September 1989

The Public Trust Misapplied: Phillips Petroleum v. Mississippi and the Need to Rethink an Ancient Doctrine

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\textbf{INTRODUCTION}

"Of all the difficult questions which have arisen in the application of the law to questions involving water rights," wrote Professor Henry Farnham nearly a century ago, "there is none which has produced more uncertainty, caused greater conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters." The process of delineating ownership of submerged lands is no less difficult today than in Farnham's time. Under the public trust doctrine, certain lands that lie under water belong to the state. The state, in turn, must administer these submerged lands, as well as the waters flowing over them, in accordance with the public interest. Consequently, the critical issue involves deciding where official state ownership begins and private title ends.

Traditionally, the public trust was meant to secure free access to navigation and fishing. Hence, the trust was most commonly applied in the context of navigable waters. In \textit{Phillips Petroleum v. Mississippi}, however, the United States Supreme Court ruled that the public trust also extends to all nonnavigable waters that are influenced by the ebb and flow of the tide. Although the Court relied on what it considered to be longstanding precedents that extended the trust to the reaches of the "ebb and flow of the tide," it misapplied the ebb and flow test. Histori-

\* An earlier draft of this Comment received honorable mention in the 1989 Ellis J. Harmon Environmental Law Writing Competition.

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2. Historically, the public trust extended only to submerged soil and not to interior public lands not covered by water. For example, there is no public trust in the dry forest of the National Parks System according to this traditional model. \textit{See} Wilkinson, \textit{The Public Trust Doctrine in Public Land Law}, 14 U.C. \textit{DAVIS L. REV.} 269, 273-78 (1980).
4. \textit{Id.} at 795.
cally, tidality⁵ was nothing more than a convenient measure of navigability.⁶ English cases often associated the movement of the tide with the presence of navigability. Hence, the ebb and flow test does not justify Phillips' conclusion that discrete, wholly nonnavigable tidewaters are covered by the trust.

This Comment concludes that the trust should be extended to certain nonnavigable waters. However, it argues that the correct rationale for Phillips entails reevaluating the public interests served by the trust to legitimize its extension to nonnavigable water resources. With this revised rationale, courts can use the trust to protect vital new concerns such as the environment.⁷

This Comment is divided into five sections. Part I discusses the basic pillars of the public trust doctrine as it related to state ownership of submerged lands prior to Phillips. Part II outlines the facts of Phillips, the decisions below, and the reasoning of the majority and dissenting opinions of the Supreme Court. Part III considers the two legal issues raised by Phillips: the historical role of the ebb and flow of the tide in delineating public waters, and the link between the public trust doctrine and navigable waterways. This analysis indicates that courts have traditionally limited the trust to navigable channels, and that the ebb and flow test is simply a measure of navigability. Part IV outlines the broad federal navigability-for-title rule, then discusses California and New Jersey decisions that have extended a limited version of the trust to distinct nonnavigable areas. Finally, Part V suggests that because the public interest in water is no longer closely tied to navigability, the doctrine would best be served through a reappraisal of the interests it is meant to secure.

I

HISTORICAL BACKGROUND OF THE PUBLIC TRUST
DOCTRINE

The public trust doctrine has roots in ancient Rome in the context of an economy primarily based on maritime commerce.⁸ The Romans placed a premium upon free access to major commercial arteries such as rivers, ports, and seas.⁹ In response, Roman law developed the concept

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⁵ The term "tidality" refers to the concept of waters that are touched by the ebb and flow of the tide.
⁷ See Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (public trust interests held to include the preservation of tidelands as ecological units for scientific study, as open space, as environments providing food and habitats for birds and marine life, and as favorable to the scenery and climate of the area).
⁹ Id.
of res communis, or common things. This notion envisioned that "[t]hings common to mankind by the law of nature are the air, running water, the sea and consequently the shores of the sea." There was no ownership in a strict sense; all men had free use of these resources so long as no one man's activities interfered with the rights of another.

The public trust as practiced in America emerged primarily from English common law. In his 1670 pamphlet *De Jure Maris et Brachiorum ejusdem*, Sir Matthew Hale detailed his understanding of the interplay of public and private rights to waterways in Roman law. He classified three such rights: *jus publicum*, the public's right of access to major navigable waterways for fishing and commerce; *jus regium*, the Crown's ownership of submerged beds to be administered both for the public good and for the sovereign's personal delectation; and *jus privatum*, the private right of ownership.

The concept of the public trust arrived on American soil during British colonization. Title to trust lands passed from the King to the original thirteen states at the time of the American Revolution. States that entered the Union later obtained the same rights as the original thirteen by virtue of the equal footing doctrine. The federal government held each territory's submerged lands in trust for the future state. As trustee, the federal government had no power to improve or transfer submerged lands, except to further its obligations to the future state or as

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11. *Id.* at 67.
required by treaty with a foreign power.\textsuperscript{19} Nothing remained of federal sovereignty once title vested in the state.\textsuperscript{20}

Early American cases relied on the English tidality standard to determine the reach of both the public trust\textsuperscript{21} and federal admiralty law.\textsuperscript{22} English courts had understood the King's submerged bed ownership to reach all lands beneath tidewaters or waters where "the sea flows and ebbs."\textsuperscript{23} This common law tidality concept describes the tide's lateral influence on nearby waters. As the tide ebbs and flows, the increase and decrease in pressure causes surrounding waters to rise and fall.\textsuperscript{24} Such waters, however, need not actually commingle with the sea.\textsuperscript{25} Thus, federal jurisdiction over admiralty law, as well as the public trust, was initially confined to coastal waters.\textsuperscript{26}

As maritime commerce reached into America's nontidal rivers and lakes, courts challenged this limitation.\textsuperscript{27} In The Propeller Genesee Chief \textit{v. Fitzhugh},\textsuperscript{28} the Supreme Court extended the reach of federal admiralty law to nontidal navigable freshwaters such as the Great Lakes.\textsuperscript{29} Twenty-four years later the Court, following the policy set out in \textit{Genesee}, expanded public trust title to inland nontidal rivers in \textit{Barney v. Keokuk}.\textsuperscript{30} The Court reasoned that the trust was defined by its purpose of aiding commerce, and not by any distinction between tidal and nontidal

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\textsuperscript{19} \textit{Id.} at 205-06. This trustee obligation of the federal government is distinguishable from situations where title predates the federal government's ceding the territory. Cases of this latter type are common in those western states whose territory was acquired from Mexico in 1848. There is support for the view that such ancient titles are completely outside the reach of the public trust. \textit{See id.} at 204-09; \textit{see also} Cinque Bambini Partnership \textit{v. State}, 491 So. 2d 508, 518 (Miss. 1986).

\textsuperscript{20} \textit{Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co.}, 429 U.S. 363, 371 (1977). Determining which lands were covered by the trust at the time of statehood is a federal question. \textit{Borax Consolidated}, 296 U.S. at 22. However, states may dispose of their sovereign lands as they deem consistent with the public interest. \textit{Shively v. Bowlby}, 152 U.S. 1, 26 (1893). Thus, it is a matter of local concern whether to employ the trust as a guarantee of the right to swim in navigable water. Similarly, it is the state's decision whether the public interest is best served by alienating trust land to private parties. However, the states may not completely alienate large tracts of their trust properties. \textit{Illinois Cent. R.R. v. Illinois}, 146 U.S. 387, 452-54 (1892).


\textsuperscript{22} \textit{See, e.g., The Steam-Boat Thomas Jefferson}, 23 U.S. (10 Wheat.) 428 (1825).

\textsuperscript{23} \textit{See, e.g., The Royal Fisheries of the Banne}, 80 Eng. Rep. 540, 541 (1604).


\textsuperscript{25} \textit{Id.} For convenience, this Comment occasionally speaks in terms of "tidewaters" and "freshwaters," although it should be understood that tidally influenced waters may be free of salt.


\textsuperscript{27} \textit{See, e.g., Carson v. Blazer}, 2 Binn. 475 (Pa. 1810).

\textsuperscript{28} 53 U.S. (12 How.) 443 (1851).

\textsuperscript{29} \textit{See infra} notes 219-28 and accompanying text.

\textsuperscript{30} 94 U.S. 324 (1876); \textit{see infra} notes 229-38 and accompanying text.
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water.31 In 1891, this reasoning was extended yet again to include navigable inland lakes within the public trust.32

Navigability was the driving concern in all these cases. The federal measure of navigability in admiralty law was and is "navigability-in-fact."33 Bodies of water satisfy this standard when they "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."34 In Packer v. Bird,35 the Court held that the navigability-in-fact test governed the public trust at least where freshwater was involved.36 The public trust's applicability to all lands beneath navigable water is now beyond question.37

These cases created two sets of standards for determining the reach of the public trust. On the one hand, the trust extended to tidally influenced waters under the ebb and flow test. On the other hand, courts

31. Barney, 94 U.S. at 336-37. In reality, the Supreme Court applied the trust to navigable tidewaters in its first decisions on the issue. See Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 407 (1842). In Martin, the Court relied heavily on the New Jersey Supreme Court's decision in Arnold v. Mundy, 6 N.J.L. 1 (1821), which held that New Jersey could make any changes to trust land designed "for the improvement of . . . navigation and the ease of passage." Id. at 78. The outcome in Martin, along with its reliance on Arnold, has been criticized as having no basis in previous authority. See MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water, 3 Fla. St. U.L. Rev. 511, 589-91 (1975).
33. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
34. Id. The navigability-in-fact test is employed in two settings other than submerged bed ownership. One is federal admiralty jurisdiction. The other involves federal regulatory power under the Constitution. MacGrady, supra note 31, at 593. For thorough discussions of federal law on navigable waters, see Guinn, An Analysis of Navigable Waters of the United States, 18 Baylor L. Rev. 559 (1966); Laurent, Judicial Criteria of Navigability in Federal Cases, 1953 Wis. L. Rev. 8 (1953). For a broader discussion of navigability from pre-Roman times, see generally MacGrady, supra note 31.
35. 137 U.S. 661 (1891).
36. Id. at 667.
37. See id.; see Stevens, supra note 12, at 203.

The public trust should be distinguished from several state-based water rights doctrines. The most important of these is the public's right of access to navigable state waters. This does not involve ownership of submerged beds, but only use and enjoyment of the water. As a state law concept, it does not call into play the federal test of navigability. Rather, state measures of navigability are employed. The most common of these state tests finds that waters are navigable if they can be traversed by oar or motor-propelled small craft. See People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971). Essentially, this is a measure of the water's capacity to accommodate recreational boating. See State v. McClory, 268 Ark. 227, 595 S.W.2d 659 (1980).

The Michigan Supreme Court has criticized the recreational boating test as being at odds with public policy. Bott v. Commission of Natural Resources, 415 Mich. 45, 327 N.W.2d 838 (1982). The court argued that such a test does not distinguish between waters that are fit for recreational use and those that are not fit. Furthermore, the court charged that the test opens large sections of environmentally sensitive waters to damaging public use. At least since 1853, Michigan has measured navigability by the water's capacity to float logs. Id. at 60, 327 N.W.2d at 841.
applied the trust to all navigable waters. Prior to *Phillips*, the Supreme Court had not fully addressed the interplay between these two standards. Specifically, the Court had not determined whether the trust extends only to navigable bodies, or to all waters subject to the tide's influence, regardless of navigability.

II

THE CASE: *PHILLIPS PETROLEUM v. MISSISSIPPI*

A. Facts and Issues

The issue before the Court in *Phillips Petroleum v. Mississippi* was Mississippi's assertion of public trust sovereignty over tidal wetlands lying several miles north of the Mississippi coast. The wetlands at issue consists of forty-two acres of undeveloped farm land covered by waters from the Bayou La Croix River and eleven unnamed drainage streams. The land is bordered on the east by the navigable, tidally influenced Jourdan River. According to documents dating from 1817, when Mississippi attained statehood, the wetlands are subject to the influence of the tide. They are not navigable, however. According to petitioners, these waters are so shallow at some points that they "consist of little more than a film of moisture around the roots of trees and grasses." Other portions "are only ankle deep or less at average or mean high tide."

Relying on the tidality standard, Mississippi based its title on certain maps that outlined the boundaries of state wetlands. The maps were generated from aerial photographs obtained from the Mississippi Marine Resources Council. Although the Council cautioned that the maps were not made with the precision necessary to determine title, the Mississippi Mineral Lease Commission used the maps to establish which state lands it could alienate under the public trust doctrine. The Commission thereafter leased 600 acres of wetlands to Saga Petroleum U.S., Inc., in 1977. However, record titles to these lands were held by Cin-

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41. *Id.* at 4.
42. *Id.*
44. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
que Bambini Partnership, Phillips Petroleum Company, and others. These titles originated in prestatehood Spanish land grants and were subsequently confirmed by acts of Congress.

The title holders brought suit against Mississippi in the Hancock County Chancery Court. The action sought to confirm and remove clouds from the titles to 2400 acres of wetlands. In an unpublished opinion, the chancery court concluded that 140 of these acres belonged to the state. The chancery court apparently grounded its decision on the theory that the public trust to submerged lands extends to all waters subject to the tide's influence, regardless of navigability.

B. The Mississippi Supreme Court Decision

The title holders appealed to the Mississippi Supreme Court, arguing that the ebb and flow test did not extend the public trust beyond the realm of navigable waters—that tidewaters and navigable waters were the same thing under the trust. Mississippi responded that navigability and tidality were not synonymous and that the public trust reached all tidewaters regardless of their navigability. Although voicing "temerity" in deciding an issue without clear federal authority, the Mississippi court agreed with the state's position.

The case was one of first impression for the Mississippi Supreme Court. No United States Supreme Court opinion had ever defined the extent of the public trust over tidally influenced, but nonnavigable waters. Nonetheless, the court found guidance from the Genesee case, which had expanded public trust sovereignty to nontidal but navigable inland waters. Noting that the Genesee opinion was premised on a concern for states that had navigable waters untouched by the tide, the Mississippi court felt that the issue turned on the following question: Did Genesee and its progeny redefine the trust to focus exclusively on navigability, or did it merely add navigable freshwaters to the list of trust properties—a list that already included tidewaters regardless of navigability?

51. Cinque Bambini, 491 So. 2d at 511 (the Mississippi court did not cite to these congressional acts).
52. Id. at 510.
53. Id.
54. Id.
55. See Certiorari Petition, supra note 40, at 7.
56. Cinque Bambini, 491 So. 2d at 513.
57. Id. at 513-14.
58. Id. at 514.
59. Id.
60. Id.
61. Id.
The Mississippi court held that *Genesee* did not redefine the public trust.\footnote{Id. at 515.} It stated that "the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable freshwaters."\footnote{Id.} In either case, the Court stressed, the "central focus" of the public trust is navigability.\footnote{Id.} Thus, it concluded that *Genesee* merely corrected the "arbitrary and irrational" rule that limited the trust to only those waters that were both navigable and tidal.\footnote{Id.}

The court held that the trust also extended to nonnavigable tidewaters; consequently, Mississippi owned all submerged lands whose waters were subject to the ebb and flow of the tide.\footnote{Id. at 514.} The court indicated that an expansive definition of navigability compelled this conclusion. Noting that all navigable waters, whether tidal or fresh, necessarily include shallow, nonnavigable areas at the periphery,\footnote{Id.} the court argued that the trust does not distinguish between these navigable and nonnavigable portions of a channel. Rather, it includes the entire body of water.\footnote{Id.} The court fashioned a "toothpick sailboat" test to draw the line at which the navigable channel—and hence the public trust—ends:

[S]o long as by unbroken water course . . . 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 we consider the United States set out for the properties granted the State in trust.\footnote{Id. at 515.}

This "toothpick sailboat" test was to apply at high tide, since that is when the boundaries of the trust are normally measured.\footnote{Id.} In this way, all tidally influenced waters would fall under state dominion. The court buttressed this expansive view of the public trust by noting that trust interests such as fishing and bathing are not dependent on navigability\footnote{Id.} and that federal cases continue to describe the public trust in tidelands with reference to the ebb and flow of the tide.\footnote{Id. at 516. The court acknowledged two potential inconsistencies between its decision and existing Mississippi law. First, no prior state case had ever extended the trust to waters that were not navigable in fact. \textit{Id.} The court dismissed this by repeating its toothpick sailboat test. \textit{Id.} Second, Mississippi decisions had held that lands beneath all freshwater streams, navigable and nonnavigable, are open to private ownership. Steamboat Magnolia v. Marshall, 39 Miss. 109 (1860); Morgan v. Reading, 11 Miss. (3 S. & M.) 366 (1844). The court dismissed this inconsistency by finding that the state had elected not to exercise its sovereign powers over inland freshwaters after that power was established in Barney v. Keokuk, 94 U.S.}
The Mississippi Supreme Court also held that the boundaries of sovereign title expand concurrently with the physical boundaries of trust waters. Thus, according to Mississippi law, any gradual expansion of tidewaters entailed a corresponding expansion of the public trust. It distinguished expansions through accretion, which enlarge trust title, from expansions through avulsion, which do not. The court refused to rule, however, whether the trust might also regress as waters receded.

Finally, the court held that since the wetlands in question were part of the public trust when petitioners purportedly gained title, their title deserved no presumption of validity. The court went on to declare that no Mississippi decision had ever estopped the state from asserting its public trust dominion and, moreover, that the present facts did not give rise to an estoppel claim. Similarly, the court rejected petitioners' claims of adverse possession, limitations, and laches.

Of the 140 acres that the chancery court had awarded to the state, the Mississippi Supreme Court reversed as to ninety-eight acres consisting of two artificial lakes. These lakes were formed by an avulsive change and therefore were deemed not covered by the public trust. The decision to leave forty-two acres in state public trust became the focus of the dispute before the United States Supreme Court.

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324 (1876). Cinque Bambini, 491 So. 2d at 517.

The court rejected petitioners' claim that their titles to the wetlands originated before either the state or the federal government obtained trust sovereignty. Id. at 518. Petitioners argued that their titles dated from April 15, 1813, four years before Mississippi's admission to the Union. Id. However, the court noted that President Madison claimed the territory for the United States in 1810 and that Congress authorized Madison's action in 1812. Id. The court thus concluded that the federal government already held the land in trust for Mississippi at the time of petitioners' claimed titles. Petitioners' titles were therefore invalid. Id.

73. Cinque Bambini, 491 So. 2d at 519-20.

74. The court viewed this issue as wholly governed by state law. Id. at 519. Federal authority over trust land fully vests in the state at the time of statehood, id., and no federal sovereignty remains after that point. Id. Hence, the legal outcome derived from changes in the size or direction of a public trust water was strictly a matter of state jurisdiction. Id.

75. Id. at 520.

76. Id. Accretion is defined as "[t]he act of growing to a thing; usually applied to the gradual and imperceptible accumulation of land by natural causes, as out of the sea or a river." BLACK'S LAW DICTIONARY 19 (5th ed. 1979). The Mississippi Supreme Court used the term to denote the gradual and imperceptible expansion of trust waters. By contrast, avulsion is defined as "[a] sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream." Id. at 125.

77. Cinque Bambini, 491 So. 2d at 520.

78. Id. at 521.

79. Id.

80. Id. at 520. These lakes were formed when earth was removed in the mid-1960's for use in the construction of an interstate highway. Id. at 510.

81. Id. at 521. The Mississippi Supreme Court also affirmed the lower court's dismissal of the state's counterclaim for recovery of the value of earth removed from the wetlands for highway construction in the 1960's. It believed the value of such earth, where it was removed from trust land, was impossible to calculate. Id. Only Phillips Petroleum appealed the Mississippi court's decision.
C. The United States Supreme Court Decision

1. The Majority

The issue before the Court was straightforward: Were the lands underlying nonnavigable tidewaters owned by Mississippi through the public trust doctrine or by petitioners through their grants from Spain? Basing its decision on the language of cases dating from the nineteenth century, the majority affirmed the lower court's view that title rested with Mississippi. The Court was confident in the soundness of its conclusion, proclaiming its adherence to "longstanding precedents which hold that the States, upon entry to the Union, received ownership of all lands under waters subject to the ebb and flow of the tide." Relying on these previous "sweeping statements of States' dominion over lands beneath tidal waters," the Court held that such waters need not be navigable for a state to own the soil beneath them.

The Court did not employ the Mississippi Court's analysis and never mentioned the toothpick sailboat test. Instead, it relied principally on Shively v. Bowlby, which it described as "the 'seminal case in American public trust jurisprudence.'" In Shively, the Court held that Oregon owned the soil below the high water mark in the navigable, tidally influenced Columbia River. Phillips quoted language from Shively which declared that "'title and dominion in lands flowed by the tide water'" belonged to the King of England in common law and later to the states as inheritors of the King's interest upon their entry into the Union. The Court quoted similar language from Knight v. United States Land Association and listed several subsequent Supreme Court cases that have "restated and reaffirmed" this same basic language.

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82. The Court emphasized the apparent simplicity of the issue by quoting the Mississippi Supreme Court: "'Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit.'" Phillips Petroleum v. Mississippi, 108 S. Ct. 791, 793 (quoting Cinque Bambini, 491 So. 2d at 510).

83. The opinion was written by Justice White. Chief Justice Rehnquist and Justices Brennan, Marshall, and Blackmun joined. Justice Kennedy took no part in the decision.


85. Id. at 794.

86. 152 U.S. 1 (1894).


88. 152 U.S. at 58.


90. 142 U.S. 161 (1891). The language the Phillips Court quoted reads:

It is the settled rule of law in this court 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, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.

Phillips, 108 S. Ct. at 794 (quoting Knight, 142 U.S. at 83).

For further support, the Phillips majority pointed to Supreme Court cases that recognized such divergent public trust interests as oyster farming and land reclamation for urban expansion.92 These matters obviously have no bearing on the public's concern over navigation rights. According to the Court, it was improbable that these decisions would recognize interests unrelated to navigation if the public trust was limited to navigable tidewaters.93

The majority also cited early state cases that purported to extend the public trust to all tidewaters,94 but it attached no significance to the fact that many early states may only have claimed title to lands beneath navigable waters.95 The Court noted that states are free to limit their tideland holdings as they see fit.96 That some exercise this prerogative, the Court reasoned, does not affect the rights of those states seeking the full reach of their trust sovereignty.97

The Court addressed two arguments advanced by the petitioner Phillips. The first was that the common law ebb and flow test, which developed in the context of English geography, was never intended to cover more than navigable waterways.98 Petitioners argued that navigability and tidality were synonymous in common law, pointing out that nearly all navigable English rivers are also touched by the influence of the tide.99 Petitioners thus concluded that the public trust was confined to navigable waters.100 The Court, however, refused to speculate on the details of English common law, noting instead that American courts understood the ebb and flow test to cover any waters that fall under the tide's influence.101

Petitioners' second argument was that more recent American decisions delineated the trust as being linked to navigability, regardless of the common law.102 In response to this argument, the Court conceded that it had earlier rejected the ebb and flow test for admiralty jurisdiction in

94. See id. at 794 n.3 (citing Wright v. Seymour, 69 Cal. 122, 123-27, 10 P. 323, 324-26 (1886) (state ownership of the bed of the Russian River as far as the tide moved it); Simons v. French, 25 Conn. 346, 352-53 (1856) (public ownership of tidal flats); State v. Pinckney, 22 S.C. 484, 507-09 (1885) (public ownership of salt marshes)).
96. Id. at 794; see infra notes 282-84 and accompanying text.
98. Id. at 796.
99. Id.; see also Brief for Petitioners, supra note 39, at 19.
100. Phillips, 108 S. Ct. at 796.
101. Id.
Genesee. It also acknowledged that the same navigability test was applied to the public trust several years later in Barney v. Keokuk. Stressing that these moves were in response to American geography, where there are thousands of miles of navigable waters above the tide's influence, petitioners argued that the doctrine's basic orientation is toward navigability.

The Court did not agree. The extension of the trust to all navigable waters, it argued, did not change the fact that the trust also extended to all tidelands—regardless of navigability. As the Court noted, even petitioners conceded that the trust extends to nonnavigable tidewaters immediately adjacent to major waterways, such as the shore bordering the ocean. The Court attributed this rule to the fact that such waters are "influenced by the ebb and flow of the tide." The Court was not concerned that the forty-two acres in dispute did not immediately border a major waterway. Instead, it speculated that "[p]erhaps 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."

The Court dismissed the argument that its decision would upset reasonable expectations in property. It stated that Mississippi case law broadly describes trust boundaries as including "all the land under tidewater." Although none of these Mississippi cases dealt with nonnavigable tidewater, the Court nonetheless concluded that "the clear and unequivocal statements in [the Mississippi Supreme Court's] earlier opinions should have been ample indication of the State's claim to tidelands." The Court also pointed out that the Mississippi Supreme Court recognizes public trust uses that have nothing to do with navigation. Given these state precedents, any private expectations in trust property were deemed to be unreasonable.

In addition, the majority rejected the dissent's suggestion that the Court's ruling would have sweeping implications for property holders.

104. Phillips, 108 S. Ct. at 796; see Barney, 94 U.S. at 398 (trust extends to points on the Mississippi River that are above the tide's influence).
105. Brief for Petitioners, supra note 39, at 29-34.
107. Id.
108. Id.
109. Id. (quoting Justice Blackmun's dissenting opinion in Kaiser Aetna v. United States, 444 U.S. 164, 183 (1979)).
110. Id. at 798 (quoting Rouse v. Saucier's Heirs, 166 Miss. 704, 713, 146 So. 291, 291-92 (1933)); see also State ex rel. Rice v. Stewart, 184 Miss. 202, 230, 184 So. 44, 49 (1938); Martin v. O'Brien, 34 Miss. 21, 36 (1857).
112. Id. (citing Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 632-33 (Miss. 1967)).
113. Id.
nationwide.\footnote{114} The Court stressed that its decision was in agreement with the rule that allows states to limit the extent of their own public trust sovereignty.\footnote{115} It argued that, in most cases, longstanding state precedents conformed to its decision in any event.\footnote{116} Indeed, the Court speculated that many state land grants and public rights to tidewaters would be upset if the trust did not apply to all tidal waters.\footnote{117} Finally, the Court stated that where an owner’s rights are upset by a state that asserts title over tidelands, the remedy available would be a question of state property law.\footnote{118}

2. The Dissent

The dissent\footnote{119} began by stressing that Phillips was a case of first impression.\footnote{120} It strongly implied that language from previous decisions must be understood within the context of fact situations involving navigable tidewaters.\footnote{121} “Until today,” the dissent wrote, “none of our 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.”\footnote{122} It cited no fewer than nine Supreme Court cases where the Court had defined the scope of the public trust according to the water’s navigability.\footnote{123} Although these cases involved freshwater, the dissent argued that there was no basis for believing that the rule was different for tidewater.\footnote{124}

Indeed, the dissent’s argument amounted to an assertion that the trust should be measured only by reference to navigability. The dissent reasoned that the public trust doctrine developed as the best way to protect the public’s right of free passage.\footnote{125} It stressed that early English cases never dealt with nonnavigable waterways—tidal or otherwise.\footnote{126} While recognizing that some English cases required that public trust wa-
ters be influenced by the tide, the dissent suggested that these tidal waters had to be navigable before the King obtained title.

The dissent conceded that the boundaries of a navigable waterway include the nonnavigable areas immediately on its periphery. It argued, however, that discrete waters, unconnected to a navigable channel, should not be included within the trust.

Arguing that American cases are in accord with the notion that navigability is the key to the public trust, the dissent defined the trust's primary function as protecting the use of navigable waters for transportation and commerce. It argued that trust lands do not extend to nonnavigable waters merely because states pursue other interests that have nothing to do with navigation. It noted that the majority would not extend the trust to every isolated waterway that could support uses such as fishing or land reclamation. The dissent argued that both the trust and federal admiralty law are fundamentally concerned with commerce; therefore, public trust sovereignty ought to parallel federal admiralty jurisdiction, which reaches only navigable waters.

The dissent also expressed concern for the property expectations of petitioners and those in similar situations, potentially thousands of landowners, who reasonably believed that their titles were valid. Furthermore, the dissent characterized Mississippi's claim to the wetlands as belated and opportunistic. It noted that Mississippi had shown no interest in the land for more than 150 years, while petitioners or prior titleholders had paid property taxes during that same period. This characterization was grounded in a suspicion that Mississippi did not pursue the land in order to protect traditional public trust interests, but rather to profit from oil and gas leases. The dissent concluded by questioning the majority's reliance on state law to resolve equitable ques-

128. Id.
129. Id. at 802.
130. Id.
131. Id. at 801.
132. Id.
133. Id.
135. Phillips, 108 S. Ct. at 804. Those that could be affected by the Phillips decision include owners of millions of acres of tidal wetlands in the United States. Id.
136. Id. at 803.
137. Id.
138. Id. at 804.
tions arising from the trust, given the Mississippi court's swift rejection of such claims in Cinque Bambini.

III
TIDAL INFLUENCE AND THE PUBLIC TRUST

Phillips is the first Supreme Court case to consider the applicability of the public trust doctrine to discrete nonnavigable waters. As discussed in Part II, the Court relied on the ebb and flow test to find that the trust extended to nonnavigable tidal waters, arguing that, under American precedent, the public trust had always included all tidal waters. Thus, the question is whether Phillips correctly interprets the traditional Anglo-American understanding of the ebb and flow test.

It is not clear whether the common law intended this test to reach nonnavigable waters. Certain early American cases, such as Martin v. Waddell and Pollard's Lessee v. Hagan, focused on navigability when discussing the tidewaters trust. Where the trust involves freshwater, the Court has strictly delineated trust boundaries by reference to navigability. The ebb and flow test was used in this country only as a means to prove the factual and legal existence of navigability, not as an independent legal standard for placing submerged lands under the public trust. This section reviews the history of the ebb and flow test and concludes that it fails to support the Phillips decision.

A. Tidal Influence and the Public Trust at Common Law

To understand the proper role of the ebb and flow test in modern jurisprudence, it is necessary to examine its historical roots. Although the law surrounding public rights to waterways originated in ancient Rome, references to free and open water passage arose in England sometime after the 12th century. As early as 1225, the Magna Carta expressed a concern with navigation when it prohibited the construction of weirs along all navigable waterways except the seashore. The

139. See supra notes 110-18 and accompanying text.
141. See supra notes 84-91 and accompanying text.
143. 44 U.S. (3 How.) 212, 215 (1845).
144. See, e.g., Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); see also cases cited by the Phillips dissent, 108 S. Ct. at 800.
145. See INSTITUTES OF JUSTINIAN, supra note 10, at 67.
146. See, e.g., H. FARNHAM, supra note 1, at 179-90 (focusing on the period during the reign of Queen Elizabeth I).
147. A weir is a fishing structure attached to the bed of a water body. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2593-94 (1986).
148. See Note, supra note 8, at 766. See MAGNA CARTA ch. 33 ("Henceforth all the weirs in the Thames and Medway, and throughout all England, save on the sea-coast, shall be done away with entirely.")
common law, in turn, placed great reliance on the Magna Carta as a comprehensive endorsement of public rights to navigable waters. The view that the Magna Carta prohibited interference with navigable rivers persisted in English decisions for the next five centuries and was picked up by American cases and commentary as well.

Along with this focus on navigability, however, English authorities also referred to “the tide,” “the tide’s influence,” or “the ebb and flow of the tide” when defining public waters. For example, Hall’s 1830 work *An Essay on the Rights of the Crown in the Sea Shores of the Realm* states that the King’s dominion over submerged beds “not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports, and tiderivers*, as far as the reach of the tide, around the coasts of the kingdom.” Hall emphasized that the public nature of a river lies in the fact that its waters “communicate with the sea, and are within the *flux and reflux* of its tides.” Thus, such waters are public because the impact of the tide makes them “part and parcel of the sea itself.”

The roots of the confusion between tidality and navigability lie in the difference between royal or state ownership of submerged lands and the public’s right of free passage over navigable waters. The Crown’s ownership of the beds of English waters, on which the public trust is based, extended only so far as the tide ebbed and flowed. By contrast, the public’s right of navigation extended even to privately held waters above the flow of the tide, thus encompassing navigable but nontidal waters.

The rule limiting submerged bed ownership to tidelands must be traced to the 16th century, where it was first proposed by Thomas Digges in his treatise *Proofs of the Queen's Interest in Lands Left by the Sea and*
Digges argued that the King should own the tidewaters because they are components of the sea, "the most important kind of water." Digges' theories were later expressed in Hale's *De Jure Maris*. The shore, Hale wrote, "doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea." English cases similarly delineated the Crown's ownership in terms of tidewaters.

The issue thus became whether royal submerged bed ownership extended to land beneath nonnavigable as well as navigable tidewaters. Early English decisions do not squarely answer this question. Their analyses, however, suggest a connection between navigability and tidality. Perhaps the first case to consider the issue was the 1631 case *Attorney-General v. Philpot*. There, the court decreed that "[t]he king has [an] interest in a navigable river as high as the sea flows and re-flows in it." Explaining its reference to navigability, the court continued by stating that "there are two sorts of rivers: i. navigable, and this is royal and public; ii. not navigable, as inland rivers."

Close scrutiny demonstrates that *Philpot*'s language is vague. By distinguishing navigability and nonnavigability in terms of royal ownership, *Philpot* implies that only navigable rivers fell within the sovereign's domain. Yet, the court also posits two contradictory notions of navigability. The first quotation states that the King has an interest in navigable rivers only so high as the tide influences them. This would limit the King's ownership of submerged lands to navigable, tidally influenced waters. The second quotation, however, makes no distinction based on tidality. Hence, while the court clearly states that navigable waters below the tide are subject to royal ownership, one is left uncertain as to the status of navigable waters above the tide. More importantly, nonnavigable waters of both types appear to be outside the King's domain, although the court never directly states this.

*Philpot*'s precedential value has recently been challenged, and subsequent cases rarely cite it. A more influential decision is *The Royal
*Fisheries of the Banne,*166 which involved royal fishing rights to the Banne River in Ireland at a point where the water was subject to the ebb and flow of the tide. The court wrote:

There are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and it belongs to the king by his prerogative; but in every other river not navigable, and in the fishery of such river, the tenants on each side have interest of common right.167

This language states more clearly than *Philpot* that Crown rights attached only where the water was both navigable and tidally influenced. By contrast, where there was no navigability, there also was no sovereign ownership.

English authorities continued to relate navigability to tidality. Woolrych argued that "the soil of ancient navigable rivers, where there is a flux and reflux of the sea, belongs to the crown, and that of other streams . . . to the owners of the adjacent grounds."168 Woolrych concluded that "[[t]he soil beneath rivers which are not navigable, belongs . . . to the owners of the [adjacent] land."169

Where authorities did not directly express a connection between navigability and tidality, they frequently spoke in terms of navigability alone. For example, the King's Bench declared in 1780 that "*prima facie*, the soil of a navigable river belongs to the king."170 As late as 1852, the House of Lords similarly proclaimed that a "public navigable river" was royally owned.171

It is not clear why the common law linked navigability and tidal influence when delineating submerged bed ownership. As a matter of policy, the difference between navigable freshwater and navigable tidewater is difficult to see.172 Certainly, both are equally useable for travel. An explanation perhaps stems from the fact that the sea was uniquely important as an avenue of commerce in England. That it would therefore be

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166. 80 Eng. Rep. 540 (1604). Although the *Banne* court did not address submerged bed ownership, American courts have frequently relied on it for support in public trust cases. See, e.g., Palmer v. Mulligan, 3 Cai. R. 307, 308, 318 (N.Y. Sup. Ct. 1805).


168. H. WOOLRYCH, supra note 150, at 44 (citations omitted) (emphasis added).

169. Id. at 46.


172. Moore assails Digges' thesis of royal submerged bed ownership as having no basis in law or fact. S. MOORE, supra note 14, at 182-84. Indeed, Moore points out that most tidal lands were held in private hands for at least 300 years before Digges advanced his theory. Id. at 24. This raises the possibility that originally there was no sound rationale for the distinction. Such is the argument advanced by at least one modern commentator. See MacGrady, supra note 31, at 551-68.
given a special legal significance is understandable in a nation whose pre-
19th-century economy was predominately maritime. Hence, English
courts attached great importance to the fact that tidal waters are an ex-
tension of the ocean itself. The Banne court, for example, explained that
“[t]he reason for which the king hath an interest in such navigable river,
so high as the sea flows and ebbs in it, is because such river participates
of the nature of the sea, and is said to be a part of the sea so far as it
flows.”

This interpretation is reinforced by the fact that tidal influence was
considered prima facie evidence of navigability, at least for purposes of
delineating public access to English waters. In Miles v. Rose, the
Court of Common Pleas held that the tide’s influence was “strong prima
facie evidence of its being a public navigable river.” Similarly, in
Mayor of Colchester v. Brooke, the court stated that:
It cannot be disputed that the channel of a public navigable river is prop-
erly described as a common highway . . . and there is no one circum-
stance which more decisively affixes on a river the character of being
public and navigable in this sense of a highway than the flow and reflow
of the tide in it.

However, this prima facie assumption could be overcome by exam-
inng the specifics of the case. In Mayor of Lynn v. Turner, the King’s
Bench concluded that the mere influence of the tide did not automatically
create a public navigable river. Rather, determinations of navig-
ability were questions of fact, and the court cautioned that there were
many tidal rivers that were not navigable. In Rex v. Montague, the
court wrote that “[t]he strength of the prima facie evidence, arising from
the flux and reflux of the tide, must depend upon the situation and nature
of the channel.” If the channel was “broad and deep,” “calculated for
the purposes of commerce,” then it was public water. If, on the other
hand, it was “a petty stream, navigable only at certain periods of the tide,

173. The Royal Fisheries of the Banne, 80 Eng. Rep. 540, 541 (1604); see also H. Wool-
RyCh, supra note 150, at 44. Indeed, English admiralty jurisdiction, like the King’s submerged
bed ownership, was limited to tidewaters. MacGrady, supra note 31, at 550.
174. See H. FARNHAM, supra note 1, at 116 n.17; J. Gould, A TreAtise on the Law
of Waters, including riparian Rights, and Public and Private Rights in Waters
TidAl and Inland 101-02 (3d. ed. 1900) [hereinafter Riparian Rights]; S. Moore & H.
Moore, History and Law of Fisheries 166-67 (1903); Stevens, supra note 12, at 201.
176. Id.
178. Id. at 531.
180. Id. at 981.
181. Id.
183. Id. at 1184.
184. Id.
and then only for a very short time, and by very small boats, it is difficult to suppose that it ever [was] a public navigable channel."\textsuperscript{185}

Of course, the fact that tidewater was presumptively navigable for purposes of public passage does not settle the limits of crown submerged bed ownership. Merely because the public's access to tidewater was defined by navigability does not mean the same applied to the King's title. Nonetheless, the rule of \textit{prima facie} navigability sheds additional light on the importance English law attached to tidewater as a highway for commerce. Indeed, much of the tide's legal significance flowed from the fact that it presumptively indicated navigability.

The common law apparently did not produce a firm rule precluding the King's ownership of nonnavigable tidewaters. Instead, it merely linked the notions of tidality and navigability.\textsuperscript{186} This is not attributable solely to happenstance, or to the confusion of the few judges who actually faced the issue. Rather, eminent commentators, discussing broad principles of law, likewise discussed tidality within the context of navigability. Lord Hale, for example, consistently framed his discourse in these terms.\textsuperscript{187} It was this tradition upon which American courts built the 19th century public trust doctrine.

\textbf{B. Tidal Influence and the Public Trust in American Law}

American courts generally accepted the idea that the common law linked the issues of tidality and navigability. There was, however, uncertainty as to the precise nature of that connection.\textsuperscript{188} It is clear that few if any courts viewed tidal influence as \textit{prima facie} evidence of navigability. In 1846, Chief Justice Gray of the Massachusetts Supreme Court speculated that there were three possible meanings of the term "navigable waters," and thus three possible models for defining the public trust.\textsuperscript{189} The first required that waters be both navigable and tidally influenced.\textsuperscript{190} The second created a legal fiction whereby all tidal waters were navigable in law, regardless of whether they were navigable in fact.\textsuperscript{191} The third model employed something akin to the navigability-in-fact test developed

\begin{footnotes}
\item[185] Id.
\item[186] English law was clarified considerably in 1868 by Murphy v. Ryan, 2 Ir. R.-C.L. 143 (1868), a case involving title to the bed of the nontidal Barrow River. In \textit{Murphy}, the court stated that a river may be held navigable for title purposes only where the sea ebbs and flows in it. \textit{Id.} at 152. However, the \textit{Murphy} decision followed American precedent on the issue. \textit{Id.} at 153. But, \textit{Murphy} does not appear to resolve the problem of nonnavigable tidewaters. See \textit{infra} note 209 and accompanying text; \textit{see also} MacGrady, \textit{supra} note 31, at 586-87.
\item[187] See H. \textit{Farnham}, \textit{supra} note 1, at 114.
\item[188] See \textit{infra} notes 192-228 and accompanying text.
\item[189] Commonwealth v. Vincent, 108 Mass. 441, 447 (1871), \textit{cited with approval in Ripsarian Rights, supra} note 174, at 100 n.3.
\item[190] \textit{Vincent}, 108 Mass. at 447.
\item[191] \textit{Id.}
\end{footnotes}
later—all waters capable of supporting navigation were viewed as navigable, irrespective of tidality.\textsuperscript{192}

Gray's analysis highlights the range of views American courts held regarding the ebb and flow test. For the first quarter of the 19th century, his first and second models were the most prominent.\textsuperscript{193} It is significant that the ebb and flow test was associated with navigability in both models. Hence, in Gray’s first model the test served to distinguish between public and private navigable waters, and in his second it represented the legal definition of navigability. Only the second left open the possibility that public tidewaters might be factually nonnavigable. Unfortunately, judges usually did not specify which of the two models they employed. Moreover, the courts never faced a situation where the tidewaters were in fact nonnavigable.

The difficulty was that use of either of Gray’s first two models of navigability produced the same result—the public trust did not extend to freshwater.\textsuperscript{194} Criticism of this fact mounted quickly, particularly as the steamboat opened vast stretches of inland waters.\textsuperscript{195} Several states broke ranks and chose to apply Gray’s third model, thereby extending the trust to all navigable waters regardless of tidal influence.\textsuperscript{196} The Supreme Court eventually joined this growing consensus in both its admiralty\textsuperscript{197} and public trust jurisprudence.\textsuperscript{198}

This section describes the historical progress toward this new approach to the public trust. The first subsection outlines the early ebb and flow test and its reevaluation in The Propeller Genesee Chief v. Fitzhugh. The second subsection examines the Supreme Court’s public trust jurisprudence in light of this reevaluation.

1. The American Ebb and Flow Test

A cursory review of American cases and commentary of the 19th century shows a certain lack of clarity surrounding the ebb and flow test. For example, in two separate editions of John M. Gould’s \textit{A Treatise on the Law of Waters}, the author gave two apparently distinct versions of the ebb and flow test. His 1883 edition stated that while deep and navigable channels were certainly subject to public rights, shallow and non-

\textsuperscript{192} Id.
\textsuperscript{193} See infra notes 199-218 and accompanying text. Gray’s third model was not employed during this period.
\textsuperscript{195} See, e.g., The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).
\textsuperscript{196} See Carson v. Blazer, 2 Binn. 475, 478 (Pa. 1810); see infra notes 212-16 and accompanying text.
\textsuperscript{197} The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).
\textsuperscript{198} Barney v. Keokuk, 94 U.S. 324 (1876); see infra notes 229-55 and accompanying text.
Navigable waters likely were not. By contrast, his 1903 edition simply proclaimed that "[t]hose rivers and parts of rivers in which the tide ebbs and flows are known as 'navigable' rivers, and by the common law they are vested *prima facie* in the Crown." In the former, the public trust is defined by actual navigability. In the latter, all tidewaters are deemed navigable and thus within the public trust regardless of actual navigability. Somewhere in the twenty years between editions the distinction between navigability and nonnavigability became considerably more blurred.

Gould's analysis parallels the writing of James Kent in his *Commentaries on American Law*, long considered the seminal treatise on American law of the 19th century. Kent wrote that "[i]t is a settled principle of the English common law, that the right of soil owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to high-water mark." If it were possible to take this statement as the proper rule, we might conclude that American writers viewed English public waters as having to be both navigable and tidal. However, it seems that more commentators chose to parrot the open-ended description of the common law found several pages earlier in Kent's *Commentaries*. Describing *The Banne*, Kent wrote that "in the common law sense of the term, those [waters] only were deemed navigable in which the tide ebbed and flowed." Again, he repeated the same principle several pages later that "no rivers are deemed navigable . . . except those where the tide ebbs and flows."

Many state courts took this language to mean that tidality was required for a finding of legal navigability, and thus for a finding of public waters as well. The most significant of these cases was *Palmer v. Mulligan*, authored by none other than Kent himself. There, the plaintiff sued the defendant for constructing a dam that obstructed the plaintiff's ability to raft timber down the navigable Hudson River. Kent ruled that the defendant was within his rights to build the dam. The Hudson was

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199. *J. Gould, A Treatise on the Law of Waters, Including Riparian Rights, and Public and Private Rights in Waters Tidal and Inland* 97 (1883). This definition indicates that the public trust is defined by actual navigability.
202. 3 J. Kent, *Commentaries on American Law* 427 (New York 1832).
203. *See, e.g., J. Angell, supra note 152, at 75-76 (discussing a distinction between true navigability and legal navigability; the latter turning on whether the influence of the tide is felt. The author is no more specific than Kent as to the significance of tidal influence).*
204. 3 J. Kent, *supra* note 202, at 412.
205. *Id.* at 417.
206. 3 Cai. R. 307 (N.Y. Sup. Ct. 1805); *see generally* MacGrady, *supra* note 31, at 569-87 (importance of *Palmer*).
not public water at the point in question because there was no tidal influence.

The Hudson at Stillwater is a fresh [water] river, not navigable in the common law sense of the term, for the tide does not ebb and flow in that place. In the case of The Royal Fishery in the river Banne it was resolved, that by rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil.\(^{207}\)

Kent clearly endorsed the notion that tidality was the legal test for navigability.\(^{208}\) A myriad of state cases adopted this approach and likewise tied together the notions of tidality and navigability.\(^{209}\) For example, the Illinois Supreme Court ruled that since the Mississippi River was not subject to tidal influence, it was not navigable in law even if it was navigable in fact; hence, its bed could be privately owned.\(^{210}\) As a result, the beds of many major inland waterways above the tide were owned by private parties and subject to their control.

This interpretation of the trust was not much of a problem in the first years of the nation’s existence, because most navigation was performed along the coast. The situation changed, however, with the advent of the steamboat and the opening of the Northwest and Louisiana Territories.\(^{211}\) It became apparent to many courts that the equation of tidality and navigability was ill-suited to American geography. If the delineation of public waters was to depend upon the interests of free passage and commerce, then the ebb and flow test had to be redefined. What emerged was a new model for delineating public trust boundaries, based on navigability and existing concurrently with the tidality standard.

The first court to apply this standard was the Pennsylvania Supreme Court in Carson v. Blazer.\(^{212}\) There, the court ruled that Pennsylvania owned the bed of the Susquehanna River by virtue of its navigability, notwithstanding the fact that it was not subject to the ebb and flow of the tide.\(^{213}\) The court wrote that “[t]he qualities of fresh or salt water cannot amongst us, determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character.”\(^{214}\) The

\(^{207}\) Id. at 318 (citation omitted).

\(^{208}\) His contention that The Banne “resolved” this rule is disputable, however. A close reading of The Banne’s language shows that it might just as easily stand for the idea that sovereign ownership turned on the existence of both tidality and navigability. See supra notes 166-67 and accompanying text.

\(^{209}\) See H. Farnham, supra note 1, at 249-50. Kent’s approach was even adopted by England in Murphy v. Ryan, 2 Ir. R.-C.L. 143 (1868). For a brief statement of Murphy’s effect on English law, see supra note 186; see also MacGrady, supra note 31, at 585-86.

\(^{210}\) Middleton v. Pritchard, 4 Ill. 498, 500 (1842).


\(^{212}\) 2 Binn. 475 (Pa. 1810).

\(^{213}\) Id. at 484.

\(^{214}\) Id. (emphasis in original).
court thus ruled that the test for submerged bed ownership was whether the water was navigable in fact. Numerous state courts followed suit, but the New York Supreme Court, after considering the navigability standard, maintained its tidality standard.

The tidewater concept was ultimately challenged in the United States Supreme Court in the context of federal admiralty and maritime jurisdiction. For the first half of the 19th century, admiralty law jurisdiction was, like the public trust, limited to tidewaters. The Court first reached this conclusion in *The Steam-Boat Thomas Jefferson*, which involved a suit in federal court for wages allegedly earned in a voyage on the Missouri River above the ebb and flow of the tide. The Court ruled that federal courts did not have jurisdiction over the matter because federal maritime law applied only to activities substantially performed “upon the sea, or upon waters within the ebb and flow of the tide.”

The Supreme Court finally reconsidered its application of the ebb and flow test in *The Propeller Genesee Chief v. Fitzhugh*. This landmark case held that federal admiralty jurisdiction extended to the navigable but nontidal waters of Lake Ontario. The Court, per Chief Justice Taney, asserted that the tidewaters test developed in response to the unique characteristics of the English countryside, where “there was no navigable stream beyond the ebb and flow of the tide.” Taney lamented that by applying the common law model automatically, United States courts ignored the geographic realities of America, where large sections of inland navigable waters are never touched by the tide. He wrote that “there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit.” Rather, the ebb and flow limitation was useful only where the geography proved that all tidal waters were navigable anyway.

In perhaps the most significant words written by the Supreme Court on the issue, Taney concluded:

In England therefore tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; [English courts] took the ebb and flow of the tide as the test,
because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words it is confined to public navigable waters.\(^{222}\)

Taney thus explicitly stated that the common law tidewaters concept meant navigability. Tidality was a "convenient" test of true navigability. Applied to the American landscape, the tidality distinction was "arbitrary" and "without any foundation in reason."\(^{223}\) Taney believed that, in applying this common law rule, American courts lost sight of the object they were trying to describe: "The description of a public navigable river [i.e. the ebb and flow test] was substituted in the place of the thing intended to be described [i.e. navigability]."\(^{224}\) He thus held that the proper test of the government's admiralty jurisdiction was whether the water was navigable in fact.\(^{225}\)

Genesee's significance stems from its statement that the ebb and flow test is only a measure of true navigability. Tidality has no independent life or legal significance. Whether Taney offered an accurate portrait of English law and geography is hotly disputed.\(^{226}\) Nonetheless, his analysis has become the legal status quo in the United States.\(^{227}\) Of course, Genesee involved admiralty law and not the public trust; however, the Supreme Court applied Genesee's reasoning to the public trust twenty-five years later in Barney v. Keokuk.\(^{228}\) Cases proceeding from Barney similarly demonstrate the connection between tidality and navigability in the public trust context. It is to these cases which we now turn.

2. The Court's Reevaluation of Public Trust Jurisprudence

a. Barney v. Keokuk and Its Antecedents

In Barney v. Keokuk,\(^{229}\) the Supreme Court applied Genesee's equation of tidality and navigability to the public trust. The Court ruled that Iowa's trust sovereignty extended to the bed of the Mississippi River, even above the influence of the tide. The Court began by paraphrasing Genesee's view that tidality and navigability were synonymous.\(^{230}\) Remarkably that major differences existed between English and American

\(^{222}\) Id. at 455.
\(^{223}\) Id. at 454.
\(^{224}\) Id. at 455 (emphasis added).
\(^{225}\) Id. at 457.
\(^{226}\) See, e.g., MacGrady, supra note 31, at 570.
\(^{227}\) Id.
\(^{228}\) 94 U.S. 324 (1876).
\(^{229}\) Id.
\(^{230}\) Id. at 337.
the Court dismissed the trend in American courts of restricting the public trust to navigable tidewaters.

Barney left no doubt that the public policy it was concerned with was ensuring state control over navigable waterways. It therefore directly equated the ebb and flow test to navigability:

As the only waters recognized in England as navigable were tide-waters, the rule [the ebb and flow test] was often expressed as applicable to tide-waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.

The Court then extended the result in Genesee to the public trust doctrine, holding that the ebb and flow test did not bar the trust from reaching all navigable waters, whether above or below the tide.

Since Barney and Genesee so closely parallel one another, it is tempting to conclude that Barney simply incorporated Genesee’s views and applied them to the public trust. In fact, the Phillips dissent advanced an argument similar to this. However, a close reading of the Court’s language shows that Barney did not explicitly endorse Genesee’s conclusion that tidal influence means true navigability. Rather, Barney, following the same pattern of analysis as developed in Genesee, simply embraced Genesee’s result without direct reference to its analysis. Nonetheless, it is clear that Barney understood the ebb and flow test as but a measure of navigability. These two decisions make clear that tidality should only be considered within the context of true navigability.

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231. Id. at 338.
232. These other courts created a “confusion” that “laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy.” Id.
233. Id. at 337-38.
234. Id. at 338.
236. In Barney’s words:
   Since this court [declared in Genesee] that the Great Lakes and other navigable waters of the country, above as well as below the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.
237. Like Genesee, Barney asserted that navigability and tidality were synonymous at common law because English navigable rivers were almost always tidal. Id. at 337. Barney similarly considered navigability to be the central factor of concern for English submerged bed ownership. The Court thus emphasized the policy of granting public authorities “entire control of the great passageways of commerce and navigation.” Id. at 338. Also like Genesee, Barney considered earlier public trust decisions requiring tidality for a legal finding of navigability to be at odds with this policy. Id. Therefore, Barney concluded, like Genesee, that the public trust should return to its common law roots and extend to all navigable waters. Id.
This makes sense in light of the paramount public trust interest in navigation.\textsuperscript{238}


An even clearer statement of the trust's focus on navigability was made in \textit{Illinois Central R.R. v. Illinois},\textsuperscript{239} a case considered by many to be the "lodestar" of American law on this subject.\textsuperscript{240} The case involved the validity of an 1869 legislative grant to the Illinois Central Railroad of virtually all the submerged lands of Lake Michigan within one mile of the Chicago waterfront. Illinois had repealed this grant four years after making it and brought suit against the Railroad seeking judicial determination of its title. The United States Supreme Court decided two substantive issues relating to the dispute: first, whether the trust extended to inland navigable lakes above the flow of the tide;\textsuperscript{241} and second, whether a state could grant away vast parcels of its trust holdings and subject them to almost total private control.

As to the first issue, the Court held that the trust applied as fully to freshwater lakes as to the ocean itself.\textsuperscript{242} It argued that such lakes are of the same character as the sea, except that their waters are fresh and im-

\begin{itemize}
\item \textsuperscript{238} Earlier Supreme Court cases, cited in \textit{Barney}, reinforce the view that navigability is the sole measure of the tidelands trust. In \textit{Martin v. Waddell}, 41 U.S. (16 Pet.) 367 (1842), \textit{cited with approval in Barney}, 94 U.S. at 338, the Court ruled on New Jersey's title to the beds of Raritan Bay—a navigable and tidally influenced body. \textit{Id.} at 407. The Court never mentioned tidality, but instead framed its entire analysis in terms of navigability. Of the common law, it stated that "dominion and property in \textit{navigable waters}, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit." \textit{Id.} at 411 (emphasis added). The Court concluded that the 13 original states, at the time of the American Revolution, obtained "the absolute right to all their \textit{navigable waters} and the soils under them for their own common use, subject only to the rights surrendered by the Constitution to the general government." \textit{Id.} at 410 (emphasis added). \textit{Martin} was largely based on the reasoning in \textit{Arnold v. Mundy}, 6 N.J.L. 1 (1821); see \textit{MacGrady, supra} note 31, at 590-91.

Three years later, in \textit{Pollard's Lessee v. Hagan}, 44 U.S. (3 How.) 212 (1845), \textit{cited with approval in Barney}, 94 U.S. at 338, the Court extended the trust to newly admitted states by virtue of the equal footing doctrine. It held invalid a landowner's federal patent to land underlying navigable tidewaters in Mobile Bay and the Mobile River. The Court held, "[t]hen to Alabama belong the \textit{navigable waters}, and the soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States." \textit{Id.} at 229 (emphasis added).


\item \textsuperscript{239} 146 U.S. 387 (1892).
\item \textsuperscript{241} Technically, \textit{Barney} had only resolved the question as to an inland river.
\item \textsuperscript{242} \textit{Illinois Cent. R.R.}, 146 U.S. at 436-37.
\end{itemize}
mune from tidal influence.243 “In other respects,” the Court continued, the lakes “are inland seas and there is no reason or principle for the assertion” of the trust over tidewaters that does not apply with equal force to lakes.244 The Court acknowledged that the traditional problem with applying the trust to these “inland seas” was the ebb and flow standard, which it described as the English common law’s legal test of navigability.245 The Court concluded, however, that this test had been repudiated in the United States,246 and thus there was no bar against extending the trust to Lake Michigan.247

The Court attributed its holding to the trust’s purpose of securing public navigation. According to the Court, the public trust “is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.”248 The Court emphasized that the trust had always focused on navigation:

[B]y the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters . . . being used as synonymous terms in England.249

Hence, no question was left as to either the scope of the public trust, or the role of the tide in relation to it.

The Court then ruled that a state may not alienate vast parcels of trust land in contravention of the public’s interest in navigation.250 It found that trust title was of a different nature than ordinary title, carrying with it a guarantee of certain values that may not be divested.251 These values revolved around the people’s right to “enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”

While the Court conceded that certain parcels could be granted away in order to further the public interest, “[a] grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power.”253 The Court concluded that such a grant was surely revocable, if not totally void.254 It therefore ruled that Illi-

243. Id. at 435.
244. Id.
245. Id.
246. See supra notes 219-38 and accompanying text.
248. Id. at 436.
249. Id.
250. Id. at 453.
251. Id. at 452-54.
252. Id. at 452.
253. Id. at 453.
254. Id.
nois' repudiation of its grant to the railroad was legal and that title to the Chicago waterfront remained with the state. The public's paramount interest in navigation thus was preserved.

c. The Misapplication of Shively v. Bowlby in Phillips

Subsequent Supreme Court decisions reinforce the view that submerged bed ownership turns on navigability. The case most heavily relied on in Phillips was Shively v. Bowlby, which involved the title to a tract of land beneath the mouth of the Columbia River. These waters were entirely navigable, and the Court never alluded to the trust's role in nonnavigable areas.

The Shively court articulated a broad, open-ended description of the tidewaters trust. For example, it asserted that in England, "the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation" and that such rights to tidewaters passed to the states upon the American Revolution. Phillips touted this quotation as evidence of the Court's "sweeping" extension of the trust to all tidewaters, navigable or otherwise. As a purely semantic exercise, however, this conclusion is not borne out. Shively's language is neutral on the question of navigability, thereby opening itself to varying interpretations. Indeed, a thorough reading of the Phillips opinion indicates that the majority misinterpreted Shively.

On numerous occasions Shively spoke of the public trust in terms of navigable waters. It declared, for example, that grants of trust land "bounded by the sea, or by any navigable tide water [do] not pass any title below high water mark" unless the grants provide so expressly.
However, the *Shively* Court's attitude toward the contours of the trust is most tellingly displayed by its discussion of the trust's underlying policies.260 Speaking of the common law, *Shively* described trust lands as those where "their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects."261 It stated that, in conjunction with the King's ownership of the submerged bed, construction of wharves or other structures representing nuisances to navigation were deemed to be purprestures and therefore were subject to demolition.262 The Court also referred to *Genesee*’s notion that the ebb and flow test only constituted a more convenient measure of navigability.263 These are not the descriptions of a broad doctrine comprising all types of waters, navigable or otherwise. Rather, they involve a doctrine tailored to the needs of a public relying on navigable water for open passage and commerce.

Ignoring this repeated emphasis on navigability, the *Phillips* majority relied on one quote describing the trust as comprising "lands flowed by the tide."264 Certainly, this language could mean both nonnavigable and navigable water. The *Shively* Court's choice and arrangement of the words do not preclude this possibility. However, it is significant that the Court rarely used a modifier to clarify its intended definition of "tide water."265 In those passages where it did employ a word of explanation, the word was "navigable." The importance of this language is discussed in a subsequent decision, *McGilvra v. Ross*,266 where the Supreme Court explained that *Shively*’s use of the phrase "navigable waters" was not inadvertent, but rather reflected the Court's view that navigability in fact represented the test for state and national sovereignty over territorial shores.267 *McGilvra* made no distinction between tidewater and freshwater: navigability was the measure of trust boundaries in toto.268

260. See also *Appleby*, 271 U.S. at 380, 384.
262. Id. at 13.
263. Id. at 34. As the court wrote:
   In England, where there were no navigable streams beyond the ebb and flow of the
tide, the description of the admiralty jurisdiction as confined to tidewaters was a
reasonable and convenient one, and was equivalent to saying that is was confined to
public navigable waters.
Id. (emphasis added).
265. The Court's specific reference to navigability when describing public trust tidewaters
is not uncommon. See United States v. Mission Rock Co., 189 U.S. 391, 407 (1902); *Knight v.
266. 215 U.S. 70 (1909).
267. Id. at 78.
268. Id. at 77-78.
Supreme Court decisions following Shively similarly focused on navigability when defining the public trust. In Packer v. Bird,269 the Court was asked to determine title to an island located within a navigable California river above the influence of the tide. Concluding that the riverbed fell within the ambit of the public trust, the Court stated that the trust’s purpose was to administer the land in accord with the public interest in secure and free commerce.270 The Court wrote that in England submerged bed ownership was limited “to such navigable rivers as are affected by the tide” because the influence of the tide was the standard measure of navigability there.271 Referring to Genesee and Barney, the Court stated that this English rule was inapposite in the United States.272 Instead, the Court applied the navigability-in-fact test developed in The Daniel Ball.273 This same test from The Daniel Ball was applied as recently as 1987 in Utah Division of State Lands v. United States,274 a case involving title to the navigable Utah Lake. There the Court described the trust strictly in terms of navigability and never referred to another standard—whether it cited freshwater or tidewater cases for support.275 Most importantly, the Court described the trust’s purpose as the protection of navigation, commerce, and fishing.276

269. 137 U.S. 661 (1891).
270. Id. at 666-67.
271. Id. at 667 (emphasis added).
272. Id. at 671-72.
273. Id. at 667.
275. See id. at 196-98, 201-02.
276. Id. at 195. That the Court should emphasize navigability in these cases is not surprising. Through the years the Court has repeatedly defined the public trust in terms of navigability. In United States v. Holt State Bank, 270 U.S. 49 (1925), which involved title to a navigable lake in Minnesota, the Court cited Shively to decree “that lands underlying navigable waters within a State belong to the State in its sovereign capacity.” Id. at 54. In United States v. Oregon, 295 U.S. 1 (1934), the Court likewise cited Shively when stating that the soil underlying several freshwater lakes in Oregon belonged to the state “[i]f the waters were navigable in fact.” Id. at 6. In Utah v. United States, 403 U.S. 9 (1971), the Court cited both Martin and Shively to support its declaration that the state’s title to the bed of the Great Salt Lake “ultimately rest[ed] on whether the lake was navigable.” Id. at 10. In Montana v. United States, 450 U.S. 544 (1980), the Court proclaimed that “the ownership of land under navigable waters is an incident of sovereignty.” Id. at 551.

Even Justice Rehnquist, who joined the Phillips majority, stated in 1976 that Pollard held that the equal footing doctrine granted the states, “upon their admission to the Union ... title to the lands underlying navigable waters within their boundaries.” Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370 (1977). See also id. at 372-74, 379. For other cases resolving trust questions in terms of navigability, see United States v. Utah, 283 U.S. 64, 75 (1931); Oklahoma v. Texas, 258 U.S. 574, 583 (1922); Brewer Oil Co. v. United States, 260 U.S. 77, 84-85 (1922).

Moreover, there is even a federal statute dealing with public waters that speaks in terms of navigability. In the Submerged Lands Act of 1953, Pub. L. No. 83-31, 67 Stat. 29 (codified at 43 U.S.C. §§ 1301-1315 (1982 & Supp. V 1987)), Congress confirmed and established state ownership of “lands beneath navigable waters.” Id. § 1311(a) (emphasis added). The Act defines state ownership rights as extending to lands beneath navigable tidal and nontidal wa-
IV
THE BROAD NAVIGABILITY-FOR-TITLE RULE AND
EXPANSIVE TRENDS IN CALIFORNIA AND
NEW JERSEY

The foregoing illustrates the lack of support for the Phillips Court's analysis. While there is no firm preclusion of the trust's application to nonnavigable tidewaters, Phillips' holding does not follow from the ebb and flow test. The test merely defines the legal meaning of navigability, but navigability, not tidality, remains the "sine qua non" of the public trust.277 This section considers the exact parameters of the navigability-for-title standard.

Federal courts apply this standard capaciously, allowing title to reach nonnavigable waters within a navigable channel. State courts have been even freer with the test, extending trust jurisdiction to nonnavigable areas immediately surrounding navigable water. In particular, recent decisions in California and New Jersey indicate that navigability need not always serve as a strict limit on the trust's applicability to other water resources. Indeed, the very notion of ownership as a prerequisite for trust jurisdiction has been undermined by these state court decisions.

These trends in federal and state authority have lessened the public trust's historic union with navigability, but they have done so without relying on the ebb and flow test. They also illustrate the growing tension between the traditional standard for delineating trust title, and the growing list of trust policies that have little, if any, direct relationship to the presence or absence of navigability.

A. The Parameters of the Federal Navigability-for-Title Rule

Recall that the federal navigability-in-fact standard governs the public trust doctrine.278 In The Daniel Ball,279 the Supreme Court held that waterways are deemed to be navigable in fact at those places where they are susceptible to use as highways of commerce in the customary modes of trade and travel.280 The key is whether the water is susceptible to commercial use, not whether it is actually used for commercial transportation.281 This raises two questions related to the federal navigability-for-title test. First, what nonnavigable waters will be included within the

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277. Brief for Petitioners, supra note 39, at 12.
279. 77 U.S. (10 Wall.) 557 (1870).
280. Id. at 563.
281. United States v. Utah, 283 U.S. 64, 82 (1931); see also Economy Light & Power Co. v. United States, 256 U.S. 113, 122-23 (1921), quoting with approval The Montello, 87 U.S. (20 Wall.) 430, 441 (1874); Packer, 137 U.S. at 667.
boundaries of a navigable waterway? Second, what represents "commercial use" for purposes of establishing factual and legal navigability? Evaluation of these issues demonstrates that the federal navigability standard has been broadly applied to extend the public trust to waters of modest depths.

For purposes of establishing state submerged bed ownership, the boundaries of a navigable channel normally extend to the high water mark. Of course, states are free to narrow the range of their trust sovereignty as they choose. Many therefore use the mean high water mark, the mean low water mark, or the low water mark to establish sovereign properties. By any of these measures, however, the boundary will include nonnavigable as well as navigable areas, since water close to the shore tends to be too shallow for travel in any channel. This was highlighted by the Phillips dissent, which suggested that trust boundaries exactly parallel the boundaries of navigable bodies. This would exclude distinct but nonnavigable bodies, but include even nonnavigable water at the periphery of navigable waters. This rule's appeal stems from its treatment of the navigable body as a unit. It delineates trust boundaries "waterway by waterway, not inch by inch."
The *Phillips* majority acknowledged that there was a difference between nonnavigable portions of a navigable channel and deeper inland waters.\footnote{Phillips, 108 S. Ct. at 797.} However, it dismissed this difference as having no substance, arguing instead that the wetlands at issue in *Phillips*, while they may differ from wetlands closer to the shore, "still share those 'geographic, chemical and environmental' qualities that make lands beneath tidal waters unique."\footnote{Id. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting)).} The majority cited *Mann v. Tacoma Land Co.*,\footnote{153 U.S. 273 (1894). See *Phillips*, 108 S. Ct. at 797 n.8.} in which the Supreme Court rejected a claim to private ownership of nonnavigable mud flats situated between the high and low water lines in Washington's Commencement Bay, for this position. In *Mann*, however, the mud flats were clearly connected to the ocean; thus, *Mann* is inapposite to the discrete nonnavigable bodies in *Phillips*.

By contrast, the notion that the boundaries of navigability include, but do not extend beyond, the nonnavigable sectors of otherwise navigable channels is supported by a number of federal decisions. For example, in *Economy Light & Power Co. v. United States*,\footnote{256 U.S. 113 (1921).} the Supreme Court stated that "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."\footnote{Id. at 122 (interpreting The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), for purposes of federal admiralty jurisdiction); see also The Montello, 87 U.S. (20 Wall.) 430 (1874). "The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this is to be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars." *Id.* at 443.} Five years later, the Court held in *United States v. Holt State Bank*\footnote{270 U.S. 49 (1926).} that navigability in fact was not disrupted for purposes of establishing title where certain portions of an otherwise navigable lake in Minnesota were made nonnavigable by the presence of sand bars and vegetation.\footnote{Id. at 56.} The Court has reached similar conclusions in cases considering the navigability of rivers that are nonnavigable in places.\footnote{See *United States v. Utah*, 283 U.S. 64 (1931). There, the Court was asked to decide the extent of Utah's title to the Colorado River and two of its tributaries. Surveys of the tide came in. There is no basis for this conclusion. A wetland is only part of the trust if it lies below the high water mark; that it merely touches water below the high water mark is of no consequence. Justice Field cautioned against this merging of distinct waterways in his concurrence to *Knight v. United States Land Ass'n*, 142 U.S. 161, 207-08 (1891). In Field's words, "[i]t would be absurd to include in the measurement of the bay of San Francisco the waters of the river Sacramento as far as the city of that name, nearly a hundred miles above the bay, because the tide is felt there." *Id.* at 207.}
Of course, a finding of navigability depends on whether the water is susceptible to commercial activity. Here again, federal cases have not required very much. The courts consider whether there is commercial activity on a case by case basis. Whether "commercial" is defined by the level of technology at the time of statehood or by a more contemporary definition of commerce is not settled. However, it is typical that these decisions are based substantially on actual historical practice. Thus the Supreme Court has held that use of livestock barges, tourist excursion crafts, small boats, and flatboats qualify as commercial activity. Federal appellate courts have expanded this further, finding commercial activity when waters have been suitable only for small canoes or logdriving.

waters showed that substantial portions, particularly in the Colorado River itself, were non-navigable. Id. at 73-74. However, the Court emphasized the difference between nonnavigable sections of an otherwise navigable river, and long stretches of wholly nonnavigable water. The question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise non-navigable. We are concerned with long reaches with particular characteristics of navigability or non-navigability . . .

Id. at 77 (citations omitted). The Court indicated that the distinction lies in whether the impediment makes navigation an exceptional occurrence, or simply makes it more difficult and inconvenient. Id. at 87. Applied to the facts of the case, the Court held that the presence of sand bars did not impede overall navigability to the point that the river as a whole was no longer navigable. Id. at 89.

Lower courts have followed the Utah Court's lead. The Eighth Circuit, for example, found that the Little Missouri River was navigable for title purposes even though seasonal changes frequently made the water nonnavigable during parts of the spring, summer, and winter. North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus, 671 F.2d 271 (8th Cir. 1982), rev'd on other grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273 (1983). The court held that the rule requiring waters to be useable for commerce did not require the channel to be free from obstruction for the entire year. Andrus, 671 F.2d at 277. Similarly, the Ninth Circuit held that the McKenzie River in Oregon was navigable for title purposes even though it was too deep and rapid for travel during high water periods and was frequently obstructed during the summer. Oregon Div. of State Lands v. Riverfront Protection Ass'n, 672 F.2d 792, 794 (9th Cir. 1982). See also Alaska v. United States, 662 F. Supp. 455, 466 (D. Alaska 1987).

Even in those sections of a channel where the water is actually navigable, federal decisions have not required great depths. See generally Frank, Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest, 16 U.C. DAVIS L. REV. 579 (1983) (discussing the federal courts' expansion of public rights in waterways through a more liberal interpretation of the navigability test, and California courts' expansion of those rights through the public trust doctrine). In Holt State Bank, for example, the Supreme Court found that waters which ranged from between three and six feet in depth were navigable. United States v. Holt State Bank, 270 U.S. 49, 56 (1926). In addition, the Eighth Circuit found waters to be navigable where their maximum depth did not exceed two and one half-feet in North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus 671 F.2d 271, 277 (8th Cir. 1982).

297. See, e.g., Utah v. United States, 403 U.S. 9 (1971); United States v. Holt State Bank, 270 U.S. 49 (1926), respectively; see also Frank, supra note 294, at 587 n.45.
298. Andrus, 671 F.2d at 277-78.
299. Oregon Div. of State Lands v. Riverfront Protection Ass'n, 672 F.2d 792, 794 (9th Cir. 1982). These cases are distinguishable from those involving waterways not suitable for
Thus navigability in fact as applied by federal courts is a fairly broad standard. The channel must be sufficiently deep and wide for a parcel of submerged land to qualify for state title, but state title extends to non-navigable waters if they are components of an otherwise navigable channel. Moreover, fairly light and inconsistent use can satisfy the commercial activity requirement.

B. Areas Adjacent to the Navigable Channel: State Expansions of the Public Trust

Prior to Phillips, federal courts had refused to apply the trust outside the context of navigable channels. Nonetheless, recent cases in California and New Jersey indicate a possible means of further extension, although only to a limited degree and under limited circumstances.

While delineation of trust boundaries has historically been a federal question, a great deal of public trust law is also generated at the state level. For example, it is a matter of local concern whether to employ the trust to guarantee recreational usage. Similarly, the state decides whether the public interest is best served by alienating trust land to private parties. Yet, these state court decisions raise issues over where the line should be drawn between trust and nontrust lands. Thus, state courts often decide traditionally federal questions, and these questions are therefore susceptible to federal review.

In California and New Jersey, state courts have applied the trust to nonnavigable areas having a significant impact on the public's rights to an adjacent navigable channel. These cases do not limit the application of the public trust to matters of land ownership. Rather, they view the trust as a broader instrument of power encompassing an evolving body of public rights that may even apply to privately held, nonnavigable waters.

passage in their own right, but only as launching points for commerce along another medium. See Alaska v. United States, 754 F.2d 851 (9th Cir. 1985), cert. denied, 474 U.S. 968 (1985) (small lake not susceptible to commerce where it was only used to launch floatplanes).


302. Recreational rights such as swimming and boating have been a particularly potent source of public trust litigation. See, e.g., Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Hixon v. Public Serv. Comm'n, 32 Wis. 2d 608, 146 N.W.2d 577 (1966).

In so doing, California and New Jersey have offered viable rationales for extending trust sovereignty to traditionally nontrust land.

1. California

California's early public trust cases borrowed heavily from Kent's fiction that tidality was the legal equivalent of navigability. One early case was Wright v. Seymour, in which the California Supreme Court held that a factually nonnavigable river was legally navigable by virtue of the English ebb and flow test. The court cited no federal authority; instead, it relied on The Royal Fisheries of the Banne. Wright is rarely cited in subsequent decisions, however, and its conclusion that the trust extends to nonnavigable tidewater has never been repeated.

Recent California cases have focused instead on the extent to which trust lands may be granted to private parties and the purposes to which trust lands should be put. It is now well-settled in California that grants of trust properties do not usually divest the public of its right of access for commerce and navigation. Complete divestiture of public rights is possible, but it must clearly be part of a program designed to serve the trust interests of commerce and navigation. In Marks v. Whitney, the California Supreme Court characterized environmental protection and recreational enjoyment as significant public trust interests. The court held that the trust was a flexible doctrine and ought to change with differing social values and priorities.

The Mono Lake controversy of the late 1970's spawned the most significant California trust decision involving the navigability-for-title measure. Mono Lake, the second largest nontidal body in the state, is navigable, but is fed by five nonnavigable streams flowing from the Sierra Nevada Mountains. However, the lake has no downstream outlet to

304. 69 Cal. 122, 10 P. 323 (1886).
305. Id. Wright involved title to an island lying in the middle of the Russian River, a nonnavigable, tidally influenced stream. The riparian owner claimed ownership to the bed of the river, thereby including the island. However, the court held that all rivers were deemed navigable in law where the tide ebbed and flowed in them. Hence, the Russian River at the point in question was legally navigable and its beds therefore were subject to state ownership.
310. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
311. Id. at 259-60, 491 P.2d at 375, 98 Cal. Rptr. at 796.
312. Id.
carry its excess water to the sea. Instead it relies on evaporation to maintain its water level, resulting in a particularly high salt content.\textsuperscript{314} Due to its high salinity, Mono Lake cannot support a freshwater fish population; nonetheless, it provides a habitat for brine shrimp and several species of migratory birds.\textsuperscript{315} This makes the lake a unique and highly valued component of the California wilderness. Visitors to the lake are often struck by its stark beauty and highly unusual landscape.\textsuperscript{316}

The Los Angeles Department of Water and Power began diverting water from Mono Lake's nonnavigable tributaries during the 1940's to supply the growing population of Southern California. By the end of the 1970's, the lake's water level had diminished by one third.\textsuperscript{317} Salinity in the remaining water grew progressively, threatening the shrimp population that area birds used as a food supply. In addition, as the water level dropped, an island that was once a home for birds changed into a peninsula, thereby admitting coyotes from the shore.\textsuperscript{318} In 1978, several citizens groups, including the National Audubon Society, brought suit in state court to enjoin any further diversions from the lake. Their action rested in part on the theory that Mono Lake was subject to state ownership and thereby public trust protection.\textsuperscript{319}

The case reached the California Supreme Court as \textit{National Audubon Society v. Superior Court}.\textsuperscript{320} The court faced a difficult problem. Without question, the lake bed itself was subject to the public trust since it lay beneath a navigable waterway.\textsuperscript{321} The public's valid interest in the lake's ecosystem was also beyond question.\textsuperscript{322} The problem was that Los Angeles' trust-threatening activity took place in the lake's nonnavigable tributaries; thus, it was far from clear that the trust should apply. The court nonetheless held that the public trust extended to any nonnavigable waterway that significantly affected the public's interest in a larger navigable body.\textsuperscript{323}

The \textit{National Audubon} court relied on two turn-of-the-century California cases for support: \textit{People v. Gold Run Ditch & Mining Co.}\textsuperscript{324} and

\begin{thebibliography}{10}
\bibitem{658 P.2d 709, 711, 189 Cal. Rptr. 346, 348 (1983), cert. denied. 464 U.S. 977 (1983).} Id.
\bibitem{314} Id.
\bibitem{315} Id.
\bibitem{316} Id. at 424-25, 658 P.2d at 711, 189 Cal. Rptr. at 348.
\bibitem{317} Id. at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.
\bibitem{318} Id.
\bibitem{319} Id. at 425, 658 P.2d at 712, 189 Cal. Rptr. at 348-49.
\bibitem{321} Id. at 433, 658 P.2d at 718, 189 Cal. Rptr. at 355 (citing Colberg, Inc. v. State, 67 Cal. 2d 408, 416, 432 P.2d 3, 8, 62 Cal. Rptr. 401, 406 (1967)).
\bibitem{322} See infra notes 382-88 and accompanying text.
\bibitem{323} \textit{National Audubon}, 33 Cal. 3d at 436-37, 658 P.2d at 720, 189 Cal. Rptr. at 357.
\bibitem{324} 66 Cal. 138, 4 P. 1152 (1884).
\end{thebibliography}
In Gold Run, the defendants had dumped waste from a strip mining operation into a nonnavigable tributary. The waste flowed downstream and interfered with navigation along the American and Sacramento Rivers. Declaring that "the rights of the people in the navigable rivers of the state are paramount and controlling," the Supreme Court held that the public trust entitled the state to prohibit the dumping. In Russ, the issue was whether the defendants could dam nonnavigable sloughs that fed into a navigable river. Although making no specific finding of interference with navigability, the court held that diverting material quantities of water from a navigable stream constituted a public nuisance.

The National Audubon court's application of these early decisions to an environmental crisis illustrates a creative interpretation of trust doctrine. Rather than rigidly adhering to the navigability-for-title rule, the court took a larger, systemic view of the trust. It recognized that navigable waters interact with the nonnavigable waters around them. Safeguarding navigable waters, therefore, requires addressing this interconnection. The court, however, did not rule that California owned the beds of Mono Lake's tributaries. Rather, it held that the trust "protects navigable waters from harm caused by diversion of nonnavigable tributaries."

The notion that a trust easement may be held over private property is well established. However, cases involving this issue usually revolve around alienation of state-owned land as a "naked fee." By contrast, in National Audubon, the state never had title to the tributaries of Mono Lake. Rather, the court viewed the trust as a type of police power that granted California a right to control property it did not own. Removing the issue of title from the equation perhaps made it easier to expand the trust beyond the reach of navigability.

The issue remaining after National Audubon is how much further California courts will be willing to extend the trust into the realm of nonnavigability. The California Supreme Court declined to say whether certain public trust purposes might extend to nonnavigable streams as well. However, the California Court of Appeal may have given an indication of the future trend in state decisions when, in 1988, it held that

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325. 132 Cal. 102, 64 P. 111 (1901).
326. Gold Run, 66 Cal. at 138, 4 P. at 1152.
327. Russ, 132 Cal. at 105-06, 64 P. at 111.
330. Id.; see also Stevens, supra note 12, at 214-20.
331. National Audubon, 33 Cal. 3d at 437 n.19, 658 P.2d at 721 n.19, 189 Cal. Rptr. at 357 n.19.
the trust did not apply to a nonnavigable, artificially created reservoir.\textsuperscript{332} Plaintiffs sought to enjoin the owners of a reservoir from releasing water for irrigation. They alleged that this practice interfered with the public’s use and enjoyment of the reservoir.\textsuperscript{333} The trial court concluded that the public trust only applied to navigable water, and the Court of Appeal affirmed.\textsuperscript{334} The court stated that there were strong reasons not to extend the trust to nonnavigable waters, at least where they have no impact on navigability.\textsuperscript{335} The court stressed that the major purpose of the trust was to safeguard public navigation, that no California case had ever held that isolated nonnavigable waters are subject to the trust, and that the state constitution\textsuperscript{336} provided only for a trust in navigable water.\textsuperscript{337} Thus, after Golden Feather, it is not clear whether California will continue further down the path that National Audubon began.

2. New Jersey

New Jersey was among the first states to find a public trust securing access to navigation in Arnold v. Mundy.\textsuperscript{338} The New Jersey Supreme Court’s decision served as a model for Justice Taney in Martin v. Waddell.\textsuperscript{339} In recent years, the New Jersey Supreme Court has greatly extended the public trust into low-lying tidal wetlands and meadowlands.\textsuperscript{340} The court has also recognized the trust’s extension to all tidewaters without regard to navigability.\textsuperscript{341} In this latter respect, the New Jersey Court foreshadowed Phillips.

The most significant public trust decisions in New Jersey, however, have had nothing to do with the ebb and flow test. Rather, they have concerned public access to and use of dry sand beaches. The first of these cases was Borough of Neptune City v. Borough of Avon-by-the-Sea,\textsuperscript{342} where the plaintiffs challenged a municipal ordinance requiring nonresidents to pay a higher fee than residents to use a public beach. After a

\begin{itemize}
  \item \textsuperscript{332} Golden Feather Community Ass’n v. Thermalito Irrigation Dist., 199 Cal. App. 3d 402, 244 Cal. Rptr. 830 (1988).
  \item \textsuperscript{333} Id. at 405, 244 Cal. Rptr. at 831.
  \item \textsuperscript{334} Id. at 404, 244 Cal. Rptr. at 831.
  \item \textsuperscript{335} Id. at 409, 244 Cal. Rptr. at 834.
  \item \textsuperscript{336} See CAL. CONST. art. X, § 4.
  \item \textsuperscript{337} Golden Feather, 199 Cal. App. 3d at 408, 244 Cal. Rptr. at 833. In a footnote, the court distinguished the case from Phillips, which had come down four months previously. The court stated that it was not dealing with tidally influenced water, and so Phillips was not applicable. Id. at 408 n.2, 244 Cal. Rptr. at 6 n.2.
  \item \textsuperscript{338} 6 N.J.L. 1 (1821).
  \item \textsuperscript{339} 41 U.S. (16 Pet.) 367 (1842). See MacGrady, supra note 31, at 590.
  \item \textsuperscript{341} City of Newark v. Natural Resource Council, 82 N.J. 530, 414 A.2d 1304 (1980), cert. denied. 449 U.S. 983 (1980).
  \item \textsuperscript{342} 61 N.J. 296, 294 A.2d 47 (1972).
\end{itemize}
lengthy description of the public trust doctrine in New Jersey, the state supreme court held that the doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."343 The court concluded that bathing, swimming, and other recreational activities were important trust interests and that their pursuit on the seashore required that the public have the right to use the dry sand beach lying adjacent to the coast.344 This right is distinct from the mere right to cross private property to reach the water; it was a right of general recreational enjoyment, such as sunbathing or other activities normally done on a dry sand beach.345

The Neptune court rested its decision substantially on the fact that the beach was municipally owned and devoted to public use. It is somewhat curious that the court did so, and yet still relied on the public trust. The court perhaps could have resorted to a theory of public dedication.346 Nonetheless, in Van Ness v. Borough of Deal,347 the state supreme court reaffirmed its position that the public trust doctrine, and not dedication, was the basis for affording the public a uniform, nondiscriminatory right to the use and enjoyment of all dry sand beaches adjacent to the ocean.348

The New Jersey Supreme Court extended its public trust analysis to private landowners in Matthews v. Bay Head Improvement Association.349 There, the plaintiffs brought suit against a nonprofit community association for denying the public access to its privately owned beaches from 10:00 a.m. to 5:30 p.m. during the summer.350 The trial court granted the association summary judgment on the grounds that it was not a municipal agency and therefore was not subject to public trust control.351 The New Jersey Supreme Court reversed, ruling that there was no reason why Neptune could not also apply to private property.352 Emphasizing the growing need for public access to beaches and saltwater swimming,353 the court concluded that "[r]easonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry

343. Id. at 309, 294 A.2d at 54.
344. Id.
345. Id. at 308, 294 A.2d at 54; see also Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 323-24, 471 A.2d 355, 364 (1984).
346. See 61 N.J. at 298, 294 A.2d at 49.
348. Id. at 179-80, 393 A.2d at 574.
350. Id. at 315, 471 A.2d at 359.
351. Id. at 316, 471 A.2d at 360.
352. Id. at 325, 471 A.2d at 365.
353. Id. at 323, 471 A.2d at 364. See also Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981).
sand area is also allowed.\textsuperscript{354} The court cautioned, however, that some accommodation of private interests must be sought if possible.\textsuperscript{355} It stated that the question of when the public obtains a right of use is one of fact, depending on circumstances such as the beach's proximity to public land, the level of public need, and the importance of the beach to the private owner.\textsuperscript{356} Applied to the facts of the case, the court concluded that a "quasi-public" organization such as the one involved there could not act in such contravention of the public interest.\textsuperscript{357}

As in \textit{National Audubon}, the New Jersey experience was governed by the realization that protection of important trust interests—in this case saltwater recreation—often requires extension of trust jurisdiction to nonnavigable areas that are adjacent to state-owned property. Like \textit{National Audubon}, the New Jersey court did not recognize a state ownership right;\textsuperscript{358} rather, it concluded that the public ought to assert certain powers over adjacent, privately owned lands in order to safeguard its existing public trust holdings.\textsuperscript{359}

In one respect, New Jersey's analysis is more expansive than California's. Recall that the California Supreme Court refused to rule on the question of whether trust interests such as recreation might extend to nonnavigable waters. By contrast, New Jersey was willing to extend these rights to nonnavigable areas, although it too based its action on the premise that it was ultimately protecting the public trust interests in actual state-owned property. As in California, the New Jersey court did not attempt to create positive public trust rights that were completely independent of state ownership.

3. \textbf{Summary}

What emerges from this discussion is that the navigability-for-title rule, although generally the test for delineating public trust title, is not as strict a limit on trust sovereignty as one might initially believe. First, it is well settled that trust title extends to any nonnavigable waters that lie within the boundaries of a navigable channel, so long as their inclusion does not substantially diminish the navigability of the body as a whole. Moreover, federal courts have been fairly liberal in finding that a body of water is susceptible to commercial activity and have therefore found waters of fairly modest depths to be navigable. Second, California and New Jersey have been at the forefront of the movement away from reliance on navigability for title as the sole measure of trust power. The supreme

\textsuperscript{354} Matthews, 95 N.J. at 325, 471 A.2d at 365.  
\textsuperscript{355} Id.  
\textsuperscript{356} Id. at 326, 471 A.2d at 365.  
\textsuperscript{357} Id. at 330, 471 A.2d at 368.  
\textsuperscript{358} Id. at 326-27, 471 A.2d at 366.  
\textsuperscript{359} Id. at 331-32, 471 A.2d at 368-69.
court of each state has been willing to extend certain trust powers to areas that were never owned by the state and that were not navigable. Under this evolving body of doctrine, the *Phillips* wetlands should not have passed the federal navigability standard; nonetheless, Mississippi still could have rights over the *Phillips* wetlands. What these potential rights are is the question to which we now turn.

V

REDEFINING PUBLIC AND PRIVATE INTERESTS IN WATER: THE BETTER APPROACH TO *PHILLIPS*

Although never discussed by the Supreme Court, another way of dealing with the issue in *Phillips* would have been to determine whether Mississippi had a legitimate public trust interest in the disputed wetlands. This involves more than simply analyzing ancient cases dealing with trust boundaries. Rather, it turns fundamentally on what the public interest in trust lands ought to be and how Mississippi’s actions conformed to these expectations. As discussed below, the public’s interest in water is no longer tied exclusively to navigability. Hence, the trust would best be served through a reappraisal of the values it is meant to secure. Redefining the trust’s scope, however, challenges the interests of existing landowners. Consequently, the state’s fundamental interest in preserving private property may conflict with an otherwise valid public trust use of certain land. The following pages survey the issues arising from these competing claims and outline a proposal to accommodate them.

A. The Evolving Public Trust and its Tension with the Navigability-In-Fact Standard

The boundary issue raised in *Phillips* could have been resolved in at least two ways: (1) by reliance on the navigability-in-fact test, thereby defeating Mississippi’s claim, or (2) by isolating the purposes that the trust is meant to pursue and delineating state rights accordingly. By resting its analysis on the ebb and flow test, however, the Supreme Court avoided both of these approaches. Instead, it broadened the existing contours of trust sovereignty, while couching its actions in a seemingly ancient legal doctrine. In so doing, the Court at once disregarded the meanings of the ebb and flow and navigability-in-fact tests and expanded state title without regard to whether this served a legitimate public trust interest.

The crucial question is what gives rise to public trust sovereignty? Traditional writing on the subject suggests that there is something inherently nonownable about particular lands that allows them to be withheld from private consumption.\(^360\) The Romans spoke of resources which

\(^{360}\) Obviously, the presence of water alone does not make land nonownable. If that was
were incapable of private ownership as a matter of natural law.\textsuperscript{361} Lord Hale referred to a "great waste" composed of navigable waters held for the common benefit of all people.\textsuperscript{362} The Supreme Court explained in \textit{Shively} that tidewaters, "and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement.\textsuperscript{363} Modern commentators more often speak of resources that are of such value to every citizen or so "inherently public" in nature that private ownership is inconceivable.\textsuperscript{364}

Along with this conception of nonownability is a parallel notion that certain inalienable public rights accompany the land. Of course, the crucial trust right has always been free public navigation. The state assumed a negative obligation under the trust—it was restrained from completely alienating submerged beds or otherwise interfering with navigation.\textsuperscript{365} Hence, the New Jersey Supreme Court admonished in 1821 that state power "cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."\textsuperscript{366}

The trust is thus driven in part by the type of land at issue and in part by the public's interest in the land.\textsuperscript{367} Regrettably, this has been the root of confusion since the earliest days of public trust jurisprudence. The doctrine has recognized an ever-growing range of interests confined to a limited geographical space.\textsuperscript{368} While it would be convenient if the case issues of tidality and navigability would be irrelevant.

\textsuperscript{361} \textit{The Institutes of Justinian}, supra note 10, at 67; see supra notes 10-12 and accompanying text.
\textsuperscript{362} \textit{M. Hale, De Jure Maris}, reprinted in S. Moore, supra note 14, at 377.
\textsuperscript{363} \textit{Shively v. Bowlby}, 152 U.S. 1, 11 (1893).
\textsuperscript{364} See generally Rose, \textit{The Comedy of the Commons: Custom, Commerce, and Inherently Public Property}, 53 U. Chi. L. Rev. 711 passim (1986); \textit{Effective Judicial Intervention}, supra note 240, at 471.

The notion of nonownability is itself an illusion, however. Private parties are capable of owning the beds of a lake, or of a river, or even of the sea close to the shore. If the state may own these properties under the public trust doctrine, why not an individual citizen? More particularly, certain submerged beds are not privately owned because they \textit{should} not be, not because they cannot be.

\textsuperscript{365} \textit{See Stevens}, supra note 12, at 196.
\textsuperscript{366} \textit{Arnold v. Mundy}, 6 N.J.L. 1, 78 (1821).
\textsuperscript{367} These two concepts of nonownability and inalienable rights do not necessarily go hand in hand. The public does not automatically obtain vested rights to a resource merely because it is incapable of private ownership. Similarly, the state does not have sovereign powers over a resource merely because the public has an interest in it. Rather, the trust is triggered by a convergence of the \textit{type} of resource involved and the \textit{use} to which the public seeks to put it.

\textsuperscript{368} \textit{Note}, supra note 8, at 777-78.
In *Barney v. Keokuk*, the Supreme Court restored the trust to a basic equilibrium. Recognizing the trust’s primary concern with navigation, *Barney* simply extended state sovereignty to include all navigable waters. Thus, for the first time in North America, the trust saw a comprehensive legal connection between the public interest (free navigation and commerce) and the type of water covering trust land (all navigable water, tidally influenced or otherwise). At the periphery of the doctrine there were secondary and fairly inconsequential interests such as oyster farming and fishing. For these, the requirement of navigability was an unneeded impediment. However, as long as the trust remained primarily focused on free navigation, there was little cause for concern.

Recently, the situation has changed again. The modern trust doctrine is far more comprehensive than a mere restraint on alienation designed to protect public passage over water. Current thinking on the subject envisions certain natural resources that are so important that they warrant special judicial protection. The trust has evolved to meet these changing needs, culminating in a notion that vests in the state an affirmative obligation to safeguard critical public interests. Without the trust, many state lands decisions would not receive adequate public scrutiny. Hence, public interests would often go unrepresented. The trust is effective against these “insufficiencies of the democratic process” because it affords the public a judicial means to block adverse decisions.

The range of trust interests has also expanded as a consequence of this activist doctrine. In the past twenty-five years, the trust has become a tool for the public to pursue such previously unheard of interests as recreation and environmental preservation. As these interests con-

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369. For example, the traditional trust interest turned on protecting navigation. Yet, the King of England only held title to the beds of navigable *tidewaters*, leaving *nontidal* waters open to private control. Early American courts similarly were content to distinguish between tidal and nontidal navigable waters without concern for the fact that the public’s interest was the same in both. Hence, while the public had an interest in navigation, this interest was confined only to certain types of navigable waters.

370. 94 U.S. 324 (1876).
374. *See Sax, Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. Davis L. Rev. 185 (1980) [hereinafter *Liberating the Public Trust Doctrine*] (describing this obligation as a “fiduciary” one on the part of the state).
376. *Id.* at 521.
377. *Id.* at 559-61.
continue to grow in importance, they will increasingly conflict with the trust’s limitation to navigable water. Surely the public might enjoy recreational activities of equal importance in navigable and nonnavigable water alike.\textsuperscript{379} Moreover, as illustrated in \textit{Borough of Neptune City v. Borough of Avon-by-the-Sea} \textsuperscript{380} and \textit{Matthews v. Bay Head Improvement Association},\textsuperscript{381} enjoyment of navigable waters might entail the need for public rights to adjacent dry shore areas, thus further removing the trust from strict navigation-in-fact.

In the environmental realm, nonnavigable wetlands such as those in \textit{Phillips} are among the most important resources in need of trust protection. Wetlands provide habitats for migratory birds, waterfowl, mammals, reptiles, fish, and shellfish.\textsuperscript{382} Although wetlands amount to only five percent of the land mass in the United States, nearly thirty-five percent of the nation’s rare and endangered species depend on these areas for survival.\textsuperscript{383} Wetlands also serve many practical human needs. They act as natural floodways and flood storage sectors, barriers between the ocean and upland areas, erosion control mechanisms, filters of chemical and biological impurities, and sources of timber, food, and water.\textsuperscript{384} They also provide important sites for fishing, hunting, wildlife observation, visual enjoyment, educational study, and scientific research.\textsuperscript{385}

Notwithstanding the importance of this natural resource, however, the record of wetland destruction has been staggering. In the mid-1950's "there were 108.1 million acres of wetlands" in the coterminous forty-eight states.\textsuperscript{386} By the mid-1970's there were only 99 million acres remaining.\textsuperscript{387} Between the mid-1950's and mid-1970's, therefore, the net wetland loss was over 9 million acres.\textsuperscript{388}

While the public clearly has significant interests in submerged lands, it is equally clear that there is no correlation between these new interests and the navigability-in-fact test. Indeed, even in combination with the ebb and flow test these standards do not accommodate the current range of trust interests. The tests are not concerned with what Professor Sax

\textsuperscript{379} One certainly does not require navigable depths in order to swim.
\textsuperscript{380} 61 N.J. 296, 294 A.2d 47 (1972).
\textsuperscript{382} J. Kusler, \textit{Our National Wetland Heritage: A Protection Guidebook} 1, 3 (1983).
\textsuperscript{383} Id. at 3.
\textsuperscript{384} Id. at 7.
\textsuperscript{385} Id. at 3, 5.
\textsuperscript{387} Id.
\textsuperscript{388} Id.
describes as the trust’s role in “preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.” To maintain its viability, the trust doctrine must maintain the capacity to adapt to changing social priorities.

To the extent that Phillips expands the trust to all tidewaters, irrespective of navigability, the decision will mitigate some of the above problem. Phillips, however, will do nothing to service those trust interests that reside in nonnavigable freshwater. In reality, Phillips is both underinclusive and overinclusive. While it ignores freshwater altogether, the decision’s broad sweep covers all tidewaters, many of which are privately owned, without regard for whether there is a valid trust interest in them.

By turning to the ebb and flow test, the Phillips Court was able to enlarge the trust while preempting petitioners’ equitable claims to the land. Throughout the Phillips litigation, great issue was taken with Mississippi’s alleged lack of regard for plaintiff’s reasonable property expectations. This debate was strongly influenced by attacks on Mississippi’s motives. The Phillips dissent, for example, emphasized that Mississippi was pursuing earnings from mining leases rather than seeking to facilitate commerce, fishing, “or other traditional uses of the public trust.” The dissent lamented that the majority’s decision “may permit grave injustice to be done to innocent property holders in coastal States.” Pointing to the historical use of the ebb and flow test, however, the majority responded that any private expectations in tidelands were unreasonable. The majority also asserted that any valid private property interests could be protected by applicable state law.

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389. Liberating the Public Trust Doctrine, supra note 374, at 188.
390. See generally id.
392. Id. at 804.
393. Id. at 805.
394. Id. at 798-99.
395. Id. at 799. In reality, landowners have few legal tools with which to defend themselves against official assertions of trust dominion. Since the trust vests all property rights in the state as a matter of title, challenges premised on an unconstitutional taking of property typically are not feasible. See Lazarus, supra note 301, at 648-49. Similarly, claims based on adverse possession and prescription usually fail, see, e.g., O’Neill v. State Highway Dep’t, 50 N.J. 307, 320, 235 A.2d 1, 8 (1967), as do theories of limitations and laches. See, e.g., Cinque Bambini Partnership v. State, 491 So. 2d 508, 521 (Miss. 1986).

An equitable estoppel argument is hardly more promising. In City of Long Beach v. Mansell, 3 Cal. 3d 462, 489, 476 P.2d 423, 442, 91 Cal. Rptr. 23, 42 (1970), the California Supreme Court described a rigorous four-part test for triggering the estoppel doctrine in title questions:

‘[I]t must appear, first, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and, fourth, that he relied directly upon such admission,
majority, however, made no reference to the strength of Mississippi's interests in the land.

The Phillips ebb and flow test allows an expansive outcome to rest on apparently hallowed soil. Widening the public trust by virtue of what has always been, rather than by new assumptions of what should hereafter be, is clearly easier to defend in view of the thwarted expectations of private landowners. Of course, there is no way to know if this consideration entered into the Supreme Court's decision. However, once we realize that the ebb and flow test does not actually provide an historical basis for expanding the trust, we are left with the unpalatable option of expanding the trust based upon policy considerations alone.

This paradox undoubtedly thrusts the analysis onto perilous ground, for there are strong policy arguments in favor of preserving private property. Viewed in terms of a model for resource allocation, private property rights direct scarce resources to their maximum social utility because, at least in theory, private parties will develop the resources to their full value and profit. Allocation and use of property in private hands therefore insures maximum management efficiency. Similarly, the process of exchange in a market economy is viewed as the most effective means of transferring finite resources to the highest value uses.

Conversely, unrestricted access to a resource arguably leads to its degradation, because each person exploits it to maximum advantage without regard for its future upkeep. This occurs when no one person's interest in the resource is large enough for her to contribute her own capital to its maintenance. From the individual's standpoint, it is more efficient to take whatever she is able to take before the next person does and will be injured by allowing its truth to be disproved."

Id. at 490, 476 P.2d at 443, 91 Cal. Rptr. at 43 (quoting Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 367 (1859), error dismissed, 70 U.S. 304 (1866)).

One can see that the Mansell court discusses little more than a fraud standard, id., thus offering no hope to the average title holder. The grim outlook is only reinforced by the court's admonition that earlier cases "have proceeded with considerable caution and restraint when the effect of raising an estoppel would be to take the title to land from one person and vest it in another." Id. at 489, 476 P.2d at 442, 91 Cal. Rptr. at 42. The California Supreme Court has subsequently refused to apply equitable estoppel where the contested land involves the public policy of environmental preservation. State v. Superior Court (Fogerty), 29 Cal. 3d 240, 244, 625 P.2d 256, 258-59, 172 Cal. Rptr. 713, 715-16 (1981), cert. denied, 454 U.S. 865 (1981). See also Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339 (Fla. 1986), cert. denied, 107 S. Ct. 950 (1987); Case Comment, supra note 301, at 511.

396. Rose, supra note 364, at 711.
398. See generally Holderness, A Legal Foundation for Exchange, 14 J. LEGAL STUD. 321 (1985). In addition, private property frees an individual from worrying about survival concerns such as food and shelter, thereby affording her greater time for pursuit of more socially or culturally productive goals. It also allows people to express their own unique self-worth. Comment, Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff, 15 ECOLOGY L. Q. 671, 701 n.190 (1988).
the same. The result is waste and finally scarcity, a "tragedy of the commons." 399 One commentator has suggested that it is the movement from plentiful common access to scarcity that creates the need for regulation of a resource through private property ownership. 400

B. Rethinking the Public Trust

The dilemma of the public trust doctrine lies in how to accommodate its growing scope with its historic link to navigability, while at the same time not disrupting the present system of land ownership. One approach is to dispense with the trust altogether, relying instead on regulation to defend public concerns. A better strategy, however, would be to view the trust as a broad judicial weapon for defending the public interest, and not simply as an incident of state title.

Professor Lazarus has argued that public and private interests in water resources can be reconciled without eliminating private ownership. 401 Lazarus believes that the state's existing police and administrative powers adequately guarantee the vital public interests currently enforced by the trust. He notes that the public trust arose during a time when the state's legitimate power over private property was quite limited; hence, state ownership was crucial. 402 Lazarus contends, however, that contemporary politics affords the state a far greater role in regulating property. 403 Conversely, he argues that this growth in police power has led to an erosion in the sanctity of private property itself, thereby further increasing the government's powers of regulation. 404 Thus, the need for sovereign title is no longer as pronounced.

Lazarus also asserts that modern developments in administrative law obviate the rationale for the public trust. 405 Specifically, he points to the increased lawmaking role that agencies have assumed in the last twenty years, 406 combined with the enhanced executive and legislative scrutiny that has accompanied it. 407 He also argues that environmental values have had a significant impact on the agency process, 408 as well as

399. Rose, supra note 364, at 712 (discussing Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968), reprinted in ECONOMIC FOUNDATIONS OF PROPERTY LAW 2 (B. Ackerman ed. 1975)).
401. Lazarus, supra note 301.
402. Id. at 665-66.
403. Id. at 665-68.
404. Id. at 668-74.
405. Id. at 680-88.
406. Id. at 680-83.
407. Id.
408. Id. at 684-88.
on the proliferation of environmentally focused bureaucracies such as the Environmental Protection Agency.\footnote{Id. at 688-91.}

While Professor Lazarus offers the states a means of satisfying their trust obligations without the need for divesting private interests, his proposal is not totally convincing. Whether it will remedy potential state inaction in little-publicized trust matters is subject to debate.\footnote{See generally Effective Judicial Intervention, supra note 240, at 496-501.} Modern state governments may have the power to regulate private property, but this is quite different from the obligation to do so. Political pressure from powerful landowners certainly may discourage official attention in many cases.\footnote{The California Supreme Court has already indicated its skepticism of regulation as an alternative to the public trust duty. State v. Superior Court (Fogerty), 29 Cal. 3d 240, 249, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981).} In contrast, the public trust requires official protection of public interests by imposing an affirmative duty upon the state.\footnote{Liberating the Public Trust Doctrine, supra note 374, at 185.} Moreover, the trust affords the public a right of action in the courts if the state avoids its responsibilities.\footnote{See Effective Judicial Intervention, supra note 240, at 558.} The trust thus is a democratizing force. Public concerns of any magnitude enjoy the levelling effect produced by legal action—they need not face the partisan pressures associated with political solutions. Therefore, the better approach is to rely on some form of the public trust doctrine.

Two issues remain. What will serve as the proper standard for measuring trust sovereignty? Second, must this sovereignty always rely on state title?

Analyzing takings cases, Professor Sax has explained public interests in land by virtue of competing models of resource allocation.\footnote{Sax, Some Thoughts on the Decline of Private Property, 58 WASH. L. REV. 481 (1983).} He argues that courts have been willing for some time to challenge the property expectations of private parties when larger public interests are at stake. He attributes this to a distinction between two different types of consumption benefits. The first is an exclusive consumption benefit, which one derives strictly from ownership and possession. Since the benefit flows from possession, the traditional property allocation system is adequate. The party willing to pay the most for the benefit will acquire control of it and thereafter exploit it in a presumptively optimal fashion.\footnote{Id. at 487.} The second type of consumption benefit is nonexclusive. Here, groups of individuals enjoy benefits from a resource even when they do not possess it. The allocation system breaks down since these individuals have no power to influence the resource's management and disposition.

\footnote{Id. at 688-91.}
\footnote{See generally Effective Judicial Intervention, supra note 240, at 496-501.}
\footnote{The California Supreme Court has already indicated its skepticism of regulation as an alternative to the public trust duty. State v. Superior Court (Fogerty), 29 Cal. 3d 240, 249, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981).}
\footnote{Liberating the Public Trust Doctrine, supra note 374, at 185.}
\footnote{See Effective Judicial Intervention, supra note 240, at 558.}
\footnote{Sax, Some Thoughts on the Decline of Private Property, 58 WASH. L. REV. 481 (1983).}
\footnote{Id. at 487.}
Hence, one may no longer presume that the resource will be exploited to maximum social utility.\(^{416}\)

Thus, in the case of wetlands that have no aesthetic, environmental, or recreational value to the public, the benefit of their consumption rests exclusively with the titleholder. He may exploit them to maximum profit. On the other hand, where the wetland provides a habitat for a valued species of wildlife or exhibits a unique setting for outdoor activities, consumption benefits flow to parties other than the owner. The traditional system of resource allocation is ineffective because it grants exclusive control to the owner without consideration of the interests of the public at large. The public is thereby left powerless to protect its interests.\(^{417}\)

One can readily see application of this analysis to the takings setting. Where a private owner has monopoly power over the nonexclusive consumption benefits of a resource, the public should be entitled to assert some control over the disposition of the resource. Professor Sax argues that the Supreme Court’s decisions in *Penn Central Transportation Co. v. City of New York* \(^{418}\) and other cases resulted from the force of this type of public interest.\(^{419}\)

The notion of differing consumption benefits highlights a means of distinguishing properties that ought to be held in private hands from those best held—or at least safeguarded—by the state. In this way, the trust can be understood as a device that guarantees the public’s rights to those natural resources that would otherwise be detrimentally exploited according to private self-interest. Thus, wetlands (tidal or fresh) best belong in sovereign hands when they are of such value that their exploitation by private parties would do a gross disservice to the public. For example, the trust should be invoked to protect an ecologically vital wetland from planned mining operations. By contrast, where a state merely seeks an exclusive consumption benefit from the profits of those mining operations (i.e., the interest pursued by Mississippi in *Phillips*), use of the public trust would be inappropriate. In the latter case, there would be no abrogation of the resource allocation process.

This model of resource allocation based on consumption benefits would dispose of Mississippi’s claim in *Phillips*. However, a question remains as to whether this analysis should serve to restructure the boundaries of trust ownership. Certainly, this solution would lend even greater force to the equitable arguments raised by the *Phillips* dissent. The state would be abrogating the titles to vast tracts of privately held land, based upon its perception of public necessity. In view of the need to recognize

\(^{416}\) *Id.* at 485.

\(^{417}\) See *Effective Judicial Intervention*, supra note 240, at 561.


\(^{419}\) *Sax*, supra note 414, at 486.
reasonable property expectations, such a broad doctrine would be misguided.

In order to protect long-established private titles to the beds of non-navigable waters, state ownership should be confined under the ambit of the navigability-in-fact test. The common law tidality test, on the other hand, should be discarded as a weathered relic from an earlier time. However, the trust should also be used to assert state control over certain privately held lands. As the cases from California and New Jersey illustrate, important trust interests are capable of enforcement even when property is not state owned. Such a scheme would entail more than the regulation envisioned by Professor Lazarus, however. In the case of regulation, vital trust interests are at the mercy of the political whims of legislators and administrators. Unless a decision has particularly dire consequences for the public, it will likely avoid prolonged political controversy. By contrast, the trust empowers individual citizens to employ the judicial process to enforce what amounts to an affirmative duty upon the government to protect significant interests.

The difficulty with a doctrine focused on title is that trust boundaries remain static while trust policies do not. Indeed, since the trust is essentially a creation of public policy, albeit policy of a special class, any rule that strictly anchors the doctrine in state ownership places it in an impossible position. Under one approach, the trust would remain confined to specific types of land, thereby frustrating its changing purposes and ultimately consigning it to obscurity. Alternatively, trust title would be continually redefined to accommodate changing policy priorities, thereby causing intolerable chaos among private property owners.

The key is viewing the trust as a flexible tool of judicial intervention, rather than merely as a means of establishing state ownership. In so doing, the need for laboriously reconciling the trust with the federal navigability-for-title rule would disappear. The delineation of trust boundaries would thus be self-enforcing; it would adjust itself according to changing priorities.

420. See supra notes 308-59 and accompanying text.
421. This notion may suggest the possibility of a regulatory takings problem. Of course, a complete takings analysis is well beyond the scope of this Comment. However, this approach to redefining the public trust began by considering what constitutes a public interest sufficient to defeat a takings challenge. Nonetheless, takings decisions are based on essentially ad hoc, factual inquiries. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Hence, there will always be the possibility that a particular assertion of trust power in a particular set of circumstances could result in an unconstitutional regulatory taking. The basic issue will likely turn on whether the public has developed such a pronounced interest in a parcel that the owner no longer has a reasonable expectation that his rights are inviolate. See Liberating the Public Trust Doctrine, supra note 374, at 188-89 n.13. For a proposal on how a takings challenge may succeed in certain situations, see Comment, Lyon and Fogarty: Unprecedented Extensions of the Public Trust, 70 CALIF. L. REV. 1138, 1153-58 (1982).
CONCLUSION

*Phillips Petroleum v. Mississippi* does not challenge the public trust's well-settled applicability to all navigable waters. Rather, it addresses whether the trust extends to nonnavigable waters as well as to navigable ones and whether the ebb and flow test is the appropriate vehicle for reaching this result. The *Phillips* Court held in the affirmative on both points. However, relevant English and American authorities do not support the Supreme Court's decision. These cases instead suggest that the trust was strictly concerned with navigability.

Recent developments, however, illustrate a growing discomfort with the navigability-in-fact test. They raise the question of whether the trust's traditional focus on navigability is suited to contemporary notions of the value of water resources. The evidence shows that it is not and that the doctrine's continued vitality depends on a reevaluation of the criteria that go into delineating trust boundaries. The central trust issue should turn on how to exploit land to maximum efficiency and social utility and on whether land is better managed in public or private hands. Hence, on balance, the detriment to the public from loss of a valued wetland or other component of the environment may be outweighed by the benefit from private development. This analysis is neutral on the question of navigability. Instead, it focuses more broadly on whether the public has a reasonable claim to the management of a resource.

This is not to say that boundaries for state title should be changed along such lines. Given the historical reliance on navigability as the standard for delineating trust boundaries, such a redefinition would radically upset existing private expectations in land. Hence, the federal navigability-in-fact standard should be maintained as the test for state ownership, but a broader view of trust goals should be employed to govern official assertions of trust authority over *private* property beneath nonnavigable waters.

Naturally, administration would be easier if the trust were restricted to navigable waters, the public being forced to rely on other mechanisms to protect its larger interests. However, other mechanisms are not likely to be as effective as the trust. Thus, if the trust is to adapt to changing priorities and remain a viable doctrine, its application necessarily will become more complex. Were this not so, the trust would collapse beneath the weight of its own rigid structure.