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Robert E. Beck

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HUGHES V. WASHINGTON: SOME FEDERAL COMMON LAW IN THE REAL PROPERTY AREA

ROBERT E. BECK*

I. *THE PROBLEM*

In Hughes v. Washington,[1] Mr. Justice Black speaking for the United States Supreme Court put the question for decision as follows: "whether federal or state law controls the ownership of land, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood."[2] The answer that the court gave was that federal law controlled. Looking at Justice Black's posit of the question, several factors are mentioned that could have been decisive for the court. (1) Was it simply that there was a federal conveyance? (2) Was it that "ownership," that is "title," rather than some other issue was involved? (3) Was it that accretion rather than some other issue was involved? (4) Was it that an ocean, rather than an inland, boundary was involved? (5) Was it that the conveyance was made prior to Washington statehood? (6) Or was it a combination of one or more of the foregoing?

What makes the answers to these questions immediately of fundamental importance is the interpretation put upon the majority opinion by Justice Stewart in his concurring opinion. He clearly focuses on the existence of the "federal grant" as the necessary nexus for the majority and points out what the ultimate conclusion will be if that reasoning is accepted: "For if they [riparian owners deriving their title from the federal government] were [immune from the changing of general state rules], then the property law of a state like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union."[3] If such is indeed the import of the ma-

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* Professor of Law, University of North Dakota School of Law, LL.B. University of Minnesota, LL.M. New York University.

1. Hughes v. Washington, 389 U.S. 290 (1967).
2. *Id.* at 290-91.
3. *Id.* at 295.

jority opinion, it is, without doubt, of fundamental importance, including to North Dakota.[4]

Before going on to an analysis of the opinion, it is important to bring out clearly that two major problems exist: (1) Is there a federal question?[5] (2) If so, what is the federal law? The federal law under (2) could be to apply the rule of the state where the land is located.[6] The Court's answer in *Hughes* that federal law controlled meant not only that there was a federal question but that state law would be disregarded as to (2).

II. THE FACTS OF HUGHES

In 1859 the federal government completed a survey of the general locality in question. The ocean meander line was, however, established east of the tract now admittedly owned by plaintiff, Mrs. Hughes. Plaintiff derived her title from predecessors whose patent from the federal government predated statehood. Apparently all or most[7] of what is now plaintiff's property was formed by accretion between 1859 and November 11, 1889, the date that Washington was admitted to statehood. The State of Washington, as owner of the bed where the alluvion formed, claimed all of the alluvion formed by accretion since its admission to the Union on November 11, 1889, because of a constitutional provision adopted at that time. The Supreme Court of Washington in a 7-2 decision agreed with the State.[8]

4. "All the land within the state of North Dakota was within the public domain and title was only to be acquired from the United States of America." Ruemmele, *Title Evidencing in North Dakota*, 43 N.D.L. REV. 467, 468 (1967).
5. The federal constitution provides in part:
"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ." *U.S. Const.* Art. III § 2. If a matter meets the "arising under"test, it is said that a "federal question" exists.
In commenting upon the wide-open door regarding the interpretation of "arising under" in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), Professor Wright observed: "But to hold that the 1875 statute gives federal jurisdiction whenever some element of federal law is an 'ingredient' of the cause of action would mean, for example, that virtually every case involving the title to land in the western states, where title descends from a grant from the United States, could be litigated in federal court" (C. WRIGHT, FEDERAL COURTS 49-50 (1963), his clear implication being that this would be an absurd result. *See* Act of March 3, 1875, Ch. 137, § 1, 18 Stat. 470 concerning the original jurisdiction granted to federal courts of the United States. Thus Professor Wright felt that the statute should be given a more restrictive interpretation than the Constitution. *See also* Act of Sept. 24, 1789, Ch. 20 § 13, 1 Stat. 73, 81 that declares, "The Supreme Court shall also have appelate jurisdiction from the circuit courts and courts of the several States . . . ."
6. In some instances it has to be applied.
See Act of Sept. 24, 1789, Ch. 20 § 34, 1 Stat. 73, 92 which provides that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they may apply."
See also Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1945).
7. This is not clear from the facts. The 1859 survey meander line clearly was east of what is now plaintiff's tract. But how close the meander line was to the ocean water is not clear.
8. Hughes v. Washington, 410 P.2d 20 (Wash. 1966). *See also* 11 ST. LOUIS U.L.J. 122

In reversing the state court, the majority of the United States Supreme Court, per Mr. Justice Black, said that *Borax, Consolidated Ltd. v. Los Angeles*[9] pointed the way for decision. This is the principal case relied upon by the majority and must, therefore, be analyzed for its relevance and limits.

III. *BORAX, CONSOLIDATED LTD. V. LOS ANGELES*

A. The Black View of *Borax*

According to Mr. Justice Black, the *Borax* case, which was decided in 1935,

(1) held that the *extent* of a federal grant was a federal question;
(2) has never been doubted since; and
(3) was rightly decided in choosing federal law because it dealt

"with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land'."[10] Beautiful prose, but what does it mean? No one doubts that the state owns the tidelands. The question for decision is strictly as to the dividing line between the upland and the tidelands and not as to the dividing line between the tidelands and the lands outward from there. So how does the former question affect the Nation's boundaries? Or is the Court merely lapsing back to the arguments from the old submerged lands controversy?[11]

B. The *Borax* Opinion.

In 1850 California became a state and upon admission it succeeded to ownership of the land underlying the tide waters.[12] In

(1966) *and* Note, *Federal Law and Seashore Accretion*, 28 LA. L. REV. 655 (1968). While there is some controversy as to whether the Washington Constitutional provision was really intended to cut off private ownership of future alluvion, the Washington Supreme Court so interpreted it and that conclusion will be accepted for the purpose of this comment.

9. Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935) (Mr. Justice McReynolds dissenting).

10. Hughes v. Washington, 389 U.S. 290, 293 (1967).

11. *See* Alabama v. Texas, 347 U.S. 272 (1954) *and* United States v. Louisiana, 389 U.S. 155 (1967).

12. This is generally referred to as coming in on "an equal footing." The Constitutional argument is presented as follows in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845), quoting in part from Martin v. Waddell, 41 U.S. (16 Pet.) 366 (1842):

> "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.
> By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, the right of the United States to the public lands, and the power of Con-

1880 the federal survey was made of the area. In 1881 the federal government gave a patent to one Banning. If the land in question was tidelands and, therefore, belonged to California the federal government had no power to convey it to Banning, and thus his successors, in turn, would have no claim. The United States Supreme Court held, first, that the Federal Land Department's decision was not conclusive since its jurisdiction extended only to "public lands of the United States,"[13] and here the very question in dispute was as to the boundary between state and federal lands. Then, since the Court of Appeals had also determined that the status of the land should be determined by the District Court on remand, it moved to consider the correctness of the Appeal's Court instruction that the "mean high tide line" rather than the "neap tide line" should be used. The Court appeared to address itself first to the existence of a "federal question"; but in reality it was deciding the choice of law issue:[14]

> The question as to the extent of this federal grant, that is as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.[15]

The Court then cited four of its own decisions as authority.[16] It drew a distinction between this "federal question" and questions as to "Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law."[17] For this observation the Court also cited four of its own decisions,[18] but none of the former four were cited.

C. The Earlier Decisions Cited by the *Borax* Court to support the "Federal Question" Language.

(1) The Cases Considered Individually

(a) Packer v. Bird[19]

The question to be decided was whether a federal patent con-

gress to make all needful rules and regulations for the sale and disposition thereof, confer no power to grant the plaintiff the land in controversy in this case."

13. Borax, Ltd. v. Los Angeles, 296 U.S. 10, 17 (1935). In so holding, the Court distinguished Knight v. U.S. Land Ass'n., 142 U.S. 161 (1891) which Mr. Justice McReynolds in dissenting in *Borax* relied upon exclusively. The distinction seems tenable, and since the case has no particular relevance to *Hughes*, it will not be detailed.

14. For a more detailed discussion see p. 89 *infra*.

15. Borax, Ltd. v. Los Angeles 296 U.S. 10, 22 (1935).

16. "Packer v. Bird, 137 U.S. 661, 669, 670; Brewer-Elliott Co. v. United States, 260 U.S. 77, 87; United States v. Holt Bank, 270 U.S. 49, 55, 56; United States v. Utah, 283 U.S. 64, 75." *Id.* at 22.

17. *Id.* at 22.

18. "Barney v. Keokuk, 94 U.S. 324, 338; Shively v. Bowlby, *supra*, p. 40, [152 U.S. 1, 40] Hardin v. Jordan, 140 U.S. 371, 382; Port of Seattle v. Oregon and Washington R. Co., 255 U.S. 56, 63." *Id.* at 22.

19. Packer v. Bird, 137 U.S. 661 (1891).

veyed land to the middle of the Sacramento River in California or whether the boundary stopped at the river's edge. The area in question was above the influence of the tide, but California claimed that the Sacramento River was still navigable in fact at this point. The United States Supreme Court decided that it had used the navigable in fact test rather than the common law test ever since The Genesee Chief[20] to determine navigability. Therefore, California was right, and the underlying beds properly belonged to the State. If the State wanted to cede its land to the abutting landowner that was its business. Since the Supreme Court agreed with the more liberal California test for determining navigability there was, of course, no real confrontation as between federal and state jurisdiction, since the law of both jurisdictions was therefore the same. And the *Packer* case has generally been cited by the United States Supreme Court itself as showing the controlling nature of local law.[21] Further the *Packer* Court had quoted extensively from *Barney v. Keokuk*,[22] one of the cases cited by the *Borax* court for the state sovereignty proposition and from the very same page cited by the *Borax* court.[23] But in writing for the *Packer* Court, Mr. Justice Field did say:

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attached to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.[24]

And the Court did suggest that it might look to the state courts as a whole to find the law in question assuming no clear federal statute or federal court decision in point.[25]

(b) Brewer-Elliott Oil Co. v. United States[26]

In this case, the question was whether the oil rich bed under the Arkansas River belonged to Oklahoma or to the Osage Tribe. If the River was not navigable it belonged to the Osage; if navigable, it belonged to Oklahoma. Should Oklahoma law or federal law determine navigability? Federal law said Mr. Justice Taft speaking for

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

21. *E.g.*, Hardin v. Jordan, 140 U.S. 371, 383 (1891); Water Power Co. v. Water Comm'rs., 168 U.S. 349, 362 (1897).

22. Barney v. Keokuk, 94 U.S. (4 Otto) 324 (1876).

23. 137 U.S. at 671-672, quoting 94 U.S. at 338.

24. 137 U.S. at 661, 669. However, no citations are given at this point.

25. "From the conflicting decisions of the state courts cited, it is evident that there is no such *general law* on the subject as will be deemed to control their construction." *Id.* at 670 (Emphasis added).

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

the entire United States Supreme Court. Several reasons were suggested by his opinion. First, the federal government had not been a party to the prior Oklahoma Supreme Court decision in question.[27] Here it was a party as Trustee for the Osage Tribe. It is clear from the authority cited, however, that this is a simple matter of *res judicata* as to a factual determination.[28] Second, the federal grant to the Osage Tribe was made thirty-five years before Oklahoma became a state "and before there were any local tribunals to decide any such questions."[29] If it was non-navigable then, no later rule of the state of Oklahoma could change that. Finally, the Court said: "As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question."[30] But the Court expressly qualifies this language by referring to the grant as having been made prior to Oklahoma statehood. And even then, the Court qualified further:

> It is true that, where the United States has not in any way provided otherwise, the ordinary instance attaching to a title

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27. *Id.* at 87.

28. The Court cites two cases: Oklahoma v. Texas, 258 U.S. 574 (1922) and Economy Light and Power Co. v. United States, 256 U.S. 113 (1921).

In *Oklahoma v. Texas* the United States Supreme Court said as to the prior Oklahoma case determining the Red River to be navigable at a particular location:

> "A decision by the Supreme Court of Oklahoma, in Hale v. Record, 44 Okla. 803, is relied on as adjudging that the river is navigable in part. The opinion in the case is briefly to the effect that in the trial court the evidence was conflicting, that the conflict was there resolved on the side of navigability, and that this finding had reasonable support in the evidence and therefore would not be disturbed. It was a purely private litigation. The United States was not a party and is not bound. There is in the opinion no statement of the evidence, so the decision hardly can be regarded as persuasive here. We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union." (258 U.S. 574, 591) (footnotes of original text are omitted).

No Oklahoma rule as such has been established that is being rejected by the United States Supreme Court. The *Oklahoma v. Texas* Court also cited *Economy.* The following language from *Economy* should make the point as clear as one can:

> "Our attention is called to the fact that in *People v. Economy Power Co.,* 241 Illinois, 290, 320-338, the Supreme Court of Illinois held that the Desplaines in its natural condition is not a navigable stream; and it is intimated that we ought to follow that decision. A writ of error brought to review it was dismissed by us because no federal question was involved (234 U.S. 497, 510, 524). Of course, the decision does not render the matter *res Judicata,* as the United States was not a party. The District Court in the present case treated it as not persuasive, because it appeared that evidence was wanting which was present here; and we cannot say that the court below erred in not following it." (256 U.S. 113, 123).

29. 260 U.S. at 87-88. "The title of the Indians grows out of a Federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma, when she came into the Union, took sovereignty over the public land(s) in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which requires or permitted a divesting of the title. It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant in large what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked."

30. *Id.* at 87. *See* note 29 *supra.*

> traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualifications that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee.[31]

Then the Court again referred to the fact that rights had vested prior to statehood and that no newly created rule could retroactively divest them. No such issue of retroactivity existed in the *Borax* case, but it did in *Hughes*.

(c) United States v. Holt Bank[32]

In this case, the federal government claimed title to the lands that had formerly been under the bed of Mud Lake in Minnesota.[33] The United States Supreme Court determined that if the lake was navigable, and the bed had not otherwise been disposed of, it passed to the State of Minnesota in 1858 upon its admission into the Union. Both lower federal courts had held that the lake was navigable on the basis that this question was to be determined by local law and that under the Minnesota rule it was navigable. While agreeing with this result, the United States Supreme Court, per Mr. Justice Van Devanter, disagreed as to the test:

> We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in federal courts.[34] To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended.[35]

In referring to the Constitution, Mr. Justice Van Devanter is referring to "the constitutional principle of equality among the several states."[36] Apparently his argument was that since the states are being admitted on an equal footing, a new state should not be able to get a greater ownership of soil underlying waters than the original states merely by adopting a more expansive navigability test. But the argument does not seem persuasive in this factual context. First, the principle was designed to protect the new states not the old states.

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31. *Id.* at 88 (Citing Packer v. Bird, 137 U.S. 661, 669). The court also cited without disapproving *Hardin v. Jordan,* 140 U.S. 371 (1891), as cited to in *Borax* for the second proposition. The Court futher noted *Wear v. Kansas,* 245 U.S. 154 (1917), and agreed in the principle therein set forth while distinguishing it from the present situation.
32. United States v. Holt Bank, 270 U.S. 49 (1925).
33. Ostensibly as Trustee for the Chippewa Indians.
34. At this point the Court cited the *Brewer-Elliott* case, which involved a Federal grant prior to Oklahoma statehood, a factor clearly not involved in the aspect of this case for which it was cited.
35. 270 U.S. at 55-56. *See also* note 12 *supra.*
36. 270 U.S. at 55.
    See the extensive discussion in *Shively v. Bowlby,* 152 U.S. 1 at 26-31 and note 12 *supra.*

Second, few would deny that if the federal government wanted to cede ownership of lands underlying non-navigable waters to the new states it could do so. Thus it does not seem that any great principle of uniformity is being either achieved or protected by such a decision. Further, the rationale of *Hughes* may well be repugnant to "the constitutional principle."[37]

(d) United States v. Utah.[38]

The primary question in this case was as to the ownership of the beds of several streams in the state of Utah, and this depended on whether or not the streams were navigable. If navigable, the beds belonged to Utah; if not navigable, the beds belonged to the federal government as it had never conveyed them or the abutting land to anyone. In determining the question of navigability, Mr. Chief Justice Hughes wrote for the United States Supreme Court as follows:

> The question of navigability is thus determinative of the controversy, and that is a federal question. This is so, although it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United states, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are navigable waters of the State of Utah. State laws cannot affect titles vested in the United States.[39]

For this last statement the Court cited only the *Brewer-Elliott* and *Holt Bank* cases. But *Brewer-Elliott* was clearly limited to the situation where rights had vested prior to Statehood. And the rationale for *Holt Bank* had appeared to be the desire for uniformity as among the states; as such that does not necessarily have anything to do with whether a title is vested in the United States or not. The opinion does refer to the "constitutional principle of. . . equality of States,"[40] so that perhaps the uniformity argument is present in this case also.

The Court reviewed the evidence as to whether it supported the Master's findings under the federal test and held that essentially it did. The Court made it clear, however, that the primary factor for finding federal law to control was that the United States claimed ownership of the land. This factor did not exist in either *Borax* or *Hughes*.

(2) The Cases Considered as a Group

Assuming then that these four cases are cited for the proposition that federal law controls, they are, in total, weak authority. What-

37. For a more detailed discussion see this text at p. 93.
38. United States v. Utah, 283 U.S. 64 (1931).
39. *Id.* at 75. The "state laws" in question was an act of the Utah legislature. LAWS OF UTAH at 8 (1927) declaring certain streams in Utah to be navigable.
40. 283 U.S. at 75.

ever the language of *Packer,* it has been subsequently cited by the United States Supreme Court itself as illustrating the applicability of local law. In *Brewer-Elliott* the factor emphasized over and over again by the court was the fact that the grant predated Oklahoma statehood, a factor not present in *Borax.* Further, the outright rejection of the Oklahoma Supreme Court decision clearly was made on a *res judicata* basis. In *Holt Bank* as in *Packer* the result was consistent with the state law; *Brewer-Elliott* was there cited erroneously. In the *Utah* case, the Court made it clear that the federal claim of ownership was the overriding consideration. No such claim was made in *Borax.* In fact the federal government was not a party in *Borax* while it had been in all of the above cases except *Packer.* On the other hand, all four cases dealt with the issue of navigability which was not in issue in either *Borax* or *Hughes.*

D. The Earlier Decisions Cited by the *Borax* Court to Support the State Sovereignty Language

(1) The Cases Considered Individually

(a) Barney v. Keokuk[41]

This case presented a question as to the ownership of land abutting the Mississippi River after a street dedication and reclamation project. The courts held that a common law dedication had taken place so that the bed underlying the street belonged to the abutting land owner. The City of Keokuk, Iowa, had filled in a portion of the Mississippi River adjacent to the street in excess of 200 feet. The United States Supreme Court pointed out that under Iowa law riparian ownership extended no further than the ordinary high-water mark, and that the state owns the shore between high and low water marks, as well as the bed of the river. This the court found to be the common law as well, so no controversy existed as to this point, although it is this point for which the case is generally cited as following local law.[42] But the Court went on to make it fairly clear that it was up to the state to determine the ownership of the man-made fill as well.[43]

(b) Hardin v. Jordan[44]

The question in this case was the location of plaintiff's boundary in relation to a non-navigable Illinois lake. Plaintiff claimed under a federal patent. The Court used strong language to indicate that the decision was to be based on Illinois law:

41. Barney v. Keokuk, 94 U.S. 324 (1876).
42. Shively v. Bowlby, 152 U.S. 1, 41-42, 45 (1894).
43. "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself." 94 U.S. at 337.
44. Hardin v. Jordan, 140 U.S. 371 (1891).

> This question must be decided by some rule of law and no rule of law can be resorted to for the purpose except the local law of the State of Illinois.[45] In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.[46]

The Court then went on to determine that under the law of Illinois plaintiff's boundary extended to the center of the lake. Here the Court got into difficulty, three justices dissenting on the basis that the Court was ignoring rather than declaring Illinois law. The dissenters' opinion was that Illinois law would place plaintiff's boundary at the water's edge, and there seemed to be substantial merit to that view.[47] The majority's method of determining state law was somewhat disapproved in at least one later case.[48]

(c) Shively v. Bowlby[49]

Plaintiff claimed ownership of land below the high water mark on the Columbia River in Oregon as a grantee of the State of Oregon. Defendant counterclaimed alleging title to some of the tidelands because of a federal grant of land bounded by the Columbia River. The state courts held against the defendant on his counterclaim and then allowed the plaintiff to dismiss his complaint without prejudice. The United States Supreme Court, first, found the existence of a federal question:

> The judgment against its [the counterclaim's] validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court.[50]

The argument against finding a federal question was that this case was just like a private grant construction case, the fact of the grantor being the federal government not making any difference. To this argument, the court gave this interesting answer:

> But this is not so. The rule of construction in the case

45. *Id.* at 380.
46. *Id.* at 384.
47. The later case of Hardin v. Shedd, 190 U.S. 508, 519 (1903), proves that the dissenters were better attuned to the status of Illinois Law: "The Law of Illinois has been settled since *Hardin v. Jordan* . . . and it is now clear, by the decision in this case and later, that conveyances of the upland do not carry adjoining land below the water line."
48. *See* Water Power Co. v. Water Comm'rs., 168 U.S. 349, 366 (1897).
49. Shively v. Bowlby, 152 U.S. 1 (1894).
50. *Id.* at 9-10.

> of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.'[51]

Fortunately this kind of feudalistic notion does not seem to have prevailed. The Court then went on to deal with the choice of law question, and its conclusion on this point was as follows:

> The later judgments of this Court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution.[52]

This conclusion took on much greater meaning with the express recognition by the Court that the results varied from state to state.[53] The Court went through a 58 page analysis of its prior decisions because it found "such a diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high water mark of navigable waters. . ."[54] Because of this review which included over thirty of its own decisions in varying degrees of detail, it has been frequently cited and relied upon.[55] What has been clearly determined by this and other decisions of the United States Supreme Court is that a state may exercise its ownership over the beds to completely cut off access by upland owners. In this case the plaintiffs had been conveyed tidelands by the State of Oregon on which they maintained a wharf. This prevented access to the water by the defendants but they were held to have no right to wharf out to the navigable water.

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51. *Id.* at 10, citing *"The Rebeckah,* 1 C. Rob. 227, 230" (1799).
52. *Id.* at 40.
53. *Id.* at 26.

> The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interest of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.

54. *Id.* at 10-11.
55. *E.g.,* Joy v. St. Louis, 201 U.S. 332, 343 (1906); Seattle v. Oregon & Wash. R.R., 255 U.S. 56, 63 (1921); Brewer-Elliott Oil Co. v. United States, 260 U.S. 77, 84-85 (1922).

What limits there are or should be on this principle will be discussed later.[56]

(d) Port of Seattle v. Oregon and W. R. R.[57]

In this case the question was whether the Railroad had acquired in connection with its purchase from the State of lots of filled land abutting on a waterway, "a private riparian or littoral right to construct wharves, docks and piers on this 125-feet area, in order to provide for itself, as owner of the land, and for those claiming under it, convenient access to the fairway for purposes of navigation and commerce."[58] This, the Court said, depended on the law of Washington, since it has "the full proprietary right" in the tidelands.[59] The Court then went on to find that under the law of Washington the railroad acquired no such right. The Court expressly recognized that Washington law differed from that of other states on the same question.[60]

(2) The Cases Considered as a Group

In these four cases, the court discussed the presence of a federal question in only one, (the case being appealed from a state court) although it decided the merits in all. It is not clear whether in the other three cases federal jurisdiction was based on the existence of a federal question or on a diversity of citizenship basis. But in all four the Court was clear that as to choice of law it would apply the local law. To the extent that the application of local law reflects only a recognition that the state has the right to relinquish its ownership of land under navigable waters to the upland owner, it is really not very significant for such a proposition ought to be self-evident.[61] But certainly in *Shively* and in *Port of Seattle* the Court goes much beyond this in looking to state law to determine riparian or littoral rights regarding maintaining of access to bodies of water, the very question before the Court in *Hughes*. And in none of these four cases was navigability really in issue whereas in the first four it had been the primary issue. But in *Borax* navigability is not the primary issue either; rather it is whether the "mean high tide line" or "neap tide line" forms the boundary.

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56. *Infra* this text.
57. Seattle v. Oregon and Wash. R.R., 255 U.S. 56 (1921).
58. *Id.* at 62.
59. *Id.* at 63.
60. *Id.* at 64.
So complete is the absence of riparian or littoral rights that the state may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water.
61. This is the proposition for which *Barney* has been cited. *See* Shively v. Bowlby, 152 U.S. 1 (1894). For additional cases where the question was simply whether the state had given up its ownership beyond the highwater mark and where the local determination was followed see St. Louis v. Rutz, 138 U.S. 226 (1891) and Kaukauna Water Power Co. v. Green Bay and Miss. Canal Co., 142 U.S. 254 (1891).

E. The *Borax* Opinion Re-Analyzed.

While it had first appeared that the *Borax* Court in the quotation above was addressing itself solely to the existence or nonexistence of the federal question, it is apparent from the material cited that it was purporting to address itself to both the federal question and the choice of law problem, if indeed it had before it the notion of any jurisdictional problem at all. For example, *Shively* which decided that the issue was controlled by local law also decided there was a federal question. This conclusion about *Borax* is emphasized further by the fact that the court made no specific (or further) analysis as far as the choice of law question was concerned. It said merely that it saw no reason to review the California decisions as to what tidal test they had used and finally concluded: "In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time."[62] But what the Court was doing in holding to the mean high tide line was telling California that if she has been using the neap tide line, she may have been interpreting the extent of the tidelands acquired by the State upon accession too narrowly. This is not the result in *Hughes* where the Court is restricting the state's control over the tidelands by giving the riparian owner a "right" to alluvion.

IV. THE CASES SINCE *HUGHES*

There have been seven court decisions since *Hughes* that have referred to the United States Supreme Court opinion.[63] Two are lower federal court opinions; four are state supreme court opinions and one is a state intermediate appellate court opinion.

Three of these seven cases merely refer to the language in *Hughes* that states how important access is.[64] A fourth merely cites *Hughes* for the innocuous proposition that legislation cannot divest a vested right.[65] The remaining three, however, involve at least minor attempts to distinguish *Hughes*. In 1968 the Supreme Court of Washington wrote of *Hughes* and the issue then before it:

62. Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935).

63. United States v. 222.0 Acres of Land, 306 F. Supp. 138 (D. Md. 1969); Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969); Linn Farms, Inc. v. Edlen, 111 Ill. App.2d 294, 250 N.E.2d 681 (1969); State ex rel Thorton v. Hay, 462 P.2d 671 (Ore. 1969); Bach v. Sarich, 445 P.2d 648 (Wash. 1968); Anderson v. Olson, 461 P.2d 343 (Wash. 1969); Borough of Wildwood Crest v. Masciarella, 240 A.2d 665 (N.J. 1968).

For comments on *Hughes*, see 54 A.B.A.J. 192 (1968); Note, Federal Law and Seashore Accretion, 28 LA. L. REV. 655 (1968).

64. United States v. 222.0 Acres of Land, 306 F. Supp. 138, 151 (D. Md. 1969); Burns v. Forbes, 412 F.2d 995, 998 (3d Cir. 1969); Linn Farms Inc. v. Edlen, 111 Ill. App.2d 294, 250 N.E.2d 681, 684-85 (1969).

65. State v. Hay, 462 P.2d 671, 675 (Ore. 1969).

> Defendants finally argue that under Hughes . . . , the federal common law controls the result here; and that under the federal common law the defendants have a right to build their apartment on a fill on their portion of the lake bed.
>
> This contention is based on the fact that defendants' title is to upland property and submerged land, and is traced to an 1872 federal government patent. This patent was issued prior to Washington statehood, and made no reference to the lake.
>
> In *Hughes*, supra, the issue presented was whether federal or state laws govern the ownership of accreted land, gradually deposited by the ocean on adjoining upland property conveyed by the United States to petitioner's predecessor in title prior to Washington statehood. The United States Supreme Court held that federal law applied, and that under federal law petitioner was entitled to the accretion that had gradually formed along her ocean front property.
>
> The *Hughes* decision is in no way applicable to the instant case. We are not concerned here with the ownership of land or the extent or validity of title created by a federal act.[66]

In 1969 in a footnote comment, the Washington Supreme Court said of *Hughes*:

> In Hughes . . ., it was established that the line of ordinary highwater, with respect to tidelands bounding uplands held under a pre-statehood patent, was a moving boundary, *i.e.*, that the owner of the upland was entitled to accretions by virtue of a pre-statehood federal patent. *See generally* Corker, Where Does the Beach Begin, and to What Extent Is This a Federal Question?, 42 Wash. L. Rev. 33 (1966). A fruitful comparison may be made between the *Hughes* opinion in the U. S. Supreme Court and Professor Corker's comments on the position assumed by the Solicitor General re a grant of certiorari. *Id.* at 115.[67]

In 1968, the Supreme Court of New Jersey had referred to *Hughes*:

> New Jersey's law of accretion, rather than the federal decisions, is admittedly controlling here. See 43 U.S.C.A. § 1301 et seq.; 1 Shalowitz, Shore and Sea Boundaries 115 et seq. (1962); cf. Hughes . . . .[68]

The New Jersey court was referring to the Submerged Lands Act of 1953.[69]

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66. Bach v. Sarich, 445 P.2d 648, 653-54 (Wash. 1968).
67. Anderson v. Olson, 461 P.2d 343, 345 N.2 (Wash. 1969).
68. Borough of Wildwood Crest v. Masciarella, 240 A.2d 665, 667 (N.J. 1968).
69. 67 Stat. 29. *Cf.* note 11, *supra*.

V. THE FEDERAL QUESTION AND *HUGHES*

It is not my initent to delineate what is meant by a "federal question" when so learned an expert in the area as Professor Wright has been unable to do so.[70] But there are some observations that do seem appropriate.

The mere fact that a right originated under a federal land law or federal grant does not mean that a federal question exists.[71] In many of the cases so holding, the original grant has not been disputed. At some later time a dispute has arisen between two parties both making some claim under the original grantee.[72] In other cases the Court has said that the question is simply one of fact. Thus in *Sweringen v. St. Louis*, the United States Supreme Court dismissed a writ of error to the Supreme Court of Missouri for want of jurisdiction stating that the validity of the patent involved was not in question and that it was "a pure question of the construction of the language used in the patent, whether the land granted therein reached the waters of the Mississippi River on the east, or whether, according to the courses and distances contained in the patent, the eastern limit of the land conveyed was some hundreds of feet west of the river. It was really a question of fact as to how far east the measurements of the courses and distances carried the boundary."[73] Another example would be where a claim is based on a patent and the jury finds that no patent exists. This does not deny authority of the federal government to issue such a patent, it merely denies the existence of one.[74]

But an opinion that more squarely stands in the way of the majority rationale in *Hughes* is cited and relied upon by Mr. Justice Stewart in his concurring opinion: *Joy v. St. Louis*.[75] The majority disposed of it by ignoring it. Apparently Mr. Justice Stewart relied on the following conclusion stated by the Court in *Joy*:

> As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under

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70. C. WRIGHT, FEDERAL COURTS 48-63 (1963).

71. *E.g.*, Romie v. Casanova, 91 U.S. (1 Otto) 379 (1875); McStay v. Friedman, 92 U.S. (2 Otto) 723 (1875); Gold-Washing & Water Co. v. Keyes, 96 U.S. (6 Otto) 199 (1877); Bushnell v. Crooke Mining Co., 148 U.S. 682 (1893); Gillis v. Stinchfield, 159 U.S. 658 (1895); Blackburn v. Portland Gold Mining Co., 175 U.S. 571 (1900); Florida Cent. & Peninsular R.R. v. Bell, 176 U.S. 321 (1900); Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

72. *E.g.*, Romie v. Casanova, 91 U.S. (1 Otto) 379 (1875); McStay v. Friedman, 92 U.S. (Otto II) 723 (1875).

73. Sweringen v. St. Louis, 185 U.S. 38, 41 (1902).

74. *See* Mining Co. v. Boggs, 70 U.S. (3 Wall.) 304 (1865).

75. Joy v. St. Louis, 201 U.S. 332 (1906).

> the cases just cited, a matter of local or state law, and not one arising under the laws of the United States.[76]

But for the fact that an ocean rather than a river is involved in *Hughes*, this exact language could have been written in the *Hughes* case. The statement was not necessary to the decision in *Joy;* however, it probably should be treated as an alternative ground for decision.

In *Joy*, the federal circuit court had dismissed the plaintiff's petition for want of jurisdiction. The dismissal was affirmed by the United States Supreme Court. The opinioin began by pointing out that there was no diversity of citizenship. It then went on to determine whether there was a federal question. The action was one of ejectment. While the plaintiff in his complaint alleged title based on a federal patent and acts of Congress, this was unnecessary to an ejectment action. The Court said that its mere allegation did not comply with the rule that the existence of the federal question must appear in the complaint or petition. As the Court pointed out in an ejectment action the defendant might admit the validity of plaintiff's title originally but defend on the ground of adverse possession, as happened in this case. Then clearly there would be no federal question. This analysis was sufficient under the then existing law to dispose of the case, but the Court went on to discuss the alternative ground quoted above. The *Joy* Court thought that its alternative ground was consistent with the *Packer* case.

Since the issues in the *Hughes* case could involve a challenge to the authority of the federal government to vest a right to future alluvion in a littoral owner prior to the assumption of sovereignty by a state over tidelands, a federal question would exist. When the *Hughes* conveyance was made, as in *Brewer-Elliott,* there was no state law on this matter. The case would then be distinguishable from *Joy.* [77]

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76. *Id.* at 343. Citing Sweringen v. St. Louis, 185 U.S. 38 (1902), Packer v. Bird, 137 U.S. 661 (1891) and Shively v. Bowlby, 152 U.S. 1 (1894).

77. In Mitchell v. Smale, 140 U.S. 406, 410 (1891), one of the few land cases in which the Court specifically addresses itself to the federal question issue and where it was dealing with removal from a state court to the federal court, it reasoned as follows:

> " . . . we think that the additional ground of removal, stated in the amended petition, was sufficient to authorize the removal to be made. It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the act of 1875." *See also* the language quoted from the *Shively* case *supra* at note 49.

VI. THE CHOICE OF LAW AND *HUGHES*

The analysis in this section begins with the following general proposition:

> It is the settled rule in this court that absolute property in, and dominion and sovereiginty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States within their respective borders.[78]

Under this general principle it has been recognized that the state can cut off the access of the upland owner by appropriating the tidelands to a use which does so. Thus the United States Supreme Court has previously sustained the reclamation of tidelands and the use of the reclaimed land for building lots.[79] These cases are recognized by the *Hughes* Court and are not disapproved.[80] Thus the conclusion would seem to follow that even though land is involved where title originates from a federal grant, a state has the power to prevent the accumulation of alluvion and to cut off access by use of its underlying bed.

Query if alluvion to the littoral owner would be cut off by a grant of tidelands to a private party where the private party had not utilized the granted lands before the accretion occurred. In the only United States Supreme Court case dealing with the issue, the Court assumed that the state had no intent to cut it off.[81] Thus the Court never reached the question whether the state had the power to do so.

Since a new state has the same sovereignty over its tidelands that the original states have, the next question is whether one of the original states, for example, New Jersey, not formed from the public domain and thereby having no federal grant to be construed, could

78. Knight v. U.S. Land Ass'n., 142 U.S. 161, 183 (1891).

79. Den v. Jersey Co., 56 U.S. (15 How.) 426 (1853); Seattle v. Oregon and Wash. R.R., 255 U.S. 56 (1921); United States v. Mission Rock Co., 189 U.S. 391, 407 (1903) (In the latter case the United States Supreme Court in interpreting California law said "in other words the rights granted must be in aid of commerce" after it had just finished quoting California's court language to the effect that the rights would be granted if the grant was "not inconsistent with" the public trust which is to promote navigation.) For other state activity approved by the United States Supreme Court affecting the upland owners' access to the water see Martin v. Waddell, 41 U.S. (16 Pet.) 366 (1842) (New Jersey allowed a nonriparian owner to possess tidewater land to grow and dredge oysters) and Shively v. Bowlby, 152 U.S. 1 (1894) (Oregon allowed a nonriparian to erect and maintain a wharf on tidelands).

80. Hughes v. Washington, 389 U.S. 290, 294 n. 3 (1967).

81. "We presume from this language that in New Jersey as elsewhere by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees, when as here the grantees have not filled in the land. . . . We conclude that the conveyance by the State did not give the defendant a title to land added by accretion to the complainants' premises, and that it does not matter that this conveyance was by metes and bounds. The boundaries however indicated were good until changed by the gradual work of the ocean and then were modified in accordance with what we believe to be the common law." Per Mr. Justice Holmes in Stevens v. Arnold, 262 U.S. 266, 270 (1923).

declare that henceforth all land formed by accretion or reliction shall belong to the owner of the bed; that is, if you will, henceforth these lands shall have fixed boundaries. If she may do so, then a new state admitted with the same rights of sovereignty should be able to do so. Is the Supreme Court in *Hughes*, when it denies Washington this power over its tidelands, saying that New Jersey could not cut off future alluvion by declaring boundaries to be fixed? If it is not doing so, its decision is a clear interference with state sovereignty unless one argues the only argument left, that the federal government *before Washington became sovereign* vested a right in the littoral owner to future alluvion which could not be cut off by the state. While it is true that in *Borax*, the Court had said that prior to statehood, the federal government merely held the tidelands "in trust"[82] for the future states, it is clear that the federal government had the power to completely dispose of the tidelands before statehood.[83] If it had the power to convey the whole fee, then it should have the power to subject the tidelands to rights of future alluvion. But the troublesome question remains: Why should there be a vested right to *future* alluvion?

If a state has barred itself from cutting off future alluvion, that should not bar a state that has not done so. However, if as a matter of due process under the federal constitution future alluvion is treated as a vested property right which may not be divested except upon payment of just compensation, a different problem exists. This latter approach is essentially the one argued for by Mr. Justice Stewart in his concurring opinion in *Hughes*.[84]

Why might future alluvion be considered so important? The United States Supreme Court has frequently discussed the subject of accretion and its importance to the riparian land owner, and it has suggested several reasons for that importance. In *New Orleans v. United States*, it said: "No other rule can be applied on just principles. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain."[85] This reason is reiterated in *St. Clair v. Lovingston*.[86]

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82. Borax, Ltd. v. Los Angeles, 296 U.S. 10, 15 (1935).

83. Knight v. U.S. Land Ass'n, 142 U.S. 161, 183 (1891). *See also* Shively v. Bowlby, 152 U.S. 1, 48-50 (1894), and United States v. Holt Bank, 270 U.S. 49, 55 (1925).

84. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Hughes v. Washington, 389 U.S. 290, 298 (1967) (Mr. Justice Stewart Concurring).

85. New Orleans v. United States, 35 U.S. (10 Pet.) 660, 716 (1836).

86. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874).

In the interim however, the Court had recognized another possible basis: "by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself."[87]

In *Jefferis v. East Omaha Land Co.* both were recognized, the Court refusing to choose as between them.[88] Obviously the latest reasoning is that found in the *Hughes* case: ". . . the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines."[89]

Other reasons have been suggested for awarding alluvion to the riparian or littoral owner, but it appears that access to water is now the most important.[90] Another article discusses the nature of future alluvion and its "vestedness."[91] The concern there was not with access, however, since the problem then discussed, the maintenance of water levels, would maintain rather than eliminate access. The conclusion was that perhaps access was no longer a primary reason for awarding alluvion but was merely secondary to maintaining rights of "navigation, boating, fishing and the like,"[92] and that since access was being maintained there was no need to say that the riparian owner had a vested right to future alluvion. If one wants to argue that he has a vested right to access, akin to access on a highway, that is another matter. Awarding of alluvion is only a means to an end or as stated in this earlier article: "Accretion and reliction would then become rights at a third level, secondary to the secondary right of access."[93]

There were several earlier cases dealing with wharfing out that made the Supreme Court look like it was trying to establish some such right that it would be forcing on the states.[94] However, these cases were later expressly qualified by the Court.[95]

It is true that in most, if not all, of the decisions applying local law, the Court qualified the general statement about applicability of local law with language to the effect that this was true as long as

87. Banks v. Ogden, 69 U.S. (2 Wall.) 57, 67 (1864).
88. Jefferis v. East Omaha Land Co., 134 U.S. 178, 191 (1889).
89. Hughes v. Washington, 389 U.S. 290, 293-94 (1967).
90. See the discussion in Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. REV. 429, 431-439 (1967).
91. Beck, *Governmental Refilling of Lakes and Ponds and the Artificial Maintenance of Water Levels: Must Just Compensation Be Paid to Abutting Landowners?*, 46 TEX L. REV. 180, 183-199 (1967).
92. *Id.* at 195.
93. *Id.*
94. Dutton v. Strong, 66 U.S. (1 Black) 23 (1861); Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870). *See also* R.R. Co. v. Schurmeir, 74 U.S. (7 Wall.) 272 (1868).
95. Shively v. Bowlby, 152 U.S. 1, 34-40 (1894).

it did not impair the efficacy of the grant or the use and enjoyment of the granted property. In *St. Anthony Falls Water Power Co. v. Board of Water Comm'rs*, the United States Supreme Court specifically noted why freedom in the state to declare what riparian rights an upland owner may have in lands underlying navigable waters was not affected by these earlier qualifications:

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.[96]

Thus, again, the sovereignty argument is brought to the fore.

Another point that seemed fairly clear was that as to the question whether a federal grant carried with it the bed underlying nonnavigable waters, local law would be determinative. At least the United States Supreme Court had said so frequently enough. In 1921, in *Oklahoma v. Texas*, the Court per Mr. Justice Van Devanter, summed up the earlier decisions very well:

> Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what is intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies.[97]

The Court there held that the Oklahoma rule was the same as the common law rule extending title of the riparian owner to the middle of the nonnavigable stream.

Probably no language could have been more crystal clear than the earlier language of Mr. Justice Holmes in 1903 in *Hardin v. Shedd*:

> . . . it has become established almost without argument that in the former case (nonnavigable waters) as in the latter

96. St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs., 168 U.S. 349, 363 (1897).

97. Oklahoma v. Texas, 258 U.S. 574, 594-595 (1922). Here the Court cited Hardin v. Jordan, 140 U.S. 371, 384; Mitchell v. Smale, 140 U.S. 406, 413-414; Grand Rapids and Indiana R.R. Co. v. Butler, 159 U.S. 87, 92; Hardin v. Shedd, 190 U.S. 508, 519; Whitaker v. McBride, 197 U.S. 510, 512, 515-516. *See also* Kean v. Calumet Canal Co., 190 U.S. 452 (1903).

> (navigable waters) the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies. In the case of land bounded on a nonnavigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned.[98]

However, a substantial qualification upon this approach was interjected as a result of the opinion in 1935 in *United States v. Oregon*,[99] although it must be remembered that this latter case does not involve a contest between the state and riparian owners, but between the federal government and the state. This decision came in the same year as *Borax* so that perhaps we were witnessing a change in the Court's philosophy. The Court used strong language:

> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control. The construction of grants by the United States is a federal not a state question, and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted. But no such question is presented here, for there is no basis for implying any intention to convey title to the State.[100]

The Court here was considering the argument that when the federal government gave a patent to riparian land on nonnavigable waters, the title to the land underlying the water inured to the state, rather than going to the riparian owner or remaining with the federal government. The argument was rejected. The case was, however, therefore distinguishable from the earlier case and granted that these lands were underlying nonnavigable waters and therefore did not belong to the state, it can be questioned whether this decision interfered in any appreciable way with state sovereignty. On the basis of the sovereignty rationale the Court could be more solicitous of federal law in relation to riparian owners on nonnavigable waters than in relation to riparian owners on navigable waters. That it has seemed to be the other way, is an interesting commentary on its attitude toward the question of sovereignty.

If the Supreme Court of the United States continues its involve-

98. Hardin v. Shedd, 190 U.S. 508, 519 (1903).
99. United States v. Oregon, 295 U.S. 1 (1935).
100. *Id.* at 27-28.

ment with accretion, how far will it go? In 1903 the Supreme Court of Missouri decided that when nonriparian land came to abut on the water's edge because the intervening land had eroded away, the newly abutting land became riparian.[101] Thus when the water receded and bared the old eroded away land, it now belonged to the newly abutting tract owner and not to the old tract owner. In 1965 on the same basic facts, the Supreme Court of North Dakota held to the contrary.[102] May the United States Supreme Court decide who is right by applying a federal common law; simply because one or more of the tracts in each case may have originated with a federal grant? Should it do so?

It is this writer's belief that there is no need for uniformity in this area, that there is little that is more local in nature than real property. This was, of course, expressed in the diversity of citizenship choice of law cases as early as *Swift v. Tyson* itself, where Mr. Justice Story specifically said that his general common law was not to apply "to rights and titles to things having a permanent locality, such as the rights and titles to real estate. . . ."[103] If the United States Supreme Court is concerned that private property rights may be invaded by the states, the due process clause of the fourteenth amendment offers an ample control device.

Consequently, the *Hughes* case should be limited in its interpretation to the situation where there is a federal grant prior to statehood and involving tidelands. The facts warrant this conclusion. The prior authorities warrant this conclusion. And sound policy considerations warrant this conclusion.[104]

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101. Widdecombe v. Chiles, 73 S.W. 444 (Mo. 1903).
102. Perry v. Erling, 132 N.W.2d 889 (N.D. 1965).
103. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17-18 (1842).
104. For further discussion and for an article that the United States Supreme Court should have read before deciding *Hughes*, but apparently did not, see Corker, *Where Does the Beach Begin, And to What Extent Is This A Federal Question,* 42 WASH. L. REV. 33 (1966).