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NOTES

Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States

John F. Baughman

Two tests combine to define federal admiralty jurisdiction.¹ Under the threshold "locus" test, the alleged wrong must have occurred on "navigable waters."² Under the secondary "nexus" test, the act giving rise to liability must bear a "significant relationship" to "traditional maritime activity."³ Historically, admiralty jurisdiction depended only on the locus, or "pure locality," test. Between 1972 and 1982 the Supreme Court added the nexus test⁴ in response to academic criticism of the pure locality test,⁵ resistance from the lower courts,⁶ and practi-

1. For purposes of this Note, whether the cases discussed were decided before or after the 1966 merger of the admiralty "side" of the federal docket into the general pool of civil actions is not important. See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 1-1, at 2 (2d ed. 1975). Cases are discussed without reference to the special procedures formerly used in admiralty.

2. *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866).

3. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673 (1982). Recently the nexus test was modified to require both that "[t]he type of incident . . . [be] likely to disrupt commercial activity," and that there be "a substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Sisson v. Ruby*, 110 S. Ct. 2892, 2896-97 (1990). See Daniel J. Capra, *Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632, 657 (1991). The locus test remains unchanged.

4. The Court first adopted the nexus test for the limited category of aviation accidents. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972). Subsequently, the nexus test was applied to all admiralty cases. *Foremost*, 457 U.S. at 673-74. A number of authors have explored the contours of the Court's new nexus test. See, e.g., Mary K. DePoy, Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 WASH. & LEE L. REV. 121 (1977); Phyllis D. Carnilla & Michael P. Drzal, *Foremost Insurance Co. v. Richardson: If This Is Water, It Must Be Admiralty*, 59 WASH. L. REV. 1 (1983); Alan J. Kaplan, Case Note, 14 B.C. INDUS. & COM. L. REV. 1071 (1973); D.T. Plunkett, Recent Development, *Sisson v. Ruby: Muddying the Waters of Admiralty Jurisdiction*, 65 TUL. L. REV. 697 (1991); David R. Priddy, *Pleasure Boating Under Admiralty Jurisdiction: An Unwarranted Expansion of Federal Authority*, 12 CAP. U. L. REV. 545 (1983).

5. E.g., AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 227-32 (1969) [hereinafter ALI STUDY]; 7A JAMES W. MOORE & ALFRED S. PELAEZ, *MOORE'S FEDERAL PRACTICE* ¶ .325[3] (2d ed. 1988); DePoy, *supra* note 4; Note, *Pleasure-Boating and the Admiralty Jurisdiction*, 10 STAN. L. REV. 724 (1958); Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950); Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661 (1963); Austin T. Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123 (1925).

6. E.g., *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972). In both *Executive Jet*, 409 U.S. at 256-57, and *Foremost*, 457 U.S. at 673, the Court cited academic and judicial criticism as factors influencing their adoption of the nexus test; *Chapman v. City of*

cal necessity.⁷ The principal shortcomings of the pure locality test were that it created federal jurisdiction over seemingly trivial cases,⁸ and that it was sometimes difficult to apply.⁹

Unfortunately, adding the nexus test did not address all of the locus test's limitations, and the locus test remains difficult to apply in some contemporary circumstances. Consequently, lower courts have developed at least two competing definitions of navigable waters. Some courts define as navigable only those waters that currently support, or are likely to support, commercial shipping;¹⁰ others include all waters that could possibly support such traffic.¹¹

The traditional locus test is difficult to apply in a modern setting because rules developed to meet the needs of sailing ships and cargo vessels often adapt poorly to contemporary admiralty cases, which may involve water skiers¹² or people swimming off a public dock.¹³ In response, some courts have narrowed the locus test to dispose of cases they were unable to dismiss under the nexus test.¹⁴ For example, an unbroken chain of Supreme Court precedents indicates that most,¹⁵ if not all,¹⁶ accidents involving pleasure boats are properly heard in admiralty.¹⁷ The Supreme Court has said repeatedly that the activities of pleasure boats qualify as traditional maritime activity.¹⁸ Courts,

Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); *McDonald v. City of New York*, 36 F.2d 714 (2d Cir. 1929); *Campbell v. H. Hackenfeld & Co.*, 125 F. 696 (9th Cir. 1903); *Hastings v. Mann*, 226 F. Supp. 962 (E.D.N.C. 1964), *aff'd.*, 340 F.2d 910 (4th Cir.), *cert. denied*, 380 U.S. 963 (1965); *Weinstein v. Eastern Airlines*, 203 F. Supp. 430 (E.D. Pa. 1962), *modified*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

7. The facts of *Executive Jet* illustrate the practical shortcomings of the pure locality test. The case concerned a commercial airplane that crashed on takeoff into Lake Erie after hitting a flock of seagulls. The Court refused to decide whether the locus of the accident was over land or over water and held that the case should not be heard in admiralty because the event did not "bear a sufficient relationship to traditional maritime activity." 409 U.S. at 271.

8. The most persistent criticism was that the pure locality test included all accidents involving pleasure boats. See citations *supra* note 5; *infra* notes 14-19 and accompanying text.

9. See *supra* note 7.

10. See, e.g., *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980); see *infra* section II.A.

11. See, e.g., *Fineseth v. Carter*, 712 F.2d 1041 (6th Cir. 1983); see *infra* section II.B.

12. One current rule applicable to accidents involving water skiers is that admiralty jurisdiction is appropriate only when the complaint alleges a navigational error. See, e.g., *Hogan v. Overman*, 767 F.2d 1093 (4th Cir. 1985). Such a distinction is an example of the use of the nexus test to determine admiralty jurisdiction.

13. See, e.g., *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967).

14. See, e.g., *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975); *Reed v. United States*, 604 F. Supp. 1253 (N.D. Ind. 1984); *Dunham v. Demaine*, 559 F. Supp. 224 (E.D. Ark. 1983).

15. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982).

16. *Sisson v. Ruby*, 110 S. Ct. 2892, 2901 (1990) (Scalia, J., concurring).

17. The Court has heard at least five cases concerning pleasure boats. *Sisson v. Ruby*, 110 S. Ct. 2892 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Levinson v. Deupree*, 345 U.S. 648 (1953); *Coryell v. Phipps*, 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941).

18. *Foremost*, 457 U.S. at 674; *Sisson*, 110 S. Ct. at 2901 (Scalia, J., concurring).

therefore, cannot use the nexus test to decline jurisdiction over pleasure boat torts. Consequently, the only way for lower courts to decline jurisdiction is to apply the locus test to find that the tort did not occur on navigable waters. Such decisions misuse the jurisdictional locus test to achieve a substantive result.¹⁹

Despite the confusion, it remains desirable for plaintiffs in some situations, and for defendants in others, to have the case heard in admiralty.²⁰ All parties, therefore, have an interest in having the navigable waters of the United States clearly defined. A precise and stable definition also serves the courts' own interests of judicial economy and ease of administration.²¹

This Note develops a simple set of principles useful for defining navigable waters in a contemporary context. Part I considers why federal admiralty jurisdiction exists, and traces the evolution of the phrase *navigable waters* as a term of art. Part II analyzes the conflicting contemporary definitions of navigable waters. Part III resolves the conflict by proposing guidelines that address the major concerns of all competing definitions. The system advocated is consistent with the goals of admiralty, constitutionally sound, easy to apply, and focuses attention on the nexus test to resolve the issue of whether particular cases "belong" in admiralty.

I. HISTORY, POLICY, COMMERCE, AND THE DEFINITION OF NAVIGABLE WATERS

This Part examines the historical development of, and policy reasons for, a distinct federal admiralty jurisdiction. The standard of navigability developed in this Note is designed to complement these origins and goals. Section I.A reviews the origin of federal maritime jurisdiction and suggests that history is ambiguous with regard to what interests federal admiralty courts were intended to serve. Section I.B explains that, although admiralty jurisdiction is independent of the federal interest in interstate commerce, maritime activity and inter-

19. See ALI STUDY, *supra* note 5, at 227-28.

20. A plaintiff might prefer admiralty jurisdiction for several reasons: to obtain federal jurisdiction when there is no diversity of citizenship, *e.g.*, *Marroni v. Matey*, 492 F. Supp. 340 (E.D. Pa. 1980); to be classified as a seaman under the Jones Act, 46 U.S.C. app. § 688 (1988), *e.g.*, *Jones v. Duke Power Co.*, 501 F. Supp. 713 (W.D.N.C. 1980); to sue under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1988), instead of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1988), *e.g.*, *Respass v. United States*, 586 F. Supp. 861 (E.D. La. 1984); to sue under the federal maritime wrongful death cause of action, *e.g.*, *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987); to have a cause of action under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-50 (1988), *e.g.*, *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). A defendant might prefer admiralty: to take advantage of the Limitation of Liability Act, 46 U.S.C. app. §§ 181-96 (1988), *e.g.*, *Three Buoys Houseboats v. Morts*, 921 F.2d 775 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 272 (1991); or where the United States is a defendant, because the statute of limitations under the Suits in Admiralty Act may be shorter than that under the Federal Tort Claims Act, *e.g.*, *Cooper v. United States*, 500 F. Supp. 191 (W.D. Mo. 1980).

21. *Sisson*, 110 S. Ct. at 2902 (Scalia, J., concurring).

state commerce are often impossible to separate, making analysis of “pure” admiralty questions difficult. Section I.C traces the evolution of the term *navigable waters* and describes the various contexts in which it is employed.

A. *The History and Purpose of Admiralty*

Commentators agree that to make “any sense at all,”²² federal admiralty courts must serve some compelling federal interest that would be frustrated by leaving matters to adjudication in state courts.²³ Precisely identifying that compelling interest, however, is difficult. Most frequently mentioned are the need to apply a uniform body of law,²⁴ and the unique needs of the commercial shipping industry.²⁵ Some courts have combined these interests and defined uniformity as the mechanism that achieves the more substantive goal of regulating the shipping industry.²⁶ Whether this interpretation accurately reflects the historical origins of the admiralty courts, however, is unclear.

The Framers’ intent in including “all Cases of admiralty and maritime Jurisdiction” in the federal judicial power is frustratingly obscure.²⁷ There is no evidence of substantive debate over the matter at the Constitutional Convention,²⁸ and the matter was apparently so uncontroversial as to merit a mere two lines in *The Federalist*.²⁹

The First Congress included admiralty and maritime jurisdiction

22. GILMORE & BLACK, *supra* note 1, at 29.

23. *See id.*; Black, *supra* note 5, at 261-64.

24. *See, e.g.*, ALI STUDY, *supra* note 5, at 227.

25. *See* MOORE & PELAEZ, *supra* note 5, ¶.325[3], at 328-31 (Supp. 1991-92).

26. *See, e.g.*, *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

27. U.S. CONST. art. III, § 2, cl. 3. Commentators debate why the Constitution refers to both “admiralty” and “maritime” jurisdiction instead of one or the other, and whether the terms refer to different things. *See generally* MOORE & PELAEZ, *supra* note 5, ¶.200[1] n.1, at 2011; 1 STEVEN F. FRIEDEL, BENEDICT ON ADMIRALTY § 101, at 7-2 - 7-4 (7th ed. 1988). In 1833, Justice Story suggested that the word *maritime* was intended to ensure a broad interpretation of the word *admiralty*. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1666, at 466-67 (5th ed. 1891), *cited in* DAVID W. ROBINSON, ADMIRALTY AND FEDERALISM 6 (1970). Since 1925, however, the conventional wisdom has been that inclusion of the term *maritime* was essentially an afterthought of little constitutional significance. Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 469 (1925). This explanation has been criticized as historically inaccurate, ROBINSON, *supra*, at 6-17, but the matter is now of purely academic significance. Courts do not distinguish between *admiralty* and *maritime* cases and for all practical purposes the terms are synonyms. *See* MOORE & PELAEZ, *supra* note 5, ¶.200[1] n.1, at 2011. The only possible exception is that *maritime* may occasionally be used to refer specifically to the sea, not freshwater. *See* FRIEDEL, *supra*, § 103, at 7-5 - 7-6. In this Note the terms *admiralty jurisdiction* and *maritime jurisdiction* are used interchangeably.

28. Putnam, *supra* note 27, at 460.

29. The most bigotted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.

THE FEDERALIST NO. 80, at 590-91 (Alexander Hamilton) (John C. Hamilton ed., 1864).

in the powers conferred on the newly established federal courts by the Judiciary Act of 1789.³⁰ Because the Act used virtually the same language as the Constitution,³¹ determining the jurisdictional and substantive limits of admiralty is a question of constitutional interpretation to be decided by the judiciary.³²

Unfortunately, what the Framers intended the federal admiralty jurisdiction to include is just as uncertain as why they created it at all.³³ Consequently, in the first half of the nineteenth century the Supreme Court struggled to identify both the source of law to be applied in, and the interests served by, the federal admiralty courts.³⁴ In 1847 the Court finally concluded that admiralty is based on general principles of law used by all maritime nations.³⁵ The result is that today in admiralty cases federal courts apply a body of judge-made law consisting of "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."³⁶ The definition of navigable waters is just such an amalgamated rule.

During the Supreme Court's first century, when the underlying purpose of admiralty was more at issue than it is today, the Court identified three justifications for maintaining federal jurisdiction. Practically, federal jurisdiction produces a more uniform body of law than does state adjudication.³⁷ More fundamentally, because of its re-

30. 1 Stat. 73 (1789).

31. "[A]ll civil causes of admiralty and maritime jurisdiction." 1 Stat. 77, § 9 (1789).

32. We look upon [the Judiciary Act of 1789] as legislative action contemporary with the first being of the constitution, expressive of the opinion of some of its framers, that the grant of admiralty jurisdiction was to be interpreted by the courts in accordance with the acknowledged principles of general admiralty law.

Waring v. Clarke, 46 U.S. (5 How.) 456, 470 (1847). The limit of admiralty jurisdiction "[i]s to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government." The Steamer St. Lawrence, 66 U.S. (1 Black) 522, 527 (1862).

33. Wright, *supra* note 5, at 129.

34. In 1815, Justice Story wrote an exhaustive 26-page opinion analyzing the possible sources of American maritime law. He considered the law employed by English admiralty courts at the time of the American Revolution; the law exercised by the English courts in the seventeenth century before their jurisdiction was greatly curtailed; the law employed in the colonies at the time of the revolution, which was more extensive than that in England itself; "the ancient and original jurisdiction, inherent in the admiralty of England by virtue of its general organization." *De Lovio v. Boit*, 7 F. Cas. 418, 418 (C.C.D. Mass. 1815) (No. 3776). Story concluded that "[t]he language of the Constitution will therefore warrant the most liberal interpretation," meaning that admiralty in this country is based on general principles used by all maritime nations. 7 F. Cas. at 418.

35. *Waring v. Clarke*, 46 U.S. (5 How.) 456 (1847); *see also* *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35 (1871) (explicitly affirming *De Lovio*).

36. *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 865 (1986).

37. Federal jurisdiction avoided the "difficulties" and "evils" that resulted from the separate exercise of admiralty power by individual states before 1789. *Waring*, 46 U.S. at 462. In addition to uniformity for the sake of consistency, the Framers may have been concerned that individual states would unfairly discriminate in cases involving their citizens. *See* *The Lottawanna*, 88 U.S. (21 Wall) 558 (1874), which concerned the ability of a state to create causes of action in

lation to international trade and war, admiralty jurisdiction was seen as an essential attribute of national sovereignty.³⁸ By 1778, all of the original states had established admiralty courts.³⁹ With the ratification of the Constitution, the states ceded admiralty jurisdiction (an attribute of their independent sovereignty) to the federal government.⁴⁰ The Supreme Court has viewed this transfer of sovereign power as complete.⁴¹ Finally, as described in section B, admiralty jurisdiction serves a special federal interest in regulating the waterways used in interstate commerce.

In summary, because the Framers were silent on why they included admiralty jurisdiction in the Constitution, the Supreme Court had to determine what federal interests admiralty is designed to serve. Most generally, admiralty has been defined as an attribute of sovereign power. More specifically, the Court has recognized that the federal government has interests in maintaining jurisdiction over the arteries of interstate commerce, in applying a uniform body of law, and in regulating maritime trade.

B. *The Relationship Between Admiralty and Commerce*

In 1852, in *The Propeller Genesee Chief v. Fitzhugh*, the Supreme Court declared that admiralty jurisdiction does not depend on the fed-

admiralty. "[A] more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system . . ." 88 U.S. at 571.

38. Hamilton's justification of a federal admiralty power, discussed *supra* note 29, is clearly based on a notion of national competence. Foreigners, he implies, should be dealt with on the national level. Similarly, because admiralty cases may frequently arise outside the borders of a state and may involve other countries, state adjudication is inappropriate. CHARLES A. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS*, § 1, at 2 (3d ed. 1976). In addition, the Supreme Court has frequently spoken of maritime law as a type of national power derived from the concept of sovereignty. *See, e.g.*, *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 300-01 (1858). An example of a national concern best adjudicated in a federal system is the disposition of prizes. 28 U.S.C. § 1333(2) (1988).

39. Putnam, *supra* note 27, at 461-63. Under the Articles of Confederation these courts functioned independently, *see, e.g.*, *Talbot v. The Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95 (Pa. 1784), although an appeal could be taken to Congress or to a committee appointed by Congress under some circumstances. Putnam, *supra* note 27, at 463.

40. *See Waring v. Clarke*, 46 U.S. (5 How.) 456, 462 (1847) ("The States . . . yield[ed] admiralty jurisdiction altogether to the United States."); *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 301 (1858); ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE* 16-17 (1870).

41. "When, therefore, the exercise, of admiralty and maritime jurisdiction . . . was surrendered by each State to the Government of the United States, without an exception as to subjects or places, this court cannot interpolate one into the Constitution . . ." *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, at 298 (1858). This conception of the states as sovereign entities transferring power to the federal government is at odds with Justice Marshall's explicit rejection of this argument in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 402-05 (1819) ("The government of the Union . . . is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.") The Supreme Court, however, has always described maritime power as coming from the states. The Court has never explained why the admiralty power does not come from the people.

eral interest in regulating interstate commerce.⁴² The Court has used this doctrine repeatedly to reject arguments that there is no federal jurisdiction over accidents involving vessels engaged in purely intrastate commerce.⁴³ Ultimately, the Court characterized such arguments as "a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States."⁴⁴

The Genesee Chief doctrine had three important consequences. First, it laid the groundwork for the strict locality rule for admiralty tort jurisdiction.⁴⁵ Second, it led to the rule that admiralty jurisdiction over contracts depends on their maritime nature, not on whether the contracts concern an interstate transaction.⁴⁶ Third, it made possible the constitutional interpretation that the Article III grant of admiralty jurisdiction enables Congress to pass maritime legislation independent of the Commerce Clause.⁴⁷ As a historical matter, this interpretation was necessary to expand federal authority beyond the constrictive limits then placed on the federal commerce power.⁴⁸ Congress has rarely exercised this maritime lawmaking power, however, and virtually all statutes regulating shipping, boating, and navigation are Commerce Clause statutes.⁴⁹ Consequently, the relationship between admiralty

42. 53 U.S. (12 How.) 443 (1851). "Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants." 53 U.S. at 452. See generally MOORE & PELAEZ, *supra* note 5, at ¶1,200[4]. Justice McLean, concurring in *The Steamboat Magnolia*, 61 U.S. at 304, attempted to link admiralty jurisdiction to the commerce power, but the full Court has never adopted his reasoning.

43. See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564-66 (1871); *The Propeller Commerce*, 66 U.S. (1 Black) 574, 579-80 (1862); see also *The Montello*, 87 U.S. (20 Wall.) 430, 439 (1874). As discussed *infra* note 66, debate remains over whether *The Daniel Ball* and *The Montello* established rules for admiralty or Commerce Clause cases. All that is relevant here, however, is that the operation of the vessels within a single state did not remove them from admiralty jurisdiction.

44. *London Guarantee & Accident Co. v. Industrial Accident Comm.*, 279 U.S. 109, 124 (1929).

45. Expressed in rudimentary terms in *The Propeller Commerce*, 66 U.S. at 579, the strict locality test was made explicit in the form that endured until 1972, in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865).

46. See *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 29 (1871); *The Belfast*, 74 U.S. (7 Wall.) 624, 637 (1868).

47. "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question." *In re Garnett*, 141 U.S. 1, 12 (1891); see also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385-86 (1924); *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527, 556-57 (1889); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

48. In the nineteenth century intrastate commerce was a living concept. It would be almost a century before the Court found that even the most local transactions could "affect" interstate commerce and were therefore subject to federal regulation. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

49. See, e.g., statutes codified in 33 U.S.C. § 5, Navigation and Navigable Waters (1988).

and commerce remains complicated.

Furthermore, as discussed in section I.C, navigable waters are defined in terms of their ability to support interstate commerce. If the only federal interest is the interstate shipment of goods by water, that could be comprehensively regulated through the Commerce Clause.⁵⁰ However, the Admiralty Clause⁵¹ and the concern expressed in early cases that federal jurisdiction extend over waters that are "highways of commerce"⁵² evidence a broader concern with the interstate waters themselves. The federal interests in interstate commerce and in the movement of people across state lines were protected by asserting jurisdiction over the "highways" on which they moved.

The federal interstate highway system provides a useful analogy. In *Foremost Insurance Co. v. Richardson*,⁵³ Justice Powell used the highway analogy to attack the assertion of admiralty jurisdiction over accidents involving pleasure boats. Powell claimed that "no one suggests that federal jurisdiction is needed to prevent chaos in automobile traffic, or that only federal courts are qualified to try accident cases."⁵⁴ Powell was correct, but his argument overlooked a crucial distinction between interstate commerce conducted on water and on land. The federal courts, through the Admiralty Clause, have constitutional jurisdiction over both the situs and the instruments of waterborne commerce. No such jurisdiction exists over land traffic per se. If the federal courts had constitutional jurisdiction over all cases involving commerce, for instance, there would be federal jurisdiction over all cases involving interstate trucking. And, as is currently the case in admiralty, there would be vigorous debate over which traffic accidents sufficiently affect commerce that they should be heard in federal court. It is easy to imagine courts identifying certain roads as highways of interstate commerce and leaving the rest to local jurisdiction.

Thus, there is a close relationship between the federal commerce power and admiralty jurisdiction. Although most affirmative regulation of waterborne commerce is done under the Commerce Clause, there is an independent federal interest in the waterways on which the commerce moves. The definition of navigable waters delimits the scope of that distinct federal power.

50. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), clearly established the constitutionality of congressional power over interstate navigation. The vast majority of regulatory statutes concerning shipping and navigation have been passed under the Commerce Clause. See *supra* note 49 and accompanying text.

51. U.S. CONST. art. I, § 2, cl. 1.

52. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1871).

53. 457 U.S. 668 (1982).

54. 457 U.S. at 682 (Powell, J., dissenting).

C. *The Evolution of the Term Navigable Waters*

In *Kaiser Aetna v. United States*,⁵⁵ the Supreme Court reviewed a century and a half of litigation over the definition of navigable waters and observed that the term had been used in a variety of unrelated contexts.⁵⁶ The Court announced that precedents defining navigable waters should be read in light of "the purpose for which the concept of "navigability" was invoked in a particular case."⁵⁷ In so doing, the Court implied that different definitions should apply in different circumstances.

Prior to *Kaiser Aetna*, only a handful of lower courts distinguished different definitions of navigability.⁵⁸ Furthermore, the Supreme Court itself frequently applied definitions developed in one context to unrelated cases. Nevertheless, assuming that such a classification is both important and possible, the definitions used to characterize admiralty jurisdiction, the scope of congressional regulatory authority under the Commerce Clause, and state ownership of river and lake bottoms are described below.⁵⁹

1. *The Admiralty Definition*

In 1825, following the English example, the Court restricted admiralty jurisdiction to waters within the "ebb and flow of the tide."⁶⁰ In 1852, this rule was discarded and admiralty jurisdiction was extended to all "public water used for commercial purposes or foreign trade."⁶¹

55. 444 U.S. 164 (1979).

56. The Court identified four: the boundaries of congressional regulatory authority under the Commerce Clause; admiralty jurisdiction; the extent of the authority of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899; and the limits of the navigational servitude. 444 U.S. at 171-72.

57. 444 U.S. at 171 (quoting *United States v. Kaiser Aetna*, 408 F. Supp. 42, 49 (D. Haw. 1976), modified, 584 F.2d 378 (9th Cir. 1978), *rev'd.*, 444 U.S. 164 (1979)).

58. *E.g.*, *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975); *The Lucky Lindy*, 76 F.2d 561 (5th Cir. 1935); *Doran v. Lee*, 287 F. Supp. 807 (W.D. Pa. 1968); *United States v. Banister Realty Co.*, 155 F. 583 (E.D.N.Y. 1907).

59. At least five articles have made extensive examinations of the various contexts in which definitions of navigable waters are used. David M. Guinn, *An Analysis of Navigable Waters of the United States*, 18 BAYLOR L. REV. 559 (1966); Francis W. Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8; Leighton L. Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391 (1970); Merritt Starr, *Navigable Waters of the United States — State and National Control*, 35 HARV. L. REV. 154 (1921); G. Graham Waite, *Pleasure Boating in a Federal Union*, 10 BUFF. L. REV. 427 (1961). All offer a more comprehensive classification than is necessary here. Other categories discussed include cases arising under treaties (Laurent, Leighty); arising under federal land grants (Laurent); involving citizens of different states (Laurent); involving questions of public rights (Leighty, Waite); and state power to zone waters for particular purposes (Waite). The three broad categories discussed in the text have been the source of the most Supreme Court litigation.

60. *The Thomas Jefferson*, 23 U.S. (10 Wheat) 428 (1825); *see also The Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837) (sea or tidewater).

61. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851). Because *The Genesee Chief* concerned a collision on Lake Ontario the waters involved were in fact un-

Shortly thereafter, the Court made clear that such waters would be within admiralty jurisdiction even if all navigable ports were located entirely within a single state or county,⁶² as long as they could be used in interstate commerce.⁶³ In most admiralty cases, navigability is not an issue and thus when the Court announced the strict locality rule it said only that “the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters.”⁶⁴

*The Daniel Ball*⁶⁵ was the first case following adoption of the strict locality test in which navigability was at issue.⁶⁶ The defendant ar-

questionably navigable. The case is anomalous because it dealt with an 1845 federal statute that extended admiralty jurisdiction to the Great Lakes and their connecting waters. The Court made clear, however, that the Judiciary Act of 1789 authorized admiralty jurisdiction over inland admiralty and maritime cases, so that the waters in question would be covered even without the 1845 statute. This reasoning was given immediate effect in the Court's next case, *Fretz v. Bull*, 53 U.S. (12 How.) 466 (1851). For a short time it appeared that jurisdiction over the Great Lakes might rest on a different footing than that covering the rest of the country's inland waters. See *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866). In 1869, however, the Court declared that the Act of 1845 “has become useless and of no effect.” *The Eagle*, 75 U.S. (8 Wall.) 15, 26 (1868).

62. *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296, 299 (1858).

63. *Nelson v. Leland*, 63 U.S. (22 How.) 48, 56 (1859).

64. *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1865). *The Plymouth* also introduced a curious rule that admiralty jurisdiction does not extend to torts caused by actions on navigable waters that resulted in injuries on shore. This anomaly was reversed by statute. The Admiralty Extension Act of 1948, 62 Stat. 496, codified at 46 U.S.C. app. § 740 (1988).

65. 77 U.S. (10 Wall.) 557 (1871).

66. *The Daniel Ball* and *The Montello*, discussed *infra* at notes 69-74 and accompanying text, are the two most important and often cited cases defining navigable waters. There is considerable disagreement, however, as to whether they should be classified as admiralty or Commerce Clause cases. Both were actions brought by the United States against ships operating without the federal license required of all vessels on navigable waters. Proponents of the view that the definition of navigability developed in these precedents applies only to Commerce Clause cases base their argument on the fact that the underlying statutes were regulations adopted under the Commerce Clause. Laurent, *supra* note 59, at 25; Waite, *supra* note 59, at 442 n.61; see also *Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975). For two reasons, however, it makes more sense to regard these cases as defining navigable waters for admiralty cases as well as for Commerce Clause matters. First, they were admiralty cases. In each, the United States filed a libel in admiralty rather than bringing a law action. Second, in a series of “pure” admiralty cases, the Supreme Court cited the rules developed in *The Daniel Ball* and *The Montello* as controlling. *Ex parte Boyer*, 109 U.S. 629, 631-32 (1884); *Ex parte Garnett*, 141 U.S. 1, 15 (1891); *The Robert W. Parsons*, 191 U.S. 17, 26 (1903). If there was any doubt that *The Daniel Ball* and *Montello* definitions were not admiralty rules, these subsequent cases made them so. Extending this second argument, *The Daniel Ball* and *The Montello* should also be considered valid precedent for determining state ownership of river beds (and other questions of property ownership) because of the Supreme Court's extensive reliance on them in such cases. See *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 15 (1935); *United States v. Utah*, 283 U.S. 64, 76 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 586 n.2 (1922); *United States v. Cress*, 243 U.S. 316, 323-24 (1917); *Packer v. Bird*, 137 U.S. 661, 667 (1891). In *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979), Justice Rehnquist cited *The Daniel Ball* and *The Montello* as Commerce Clause cases without discussion. Justice O'Connor, however, considers *The Daniel Ball* an admiralty case. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 488 (1988) (O'Connor, J., dissenting). For a thorough analysis of *The Daniel Ball* as precedent, see Guinn, *supra* note 59, at 561-80.

gued that the Grand River in Michigan was not navigable. The Court replied:

A different test must . . . be applied to determine the navigability of our rivers, and that is found in their navigable capacity. 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 on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary 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 in the customary modes in which such commerce is conducted by water.⁶⁷

Using this test, the Court easily found the Grand River navigable because the evidence showed it was capable of supporting steamboat traffic.⁶⁸

The Montello,⁶⁹ which concerned the navigability of the Fox River in Wisconsin, presented a more difficult case. The case originally reached the Court in 1870 but, because of insufficient evidence regarding the river itself, was remanded with instructions for the district court to apply *The Daniel Ball* test.⁷⁰ The Court's decision when the case returned three years later⁷¹ is important for two reasons.

First, the Court made clear that a finding of navigability did not depend on the ease or method of navigation:

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.⁷²

The Court did, however, add a small caveat.

It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."⁷³

67. 77 U.S. at 563.

68. 77 U.S. at 564.

69. 78 U.S. (11 Wall.) 411 (1870), *appeal after remand*, 87 U.S. (20 Wall.) 430 (1874).

70. 78 U.S. at 415.

71. 87 U.S. (20 Wall.) 430 (1874).

72. 87 U.S. at 441-42.

73. 87 U.S. at 442 (citation omitted). The Court's quotation of what might be termed the

Second, the Court found that navigability could be established on the basis of historical records of commercial navigation. The Court based its finding of navigability on evidence that the Fox River was traveled by explorers in 1673, was used by fur trappers in the eighteenth century, and was used as an artery of commerce by animal-drawn Durham boats in the nineteenth century.⁷⁴

Subsequent decisions based on *The Daniel Ball* and *The Montello* extended the admiralty jurisdiction to artificial waterways such as canals,⁷⁵ even when located entirely within a single state, as long as the waterway afforded a highway for interstate commerce.⁷⁶ The Court made clear that admiralty jurisdiction applied to vessels engaged in purely intrastate commerce on a river located entirely within one state, because rivers eventually empty into a sea, bay, or gulf.⁷⁷ The Supreme Court has not ruled directly on what constitutes navigability in the admiralty context since 1903.⁷⁸

2. *The Commerce Clause Definition*

Federal Commerce Clause power over navigable waters originally derived from such waters' susceptibility to use in interstate commerce.⁷⁹ Gradually, however, the federal power extended beyond concern for navigation to include dams⁸⁰ and other structures, such as levees, drains, and flood control plans, that affect the waterway itself.⁸¹ In *United States v. Appalachian Electric Power Co.*,⁸² the Court held that federal power over waterways is not limited to regulating navigation. "In truth the authority of the United States is the regulation of

"Shaw caveat" is interesting because the case cited was a property case. *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344 (1838). In *Rowe*, the plaintiffs alleged a public nuisance when the defendant constructed a road over a small creek that the plaintiffs claimed to have used for transporting hay. The Supreme Court's reliance on *Rowe* thus began a long history of applying definitions of navigability developed in one context to unrelated cases. Justice Rehnquist's declaration in *Kaiser Aetna* that definitions developed in different contexts should be kept separate, see *supra* notes 55-57 and accompanying text, is at odds with the very foundation of the Supreme Court's navigability doctrine.

74. 87 U.S. at 440-41.

75. *Ex parte Boyer*, 109 U.S. 629, 632 (1884).

76. *The Robert W. Parsons*, 191 U.S. 17, 28 (1903).

77. See *In re Garnett*, 141 U.S. 1, 15-17 (1891) (discussing cases). The river in question was located in two states, however, and emptied into the Atlantic Ocean.

78. *The Robert W. Parsons* 191 U.S. 17 (1903). In the last case decided under the strict locality test the Supreme Court stated simply that "maritime law governs only those torts occurring on the navigable waters of the United States." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971).

79. "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie." *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865).

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

81. *Leovy v. United States*, 177 U.S. 621 (1900).

82. 311 U.S. 377 (1940).

commerce on its waters. Navigability . . . is but a part of this whole."⁸³ Nevertheless, while Congress may exercise Commerce Clause power over waters for reasons unrelated to navigation, it may do so only over waters classified as navigable.⁸⁴

Appalachian Electric modified *The Daniel Ball* definition of navigability in several ways.⁸⁵ The Court dropped the requirement that the waterway be navigable in its natural state. Rather, as long as a waterway could be made navigable through reasonable improvements, it would qualify as navigable. It is not even necessary that the improvements be made, or even authorized, just possible.⁸⁶ The court also endorsed the concept of "indelible navigability,"⁸⁷ under which a waterway once found to be navigable in fact remains permanently navigable in law.⁸⁸ Following the example set in *The Montello*, the *Appalachian Electric* decision also made extensive use of historical evidence to demonstrate navigability.⁸⁹ Finally, the Court examined the physical characteristics of the river itself to demonstrate its capacity to support navigation.⁹⁰ Under the *Appalachian Electric* doctrine the

83. 311 U.S. at 426.

84. Justice Rehnquist has reached a somewhat different conclusion. Referring to the quoted passage, he stated:

Appalachian Power Co. indicates that congressional authority over the waters of this Nation does not depend on a stream's "navigability." . . . The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as "navigable water of the United States."

Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979). Justice Rehnquist's argument is unconvincing. If he were correct, then the contortions the *Appalachian Electric* Court went through to demonstrate that the stream in question was in fact navigable would have been unnecessary. See *infra* text accompanying notes 86-90. Furthermore, in referring to the "traditional Commerce Clause analysis," Justice Rehnquist cites *Wickard v. Filburn*, 317 U.S. 111 (1942), *United States v. Darby*, 312 U.S. 100 (1941), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). All three of these cases were decided within three years of *Appalachian Electric*. If the *Appalachian Electric* Court had intended to use the "traditional Commerce Clause analysis," they surely were familiar with it. They invented it.

85. In the 70 years before *Appalachian Electric*, however, the Court relied heavily on *The Daniel Ball* in Commerce Clause cases, often construing it more narrowly than in admiralty cases, probably reflecting the more limited doctrine of federal Commerce Clause power then applied by the Court. See *supra* note 48. In *Escabana & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 682 (1883), the Court cited *The Daniel Ball* without comment to declare the Chicago River navigable for Commerce Clause purposes. In *Leovy v. United States*, 177 U.S. 621, 632 (1900), the Court read *The Daniel Ball* and *The Montello* narrowly and imposed a requirement that navigable waters support "commerce of a substantial and permanent character." In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899), the Court said "the mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."

86. *Appalachian Electric*, 311 U.S. at 407-08.

87. *Guinn*, *supra* note 59, at 563.

88. 311 U.S. at 408. This principle was first articulated in *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921).

89. 311 U.S. at 413-19.

90. 311 U.S. at 410-13.

definition of navigable waters is extremely broad — broader than the admiralty definition.

3. *State Ownership of River Bottoms*

The definition of navigability used to determine state ownership of submerged lands is closely associated with the equal footing doctrine under which new states admitted to the union acquire the same property rights as the original thirteen.⁹¹ New states acquire title to all land beneath navigable waters within their borders on the date of statehood.⁹² The key question in cases of disputed ownership is whether the waters overlying the land in question were navigable on that date.⁹³ In these cases, the doctrine of indelible navigability applies.⁹⁴ A state could never lose title to a river bottom simply because the river is no longer used for navigation.

Although title cases have relied heavily on the definitions of navigability developed in *The Daniel Ball* and *The Montello*,⁹⁵ courts have focused on whether a waterway is *capable* of being used for commercial navigation; whether it actually is or has been navigated is less important.⁹⁶ In resolving questions of navigability for title, the Supreme Court has relied on four types of evidence: the physical characteristics of the waterway, such as its depth and volume of flow;⁹⁷ historical records of navigation;⁹⁸ contemporary use by pleasure craft;⁹⁹ and de-

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

92. "[U]pon the admission of the State of Alabama into the Union, the title in the lands below high water mark of navigable waters passed to the State, and could not afterwards be granted away by the Congress of the United States." *Shively v. Bowlby*, 152 U.S. 1, 27 (1894). The state's title is, however, subject to the "navigational servitude," under which the federal government may exercise its Commerce Clause power over navigable waters. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977).

93. See, e.g., *United States v. Utah*, 283 U.S. 64, 73 (1931); *United States v. Oregon*, 295 U.S. 1, 6 (1935).

94. *Guinn*, *supra* note 59, at 565.

95. See e.g., *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 15 (1935); *United States v. Utah*, 283 U.S. 64, 76 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922).

96. The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. . . . The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. *United States v. Utah*, 283 U.S. 64, 82 (1931).

97. *Utah v. United States*, 403 U.S. at 12; *United States v. Oregon*, 295 U.S. at 15; *United States v. Utah*, 283 U.S. at 77-81; *United States v. Holt State Bank*, 270 U.S. at 52-53, 56-57; *Oklahoma v. Texas*, 258 U.S. at 586-87.

98. *Utah v. United States*, 403 U.S. at 11-12; *United States v. Utah*, 283 U.S. at 81; *United States v. Oregon*, 295 U.S. at 15; *Oklahoma v. Texas*, 258 U.S. at 586-87; *Holt State Bank*, 270 U.S. at 57.

99. In *United States v. Oregon*, evidence that duck hunters and pleasure boaters had failed in

terminations of navigability by administrative agencies or state courts.¹⁰⁰ Courts may also take judicial notice when waterways are commonly considered navigable.¹⁰¹ The net result is that a body of water may be considered navigable in title actions based on very scanty evidence of historical use, even when not currently used for any purpose.¹⁰²

II. CONFLICTING CONTEMPORARY DEFINITIONS OF NAVIGABILITY

The Supreme Court's long silence on the definition of navigable waters for admiralty purposes, its frequent reliance on definitions developed in Commerce Clause or property cases, and uncertainty over the interests served by federal admiralty courts have led to conflict among the courts of appeals over the proper definition of navigability.¹⁰³ The major area of disagreement concerns the amount of commerce a waterway must presently support to be considered navigable. A second issue is whether admiralty jurisdiction may ever exist over waters landlocked in a single state, and conversely, whether interstate waters may ever be excluded from admiralty.

This Part describes the two definitions of navigability currently in use. Section II.A describes the "contemporary navigability-in-fact" standard that requires evidence of ongoing or reasonably likely commercial activity. Section II.B describes the "navigational capacity" standard that requires only that commerce be possible. Section II.C considers whether waters navigable in admiralty must be part of an interstate nexus in order to fall within federal admiralty jurisdiction.

attempts to use small boats on a lake was persuasive evidence against a finding of navigability. 295 U.S. at 21-23. The Court's consideration of this evidence, however, suggests that evidence of regular use of a waterway by pleasure craft would support a finding of navigability for title purposes.

100. *United States v. Oregon*, 295 U.S. at 23. Such determinations, however, are not controlling. See *Oklahoma v. Texas*, 258 U.S. at 585 (opinion of surveying officers that the Red River was navigable not dispositive). Ultimate resolution of navigability is a federal question not subject to adjudication in state courts. *Holt State Bank*, 270 U.S. at 55.

101. *United States v. Utah*, 283 U.S. at 77.

102. For instance, the Great Salt Lake was determined to be navigable on evidence of (1) "nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands," by their owners; (2) "one boat used by an outsider who carried sheep to an island for the owners of the sheep"; (3) "a boat known as the *City of Corrine* which was launched in May 1871 for the purpose of carrying passengers and freight; but its life in that capacity apparently lasted less than a year. In 1872 it was converted into an excursion boat which apparently plied the waters of the lake until 1881"; (4) "other boats that hauled sheep to and from an island in the lake and also hauled ore, and salt, and cedar posts"; (5) "another boat . . . used to carry salt from various salt works around the lake to a railroad connection"; (6) The fact that the lake was 30.2 feet deep on the date Utah became a state. *Utah v. United States*, 403 U.S. at 11-12.

103. For an excellent discussion of the difficulties faced by a district court attempting to decide whether admiralty jurisdiction is appropriate, see *Wilder v. Placid Oil Co.*, 611 F. Supp. 841, 845-47 (W.D. La. 1985), *affd. sub nom. Sanders v. Placid Oil Co.*, 861 F.2d 1374 (5th Cir. 1988).

This Part concludes that although the first definition better reflects modern circumstances, the second is more faithful to the underlying goals of admiralty. Consequently, elements of each definition will be combined in the analytical framework proposed in Part III.

A. *The Contemporary Navigability-in-Fact Standard*

The narrower of the two rules defining navigability for admiralty purposes requires that the waters in question actually support commercial shipping, or have a "present capacity to sustain commercial shipping."¹⁰⁴ Read closely, this rule has a "hard" and a "soft" version. The hard version, first developed by the Eighth Circuit in *Livingston v. United States*,¹⁰⁵ has been read to require evidence of actual contemporary commercial use.¹⁰⁶ The soft version, developed by the Ninth Circuit in *Adams v. Montana Power Co.*,¹⁰⁷ and endorsed by the Seventh Circuit in *Chapman v. United States*,¹⁰⁸ states that "admiralty jurisdiction need and should extend only to those waters traversed or susceptible of being traversed by commercial craft."¹⁰⁹

The term *susceptible* as used in this context does not mean physically capable, but rather, likely.¹¹⁰ *Adams* concerned a boating accident in Montana on an artificial lake formed between two dams on the Missouri River.¹¹¹ *Chapman* concerned a similar accident on the

104. *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 73 n.3 (8th Cir. 1988).

105. 627 F.2d 165 (8th Cir. 1980).

106. *See, e.g., Reed v. United States*, 604 F. Supp. 1253, 1267 (N.D. Ind. 1984); *Motley v. Hale*, 567 F. Supp. 39, 40 (W.D. Va. 1983); *Cooper v. United States*, 500 F. Supp. 191, 193 (W.D. Mo. 1980); *see also Finneseth v. Carter*, 712 F.2d 1041, 1045-46 (6th Cir. 1983).

107. 528 F.2d 437 (9th Cir. 1975). In a subsequent case, however, the Ninth Circuit characterized its *Adams* holding in a way that appears to endorse the hard version of the rule. "Because we concluded that none of the activities on the river constituted commerce, we held the action was not cognizable in admiralty." *In re Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986), *cert. denied*, 479 U.S. 1008 (1986).

108. 575 F.2d 147 (7th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978). The contemporary navigability in fact standard has also been implemented by at least four district courts in circuits where the court of appeals had not previously ruled on the issue. *Seymour v. United States*, 744 F. Supp. 1161 (S.D. Ga. 1990); *Reynolds v. Bradley*, 644 F. Supp. 42 (N.D.N.Y. 1986); *Motley v. Hale*, 567 F. Supp. 39 (W.D. Va. 1983); *Smith v. Hustler, Inc.*, 514 F. Supp. 1265 (W.D. La. 1981). *Motley* and *Smith* seem contrary to cases subsequently decided by the courts of appeals in their circuits. *Price v. Price*, 929 F.2d 131 (4th Cir. 1991); *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. 1981), *affid. sub nom. Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

109. *Adams*, 528 F.2d at 439.

110. "The issue . . . is whether . . . admiralty jurisdiction extends . . . over waters that, although navigable and used for commercial transportation in the past, are now used and likely to be used only for recreational activities." *Chapman*, 575 F.2d at 147. Another definition of admiralty jurisdiction that has been used is "actual or reasonably potential navigability." *Marroni v. Matey*, 492 F. Supp. 340, 342 (E.D. Pa. 1980) (quoting *United States v. Stoeco Homes*, 498 F.2d 597, 610 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975)). The *Marroni* decision illustrates the difficulty lower courts have in applying the various definitions of navigable waters because *Stoeco Homes* was not an admiralty case; it concerned alleged violations of the Rivers and Harbors Appropriation Act of 1899. *Stoeco Homes*, 498 F.2d at 600.

111. The dams were 25 miles apart and neither had locks. 528 F.2d at 439.

Kankakee River in Illinois.¹¹² In both cases, and in several others applying the contemporary navigability-in-fact standard, the waterway either previously had supported, or was physically capable of supporting, commercial activity.¹¹³

The strongest argument supporting the contemporary navigability-in-fact standard is that, because admiralty exists only to serve the national interest in commercial shipping, there is no federal interest to protect if there is no shipping.¹¹⁴ This argument relies heavily on *Kaiser Aetna's* admonition that definitions of navigability should reflect the *purpose* they serve.¹¹⁵ It is a strong policy argument but requires a carefully made distinction between the federal interest in maintaining admiralty jurisdiction over navigable waters from the "intense" federal interest in uniform regulations governing safety, navigation, and other concerns regulated under the Commerce Clause.¹¹⁶

An important corollary to the argument that admiralty jurisdiction should not exist in the absence of commerce derives from *The Genesee Chief* precedent that as maritime commerce expands, admiralty jurisdiction expands with it. By analogy, when commercial shipping stops on a particular waterway it should cease to be considered navigable for admiralty purposes.¹¹⁷ This argument rejects the *Appalachian Electric* doctrine of immutable navigability in the admiralty context. Historically, however, many lower courts deciding admiralty cases have ap-

112. 575 F.2d at 147.

113. *Chapman*, 575 F.2d at 147; *Adams*, 528 F.2d at 440. In *Minix v. Fellers*, 654 F. Supp. 1127 (N.D. Cal. 1987), the court states:

Although past activities and conditions of Clear Lake indicate the presence of previous interstate commerce, the activities and condition of Clear Lake now and at the time of the subject accident are and were non-commercial and intrastate. In addition, the condition and location of the lake do not make it susceptible to interstate commerce in the future.

654 F. Supp. 1129. See also *Motley v. Hale*, 567 F. Supp. 39, 40 (W.D. Va. 1983) (refusing to consider plaintiff's evidence of historic navigability); *Dunham v. DeMaine*, 559 F. Supp. 224, 225 (E.D. Ark. 1983) (Lake Hamilton held not navigable for admiralty although it "historically had been navigable in its natural state"); *Smith v. Hustler, Inc.*, 514 F. Supp. 1265, 1267 (W.D. La. 1981) (Lake Bistineau no longer navigable for admiralty purposes).

114. The Ninth Circuit wrote:

The logic of requiring commercial activity is evident. The purpose behind the grant of admiralty jurisdiction is the protection and promotion of the maritime shipping industry through the development and application, by neutral federal courts, of a uniform and specialized body of federal law. . . . In the absence of commercial activity, present or potential, there is no federal interest justifying the frustration of legitimate state interests.

Adams, 528 F.2d at 439 (footnote omitted); see also *Three Buoys Houseboat Vacations U.S.A. v. Morts*, 878 F.2d 1096 (8th Cir. 1989) (*Three Buoys I*), vacated and remanded 110 S. Ct. 3265 (1990), modified, 921 F.2d 775 (8th Cir. 1990) (*Three Buoys II*), cert. denied, 112 S. Ct. 272 (1991); *Livingston v. United States*, 627 F.2d 165, 169-70 (8th Cir. 1980), cert. denied, 450 U.S. 914 (1981); *Chapman*, 575 F.2d at 149-50; *Cooper v. United States*, 500 F. Supp. 191, 193 (W.D. Mo. 1980).

115. See, e.g., *Three Buoys II*, 921 F.2d at 778; *Livingston*, 627 F.2d at 169.

116. *Land and Lake Tours Inc. v. Lewis*, 738 F.2d 961 (8th Cir. 1984), cert. denied, 469 U.S. 1038 (1984); see also *Adams*, 528 F.2d at 440.

117. *Livingston*, 627 F.2d at 169; *Chapman*, 575 F.2d at 149; *Adams*, 528 F.2d at 440; *Dunham*, 559 F. Supp. at 225.

plied the *Appalachian Electric* doctrine,¹¹⁸ although the Supreme Court has never done so.¹¹⁹ If the *Appalachian Electric* doctrine should not apply, then it is logically sound to argue that waters previously held navigable for admiralty purposes should drop out of admiralty jurisdiction when commercial navigation stops.

Some courts have also suggested that *The Daniel Ball* and *The Montello* may require use of the contemporary navigability-in-fact standard.¹²⁰ *The Daniel Ball* and *The Montello* do contain language very similar to that used to define the contemporary navigability-in-fact standard.¹²¹ Such an argument, however, ignores *The Montello*'s extensive use of historical evidence to support a finding of navigability.¹²²

A final argument advanced in favor of the contemporary navigability-in-fact standard is that a narrow definition of navigability would reduce the caseload of the federal courts.¹²³ This argument goes hand in hand with Justice Powell's complaint in dissent that the majority in *Foremost Insurance Co. v. Richardson* — the case that added the nexus test — expanded admiralty jurisdiction "to the edge of absurdity."¹²⁴

118. *Jones v. Duke Power Co.*, 501 F. Supp. 713 (W.D.N.C. 1980), *affd.*, 672 F.2d 910 (4th Cir. 1981); *Clinton Bd. of Park Comms. v. Claussen*, 410 F. Supp. 320 (S.D. Iowa 1976); *Dow Chem. Co. v. Dixie Carriers, Inc.*, 330 F. Supp. 1304 (S.D. Tex. 1971), *affd.*, 463 F.2d 120 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972); *Spiller v. Thomas M. Lowe, Jr., & Assocs.*, 328 F. Supp. 54 (W.D. Ark. 1971), *affd.*, 466 F.2d 903 (8th Cir. 1972); *Dardar v. Louisiana*, 322 F. Supp. 1115 (E.D. La. 1971), *affd. sub nom. Dardar v. Louisiana State Dept. of Highways*, 447 F.2d 952 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Builders Supply Co. v. Chris Craft*, 278 F. Supp. 254 (N.D. Iowa 1968); *In re River Queen*, 275 F. Supp. 403 (W.D. Ark. 1967), *affd. sub nom. George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968); *Madole v. Johnson*, 241 F. Supp. 379 (W.D. La. 1965); *In re Howser*, 227 F. Supp. 81 (W.D.N.C. 1964); *Johnson v. Wurthman*, 227 F. Supp. 135 (D. Or. 1964); *Shogry v. Lewis*, 225 F. Supp. 741 (W.D. Pa. 1964); *In re Madsen*, 187 F. Supp. 411 (N.D.N.Y. 1960); *Mase v. Keller*, 149 F. Supp. 513 (D. Minn. 1956).

119. Guinn, *supra* note 59, at 576, states "[a]lthough *Appalachian* is not an admiralty case, the Supreme Court's inclusion of it in decisions concerning admiralty matters makes it essential that its concepts be included in determining any rule of navigability for admiralty purposes." Guinn cites no cases to support this proposition and none have been found.

120. *Three Buoys Houseboat Vacations U.S.A. v. Morts*, 878 F.2d 1096 (8th Cir. 1989) (*Three Buoys I*), *vacated and remanded*, 110 S. Ct. 3265, *modified*, 921 F.2d 775 (8th Cir. 1990) (*Three Buoys II*), *cert. denied*, 112 S. Ct. 272 (1991); *Reynolds v. Bradley*, 644 F. Supp. 42, 45-45 (N.D.N.Y. 1986).

121. *E.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870) ("[Waters] are navigable in fact when they are used or are susceptible of being used . . . as highways for commerce . . ."); *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874) ("The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river. . .").

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

123. See *Adams v. Montana Power Co.*, 528 F.2d 437, 440-41 (9th Cir. 1975).

124. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 678 (1982) (Powell, J., dissenting); see also *Motley v. Hale*, 567 F. Supp. 39, 40 (W.D. Va. 1983) (quoting Powell); *Carnilla & Drzal, supra* note 4, at 1 (quoting Powell). Criticism of "expanding" federal admiralty jurisdiction is nothing new. See Notes, *Extension of Federal Jurisdiction over State Canals*, 37 AM. L. REV. 911 (1903), for two colorful quotations.

Another downward surge has been taken upon the level of the Federal ratchet. The weight has been lifted to a new point. The tooth has caught in a new notch. The weight will never

This interpretation of *Foremost* is wrong. *Foremost* did nothing to expand admiralty jurisdiction that was defined previously by only the pure locality test.¹²⁵ The addition of the nexus test could only have the effect of reducing the number of cases arising in admiralty. As the *Foremost* majority recognized, “[under the strict locality test] there was little question that a complaint such as the one filed here stated a cause of action within federal admiralty jurisdiction.”¹²⁶ The real complaint of the *Foremost* dissent and some lower court decisions advocating a narrow definition of navigable waters is that torts involving pleasure boats do not belong in admiralty.¹²⁷ Such concerns may be valid, but they should be dealt with under the nexus test, not by manipulating the definition of navigable waters.

The foregoing reveals two strong arguments for restricting admiralty jurisdiction to waters that presently support or are likely to support commercial navigation: the generally assumed, albeit historically uncertain,¹²⁸ reasoning that admiralty exists only to further the federal interest in creating a uniform body of law for maritime commerce; and the argument that admiralty jurisdiction should not anachronistically remain after a waterway falls out of commercial use. Other arguments for the contemporary navigability-in-fact standard — based on a suspect reading of precedent or a desire to limit the federal caseload by excluding cases involving pleasure boats — are misplaced.

B. *The Navigational Capacity Standard*

The navigational capacity standard does not require actual or probable commerce. It asks only whether a waterway is “susceptible or capable of being used as an interstate highway of commerce.”¹²⁹ “Susceptible or capable” in this context means physically capable.¹³⁰

descend. The contrivance is of such a nature that it works only in one way — moves the weight only in one direction.

Id. at 913. “It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.” *Id.* at 916.

125. See *supra* text accompanying notes 1-9.

126. 457 U.S. at 672.

127. *Richardson*, 457 U.S. at 678-86 (Powell, J., dissenting); *Chapman v. United States*, 575 F.2d 147, 150 (7th Cir.), cert. denied, 439 U.S. 893 (1978) (quoting *Adams*); *Adams*, 528 F.2d at 440; *Motley v. Hale*, 567 F. Supp. 39, 40-41 (W.D. Va. 1983); *Marroni v. Matey*, 492 F. Supp. 340, 342-43 (E.D. Pa. 1980).

128. See *supra* notes 27-33 and accompanying text.

129. *Finneseth v. Carter*, 712 F.2d 1041, 1047 (6th Cir. 1983).

130. An alternate formulation of the test would define a waterway as navigable if there is any evidence of past or present commercial use, or if “it could be made suitable for use in the future by reasonable improvements.” *Rochester Gas & Elec. Corp. v. Federal Power Commn.*, 344 F.2d 594, 596 (2d Cir.), cert. denied, 382 U.S. 832 (1965). *Rochester Gas* was a Commerce Clause case, and because its criteria of future use through reasonable improvements depends on *United States v. Appalachian Elec. Power Co.*, 311 U.S. 712 (1940), a Commerce Clause case, it is not good precedent in admiralty cases. Nevertheless, because of the conceptual simplicity of the past, present, or future analysis in *Rochester Gas*, it has been used in several admiralty cases.

This test has been most clearly articulated by the Sixth Circuit in *Finneseth v. Carter*¹³¹ and the Fourth Circuit in *Price v. Price*.¹³² It was implicitly adopted by the Fifth Circuit in *Richardson v. Foremost Insurance Co.*¹³³

The strongest argument advanced in favor of the navigational capacity standard, and against the contemporary navigability-in-fact standard, is that a definition based on the presence or absence of commercial activity is unstable.¹³⁴ As the *Finneseth* court observed,

if current or present commercial maritime activity is the test, a ferry could operate on Dale Hollow Lake between Kentucky and Tennessee one day and go out of business the next and tortious occurrences happening on each of the two days would be subject to different rules of conduct and liability.¹³⁵

This instability causes significant problems for courts applying the contemporary navigability-in-fact standard. As a result, decisions have turned on such trivial facts as whether or not the post office used a boat to deliver the mail.¹³⁶

A definition of navigability based on the amount of commerce also leads to problems in dividing a waterway into navigable and nonnavigable sections.¹³⁷ This problem is easily surmounted in cases like

See, e.g., Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968), *revd. on other grounds sub nom.* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Sawczyk v. United States Coast Guard, 499 F. Supp. 1034 (W.D.N.Y. 1980); Jones v. Duke Power Co., 501 F. Supp. 713 (W.D.N.C. 1980), *affd.*, 672 F.2d 910 (4th Cir. 1981); Stallworth v. McFarland, 350 F. Supp. 920 (W.D. La. 1972), *affd.*, 493 F.2d 1354 (5th Cir. 1974); Spiller v. Thomas M. Lowe, Jr., Assocs., 328 F. Supp. 54 (W.D. Ark. 1971), *affd.*, 466 F.2d 903 (8th Cir. 1972).

131. 712 F.2d 1041 (6th Cir. 1983).

132. 929 F.2d 131 (4th Cir. 1991).

133. 641 F.2d 314 (5th Cir. 1981), *affd. sub nom.* Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982); *see* Respass v. United States, 586 F. Supp. 861 (E.D. La. 1984); Duke v. United States, 711 F. Supp. 332 (E.D. Tex. 1989).

134. *See* Price v. Price, 929 F.2d 131, 133-34 (4th Cir. 1991); *Finneseth* 712 F.2d at 1046-47; *cf.* Richardson v. Foremost Ins. Co., 641 F.2d 314, 316 (5th Cir. 1981).

135. *Finneseth*, 712 F.2d at 1047. *Finneseth* can be distinguished from Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975), and Chapman v. United States, 575 F.2d 147 (7th Cir.), *cert. denied*, 439 U.S. 893 (1978) — two important cases using the contemporary navigability-in-fact standard, *see supra* section II.A — on the grounds that unlike Dale Hollow Lake, the lakes in question were located entirely within a single state. If, however, the true test is the presence, or likelihood, of commerce, this appears to be a distinction without difference. The federal interest in protecting maritime commerce is no greater on interstate as opposed to intrastate lakes. *But see infra* section II.C.

136. Compare Minix v. Fellers, 654 F. Supp. 1127 (N.D. Cal. 1987) with Davis v. United States, 185 F.2d 938 (9th Cir. 1950), *cert. denied*, 340 U.S. 932 (1951).

137. *See* Wilder v. Placid Oil Co., 611 F. Supp. 841 (W.D. La. 1985) (was the Catahoula Lake portion of the Little River navigable?), *affd. sub nom.* Sanders v. Placid Oil Co., 861 F.2d 1394 (5th Cir. 1988); Jones v. Duke Power Co., 501 F. Supp. 713 (W.D.N.C. 1980) (was Lake Norman on the Catawba River navigable?), *affd.*, 672 F.2d 910 (4th Cir. 1981); Sawczyk v. United States Coast Guard, 499 F. Supp. 1034 (W.D.N.Y. 1980) (was the Niagara River navigable below Niagara Falls?). A few courts have also been asked — but all have declined — to define parts of the ocean or the Great Lakes as nonnavigable because of lack of commercial activity at a particular spot. *See, e.g.,* *In re Paradise Holdings Co.*, 795 F.2d 756 (9th Cir.), *cert.*

Adams, which arise on artificial lakes closed by dams,¹³⁸ but not for those arising on inland rivers and lakes with potentially navigable outlets and tributaries.

Proponents of the navigational capacity standard maintain that *The Daniel Ball* and *The Montello* definitions speak in terms of navigational capacity and should be construed broadly.¹³⁹

No Supreme court case imposes the requirement that navigability only exists, for purposes of admiralty jurisdiction, if the lake or river is currently or presently being used as a highway for interstate commerce. This requirement has been imposed, however, by the Eighth Circuit [in *Livingston*], despite the contrary language of futurity, such as "susceptibility," "capability," and "may be" conducted or carried on, in early Supreme Court cases.¹⁴⁰

The context of the early cases supports this argument. Throughout the nineteenth century the Court pursued a vigorous policy of expanding admiralty jurisdiction to places where commerce might follow.¹⁴¹

Several courts adopting the navigational capacity standard have also argued that the federal interest in protecting maritime commerce is best served by uniform administration of activities on potentially navigable waters.¹⁴² Under this view, admiralty and Commerce Clause-based regulations of navigation are seen not so much as clearly separable federal interests but as part of a cohesive regulatory scheme.¹⁴³ This argument is logically sound but ignores the consistent distinction maintained by the Supreme Court between admiralty and Commerce Clause jurisdiction.¹⁴⁴

denied, 479 U.S. 1008 (1986); *McCormick v. United States*, 680 F.2d 345 (5th Cir. 1982); *Kozan v. United States*, 570 F. Supp. 1351 (N.D. Ill. 1983).

138. *Adams*, 528 F.2d at 439.

139. *Price*, 929 F.2d at 134; *Finneseth*, 712 F.2d at 1045.

140. *Finneseth*, 712 F.2d at 1045.

141. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852), *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), greatly expanded the waters subject to admiralty jurisdiction. Of course, one might argue that because maritime is now contracting, admiralty should contract as well. *Cf. supra* notes 117-19 and accompanying text.

142. *See Price*, 929 F.2d at 133-34; *Finneseth*, 712 F.2d at 1046-47; *Richardson*, 641 F.2d at 316.

143. This argument finds support in Justice Marshall's reasoning in *Foremost Ins. Co. v. Richardson*:

Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in maritime activity. This interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce.

457 U.S. 668, 674 (1982).

144. *See supra* notes 42-44 and accompanying text.

A final argument advanced in favor of the navigational capacity standard is that it provides easy access to the federal courts. In contrast to courts that use definitions of navigability to restrict jurisdiction, the *Richardson* court viewed its role more expansively: "Jurisdiction should be as readily ascertainable as courts can make it. If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction."¹⁴⁵ The different philosophies of the *Richardson* and *Adams* courts represent an unresolvable difference of opinion about the role of the federal courts.¹⁴⁶ The jurisdictional rule chosen, however, can have serious consequences. A plaintiff whose case is dismissed for lack of jurisdiction based solely on the definition of navigable waters may be denied access to any forum, and therefore denied any remedy.¹⁴⁷

In summary, there are sound arguments for the navigational capacity standard based on its certainty, uniformity, and consistency with precedent. Weaker arguments stem from a desire for comprehensive regulation of all maritime activities and a desire to provide easy access to the federal courts.

C. *Is an Interstate Nexus Required?*

The *Finneseth* court interpreted Supreme Court precedent as requiring admiralty jurisdiction over waters that form an interstate nexus.¹⁴⁸ This section considers whether admiralty jurisdiction can be determined by geography alone. Three types of waterways are discussed: those connecting two or more states, those located in a single state but that combine with others to connect two or more states, and those landlocked entirely within a single state.

There is little dispute that lakes or rivers that lie on the border between two states, large rivers that flow through two or more states, and rivers that empty into the sea are navigable for admiralty purposes.¹⁴⁹ This is true whether or not there is evidence of commerce on

145. *Richardson*, 641 F.2d at 316.

146. Compare the *Richardson* policy with *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), which stated:

No purpose is served by application of a uniform body of Federal law, on waters devoid of trade or commerce, to regulate the activities and resolve disputes of pleasure boaters . . .

Only the burdening of Federal courts and the frustrating of the purposes of state tort law would be thereby served.
528 F.2d at 440-41.

147. *E.g.*, *Smith v. Hustler, Inc.*, 514 F. Supp. 1265, 1270 (W.D. La. 1981) (plaintiff time barred from bringing state tort action); *Cooper v. United States*, 500 F. Supp. 191, 193 (W.D. Mo. 1980) (plaintiff left with no remedy after admiralty suit dismissed because the statute of limitations for the cause of action under the Federal Tort Claims Act had expired).

148. *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983).

149. *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) (lake on the border of Virginia and North Carolina); *Finneseth v. Carter*, 712 F.2d 1041 (6th Cir. 1983) (lake on the border of Kentucky and Tennessee); *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975) (lake on the border of Virginia and North Carolina); *Earles v. Union Barge Line Corp.*, 486 F.2d 1097 (3d

the body of water in question.¹⁵⁰ Only one reported case in the past thirty years found a river emptying into the sea nonnavigable for admiralty purposes. In *Marroni v. Matey*¹⁵¹ the court held that a section of the Delaware River was not navigable because there was no evidence of commerce in that area.¹⁵² With the exception of *Marroni*, determinations that interstate bodies of water are navigable seem to rest simply on the observation that they are capable of serving as highways for interstate commerce.¹⁵³

The same reasoning holds true for waterways that connect with others to form a continuous interstate highway. Most courts have defined such waters as navigable.¹⁵⁴ The *Livingston* decision is a prominent exception.¹⁵⁵ The case concerned an accident on the Norfolk River in Arkansas, which eventually flows into the Mississippi below the site of the accident.¹⁵⁶ The court's reasoning turned on the fact that the accident occurred near the Norfolk hydroelectric dam that had eliminated waterborne commerce in the area,¹⁵⁷ but it ignored the fact that the accident occurred below the dam. Because the accident situs was on a continuous interstate waterway, the *Livingston* decision was criticized by the *Finneseeth* court for discounting the importance of the interstate nexus.¹⁵⁸

Waters confined to a single state present more difficult problems.¹⁵⁹ Two types of waterways must be distinguished: those that are naturally landlocked, and those, like the lake in *Adams*, that were once connected with other waters but have become landlocked

Cir. 1973) (Ohio River); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973) (Mississippi River), *cert. denied*, 416 U.S. 969 (1974); *Hartman v. United States*, 522 F. Supp. 114 (D.S.C. 1981) (lake on the border of North and South Carolina); *Stallworth v. McFarland*, 350 F. Supp. 920 (W.D. La. 1972), *affd.*, 493 F.2d 1354 (5th Cir. 1974) (lake on the border of Texas and Louisiana); *Spiller v. Thomas M. Lowe Assocs.*, 328 F. Supp. 54 (W.D. Ark. 1971) (Red River), *affd.*, 466 F.2d 903 (8th Cir. 1972).

150. *E.g.*, *Price*, 929 F.2d 131; *Finneseeth*, 712 F.2d 1041; *Richards*, 528 F.2d 745.

151. 492 F. Supp. 340, 342 (E.D. Pa. 1980).

152. 492 F. Supp. at 342.

153. *See Finneseeth*, 712 F.2d at 1044 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871)).

154. *Sanders v. Placid Oil Co.*, 861 F.2d 1374 (5th Cir. 1988); *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. 1981), *affd.*, 457 U.S. 899 (1982); *Reynolds v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975); *Duke v. United States*, 711 F. Supp. 332 (E.D. Tex. 1989); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987); *Wilder v. Placid Oil Co.*, 611 F. Supp. 841 (W.D. La. 1985); *Respass v. United States*, 586 F. Supp. 861 (E.D. La. 1984); *Sawczyk v. United States Coast Guard*, 499 F. Supp. 1034 (W.D.N.Y. 1980).

155. *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See supra* section II.A.

156. 627 F.2d at 166-67.

157. 627 F.2d at 170.

158. *Finneseeth v. Carter*, 712 F.2d 1041, 1045 (6th Cir. 1983).

159. For a discussion of cases decided before 1969 dealing with intrastate lakes, see Ralph McCaughan, *Federal Maritime Jurisdiction Over Inland Intrastate Lakes*, 26 WASH. & LEE L. REV. 1 (1969).

by lockless dams. In the few cases in the first category, all but one of the naturally landlocked lakes in a single state were held to be non-navigable.¹⁶⁰ Interestingly, however, none of these cases was decided solely on the lack of an interstate nexus. In each case the court based its ruling, at least in part, on a finding that the lake did not support commerce. If the interstate nexus requirement is deemed dispositive, such an analysis would be unnecessary.

A more frequent situation is the case of dams built across previously navigable rivers. Most courts faced with the issue have followed the *Adams* reasoning¹⁶¹ and held that when a waterway loses the capacity to support commercial traffic it ceases to be navigable for admiralty purposes.¹⁶² The two cases holding otherwise appear to have been overruled.¹⁶³

Decisions such as *Adams*, however, do present doctrinal difficulties. Because *The Daniel Ball* and *The Montello* refer to a waterway's navigability in its "natural state," some courts have suggested that the navigability of a dam-made lake should turn on the navigability of the underlying river.¹⁶⁴ This rationale has played an important role in Commerce Clause and property cases.¹⁶⁵ Similarly, the *Appalachian*

160. *Stother v. Bren Lynn Corp.*, 671 F. Supp. 1118 (W.D. La.), *affd.*, 834 F.2d 1023 (5th Cir. 1987); *Minix v. Fellers*, 654 F. Supp. 1127 (N.D. Cal. 1987); *Oseredzuk v. Warner Co.*, 354 F. Supp. 543 (E.D. Pa. 1972), *affd.*, 485 F.2d 680 (3d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Doran v. Lee*, 287 F. Supp. 807 (W.D. Pa. 1968). The only case found where a naturally landlocked lake was held to be navigable was *In re Rowley*, 425 F. Supp. 116 (D. Idaho 1977), concerning Lake Coeur d'Alene in Idaho. The parties had stipulated that the lake is

totally within the boundaries of the State of Idaho and by the use of the waters of the lake it is not possible to reach ports of call other than in the State of Idaho without removing the vessel or boat onto land and transporting it to another body of water. 425 F. Supp. at 117-18. The judge held the lake to be navigable for admiralty purposes based on a Coast Guard determination that the lake was navigable. 425 F. Supp. at 118. Such a basis for a determination of navigability is unjustified as the determinations of administrative officers are not controlling. See *supra* note 100. *Rowley* should be dismissed as a poorly reasoned anomaly.

161. *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975).

162. *Three Buoys Houseboat Vacations U.S.A. v. Morts*, 878 F.2d 1096 (8th Cir. 1989) (*Three Buoys I*), *vacated and remanded*, 110 S. Ct. 3265, *modified*, 921 F.2d 775 (8th Cir. 1990) (*Three Buoys II*), *cert. denied*, 112 S. Ct. 272 (1991); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975); *Reynolds v. Bradley*, 644 F. Supp. 42 (N.D.N.Y. 1986); *Reed v. United States*, 604 F. Supp. 1253 (N.D. Ind. 1984); *Motley v. Hale*, 567 F. Supp. 39 (W.D. Va. 1983); *Dunham v. DeMaine*, 559 F. Supp. 224 (E.D. Ark. 1983); *Smith v. Hustler, Inc.*, 514 F. Supp. 1265 (W.D. La. 1981); *Jones v. Duke Power Co.*, 501 F. Supp. 713 (W.D.N.C. 1980), *affd.*, 672 F.2d 910 (4th Cir. 1981); *Cooper v. United States*, 500 F. Supp. 191 (W.D. Mo. 1980); *In re Stevens*, 341 F. Supp. 1404 (N.D. Ga. 1965); *In re River Queen*, 275 F. Supp. 403 (W.D. Ark. 1967), *affd.*, 402 F.2d 977 (8th Cir. 1968).

163. See *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957), *overruled by Three Buoys Houseboat Vacations U.S.A. v. Morts*, 921 F.2d 775 (8th Cir. 1990) (*Three Buoys II*); *Madole v. Johnson*, 241 F. Supp. 379 (W.D. La. 1965), *superseded by Smith v. Hustler, Inc.*, 514 F. Supp. 1265 (W.D. La. 1981); see also *Land & Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir. 1984).

164. *Waring v. Unnamed Inboard Motor Boat No. WV 4488 AB*, 322 F. Supp. 1226, 1228 (S.D. W. Va. 1971); *Madole*, 241 F. Supp. at 382.

165. For instance, in *United States v. Holt State Bank*, 270 U.S. 49 (1926), title to land which had been underwater but was uncovered at the time of the case depended on whether the lake

Electric doctrine of immutable navigability, which has been used extensively in admiralty cases,¹⁶⁶ suggests that damming a river should not necessarily remove it from admiralty jurisdiction. To dismiss these arguments, courts have relied heavily on the distinction between admiralty and other types of cases involving navigable waters.¹⁶⁷

Declaring that intrastate lakes large enough to support substantial commerce are nonnavigable for admiralty purposes is more difficult. For example, the Lake of the Ozarks in Missouri, which has been the site of several accidents giving rise to admiralty claims,¹⁶⁸ supports some commercial shipping and transportation.¹⁶⁹ In denying admiralty jurisdiction to cases arising on the lake, the Eighth Circuit drew a bright line between intra- and interstate commerce in the physical sense.¹⁷⁰ Thus, for admiralty purposes, interstate commerce occurs only when a vessel actually moves between two states. This reasoning seems contrary to *The Montello*, which established the principle that vessels on intrastate voyages were subject to admiralty jurisdiction if they carried goods moving in interstate commerce.¹⁷¹ The two cases may be reconciled, however, by reading *The Montello* and other early cases as basing admiralty jurisdiction on the interstate character of the waterway, not on the status of the vessel.¹⁷² The Eighth Circuit has recognized this,¹⁷³ and its definition of navigability seems to have returned full circle to that first laid down in *The Daniel Ball*: whether the waterway is physically capable of serving as a highway for interstate transportation and commerce.

Based on the above analysis, almost all the cases concerning inland waters can be reconciled under the principle that admiralty jurisdic-

had been navigable in its natural state. 270 U.S. at 50, 56. Similarly, in *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921), the navigability of the Desplaines River was unaffected by changes including the draining of a nearby swamp, clearing of a forest (which reduced runoff), and diversion of water into a canal. 256 U.S. at 117-18.

166. See *supra* note 118.

167. *Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975); *In re Three Buoy Houseboat Vacations U.S.A., Ltd.*, 689 F. Supp. 958, 961-62 (E.D. Mo. 1988), *affd. sub nom. Three Buoy Houseboat Vacations U.S.A. v. Morts*, 878 F.2d 1096 (8th Cir. 1989) (*Three Buoy I*), *vacated and remanded* 110 S. Ct. 3265 (1990), *modified*, *Three Buoy Houseboat Vacations U.S.A. v. Morts*, 921 F.2d 775 (8th Cir.) (*Three Buoy II*), *cert. denied*, 112 S. Ct. 272 (1991); *Motley v. Hale*, 567 F. Supp. 39, 41-42 (W.D. Va. 1983); *Smith v. Hustler, Inc.*, 514 F. Supp. 1265 (W.D. La. 1981).

168. *Three Buoy Houseboat Vacations U.S.A. v. Morts*, 878 F.2d 1096 (8th Cir. 1989) (*Three Buoy I*), *vacated and remanded* 110 S. Ct. 3265 (1990), *modified*, *Three Buoy Houseboat Vacations U.S.A. v. Morts*, 921 F.2d 775 (8th Cir. 1990) (*Three Buoy II*), *cert. denied*, 112 S. Ct. 272 (1991); *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957), *overruled by Three Buoy II*; *Cooper v. United States*, 500 F. Supp. 191 (W.D. Mo. 1980).

169. *Three Buoy I*, 878 F.2d at 1099.

170. *Three Buoy II*, 921 F.2d at 779; *Three Buoy I*, 878 F.2d at 1099.

171. *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870); see also *Ex parte Boyer*, 109 U.S. 629, 632 (1884); *The Belfast*, 74 U.S. (7 Wall.) 624, 640 (1868).

172. See *supra* text at notes 50-54.

173. *Three Buoy II*, 921 F.2d at 777.

tion only extends over waterways physically capable of carrying vessels engaged in commerce between the states. Interstate bodies of water clearly qualify, as do those that connect with interstate waterways. Conversely, waters landlocked in a single state, whether naturally so or because of dams, are not navigable for admiralty purposes.

The foregoing review of conflicting standards of navigability reveals three strong principles that are combined in a comprehensive system in Part III. First, the doctrine of immutable navigability should not apply in admiralty. When a waterway loses its capacity to support interstate commerce, it should cease to be subject to federal jurisdiction. Second, determination of navigability should turn on the characteristics of the waterway itself, not on the presence or absence of commerce. Such a requirement is inherently unstable. Third, to be considered navigable, a waterway must be part of an interstate nexus.

III. PROPOSED ANALYTICAL SCHEME FOR DEFINING NAVIGABLE WATERS

In Part II, this Note described considerable disagreement among courts attempting to define navigable waters, but suggested that synthesis is possible. Resolving the conflict requires addressing three issues. First, any definition must clearly address a federal interest. Second, a framework for applying aging Supreme Court precedents to modern situations must be developed. Third, substantive differences about the role of interstate commerce in the definition of navigability must be resolved.

This Part proposes an analytical scheme for determining navigability in particular cases. It draws from all the competing definitions described in Part II to provide a workable system that incorporates the major goals of each. Section III.A describes the policies and interests the system is designed to advance. The system itself is defined and defended in section III.B. The important Supreme Court precedents are integrated at each step of the analysis.

A. *The Federal Admiralty Interest and Navigable Waters*

The primary federal interest served by admiralty courts is the provision of a specialized forum to administer a unique system of law that serves the special needs of the shipping industry.¹⁷⁴ The federal interest, however, is not exclusively defined by the shipping industry. Rather, an independent federal interest exists in maintaining jurisdiction over the waters that form the highways capable of carrying interstate commerce.¹⁷⁵ Given this jurisdictional mandate, the federal courts have an interest in developing a straightforward, predictable

174. See GILMORE & BLACK, *supra* note 1, at 29; Black, *supra* note 5, at 261.

175. See *supra* notes 50-54 and accompanying text.

test for identifying navigable waters. Justice Scalia has criticized the nexus test for bogging down the courts in a cumbersome analysis of what constitutes a traditional maritime activity. "[A]n enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there."¹⁷⁶ Justice Scalia's criticisms apply equally well to definitions of navigability based on such tenuous findings as whether a ferry was operating on the day of an accident.¹⁷⁷ Judicial inquiry will always be necessary when the navigability of a particular waterway is challenged, but the scheme proposed below should make the defining process more efficient and accurate.

B. *Defining Navigable Waters*

The conflict among competing definitions of navigability stems primarily from two misunderstandings about the role of interstate commerce in that definition. First, courts have focused on the inter- or intrastate nature of the commerce, not of the waterway itself.¹⁷⁸ Second, some courts have transformed the general federal interest into a requirement that commerce actually or potentially exist.¹⁷⁹ The proposed scheme redirects attention to the physical characteristics of the waterway in question. Analysis of the type, amount, or likelihood of commerce is discarded in favor of a simpler inquiry into whether interstate transportation is possible on a particular body of water.

Determining whether a body of water is navigable for admiralty purposes rests on five basic principles:

- (i) Waters must be part of an interstate nexus.
- (ii) Waters may become, or cease to be, navigable as circumstances warrant. The doctrine of immutable navigability is rejected.
- (iii) Waters currently supporting interstate commerce are by definition considered navigable.
- (iv) Waters that formerly supported interstate commerce are presumed to be navigable.
- (v) Waters that have never supported interstate commerce are presumed to be nonnavigable.

The sections that follow discuss each of these principles in detail.

176. *Sisson v. Ruby*, 110 S. Ct. 2892, 2902 (1990) (Scalia, J., concurring) (quoting ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 312 (1950)).

177. See *supra* text accompanying note 135; *Finneseth v. Carter*, 712 F.2d 1041, 1046-47 (6th Cir. 1983).

178. See *supra* section II.C.

179. See *supra* section II.A.

1. *Interstate Nexus Required*

Both Supreme Court precedent and the interests those decisions attempted to protect suggest that navigable waters must be part of an interstate nexus.¹⁸⁰ The most direct suggestion is *The Daniel Ball's* explicit distinction between the "navigable waters of the United States," and the "navigable waters of the States."¹⁸¹ The navigable waters of the United States form part of "a continued highway over which commerce is or may be carried on with other States or foreign countries."¹⁸² Even more explicit is the definition of navigable waters in *Ex parte Boyer*: "a highway for commerce between ports and places in different States."¹⁸³ The fundamental concern underlying these definitions is that admiralty jurisdiction should turn on the interstate nature of the water, not the type of activity occurring there.¹⁸⁴

Requiring an interstate nexus eliminates from admiralty jurisdiction all accidents occurring on waters landlocked within a single state, regardless of their capacity to support commerce. Excluding those intrastate bodies of water that are large enough to support commercial activity such as the Lake of the Ozarks¹⁸⁵ is at first troubling. It could be argued that if the primary interest of admiralty jurisdiction is to serve the needs of the commercial shipping industry, that interest should encompass all shipping, wherever it occurs. Commercial shipping, however, as used to define admiralty jurisdiction, has a very specific meaning. The federal interest in interstate waters depends on the federal interest in the actual interstate movement of goods by water, a different idea than the modern notion of interstate commerce.¹⁸⁶ Furthermore, such cases are rare and the utility of a clearly applicable rule outweighs potential objections in unusual instances.¹⁸⁷

Only waters capable of supporting uninterrupted interstate travel should be considered navigable. *The Montello's* rule that waters may still be defined as navigable despite occasional obstacles should be discarded.¹⁸⁸ The rule is outdated and at odds with the principle that

180. See *supra* sections II.A, II.B.

181. 77 U.S. (10 Wall.) 557, 563 (1870).

182. 77 U.S. at 563.

183. 109 U.S. 629, 632 (1884).

184. See *supra* notes 171-73 and accompanying text.

185. See *supra* notes 168-69 and accompanying text.

186. See *supra* note 48 and accompanying text.

187. Again, Justice Scalia's criticism of the nexus test provides a useful analogy.

The time expended on such rare freakish cases will be saved many times over by a clear jurisdictional rule that makes it unnecessary to decide, in hundreds of other cases, what particular activities aboard a vessel are "traditionally maritime" in nature and what effect a particular tort will have on maritime commerce.

Sisson v. Ruby, 110 S. Ct. 2892, 2902 (1990) (Scalia, J., concurring).

188. *The Montello* held the Fox River to be navigable in its natural state despite the need for occasional portages. 87 U.S. (20 Wall.) 430, 442-43 (1874).

only those waters capable of serving as highways for commerce should be considered navigable. Customary modes of waterborne commerce, an underemphasized element of *The Daniel Ball* definition,¹⁸⁹ no longer include portages around rapids and sandbars. To satisfy the modern interstate nexus test, a waterway should be capable of supporting uninterrupted navigation from one state to another.

2. *Immutable Navigability Does Not Apply*

The doctrine of immutable navigability was developed to justify expansive federal regulation under the Commerce Clause.¹⁹⁰ The rule is also essential in property law to assure stable title.¹⁹¹ Immutable navigability, however, is inappropriate in admiralty. When the physical characteristics of a waterway change to make it incapable of serving as a highway between the states, the waterway should drop out of admiralty jurisdiction.¹⁹²

The requirement that a waterway's navigability should be determined from its "natural state," first announced in *The Montello*,¹⁹³ should also be discarded. The Supreme Court itself has held that formerly nonnavigable waters may become navigable for admiralty purposes through "improvements."¹⁹⁴ The converse should also be true. Admiralty jurisdiction should not include waterways that have been modified and are no longer navigable. Determinations that waterways are no longer navigable, however, should be made cautiously and should only be based on substantial physical changes. Most obviously, building a lockless dam to create an intrastate lake with no navigable outlets would qualify as a substantial change.¹⁹⁵

The doctrine of immutable navigability should also not apply when a waterway undergoes a substantial natural change. Cutting off an oxbow from a major river would constitute a substantial change. A temporary reduction in a river's flow due to a period of drought, however, would not qualify. Similarly, a seasonal reduction in flow should

189. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

190. See *supra* notes 87-88 and accompanying text.

191. See *supra* note 93-94 and accompanying text.

192. The reasoning in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), is convincing. See *supra* note 114.

193. 87 U.S. (20 Wall.) 430, 441 (1874). Similarly, *The Daniel Ball* speaks of a waterway's "ordinary condition." 77 U.S. at 563.

194. The Supreme Court has spoken most extensively about "improvements" in Commerce Clause cases. See *supra* note 86 and accompanying text. The scheme described here rejects the *Appalachian Electric* doctrine, which includes as navigable those waters that may become so through future improvements. Waters are only navigable for admiralty purposes when the improvements have actually been made. See, e.g., *Ex parte Boyer*, 109 U.S. 629 (1884) (a canal). For an excellent discussion of the limits of the improvements doctrine in an admiralty context, see *Oseredzuk v. Warner Co.*, 354 F. Supp. 453 (E.D. Pa. 1972), *affd.*, 485 F.2d 680 (3d Cir. 1973), *cert. denied*, 415 U.S. 977 (1978).

195. See *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975).

not bar admiralty jurisdiction as long as the waterway is regularly usable as an interstate highway.¹⁹⁶ Rejecting the doctrine of immutable navigability does not, however, justify a determination of nonnavigability based on a finding that commerce has ceased.¹⁹⁷ Resolving questions of navigability for waters that have fallen out of use is discussed in section III.B.4.

Rejecting the doctrine of immutable navigability also protects the expectations of the parties. People base their decisions and actions on contemporary circumstances. It makes little sense to rest a jurisdictional ruling, which may have a significant impact on liability,¹⁹⁸ on an outdated set of facts and circumstances.¹⁹⁹ Courts should be free to reexamine the navigability of a waterway whenever circumstances warrant.²⁰⁰ In every individual case a federal court must examine its jurisdiction over the parties and subject matter anew.²⁰¹ Jurisdiction over a particular place should be similarly reviewed.

3. *Waters Currently Used for Commerce Are Considered Navigable*

An interstate nexus is necessary but not sufficient for a waterway to be navigable. The caveat quoted in *The Montello* has as much force today as it did in 1874.²⁰² Not every creek or pond that happens to fall on a border and is capable of floating a canoe should be navigable for admiralty purposes. The task should be identifying those interstate waters that should be considered navigable.

196. See *Sanders v. Placid Oil Co.*, 861 F.2d 1374, 1376-77 (5th Cir. 1988) (lake still navigable for admiralty jurisdiction despite being passable only certain parts of the year). Although developed in a different context, reasoning from *Appalachian Elec.* is persuasive. "[It is not] necessary for navigability that the use of a river should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use." *United States v. Appalachian Elec. Power Co.* 311 U.S. 377, 409 (1940).

197. The portion of the *Adams* reasoning that turns on present use is rejected because of its uncertainty and instability. See *supra* notes 134-38 and accompanying text. The reasoning that turns on "potential" use is adopted, but only insofar as it applies to the physical characteristics of the waterway.

198. See *supra* note 147 and accompanying text.

199. This is one of the strongest arguments advocated by proponents of the contemporary navigability-in-fact standard. See *supra* notes 117-19 and accompanying text.

200. For example, in *Cooper v. United States*, 489 F. Supp. 200, 204 (W.D. Mo. 1980), a district court complained that it was compelled to assert jurisdiction by a prior decision declaring the lake in question navigable. After the Eighth Circuit decided *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), which rejected the doctrine of immutable navigability, the district court unhesitatingly reversed its order, declared the lake nonnavigable, declined jurisdiction, and dismissed the suit. *Cooper v. United States*, 500 F. Supp. 191 (W.D. Mo. 1980).

201. See, e.g., *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986); FED. R. CIV. P. 12(h)(3).

202. It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water which is deemed navigable.

Rowe v. Granite Bridge Corp., 38 Mass. (21 Pick.) 344, 347 (1839); see also *supra* note 73.

A waterway should be defined as navigable based on its physical capacity to support interstate commerce. Unfortunately, a definition based only on physical features such as the depth of a lake or the width of a river is inadequate. Such a rule would be both arbitrary and based on an assumption about how large a waterway must be to be capable of supporting commercial navigation. Thus, it is impossible to determine a waterway's navigational capacity without considering the types of activities it actually supports. Evidence of use or nonuse should be used to make a broader finding about a waterway's physical capacity to support commercial navigation. Evidence of current use is evidence of that capacity. Therefore, waterways currently used for commerce are conclusively presumed to be navigable.

4. *Waters Formerly Used for Commerce Are Presumed Navigable*

Waters that once supported commercial traffic are presumed to be navigable because that use is evidence of their navigational capacity. This presumption of navigability is, however, subject to two conditions. First, the waterway must not have undergone a significant physical change since the cessation of commercial activity that would prevent the resumption of such activity. Second, the past type of commercial activity must be reasonably likely to resume in the foreseeable future. It is a technical inquiry. On the one hand, a waterway should not be perpetually navigable because fur trappers once paddled there;²⁰³ but, on the other, a river should not cease to be navigable just because the ferry goes out of business.²⁰⁴

At first, such a technical rule seems at odds with the admonition in *The Montello* that navigability should not be determined by the type or method of commercial activity.²⁰⁵ *The Montello*, however, should be read as expressing incomplete Supreme Court doctrine on the question of navigability. In deciding *The Montello*, the Court was faced with its then very recent precedent of *The Daniel Ball*, which required that navigability be assessed from a waterway's ordinary condition.²⁰⁶ It was also faced with a factual situation seemingly at odds with this requirement. The Fox River could not, in its natural state, have supported the steamboat that was the subject of the action.²⁰⁷ Thus, the

203. See e.g., *The Montello*, 87 U.S. (20 Wall.) 430 (1874). Similarly the kind of evidence used to support a finding of navigability for title purposes in *Utah v. United States*, 403 U.S. 9 (1971), see *supra* note 102, would not support a finding of navigability for admiralty purposes.

204. See *supra* text accompanying notes 134-36.

205. *The Montello*, 87 U.S. at 441-42.

206. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

207. It is said, however, that although the Fox River may now be considered a highway for commerce, over which trade and travel are, or may be, conducted in the ordinary modes of trade and, travel on water, it was not so in its natural state, and therefore, is not a navigable water of the United States within the purview of the decisions referred to.

The Montello, 87 U.S. at 440.

Court confronted a conflict between the expressed rule and the policy behind it. Instead of extending the definition of navigability to include "improved" waterways as it did in later decisions,²⁰⁸ the Court chose a more conservative course. It used evidence of prior use to support a finding that the river was navigable in its natural state.²⁰⁹ The expansion of the definition of navigable waters in subsequent cases makes such an analysis unnecessary today. Now only inquiry into whether the waterway, in its current state, is capable of supporting commerce in the "customary modes in which such commerce is conducted by water"²¹⁰ is necessary.

Judge Stagg's reasoning in *Smith v. Hustler, Inc.*,²¹¹ is an example of how to apply *The Daniel Ball's* requirements in a modern setting.

It is common knowledge that since the dam was constructed at Lake Bistineau the lake has not been susceptible of use for commercial shipping and, in fact, has been used exclusively for recreational activities.

One simply would not expect to see, and would not see, tugboats, barges, or any other type of commercial vessel on Lake Bistineau.²¹²

For large interstate lakes, such as the one in *Finneseth*, applying such reasoning will be difficult.²¹³ If the *Smith* reasoning turns on a finding of probability, then it is error. But if the passage reflects a determination about the physical characteristics of the lake itself, then it is an excellent model.²¹⁴ In borderline cases, it seems appropriate to err on the side of navigability. Deciding conclusively that a previously navigable waterway is no longer capable of supporting commercial traffic seems to require greater certainty than conceding that it could be used again.²¹⁵

208. See *supra* note 194 and accompanying text.

209. *The Montello*, 87 U.S. at 440-41.

210. *The Daniel Ball*, 77 U.S. at 563.

211. 514 F. Supp. 1265 (W.D. La. 1981).

212. 514 F. Supp. at 1268-69. Such reasoning should, of course, be used cautiously. Under the method of analysis presented here, Lake Bistineau could have been declared nonnavigable simply because the dam removed it from an interstate nexus. Nevertheless, Judge Stagg's consideration of whether the current customary modes of commerce were possible on the lake is a good example of applying *The Daniel Ball* in a contemporary setting.

213. The *Finneseth* court apparently felt constrained by the "liberal definition given to 'customary modes of trade and travel on water' [in *The Montello*]." *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983). If, as argued here, *The Montello's* "liberal" rule does not necessarily control, see *supra* text accompanying notes 205-10, the inquiry should extend only to the common types of contemporary commercial vessels.

214. It is, however, troubling that Lake Bistineau is "30 or 40 miles long, [and] from 1 to 2 miles wide." *Smith v. Hustler, Inc.*, 514 F. Supp. 1265, 1267 (W.D. La. 1981) (quoting *Sapp v. Frazier*, 26 So. 378, 379 (La. 1899)). Because of its large size it seems at least possible that the lake may be capable of supporting some type of commercial activity.

215. In specific cases like *Finneseth*, a finding of navigability serves another judicial interest. In *Finneseth* it was uncertain whether the accident occurred in Kentucky or Tennessee. 712 F.2d at 1042. Thus the choice of laws problem was not simply between state and federal law but between three possible alternatives. In such cases a choice of federal law seems a safe middle course.

5. *Waters Never Used for Commerce Are Presumed Nonnavigable*

Waters that have never been used for commercial transportation should be presumed to be nonnavigable for admiralty purposes. Extensive and regular use by recreational boaters, however, may demonstrate the waterway's physical capacity to support commerce. A finding that such a waterway is navigable should be made even more cautiously than a determination that a formerly navigable waterway no longer is. The federal interest in exerting jurisdiction over historically unused bodies of water is minimal.

In the nineteenth century, the Supreme Court expanded the waters subject to admiralty jurisdiction in response to a dramatic increase in commercial activity.²¹⁶ Similar considerations should still apply. In contrast to situations discussed above, here a consideration of the likelihood of commercial activity is relevant to whether a particular waterway should be considered navigable. An inquiry into whether waters historically not used for commerce are navigable for admiralty purposes should proceed in two steps.

Initially, the nature and extent of currently ongoing waterborne activity should be evaluated to determine whether a waterway is physically capable of supporting contemporary commerce. If not, the waterway is not navigable for admiralty purposes. If the waterway is physically capable then inquiry should be made into whether commercial use is foreseeable.

Most important in the foreseeability inquiry is the level of commercial activity on nearby or connected bodies of water. If such activity is common, and is likely to expand into the waterway in question, then a finding of navigability for admiralty purposes is justifiable. If there is no waterborne commercial activity nearby then a finding of navigability is probably unwarranted. Considering the level of commercial activity for this limited category of waterways protects the federal interest in highways of waterborne commerce when appropriate but does not impose it unnecessarily. When circumstances change sufficiently to warrant a new finding of navigability then such determinations should be possible.

The principles developed in this Part describe a workable system of determining when waters are navigable for admiralty purposes. As a threshold matter such waters must be part of an interstate nexus forming a continuous highway for waterborne commerce between the states. Determinations of navigability should be based on the physical characteristics of the waterway. Evidence of use or nonuse should be used to determine a waterway's capacity to support commercial transportation. The likelihood of such use is only germane when consider-

216. See *supra* notes 75-78 and 117 and accompanying text.

ing whether to define as navigable waters which have not previously been used for commerce.

The system described has several advantages. It establishes clear jurisdictional rules which will quickly resolve most questions of navigability. It establishes an analytical framework for evaluating evidence pertaining to navigability in the few borderline cases that will arise. Because it emphasizes the physical characteristics of the waterway, rather than the activities occurring there, the system is stable and predictable. Finally, the scheme avoids treating particular types of activity, like recreational boating, as relevant to the definition of navigability, focusing attention on the nexus test to determine whether particular cases should be subject to admiralty jurisdiction.

CONCLUSION

Defining precisely which waters should be considered navigable for admiralty purposes has proven difficult for several reasons. Although the concept of navigability plays an important role in several contexts unrelated to admiralty, the Supreme Court has not addressed the issue for nearly a century, and the controlling precedents are outdated. Consequently, lower courts have split over the proper definition of navigability to apply in a modern context. The principal competing theories are the contemporary navigability in fact standard, which requires evidence of actual or probable commercial activity, and the navigational capacity standard, which requires only that a waterway be physically capable of supporting interstate commerce.

This Note resolves the conflict by proposing a simple set of presumptive rules for determining the navigability of a particular waterway. For admiralty purposes the navigable waters of the United States are those that form part of an interstate nexus and that are physically capable of supporting commercial traffic. Elements of both the contemporary navigability in fact standard and the navigational capacity standard are combined to produce a system that reflects the major goals and concerns of each. The resulting system is constitutionally sound, faithful to precedent, fulfills the goals of admiralty, and most importantly, is straightforward, predictable, and easy to apply.