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**THE PUBLIC TRUST DOCTRINE
UNPRECEDENTEDLY GAINS NEW GROUND IN
PHILLIPS PETROLEUM CO. v. MISSISSIPPI**

I. INTRODUCTION

In the United States, the “public trust” doctrine gives each state the power to control and manipulate the lands to which they have title, which are certain waterways and lands, including coastlines, harbors, bays and navigable rivers along with their non-navigable shores.¹ The purpose of the doctrine is to preserve the public’s rights to use these waters and lands.² As a function of holding title, a state may convey the property under certain circumstances to private individuals, but the grantee’s interest in the property remains subject to the public trust.³

Early public trust cases, at both the state and federal level, concerned protection of the public’s interest in navigable waters,⁴ because of their importance to the public for purposes of fishing and other commerce.⁵ Concerning non-navigable waters, in *Shively v. Bowlby*,⁶ the Supreme Court of the United States held that states hold title to the non-navigable shores of navigable tidal rivers; thus the state could include

1. Jampol, *The Questionable Renaissance of the Tidelands Trust Doctrine in California*, 13 Sw. U.L. REV. 1, 6-8, 10-11 (1982). See *infra* note 16 and accompanying text for a basic definition of the public trust doctrine. The public trust has historically encompassed the sea and the seashore. Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763 (1970).

States do not automatically apply the public trust doctrine to all lands to which they have title. See *infra* notes 79-81 and accompanying text.

2. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633 (1986).

3. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). A state’s ability to convey its property is limited by the requirement that any conveyance or activity on the land be consistent with the purposes of the public trust doctrine, or that the conveyance not substantially infringe upon the public’s rights. *Id.*; see also *infra* notes 113-20 and accompanying text.

4. The federal definition of navigable waters includes those waters that are “used or susceptible of being used” as “highways or channels for . . . commerce.” *United States v. Oregon*, 295 U.S. 1, 15 (1934). The federal test of navigability determines to which waters and underlying lands each state received title upon gaining statehood. *Id.* at 14. State law independently determines which of the waters and underlying lands to which a state holds title are included in the public trust, according to each state’s own test of navigability; definition of the scope of the public trust doctrine is a matter of state law. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). See *infra* notes 75-81 and accompanying text for a discussion of the applicability of federal and state law to the public trust doctrine.

5. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Arnold v. Mundy*, 6 N.J.L. 1 (1821); see also *infra* notes 61-74 and accompanying text.

6. 152 U.S. 1 (1894).

such land within the public trust.⁷ Over the years, courts have consistently followed the *Shively* definition of tidelands: those shore waters and underlying lands between the high-tide and low-tide lines of navigable waters.⁸ This definition, however, has seldom included waters too small in area to be navigable yet close enough to the ocean to be affected by the daily flow of tides.⁹

Recently, in *Phillips Petroleum Co. v. Mississippi*,¹⁰ the Supreme Court extended radically the reach of the public trust doctrine to include inland non-navigable tidelands. In *Phillips*, the Court held that the State of Mississippi held title to all lands underneath waters subject to the ebb and flow of the tide, regardless of whether the waters were navigable.¹¹ In reaching its holding, the Court deviated from its own precedents and ignored well-settled state common law which had not included these tidal waters within the public trust.¹² Moreover, the holding presages significant, negative effects on the expectations of private landowners.¹³

This Note analyzes the Court's reasoning in holding that states received title to discrete, inland non-navigable tidelands and affirming the Mississippi Supreme Court's application of the public trust doctrine to these areas, against the backdrop of Roman law and English and American common law. The Note argues that in misinterpreting its precedents, the Court has placed misguided emphasis on the old "ebb and

7. *Id.* at 51-52. No reference was made to those waters *below* the low-tide line, because those waters were navigable, and therefore, unquestionably the state held title and could include these waters and lands within the public trust. *Id.*

8. *Id.* See, e.g., *Utah Div. of State Lands v. United States*, 107 S. Ct. 2318 (1987); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *United States v. Oregon*, 295 U.S. 1 (1935).

The ordinary definition of tidelands is "land between the lines of the ordinary high and low tides, covered and uncovered successively by the ebb and flow [of the tide]." BLACK'S LAW DICTIONARY 1329 (5th ed. 1979). Tidelands have been similarly defined as "land below the mean high tide line" where the land is "covered and uncovered by the flux and reflux of the tides." Jampol, *supra* note 1, at 6-7.

9. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 800 (1988) (O'Connor, J., dissenting). See *infra* notes 169-72 and accompanying text. Only New Jersey has asserted public trust control over clearly non-navigable tidal waters. See *infra* notes 289-92 and accompanying text.

10. 108 S. Ct. 791 (1988).

11. *Id.* at 795. *Phillips* is the first case to hold that states have title to the distinct geographical area of land below discrete non-navigable tidal waters. See *infra* notes 169-72 and accompanying text.

12. The *Phillips* Court acknowledged that none of its prior decisions had involved the type of non-navigable tidal waters in question in this case. *Phillips*, 108 S. Ct. at 796; see also *infra* notes 169-72 and accompanying text.

13. The expectations of private landowners may be adversely affected when a state decides to assert title or exercise some degree of public trust control without any prior warning to the landowner. See *infra* notes 289-98 and accompanying text.

flow" rule as the rule determining whether a state holds title in tidal areas.¹⁴ Further, the Court's conclusion unadvisedly encourages states to expand the physical scope of their public trust lands, now that the Court has expanded the physical limits of the land to which the states hold title.¹⁵ Finally, this Note proposes that states employ a navigability-based definition in determining which of its lands are subject to the public trust, and urges states to cautiously expand the *purposes* for which lands should be subject to the trust, rather than expand the doctrine's physical scope to the extent that the Supreme Court decided that the states' title extends.

II. HISTORICAL BACKGROUND

The public trust doctrine developed from "the idea that certain common properties, such as rivers, the seashore, and the air were held by the government in trusteeship for the free and unimpeded use of the general public."¹⁶ This concept originated from the law of the Roman Empire¹⁷ in response to an increased need to protect coastal areas for fishing and commerce.¹⁸ Thus, the government could keep coastal areas, the waterways and shores, open for public use by controlling the common properties.

However, the Roman public trust doctrine did not absolutely protect public rights of use; the government could and did convey these common areas, especially the shores, to private individuals, thereby extinguishing the public's rights.¹⁹ The doctrine developed similarly in England that public rights existed, and further, that these rights would be protected despite conveyance of waters and lands to private individuals.²⁰ English law provided the basis for development of a public trust doctrine in the American common law.²¹ The American common law,

14. See *infra* notes 203-13 and accompanying text.

15. *Phillips*, 108 S. Ct. at 795.

16. J. SAX, *DEFENDING THE ENVIRONMENT* 163-64 (1971), *quoted in* Comment, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 16 (1976). The author provides an in-depth analysis of the development of the Roman, English, and American common law regarding the public trust doctrine.

17. Comment, *supra* note 16, at 16; Comment, *supra* note 1, at 763; *see also infra* notes 23-26 and accompanying text.

18. Comment, *supra* note 16, at 17.

19. Jampol, *supra* note 1, at 18; Comment, *supra* note 16, at 21; *see also infra* notes 28-29 and accompanying text.

20. Comment, *supra* note 16, at 48; *see also infra* notes 56-59 and accompanying text.

21. *Arnold v. Mundy*, 6 N.J.L. 1, 72-77 (1821). In *Arnold*, the New Jersey Court of Errors and Appeals discussed in detail its interpretation of the English common law, and the importance of English law in developing a public trust doctrine in New Jersey. *Id.*; *see also infra* notes 60-69 and accompanying text.

in turn, focused on title to the public lands in question, as well as protection of public rights of use.²²

A. *Development of the Traditional Public Trust Doctrine*

1. Roman law

Roman law developed the doctrine of a public trust for the purposes of protecting the three basic concerns of the Roman Empire: commerce, navigation and fishing.²³ Coastal areas became especially important as commerce expanded throughout the Roman Empire, and thus the government had great interest in keeping coastal seas and waterways open for public use and for navigational purposes.²⁴ The Roman government based its authority to protect public rights in these concerns on the best known and most authoritative source of Roman law relative to public rights in the sea and coastal areas—the Institutes of Justinian.²⁵ The Institutes described public rights as follows:

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common. . . . [T]he use of the banks is as public as the rivers . . . [and] [t]he use of the sea-shore, as well as of the sea, is also public[,] . . . for the shores are not understood to be property in any man, but are compared to the sea itself.²⁶

This excerpt from the Institutes reflects the Roman viewpoint that all persons had the right to open use of the sea and the seashore, because these resources theoretically did not belong to any one person.²⁷ According to the Institutes, Roman law specifically granted common rights to the people in the seashores and rivers; however, Roman law also gave the

22. Lazarus, *supra* note 2, at 636.

23. Comment, *supra* note 16, at 21.

24. *Id.*; Jampol, *supra* note 1, at 17. The government used its power to keep navigable waters open and free from obstruction from private individuals. *Id.*

The common rights granted by Roman law were not applied according to whether the waterways were tidally influenced; public rights were granted to the people in waters that were navigable in fact. *Id.* at 19.

25. J. INST. 2.1 (T. Cooper trans. 2d ed. 1841). The Institutes of Justinian were a summary of Roman case law as chronicled by Roman legal scholars. Comment, *supra* note 16, at 25. The Institutes of Justinian, codified in the 6th and 7th centuries A.D., have been translated by many authors and have been cited in many articles as the definitive summary of Roman law. See, e.g., Jampol, *supra* note 1, at 17; Comment, *supra* note 16, at 25-26; Comment, *supra* note 1, at 763-64.

26. J. INST. 2.1.1-2.1.5, *supra* note 25, at 67-68.

27. Comment, *supra* note 16, at 21.

government power to convey title in these lands—including full title to the waterways—to private individuals for their exclusive use.²⁸ Once the government made an exclusive grant of particular land, public rights no longer existed in the land or in the overlying waters.²⁹ Thus, although Roman law created the concept of a public trust doctrine, a real public trust did not exist under Roman law because the public rights granted to the people could be arbitrarily eliminated by a private grant from the government.

2. English common law

In England, prior to the thirteenth century, the sea and seashores were owned and controlled either by the King or by subjects to whom the King granted exclusive ownership.³⁰ Public rights in the sea and seashore were not widely recognized, nor were public rights protected.³¹ However, in the thirteenth century the signing of the Magna Carta³² signaled a recognition of public rights in the coastal areas to be protected by the King.³³ The provisions of the Magna Carta did not broadly proclaim the existence of public rights.³⁴ Instead, one provision merely prohibited obstruction of navigable rivers.³⁵ Later, English law broadened the interpretation of the Magna Carta as protecting public rights of navigation.³⁶ Although the Magna Carta reasserted the King's dominion over all Eng-

28. Jampol, *supra* note 1, at 18-19 & n.111. "[T]here were no restraints whatever imposed by law on the power of the sovereign to convey public lands, including the sea and seashore." Comment, *supra* note 16, at 32-33. The government had limitless powers of conveyance, because "[a]ll such restraints were in fact made impossible by the basic premise of Roman law: 'That which pleases the Emperor has the force of law.'" *Id.* at 33 (quoting J. INST. 1.2.6).

In fact, the government often exclusively granted coastal lands to private individuals. *Id.*

29. According to Roman law, public rights existed as to the sea and seashore areas, as long as these areas "were not yet appropriated to the use of anyone or allocated by the state." Comment, *supra* note 16, at 29 (emphasis omitted); see also Jampol, *supra* note 1, at 18-19.

30. Comment, *supra* note 1, at 764-65.

31. *Id.* at 765. Private individuals owned most of the English seashore; they did not recognize the public rights that had been introduced by Roman law. *Id.* Prior to the signing of the Magna Carta, private individuals had much control over coastal areas. Comment, *supra* note 16, at 39.

32. The Magna Carta was "primarily a protest by the landed barons against infringements of their property rights." Comment, *supra* note 16, at 39.

33. *Id.* The Magna Carta, which was written in the early thirteenth century and revised in 1225, has been described as "the original source of the public's rights in the coastal area." *Id.*; see also Lazarus, *supra* note 2, at 635 n.16.

34. Comment, *supra* note 1, at 766-67.

35. MAGNA CARTA, ch. 33, reprinted in W. MCKECHNIE, MAGNA CARTA 343 (2d ed. 1958). This provision was designed to force removal of weirs, which were "permanent fishing structures fixed to the bottom," from the rivers. Comment, *supra* note 1, at 766.

36. Comment, *supra* note 1, at 766. Interpretation of the Magna Carta was broadened because "the common law . . . sought to broaden the public's interest." *Id.*

lish lands,³⁷ it did not strip private landowners of their land.³⁸ Private rights in land were recognized, as long as public rights of navigation were not prejudiced by private ownership of land.³⁹

The doctrine was primarily a result of England's dependence on the sea for trade with foreign nations.⁴⁰ The Crown required open access to the sea, which meant that access be kept open over navigable rivers—those rivers that were influenced by the tide and big enough to support commercial traffic.⁴¹ The doctrine was also influenced by the English scholar Bracton, who in the mid-thirteenth century adopted the words of the Institutes of Justinian,⁴² restating the principles that “[b]y natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea.”⁴³ Bracton, however, ignored the Roman principle disallowing private ownership in the seashore,⁴⁴ and also ignored provisions of Roman law which protected common rights so long as the seashores or rivers had not been conveyed to an individual.⁴⁵ Thus, early English common law developed a doctrine appearing to protect public rights in navigable waters and the seashore, regardless of whether the land had been conveyed into private ownership.⁴⁶

However, this preliminary public trust concept was not actually a public trust. Under this early theory, the King did not have sovereign title or control over all coastal lands and waterways.⁴⁷ Private landowners maintained title to navigable waters and underlying land granted to

37. Jampol, *supra* note 1, at 20.

38. Note, *The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds*—Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996 (1988), 63 WASH. L. REV. 1087, 1090 (1988).

39. *Id.*

40. Jampol, *supra* note 1, at 20.

41. *Id.* Navigable rivers were those influenced by the tide, for a practical reason:

Prior to the invention of the steam engine, the easiest, if not the only, efficient method of navigating English rivers was by utilizing incoming tides to assist propulsion up rivers, and by following the recession of the tide in the opposite direction. As a result, tidal rivers were the *only* navigable rivers, and the two were treated as one with respect to the tidelands trust doctrine.

Id. (footnotes omitted) (emphasis in original).

42. See *supra* notes 25-26 and accompanying text.

43. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968) (citing J. INST. 2.1.1-2.1.5); see also Lazarus, *supra* note 2, at 635.

44. See *supra* text accompanying note 26.

45. Comment, *supra* note 16, at 36-37. Bracton did not entirely adopt the writings of Justinian, because Roman law did not inalienably protect public rights, and Bracton was trying to promulgate the concept that public rights existed in the land, whether held by the King or by a private individual. *Id.* at 37.

46. *Id.* at 36.

47. *Id.* at 38-39.

them by the King.⁴⁸ Thus, while the public had certain rights of use, there was no guarantee that the King could protect these rights against infringement by private landowners.⁴⁹

By the seventeenth century, further significant developments had occurred in the English public trust doctrine. The theory developed that the Crown had always held title to the seashore and to lands under water, and that such land had not been conveyed to private landowners unless specifically mentioned in the deed.⁵⁰ Although this theory was met with great outrage and was not enforced at that time,⁵¹ the jurist Lord Hale relied on it in his own summary of the English common law.⁵² Hale's writings summarized the law of the coastal zone as follows:

[T]he king is the owner of [the sea], and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common [right], and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.⁵³

Hale also described the physical areas in which the King's rights existed, including: (1) the "rivers that are arms of the sea"⁵⁴ and (2) "the shore of the sea . . . between the ordinary high-water and low-water mark."⁵⁵

48. *Id.* "[I]t was never more than a theory . . . that all property in the kingdom originally had been owned by the king." *Id.*

49. *Id.*

50. *Id.* at 41. Most of the seashore had previously been conveyed to private landowners; however, few deeds explicitly conveyed the land covered by water or affected by the tide. *Id.* This theory was first propounded in the sixteenth century by Thomas Digges, a lawyer for Queen Elizabeth, in order to recoup coastal lands from their private owners and sell them for profit. Digges initially was unsuccessful in enforcing this theory against private owners; English courts later held that the sovereign held title to the seashore up to the high-water mark. *Id.* at 42; Lazarus, *supra* note 2, at 635 n.19.

51. *See supra* note 50.

52. Hale's most famous writings are contained in M. HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM, reprinted in S. MOORE, A HISTORY OF THE FORESHORE 370 (3d ed. 1888). Hale wrote his treatise in the seventeenth century, and it had great influence on both English law and American common law. Comment, *supra* note 16, at 44; *see* Shively v. Bowlby, 152 U.S. 1, 11-12 (1894).

53. S. MOORE, *supra* note 52, at 377; *see also* Comment, *supra* note 16, at 47.

54. S. MOORE, *supra* note 52, at 378.

55. *Id.* at 379. The King's dominion has also been described as including "all creeks, arms of the sea," "tide-rivers," and "[a]ll waters . . . within the flux and reflux of its tides." R. HALL, ESSAY ON THE RIGHTS OF THE CROWN, reprinted in S. MOORE, *supra* note 52, at 669 (emphasis omitted).

Hale's writings suggested the possibility that public rights would not be protected in a creek or river that the King had exclusively granted to a private landowner.⁵⁶ Additionally, despite acknowledging public rights in coastal lands, Hale recognized no limitations on the sovereign's power of conveyance.⁵⁷ However, Hale did not view this as a compromise of the public's rights; rather, Hale recognized the existence of public rights of use in navigable waters despite conveyances to private individuals.⁵⁸ Therefore, a public trust doctrine did exist in the English common law because public rights were protected whether the land in question was owned by the King or by a private individual.⁵⁹

B. Emergence of the Modern Public Trust Doctrine

1. American common law: development of the doctrine

a. the emerging doctrine: public trust rights guaranteed in the original thirteen states

The concept of a public trust doctrine emerged in American common law after the revolution.⁶⁰ The first case to discuss the public trust doctrine was *Arnold v. Mundy*,⁶¹ a New Jersey Court of Errors and Appeals decision holding that navigable rivers in which the tide ebbed and flowed, and the beds beneath the rivers, were held by New Jersey in trust for the use and benefit of its people.⁶² In this case, the plaintiff, Arnold, planted an oyster bed below the low-water mark in the Raritan River at the mouth of Raritan Bay.⁶³ Arnold claimed title to the bed of the river as incident to his title to land on the bank of the river.⁶⁴ The court held that Arnold did not and could not have title to the riverbed because the

56. S. MOORE, *supra* note 52, at 384. The King did, in some instances, grant land under the sea, where a private landowner could exclusively possess a creek or bay. *Id.* at 672.

57. Comment, *supra* note 16, at 48.

58. *Id.* See *supra* note 41 and accompanying text for a description of navigable waters in the English common law.

59. Comment, *supra* note 16, at 48.

60. Jampol, *supra* note 1, at 23. Early American common-law development necessarily relied upon English law, because American lawyers were most familiar with English law, and sources were more readily available than for other legal systems such as French law. G. GILMORE, *THE AGES OF AMERICAN LAW* 19-20 (1977).

61. 6 N.J.L. 1 (1821); see Comment, *supra* note 16, at 55.

62. *Arnold*, 6 N.J.L. at 76-77. Prior to the revolution, the coastal lands in New Jersey were held by the Duke of York in his sovereign capacity as governor in trust for the people. *Id.* at 77. After the revolution, New Jersey gained possession of these lands with the same rights and duties as the Duke of York had held, thus preserving the public rights. *Id.* at 78.

63. *Id.* at 65.

64. *Id.* at 65-66. Arnold claimed that although the deed to the land described the land as extending to the bank of the river, the previous owner had maintained an oyster bed in the same area, and there was no interference with navigation. *Id.*

State of New Jersey held title to navigable rivers, such as the Raritan, that were influenced by the tide.⁶⁵ The court reasoned that the state held title to protect public rights of fishing and navigation in these waters; thus, the state could not abrogate the public's rights by a conveyance to a private landowner.⁶⁶

The *Arnold* court relied on Lord Hale's principles of sovereign dominion of the King in the seas, their arms, and navigable rivers affected by the ebb and flow of the tide.⁶⁷ Using these principles, the court determined that the public trust doctrine that existed in English law applied in New Jersey.⁶⁸ Accordingly, the state held title to the navigable waters influenced by the tide to protect the rights of the public.⁶⁹

The Supreme Court of the United States affirmed the *Arnold* principles in *Martin v. Waddell*.⁷⁰ *Martin* similarly involved a claim to oyster beds underneath the navigable waters of the Raritan River near Raritan Bay, waters that were affected by the ebb and flow of the tide.⁷¹ The Supreme Court interpreted Hale's writings as confirming the English common-law rule that the King held, in trust for the public, lands under navigable waters affected by the ebb and flow of the tide.⁷² The Court held that the rights and responsibilities held by the English sovereign prior to the revolution—holding title in trust for public use to lands under navigable waters subject to the ebb and flow of the tide—translated

65. *Id.* at 76-78.

66. *Id.* The court discussed protection of the public's rights as follows:

[T]he navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the citizens, and . . . the property . . . is vested in the sovereign. . . . The sovereign power itself, therefore, cannot, consistently with the principles of the law . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.

Id.

The *Arnold* court also set down two important principles of riverfront ownership: (1) a conveyance along a river that was not navigable and was not influenced by the tide extended to mid-channel, and (2) a conveyance along a navigable, tidal river extended only to the high-tide line. *Id.* at 67.

67. *Id.* at 74 (citing M. HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM, reprinted in S. MOORE, A HISTORY OF THE FORESHORE 370 (3d ed. 1888)). The court supported its reliance on Hale's writings by describing them as "the great foundations upon which [principles of the public trust doctrine] are to rest." *Id.*

68. *Id.*

69. *Id.* at 76-77. The reliance on Hale resulted from a misinterpretation of his writings; Hale never placed full title to navigable waters in the government, and recognized that there were few restraints on the sovereign's power to convey coastal lands. See *supra* notes 53-59 and accompanying text.

70. 41 U.S. (16 Pet.) 367 (1842).

71. *Id.* at 407.

72. *Id.* at 412-13.

into the rights and responsibilities of each of the thirteen original states subsequent to the revolution.⁷³ Hence, title to the Raritan River bed was deemed to be held by the State of New Jersey, in trust for its people.⁷⁴

*b. the role of the Supreme Court: the significance
of federal and state law*

Public trust cases involve issues of both federal and state law. As a matter of federal law, Congress admits new states into the Union.⁷⁵ When a state is admitted, federal law determines the lands to which title passes from the United States to the state.⁷⁶ Therefore, since a state upon gaining statehood receives title from the United States to navigable waters and their underlying lands, *federal* law defines navigability in determining title for this purpose.⁷⁷ Thus, in this context, a federal test of navigability applies to issues of determining original state title in navigable waters and their underlying lands, and Supreme Court decisions are binding as to the tests determining state title.⁷⁸

73. *Id.* The Court stated that since the states obtained the same rights with the limitations of the public trust as held by the English sovereign, there was no justification to allow the state to grant the lands within the trust to private individuals. *Id.* at 413. The Court observed:

[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Id. at 410.

74. *Id.*

75. U.S. CONST. art. IV, § 3, cl. 1.

76. *United States v. Oregon*, 295 U.S. 1, 14, 27-28 (1934). As the *Oregon* Court specifically stated, "[t]he laws of the United States alone control the disposition of title to its lands." *Id.* at 27. See also *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Packer v. Bird*, 137 U.S. 661, 669, 670 (1891).

77. *Oregon*, 295 U.S. at 14. The Court stated that "[s]ince the effect upon the title to such lands [navigable waters and their underlying lands] is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a [state] one." *Id.*

Although the federal government passes title to the state in navigable waters, the federal government retains a navigational easement to regulate and maintain the waterways for purposes of interstate commerce. *Id.*; see U.S. CONST. art. I, § 8, cl. 3; Lazarus, *supra* note 2, at 636-37. However, the federal test of navigability to determine state title is not necessarily the same as the federal test of navigability to determine existence of a federal navigational easement. Lazarus, *supra* note 2, at 637. As a matter of federal law, federal courts can develop a distinct test for the purpose of determining state title. *Oregon*, 295 U.S. at 14 (citing *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 55, 56 (1926); *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 87 (1922)).

78. The original federal test of navigability applied to navigable waters where the tide ebbed and flowed. *Martin*, 41 U.S. (16 Pet.) at 417-18. Twentieth century cases defined the federal test of navigability as inclusive of waters "used, or . . . susceptible of being used, in its natural and ordinary condition, as a highway for commerce." *Oklahoma v. Texas*, 258 U.S. 574, 586 (1921); see also *Oregon*, 295 U.S. at 14. Most recently, the Court has held that the

Although the Supreme Court has repeatedly discussed the public trust doctrine, the doctrine exists solely as a matter of state common law.⁷⁹ Each state has the authority to determine which of its lands are within the public trust, and which of its lands are not within the trust and therefore may be conveyed to private parties free of the trust.⁸⁰ Thus, applicability and scope of the public trust doctrine are matters of state discretion.⁸¹

c. the equal footing doctrine: public trust doctrine applied in new states as they are admitted to the Union

Under the rights and responsibilities theory of the *Martin* Court, the original basis for the public trust doctrine was applicable only to the original thirteen states.⁸² In *Pollard's Lessee v. Hagan*,⁸³ the Supreme Court of the United States held that pursuant to the "equal footing" doctrine,⁸⁴ new states entering the Union received title to lands under navigable water to the same extent as the original states.⁸⁵ Without articulating a specific test as to what types of waterways constituted navigable waters, the *Pollard* Court determined that all new states received title to their

federal test of navigability for fresh waters depends upon the existence or potential of use in commerce and navigation, while the federal test of navigability for tidal waters simply depends upon the existence of the tide. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 797 (1988).

79. *Shively*, 152 U.S. at 26; see *Lazarus*, *supra* note 2, at 637.

80. *Shively*, 152 U.S. at 26.

81. *Id.* However, the Court in some instances may dictate limits on a state's wholesale ability to convey its lands to private owners. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455-56 (1892); see also *infra* notes 112-20 and accompanying text.

82. *Martin*, 41 U.S. (16 Pet.) at 410; see *supra* notes 70-74 and accompanying text.

The original thirteen states were the only states that took possession of their lands directly from the English sovereign, because they were the only states existing at the time of the revolution in 1776. *Martin*, 41 U.S. (16 Pet.) at 410.

83. 44 U.S. (3 How.) 212 (1845).

84. The equal footing doctrine has been described as the entitlement of new states "to the lands beneath their navigable waters subject to the same trust" as held by the original states. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 200 (1980). Not only did the new states receive title to the lands within the trust, but the United States government was obligated to not convey these lands to any other party both before and after new states attained statehood. *Id.*; Comment, *Ownership Rights to Submerged and Formerly Submerged Land in New Jersey*, 91 DICK. L. REV. 833, 839 (1987); see also *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873).

85. *Pollard's Lessee*, 44 U.S. (3 How.) at 228-29. Thus, when Alabama became a state it received title to the lands underneath navigable waters; this title could not be defeated by a later grant from the United States government to a private individual because the United States government had no power to make such a conveyance. *Id.* at 220, 228-29.

navigable waters.⁸⁶ Additionally, the Court held that the states also received title to the soils under navigable waters.⁸⁷ Thus, under the equal footing doctrine, new states "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which [the original states] possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States."⁸⁸ In this manner, the new states gained sovereign title to navigable waters and the soils under the navigable waters within their territory, and thereafter were free to apply the public trust according to their own policies.

2. American common law: the scope of the public trust doctrine

Initial decisions of the American courts established that under the public trust doctrine, states held title to those navigable waters affected by the ebb and flow of the tide, and could include these waters and their underlying lands within the public trust.⁸⁹ Subsequent judicial decisions focused more precisely on the scope of the doctrine and definition of public trust lands,⁹⁰ as well as the powers of the state governments to control and convey these lands.⁹¹

a. scope of the public trust doctrine: expansion to include inland, non-tidal navigable waters

The public trust doctrine, as developed from the English common law, historically encompassed only those waters that were affected by the tide because most rivers in England and along the coast of the original

86. *Id.* at 229. The Court also referred to the importance of state ownership and control over these lands to preserve state sovereignty and protect the exercise of state police powers. *Id.* at 230.

87. *Id.*

88. *Id.* at 223. These principles have been reaffirmed recently. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981), where the Court stated:

[O]wnership of land under navigable waters is an incident of sovereignty; [these lands are held] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States.

Id. at 551 (footnotes omitted).

89. See, e.g., *Martin*, 41 U.S. (16 Pet.) at 410; *Arnold*, 6 N.J.L. at 76-77; see also *supra* notes 61-74 and accompanying text. This doctrine similarly applied to all incoming states under the equal footing doctrine. See *supra* notes 84-88 and accompanying text.

90. See, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894); *Packer v. Bird*, 137 U.S. 661 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1876); see also *infra* notes 92-111 and accompanying text.

91. See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); see also *infra* notes 112-20 and accompanying text.

thirteen states were tidal.⁹² However, the topography in the United States differed greatly from England. In the United States, there were many inland, fresh-water lakes and rivers that were large enough to be used as commercial highways, but were not as of that time included within the scope of the public trust doctrine.⁹³ States could not rely on a "tidal test" of navigability to assert title to and control over fresh-water lakes and rivers as they had over rivers affected by the tide.⁹⁴ Thus, it became imperative that governments find a means to exercise control over inland fresh waters.⁹⁵

The first decision involving government dominion over non-tidal waters was *The Propeller Genesee Chief v. Fitzhugh*,⁹⁶ a case determining whether federal admiralty jurisdiction existed as to a ship collision on Lake Ontario in New York, an inland fresh-water lake.⁹⁷ One party objected to federal jurisdiction over the matter, asserting that the Court did not have jurisdiction since the lake was not tidal water.⁹⁸ The Court held that admiralty jurisdiction did not depend upon whether the waterway in question was tidal; it had jurisdiction over public waters—those waters that were in fact navigable.⁹⁹ The Court determined that the traditional definition of navigable waters—those waters influenced by the tide—really referred only to waters that were in fact navigable.¹⁰⁰ Thus, "tide water and navigable water [were] synonymous terms," and "public" rivers were those capable of being navigated, as distinguished from non-navigable "private" rivers.¹⁰¹

Subsequent decisions of the Court, relying on the principles stated in

92. Comment, *supra* note 16, at 54-55. In England, only those rivers affected by the tide were navigable. Jampol, *supra* note 1, at 7; *see also supra* note 41.

93. Jampol, *supra* note 1, at 7. Thus, important waterways such as the Mississippi River and the Great Lakes were initially excluded from the public trust doctrine. *Id.* Up to this point, the public trust doctrine had only included those waters that were navigable *and* subject to the ebb and flow of the tide. *See supra* notes 61-66 and accompanying text.

94. Jampol, *supra* note 1, at 7.

95. *Id.* A tidal test of navigability "simply made no sense" to the states with fresh-water lakes and rivers, especially with the invention of the steam engine, which made these waterways more accessible. Stevens, *supra* note 84, at 201.

96. 53 U.S. (12 How.) 443 (1852).

97. *Id.* at 450-52.

98. *Id.* at 454.

99. *Id.* at 457. Although the Court did not specifically define navigable-in-fact, the Court cited section 9 of the Judiciary Act of 1789, which described jurisdiction applicable to waters that were navigable "by vessels of ten or more tons burden." *Id.* (quoting Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77). Thus, it appears that the Court was referring to waters upon which a ship could actually navigate.

100. *Id.* at 455.

101. *Id.* The Court acknowledged that the definition of "navigable" as "tidal" made sense in England, but described application of that definition in the United States as "merely arbi-

Genesee Chief, determined that states received title to navigable waters not affected by the tide, and thus the states were free to apply the public trust doctrine to these areas.¹⁰² For example, in *Barney v. Keokuk*,¹⁰³ the Court held that the state received title to the navigable waters of the Mississippi River above the flow of the tide, and thus the state could include these areas within its public trust.¹⁰⁴ The Court held as a general rule that "all waters are deemed navigable which are really so."¹⁰⁵ This new principle which recognized the existence of state title and placed the navigable waters and the soil beneath them within the public trust was equally applicable to fresh waters as to tidewaters.¹⁰⁶ The reason behind the rule that the state had title to and the public trust included *all* navigable waters—whether or not affected by the tide—was that there should be public control of the "great passageways of commerce and navigation, to be exercised for the public advantage and convenience."¹⁰⁷ Thus, the settled rule became that states had title to all waters navigable in fact, whether or not affected by the tide, and thus these areas could be included in the public trust.¹⁰⁸

Later decisions also expanded the purposes of the public trust doc-

trary, without any foundation in reason." *Id.* at 454. The Court thus rejected the rule that tidal influence was the test of "public waters." *Id.* at 457.

The "tidal" definition of navigability did not appear to be supported by English decisions either. See, e.g., *Mayor of Lynn v. Turner*, 98 Eng. Rep. 980 (1774), wherein the court questioned tidality as the proper test of public land:

How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate.

Id. at 981.

102. See, e.g., *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Packer v. Bird*, 137 U.S. 661 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1877). Note that although the Supreme Court of the United States has discussed the scope of the public trust doctrine as applied to the states, questions of the scope of the doctrine and specific tests of navigability for application of the doctrine are matters of state law. Stevens, *supra* note 84, at 202; see also *supra* notes 79-81 and accompanying text.

103. 94 U.S. 324 (1876).

104. *Id.* at 337-38.

105. *Id.* at 336.

106. *Id.* at 338. The Court conceded that if states had relied on the ebb and flow of the tide as the rule of navigability, it was for the states themselves to determine whether to change the rule. *Id.* However, the Court also commented that doctrines that placed only waters affected by the tides within the public trust were contrary "to sound principles of public policy," due to the confusion between "tide water" and "navigable" water. *Id.*

107. *Id.*

108. *Id.* This principle was affirmed in *Shively v. Bowlby*, 152 U.S. 1 (1894). There, the Court conceded that while each state was free to develop its public trust doctrine as to its navigable waters, the prevailing rule as to state title was that the states held title to their navigable rivers; a rule dependent upon tidal influence "would be highly unreasonable when

trine beyond the historical common-law purposes of navigation, fishing and commerce.¹⁰⁹ According to their individual needs, states have held that the public trust doctrine encompasses navigable waters for other purposes, such as preserving beaches and waters for bathing, recreation and production of minerals.¹¹⁰ Public trust purposes have expanded as states have sought to maximize finite resources.¹¹¹

b. limitations on a state government's ability to dispose of public trust lands

Federal legislative control over navigable waterways is generally limited to a federal navigation easement protecting the navigability of waterways in furtherance of interstate commerce.¹¹² Otherwise, each state retains authority to dispose of its lands as it desires, according to the constraints of its public trust.¹¹³ However, state authority is not absolute. In *Illinois Central Railroad Co. v. Illinois*,¹¹⁴ the Supreme Court of the United States delineated some limits on the states' ability to dispose of public trust lands.¹¹⁵ In *Illinois Central*, the Illinois legislature had granted the entire Chicago Harbor area along and under Lake Michigan to a private corporation.¹¹⁶ The Court held that a grant of such

applied [to rivers within the states]." *Id.* at 31-32 (quoting *Carson v. Blazer*, 2 Binn. 475, 477, 478 (Pa. 1810)).

Additionally, in *Packer v. Bird*, 137 U.S. 661 (1891), the Court stated that "[t]hose rivers are regarded as public navigable rivers in law which are navigable in fact." *Id.* at 667. Thus "the test of navigability of waters . . . [the ebb and flow of the tide] has had no place in American jurisprudence since the decision in the case of [*Genesee Chief*], and is therefore no test of riparian ownership." *McGivra v. Ross*, 215 U.S. 70, 78 (1909) (citing *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852)).

109. Public trust lands were "chiefly valuable for the public purposes of commerce, navigation and fishery." *Shively*, 152 U.S. at 49.

110. *See, e.g.*, *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (public trust doctrine includes bathing rights); *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928), *cert. denied*, 280 U.S. 517 (1929) (oil drilling within public trust purpose); *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978) (beach areas within public trust doctrine); *Warren Sand & Gravel Co. v. Commonwealth Dep't of Env'tl. Resources*, 20 Pa. Commw. 186, 341 A.2d 556 (1975) (production of sand and gravel from water beds); *see also Jampol*, *supra* note 1, at 11; *Lazarus*, *supra* note 2, at 649.

111. *Lazarus*, *supra* note 2, at 651.

112. *Id.* at 636-37; *Stevens*, *supra* note 84, at 202-03.

113. *Jampol*, *supra* note 1, at 10. The most common state utilization of public trust lands has been granting those lands for development, subject to state restrictions. *Id.*

114. 146 U.S. 387 (1892). *Illinois Central* has been labelled "the most celebrated public trust case in American law." *Jampol*, *supra* note 1, at 34. Prior to *Illinois Central*, there was little limitation on the power of a state to convey tidelands into ownership free of the public trust. *Id.* at 33.

115. *Illinois Central*, 146 U.S. at 453.

116. *Id.* at 433.

magnitude by a state legislature impaired the sovereignty of the state, and was therefore void.¹¹⁷ The state could convey public trust land, but the power to convey was restricted.¹¹⁸ The Court held that the state could only make conveyances where: (1) the conveyance was consistent with the purposes of the public trust; or (2) the public's interests were not substantially impaired by the conveyance.¹¹⁹ Thus, the Court agreed that some grants to private individuals could be upheld.¹²⁰

III. *PHILLIPS PETROLEUM CO. V. MISSISSIPPI*

American courts have consistently held that the states have title to and the public trust could include lands under both navigable tidal and navigable fresh-water waterways.¹²¹ In *Phillips Petroleum Co. v. Mississippi*,¹²² however, the Supreme Court of the United States held that state title had never been limited to just navigable waters.¹²³ The *Phillips* Court held that the states had title to all tidal areas—all land under water affected by the tide, regardless of whether the waters were navigable—which thus could be included within the public trust.¹²⁴

A. *The Facts*

*Phillips Petroleum Co. v. Mississippi*¹²⁵ involved a title dispute over forty-two acres of submerged land under the Bayou LaCroix and eleven

117. *Id.* at 453. The Court specifically stated that "[t]he State . . . [cannot] abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties." *Id.* The Court analogized such a grant to an abdication by the state of its police powers. *Id.*

118. *Id.*

119. *Id.* Thus, the Court stated:

The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. . . . [G]rants of parcels of lands under navigable waters . . . in aid of commerce . . . [that] do not substantially impair the public interest . . . [are] sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public.

Id. at 452.

120. *Id.* at 453; see also Jampol, *supra* note 1, at 34-35; Comment, *supra* note 16, at 59-60.

121. See, e.g., *McGilvra v. Ross*, 215 U.S. 70 (1909); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Barney v. Keokuk*, 94 U.S. 324 (1876); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938); *O'Neill v. State Highway Dep't*, 50 N.J. 307, 235 A.2d 1 (1967).

122. 108 S. Ct. 791 (1988).

123. *Id.* at 795.

124. *Id.*; see *infra* notes 147-48 and accompanying text.

125. 108 S. Ct. 791 (1988).

small drainage streams.¹²⁶ The separate submerged tracts of land ranged from one-half acre to ten acres,¹²⁷ but six of the drainage streams had less than one acre in total surface area.¹²⁸ The acres in dispute were underneath water influenced by the tide because the streams were connected to the Jourdan River, a navigable tidal river that flowed into the Gulf of Mexico.¹²⁹ However, the bayou and drainage streams were not a part of the Jourdan River, were not navigable, and were located several miles from the Gulf of Mexico.¹³⁰

Phillips Petroleum Company and Cinque Bambini Partnership¹³¹ claimed to hold record title to these acres, originally derived from a Spanish land grant prior to Mississippi's statehood.¹³² The State of Mississippi claimed that these acres were within its public trust lands because when Mississippi became a state in 1817, it gained title to all waterways—and the lands beneath them—subject to the ebb and flow of the tide.¹³³ Mississippi had not exercised any authority over the lands in question prior to 1970, when the state conducted surveys to determine which lands were within the public trust and therefore subject to a new state coastal wetlands protection law.¹³⁴ Once the surveys were complete, however, the State Mineral Lease Commission decided to use the surveys to issue oil and gas leases on state-owned land.¹³⁵ Eventually, the Commission issued oil and gas leases on 600 acres of land owned by Phillips.¹³⁶

126. *Id.* at 793. The dispute concerned 140 acres under the Bayou and nearby waters; the Mississippi Supreme Court had held that all but 42 acres were privately held and not subject to the public trust. *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 510 (Miss. 1986), *aff'd sub nom.* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988); *see also infra* note 137.

127. *Phillips*, 108 S. Ct. at 793.

128. *Cinque Bambini*, 491 So. 2d at 510.

129. *Phillips*, 108 S. Ct. at 793.

130. *Id.*

131. The name "Phillips" hereinafter will refer to both Phillips Petroleum Company and Cinque Bambini Partnership.

132. *Phillips*, 108 S. Ct. at 793. Phillips claimed that it had valid record title pursuant to an 1813 Spanish land grant, which had subsequently been confirmed in 1819 by an Act of Congress, and by federal and state patents. Mississippi became a state in 1817. *Cinque Bambini*, 491 So. 2d at 510-11.

133. *Phillips*, 108 S. Ct. at 793. Mississippi claimed that by the equal footing doctrine, all lands under waters subject to the ebb and flow of the tide were within the public trust, irrespective of whether the waterways were navigable. *Id.* For a discussion of the equal footing doctrine relative to the public trust, *see supra* notes 84-88 and accompanying text.

The Mississippi Supreme Court stated that even if the original Spanish land grant had been valid, Phillips could not have title if title to the lands had been conveyed to Mississippi upon gaining statehood. *Cinque Bambini*, 491 So. 2d at 511.

134. *Phillips*, 108 S. Ct. at 803 (O'Connor, J., dissenting).

135. *Id.* (O'Connor, J., dissenting).

136. *Id.* (O'Connor, J., dissenting).

Phillips filed suit to quiet title to the 600 acres, as well as an additional 1800 acres.¹³⁷ The Chancery court held that all waters influenced by the tide—and the land beneath them below the high-tide line—were state-owned land, and thus within the public trust, but found that only approximately 140 acres were actually state-owned and within the scope of the public trust in this case.¹³⁸ On appeal, the Mississippi Supreme Court reduced the lands within the scope of the public trust to forty-two acres.¹³⁹ The court determined that upon gaining statehood, Mississippi received title to all tidelands and navigable waters.¹⁴⁰ Therefore, the court held that the state held title to Phillips' forty-two acres of tidelands, and could include these lands within its public trust.¹⁴¹

Phillips objected to the court's ruling, asserting that the forty-two acres were not state land and not within the public trust because none of the overlying waterways were navigable.¹⁴² Therefore, Phillips petitioned the Supreme Court of the United States for a writ of certiorari to reverse the Mississippi Supreme Court.¹⁴³ Phillips sought recognition that state title in tidal areas was limited, and to limit the scope of the public trust doctrine to those waters that were navigable, which would have excluded the acres in dispute.¹⁴⁴

The Supreme Court of the United States affirmed the Mississippi Supreme Court's decision that the state held title to these acres, holding that all lands beneath tidal waters were state land and therefore within the public trust, regardless of whether the waters were in fact navigable.¹⁴⁵ Justice O'Connor, joined by Justices Stevens and Scalia, dis-

137. *Id.* (O'Connor, J., dissenting). Phillips held title to more than 2400 acres, including the acres disputed in the main case. *Cinque Bambini*, 491 So. 2d at 510. Mississippi claimed that since these lands were tidelands, it had title and the tidelands were subject to the public trust. *Id.* The Chancery Court held that only 140 of these acres were subject to the public trust. *Id.* Since 98 acres of these submerged tidelands were created by the artificial means of dredging, the Mississippi Supreme Court found that Mississippi had title to only 42 acres, which thus were within the public trust. *Id.* at 510-11. The court held that "fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark, is held by the State of Mississippi in trust." *Id.*

138. *Phillips*, 108 S. Ct. at 803 (O'Connor, J., dissenting).

139. *Cinque Bambini*, 491 So. 2d at 510-11. Of the 140 acres, 98 were artificial lakes created by dredging. *Id.* at 510; see also *supra* note 137.

140. *Cinque Bambini*, 491 So. 2d at 510-12. The court stated that the tidelands were "all lands naturally subject to tidal influence, inland to today's mean high water mark." *Id.* at 510-11.

141. *Id.*

142. Petition for a Writ of Certiorari to the Supreme Court of Mississippi, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870).

143. *Id.*

144. *Id.*

145. *Phillips*, 108 S. Ct. at 799.

sented, stating that the appropriate test as to whether waters are owned by the state should be navigability of the waters, regardless of whether the waters in question were tidal or non-tidal.¹⁴⁶

B. Reasoning of the Court

1. The majority opinion

In an opinion written by Justice White and joined by Chief Justice Rehnquist and Justices Brennan, Marshall and Blackmun, the majority in *Phillips Petroleum Co. v. Mississippi*,¹⁴⁷ held that states have title to all their submerged tidal lands.¹⁴⁸ According to the *Phillips* Court, the rights of the states to tidal lands under the public trust doctrine have been affirmed many times.¹⁴⁹

The Court placed much emphasis on its decision in *Shively v. Bowlby*.¹⁵⁰ *Shively* concerned ownership of lands below the high-tide line near the mouth of the Columbia River in Oregon.¹⁵¹ The *Shively* Court held that the land in question, which was between the high- and low-tide lines and alternately covered and uncovered by the tide, was held by the State of Oregon, and therefore within the public trust.¹⁵² The *Phillips* Court relied on *Shively* as clear precedent that the Court had consistently held all land influenced by tidal water to be state land and within the public trust.¹⁵³ Thus, the *Phillips* Court dismissed Phillips' contention that "the original States did not claim title to non-navigable tidal waters."¹⁵⁴ The Court also supported its position by citing cases in which

146. *Id.* at 800 (O'Connor, J., dissenting).

147. 108 S. Ct. 791 (1988).

148. *Id.* at 795.

149. *Id.* at 794 & n.2.

150. 152 U.S. 1 (1894). *Shively* was described by the *Phillips* Court as "the seminal case in American public trust jurisprudence." *Phillips*, 108 S. Ct. at 793-94 (quoting Petitioner's Reply Brief at 11, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870)).

151. *Shively*, 152 U.S. at 9.

152. *Id.* at 57-58. The *Shively* Court concluded:

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States. . . . The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Id. at 57.

153. *Phillips*, 108 S. Ct. at 794 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

154. *Id.* Phillips claimed that the original states only claimed title to navigable tidal waters. The Court stated that since the cases upon which Phillips relied were from states that had abandoned the common-law rule holding tidelands within the public trust, these cases were not controlling. *Id.* at 794-95 & n.4.

lands held to be within the public trust were not held for navigational purposes.¹⁵⁵ Accordingly, the Court reaffirmed its rule that the states have title to lands underneath water subject to the ebb and flow of the tide, which the states can then include within their public trusts.¹⁵⁶ Since the lands in question in this case were under water subject to the tides, Mississippi held title and could apply the public trust.¹⁵⁷

The Court also addressed Phillips' arguments that the tidal influence rule was geographically tailored to England, where all navigable rivers are subject to tidal influence.¹⁵⁸ Although Phillips produced some authority to show that no non-navigable waters were held in the public trust in England,¹⁵⁹ the Court determined that the cases cited by Phillips were not concerned with non-navigable tidal waters.¹⁶⁰ Additionally, the Court was not concerned with the state of the English common law, and stated that the only relevant precedent was the Court's previous interpretations of the common law.¹⁶¹

The Court recognized that the navigability rule was applicable in determining whether fresh-water lakes and rivers and their underlying lands were state land.¹⁶² However, the Court decided that the navigabil-

155. *Id.* at 795; *see, e.g.*, *Hardin v. Jordan*, 140 U.S. 371 (1891) (reclamation of lands for urban expansion); *McCready v. Virginia*, 94 U.S. 391 (1877) (planting and harvesting of oysters); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (public trust lands used for fishing); *Den v. Jersey Co.*, 56 U.S. (15 How.) 426 (1854) (reclamation of lands for urban expansion).

156. *Phillips*, 108 S. Ct. at 795.

157. *Id.*

158. *Id.* at 796; *see Jampol, supra* note 1, at 7. *But see supra* note 41.

159. *See infra* note 178 and accompanying text.

160. *Phillips*, 108 S. Ct. at 796; *see, e.g.*, *Utah Div. of State Lands v. United States*, 107 S. Ct. 2318 (1987) (state held title to navigable fresh-water lake); *United States v. Oregon*, 295 U.S. 1 (1934) (state did not have title to bed of non-navigable fresh-water lake); *Oklahoma v. Texas*, 258 U.S. 574 (1921) (state did not have title to non-navigable fresh-water river); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852) (federal admiralty jurisdiction existed concerning navigable fresh-water waterways).

161. *Phillips*, 108 S. Ct. at 796. The Court stated:

[W]e will not now enter the debate on what the English law *was* with respect to the land under such waters, for it is perfectly clear how this Court understood the common law of royal ownership, and what the Court considered the rights of the original and later-entering States [The] Court has consistently interpreted the common law as providing that the lands beneath waters under tidal influence were given States upon their admission into the Union.

Id. (emphasis in original).

The Court also stated that although none of the cases supporting their decision dealt with non-navigable tidal waters, they were satisfied that these cases provided an accurate description of the law as applied to non-navigable tidal waters. *Id.*

162. *Id.* In *Genesee Chief*, 53 U.S. (12 How.) at 457, the Court held that admiralty jurisdiction "depend[ed] upon the navigable character of the water, and not upon the ebb and flow of the tide," reasoning that American topography was characterized by extensive waterways not subject to tidal influence.

ity rule was meant to apply only to inland fresh waters, and was a different test than the ebb and flow rule that applied to tidal waters.¹⁶³ Accordingly, the adoption of a navigability rule as to inland fresh waters did not supplant the ebb and flow rule as to tidal waters.¹⁶⁴

In support of its use of the ebb and flow rule, the Court observed that the non-navigable waters at issue were connected to the sea by a navigable tidal river and as such, were part of the sea.¹⁶⁵ The Court also stated two policy reasons in support of the ebb and flow rule: (1) its uniformity, certainty and ease of application; and (2) non-disruption of property owners' expectations, resulting from the rule's long history of use.¹⁶⁶ In support of the policy to uphold a property owner's expectations, the Court stated that there could not be any reasonable expectations to the contrary since Mississippi law had consistently claimed title and held tidelands to be within the public trust.¹⁶⁷ The Court accordingly upheld the ebb and flow rule to avoid upsetting settled property laws in the various states.¹⁶⁸

2. The dissenting opinion

The dissenting opinion of Justice O'Connor, joined by Justices Stevens and Scalia, recognized that the ebb and flow rule applied to tidewaters, but disagreed with the majority's contention that the cases cited

163. *Phillips*, 108 S. Ct. at 797.

164. *Id.*

165. *Id.* at 798-99. The Court stated that because these waters were subject to the ebb and flow of the tide, this land was owned by the state pursuant to the ebb and flow rule. *Id.* The Court went on to state:

[T]here is a difference in degree between the waters in this case, and non-navigable waters on the seashore that are affected by the tide. But there is no difference in kind. For in the end, all tide waters are connected to the sea. . . . [All these waters] share those "geographical, chemical and environmental" qualities that make lands beneath tidal waters unique.

Id. (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting)).

166. *Phillips*, 108 S. Ct. at 798.

167. *Id.* Navigability could not be the applicable rule, since many of Mississippi's cases "described uses of [public trust lands] not related to navigability, such as bathing, swimming, recreation, fishing, and mineral development." *Phillips*, 108 S. Ct. at 798; see *Treuting v. Bridge and Park Comm'n*, 199 So. 2d 627 (Miss. 1967). But see *infra* notes 255-71 and accompanying text for a discussion of Mississippi's common law.

168. *Phillips*, 108 S. Ct. at 799. The Court did not believe that there were any equitable considerations that might entitle *Phillips* to a different decision. *Id.* This determination was further supported by Mississippi law which held that the state could not lose ownership of lands by any equitable doctrines. *Id.*; see, e.g., *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 521 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988); *Gibson v. State Land Comm'r*, 374 So. 2d 212 (Miss. 1979); *City of Bay St. Louis v. Board of Supervisors*, 80 Miss. 364, 32 So. 54 (1902).

supported a general assertion of title and public trust dominion over all non-navigable tidal waters.¹⁶⁹ The dissent stated that the Court had never recognized state title to discrete, non-navigable waterways separate from any navigable body of water.¹⁷⁰ Justice O'Connor asserted that state title existed only to land underlying navigable waters, whether or not subject to tidal influence.¹⁷¹ Justice O'Connor also asserted that no reason existed for applying different tests to fresh-water and tidal waterways.¹⁷²

The dissent based its opinion on the English common-law public trust doctrine.¹⁷³ Under that law, navigable waterways were held for public use and the King had dominion over "the sea and the arms of the sea, 'where the sea flows and reflows,' " as well as the soils beneath those waters.¹⁷⁴ The dissent relied on *Martin v. Waddell*¹⁷⁵ for the proposition that the original states held lands within the public trust as successors to the English King.¹⁷⁶ States entering the union acquired under the equal footing doctrine title to lands and the same rights regarding the public trust as those held by the original states.¹⁷⁷ However, Justice O'Connor noted that the English common-law rule had not been applied to non-navigable tidal waters; rather, the English cases applied the public trust only to land underneath navigable water.¹⁷⁸

Additionally, the dissent considered purposes of a state's assertion of title and public trust dominion, stating that the "fundamental purpose

169. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting). Navigable waters included lands "beneath waters that were part of or immediately bordering a navigable body of water." *Id.* (O'Connor, J., dissenting); see *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894).

170. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting). The dissent recognized that "none of [the Court's] decisions recognized a State's public trust title to land underlying a discrete and wholly non-navigable body of water that is properly viewed as separate from any navigable body of water." *Id.* (O'Connor, J., dissenting).

171. *Id.* (O'Connor, J., dissenting).

172. *Id.* (O'Connor, J., dissenting).

173. *Id.* (O'Connor, J., dissenting).

174. *Id.* (O'Connor, J., dissenting) (quoting M. HALE, *DE JURE MARIS ET BRACHIORUM EJUSDEM*, cap. iv (1667), reprinted in R. HALL, *ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM*, apps. vii, ix (2d ed. 1875)).

175. 41 U.S. (16 Pet.) 367 (1842).

176. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting); see also *supra* notes 70-74 and accompanying text.

177. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting) (citing *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845)). For a discussion of the equal footing doctrine, see *supra* notes 84-88 and accompanying text.

178. *Phillips*, 108 S. Ct. at 801 (O'Connor, J., dissenting) (citing *Rex v. Smith*, 99 Eng. Rep. 283 (1780); *Le Roy v. Trinity House*, 82 Eng. Rep. 986 (1662)).

of the public trust is to protect commerce.”¹⁷⁹ Therefore, since the main public interest was commerce, jurisdiction of the public trust should be equivalent to admiralty jurisdiction.¹⁸⁰ The dissent thus relied on *The Propeller Genesee Chief v. Fitzhugh*,¹⁸¹ where the Supreme Court held that admiralty jurisdiction covered all navigable waterways, and recognized that admiralty jurisdiction did not depend on whether the ebb and flow of the tide affected the waterway.¹⁸² The dissent then concluded that because admiralty jurisdiction applied only to navigable waterways, the same test applied to the public trust in determining to which waterways states held title, and thus could be included in the trust.¹⁸³

The dissent also discussed other reasons why the ebb and flow rule should not determine the extent of state title. The dissent objected to the majority’s “test that will include in the public trust every body of water that is interconnected to the ocean, even indirectly, no matter how remote it is from navigable water.”¹⁸⁴ Instead, the dissent preferred a navigability test as the sole test to determine to which waterways and lands beneath them the state held title.¹⁸⁵ The dissent contended that testing by navigability would apply uniformly to any waterway, whether or not influenced by the tide, thereby eliminating the need to distinguish between salt and fresh water.¹⁸⁶ Thus, the dissent would have held that title to the forty-two acres remained in Phillips since the waterway,

179. *Id.* (O’Connor, J., dissenting). The dissent explained that according to precedent, navigable waterways were within the public trust to preserve the waterways for transportation. *Id.* (O’Connor, J., dissenting) (citing *Packer v. Bird*, 137 U.S. 661, 667 (1891)). The dissent conceded that “[s]tates may commit public trust waterways to uses other than transportation, such as fishing or land reclamation.” *Id.* (O’Connor, J., dissenting).

180. *Id.* (O’Connor, J., dissenting).

181. 53 U.S. (12 How.) 443 (1852).

182. *Phillips*, 108 S. Ct. at 801 (O’Connor, J., dissenting) (citing *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1852)). Subsequent cases also held that ebb and flow of the tide was not a proper test for the navigability of waters. See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

183. *Phillips*, 108 S. Ct. at 802 (O’Connor, J., dissenting). The dissent believed its propositions valid, even though the cases cited concerned inland, fresh-water waterways. *Id.* (O’Connor, J., dissenting) (citing *McGilvra v. Ross*, 215 U.S. 70, 78 (1909); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877)). Thus, the dissent determined that the same reasoning logically applied to both tidewaters and inland fresh-water waterways. *Id.* (O’Connor, J., dissenting). The dissent also cited the Submerged Lands Act to indicate Congress’ intent that lands beneath navigable waters were within the public trust, exclusive of tidal lands beneath non-navigable waters. *Id.* (O’Connor, J., dissenting) (citing 43 U.S.C. §§ 1301-1315 (1953)).

184. *Id.* at 803 (O’Connor, J., dissenting). The dissent also stated that the majority’s holding was “wholly inconsistent with the federal law” that determined to which inland fresh waters the states received title that thus could be included in the public trust. *Id.* (O’Connor, J., dissenting).

185. *Id.* at 802 (O’Connor, J., dissenting).

186. *Id.* (O’Connor, J., dissenting).

although tidal, was non-navigable.¹⁸⁷ Moreover, the dissent indicated that upon gaining statehood, states only acquired title to those waterways and lands beneath them that were navigable, irrespective of tidal influence.¹⁸⁸

IV. ANALYSIS

In *Phillips Petroleum Co. v. Mississippi*,¹⁸⁹ the Supreme Court of the United States held that each state upon gaining statehood acquired sovereign title and control over all its lands that were covered by water influenced by the tide.¹⁹⁰ In support of its holding, the Court stated that recognizing state title to all "tidelands," whether or not navigable, was consistent with its prior holdings.¹⁹¹ The Court also supported its decision on the basis that to hold otherwise would upset the reasonable expectations of property owners based upon the common-law confines of the public trust of the State of Mississippi.¹⁹²

The following analysis demonstrates that the Court's reliance upon precedent was misplaced since none of these cases addressed discrete, non-navigable tidal areas.¹⁹³ In its reliance on these cases, the Court destroyed any distinction between the non-navigable edge of a navigable river and discrete, non-navigable waterways.¹⁹⁴ The Court also misconstrued the ebb and flow rule as a separate test of navigability,¹⁹⁵ when in fact the rule was just a different way of stating the navigability rule as applied to tidal waters. Although the Court correctly determined that

187. *Id.* at 803-04 (O'Connor, J., dissenting). The dissent worried that the majority's decision would displace many record title holders and upset current expectations as to property rights. *Id.* at 804 (O'Connor, J., dissenting); see *infra* notes 272-80 and accompanying text. The dissent doubted that state courts would recognize any equitable doctrines that could defeat the public trust, pointing to Mississippi courts' refusals to consider estoppel against the state. *Phillips*, 108 S. Ct. at 804-05 (O'Connor, J., dissenting).

188. *Phillips*, 108 S. Ct. at 803-04 (O'Connor, J., dissenting).

189. 108 S. Ct. 791 (1988).

190. *Id.* at 795.

191. *Id.*

192. *Id.* at 798-99.

193. See, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Treuting v. Bridge and Park Comm'n*, 199 So. 2d 627 (Miss. 1967); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 192 (1933).

194. *Phillips*, 108 S. Ct. at 797. The Court stated that there was no need to make such a distinction, because "in the end, all tide waters are connected to the sea . . . [despite the possibility that] the lands at issue here differ in some ways from tidelands directly adjacent to the sea." *Id.*

195. *Id.* The *Phillips* Court described the ebb and flow rule as the test determining title in tidal areas, distinct from the navigability rule applying only to fresh waters. *Id.*

state law can limit or expand the confines of land held in the public trust,¹⁹⁶ the Court failed to fully explore and follow such state decisions. The Court also incorrectly concluded that its holding would not upset the reasonable expectations of property owners,¹⁹⁷ when in fact its holding raised the potential for that result.

A. Phillips' *Extension of the Public Trust Doctrine to Discrete, Non-navigable Tidelands*

In *Phillips Petroleum Co. v. Mississippi*,¹⁹⁸ the Supreme Court recognized that state title existed to areas that it had never before held to be state land.¹⁹⁹ As recognized by both the majority opinion²⁰⁰ and the dissenting opinion, the Court had never decided the issue presented in *Phillips*: "[W]hether a State holds [title to] all land underlying tidally influenced waters that are neither navigable themselves nor part of any navigable body of water."²⁰¹ By misconstruing the holdings of precedent and relying on dicta, the Court concluded that discrete, non-navigable inland tidelands were state land, and thus within the scope of the public trust.²⁰²

1. The ebb and flow rule: a synonym, not a separate test of navigability

One of the arguments propounded by Phillips was that "ebb and flow" and "navigability" were synonymous in the American common law.²⁰³ This contention was supported by the initial public trust cases, which stated that the waters that were state-owned and within the public

196. *Id.* at 798-99; see *infra* notes 238-42 and accompanying text.

197. *Phillips*, 108 S. Ct. at 798-99.

198. 108 S. Ct. 791 (1988).

199. *Id.* at 800 (O'Connor, J., dissenting).

200. *Id.* at 796. The majority stated that "[i]t is true that none of these cases actually dealt with lands such as those involved in this case." *Id.* (citing *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Hardin v. Jordan*, 140 U.S. 371 (1891); *McCready v. Virginia*, 94 U.S. 391 (1877)). However, the Court supported its reliance on these cases by stating:

[I]t has never been suggested in any of this Court's prior decisions that the many statements included therein—to the effect that the States owned all the soil beneath waters affected by the tide—were anything less than an accurate description of the governing law.

Id.

201. *Id.* at 800 (O'Connor, J., dissenting).

202. *Id.* at 795. The land involved in *Phillips* consisted of submerged land under 11 small drainage streams inland from the Gulf of Mexico, connected to the Gulf by way of the Jourdan River. *Id.* at 793; see *supra* notes 125-30 and accompanying text.

203. Brief for Petitioners at 19, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870).

trust were those that were navigable, irrespective of tidal influence.²⁰⁴ In these early Supreme Court cases, the Court necessarily had to interpret the English common law because English law was the only written law to which the courts had access.²⁰⁵ The early American cases involved disputes as to lands under navigable tidal rivers.²⁰⁶ Thus, the reference in the English cases to the ebb and flow of the tide was easily misconstrued as a test of navigability since the only rivers that were important to the English were those influenced by the tide.²⁰⁷

In fact, English cases and at least one commentator on English law recognized that tidal influence was not the test of navigability, and that some waters, such as small creeks, although affected by the tide were privately owned.²⁰⁸ This supported the argument that the state only held title to waterways upon which navigation was possible.²⁰⁹ Consistent with the public trust, then, private individuals could own small creeks that were non-navigable because physically they were too narrow or shallow for commercial use or navigation, despite being influenced by the tide.²¹⁰ These types of waterways would not be useful for commerce; hence, states did not claim title, and the public trust doctrine historically had not included them.²¹¹

204. In *Arnold v. Mundy*, 6 N.J.L. 1, 76 (1821), the court stated that waters within the public trust were "the navigable rivers in which the tide ebbs and flows." In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 414 (1842), the Court explained that the original states gained title to and public trust dominion over their navigable waters and their underlying lands because they were held in trust by the English sovereign. These two cases involved tidal navigable rivers. See *supra* notes 61-74 and accompanying text.

In later cases involving application of the public trust doctrine to non-tidal waters, discussion of state title and of the public trust doctrine as applied to all waters in all states specifically referred to navigability of the waters, not tidal influence. See, e.g., *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Packer v. Bird*, 137 U.S. 661 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

205. See *supra* note 60.

206. See *supra* notes 61-74 and accompanying text.

207. See *supra* note 41 and accompanying text. Tidal rivers were important to commerce and navigation because the tide provided propulsion for ships. *Id.*

208. *Mayor of Lynn v. Turner*, 98 Eng. Rep. 980 (1774) (tidal influence alone does not make a river navigable); see *supra* note 101. Additionally, in *Rex v. Montague*, 107 Eng. Rep. 1183, 1184 (1825), the court stated that "it does not necessarily follow, because the tide flows and refluxes in any particular place, that it is therefore a public navigation, although of sufficient size." See also Brief for Petitioners at 20-21, *Phillips* (No. 86-870).

One English commentator discussed the rights of private ownership in tidally influenced waters. Lord Hale recognized that "little streams and rivers," although affected by the tide, could be privately owned. S. MOORE, *supra* note 52, at 374.

209. See Brief for Petitioners at 19-22, *Phillips* (No. 86-870).

210. S. MOORE, *supra* note 52, at 374.

211. See *supra* note 204.

More recently, New Jersey has claimed title and public trust dominion over marsh and

The *Phillips* Court summarily discounted the above contentions, stating that “[t]he cases relied on by [Phillips] . . . did not deal with tidal, non-navigable waters.”²¹² The Court also selectively chose to rely on language in the English common law which seemed to indicate that all tidal rivers were navigable.²¹³ However, the case law upon which the majority relied did not deal with the same type of tidal, non-navigable waters at issue; the importance of this is explained in the following section.

2. The distinction between non-navigable borders of navigable tidewater and non-navigable tidewater

Although the Court recognized that the cases it cited did not specifically deal with the type of lands involved in *Phillips*, the Court de-emphasized the importance of the lack of specific precedent.²¹⁴ Instead, the Court focused on the principle in *Shively v. Bowlby*,²¹⁵ that the states had title to and broad dominion over the “lands beneath tidal waters.”²¹⁶ The Court interpreted this to mean that states had title to any tidelands within their borders.²¹⁷

The *Phillips* Court did not recognize any distinction between the non-navigable border of a navigable waterway, and a discrete non-navigable waterway.²¹⁸ The Court thus ignored the traditional definition of what constitute tidelands. The early common law recognized: (1) a grant of land bordering on a private waterway extended to mid-channel,²¹⁹ and (2) a grant of land bordering on a public waterway extended only to the mean high-tide line.²²⁰ The early public trust cases involved waterways that were navigable;²²¹ although the rivers involved were clearly within the definition of a public waterway according to navigability, disputes still arose as to ownership of the soil at the edge of the wa-

meadow areas that are not navigable because of heavy vegetation yet are influenced by the tide. See *infra* notes 289-92 and accompanying text.

212. *Phillips*, 108 S. Ct. at 796.

213. *Id.*

214. *Id.*; see also *supra* notes 161-65 and accompanying text.

215. 152 U.S. 1 (1894).

216. *Phillips*, 108 S. Ct. at 794 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

217. *Id.*

218. *Id.* at 797.

219. *Arnold*, 6 N.J.L. at 67; see also *supra* note 66.

220. *Shively*, 152 U.S. at 13; *Arnold*, 6 N.J.L. at 67. The *Shively* Court held that states have authority to utilize their public trust lands as they see fit, and thus some states have granted lands bordering public waterways down to the mean low-tide line. *Shively*, 152 U.S. at 54; *Jampol*, *supra* note 1, at 25.

221. See *Martin*, 41 U.S. (16 Pet.) at 407; *Arnold*, 6 N.J.L. at 65-66; see also *supra* notes 61-74 and accompanying text for a discussion of *Arnold* and *Martin*.

terway, between the high- and low-tide lines.²²² Disputes arose because technically, these tidelands between the high- and low-tide lines were too shallow to be navigable, yet were affected by the tide.²²³

Shively involved this same type of dispute, where an individual claimed title to lands below the high-water mark on the Columbia River in Oregon, a navigable tidal river.²²⁴ The *Shively* Court held that a grant of land bordering a navigable river did not pass title to the land below high-water mark, where the tide ebbed and flowed.²²⁵ Thus, the "sweeping statements of States' dominion over lands beneath tidal waters" relied upon by the *Phillips* Court applied to lands between high- and low-tide lines bordering navigable waters, not discrete areas of non-navigable waters affected by the tide.²²⁶

B. Rejection of the Ebb and Flow Test

Even if the ebb and flow test was recognized as a separate test of navigability, *Phillips* contended that this test was abandoned when the navigability-in-fact test was adopted.²²⁷ Clearly, the federal government

222. See *supra* notes 61-74 and accompanying text.

223. This common law definition of tidelands as land between high- and low-tide lines has become the accepted general definition. See BLACK'S LAW DICTIONARY 1329 (5th ed. 1979); see also *supra* notes 8-9 and accompanying text.

The *Phillips* Court recognized that Black provides the "common meaning" for the term tidelands, although the Court selectively quoted only part of this definition. *Phillips*, 108 S. Ct. at 795 n.6.

224. *Shively*, 152 U.S. at 9.

225. *Id.* at 51.

226. *Phillips*, 108 S. Ct. at 794. The Court similarly relied upon *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891), for the principle that "the settled rule of law . . . [is] that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States." *Phillips*, 108 S. Ct. at 794 (quoting *Knight v. United States Land Ass'n*, 142 U.S. 161, 183 (1891)). However, as in *Shively*, the dispute in *Knight* involved lands in San Francisco bordering on Mission Creek, "a navigable arm of the [San Francisco] bay." *Knight*, 142 U.S. at 183.

The *Phillips* Court recognized that a difference in degree existed between these tidelands and the lands in dispute, but dismissed the possibility of any relevance in a distinction:

Admittedly, there is a difference in degree between the waters in this case, and non-navigable waters on the seashore that are affected by the tide. But there is no difference in kind. For in the end, all tide waters are connected to the sea: the waters in this case, for example, by a navigable, tidal river. Perhaps the lands at issue here differ in some ways from tidelands directly adjacent to the sea; nonetheless, they still share those "geographical, chemical and environmental" qualities that make lands beneath tidal waters unique.

Phillips, 108 S. Ct. at 797 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting)).

The Court's sweeping definition encompasses every inch of tidal land, no matter where or how located.

227. Brief for Petitioners at 32-34, *Phillips* (No. 86-870).

abandoned the ebb and flow test as a definition of navigability in determining federal admiralty jurisdiction.²²⁸ Moreover, the navigability-in-fact test was used by the Court in subsequent public trust cases to determine whether state title existed to the waterways and lands in question.²²⁹ While no case has specifically rejected use of the ebb and flow rule to determine state title, the focus of these cases has been on waters that actually were navigable, and the lands that directly border these waters. Moreover, the Court has stated that "the term 'navigable waters,' as there used [in *Shively v. Bowlby*], meant waters which were navigable in fact."²³⁰

Despite these conclusions from prior public trust cases, the Court in *Phillips Petroleum Co. v. Mississippi*²³¹ did not interpret extension of state title to fresh waters as having any impact on tests of state title to tidal waters, which had consistently included all land under water influenced by the tide.²³² In the majority's opinion, navigability would be the test only as to fresh waters.²³³ But as to tidewaters, the Court determined that navigability was not an issue: The sole test was whether the land in question was underneath water affected by the tide.²³⁴ As demonstrated above, this determination was the product of flawed historical analysis. The majority's test recognized state title beyond the reach

228. In *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1852), the Court determined that the navigable character of a waterway depended upon whether the waterway was in fact navigable, and that a test of navigability dependent upon the ebb and flow of the tide was "utterly inadmissible."

The principles from *Genesee Chief* were later confirmed as the appropriate standard to test navigability in determining existence of admiralty jurisdiction in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). As the Court stated:

[T]he ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact . . . when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce.

Id. at 563.

229. *See, e.g.*, *Packer v. Bird*, 137 U.S. 661 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1876). These cases concerned disputes as to navigable fresh waters.

230. *McGilvra v. Ross*, 215 U.S. 70, 78 (1909) (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)). The Court further stated that "[t]he definition was not inadvertent or unnecessary." *Id.* Thus, no room was left for the ebb and flow test as a test of navigability when applied in tidal areas. *Id.*

231. 108 S. Ct. 791 (1988).

232. *Id.* at 797. The Court specifically stated that according to its precedents, the public trust doctrine had always included "all lands beneath waters influenced by the ebb and flow of the tide." *Id.* (emphasis in original).

233. *Id.*

234. *Id.* The majority considered the ebb and flow test to always have been in force and effect, and thus had no hesitation in affirming it as the test determining state title to tidewaters. *Id.* at 798.

contemplated by its own precedents, and as a result, similarly extended the reach of the public trust doctrine.²³⁵

In addition, by affirming the decision of the Mississippi Supreme Court,²³⁶ the majority also affirmed that court's farfetched definition of navigability:

[S]o long as by unbroken water course—when the level of the waters is at mean high water mark—one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries [that] we consider the United States set for the properties granted the State in trust.²³⁷

This court's test of navigability serves no purpose linked to navigation because a water course large enough to support a toothpick would not be large enough to support boat traffic. Similarly, this type of water course could serve no purpose for commerce, because it would not contain any fish large enough to be caught, and other commercial activity could not be supported without affecting the surrounding privately owned land.

C. *Inconsistencies With State Common Law*

According to the Supreme Court in *Shively v. Bowlby*,²³⁸ federal law determines to which lands states received title upon gaining statehood.²³⁹ However, the *Shively* Court recognized that each state developed its own public trust doctrine dealing with "the lands under the tide waters within its borders," relative to reservation of state control and granting private rights in public trust lands.²⁴⁰ This principle has been long established,

235. See, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

236. *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

237. *Id.* at 515. Compare the definition of navigability in *Oklahoma v. Texas*, 258 U.S. 574 (1921). In *Oklahoma*, the Court held that because a river dividing Oklahoma and Texas was not navigable, title to the bed of the river did not pass to Oklahoma as part of its public trust lands. *Id.* at 591. The Court stated that navigability in fact and in law did not exist where "the river is not susceptible of being used in its natural and ordinary condition as a highway for commerce." *Id.* at 587.

238. 152 U.S. 1 (1894).

239. *Id.* at 57. See *supra* notes 75-81 and accompanying text for a discussion of the federal and state law issues concerning the public trust doctrine.

240. *Shively*, 152 U.S. at 26. In summarizing its opinion, the *Shively* Court reaffirmed this principle, stating that "[t]he title and rights of riparian or littoral proprietors in the soil below high water mark . . . are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." *Id.* at 57-58.

as the Court recognized in *Phillips Petroleum Co. v. Mississippi*.²⁴¹ In determining whether Mississippi held title to the lands at issue in *Phillips*, and thus whether Mississippi could include these lands within the public trust, the Court not only had to consider its own cases that discussed the public trust, but also had to consider two other sources: (1) the common law of the thirteen original states, to determine whether Mississippi would be entitled to these lands under the equal footing doctrine; and (2) the common law of Mississippi, to determine whether Mississippi had already claimed such lands as within its public trust dominion.²⁴²

1. The common law of the thirteen original states

Pursuant to the equal footing doctrine, new states received title to certain of their lands, and received additional rights upon gaining statehood equivalent to those held by the original thirteen states.²⁴³ Since state common law dictated the limits of lands placed within the public trust,²⁴⁴ a discussion of the common law of the original thirteen states is relevant to understanding how the public trust doctrine has been applied.²⁴⁵ The *Phillips* Court discussed cases from some of these states to justify its holding.²⁴⁶ However, as the *Phillips* Court recognized, where the common law of a state has severely limited state control over public trust lands, such as in Massachusetts, this law cannot be forced upon states which have exercised greater control over their lands.²⁴⁷

Contrary to the *Phillips* Court's view,²⁴⁸ the cases it discussed did

241. 108 S. Ct. 791, 794 (1988). As the *Phillips* Court reaffirmed, "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)).

242. *Id.* at 794-95, 798-99.

243. See *supra* notes 84-88 and accompanying text for a discussion of the equal footing doctrine.

244. *Phillips*, 108 S. Ct. at 794 (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)); see also *supra* notes 240-41 and accompanying text.

245. A full discussion of the common law of each of the states is beyond the scope of this Note. For a complete discussion of the common law of each state, see Appendix to Petitioner's Reply Brief, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870); Brief *Amicus Curiae* of the Original Thirteen States in Support of Respondents, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870).

246. *Phillips*, 108 S. Ct. at 794-95, 798-99.

247. *Id.* at 794-95. Massachusetts cases have recognized that "little creeks into which the salt water flows, but which are incapable of being navigated at all," may be privately owned. *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 186 (1822). Massachusetts case law also discussed navigability, determining that "not every ditch, in which the salt water ebbs and flows," was navigable for purposes of the public trust doctrine. *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 347 (1838).

248. *Phillips*, 108 S. Ct. at 794-95, 798-99.

not suggest as extensive an application of the public trust doctrine as reached by the Court. For example, state courts have held that the public trust includes tidal flats adjacent to an arm of the sea,²⁴⁹ salt marshes adjacent to navigable water,²⁵⁰ and navigable fresh-water lakes.²⁵¹ One court did describe the test for determining public waters as “[w]aters in which the tide ebbs and flows—so far only as the sea flows and reflows.”²⁵² However, none of the above decisions concerned discrete, non-navigable tidal waters such as those at issue in *Phillips*,²⁵³ and the decisions did not reach as extensively as the *Phillips* decision.²⁵⁴ Thus the states, which historically have not included remote non-navigable tidelands within the public trust, are now, after *Phillips* decided that states have title to these areas, free to greatly expand their public trusts beyond the reach their courts have previously contemplated.

2. The common law of Mississippi

The *Phillips* Court determined that its holding was consistent with the common law of Mississippi, which “appear[ed] to have consistently held that the public trust in lands under water includ[ed] ‘title to all the land under tidewater.’”²⁵⁵ However, the Mississippi cases upon which the Court relied do not have such extensive holdings. For example, *Rouse v. Saucier’s Heirs*²⁵⁶ concerned a salt marsh, which the court held to be public trust land because the marsh was alongside a navigable river.²⁵⁷ In *Treuting v. Bridge and Park Commission*,²⁵⁸ the court held that submerged lands affected by the tide, on the shores of an island in

249. *Simons v. French*, 25 Conn. 346, 352-53 (1856).

250. *State v. Pinckney*, 22 S.C. 484, 507-09 (1885).

251. *Cobb v. Davenport*, 32 N.J.L. 369, 377 (1867).

252. *Id.* at 378. The court stated that waters not affected by the ebb and flow of the tide were private waters, such as the waters in this case. *Id.*

253. *Phillips*, 108 S. Ct. at 793; see *supra* notes 125-30 and accompanying text.

254. The majority did not discuss more recent New Jersey decisions that have extended the physical reach of the public trust doctrine, although these decisions did not discuss discrete, non-navigable tidelands. See, e.g., *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *O’Neill v. State Highway Dep’t*, 50 N.J. 307, 235 A.2d 1 (1967); see also *infra* notes 293-301 and accompanying text.

The dissent expressed its fear that the test adopted by the majority would apply the public trust to any land affected by tidal water, even though the tidal influence was indirect, or the tidal water remote from any navigable water. *Phillips*, 108 S. Ct. at 803 (O’Connor, J., dissenting); see *supra* notes 184-86 and accompanying text. See *supra* note 237 and accompanying text for the “toothpick” test of navigability described by the Mississippi Supreme Court.

255. *Phillips*, 108 S. Ct. at 798 (quoting *Rouse v. Saucier’s Heirs*, 166 Miss. 704, 713, 146 So. 291, 291-92 (1933)).

256. 166 Miss. 704, 146 So. 291 (1933).

257. *Id.* at 712-13, 146 So. at 291-92.

258. 199 So. 2d 627 (Miss. 1967).

the navigable Mississippi Sound, were within the scope of the public trust because the land was on the edge of navigable water.²⁵⁹ In *Downes v. Crosby Chemicals, Inc.*,²⁶⁰ the court stated that the test of navigability in determining the scope of the public trust was navigability in fact in finding that a fresh-water creek was non-navigable and therefore, privately owned.²⁶¹ In *State ex rel. Rice v. Stewart*,²⁶² the court held that Bayou Bernard, a navigable tidal arm of the Mississippi Sound, was within the public trust because the waterway itself was navigable.²⁶³

In its decisions concerning non-tidal waters, the Mississippi Supreme Court has clearly held that only waters that are navigable are included in the public trust.²⁶⁴ Concerning tidal waters, the court has applied the public trust doctrine only to navigable tidal waters.²⁶⁵ The court has also applied the doctrine to non-navigable tidal waters that were on the shore of or adjacent to navigable tidal waters.²⁶⁶ The court has also stated that its decisions were consistent with decisions of the Supreme Court of the United States.²⁶⁷ In addition, the court conceded that in the *Phillips* case it was confronting the question of the public trust doctrine's application to discrete, non-navigable tidelands for the first time.²⁶⁸

The *Phillips* Court's view of Mississippi's common law was superficial.²⁶⁹ In review of that law, the only Mississippi case that clearly held that the public trust included all lands affected by the tide irrespective of navigability was *Phillips*.²⁷⁰ Thus, the *Phillips* Court mistakenly concluded that Mississippi law consistently held that lands such as those concerned in *Phillips* were clearly within the public trust, and that the state had always claimed title to such lands,²⁷¹ when in fact Mississippi's

259. *Id.* at 629, 632-33.

260. 234 So. 2d 916 (Miss. 1970).

261. *Id.* at 918-19. No mention was made in this opinion as to the existence of any other test except a navigability-in-fact test.

262. 184 Miss. 202, 184 So. 44 (1938).

263. *Id.* at 228-31, 184 So. at 49-50. In this case, the court stated that Mississippi had effectively adopted the common law of England, and therefore held title to the soils underlying navigable waters and their shores, up to high-water mark. *Id.* at 224, 184 So. at 47.

264. *Downes*, 234 So. 2d at 918-19.

265. *State ex rel. Rice*, 184 Miss. at 224-25, 184 So. at 47-48.

266. *Treuting*, 199 So. 2d at 629, 632-33.

267. *State ex rel. Rice*, 184 Miss. at 228-29, 184 So. at 49 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

268. *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 516 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

269. See *supra* note 167 and accompanying text.

270. *Cinque Bambini*, 491 So. 2d at 516.

271. *Phillips*, 108 S. Ct. at 798.

law had not reached such a conclusion.

D. *Effects On Reasonable Property Expectations*

In *Phillips Petroleum Co. v. Mississippi*,²⁷² the Court supported its conclusion by stating that to hold otherwise would upset the reasonable expectations of property owners.²⁷³ The Court was "skeptical" that its decision "[would] have sweeping implications, either within Mississippi or [in other states]."²⁷⁴ However, as has been shown, none of the Court's prior decisions held that states received title to discrete, non-navigable tidelands. Moreover, the precedent upon which the *Phillips* Court relied were almost all a century old;²⁷⁵ not until the 1960s and 1970s had the public trust doctrine revived to the level it enjoyed in the nineteenth century.²⁷⁶ As the dissent recognized, the now rejuvenated ebb and flow test "will include in the public trust every body of water that is interconnected to the ocean, even indirectly, no matter how remote it is from navigable water."²⁷⁷ Thus, not only could record-title holders be dispossessed from lands they thought were theirs, but states would now be encouraged to expand the scope of their own public trusts because the Supreme Court has recognized that states have title to a greater area than previously.²⁷⁸

The effects of a finding that states hold title to and that certain lands are within the public trust—especially lands such as in *Phillips* that had not previously been held to be within the scope of the trust—would be felt most readily by those property owners unaware that the land conveyed to them was within the trust.²⁷⁹ This seems especially unjust when many years have passed without the state claiming title or exercising authority over the lands.²⁸⁰ As pointed out by the dissent in *Phillips*, Mississippi did not claim title to or exercise any public trust authority over

272. 108 S. Ct. 791 (1988).

273. *Id.* at 799.

274. *Id.* at 798.

275. *See, e.g.,* *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855).

276. *Jampol, supra* note 1, at 4-5; *Lazarus, supra* note 2, at 643-44.

277. *Phillips*, 108 S. Ct. at 803 (O'Connor, J., dissenting).

278. *Id.* at 804 (O'Connor, J., dissenting). States already have an incentive to include as much land as possible within their public trusts, since a holding that particular property is within the public trust avoids a takings issue; thus the state would not have to compensate the "owner." Berland, *Toward the True Meaning of the Public Trust*, 1 SEA GRANT L.J. 83, 135 (1976); *see also* *Lazarus, supra* note 2, at 648 (public trust doctrine can be used to achieve "natural resources goals" without "problems of unconstitutional takings").

279. *Phillips*, 108 S. Ct. at 804 (O'Connor, J., dissenting).

280. *Id.* at 800 (O'Connor, J., dissenting).

the lands until 150 years after statehood.²⁸¹ Some of the effects on a property owner's expectations resulting from such non-action by a state are illustrated in the following examples from New Jersey and California.

1. The New Jersey example

One fear of the dissent in *Phillips*, that recognizing greater areas of state title and expanding the scope of the public trust doctrine would upset property expectations,²⁸² was already realized in New Jersey prior to *Phillips*.²⁸³ In the early public trust case of *Arnold v. Mundy*,²⁸⁴ the New Jersey Supreme Court (then the Court of Errors and Appeals) held that navigable waters influenced by the tide were within the public trust.²⁸⁵ In *Gough v. Bell*,²⁸⁶ the court applied the public trust doctrine to tidelands at the shore of navigable waters.²⁸⁷ These two cases were typical applications of the public trust doctrine by the New Jersey courts through the 1950s: courts applied the public trust doctrine to tidelands at the boundaries of navigable waterways and the seashore.²⁸⁸

However, in 1959, the State of New Jersey began to use the public trust doctrine to assert title to marshes and meadows, areas affected by the tides but clearly not navigable because of heavy vegetation.²⁸⁹ Many properties were taken by the state without compensating the record owners or lienholders.²⁹⁰ This resulted in much litigation over title to the lands which the state claimed and confiscated.²⁹¹ As a result, titleholders suddenly found themselves divested of the property which they had thought they owned.²⁹²

Similarly, the expectations of property owners were upset after

281. *Id.* (O'Connor, J., dissenting). The majority resolved this issue by pointing out that since Mississippi law did not allow equitable doctrines to be applied against the state, Mississippi could not lose its title to public trust lands by any delay in action. *Id.* at 799.

282. *Id.* at 803-04 (O'Connor, J., dissenting).

283. See, e.g., *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *O'Neill v. State Highway Dep't*, 50 N.J. 307, 235 A.2d 1 (1967); see also *infra* notes 293-301 and accompanying text.

284. 6 N.J.L. 1 (1821); see also *supra* notes 61-69 and accompanying text.

285. *Arnold*, 6 N.J.L. at 76-77. The focus of *Arnold*, as in other early public trust cases, was on navigable tidal waters. *Id.*; see also *supra* notes 61-74 and accompanying text.

286. 21 N.J.L. 156 (N.J. Sup. Ct. 1847).

287. *Id.* at 160. The *Gough* decision allowed owners of land above the high-water mark to construct improvements, such as wharves, in the tidelands as long as they did not interfere with navigation. *Id.*; see also Comment, *supra* note 84, at 840.

288. Porro & Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323, 325 (1972).

289. *Id.* These areas were also not adjacent to any watercourses. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 325-26.

O'Neill v. State Highway Department.²⁹³ The *O'Neill* case involved tidelands along the Hackensack River, which the New Jersey Supreme Court held were within the public trust.²⁹⁴ However, the tidelands were no longer affected by the tide because they had been developed for residential housing.²⁹⁵ Unaware that their homes rested on former tidelands,²⁹⁶ the residents who had purchased these homes were shocked by the court's decision that New Jersey had public trust title.²⁹⁷ Nevertheless, the court held that the state was not required to exercise authority over lands or give notice to the alleged owners in order to exercise dominion pursuant to the public trust.²⁹⁸

New Jersey courts have expanded the public trust doctrine in other ways as well. For example, in *Neptune City v. Avon-By-The-Sea*,²⁹⁹ the New Jersey Supreme Court held that the public trust doctrine which protects public rights in seashores also protects the public's right of access to those public trust lands.³⁰⁰ Thus, the court extended the public trust doctrine to beaches above the high-tide line under the justification that public trust purposes included recreation, the scope of which encompassed beaches.³⁰¹ The importance of this case was that the court used the public trust doctrine to permit the state to control land *above* the high-tide line, albeit adjacent to the seashore.

2. California: the recent resurgence of the public trust doctrine

Eldridge v. Cowell,³⁰² one of the earliest public trust doctrine cases in California, decided in 1854, involved grants to private individuals of tidelands along San Francisco Harbor.³⁰³ The *Eldridge* court held that the state could convey tidelands to private owners free of the public trust, where such grants were for the general good.³⁰⁴ The court also stated

293. 50 N.J. 307, 235 A.2d 1 (1967).

294. *Id.* at 320, 235 A.2d at 8.

295. *Id.*

296. *Id.*

297. Comment, *supra* note 84, at 845.

298. *O'Neill*, 50 N.J. at 326-27, 235 A.2d at 11; *see also* Comment, *supra* note 84, at 845.

299. 61 N.J. 296, 294 A.2d 47 (1972).

300. *Id.* at 304, 294 A.2d at 54.

301. *Id.* at 303-04, 294 A.2d at 54-55. In holding that the public trust doctrine encompassed beaches, the court struck down an Avon-By-The-Sea law which discriminated against outside residents as to the fees charged for beach access. *Id.*; *see Jaffee, The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. Avon-By-The-Sea—A Case of Happy Atavism?*, 14 NAT. RESOURCES J. 309, 310 (1974).

302. 4 Cal. 80 (1854). *See Jampol, supra* note 1, for a complete discussion of the development of the public trust doctrine in California law.

303. *Eldridge*, 4 Cal. at 87.

304. *Id.*; *see also Jampol, supra* note 1, at 30.

that such grants could be made where there would be no material interference with navigation resulting from the grant.³⁰⁵

By 1913, the California Supreme Court no longer upheld the *Eldridge* principles,³⁰⁶ as shown by its decision in *People v. California Fish Co.*³⁰⁷ In *California Fish*, the dispute involved tidelands in and adjacent to the navigable waters of San Pedro Bay.³⁰⁸ The California Supreme Court held that these tidelands were part of the public trust, and invalidated grants of the tidelands from the state to private individuals.³⁰⁹

Subsequent to *California Fish*, up to 1970, there were few cases decided that involved the public trust doctrine.³¹⁰ However, the California Supreme Court reinvigorated the doctrine in the 1971 decision of *Marks v. Whitney*.³¹¹ In *Marks*, the court stated that the public trust doctrine encompassed many flexible uses, including: fishing, hunting, bathing, swimming, boating, anchoring, and standing, among others.³¹² The court held that the tidelands between the high- and low-tide lines adjacent to Tomales Bay, a navigable body of water, were within the public trust.³¹³ The *Marks* decision has been described as a "major expansion of permissible trust uses," and as an affirmation of absolute state control over tidelands.³¹⁴

California decisions regarding the public trust doctrine have applied the doctrine to those tidelands between high- and low-tide lines and adjacent to navigable waters.³¹⁵ The effect of the *Phillips* decision in California would be to allow further expansion of the public trust doctrine. California law has already expanded the permissible uses of the public trust doctrine; now, pursuant to *Phillips*, the state will be able to apply

305. *Eldridge*, 4 Cal. at 87-88.

306. Jampol, *supra* note 1, at 49.

307. 166 Cal. 576, 138 P. 79 (1913). *California Fish* has been described as a landmark case in California public trust law. Jampol, *supra* note 1, at 5.

308. *California Fish*, 166 Cal. at 582, 138 P. at 81. The court referred to the tidelands in controversy as only involving "the land lying between the ordinary high and low tide lines." *Id.* at 583, 138 P. at 82.

309. *Id.* at 596-99, 138 P. at 87-89.

310. Jampol, *supra* note 1, at 5 & nn.11-12.

311. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

312. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

313. *Id.* at 258-59, 491 P.2d at 379-80, 98 Cal. Rptr. at 795-96.

314. Jampol, *supra* note 1, at 12.

315. *See, e.g.*, *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928); *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 50 P. 277 (1897).

these public trust uses to a much larger geographical area.³¹⁶

*E. Proposals For Applying the Public Trust Doctrine
Subsequent to Phillips*

1. States should not expand the doctrine by use of the ebb and flow test

As a result of *Phillips Petroleum Co. v. Mississippi*,³¹⁷ states will be encouraged to expand the public trust to include lands never previously included.³¹⁸ However, as to future disputes involving discrete, non-navigable tidelands such as those at issue in *Phillips*, courts should refrain from following the reasoning of the *Phillips* Court because the analysis disregards over 150 years of precedent which recognized that states held title *only* to navigable waters and their non-navigable shores.³¹⁹ The ebb and flow rule *is* a bright line rule which could provide certainty to future property owners, who would be forewarned that any grant of land under tidal water would be subject to the public trust. However, the prospect of future certainty ignores the current disruption of settled property expectations, and the likely increase in litigation over this issue. Thus, courts should avoid expanding the public trust doctrine based on the *Phillips* Court's reasoning.

2. States should cautiously expand the purposes of the public trust doctrine, not its physical reach

The *Phillips* Court recognized that some courts have extended the public trust doctrine by expanding the purposes for which public trust lands can be used beyond the traditional uses of navigation, commerce and fishing.³²⁰ The Court noted that it has upheld past decisions that have included tidal lands within the public trust for other purposes, such

316. *Phillips*, 108 S. Ct. at 795. Other jurisdictions will do so as well. See Yiannopoulos, *Five Babes Lost In the Tide—A Saga of Land Titles in Two States: Phillips Petroleum Co. v. Mississippi*, 62 TUL. L. REV. 1357 (1988), for a discussion of the effects of the *Phillips* decision on Louisiana law. But see Note, *supra* note 38 for a discussion of the public trust doctrine in Washington law and the author's viewpoint that the *Phillips* case will not have detrimental effects.

317. 108 S. Ct. 791 (1988).

318. States have attempted to assert the public trust doctrine as broadly as possible, because the state can thus avoid any issues of taking without just compensation. See *supra* note 278.

319. See, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Treuting v. Bridge and Park Comm'n*, 199 So. 2d 627 (Miss. 1967); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 192 (1933); *Arnold v. Mundy*, 6 N.J.L. 1 (1821).

320. *Phillips*, 108 S. Ct. at 795.

as urban expansion.³²¹ Indeed, the *Phillips* Court affirmed the principle that state courts may develop their own limits on the scope of the public trust doctrine.³²² However, the Court did not even discuss the purpose behind Mississippi's exercise of authority over the lands in question, and did not address whether the state even had a purpose in this case. Therefore, the *Phillips* decision should not be read as a green light for states to haphazardly expand the scope of the doctrine's purposes.³²³

The *Phillips* decision nonetheless should not bar a state from cautiously expanding the purposes of the public trust doctrine to exercise control over its lands that were traditionally recognized as state-owned. As with other public trust decisions, cases that have expanded the purposes have involved tidelands on the shore of navigable waters.³²⁴ Due to modern concerns regarding the environment, conserving natural resources, and excessive urban development in coastal areas, states may desire to exercise increasing control over their public trust lands. Some courts, however, have gone beyond increasing the number of purposes for which the doctrine should be applied; they have actually increased the physical scope of the doctrine to include, for example, lands even above the high-tide line.³²⁵ States should not expand the physical scope of the public trust doctrine beyond its traditional reach solely because of current public concerns, even though *Phillips* recognized the existence of state title to a greater extent than before. Such action contains the same potential of upsetting settled property expectations that can result from the *Phillips* decision.³²⁶

3. The navigability-in-fact test: the best solution

As stated by the dissent in *Phillips*, no good reason exists supporting different tests to determine state title, and for delineating the scope of the public trust doctrine as applied to fresh water and salt water.³²⁷ Navigability should be the sole test of public trust lands.

321. *Id.*; see *supra* note 155.

322. *Phillips*, 108 S. Ct. at 794-95, 798-99; see *supra* notes 240-41 and accompanying text.

323. One author has described the public trust's purpose merely as a navigational servitude, only applicable where the waters in question were navigable. See Jampol, *supra* note 1, at 83.

324. For example, the California case of *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971), involved tidelands on the shores of Tomales Bay, a navigable body of water. *Marks* enumerated a broad list of appropriate public trust purposes, including: bathing, swimming, boating, recreation, preserving lands in their natural state for scientific study, and providing habitats for birds and marine life. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

325. See *supra* notes 299-301 and accompanying text.

326. See *supra* notes 272-81 and accompanying text.

327. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting).

The advantages to a navigability test are clear. The ebb and flow test seems to be a bright line rule, and in theory would be easily applicable. Practically, however, the ebb and flow test would engender disputes between states and private parties over lands not previously included in the public trust. In contrast, applying a navigability test would involve lands that have long been used for navigation and other public trust purposes, and would not disrupt settled expectations of private landowners. Additionally, navigability has been used as the test according to precedent; navigability imparts a settled degree of certainty in judicial application.³²⁸ Thus, the most practical, as well as equitable, application of the public trust doctrine is only as to those waters that are navigable and to their shores, irrespective of whether the waters are fresh or tidally influenced.

V. CONCLUSION

In *Phillips Petroleum Co. v. Mississippi*,³²⁹ the Supreme Court of the United States recognized greater boundaries of state title, and extended the reach of the public trust doctrine to unprecedented bounds. The Court held that states have title to all their tidelands—whether discrete, non-navigable waters remote from any navigable waters, or non-navigable waters adjacent to navigable waters—and therefore that these lands were within the scope of the public trust.³³⁰ The decision exceeded the boundaries of state-owned land as described in federal common law, and exceeded the scope of the traditional public trust doctrine as described in state common law by creating a bright-line rule—using the ebb and flow test—that states hold title to all land under water affected by the tide, abandoning any need for distinction between navigable and non-navigable waters in tidal areas.³³¹

Phillips provides a potential for great upset of settled expectations in property rights; with the Court's strong affirmation of a blanket tidal test, states have received encouragement to exercise their public trust powers in tidal areas that the Court recognized they now own. This potential would not now exist had the Court followed the more logical common-law navigability-in-fact test to determine to which lands the state held title.

Although *Phillips* held that states have title to all non-navigable tidelands, states remain free to determine whether or not they will actu-

328. *Id.* (O'Connor, J., dissenting).

329. 108 S. Ct. 791 (1988).

330. *Id.* at 795.

331. *See supra* notes 214-26 and accompanying text.

ally apply the public trust doctrine to these lands.³³² States should refrain from using the ebb and flow test to expand the physical reach of their public trusts. Instead, states desiring to expand the scope of their trusts should consider the purposes of the trusts, and balance public interests with the effects on private interests before expanding their trusts. The best application of the public trust doctrine would be to continue the use of a navigability-in-fact test—to all waters, not just fresh waters. This would be consistent with past application of the public trust doctrine and equitable to private landowners.

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332. *Phillips*, 108 S. Ct. at 794-95. The Court stated that its holding would not affect the scope of the public trust doctrine in other states, including those states which had recognized private rights in discrete, non-navigable waters, unburdened by a public trust. *Id.*; see also *supra* notes 243-47 and accompanying text.

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