and tidal rivers were legally coextensive in England, and that the Crown held title to the beds of all tidal rivers—conclusions which became conventional wisdom in America. Perhaps he merely misread the *Banne Fishery Case* and *Carter v. Murcot*. More likely, he made an intuitive leap. The easiest way to resolve the rhetorical confusion was to decide that "navigable" river, "tidal" river, "navigable tidal" river, and "arm of the sea" all meant the same thing—although that certainly was not the state of English fact nor of English law in 1805. And, since Crown proprietary rights

381. See note 316 and accompanying text *supra*.

382. 99 Eng. Rep. 283 (K.B. 1780).

383. *Id.* at 285 (emphasis added).

384. Lord Advocate for Scotland & H.M. Comm'rs of Woods & Forests v. Hamilton, 1 Macqueen 46, 48 (H.L. 1852).

385. *Le Roy v. Trinity House*, 82 Eng. Rep. 986 (K.B. 1662).

386. H. WOOLRYCH, *supra* note 314, at 40.

387. L. HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS 13 (1868).

388. J. PHEAR, A TREATISE ON RIGHTS OF WATER 13 (1859).

were described with these same phrases, the locus of Crown proprietary rights followed of course: the Crown owned the beds of all tidal (equals navigable) rivers. Whatever Kent's process of ratiocination, he not only settled the American understanding of English law, but, 63 years later, settled the English understanding of English law.

In 1868, *Murphy v. Ryan*³⁸⁹ finally pieced everything together in Britain.³⁹⁰ The case involved a place on the River Barrow which was above the ebb and flow of the tide, but which "from time immemorial [had] been, a common and public navigable river and water."³⁹¹ The plaintiff, the riparian proprietor, had brought an action of trespass against the defendant for fishing in the river at the place in question. Both parties seemed to agree that the public right of fishery should only attach to Crown ownership of the subjacent soil. The plaintiff argued that the Crown owned the submerged soil only in *tidal* rivers, and "that 'navigable,' when applied to a river, as the test of the public right of fishery, is equivalent to saying that the tide ebbs and flows in it."³⁹² The defendant, on the other hand, argued that the Crown owned the soil of all *navigable* rivers, which "means a river of which there has been public uses for navigation from time immemorial," and that "[i]t has never been decided that 'navigable' only applied where the tide ebbed and flowed; the ebb and flow is only evidence of its being navigable."³⁹³

The court, per O'Hagan, J., recognized that the river at the place in question "is capable of being navigated, and used for the purposes of communication,"³⁹⁴ but saw the issue in the case as "whether a navigable river, for the purposes of the common and public right of fishing, may be a river merely capable of navigation by ships or boats, or must be a tidal river in which the sea ebbs and flows?"³⁹⁵ Merging bed rights with fishing rights and navigability with tidality, the court held:

[T]he property in the soil furnishes the determining consideration on the question before us. In a private river that property belongs to the riparian owners, and it is only in a river which flows

389. 2 Ir. R.C.L. 143 (1868).

390. *Murphy v. Ryan* was an Irish case and thus was not technically binding on English courts. But it was cited and followed in England, *Ilchester v. Raishleigh*, 61 L.T.R. (n.s.) 477 (Ch. 1889); *Reece v. Miller*, 8 Q.B.D. 626 (1882).

391. 2 Ir. R.C.L. at 147.

392. *Id.* at 144.

393. *Id.* at 145.

394. *Id.* at 148.

395. *Id.* at 149.

and reflows, and is an arm of the sea, and in which the Crown is the proprietor of the soil, that there is a common right of fishery. . . .

....
 [N]o river has been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; . . . beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing private.³⁹⁶

Justice O'Hagan, realizing that he was playing games with the word "navigable," explained the prior English decisions by stating that "navigable" has a "popular . . . and also a legal and technical meaning," the former referring to "the existence of a public right of transit on the surface," the latter referring to "the '*fluxim et refluxum maris*.'"³⁹⁷ He then revealed the authority for his analysis: "I adopt the statement of Chancellor Kent . . . : 'In the Common Law sense of the term, those only were deemed navigable rivers in which the tide ebbed and flowed.'"³⁹⁸ Thus Kent's view of English common law, certainly not supportable when he declared it in 1805, eventually triumphed in England as well as in America. But, even so, the triumph was not as complete in England as in America. Kent implied a broad, substantive rule of Crown ownership of the soil of tidal rivers, as he had in the case of the foreshore. As indicated by *Murphy v. Ryan*, and as made clear in later English cases, however, the question of riverbed ownership in England remained a question of fact; tidality was only *prima facie* evidence of Crown ownership, and the absence of tidality was only *prima facie* evidence of private ownership.³⁹⁹

As discussed, the ("popular") test of navigability in England was always one of navigability in fact. We can now return to the question, formerly posed, of what legal rights turned on a finding of navigability in fact. It was always held by English courts and treatise writers that such a finding conferred an indestructable public right of navigation and boating.⁴⁰⁰ A plausible extension of this view is that navigability in fact should be the measure of all public rights. And, it is submitted, this was probably the view taken by courts and treatise writers who attached public fishery and/or Crown ownership of the submerged

396. *Id.* at 151-52.

397. *Id.* at 153.

398. *Id.* Justice O'Hagan quoted 3 J. KENT, *supra* note 67, at 331. But, of course, this "doctrine" in the *Commentaries* is based on, and traces, Kent's earlier decision in *Palmer v. Mulligan*. See note 307 and accompanying text *supra*.

399. See A. WISDOM, *THE LAW OF RIVERS AND WATERCOURSES* 41, 44 (1970).

400. See *id.* at 56-79.

soil to "navigable" rivers or to "public navigable" rivers. Another plausible view is that public fishery and Crown ownership of the submerged bed attached only to the sea and to "arms of the sea." Courts and commentators who subscribed to this view, the view which eventually triumphed in *Murphy v. Ryan*, naturally described bed rights and fishing rights in terms of the ebb and flow of the tide. Thus, as the English law finally became settled, navigability in fact only controlled the right of public navigation, while the fictional "technical navigability" (tidality) controlled, prima facie, public fishing rights and Crown proprietary rights in the bed.

It is curious that this fiction of "technical navigability" crept into American decisions concerned with the completely unrelated field of locational admiralty jurisdiction. Not only was "technical navigability" unsettled in England until 1868, 17 years after Taney's opinion in *The Genesee Chief*, but locational admiralty jurisdiction in England was never concerned with navigability at all. One can only conjecture that Taney and subsequent American judges had absorbed the rhetoric of English and American cases dealing with fishing rights and bed ownership when they talked about tidality and navigability being equivalent for purposes of English admiralty jurisdiction.

IV. THE CONCEPT OF NAVIGABILITY IN AMERICA

In the mid-nineteenth century, the United States Supreme Court found itself faced with the question of defining navigable waters. The problem arose in three areas: the locational extent of admiralty jurisdiction; the regulation of navigable waters under the commerce clause; and the ownership of submerged beds. The navigability tests that the Supreme Court has developed in these three areas, although very similar, are not identical.⁴⁰¹ Thus it is possible for a body of water to be navigable for one federal purpose but not for another.

401. In cases dealing with navigability the Supreme Court indiscriminately cites cases from the areas of admiralty, commerce clause regulation, and submerged bed ownership—often, it seems, without realizing it. Examination reveals that the Court relies on a relatively small number of cases for the definition of navigability. These are: *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *United States v. Cress*, 243 U.S. 316 (1917); *Leovy v. United States*, 177 U.S. 621 (1900); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899); *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U.S. 349 (1897); *Packer v. Bird*, 137 U.S. 661 (1891); *The Montello*, 87 U.S. (20 Wall.) 430 (1874); *The Daniel Ball* 77 U.S. (10 Wall.) 557 (1870).

The states, too, early began to develop tests and definitions of navigability. The concern of the states was to identify those waters to which public usufructuary rights would attach and to identify those submerged beds that were subject to state ownership. Not surprisingly, the several states have developed a variety of tests of navigability. A problem arises in the area of submerged bed ownership when the state test differs from the applicable federal test—namely, which test should control. The problem exists because the states had begun to develop navigability doctrines before the Supreme Court started expanding the federal concept of navigable waters; furthermore, it was not until the 1920's that the Supreme Court declared that the federal test would control in bed ownership cases. This part analyzes American concepts of navigability both at the federal and state levels, and discusses the problem that arises in bed ownership cases when the federal and state tests conflict.

A. Navigability at the Federal Level⁴⁰²

1. *Navigability and Title to Submerged Beds.*—Early in the nineteenth century, states became concerned with distinguishing those submerged beds which were state owned from those which were privately owned. The answer was found by looking at the character of the superjacent waters and by applying—or rejecting—supposed common law doctrines. As has been discussed, English doctrine in the early nineteenth century was in a state of confusion and flux: fishing cases and bed cases were analyzed in terms of navigability, tidality, or both, and a navigability-in-fact concept, seemingly related to the public right of navigation, was always lurking in the background. State court decisions reflected this confusion. Some states, following Kent's lead in *Palmer v. Mulligan*, declared state ownership only of those beds submerged beneath tidally affected waters—on the theory that navigable waters and tidal waters were legally equivalent in England, and that the Crown only owned lands beneath such waters.⁴⁰³ Thus

402. Among the best sources on this subject are the following: 1 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* (1971); Beck, *Hughes v. Washington: Some Federal Common Law in the Real Property Area*, 47 N.D.L. REV. 77 (1970); Guinn, *An Analysis of Navigable Waters of the United States*, 18 BAYLOR L. REV. 559 (1966); Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1 (1967); Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8; Stone, *Legal Background on Recreational Use of Montana Waters*, 32 MONT. L. REV. 1 (1971); Trelease, *Federal Limitations on State Water Law*, 10 BUFF. L. REV. 399 (1961); Waite, *Pleasure Boating in a Federal Union*, 10 BUFF. L. REV. 427 (1961).

403. Writing in 1904, Farnham identified the following states as adopting the so-called "common law" tidality rule: Connecticut, Delaware, Georgia, Illinois, Kentucky,

the Illinois Supreme Court in 1842 declared the bed of the Mississippi River to be privately owned.⁴⁰⁴ Other states, following Pennsylvania's lead in *Carson v. Blazer*,⁴⁰⁵ rejected the supposed "common law rule" and declared state ownership of the beds of all waters "navigable" in fact.⁴⁰⁶ But, as discussed in subpart B, the definition of "navigable" water varied (and still does) from state to state.

a. *The Supposed Common Law "Public Trust Doctrine."*—In 1842 the United States Supreme Court declared that there was federal law on the subject of submerged bed ownership in the landmark case of *Martin v. Waddell*.⁴⁰⁷ The case involved some mud-flats in the Raritan River near the port of Perth Amboy, New Jersey. The question was whether the state or the riparian proprietor, who held under grants traceable to Charles II, held title to the submerged bed. Justice Roger Taney wrote the majority opinion for the Court. Citing no authority whatsoever, Taney declared that at common law the "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust."⁴⁰⁸ Starting from this premise, Taney went on to hold that "when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use. . . ."⁴⁰⁹ Thus was born into federal law what has subsequently become known as the "public trust doctrine," a doctrine which holds that the states own the submerged soil and the foreshore of all navigable bodies of water, and which is firmly embedded in American constitutional law.⁴¹⁰ Strictly, the decision in *Martin v. Waddell* only applied to the 13 original colonies. But three years later, in *Pollard v. Hagan*,⁴¹¹ the same principle was held applicable to all states subsequently admitted to the Union on the theory that during territorial status the federal government held all lands

Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, Ohio, South Carolina, Wisconsin, and probably Utah. 1 H. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 51 (1904).

404. *Middleton v. Pritchard*, 4 Ill. 498, 3 Scam. 510 (1842). See note 349 *supra*.

405. 2 Binn. 475 (Pa. 1810).

406. E.g., Alabama, Arkansas, California, Florida, Kansas, Nevada, Oregon. See 1

H. FARNHAM, *supra* note 403, at § 53.

407. 41 U.S. 234, 16 Pet. 367 (1842).

408. *Id.* at 263, 16 Pet. at 411.

409. *Id.* at 262-63, 16 Pet. at 410.

410. See *Utah v. United States*, 403 U.S. 9 (1971); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

411. 44 U.S. (3 How.) 212 (1845).

beneath navigable waters and the shores thereof in trust for the future states.⁴¹²

Of course, as should be apparent from the foregoing discussion of English law, there was no public trust doctrine in England relating to Crown ownership of submerged beds and the foreshore at the time of the American Revolution. As a matter of English fact, the beds and shores of virtually all navigable waters, tidal and nontidal, were privately owned. As for English law on the subject of foreshore ownership as of 1776, the only authority for Crown ownership was the treatise of Thomas Digges and the tainted *Philpot* case, both of which were certainly unknown in America. *Attorney General v. Richards*, the first English case to recognize the prima facie rule of Crown ownership of the foreshore, was not decided until 1795, and Hale's *De Jure Maris* was not published until 1786. Thus in 1776 there was virtually no received English law on Crown ownership of the foreshore. The only pre-1776 authorities concerning Crown ownership of riverbeds were the fishing rights cases, (such as the *Banne Fishery Case*), Callis' treatise on sewers, and *Bulstrode v. Hall & Stephens*. But the fishing cases announced no Crown proprietary trust over submerged soil, and Callis and *Bulstrode* have never been cited in American decisions concerning the public trust doctrine. Even in 1842, when Taney was writing his opinion in *Martin v. Waddell*, English law on submerged bed ownership was not yet settled. Moreover, when English doctrine finally did become settled after 1868, ownership of submerged beds and of the foreshore remained a question of fact, the prima facie rule functioning merely as an evidentiary presumption of Crown ownership in tidal waters. Thus at the time the public trust doctrine was supposedly vesting the Crown title to submerged beds and the foreshore in the newly sovereign American states, there was virtually no legal support for such a doctrine in English common law.

Where, then, did Justice Taney get his public trust doctrine? No authority for the doctrine is cited in his opinion, and with good reason: there was none. His opinion does, however, contain one reference to *Arnold v. Mundy*,⁴¹³ an 1821 New Jersey case cited in the arguments to the *Martin* Court. It is clear from reading *Arnold v. Mundy* that it was the source of Taney's public trust doctrine. In *Martin*, Taney tracked Chief Judge Kilpatrick's opinion in *Arnold* very closely, lifting some parts of it almost verbatim. The next question is, what were Kilpatrick's sources for his announcement of a supposed public trust doctrine in English common law? Kilpatrick admits that

412. See also the cases cited in note 410 *supra*.

413. 6 N.J.L. 1 (S. Ct. 1821).

in England "not only navigable rivers, but also arms of the sea, ports, harbours, and certain portions of the main sea itself upon the coasts . . . [are] in the hands of [private] individuals."⁴¹⁴ Nevertheless, by a conglomerate appeal to natural law, the concept of the negative community, the civil law concept of rivers being *res publicae*, the Magna Charta, the English fishery cases and Lord Hale, Kilpatrick declared:

Upon the whole, . . . by the common law of England, . . . 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* . . . are common to all the citizens, and . . . the property . . . is vested in the sovereign . . . , not for his own use, but for the use of the citizen.⁴¹⁵

The decision is remarkable for another reason; prior to announcing his "common law" public trust doctrine, Kilpatrick felt compelled to write the following apology into the body of his opinion:

As to the right of the proprietors to convey. This is the great question in the cause, and though we have taken time since last term to look into it, yet I must confess, for myself, that I have not done so in so full and satisfactory a manner as could have been wished; and my apology must be, that during a very great part of the vacation, I have been necessarily abroad, attending to other official duties, and during the time I had assigned to myself for this purpose, I have been so much indisposed as not to be able very satisfactorily to attend to business of any kind. I have, nevertheless, so far looked into it as to satisfy myself of the principle that must prevail.⁴¹⁶

The public trust doctrine was born of such as this. Nonexistent at English common law, the doctrine was created by an obscure and unprepared state court judge, adopted by the inventive Roger Taney, and repeated forever after in hundreds of American decisions, affecting title to millions of acres of submerged land.

b. The Federal "Title Test" of Navigability.—Once state ownership of lands beneath navigable waters—conventionally known as sovereignty lands—was established as a matter of federal law in *Martin v. Waddell* and *Pollard v. Hagan*, the next problem was defining navigable waters. As of 1842, when *Martin v. Waddell* was decided,

414. *Id.* at 73.

415. *Id.* at 76 (emphasis added).

416. *Id.* at 69-70.

the Supreme Court had not considered the definition of navigable waters. In pre-*Genesee Chief* admiralty cases, it will be recalled, the Court did not talk in terms of navigability at all; locational admiralty jurisdiction was described only in terms of tidewaters. In 1851, however, with the decision in the *Genesee Chief*, the Supreme Court began to expand locational admiralty jurisdiction by declaring more and more types of water bodies to be navigable. The sovereignty lands to which the states were entitled as a matter of federal law naturally underwent a concomitant expansion.

The first Supreme Court decision to formulate a definition of navigable waters was *The Daniel Ball*⁴¹⁷ (1870), which declared:

Those rivers must be regarded as public navigable rivers in law which 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 highways for commerce, over which trade and travel are or may be conducted in the *customary* modes of trade and travel over water.⁴¹⁸

Although *The Daniel Ball* was an admiralty case, the seven Supreme Court cases⁴¹⁹ that have directly dealt with "navigability for title" have adopted the *Daniel Ball* definition as the basic federal test by which to locate those submerged beds to which the states hold title under the federal public trust doctrine.

The current federal "title test" contains five important elements. Four of them are included in the definition framed by *The Daniel Ball*. First, it is not necessary for the water body to ever have been used for navigation; it is sufficient for the water body to be "susceptible" to navigation. Secondly, it is not susceptibility to any type of navigation that will render the water body navigable; it must be susceptible to navigation "for commerce." Thirdly, the water body must be susceptible to navigation for commerce in its "natural and ordinary condition,"⁴²⁰ although navigability will not be destroyed by "occasional difficulties in navigation."⁴²¹ Fourthly, the commercial navigation can

417. 77 U.S. (10 Wall.) 557 (1870).

418. *Id.* at 563 (emphasis added).

419. *Utah v. United States*, 403 U.S. 9 (1971); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Packer v. Bird*, 137 U.S. 661 (1891). *See also* *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Shively v. Bowlby*, 152 U.S. 1 (1894).

420. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

421. *Id.*

be by any "customary mode" of trade or travel.⁴²² The Supreme Court has not yet defined what is meant by a "customary mode." One extreme position would be to consider commercial log floatage to be a "customary mode."⁴²³ Under such a view, there would not be many non-navigable streams for title purposes in the United States. The fifth element, made clear in later Supreme Court decisions, is that navigability for title purposes will be tested as of the date the particular state entered the Union.⁴²⁴ This aspect of the test presents a host of evidentiary problems for courts and lawyers. One last aspect of the federal title test is that the water body need not be a highway for interstate commerce; it can be navigable for title purposes even if it is wholly landlocked.⁴²⁵

2. Navigability and Federal Regulatory Power.—The federal government has constitutional power to regulate navigable waters under the commerce clause,⁴²⁶ the treaty clause,⁴²⁷ the war powers clause,⁴²⁸ the general welfare clause,⁴²⁹ and the public property clause.⁴³⁰ By far the most important and pervasive of these is the commerce clause. In *Gibbons v. Ogden*,⁴³¹ Chief Justice John Marshall announced that "commerce" includes "transportation," which, in turn, includes "navi-

422. *Id.*

423.

Log floating is one of the uses of a river or lake that can be accomplished with less water, and in more turbulent water, than many other commercial activities; however, none of the title navigability cases has yet faced or even discussed the log floating question. Three commerce clause cases, *The Montello*, *Rio Grande*, and *Appalachian*, all touch on the question, although their comments are too brief to be much help. In *The Montello*, the Court seemed to suggest that if there were enough water to float log rafts, then the waters were "navigable." A few years later in *Rio Grande* the Court qualified this earlier statement by saying that "the mere fact that logs, poles and rafts floated downstream occasionally and in times of high water does not make a navigable river." In *Appalachian* the Court again touched on the question, saying, "[T]he uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs. . . . The tests of navigability must take these variations into consideration." Needless to say, these brief statements do not provide definitive answers.

Johnson & Austin, *supra* note 402, at 20-21.

424. *Utah v. United States*, 403 U.S. 9 (1971).

425. In *United States v. Utah*, 283 U.S. 64, 75 (1931), the Court said it was "undisputed" that certain of the waters in question were navigable only within the state of Utah, yet held them navigable for title.

426. U.S. CONST. art. I, § 8: "[Congress shall have the power] to regulate commerce with foreign Nations, and among the several States, and with Indian Tribes."

427. U.S. CONST. art. II, § 2. See *Sanitary Dist. v. United States*, 266 U.S. 405 (1926).

428. U.S. CONST. art. I, § 8. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936).

429. U.S. CONST. art. I, § 8. See *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

430. U.S. CONST. art. IV, § 3. See *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899).

431. 22 U.S. (9 Wheat.) 1 (1824).

gation." In *Gilman v. Philadelphia*,⁴³² the Court held that regulation of navigation comprehends control over the navigable waters of the United States.

The federal "commerce clause test" of navigability that has been developed subsequent to *Gilman* is potentially broader than the federal title test. Although the basic test remains that of *The Daniel Ball*, the Supreme Court in *United States v. Appalachian Electric Power Co.*⁴³³ stated, in effect, that two of the elements of the title test do not apply in commerce clause regulation cases. First, under the commerce clause test, it is not necessary that the water body be navigable in its "natural and ordinary condition"; it is sufficient if the water body can be made navigable in fact by "reasonable improvements."⁴³⁴ And it is not "necessary that the improvements should be actually completed or even authorized."⁴³⁵ The second change from the federal title test announced in *Appalachian Electric* is that susceptibility to navigation is not tested at the time of statehood: "navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable."⁴³⁶ Another attribute of the commerce clause test is that the water at the place in question need only have an "effect" on interstate commerce; it is not necessary that the water body be an actual highway for commerce.⁴³⁷ Thus the federal government can regulate nonnavigable tributaries of navigable rivers,⁴³⁸ which tributaries would not, by definition, survive the federal title test. On the other hand, it may be possible for a relatively small, landlocked water body to have no effect on commerce, and thus be nonnavigable under the commerce clause test, but yet be navigable under the title test.

The federal regulatory powers over navigable waters have been summarized as follows:⁴³⁹

The power to control navigation and navigable waters includes the power to destroy the navigable capacity of the waters, and prevent

432. 70 U.S. (3 Wall.) 713 (1865).

433. 311 U.S. 377 (1940) (sometimes referred to as the *New River* case).

434. *Id.* at 407-08.

435. *Id.* at 408.

436. *Id.*

437. See *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899); *Johnson & Austin*, *supra* note 402, at 13-14.

438. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). For an example of even greater expansion of this exercise of commerce clause power, see *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), noted in 2 FLA. ST. U.L. REV. 799 (1974) and 26 U. FLA. L. REV. 893 (1974).

439. Trelease, *supra* note 402, at 400 (footnotes renumbered).

navigation, by the construction of obstructions.⁴⁴⁰ It also includes the power to protect the navigable capacity by preventing diversions of the water itself,⁴⁴¹ or of the nonnavigable tributaries that affect navigability,⁴⁴² or by preventing obstructions by bridges⁴⁴³ or dams⁴⁴⁴ or by constructing flood control structures on the navigable waters or on their nonnavigable tributaries or even on the watersheds of the rivers and tributaries.⁴⁴⁵ The powers to prevent obstruction in turn lead to powers to license obstructions.⁴⁴⁶ The power to obstruct leads to the power to generate electric energy from the dammed water.⁴⁴⁷

3. *Navigability and Locational Admiralty Jurisdiction.*—Beginning in 1851 with Taney's decision in *The Genesee Chief*, locational admiralty jurisdiction moved away from a tidewater concept and toward a navigability-in-fact concept. This development has been adequately treated by other commentators.⁴⁴⁸ At present, the federal test of locational admiralty jurisdiction seems to be virtually identical to the commerce clause test.⁴⁴⁹ It is interesting, however, to note a few aspects

440. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). *South Carolina v. Georgia*, 93 U.S. 4 (1876):

441. *Sanitary Dist. v. United States*, 266 U.S. 405 (1925).

442. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899).

443. *Union Bridge Co. v. United States*, 204 U.S. 364 (1907).

444. *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

445. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

446. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

447. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936).

448. See I BENEDICT; D. ROBERTSON, *ADMIRALTY AND FEDERALISM* (1970); CONOVER, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 ORE. L. REV. 34 (1958); GUINN, *An Analysis of Navigable Waters in the United States*, 18 BAYLOR L. REV. 559 (1966); Waite, *Admiralty Jurisdiction and State Waters*, 11 MICH. L. REV. 580 (1913); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

449. The following formulation of the current federal admiralty test has been suggested:

Those rivers, streams and lakes must be regarded as public navigable waters in law which are navigable in fact. They are navigable in fact when they are used or have been used in the past, or are susceptible of being used in the future, in their ordinary or improved condition (provided need and cost justify its improvement) as highways for commerce or transportation over which trade and travel [may be conducted by any available mode of trade and travel] on water. The true criterion is capability of use, however difficult, by the public for purposes of transportation and commerce, and the mode by which transportation or commerce is conducted is of no import, whether by steamer, sailing vessel or canoe. The waterway may be artificial if all other basic criteria are met. Waters constitute navigable waters of the United States in contradistinction from the navigable waters of the states, when they form in their ordinary or improved condition by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries.

of the admiralty test. First, navigability is not tested as of any special date; a water body is navigable for admiralty purposes if it has ever been navigable, if it is now navigable, or if it can be made navigable by reasonable improvements.⁴⁵⁰ Secondly, an artificial watercourse, such as a canal, is navigable for admiralty purposes if it satisfies all other elements of the test.⁴⁵¹ Thirdly, the water body by itself, or by linking up with other water bodies, must form a highway for interstate commerce;⁴⁵² thus a completely landlocked lake, such as Lake Winnepesaukee in New Hampshire,⁴⁵³ is not a navigable water of the United States for purposes of admiralty jurisdiction.

B. *Navigability at the State Level*

At the state level, tests of navigability have been employed for two primary purposes:⁴⁵⁴ (1) to identify those water bodies whose beds are owned by the state; and (2) to distinguish those waters subject to the exclusive use of the riparian owners from those subject to some sort of paramount "servitude" or "easement" of public use. This subpart first discusses the role of state tests of navigability for title vis-a-vis the role of the federal title test. Next, it discusses state tests of navigability as a tool for dividing waters into those which are "public" and those which are "private"—in the usufructuary sense.

1. *State Title Tests v. The Federal Title Test: A Functional Analysis of Their Respective Roles.*—When state tests of navigability are employed to ascertain title to submerged beds, there is potential for a collision with the federal title test. In those states whose title test is identical to the federal title test there is, of course, no problem. But states have developed an amazing variety of navigability tests, some of which are more liberal or expansive than the federal title test and some of which are more restrictive. Some states follow the purported "common law rule" that navigability for title is measured by tidality.⁴⁵⁵ Minnesota⁴⁵⁶ and North Dakota⁴⁵⁷ early developed a "pleasure boat

Guinn, *supra* note 448, at 577-78.

450. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Madole v. Johnson*, 241 F. Supp. 379 (W.D. La. 1965).

451. *Ex parte Boyer*, 109 U.S. 629 (1884).

452. See *Shogry v. Lewis*, 225 F. Supp. 741 (W.D. Pa. 1964).

453. *Marine Office of America v. Manion*, 241 F. Supp. 621 (D. Mass. 1965).

454. See generally *Johnson & Austin*, *supra* note 402.

455. See note 403 and accompanying text *supra*.

456. *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893): "Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit."

457. *Roberts v. Taylor*, 181 N.W. 622, 626 (N.D. 1921): "A use public in its

test," *i.e.* a water body is navigable if it can support recreational boating. A Texas statute declares rivers to be navigable "so far as they retain an average width of thirty feet."⁴⁵⁸ The Massachusetts Bay Colony Ordinance of 1641-47, still in effect in Massachusetts,⁴⁵⁹ Maine⁴⁶⁰ and New Hampshire,⁴⁶¹ deems any pond "containing more than ten acres of land" to be a "great pond."⁴⁶² The ordinance declares these ponds to be "common," which has been construed to mean that they are state owned.⁴⁶³ Other states have adopted a "sawlog test" of navigability, which renders a stream navigable if it has the capacity to float logs to market.⁴⁶⁴

The purpose of this discussion is not to catalog all the various state tests of navigability. The issue is whether the state or federal test should control the question of title to submerged beds. Prior to the 1920's, every state court seemed to assume that the state test controlled.⁴⁶⁵ Between 1922 and 1931, however, a trilogy of cases was decided by the Supreme Court—*Brewer-Elliott Oil & Gas Co. v. United States*,⁴⁶⁶ *United States v. Holt State Bank*,⁴⁶⁷ and *United States v. Utah*,⁴⁶⁸—which declared the federal title test to be controlling.⁴⁶⁹ The

character may exist when the waters may be used for the convenience and enjoyment of the public, whether traveling upon trade purposes or pleasure purposes."

458. TEX. CIV. STAT. ANN. art. 5302 (1962). See Hawkins, *Title to Riverbeds in Texas and Their Boundaries*, 7 TEXAS L. REV. 493 (1929); Roberts, *Title and Boundary Problems Relating to River Beds*, 36 TEXAS L. REV. 299 (1958); Comment, *Waters and Watercourses—Title to Stream Beds and Riparian Lands—Determinable Fees*, 12 TEXAS L. REV. 490 (1934).

459. MASS. GEN. LAWS ANN. ch. 131, § 1 (1974). Note that this statute has changed the water surface area of a great pond from the original 10 acres to 20 acres.

460. There is no statute in Maine, great ponds being a part of the common law. See *Conant v. Jordan*, 77 A. 938 (Me. 1910).

461. N.H. REV. STAT. ANN. § 271.20 (1966).

462. On the subject of great ponds, see M. FRANKEL, *LAW OF SEASHORE WATERS AND WATER COURSES—MAINE AND MASSACHUSETTS* (1969); Locke, *Right of Access to Great Ponds by the Colonial Ordinance*, 12 MAINE L. REV. 148 (1919); Smith, *The Great Pond Ordinance—Collectivism in Northern New England*, 30 BOST. U.L. REV. 178 (1950); Waite, *Public Rights in Maine Waters*, 17 MAINE L. REV. 161 (1965); Waite, *Public Rights To Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335; Warren & Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889).

463. See, *e.g.*, *City of Auburn v. Union Water Power Co.*, 38 A. 561 (Me. 1897).

464. See, *e.g.*, *Collins v. Gerhardt*, 211 N.W. 115 (Mich. 1926).

465. Johnson & Austin, *supra* note 402, at 25-26.

466. 260 U.S. 77 (1922).

467. 270 U.S. 49 (1926).

468. 283 U.S. 64 (1931).

469. This proposition was again made clear in *United States v. Oregon*, 295 U.S. 1, 14 (1934):

Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal,

rationale of these cases is that it is a federal question whether title to submerged lands passed from the federal government to the state government at the time of statehood.⁴⁷⁰ Thus the federal title test must be examined when determining whether a state owns the submerged bed of a water body by right of its sovereignty, that is, by virtue of its admission into the federal Union. But so far only two state courts, at least in those states west of the Mississippi, have explicitly recognized that the federal title test controls:⁴⁷¹ Minnesota⁴⁷² and North Dakota⁴⁷³ abandoned for title purposes their pleasure boat tests in favor of the federal test. Apparent state ignorance of the supremacy of the federal title test is exemplified by South Dakota,⁴⁷⁴ which in 1937 adopted what is in essence a pleasure boat test.

The Supreme Court has not decided whether a pleasure boat test or a sawlog test can comport with the federal title test of navigability, but it is of interest to conjecture. Surely logging was commerce in the timber states at the time they achieved statehood. But it is doubtful whether floating a log is in the category of navigation by a "customary mode,"⁴⁷⁵ or, indeed, whether it is navigation at all. Concerning the pleasure boat test, some commentators⁴⁷⁶ have suggested that pleasure boating is the "new commerce" in states such as Florida, and that the federal test can thus be satisfied. But, given the requirement that navigability must be scrutinized as of the date of the state's admission to the Union, pleasure boating would have to have been "commerce" at that date—an argument rather unlikely to prevail.

Even though the federal title test must control, it should not be assumed that a state test of navigability for title has no role at all. There has been much confusion on the subject,⁴⁷⁷ largely because the

not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce.

470. See note 469 *supra*.

471. Johnson & Austin, *supra* note 402, at 30.

472. State v. Adams, 89 N.W.2d 661 (Minn. 1957), *cert. denied*, 358 U.S. 826 (1958).

473. Ozark-Mahoning Co. v. State, 37 N.W.2d 488 (N.D. 1949).

474. Hillebrand v. Knapp, 274 N.W. 821 (S.D. 1937).

475. See note 423 *supra*.

476. See generally Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542; Waite, *Pleasure Boating in a Federal Union*, 10 BUFF. L. REV. 427 (1961).

477. See generally Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940); Beck, *Hughes v. Washington: Some Federal Common Law in the Real Property Area*, 47 N.D.L. REV. 77 (1970); Corker, *Where Does the Beach Begin, and to What Extent is This a Federal Question*, 42 WASH. L. REV. 33 (1966); Johnson & Austin, *supra* note 402; Stone, *Legal Background on Recreational Use of Montana Waters*,

Supreme Court itself, in a few early cases,⁴⁷⁸ indicated that state property rules could control in some cases involving submerged beds. The following attempt to analyze the respective roles of the state and federal title tests of navigability discusses these early cases where applicable. The analysis assumes a parcel of land, Blackacre, contains a body of water, *W*, in the state of Ames. The first stage of the analysis concerns a pre-statehood patent of Blackacre from the federal government to a private owner, *O*. The second stage concerns a post-statehood patent of Blackacre from the federal government to *O*. The third stage concerns a post-statehood patent of Blackacre from the federal government to the State of Ames, and then a later conveyance of Blackacre from Ames to *O*. The question is, who has the title to the bed of *W*, assuming the federal title test to be more liberal than the state test, and vice-versa.

a. *Pre-Statehood Patent from the United States to O*.—At the time of the patent, state law could have no effect because there was no state in existence to have any law. Thus, regardless of whether *W* is navigable under the federal test, the conveyance of the submerged bed of *W* is solely a matter of the intent of the grantor, that is, of the United States.⁴⁷⁹ Federal intent can be found in statutes and case law. It would seem that the federal intent during the territorial period was to convey the beds of nonnavigable waters,⁴⁸⁰ but not to convey the beds of navigable waters⁴⁸¹—the latter being held for the benefit of the future state.⁴⁸² Thus, at the time of the patent, *O* took title to the bed of *W* if *W* were nonnavigable under the federal test; on the other hand, title remained in the United States if *W* were navigable under the federal test.

What happens when Ames achieves statehood? Assume *W* to be nonnavigable under the federal test, but navigable under Ames' test, and assume *O* received title to *W* by a pre-statehood grant. Title to *W* would remain in *O* because the law of the newly formed state of Ames

32 MONT. L. REV. 1 (1971); Waite, *Pleasure Boating in a Federal Union*, 10 BUFF. L. REV. 427 (1961).

478. *Hardin v. Shedd*, 190 U.S. 508 (1903); *Kean v. Calumet Canal Co.*, 190 U.S. 452 (1903); *Hardin v. Jordan*, 140 U.S. 371 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1876).

479. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 594 (1922).

480. See *Hardin v. Jordan*, 140 U.S. 371 (1891); *State v. Bollenbach*, 63 N.W.2d 278 (Minn. 1954); *Bingenheimer v. Diamond Iron Mining Co.*, 54 N.W.2d 912 (Minn. 1952).

481. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926): "[D]isposals [of land beneath navigable waters] by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

482. *Id.*; *Shively v. Bowlby*, 152 U.S. 1, 50 (1894).

cannot retroactively deprive *O* of his vested title.⁴⁸³ Conversely, assume *W* to be navigable under the federal test, title thus having remained in the United States, but nonnavigable under the state test. At the time of statehood, title to the bed of *W* would devolve on Ames by virtue of its sovereignty. But then the title would immediately go out of Ames and into *O* because *W* is nonnavigable under the state title test. This conclusion follows because the Supreme Court recognized in *Barney v. Keokuk*⁴⁸⁴ that a state can part with title to sovereignty lands once such title has vested in the state.⁴⁸⁵ Thus we have an instance where the state title test of navigability can control the locus of title: once title has vested in the state under the federal test, the state test can control whether the title remains in the state or whether it goes to the riparian owner.

b. Post-Statehood Patent from the United States to O.—This is the situation that has generated much confusion in the law. The confusion arises from the 1891 case of *Hardin v. Jordan*,⁴⁸⁶ in which the Supreme Court said:

In our judgment the grants of the [federal] government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.⁴⁸⁷

Other Supreme Court decisions,⁴⁸⁸ over strong dissents, have articulated a similar rule. This rule amounts to a declaration that the intent of the

483. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922):

It 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 actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

484. 94 U.S. 324 (1876); see *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927).

485. There is a split of authority in the states, however, as to whether sovereignty lands can be alienated. Some states say that the *jus privatum* (title) to submerged beds cannot be alienated. Others say that the *jus privatum* can be alienated so long as the *jus publicum* (public trust) is not. See Note, *Power of the State To Convey Title to the Beds of Fresh-Water Navigable Streams*, 28 ORE. L. REV. 385 (1949). Some states hold that the title can be alienated if it is in the public interest to do so. For example, such a provision is written into Florida's constitution. FLA. CONST. art. X, § 11. See generally *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Trelease, Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957).

486. 140 U.S. 371 (1891).

487. *Id.* at 384 (emphasis added).

488. *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922); *Hardin v. Shedd*, 190 U.S. 508, 519 (1903); *Kean v. Calumet Canal Co.*, 190 U.S. 452 (1903).

grantor (the United States), as to who takes title to the submerged bed, will always be measured by local property law.

Let us apply the *Hardin* rule to our post-statehood grant from the United States to *O*. Assume *W* to be navigable under the federal test. In this case, title to the bed of *W* went to the State of Ames when Ames achieved statehood. Thus the United States no longer had title to *W* and could not possibly give it to *O* at the time of the patent of Blackacre. But it is at the time of the patent⁴⁸⁹ that the state title test determines whether title to the bed of *W* remains in the state (if *W* is navigable under the state test) or whether title goes to *O* (if *W* is non-navigable under the state test). This is a logical result and, if this is all that the *Hardin* rule means, there should be no objection.

But take the situation where *W* is nonnavigable under the federal test. In this case, title to the bed of *W* did not devolve upon Ames when it achieved statehood; title remained in the United States. When the United States patents Blackacre to *O*, where does the title to the bed of *W* go? The *Hardin* rule says that the law of Ames should control this question. If *W* is nonnavigable under the state title test, the result is tolerable; title to the bed of *W* will go to *O*. But if *W* is navigable under the state test, where will title go? Logic and normal rules of conveyancing would require that, if title does not go to the grantee, it must remain in the grantor (the United States). The effect of the *Hardin* decision, however, is to vest the title to the bed of *W* in the state, even

489. In truth, the strictly logical result would be for the state test to operate at the time of statehood, when the state first takes title to the beds of federally navigable waters. This leads to a curious result. Assume *W* to be navigable under the federal test but nonnavigable under the state test. The sequence would be that the state takes title to the bed of *W* by virtue of sovereignty at the time of statehood. Then the state test would immediately operate to give the title to the riparian proprietor, *W* being nonnavigable under the state test. But the riparian proprietor is still the United States at this point because it has not yet patented out Blackacre. Thus the United States would immediately get back what it had just parted with. To carry the speculation further, when the United States patents Blackacre to *O*, federal intent will control whether or not title to *W* passes to *O*. But, since the general federal intent is not to convey the beds of federally navigable waters to private grantees, title to *W* would remain in the United States. Thus the United States would still hold title to the beds of all waters navigable under the federal test but nonnavigable under the state test.

In order to avoid this rather ludicrous result, I have assumed that the state title test would not operate as between the United States and Ames at the time of statehood, but would first operate as between Ames and the first patentee of the United States. There is a legal argument to support such a view: the whole rationale of the federal public trust doctrine, that of putting each new state on an equal footing with the original 13 as regards title to the beds of navigable waters, would be defeated by allowing a state title test to block the title from passing out of the federal government. On the subject of the equal footing doctrine, see *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

though the state was not a party to the transaction between the United States and *O*. Thus the state gets title to *W* not by virtue of its sovereignty nor by virtue of any recordable grant, but solely by the unilateral force of its own internal law. Justice White, in his dissent in *Hardin v. Shedd*,⁴⁹⁰ correctly characterized this situation as one in which "it is in the power of the state . . . to appropriate the property of the United States."⁴⁹¹

Moreover, in practical effect, the *Hardin* rule would completely nullify the doctrine that the federal title test must control the question of whether a given submerged bed vests in the state at the time of statehood. This is so because, even though the federal test will still control what beds the state takes by virtue of sovereignty, a more liberal state title test will ultimately prevail; it will vest in the state the title to any *W* navigable under the state test that is included in a post-statehood patent of any Blackacre to any *O*. Thus, one way or another, the state will get title to all water bodies that are navigable under the state title test.

In light of the fact that very few state courts seem to be aware that the federal title test must control the question of what submerged beds vest in the state at the time of statehood,⁴⁹² it should come as no surprise that they are even less aware of the ramifications of the *Hardin* rule. In any event, it is submitted that the *Hardin* rule has been overruled sub silentio, or at least severely qualified. In 1935 the Supreme Court was faced with another submerged bed problem in *United States v. Oregon*.⁴⁹³ One of the arguments, based on *Hardin*, was that if the federal government has given a patent to riparian land on nonnavigable waters, the title to the submerged bed would inure to the state, rather than go to the riparian owner or remain in the federal government. The Court rejected this argument, using strong language:

The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control. . . . The construction of grants by the United States is a federal not a state question, . . . and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. . . . In construing a conveyance by the United States

490. 190 U.S. 508 (1903).

491. *Id.* at 523.

492. See note 471 and accompanying text *supra*.

493. 295 U.S. 1 (1935).

of land within a State, the settled and reasonable rule of construction of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted. But no such question is presented here, for there is no basis for implying any intention to convey title to the State.⁴⁹⁴

Returning to our post-statehood grant from the United States to *O*, the result after the *Oregon* decision should be this: If *W* is nonnavigable under the federal test, title to *W* thus having remained in the United States when Ames achieved statehood, the efficacy of the grant to pass title to *O* will be tested solely by federal intent. The state title test, or any other state rule of property law, is irrelevant. Absent an "adoption" of the state law by the United States, title to *W* will pass to *O* if the United States so intends; title will remain in the United States if there is no such intent. Of course, if *W* is navigable under the federal test, the state takes title by sovereignty, which title can later spring to *O* under *Barney* if *W* is nonnavigable under the state test.

c. Post-Statehood Patent from the United States to Ames, and then from Ames to O.—Under various acts, the federal government has patented huge parcels of land to many, if not all, of the states.⁴⁹⁵ For example, the Swamp Land Grant Act of 1850⁴⁹⁶ gave to Florida, a state encompassing some 34 million acres, almost 21 million acres of federal land.⁴⁹⁷ Florida, in turn, has granted out all but about 400,000 acres of these lands, often at ridiculously low prices, for the purposes of railroad development, waterway improvement, and reclamation.⁴⁹⁸ Many water bodies are included within the boundaries of these patents. Who holds title to the submerged beds?

Assume *W* to be navigable under the federal title test. Ames thus acquired title to *W* by virtue of sovereignty when it achieved statehood. When Ames patents Blackacre to *O*, the state title test will control whether *O* gets title to *W*. If *W* is navigable under the state test, title remains in Ames; if nonnavigable title goes to *O*. Next, assume that *W* is nonnavigable under the federal test, title to *W* thus remaining in the United States until it patents Blackacre. When the United States patents Blackacre to Ames—under the Swamp Land Grant Act, for example—the question of whether title to *W* passes to Ames is, under the *Oregon* decision, solely a matter of federal intent. Assume the in-

494. *Id.* at 27-28.

495. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

496. 43 U.S.C. § 864 (1970).

497. Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where is the Boundary?*, 1 FLA. ST. U.L. REV. 596, 603 n.49 (1973).

498. *Id.* at 604 n.51.

tent was to pass title to Ames, which surely is the case under statutes such as the Swamp Land Grant Act, since the very purpose of the act was to give the states title to federally nonnavigable waters. Ames then patents Blackacre to *O*. Again, the state title test should control whether or not title to *W* passes to *O*. If navigable under the state test, title to *W* remains in the state; if nonnavigable, title passes to *O*.

In summary, a state title test of navigability cannot control whether or not the state takes title to the bed of a water body by virtue of sovereignty, that is, by virtue of being admitted to the Union. Nor can a state test affect the title to the beds of federally nonnavigable waters which have been included in a direct patent, either before or after statehood, from the United States to a private owner. In such cases federal intent will control whether title to the submerged bed remained in the United States or passed to the private owner. But once the state gets title to a water body, either by sovereignty or by grant, the state title test can control whether title to the submerged bed remains in the state or passes to the state's grantee.

As a final note, it should be obvious that this result—state retention or disposal of submerged beds which it owns by virtue of sovereignty or grant—can be controlled by a variety of legal mechanisms other than by a title test of navigability, which we have concentrated on here only because navigability is the subject matter of this article. For example, a state could have a common law or statutory rule that the title to no submerged bed whatsoever would pass out of the state. Such a rule, of course, could not in accordance with due process operate retroactively.

2. *Navigability at the State Level as a Mechanism To Allocate Public and Private Usufructuary Interests.*—Many states use a navigability test not to control title, but to allocate public and private usufructuary interests.⁴⁹⁹ In other words, a nonnavigable stream is one which is subject to the exclusive use of the riparian proprietor(s), while a navigable stream is one in which the general public has rights of use—the question of bed ownership being immaterial. For example, Minnesota⁵⁰⁰ and Indiana⁵⁰¹ have both decided to retain title to all navigable, natural lakes and streams, holding them “in trust” for the public purpose of navigation and recreation. Ohio has come to the same conclusion with respect to Lake Erie,⁵⁰² but treats the beds of all

499. See Johnson & Austin, *supra* note 402; Waite, *Pleasure Boating in a Federal Union*, 10 BUFF. L. REV. 427 (1961).

500. *State v. Adams*, 89 N.W.2d 661 (Minn. 1958); *State v. Longyear Holding Co.*, 29 N.W.2d 657 (Minn. 1947).

501. *State v. Kivett*, 95 N.E.2d 145 (Ind. 1950); *Lake Sand Co. v. State*, 120 N.E. 714, 715 (Ind. App. Ct. 1918).

502. *State v. Cleveland & P.R.R.*, 113 N.E. 677 (Ohio 1916); *Cleveland Boat Serv.*

other natural lakes and streams, navigable as well as nonnavigable, as owned by the riparians.⁵⁰³ Ohio protects public usufructuary rights in all navigable water, however, by a notion of public "easement." Wisconsin has decided that riparians own the beds of all navigable and nonnavigable streams,⁵⁰⁴ but that the state owns the beds of all natural, navigable lakes,⁵⁰⁵ preserving public uses of navigable water by a trust theory.

A state using a navigability test as a mechanism to allocate usufructuary interests, as opposed to using such a test to locate submerged bed title, need not comport with any federal test of navigability; allocating usufructuary interests is a wholly internal state affair.⁵⁰⁶ Thus, when allocating usufructuary interests, a state can employ a tidewater test, sawlog test or, as have Minnesota, Wisconsin, Indiana, and Ohio, a pleasure boat test. This is so because what is really involved, though courts use terms such as "public trust," "public easement," and "public servitude," is an internal exercise of the state's sovereign police power.⁵⁰⁷ Thus the state can regulate water use, as it can land use, in any manner it pleases, subject, of course, to the usual due process requirement. Once this is recognized, it becomes clear that, absent the problem of mineral deposits in the submerged bed, the title to the bed is irrelevant because, regardless of who owns the bed, the public interest can be protected by regulating the superjacent waters. Thus, although "navigable" is one way to describe waters subject to public protection, a navigability criterion is not a necessary one at all for state regulation of public and private usufructuary rights in water.

V. SUMMARY AND CONCLUSIONS

This article has sought to present two levels of legal historical analysis. At one level, the discussion has been a doctrinal analysis—an analysis of how, historically, the doctrine of navigable waters has developed, and how it has been related to such other concepts as public waters, tidewaters, locational admiralty jurisdiction, sovereign regula-

v. City of Cleveland, 130 N.E.2d 241 (Ohio Ct. App. 1955), *aff'd*, 136 N.E.2d 274 (Ohio 1956).

503. *Gavit v. Chambers*, 3 Ohio 495 (1828).

504. *Muench v. Public Service Comm'n*, 53 N.W.2d 514 (Wis. 1952); *Diana Shooting Club v. Husting*, 145 N.W. 816 (Wis. 1914); *Willow River Club v. Wade*, 76 N.W. 273 (Wis. 1898); *Jones v. Pettibone*, 2 Wis. 308 (1853).

505. *State v. Public Service Comm'n*, 81 N.W.2d 71 (Wis. 1957); *Breese v. Wagner*, 203 N.W. 764 (Wis. 1925); *Doemel v. Jantz*, 193 N.W. 393 (Wis. 1923); *Illinois Steel Co. v. Bilot*, 84 N.W. 855 (Wis. 1901).

506. *See Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651 (1927); *Barney v. Keokuk*, 94 U.S. 324 (1876).

507. *See generally* Waite, *supra* note 499; Trelease, *supra* note 485.

tory power, and sovereign ownership of submerged beds and the foreshore. At another level, the discussion has sought to reveal and analyze the process of lawmaking that has taken place in these substantive areas. Accordingly, we have seen law made and doctrines shaped by a process of invention, misconception, manipulation, personal reputation, and by treatise writing.

At the doctrinal level, the analysis has revealed that all legal systems discussed have attached a concept of "publicness" to certain waters, and/or to the submerged beds and contiguous foreshores of those waters. In primitive society this concept of "publicness" apparently attached to all property; thus all land and water belonged to a collectively owned "negative community."⁵⁰⁸ The Romans were more sophisticated; they not only carved an elaborate system of private property (*res quae in nostro patrimonio*) out of the negative community, but they refined and trifurcated the concept of "publicness." Under the Roman scheme, some "public" property (*res extra nostrum patrimonium*) was owned by no one (*res nullius*), some was owned by all men in common (*res communes*), and some was owned by the public or state (*res publicae*). Part IIB of this article has endeavored to give a detailed analysis of the legal status of rivers and the foreshore under this somewhat confusing Roman scheme of classification.

The Roman scheme of "publicness" also recognized a navigability concept.⁵⁰⁹ Navigable rivers appear to have been a subclass of public rivers: all navigable rivers were public, but not all public rivers were navigable. It further appears that the Roman concept of navigability related to a river's capacity to support commercial boating—a concept that is very similar to the later "popular meaning" of navigability in England⁵¹⁰ and the federal "title test" of navigability in America.⁵¹¹ The legal consequence which attended a Roman finding of navigability was that certain activities, permissible in nonnavigable public rivers, were forbidden by Praetorial interdict in navigable public rivers. By using the navigability concept to identify those waters subject to greater state regulation, the Romans presaged the later use made of the concept in federal cases concerning commerce clause jurisdiction⁵¹² and state cases concerning the allocation of usufructuary water rights.⁵¹³

The Roman scheme of "publicness" eventually influenced Spanish law and, to a lesser extent, French law. Since the *Partidas*, as glossed

508. See part IIA *supra*.

509. See part IIB1c *supra*.

510. See part IIIB1 *supra*.

511. See part IVA1b *supra*.

512. See part IVA2 *supra*.

513. See part IVB2 *supra*.

and explained by commentators such as Escriche, was simply a compression and reformulation of the *Corpus Juris Civilis*, Spanish law concerning public waters, navigability, and the foreshore developed to a point where it was very similar to Roman law on these subjects.⁵¹⁴ French law, too, was influenced by Roman concepts but, after 1804, the French concept of "publicness" was codified, and waters were eventually rendered navigable solely by force of administrative enumeration.⁵¹⁵

The spread of Roman law throughout Europe after 1147 did not leave England untouched. Bracton's *De Legibus* and the works known as *Fleta* and *Britton*, all written in the latter half of the thirteenth century, were heavily influenced by Roman law. In particular, Bracton's discussions of the public character of rivers, riverbanks, and the foreshore bear an unmistakable resemblance to the classificatory scheme of the *Corpus Juris Civilis*.⁵¹⁶ But the Roman scheme of "publicness," at least as it applied to the foreshore and rivers, did not survive long after Bracton, if at all. Two developments, one factual and one legal, contributed to this. First, by 1216, the king had granted virtually all riverbeds and the entire foreshore to private persons. That this factual reality was the common understanding of all men is indicated by the absence of any case or statute between 1250 and 1600 declaring riverbeds or the foreshore to be of a public character.⁵¹⁷ Secondly, Roman law in general was repudiated by the common law,⁵¹⁸ *i.e.* by the bench and bar of the king's courts.⁵¹⁹ Notwithstanding the Romanism of the great Bracton, and although Roman law survived in the universities and the canon law of England, the "king's justices . . . bec[a]me interested in the maintenance of a system that [was] all their own."⁵²⁰ Thus English common law, the law of Common Pleas and Kings Bench, and especially the common law of property ownership, began its unique march into the nether regions of procedural cabalism and substantive arcana—and the Roman scheme of "publicness" was submerged.

514. See part IIC1 *supra*.

515. See part IIC2 *supra*.

516. See pp. 555-57 *supra*.

517. There are two possible exceptions to this statement, both minor: the ambiguous *Prior of Tynemouth's Case*, see notes 251-53 and accompanying text *supra*, and chapter 33 of the Magna Charta, see notes 232-37 and accompanying text *supra*.

518. For discussions of Roman law influence on the development of the common law, see T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 294-300 (5th ed. 1956); I F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 111-35 (2d ed. 1959).

519. There were (and still are) many courts in England other than the common law courts. See A. HARDING, *THE LAW COURTS OF MEDIEVAL ENGLAND* (1973); T. PLUCKNETT, *supra* note 518, at 139-214.

520. I F. POLLOCK & F. MAITLAND, *supra* note 518, at 135.

Legal concern with the "publicness" of the English foreshore re-emerged in the sixteenth century, when political and economic exigencies forced the Crown to seek the forfeiture of shore lands.⁵²¹ Beginning around 1600, legal concern regarding proprietary rights and fishing rights in English rivers appeared with increasing frequency in the case law.⁵²² It is unclear why this legal concern over the "publicness" of rivers suddenly appeared. But an assertion of Crown ownership of submerged riverbeds would be the logical concomitant of the Digges-Hale assertion of Crown ownership of the foreshore.⁵²³ Moreover, English conceptions of property and land ownership, in general, began to undergo profound changes in the sixteenth century.⁵²⁴ This was a period when feudalism was breaking down, when land was becoming a marketable commodity, when parliamentary sovereignty was on the ascent, and when commerce and river transport were becoming more important.⁵²⁵ This was also the period in which the battle over the locational extent of admiralty jurisdiction was reaching its peak.⁵²⁶

Whatever the reasons for the reemergence of concern over the "publicness" of waters, beaches, and shore, the debate was not framed in Roman terms. Judges and writers did not talk in terms of torrential rivers and perennial rivers, of Escriche's "linked-to-the-sea" concept, or of *res nullius*, *res communes*, and *res publicae*; they talked in terms of prima facie rules, of *jus publicum* and *jus privatum*, and of tidality and navigability.

The concept of navigability became intimately involved in the doctrinal debate concerning the "publicness" of rivers. Some jurists, such as Hale,⁵²⁷ attached "publicness" to rivers if they were affected by the ebb and flow of the tide, *i.e.* if they were "arms of the sea"—a concept that also appears in English cases addressing locational admiralty jurisdiction. Other jurists, such as Holt,⁵²⁸ attached "publicness" to rivers if they were navigable in fact. Cases such as the *Banne Fishery Case* admixed the tidality and navigability concepts with logical impunity. The doctrinal debate was resolved in the last half

521. See part IIIA *supra*.

522. See part IIIB3 *supra*.

523. See p. 580 *supra*.

524. See Thorne, *Tudor Social Transformation and Legal Change*, 26 N.Y.U.L. REV. 10 (1951).

525. See generally *id.* See also T. PLUCKNETT, *supra* note 518; T. WILLAN, *RIVER NAVIGATION IN ENGLAND: 1600-1750* (1936); Dawson, *The Privy Council and Private Law in the Tudor and Stuart Periods*, 48 MICH. L. REV. 393 & 627 (1950).

526. See part IIIB2 *supra*.

527. Lord Fitzwalter's Case, 86 Eng. Rep. 766 (K.B. 1674); DE JURE MARIS cap. IV. See part IIIB3 *supra*.

528. Warren v. Matthews, 91 Eng. Rep. 312 (K.B. 1703). See part IIIB3 *supra*.

of the nineteenth century on grounds more semantic than legal, when the English courts decided that the concepts of tidality and navigability were "technically" equivalent at law.⁵²⁹ Thus it was finally resolved that "publicness"—in the sense of public fishing rights and Crown ownership of submerged beds—would attach, *prima facie*, to all tidal (hence "technically" navigable) portions of English rivers. Meanwhile, beginning with the *Richards* case in 1795, the English courts were also resolving the debate concerning the "publicness" of the foreshore: Hale's *prima facie* rule of Crown ownership was finally adopted, but only as a rebuttable evidentiary presumption.⁵³⁰

The second level of analysis offered by this article, that revealing the lawmaking process, begins at the point where legal concern over "publicness" reemerged in sixteenth century England. We have seen that the concept of Crown ownership of the foreshore was invented by Thomas Digges in 1568 to give legal justification to the Crown's extortionate practice of title hunting. This concept was accepted by the corrupt judges of Charles I in the 1631 *Philpot* decision, and was refined into a *prima facie* rule by Lord Hale in his *De Jure Maris*, which was written about 1667 but not published until 1786. The *prima facie* rule, however, had virtually no impact on English case law until 1795, when the *Richards* court cited both Hale and *Philpot*. It is clear from Chief Baron MacDonald's opinion in *Richards*⁵³¹ that the *prima facie* rule was being adopted almost solely on the authority of the venerated Lord Hale, whose *De Jure Maris* had been published just nine years earlier. Later English cases and treatises that articulate the *prima facie* rule⁵³² rely in a similar fashion on the authority of Hale, and never cite any authority earlier than *De Jure Maris*. Thus the triumph of the *prima facie* rule is an example of lawmaking by treatise writing: the rule was invented in the treatise of Thomas Digges and was universally popularized by Hales' *De Jure Maris*, which relied on no legal support except the ambiguous *Prior of Tynemouth's Case* (1291), the inapposite *Sir Henry Constable's Case* (1601), and the tainted *Philpot* decision (1631).

Invention, misconception, and treatise writing also characterized the legal development of "publicness" in America.⁵³³ First, American

529. *Murphy v. Ryan*, 2 Ir. R.C.L. 143 (1868); cases cited note 390 *supra*. See notes 391-99 and accompanying text *supra*.

530. See part IIIA *supra*.

531. See text accompanying note 288 *supra*.

532. See cases cited notes 291, 293-94 *supra*.

533. Judicial misconception and invention is perhaps not news to anyone who has completed a year of law school. But the reader may not be aware of the prodigious influence of the nineteenth century treatise writers, who often made law out of one

law concerning the ownership of the foreshore was largely shaped by the misconceptions of influential treatise writers. At a time when English courts were in the process of adopting an evidentiary rule of prima facie Crown ownership of the foreshore, the influential treatises of Joseph Angell and James Kent were announcing a substantive rule of absolute Crown ownership of the foreshore. This absolute rule was swallowed whole by nineteenth century state court⁵³⁴ and Supreme Court⁵³⁵ decisions, which declared absolute ownership of the foreshore to be in the states as the sovereign successors to the English Crown. Thus, whereas nineteenth century English courts adopted a "common law rule" of (prima facie) foreshore ownership that had never existed in early common law, nineteenth century American courts compounded the error by adopting a "common law rule" of (absolute) foreshore ownership that has never existed in the English common law.

Secondly, invention and misconception characterized the development of American law regarding the public character of submerged beds. State ownership of all beds submerged beneath navigable waters was settled by Roger Taney's 1842 decision in *Martin v. Waddell*.⁵³⁶ Taney, citing no authority but apparently relying on *Arnold v. Mundy*, an obscure case decided by an apologetic and admittedly unprepared state court judge, announced that at common law the "dominion and property in navigable waters, and in the lands under them [were] held by the king as a public trust," and that this "dominion and property" devolved on the "people of each state" after the Revolution.⁵³⁷ Although this public trust doctrine has now become conventional wisdom in America, we have seen that there was virtually no support for such a doctrine in English common law at the time of the American Revolution—or even when Taney was writing in 1842. Moreover, the submerged bed doctrine ultimately adopted by the English courts after the 1868 *Murphy v. Ryan* decision was not a substantive rule of absolute Crown ownership; it was an evidentiary rule of prima facie Crown ownership. Thus the public trust doctrine, though purportedly

isolated case which they conceived as "correct," and whose "tomes . . . rolled through the decades before the Civil War like a juggernaut." P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 156 (1965). See also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 285-92 (1973); R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 138-72 (1938); Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEG. STUDIES 249 (1975) (describing how treatise writers and casebook editors contributed to the popularization of *Hadley v. Baxendale*); Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 Yale L.J. 1028 (1975).

534. See notes 201, 297 *supra*.

535. See cases cited note 296 *supra*.

536. See part IVA1a *supra*.

537. See notes 408-09 and accompanying text *supra*.

rooted in old English soil, is an American invention, stemming from the creative misconceptions of Roger Taney.

Thirdly, "creative" lawmaking also characterized the American development of the navigability concept. Navigability—later to become a multifaceted American doctrine—made its first American appearance in early nineteenth century cases dealing with riverbed ownership.⁵³⁸ In his 1805 decision in *Palmer v. Mulligan*, and later in his *Commentaries*, James Kent asserted that navigable waters and tidewaters were legally equivalent in English common law. Kent also asserted that tidality—navigability controlled Crown ownership of submerged riverbeds. In support of these views, Kent cited two fishing rights cases that had nothing to do with bed ownership. Perhaps Kent's view of riverbed ownership was a silent influence on Taney's decision in *Martin v. Waddell*. In any event, it is clear that Kent's views influenced the many state court decisions that, in accordance with the perceived "common law rule," announced state ownership of the beds of all tidally affected waters.⁵³⁹ Other state court decisions, however, such as *Carson v. Blazer*, rejected the "common law" rule and declared that state ownership attached to the beds of all waters navigable in fact.⁵⁴⁰

This tension between navigability and tidality in early nineteenth century American cases mirrored an identical tension in earlier and contemporary English cases. The tension was not resolved in England until 1868, when *Murphy v. Ryan* held that Crown fishing rights and Crown proprietary rights were both controlled by tidality, and that tidality was "technically" equivalent in law to navigability. Remarkably, the court cited Kent's *Commentaries* as authority for this navigability—tidality equation. Thus, decades after Kent had convinced American courts of the "common law rule" of navigability and bed ownership, he ultimately convinced English courts of the "common law rule"—indeed a strange course of legal development, and a testament to the influence of Kent's treatise.

Although Kent's views were universally accepted in America as the "common law rule," there still remained a tension between navigability and tidality, because some state courts refused to follow the "rule" and, instead, declared state ownership to attach to the beds of all waters navigable in fact. The inventive Roger Taney played a large role in resolving this tension in American jurisprudence. Taney's decision in *Martin v. Waddell*, though establishing forevermore state ownership of the beds of "navigable" waters, did not address the

538. See part IV.A1 *supra*.

539. See notes 349, 403-04 and accompanying text *supra*.

540. See notes 350, 405 and accompanying text *supra*.

meaning or scope of the navigability concept. Thus, doctrinally, *Martin v. Waddell* left the state court tension unaffected. But nine years later, in *The Genesee Chief*,⁵⁴¹ Taney rendered a creative decision that eventually resolved much of the tension between navigability and tidality. In a masterpiece of erroneous historical analysis,⁵⁴² Taney rejected supposed "common law" doctrines limiting locational admiralty jurisdiction to navigable waters and equating navigable waters with tidewaters, and held Lake Ontario, a navigable but nontidal body of water, subject to federal admiralty jurisdiction. Thus began the movement of locational admiralty jurisdiction away from a tidewater concept and toward a navigability-in-fact concept. In 1870, for example, a navigability-in-fact criterion was expressly recognized in *The Daniel Ball*.⁵⁴³

Although *The Genesee Chief* and *The Daniel Ball* were both admiralty cases, the navigability-in-fact criterion which they announced spread to other fields. Citing *The Daniel Ball*, the Supreme Court adopted a navigability-in-fact criterion as the basic test for ascertaining what submerged beds were subject to state ownership under the public trust doctrine,⁵⁴⁴ and for determining what waters were subject to federal regulation under the commerce clause.⁵⁴⁵ Finally, in the 1930's, almost 100 years after *Martin v. Waddell*, the Supreme Court recognized that, when ascertaining whether a state took title to a submerged bed by right of sovereignty, the federal title test of navigability would control state title tests.⁵⁴⁶

There still remains some tension in American law, however, because although navigability in fact is the rule for all federal purposes, it is not necessarily the criterion that exists in the case and statutory law of the several states—which have adopted tests such as recreational boating tests, saw log tests, and "common law" tidality tests.⁵⁴⁷ This article has attempted to resolve this remaining tension between the federal title test and the various state title tests. In general, there are two areas in which state navigability tests can control.⁵⁴⁸ First, once a state gets title to a water body, either by federal grant or by operation of the federal title test, the state title test can control whether title to the submerged bed remains in the state or passes to the state's subsequent

541. See note 305 and accompanying text *supra*.

542. See part IIIB1-2 *supra*.

543. See note 418 and accompanying text *supra*.

544. See part IVA1b *supra*; cases cited note 419 *supra*.

545. See part IVA2 *supra*.

546. See notes 465-70 and accompanying text *supra*.

547. See part IVB1 *supra*.

548. See parts IVB1-2 *supra*.

grantee. This is so because states are generally free to part with submerged lands if they so wish. Secondly, a state navigability test can control the allocation of usufructuary water rights between the general public and the private riparian proprietor(s). This is so because a state navigability test used in this manner is simply a classificatory instrument of sovereign state regulatory power, subject to no federal scrutiny unless the state navigability test is deemed an unreasonable classification under the due process clause.

In summary, the navigability criterion in today's America measures a variety of different but related concepts of "publicness." Shaped by a long and often remarkable process of lawmaking, both in England and America, navigability has become a much more sophisticated and pervasive concept than it ever was in the civil law or English common law. Yet it still suffers from the inescapable ambiguity of practical application. The designation of a water body as navigable in America today, under the applicable test, can mean that that water body is of sufficient public interest to be subject to locational admiralty jurisdiction, state ownership, federal regulation, state regulation, some of the above, or all of the above. The analysis offered by this article hopefully helps not only to reveal the historical development of the navigability concept, but also to clarify what the current tests of navigability are, when they apply, and why.

There is a third level of legal historical analysis that only infrequently has been addressed in this article—an analysis of the economic, social, and political conditions in England and America that, at various times in history, may have shaped the doctrinal changes that this article has described. This type of multi-disciplined legal historical analysis has become fashionable in recent times. Popularized largely by Willard Hurst and his "Wisconsin school" of legal history,⁵⁴⁹ and currently championed by scholars such as Lawrence Friedman⁵⁵⁰ and Morton Horwitz,⁵⁵¹ this type of analysis seeks to explore how extra-legal considerations have shaped the law and how in

549. See, e.g., J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956).

550. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973). "The basic premise of this book is that, despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups." *Id.* at 14.

551. HORWITZ, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1947); HORWITZ, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248 (1973); HORWITZ, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *LAW IN AMERICAN HISTORY* 287 (D. Fleming & B. Bailyn eds. 1971).

turn, the law has been used by jurists as an "instrument" to further perceived economic and social goals.⁵⁵²

We have, for example, discussed the economic and political exigencies which prompted Digges to write his treatise. Although many of the doctrinal twists discussed in this article can undoubtedly be attributed to historical misconception and (in a world relatively barren of legal source material) to the influence of prestigious judges and treatise writers, many questions remain unanswered. Why did the prima facie rule suddenly start appearing in English cases at the end of the eighteenth century? Was it simply because Hale's *De Jure Maris* had been published in 1786, or were there extra-legal exigencies at this time requiring greater protection of the English foreshore? Why did legal concern regarding Crown fishing rights and submerged bed rights appear with increasing frequency in English case law after 1600? Why was Taney so "inventive" in *Martin v. Waddell* and *The Genesee Chief*? Was he simply a creative dunce, or were there extra-legal or jurisprudential considerations that may have prompted Taney to extend public ownership of submerged beds and locational admiralty jurisdiction? Unfortunately, I only have the questions and some suspicions; the answers must be left to others.

I will, however, close with a prospective observation. The doctrinal struggles analyzed in this article have all related to the area below the mean high-water line—*i.e.* to the foreshore, submerged beds, and the water itself. We have seen how various legal systems have struggled to attach "publicness" to these areas. We have further seen how Anglo-American law has developed from private ownership of all submerged beds and foreshore, in fact and in law, to public ownership of these areas under the public trust doctrine and the related navigability concept—but we have not fully perceived the historical economic and social exigencies which underlay this development.

Today there is a perceived social exigency for attaching "publicness" to the area above the mean high-water line, that is, to the dry-sand beach. The concern, in states such as Florida, is that mushrooming hotels, motels, condominiums, and private residences will eventually wall off the entire seacoast and beach, thereby depriving the public of access and view. There is virtually no received law, however, that accords the public any rights above the mean high-water line—just as in sixteenth century England there was no received law according

552. See Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *LAW IN AMERICAN HISTORY* 287 (D. Fleming & B. Bailyn eds. 1971); Nelson, *The Impact of the Anti-slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *HARV. L. REV.* 513 (1974).

the public any rights below the mean high water line. But, like their historical predecessors, some courts are already creating the requisite law: working with old doctrines, such as implied dedication, prescriptive easement, and customary rights, those courts are recognizing public rights in the dry-sand beach.⁵⁵³ Two hundred years from now, perhaps public or state ownership of the dry sand beach will be conventional wisdom in America. It seems unlikely that such a development could be accomplished unilaterally by a latter-day Digges, Hale, Taney, or Kent; the development is likely to be more subtle and sophisticated. But one never knows. Public protection of our ever-diminishing natural resources is a more important concern now than ever before, and the law—as always—can be expected to respond.

553. E.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), noted in 2 FLA. ST. U.L. REV. 806 (1974) and 29 U. MIAMI L. REV. 149 (1974); *Application of Ashford*, 440 P.2d 76 (Hawaii 1968); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969). See generally Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYR. L. REV. 935 (1973); Comment, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092 (1971); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Commentary, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586 (1973).