

ENVIRONMENTAL LAW—PUBLIC TRUST DOCTRINE—STATE OWNERSHIP OF PUBLIC TRUST LANDS INCLUDES ALL LAND SUBJECT TO THE INFLUENCE OF THE TIDE—*Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

It has long been recognized that certain lands, including rivers, seas and shores exist for the public use.¹ To ensure that the public's right of access to these lands is protected, a doctrine has evolved within the United States forbidding alienation of such lands to private property owners.² Known as the public trust doctrine, this policy has protected the public's interests in coastal lands beneath tidewaters, as well as inland soils beneath navigable waters.³ In a recent decision, the United States Supreme Court expanded the doctrine to encompass all tidally influenced lands, including those which are neither navigable-in-fact,⁴ nor border on any navigable body of water.⁵ In *Phillips Petroleum Company v. Mississippi*,⁶ the Court declared that each state, upon en-

¹ 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, 513 (1975). The Roman Society is generally credited with first having created a distinction between private and public waters. *Id.* at 517. According to the Roman system of classification, waters which were public included those running "in the rivers, the sea and its shores." *Id.* (quoting R. POTHIER, *TRAITE DU DROIT DE PROPRIETE* (circa 1762), translated in *Geer v. Connecticut*, 161 U.S. 519, 525 (1895)). After the fall of the Roman Empire, elements of its public water system surfaced in the legal codes of many Western European countries, including Spain, France and England. See MacGrady, *supra*, at 544-45.

² The evolution of America's public trust doctrine is directly traceable to English common law, although scholars disagree as to the scope of the common law with respect to public trust lands. See MacGrady, *supra* note 1, at 547-68. For a further discussion of the public trust doctrine see *infra* notes 28-38 and accompanying text.

The first American case to discuss the concept of lands to be held in trust for use by all the public was *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821). In *Arnold*, the New Jersey Supreme Court announced that the English common law concept of royal ownership of certain waters and the lands under them, for the use of citizens, had transferred upon the Revolution to the citizens of New Jersey. *Id.* at 76-77.

³ Since 1842, the Supreme Court has recognized the public interest in coastal lands beneath tide waters. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). Not until 1877, however, did the Court determine that the American public also had an interest in navigable inland waters and the lands beneath them. See *Barney v. Keokuk*, 94 U.S. 324 (1877). See also *infra* notes 66-74 and accompanying text.

⁴ Water is navigable-in-fact if it is "being used in its natural and ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." BLACK'S LAW DICTIONARY 1329 (5th ed. 1979).

⁵ *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 795 (1988).

⁶ 108 S. Ct. 791 (1988).

tering the Union, received title to all lands beneath waters subject to the ebb and flow of the tide.⁷

In 1973, the Mississippi Legislature enacted the Coastal Wetlands Protection Law for the purpose of preserving the state's wetlands.⁸ To facilitate this objective, the Mississippi Marine Resources Council (MMRC) was charged with the task of surveying and preparing maps that would enable it to monitor activities occurring on those wetlands.⁹ Accordingly, the MMRC viewed aerial photographs of coastal lands and drew maps outlining the boundaries of the wetland areas.¹⁰

The MMRC cautioned that the maps were imprecise and, therefore, should be used only for the purpose of assisting in regulating areas within the probable scope of state wetlands.¹¹ Despite these warnings, the Mineral Lease Commission (Commission) treated the maps as establishing the legal parameters of state-owned property.¹² Speculating that valuable gas and oil resources might be hidden under some of the wetlands, the Commission began selling leases based on the maps.¹³ In 1977, the Commission sold to Saga Petroleum U.S., Inc. a 600 acre gas and oil lease situated near the Gulf of Mexico.¹⁴ Record title to this property had been vested in the Cinque Bambini Partnership

⁷ *Id.* at 799.

⁸ MISS. CODE ANN. §§ 49-27-1 to -65 (Supp. 1988). The Mississippi Legislature defines "coastal wetlands" as "all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide." *Id.* § 49-27-5(a).

⁹ *Id.* § 49-27-65; see also *Cinque Bambini Partnership v. State*, 491 So.2d 508, 511 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

¹⁰ *Cinque Bambini*, 491 So.2d at 511. The supervisor of this law testified that members of the MMRC took maps prepared by the Gulf Regional Planning Commission and "eyeballed" them to determine which areas should be classified as wetlands. *Id.* He further acknowledged that no surveys had been taken nor any total data collected or used in drawing the maps. See *Cinque Bambini Partnership v. State*, No. 14,178, 3288, 3301 (Miss. Ch. Ct. 1982), *aff'd in part and rev'd in part*, 491 So.2d 501 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

¹¹ *Cinque Bambini*, 491 So.2d at 511. The supervisor maintained that he had never represented that the maps were an accurate guideline to the state owned lands. *Id.* He stated that the MMRC had used them only for jurisdictional purposes. See *Cinque Bambini*, No. 14,178 at 3301.

¹² *Cinque Bambini*, No. 14,178 at 3301. The supervisor of the Coastal Wetlands Protection Law claimed that he told the Mineral Lease Commission not to use these maps for title purposes. *Id.* He stated that contrary to his warnings, the Commission relied on the "eyeballed" wetlands maps for leasing. *Id.* at 3302.

¹³ *Cinque Bambini*, 491 So.2d at 511.

¹⁴ *Id.*

(Cinque Bambini).¹⁵

Upon learning of the Commission's actions, Cinque Bambini instituted suit in the Chancery Court of Hancock County, Mississippi to confirm title to 2,400 acres of land, including the 600 acre tract subject to the gas and oil lease.¹⁶ Cinque Bambini alleged that in accordance with the public trust doctrine, the state only held title to lands beneath water which is navigable-in-fact.¹⁷ Cinque Bambini asserted that since none of the lands in question met this description, the state had acted outside the scope of its authority.¹⁸ In response, the co-defendants, State of Mississippi and Saga Petroleum U.S., Inc., contended that the state owned all lands under waters subject to tidal influence.¹⁹

In an unreported opinion, the chancery court found that the 140 acres of disputed land were subject to the ebb and flow of the tide, and were therefore part of the public trust lands of Mississippi.²⁰ On appeal, the Supreme Court of Mississippi affirmed in part and reversed in part,²¹ determining that 98 of the 140 acres were man-made lakes, and thus not part of the public trust.²² The United States Supreme Court granted certiorari,²³

¹⁵ *Id.* Cinque Bambini traced its title to pre-statehood Spanish land grants dating back over 150 years. *Id.* The lands were granted to Cinque Bambini's predecessors in title on April 15, 1813. *Id.* The grants were confirmed by acts of Congress. See *Cinque Bambini*, No. 14,178 at 3298. Since 1813, these landowners had paid taxes on and quietly enjoyed the wetlands at issue. *Id.* Not until the Mineral Lease Commission's actions in 1977 was the validity of the landowners' titles ever questioned. See *Cinque Bambini*, 491 So.2d at 511.

¹⁶ Brief of Respondents State of Mississippi at 6, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870) [hereinafter Respondent's Brief].

¹⁷ Respondent's Brief, *supra* note 16, at 28-29.

¹⁸ See *Cinque Bambini*, No. 14,178 at 3291.

¹⁹ *Id.* at 3290-91.

²⁰ See *id.* at 3322-23.

²¹ *Cinque Bambini*, 491 So.2d at 521-22.

²² *Id.* at 510, 520. The Supreme Court of Mississippi noted, however, that the lower court was correct in determining that the scope of the public trust doctrine extended to all tidally influenced lands. *Id.* at 510-11. The court held that the state was entitled to all tidally influenced land below "today's mean high water mark." *Id.* at 511.

The court further noted that 98 of the 140 acres of tidelands had been artificially created by dredging in the mid-1960s to obtain fill material used for construction of a highway running through the property. *Id.* at 510. The court determined these lakes to be "avulsions," which it defined as "a change in a boundary body of water so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress." *Id.* at 520 (citations omitted). Since avulsions are not part of the public trust, the court noted, the 98 acres of man-made lakes were necessarily excluded from the state's trust. *Id.*

²³ *Phillips Petroleum Co. v. Mississippi*, 107 S. Ct. 1284 (1987). After the deci-

and affirmed the decision of the Mississippi Supreme Court.²⁴ Adopting the reasoning of Mississippi's highest court, the Supreme Court held that each state, upon entering the Union, was given ownership of all property subject to the ebb and flow of the tide.²⁵ Thus, the Court determined that title to the land in question was vested in the State of Mississippi as land held in public trust,²⁶ regardless of whether the waters under which it lay were navigable-in-fact.²⁷

At common law, the king was vested with proprietorship over all Crown lands within his domain.²⁸ This proprietary right was subject to the public's interest in navigable waters and the soils beneath them.²⁹ Title to these lands was therefore held by the English Crown in trust for the public's use.³⁰ Although the

sion by the Supreme Court of Mississippi, the Phillips Petroleum Company replaced the Cinque Bambini Partnership as petitioner. *See id.*

²⁴ Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988).

²⁵ *Id.* at 799.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Shively v. Bowlby, 152 U.S. 1, 11 (1894). What is now referred to as the public trust doctrine actually has its origins in Roman law. The Romans divided public property into three classifications: that owned by no one (*res nullius*), that owned by the state or public (*res publicae*), and that public property owned by all men in common (*res communes*). *See* MacGrady, *supra* note 1, at 606. Included in this concept of common ownership (*res communes*) were the rivers, sea and shore. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 475 (1970). The state was responsible for protecting all the common property for public use. *Id.* This notion of the common ownership of the rivers, sea and shore, coupled with the state's duty of protecting these properties, was eventually adopted in England. *See id.*

²⁹ *See* M. HALE, DE JURE MARIS ET BRACHIORUM EJUSDEM cap. IV (circa 1667) [hereinafter DE JURE MARIS], reprinted in S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 404 (3d ed. 1888) [hereinafter S. MOORE]. The king's proprietary right was termed the *jus privatum*, while the public's interest was referred to as the *jus publicum*. S. MOORE, *supra*, at 404.

Lord Hale noted "[b]ut though the king is the owner of (the seas and the creeks and the arms thereof), and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and the arm thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it." S. MOORE, *supra*, at 404-05.

³⁰ S. MOORE, *supra* note 29, at 405. Hale's DE JURE MARIS is the primary authority upon which all American courts have relied in determining the scope of the common law with respect to the public trust. *See, e.g.,* Shively v. Bowlby, 152 U.S. 1, 11 (1894) ("The great authority in the law of England upon this subject is Lord Chief Justice Hale . . ."); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842) (citing Hale for proposition that king held land for public use).

Although Hale's work has received high acclaim, it has recently been sharply criticized as creating, rather than stating, the common law. *See* MacGrady, *supra* note 1, at 609. A strong argument to this effect is made by MacGrady, wherein the

king could relinquish title to these properties, such grants were nonetheless subject to the public's right of fishing, navigation, and commerce.³¹ In accordance with a classic common law treatise, the public's right extended to "the sea and arms thereof . . . where the sea flows and reflows."³²

By virtue of discovery,³³ the king's right of proprietorship over all tidelands, subject to the public's interest, was extended to the colonies.³⁴ At the time of the Revolution, title to these lands was assumed by the states, as incidental to their new-found sovereignty.³⁵ Like their common law counterpart, the states held title to tidelands in trust for the public uses of fishing and navigation.³⁶ Thus, a doctrine emerged in the states similar to the common law concept of a public interest in certain properties.³⁷ The development of this rule, now referred to as the public trust doctrine, may be traced from a series of cases beginning in 1842 with *Martin v. Waddell*.³⁸

In *Martin*, the original case in United States Supreme Court public trust jurisprudence, the Court was called upon to deter-

author contends that the notion of royal tidelands ownership was not judicially inspired, but rather invented by Thomas Digges, and advanced by Lord Hale. *Id.* Regardless of its accuracy, DE JURE MARIS is the foundation upon which the American public trust doctrine has been formed. The Court, in *Phillips Petroleum*, upon realizing the intense disagreement as to the actual state of the common law, maintained that "we will not now enter the debate on what the English law *was* with respect to the land under [tidal non-navigable] waters, for it is perfectly clear how this Court understood the common law of royal ownership." *Phillips Petroleum*, 108 S. Ct. at 796 (emphasis in original).

³¹ Lord Hale is credited with the "prima facie" theory: the king is the prima facie owner of the *jus privatum* in the arms and creeks of the sea. S. MOORE, *supra* note 29, at xxxi. The only means by which this prima facie presumption could be rebutted would be on a showing of an express grant from the king, or by prescription. *Id.* This theory is also looked upon with skepticism by some scholars. *See id.* (arguing that despite an absence of express grants, tidelands ownership could not be deemed to be prima facie held by the Crown). The Court in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), in speaking of the king's power to grant away portions of soil covered by navigable waters, noted that "[t]he question is not free from doubt, and the authorities referred to in the English books cannot perhaps be altogether reconciled." *Id.* at 410.

³² S. MOORE, *supra* note 29, at 378.

³³ The King proclaimed that since his subjects had discovered these new lands, title to them became vested in the Crown. *Id.* at 374.

³⁴ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 595-96 (1823).

³⁵ *Martin*, 41 U.S. (16 Pet.) at 410-11.

³⁶ *Hardin v. Jordan*, 140 U.S. 371, 381 (1891) (citations omitted).

³⁷ *See, e.g., Arnold v. Mundy*, 6 N.J.L. 1, 78 (Sup. Ct. 1821) ("[U]pon the Revolution, all these royal rights became vested in the people of New Jersey as the sovereign of the country, and are now in their hands . . .").

³⁸ 41 U.S. (16 Pet.) 367 (1842). *See Shively v. Bowlby*, 152 U.S. 1 (1894) for a general discussion of the early public trust cases.

mine the ownership of certain land covered by the waters of the Raritan River in Perth Amboy, New Jersey.³⁹ At issue was whether the riparian proprietor or the State of New Jersey held title to the submerged lands.⁴⁰ The proprietor alleged that his rights were supreme, since his grants were from the Crown in fee,⁴¹ and such grants were paramount to any state claims.⁴² After reviewing the language of the grants conveyed by King Charles II and his successors in title, the trial court held that the proprietor had received deeds in fee simple for the lands in question.⁴³ In reaching its conclusion, the Court noted that title had been conveyed to the proprietor by the king before the Revolution.⁴⁴ Therefore, the Court reasoned, such title had already been divested from the king when the Revolution took place, and it could not have transferred to the United States at the time of the Revolution.⁴⁵ The king's prior transfer of the land in fee precluded the subsequent grant made to Martin.⁴⁶

On appeal, the United States Supreme Court reversed.⁴⁷ Writing for the majority, Chief Justice Taney first noted that at common law, lands under navigable waters were held by the king in trust for the public.⁴⁸ The Court thus determined that the es-

³⁹ *Martin*, 41 U.S. (16 Pet.) at 407. The land in question was situated in the Raritan River and bay, below high-water mark, "where the tide ebbs and flows." *Id.* at 407.

⁴⁰ *See id.* at 411. The riparian proprietor was actually twenty-four proprietors who held under conveyances from Sir George Carteret and Lord Berkley. *Id.* at 376. The Duke of York had conveyed the land by indenture to Berkley and Carteret in 1664, and he purported to sell to the proprietors in 1682 any rights which he held in the property. *See id.* at 374, 377.

⁴¹ *See id.* at 369-71. In 1664, King Charles II granted to his brother, the Duke of York, a large amount of property, including lands beneath the Raritan River. *Id.* at 369-70. Through succeeding conveyances, the Duke's proprietors of East Jersey became vested with the territory in the grant. *Id.* at 376. The proprietors transferred the premises in question to Waddell's predecessors in title before surrendering all of the authority and privileges given them to Queen Anne of England in 1702. *Id.* at 407-08, 415.

⁴² *See id.* at 407-08. The lessee of Waddell claimed to have exclusive oyster fishing rights to the section of the river in controversy, based on grants traceable to the English Crown. *See id.* at 369-74. To the contrary, Martin and others claimed that exclusive rights were vested in them under color of grants issued by the state in 1824. *Id.* at 408. The lessee of Waddell therefore brought an action of ejectment to recover the land and exclusive oystering rights. *Id.* at 369-80.

⁴³ *See id.* at 374-80.

⁴⁴ *See id.* at 380.

⁴⁵ *See id.* at 374-79.

⁴⁶ *Id.*

⁴⁷ *Id.* at 418.

⁴⁸ *Id.* at 411. Chief Justice Taney cited no authority for this proposition. However, in another portion of the opinion he mentioned with approval a New Jersey

tate in question was passed by Charles II in the same condition that it had been held by the Crown, in trust for the common use.⁴⁹ Therefore, no title in fee could have been transferred.⁵⁰ Chief Justice Taney stated that at the end of the American Revolution, the citizens of each of the states supplanted the king as sovereign, and in this new capacity took the same dominion which the king had possessed.⁵¹ The Court concluded that because the state, in its sovereign capacity, had subsequently granted the land to Martin and others, those grants were controlling.⁵² The Supreme Court thereby established the public trust doctrine, holding the states to be sovereign owners of "all their navigable waters and the soils under them for their own common use"⁵³

The principles expounded in *Martin* were applicable only to the thirteen original colonies.⁵⁴ Several years later, however, in *Pollard's Lessee v. Hagan*,⁵⁵ the Court considered whether the public trust doctrine should extend to all new states upon their entrance to the Union.⁵⁶ In *Pollard's Lessee*, the plaintiff claimed title to certain tidelands in Alabama,⁵⁷ based on a congressional grant issued to him in 1836, seventeen years after Alabama had become a state.⁵⁸ Rejecting the plaintiff's claims, the trial court held that Congress had no right by 1836 to convey title to tidelands which had rightfully vested in Alabama upon its entering statehood in 1819.⁵⁹ After the Supreme Court of Alabama up-

Supreme Court case, *Arnold v. Mundy*, 6 N.J.L. 1 (1821). *Martin*, 41 U.S. (16 Pet.) at 417. It is quite evident that Chief Justice Taney drew this proposition almost verbatim from the *Arnold* opinion, which noted:

[B]y the common law of England, . . . the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water . . . are common to all the citizens, and that . . . the property . . . is vested in the sovereign, . . . for the use of the citizen, . . . for his direct and immediate enjoyment.

Arnold, 6 N.J.L. at 76-77.

⁴⁹ *Martin*, 41 U.S. (16 Pet.) at 413.

⁵⁰ *See id.*

⁵¹ *See id.* at 410.

⁵² *See id.* at 417-18.

⁵³ *Id.* at 410. This proposition also seems to be adopted directly from the *Arnold* opinion. *See supra* note 37.

⁵⁴ *See Martin*, 41 U.S. (16 Pet.) at 410.

⁵⁵ 44 U.S. (3 How.) 212 (1845).

⁵⁶ *Id.* at 220-21.

⁵⁷ *See id.* at 219. The "tidelands" at issue had actually been reclaimed by 1824, and were the site of streets and buildings. *Id.* at 232 (Catron, J., dissenting).

⁵⁸ *Id.* at 219. Alabama entered statehood on December 14, 1819. *Id.* at 234 (Catron, J., dissenting).

⁵⁹ *See id.* at 219-21. The *Pollard* case actually involved a title dispute. *Id.* at 220.

held the decision of the lower court,⁶⁰ Pollard appealed to the United States Supreme Court.⁶¹

The Supreme Court adjudged that upon entrance to the Union, Alabama took title to all lands below the high-water mark of navigable watercourses.⁶² Because the state assumed such title in its sovereign capacity, the majority asserted, Congress lacked the authority to subsequently convey title to any such lands.⁶³ The Court expressed that, insofar as the federal government held possession of the lands under navigable waters in any territory, it did so temporarily, until that territory was formed into a state.⁶⁴ To maintain "equal footing" with the original thirteen states, the Court concluded, each state that entered the Union must receive rights in public trust lands "to the same extent, in all respects" as those held by the original states.⁶⁵

Although the Court had determined that title to navigable waters and the soils beneath them was vested in each of the states, the Court failed to delineate exactly what lands were to be included within the public trust. In *Barney v. Keokuk*,⁶⁶ the Supreme Court resolved some of the confusion surrounding the scope of the doctrine.⁶⁷ The *Barney* Court confronted the issue of whether a private landowner or the State of Iowa owned lands below the high-water mark of a non-tidal, navigable portion of the Mississippi River.⁶⁸

The defendant, Hagan, asserted his right to the lands based on valid grants issued by Spain prior to its transfer of the land to America in 1803. *Id.* at 219-20. The Court failed to address the validity of Hagan's claim, yet it affirmed the ruling of the lower court in his favor. *See id.* at 230.

⁶⁰ *Id.* at 220.

⁶¹ *Id.*

⁶² *See id.* at 220-21.

⁶³ *Id.* at 221-23.

⁶⁴ *See id.* at 221.

⁶⁵ *See id.* at 222-23. The "equal footing" language is believed to have its foundation in the Ordinance of Congress of July 13, 1787, as applicable to the Northwest Territory. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

⁶⁶ 94 U.S. 324 (1876).

⁶⁷ *See id.* at 339.

⁶⁸ *See id.* at 336. Actually, the city of Keokuk had reclaimed lands below the high-water mark of the river, upon which it built a wharf and levee. *Id.* at 325. The city asserted that it had acted under the authority of the state, and that its actions were done to advance a public purpose, in compliance with the public trust doctrine. *See id.* at 333-34. The plaintiff, however, claimed that as a riparian landowner, he was properly vested with title. *Id.* at 325.

In rejecting the plaintiff's argument, the Court determined that each state, based on its inherent sovereignty, may transfer title to public trust lands if its legislature so decides. *See id.* at 338. It should be noted that a marginal inroad was later placed on the power of a state to freely deed away its public trust property. *See*

The Court acknowledged that at common law, the terms "navigable" and "tide-water" had been used interchangeably because all rivers in England which were navigable were also tide-waters.⁶⁹ The Court observed that the topography of America includes many rivers and lakes which are navigable but not tidally influenced.⁷⁰ Thus, the application of this mixed terminology to the American public trust lands was deemed inappropriate by the *Barney* Court.⁷¹ The purpose behind the trust doctrine, the Court stated, was to preserve "the great passageways of commerce and navigation, to be exercised for the public advantage and convenience."⁷² Since the Supreme Court had formerly recognized that navigable waters were amenable to admiralty jurisdiction,⁷³ it found no reason why the navigability test could not be applied for public trust purposes to America's rivers and lakes.⁷⁴ The *Barney* Court thus extended the public trust doctrine to include all waters which were non-tidal, but were nevertheless navigable.⁷⁵

After *Barney* instituted the navigability concept into public trust law, the question arose as to whether the navigability test served to extend public trust jurisdiction to include non-tidal waters, or to completely replace it for all waters, tidal or non-tidal.⁷⁶ In the case of *Shively v. Bowlby*,⁷⁷ considered the "seminal case in American public trust jurisprudence,"⁷⁸ the Court determined that the navigability test merely extended the scope of the public trust, instead of replacing it.⁷⁹ In *Shively*, the Court considered

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892). Although limited to the facts of that case, the *Illinois Central* Court implied that in order for a transfer of trust property to be valid, it must have the effect of benefitting the public without substantially impairing the public's interest in the remaining lands. See *id.* at 450-53.

⁶⁹ *Barney*, 94 U.S. at 338.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² *Id.*

⁷³ See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851) (extending admiralty jurisdiction to inland, non-tidal waters).

⁷⁴ *Barney*, 94 U.S. at 338-39.

⁷⁵ *Id.* See also *Oregon State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374-75 (1977) (*Barney* Court's decision consistent with earlier extension of admiralty jurisdiction to non-tidal but navigable waters).

⁷⁶ See, e.g., *Knight v. U.S. Land Assoc.*, 142 U.S. 161 (1891); *McGilvra v. Ross*, 215 U.S. 70 (1909).

⁷⁷ 152 U.S. 1 (1894).

⁷⁸ *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 793-94 (quoting Reply Brief for Petitioners at 11, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870)).

⁷⁹ See *Shively*, 152 U.S. at 57.

whether title to tidally influenced lands below the high-water mark of the Columbia River in Oregon vested in a pre-statehood grantee from the federal government or a property owner taking by virtue of state authority.⁸⁰ After canvassing the common law, prior Supreme Court holdings and state case law, the Court held in favor of the title holder taking under the authority of the state.⁸¹

In reaching its conclusion, the Court declared that because the states derived title to all tidelands within their jurisdiction, the disposition of any lands subject to the ebb and flow of the tide was properly governed not by federal dictates, but by the laws of the particular state.⁸² In so holding, the *Shively* Court clearly reaffirmed the position that the public trust doctrine included not only navigable portions of watercourses but also any lands "flowed by the tide."⁸³

More recently, the Court reevaluated the scope and applicability of the public trust doctrine in *Oregon State Land Board v. Corvallis Sand and Gravel Co.*⁸⁴ *Corvallis* concerned the issue of whether state or federal common law should govern in determining the ownership of a navigable river and the underlying bed, as between a corporation and the state.⁸⁵ Holding that the law of the state is preeminent with respect to possession and disposition of trust lands, the Court denoted that each state was rightfully vested with absolute title to all public trust lands situated within the state⁸⁶ upon entrance to the Union.⁸⁷ The Supreme Court

⁸⁰ *Id.* at 9. The land in question lay under tidal, navigable water. *See id.* at 8-9.

⁸¹ *Id.* at 57. The Court stated:

By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case.

Id.

⁸² *See id.* at 57-58. The Court pointed out that in accordance with its holding in *Barney*, states also took title to all navigable, non-tidal waters within their boundaries. *See id.* at 41-42.

⁸³ *Id.* at 57.

⁸⁴ 429 U.S. 363 (1977).

⁸⁵ *See id.* at 365. In reaching its decision, the Court overruled its previous holding in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), which held that federal common law should control in deciding this kind of title dispute. *Corvallis*, 429 U.S. at 382.

⁸⁶ *Corvallis*, 429 U.S. at 370 (citing *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)).

⁸⁷ *Id.* at 370-71 (citations omitted).

confirmed the principle that each state took title to tidelands.⁸⁸ Moreover, the Court stated that by virtue of the extension of public trust precepts, states also have complete dominion and authority over navigable waters, whether inland or tidal.⁸⁹ The holding in *Corvallis* thus affirmed the legitimacy and viability of a state's ownership of all tidal and navigable waterways, including the lands beneath them, within its boundaries.⁹⁰

The *Corvallis* Court confirmed the long-standing principles upon which the American public trust doctrine is grounded. Because the vitality of the early Court holdings had become so well entrenched in public trust jurisprudence, the scope of the doctrine appeared to be well settled as including tidelands and non-tidal but navigable watercourses.⁹¹ Against this backdrop of presumably well-defined principles, the Court in *Phillips Petroleum Co. v. Mississippi*,⁹² recently addressed whether the public trust doctrine was actually intended to encompass all tidal lands, even those which are not navigable-in-fact.⁹³

At the outset, the Court framed the issue as whether title to land underlying non-navigable, tidally influenced waters vested in the State of Mississippi upon its entrance to the Union in 1817.⁹⁴ Writing for the majority, Justice White began by emphasizing the importance of the Court's prior holding in *Shively* to all subsequent public trust issues.⁹⁵

The Court credited *Shively* for recognizing that at common law, the king held title to all tidally flowed lands for the nation's benefit, and that this sovereignty over tidelands was transferred to the original states at the time of the Revolution.⁹⁶ Quoting *Shively*, the Court confirmed that tideland ownership passed to each new state admitted to the Union.⁹⁷ Justice White reiterated

⁸⁸ See *id.* The Court reasoned that:

Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.

Id. (citations omitted).

⁸⁹ *Id.* at 374 (citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1876)).

⁹⁰ See *id.* at 375 (citing *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894)).

⁹¹ *Id.*

⁹² 108 S. Ct. 791 (1988).

⁹³ *Phillips Petroleum*, 108 S. Ct. at 793.

⁹⁴ *Id.*

⁹⁵ *Id.* at 793-94.

⁹⁶ *Id.* at 794 (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)).

⁹⁷ *Id.* (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)). The Court thus reaf-

that not only *Shively*, but also its predecessors and progeny clearly stand for the proposition that a state's sovereignty extends to all lands under tidal waters.⁹⁸

Citing the abundance of case law supporting state ownership of all tidelands, the Court found Mississippi's claim that this property was within its dominion quite reasonable.⁹⁹ The Court observed that other states considered all tidally influenced lands to be within their jurisdiction.¹⁰⁰ These states indicated in briefs supporting Mississippi that use of the navigability-in-fact test to determine tidelands ownership would be disruptive of many title deeds settled according to the ebb and flow standard.¹⁰¹

Justice White indicated that petitioners, Phillips Petroleum, incorporated early state cases to demonstrate that the thirteen original states made no claim to non-navigable tidewaters.¹⁰² The Justice explained that each state possesses the inherent sovereign power to delineate the bounds of property it chooses to include or exclude from the public trust.¹⁰³ To exemplify this precept, the Court alluded to Mississippi cases, and interpreted them as expansively defining the state's public trust to encompass all tidewater lands.¹⁰⁴ The majority afforded little weight to

firmed its holding in *Pollard* relating to the equal footing doctrine. *See id.* *See supra* notes 55-65 and accompanying text for a discussion of *Pollard*.

⁹⁸ *Id.* at 794 n.2 (citing *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Appleby v. City of New York*, 271 U.S. 364, 381 (1926); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); *Knight v. United States Land Assoc.*, 142 U.S. 161, 183 (1891); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891); *McCready v. Virginia*, 94 U.S. (4 Otto) 391, 394 (1877); *Weber v. Harbor Comm'r*, 85 U.S. (18 Wall) 57, 65 (1873); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477-78 (1850)).

⁹⁹ *Phillips Petroleum*, 108 S. Ct. at 794.

¹⁰⁰ *Id.* at 794 n.3. *See, e.g.*, *Wright v. Seymour*, 69 Cal. 122, 123-27, 10 P. 323, 325-26 (1886) (holding State of California to be owner of the bed of the Russian River, even where it was not navigable, since it was affected by the tide); *State v. Pinkney*, 22 S. C. 484, 507-09 (1885) ("salt marshes" were in public ownership); *Simons v. French*, 25 Conn. 346, 353-53 (1856) (tidal flats adjoined by an arm of the sea to be in public ownership).

¹⁰¹ *Phillips Petroleum*, 108 S. Ct. at 794. The states supporting Mississippi's use of the ebb and flow test for determining tidal rights included all of the coastal states, in addition to the thirteen original states. *See* Brief Amicus Curiae of the Thirteen Original States: New York, New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Rhode Island *Joined by the Coastal States Organization in Support of Respondents*, at 3-5, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870).

¹⁰² *Id.* (citing Brief for Petitioners at 23-29, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870)).

¹⁰³ *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)).

¹⁰⁴ *Id.* at 798 n.11 (citing *Rice v. Stewart*, 184 Miss. 202, 230, 184 So. 44, 49 (1938); *Martin v. O'Brien*, 34 Miss. 21, 36 (1857)).

the persuasiveness of the petitioner's cited authorities for, as it pointed out, those cases all originated in states which had chosen to grant more rights to private property owners than required by common law.¹⁰⁵

Continuing, the majority reflected upon prior Supreme Court holdings that sustained state interests in lands submerged beneath tidewaters unrelated to navigation.¹⁰⁶ The Court called attention to several of those uses, such as fishing,¹⁰⁷ restricting the planting and harvesting of oysters,¹⁰⁸ and reclaiming land for urban expansion,¹⁰⁹ before dismissing the contention that the primary purpose of entrusting land to the state for public use is the protection of commerce.¹¹⁰ Justice White perceived that it would be an oddity for the Court to recognize a variety of states' interests in public trust lands, only to circumscribe such uses by confining the public trust to lands navigable-in-fact.¹¹¹ The Supreme Court consequently reaffirmed its well-settled principle vesting states such as Mississippi with title to "all lands under waters subject to the ebb and flow of the tide."¹¹² Accordingly, the majority upheld the Mississippi Supreme Court's decision which determined that title to any lands "under tide waters," became vested in the state upon its admittance to the Union.¹¹³

The majority next addressed the two reasons averred by the petitioner as to why the broad "tide" language set forth in prior holdings should be interpreted differently from its more obvious association.¹¹⁴ Initially, though, Justice White spurned the assertion of the petitioner that "tidelands" refers only to shorelands

¹⁰⁵ *Id.* at 794-95; see e.g., *Groton v. Hurlburg*, 22 Conn. 178, 185 (1852); *Wetherfield v. Humphrey*, 20 Conn. 218, 227 (1850) (holding that erecting a highway over tidally influenced creeks which were not commercially navigable, did not offend federal control over waters which were navigable).

¹⁰⁶ See *Phillips Petroleum*, 108 S. Ct. at 795 (citing *Hardin v. Jordan*, 140 U.S. 371, 381-82 (1891); *McCready v. Virginia*, 94 U.S. (4 Otto) 391, 395-97 (1877); *Den v. Jersey Co.*, 56 U.S. (15 How.) 426, 432 (1854)).

¹⁰⁷ *Id.* (citing *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855)).

¹⁰⁸ *Id.* (citing *McCready v. Virginia*, 94 U.S. (4 Otto) 391, 395-97 (1877)).

¹⁰⁹ *Id.* (citing *Hardin v. Jordan*, 140 U.S. 371, 381-82 (1891); *Den v. Jersey Co.*, 56 U.S. (15 How.) 426, 432 (1854)).

¹¹⁰ See *id.* at 795 n.5. This directly rejected Justice O'Connor's assertion that, "[b]ecause the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of federal admiralty jurisdiction." *Id.* at 801 (O'Connor, J., dissenting).

¹¹¹ *Id.* at 795.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 795-96.

or tidal lands directly adjacent to the sea.¹¹⁵ Instead, the Court adopted what it considered to be the appropriate definition, which it described as land "over which the tide ebbs and flows . . . , land as is affected by the tide."¹¹⁶

The first of Phillips Petroleum's two claims, the Court noted, focused upon what the petitioner considered to be an oddity of England's topography.¹¹⁷ More specifically, the majority referred to the petitioner's contention that because in England almost all navigable rivers were also tidal, common law courts frequently interchanged the term "tidewater" for "navigability."¹¹⁸ As explained by the Court, the petitioner fashioned an argument suggesting the sovereign's ownership of lands submerged beneath tidewaters rested not on the tidal ebb and flow, but on the water's navigability.¹¹⁹ While acknowledging Supreme Court precedent signalling that it was the soils beneath navigable waters that were held at common law by the king,¹²⁰ Justice White distinguished the instant case, noting that the cases relied upon by the petitioners did not involve tidal, non-navigable waters.¹²¹ Moreover, the majority refused to enter the controversial debate concerning the actual nature of common law Crown ownership of tidal property; rather, it chose to follow what it perceived as the Court's historically consistent interpretation of trust law.¹²² This common law interpretation, the Court reiterated, provided that each state, upon entering the Union, became vested with title to all tidally influenced lands.¹²³

Rejecting the petitioner's alleged common law navigability test, the majority thus concluded that the accurate test of public

¹¹⁵ *Id.* at 795 n.6.

¹¹⁶ *Id.* (quoting BLACK'S LAW DICTIONARY 1329 (5th ed. 1979)).

¹¹⁷ *Id.* at 795-96.

¹¹⁸ *Id.* at 796 (citing *Illinois Cent. R. R. Co. v. Illinois*, 146 U.S. 387, 436 (1892); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452 (1851)).

¹¹⁹ *Id.* The petitioners thus argued for a navigability test as the standard by which to determine the boundaries of the public trust. *Id.* The Court, however, accepted the respondent's argument in favor of the ebb and flow of the tide test. *Id.*

¹²⁰ *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)). The petitioners, however, relied on English authorities, including *DE JURE MARIS*, *supra* note 29, for the contention that Crown ownership did not extend to soil beneath non-navigable waters. See Brief for Petitioners at 23-29, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870). Furthermore, Phillips Petroleum argued that both *Martin* and the *Genesee Chief* cases utilized the navigability test as a means of defining the extent of Crown ownership of lands. *Phillips Petroleum*, 108 S. Ct. at 796.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)).

trust lands is the expansive language of *Shively* and its progeny.¹²⁴ The Court interpreted these cases as determining that public trust lands include all lands affected by the ebb and flow of the tide.¹²⁵ Conceding that these cases did not actually concern non-navigable, tidally influenced lands, the Court nonetheless upheld their applicability, pointing to the lack of any contrary opinions retracting or limiting the *Shively* language.¹²⁶

After rejecting the common law navigability argument, the Court considered the petitioners' second argument. Phillips Petroleum had asserted that even assuming common law courts failed to use the navigability test for determining the scope of trust lands, subsequent Supreme Court holdings had made navigability the "*sine qua non* of the public trust interest" in America's tidelands.¹²⁷ Justice White first confirmed that the Supreme Court had extended admiralty jurisdiction beyond waters subject to the influence of the tide, to include all navigable waters.¹²⁸ The majority also recognized that the public trust was likewise broadened.¹²⁹ In the Court's view, however, this alteration did not serve to withdraw from trust classification those lands historically included within its scope.¹³⁰ Instead, the Court interpreted this development as an expansion of the doctrine to include not only those lands subject to the ebb and flow of the tide, but also all navigable lakes and rivers.¹³¹ Because the trust had been ex-

¹²⁴ See *id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (citing *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 456-57 (1851)).

¹²⁹ *Id.* at 797 (citing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435-36 (1892); *Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 338 (1876)).

¹³⁰ *Id.* By so holding, the Court rejected the petitioners' belief that "navigability is or was the prevailing test for state dominion over tidelands." *Id.*

¹³¹ *Id.* (citing *Oregon State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)). The *Corvallis* Court interpreted the holding in *Barney* as "extend[ing] the [public trust] doctrine to waters which were nontidal but nonetheless navigable, consistent with [the Court's] earlier extension of admiralty jurisdiction." *Oregon State Land Bd. v. Corvallis*, 429 U.S. 363, 374 (1977).

To support its position, the *Phillips Petroleum* majority cited *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894), which was decided shortly after the extension of the public trust rule. *Phillips Petroleum*, 108 S. Ct. at 797 n.8. After determining that *Mann* involved lands under non-navigable tidal waters, the Court noted that the lands were ultimately held to be within the scope of the trust. *Id.*

The Court noted the similarities between *Mann* and the case at bar, but stated that the *Mann* Court made no reference to the fact that the lands in question were beneath non-navigable waters. *Id.* But see Reply Brief for Petitioners at 15-16, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870) (asserting that

tended rather than replaced by the navigability test, the Court concluded, it declined to accept the petitioners' argument.¹³²

After concluding that the ebb and flow test remained valid, the Court considered whether the public trust includes the non-navigable portions of tidewaters which border on the "oceans, bays, and estuaries."¹³³ The Court rationalized that the ebb and flow test required that those lands be included in the public trust.¹³⁴ Although the majority admitted to a distinction between the waters at issue and non-navigable waters on the edge of the shore, it countered that the difference was only one in degree, and not in kind.¹³⁵ Because all tidewaters are, in the end, connected to the sea, Justice White reasoned, the petitioners' distinction was ineffectual.¹³⁶ The Court determined that since the lands in question possessed the same "geographical, chemical, and environmental" characteristics shared by all tidelands, they must be a part of the public trust.¹³⁷ Based on the ebb and flow test, the Court articulated that the lands in question were a part of the public trust, and title to them had therefore vested in the State of Mississippi upon its entrance to the Union in 1817.¹³⁸

The Court next considered the reasonable expectations of property owners.¹³⁹ While recognizing the general principle that the expectations of property owners should be maintained, Justice White posited that in the instant case, the petitioners' expectations were not reasonable.¹⁴⁰ Justice White noted that

the land in *Mann* was located on the shores of a navigable waterway and therefore rightfully within the scope of the public trust). Petitioners denied what the *Phillips Petroleum* Court eventually professed, that the land at issue in *Mann* was tidal but non-navigable, since the only reference to this effect is found within the argument of counsel, not the Court's opinion. See Reply Brief for Petitioners, *supra*, at 15-16.

¹³² *Phillips Petroleum*, 108 S. Ct. at 797.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *id.*

¹³⁷ *Id.* at 797-98 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting)).

The *Phillips Petroleum* majority also criticized the test proposed by the petitioners which would include only lands underlying or bordering on navigable bodies of water. *Id.* at 798. Instead, the majority pronounced its support for the ebb and flow standard because of that test's jurisprudential support and practical application. *Id.* In particular, the Court noted that "the ebb and flow rule has the benefit of 'uniformity and certainty and . . . eas[e] of application.'" *Id.* at 798 (quoting *Cobb v. Davenport*, 32 N.J.L. 369, 379 (Sup. Ct. 1867)).

¹³⁸ *Id.* In so doing, the Court affirmed the decision of the Mississippi Supreme Court. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

although the petitioners had paid taxes on the property for more than a century, Mississippi courts had consistently announced "title to all the land under tidewater" was vested in the state.¹⁴¹ While holding that the state courts' pronouncements applied to all tidewaters, the Court acknowledged that Mississippi had never before directly considered lands which were tidal but non-navigable in character.¹⁴² Because the state of Mississippi had repeatedly endorsed uses of public trust lands unrelated to navigability,¹⁴³ the Court reasoned that the petitioners were on sufficient notice that the state's claim to all tidelands was not confined to lands underlying navigable waterways.¹⁴⁴

The majority rejected the suggestion that its ruling would have an adverse effect, either within Mississippi or on a national scale.¹⁴⁵ Particularly, the Court reiterated that each state has handled its public trust rule as it has seen fit.¹⁴⁶ Justice White resolved that the Court's holding would not alter the law of any state which had already relinquished its claim to tidally influenced lands.¹⁴⁷

Conversely, the majority discerned, to validate the navigability test would be to upset settled expectations, because of the many land titles which had been previously adjudicated by the ebb and flow standard.¹⁴⁸ The Court noted that some states had preserved the public's use of tidelands even after giving dominion of such property away to private landowners, and then indicated that these long-standing rights might well be jeopardized were the Court to uphold a navigability rule for determining tidelands ownership.¹⁴⁹ Returning to the expectations of the private landowners in the instant matter, the Court repeated that the petitioners' long history of paying taxes and being the record title holders of the tidelands still could not equitably vest them with title.¹⁵⁰ According to the majority, this was due to the Mississippi

¹⁴¹ *Id.* (quoting *Rouse v. Saucier's Heirs*, 140 So. 291, 292 (Miss. 1933)).

¹⁴² *Id.*

¹⁴³ *Id.* (citing *Treuting v. Bridge and Park Comm'n*, 199 So.2d 627, 632-33 (Miss. 1967)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* This suggestion was taken from the dissent, wherein Justice O'Connor stated, "[t]he Court's decision departs from our precedents, and I fear that it may permit grave injustice to be done to innocent property holders in coastal states." *Id.* at 805 (O'Connor, J., dissenting).

¹⁴⁶ *Id.* at 798.

¹⁴⁷ *Id.* at 799.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Supreme Court's determination that neither laches, adverse possession, nor any similar equitable doctrine could cause the state to be divested of its ownership.¹⁵¹ Since Mississippi never forfeited claim to its lands subject to the ebb and flow of the tide, the Court concluded, the decision of the Supreme Court of Mississippi must be affirmed.¹⁵²

Justice O'Connor, joined by Justices Stevens and Scalia, dissented from the majority's holding, asserting that the Court's holding disturbed the settled expectations of many landowners with a conclusion that contravened prior Court determinations.¹⁵³ Justice O'Connor criticized the majority for achieving its result by relying on general language from opinions recognizing state ownership of land beneath tidewaters.¹⁵⁴ Justice O'Connor asserted that those cases concerned waters that were navigable-in-fact.¹⁵⁵ According to the dissent, never before had the Court allowed land beneath a "discrete and wholly non-navigable body of water that is properly viewed as separate from any navigable body of water" to be included within the public trust.¹⁵⁶ Rather, the dissent argued, the public trust has been repeatedly defined by the Court in terms of navigability.¹⁵⁷ Conceding that the authorities upon which the dissent relied for this proposition were all freshwater cases, Justice O'Connor nevertheless maintained that there was no judicial support for the use of different tests, one for fresh and another for salt water, as a means of outlining the public trust.¹⁵⁸

After reviewing the common law roots of the public trust doctrine, the dissent stated that no common law courts had reported whether title to non-navigable tidal watercourses was vested in the sovereign.¹⁵⁹ Justice O'Connor indicated, however, that English common law courts held the public's navigation

¹⁵¹ *Id.* The Court found no reason to upset the "general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Id.* (quoting *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)).

¹⁵² *Id.*

¹⁵³ *Id.* at 800 (O'Connor, J., dissenting).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Justice O'Connor was referring to the majority's reliance upon *Shively, Mann*, and other such cases. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (citing *Utah Div. of State Lands v. United States*, 107 S. Ct. 2318 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1981); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845)).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

rights to be limited to waterways which were navigable-in-fact, as opposed to extending them to all waterways subject to the tidal flow.¹⁶⁰ The dissenting Justice posited that since the king's sovereignty did not include land submerged under navigable watercourses unless influenced by the tide, title to lands underlying tidal waterways might not have been held by the king, unless the water was navigable.¹⁶¹ Since no common law cases existed identifying Crown rights in terms of lands beneath navigable waters,¹⁶² the dissent concluded, a strong case existed in support of the view that the common law would not afford sovereign ownership of the lands in question.¹⁶³

Justice O'Connor observed that American courts and their common law counterparts had consistently maintained that the trust extends to navigable waters for the fundamental purpose of preserving commerce and navigation.¹⁶⁴ The dissent explained that although a state in its discretion may allow the trust lands to be used for other purposes such as fishing and land reclamation, these uses are merely incidental, and by no means serve to expand the scope of the trust.¹⁶⁵ As the dissent stressed, even the majority did not claim that the doctrine should be expanded to include all watercourses which can be used for fishing and land reclamation.¹⁶⁶ However, Justice O'Connor implicitly noted, the majority rejected the navigability test as a means of determining which lands are to be part of the public trust since trust lands have on occasion been used for other purposes.¹⁶⁷ Justice O'Connor therefore chastised the majority for failing to explain why the ebb and flow test is superior to the navigability test for identifying watercourses fit for such other purposes.¹⁶⁸ The dissent further asserted that tidality is no longer the proper measur-

¹⁶⁰ *Id.* at 801 (O'Connor, J., dissenting) (quoting *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K.B. 1774)).

¹⁶¹ *See id.*

¹⁶² *See id.* (citing *Rex v. Smith*, 2 Dougl. 441, 446, 99 Eng. Rep. 283, 285 (K.B. 1780)).

¹⁶³ *Id.*

¹⁶⁴ *Id.* The dissent stated, "[i]t is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership either of the waters or the soils under them." *Id.* (quoting *Packard v. Bird*, 137 U.S. 661, 667 (1891)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* See *supra* notes 106-11 and accompanying text.

¹⁶⁸ *Id.*

ing stick for examining the boundaries of the public trust.¹⁶⁹ The dissent argued that soon after being abandoned for the purposes of admiralty jurisdiction,¹⁷⁰ the ebb and flow test likewise ceased to be a part of public trust jurisprudence.¹⁷¹ Justice O'Connor further rationalized that although the Supreme Court cases declining to use the ebb and flow rule all concerned inland waters, the same reasoning was nonetheless applicable to tidally influenced waters.¹⁷² The dissent reasoned that the primary purpose for which the public trust exists, to protect commerce and navigation for the public,¹⁷³ dictates that navigability is the essential element for characterizing lands fit for public trust use, regardless of whether they are inland or coastal.¹⁷⁴

Justice O'Connor pronounced that congressional legislation also supported a conclusion that the public trust is defined in terms of navigability.¹⁷⁵ Referring to the Submerged Lands Act,¹⁷⁶ the dissent insisted that since the Act had defined lands submerged below navigable waters to include land "covered by tidal waters," if one were to include discrete, non-navigable bodies of water in the term "tidal waters," then a contradiction would obviously exist.¹⁷⁷ Based on this potential inconsistency, the dissent deduced, Congress evidently understood "tide waters" to mean the boundaries of the navigable sea.¹⁷⁸ Acknowledging that although the Act was not at issue in the case before the Court, Justice O'Connor reasoned that it nonetheless deserved consideration as demonstrating Congress' understanding

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 801-02 (O'Connor, J., dissenting) (quoting *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851)).

¹⁷¹ *Phillips Petroleum*, 108 S. Ct. at 801 (O'Connor, J., dissenting). *Accord* *McGivra v. Ross*, 215 U.S. 70, 78 (1909) (tidal test "had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* . . ."); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) ("[T]he 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 Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1870) ("the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters").

¹⁷² *Phillips Petroleum*, 108 S. Ct. at 802 (O'Connor, J., dissenting).

¹⁷³ *Id.* at 801-02 (O'Connor, J., dissenting) (citing *Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 338 (1877)).

¹⁷⁴ *Id.* at 802 (O'Connor, J., dissenting).

¹⁷⁵ *Id.* (citing Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982 & Supp. IV 1986)).

¹⁷⁶ Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982 & Supp. IV 1986).

¹⁷⁷ *Phillips Petroleum*, 108 S. Ct. at 802 (O'Connor, J., dissenting) (quoting 43 U.S.C. § 1301(a)(2) (1982 & Supp. IV 1986)).

¹⁷⁸ *Id.*

of the public trust doctrine.¹⁷⁹

Justice O'Connor then explained the existence of tidewater language in public trust cases.¹⁸⁰ Since the shores of navigable bodies of water have always been included within the public trust, the dissent postulated, there is authority for describing the test in terms of tidal waters.¹⁸¹ In the dissent's view, though, the inclusion of non-navigable shorelands, up to the mean high tide line, by no means implied that all tidally influenced watercourses should also be included as part of the trust.¹⁸² Justice O'Connor thus criticized the majority for construing not only non-navigable shorelands, but also discrete bodies of water as components of the trust.¹⁸³ Such a standard, the dissent continued, wrongfully included the separate small streams and bayous in question, which, although tidally influenced, are far removed from any navigable tidal water.¹⁸⁴

Further, the dissent criticized the majority for declining to make a distinction between the two types of tidal waters, since the resulting test would include even the most remote of waters, if somehow connected to the sea.¹⁸⁵ This broad rule, the dissent continued, was entirely inconsistent with the standard utilized for inland waters, which does not afford public trust status to all parts of a river simply because they might be somehow contiguous with a navigable section.¹⁸⁶ Hence, the dissent concluded, the appropriate test is the one used for inland waters: "[o]nly waterways that are part of a navigable body of water belong to the public trust."¹⁸⁷

In concluding, Justice O'Connor turned to the particulars of the case at bar, emphasizing that Mississippi's oil and gas leasing extended far beyond the traditional uses of the public trust.¹⁸⁸

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *Id.* at 802. As an example, Justice O'Connor applied this concept to the ocean. Since the borders of the navigable ocean "extend to the mean high tide line as a matter of federal common law," Justice O'Connor denoted, the public trust includes shorelands where the tide ebbs and flows, thus explaining the existence of "tide" terminology in public trust case law. *Id.* (citing *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 16 (1935); *United States v. Mission Rock Co.*, 189 U.S. 391, 484-85 (1903); *Knight v. United States Land Ass'n*, 142 U.S. 161, 183 (1891)).

¹⁸² *Id.* at 802-03 (O'Connor, J., dissenting).

¹⁸³ *See id.* at 803 (O'Connor, J., dissenting).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Justice O'Connor criticized the majority's holding, not only for approving a "radical expansion" of the use of trust lands, but also for upsetting the reasonable expectations of thousands of landowners in coastal states.¹⁸⁹ The dissent warned that the Court's holding would encourage state actions like those taken in New Jersey, where the state was arbitrarily and without compensation taking title to all tidelands away from private landowners.¹⁹⁰ Justice O'Connor found little solace in the Court's postulation that state law might protect the equitable claims of landowners owning tidal property.¹⁹¹ Instead, the dissent charged that when the potential for profit is involved, the landowners' interests will fall by the wayside under color of Supreme Court authority.¹⁹²

The genesis of the modern confusion surrounding the scope of the public trust doctrine stems from the common law principle that in England, tidality was synonymous with navigability. Faced with the juxtaposition of these terms, the early Supreme Court used both words interchangeably in discussing the doctrine.¹⁹³ The *Phillips Petroleum* Court, lacking any clear jurisprudential support in favor of one standard over the other, was forced to resolve whether sovereignty was meant to extend to all lands subject to the ebb and flow of the tide, or only lands submerged beneath navigable waters. The majority chose to interpret the broad statements from cases like *Shively* as the primary authority for delineating the boundaries of the public trust.¹⁹⁴ Close scru-

¹⁸⁹ *Id.* at 804 (O'Connor, J., dissenting).

¹⁹⁰ *Id.* Justice O'Connor quoted from a SETON HALL LAW REVIEW article, wherein the authors noted:

Due to this attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of title; prior grants and state deeds are being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts

Porro & Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323, 325-26 (1972) (footnotes omitted). The dissent noted that these problems still exist within the State of New Jersey. *Phillips Petroleum*, 108 S. Ct. at 804 (O'Connor, J., dissenting).

¹⁹¹ *Id.* See *supra* notes 144-48 and accompanying text.

¹⁹² *Id.* at 804-05 (O'Connor, J., dissenting).

¹⁹³ Compare *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413-14 (1842) ("the navigable waters of England, and the soils under them, held by the Crown" at common law) with *Shively v. Bowlby*, 152 U.S. 1, 57 (1894) ("The new States . . . have the same rights . . . in the tide waters, and in the lands under them.").

¹⁹⁴ See *Phillips Petroleum*, 108 S. Ct. at 794-96.

tiny of the majority's reasoning in support of the expansive ebb and flow language, however, reveals that it is not nearly as solid a position as the majority suggests.

The Court utilized language from cases such as *Shively* to support the proposition that at common law, title to "lands flowed by the tide water" were vested in the king, and that after the Revolution, each state took the same rights "in tide waters, and in the lands under them."¹⁹⁵ Without examining the meaning of "tidelands" in those cases, however, the Court concluded that "tidelands" encompassed every inch of land influenced by the tide's ebb and flow.

Particularly distressing was the Court's refusal to afford full consideration to the legal framework surrounding the doctrine, especially since this was admittedly the first time the Supreme Court considered the ownership of lands beneath non-navigable, tidally influenced waters. Just as the Court had failed to look into the meaning of "tidewaters" as it was used in earlier cases, the Court also refused to consider what the common law was with respect to tidewaters, for as it remarked, "it is perfectly clear how this Court understood the common law of royal ownership"¹⁹⁶ The Court must therefore be faulted for refusing to investigate the accuracy of the prior holdings with respect to the true nature of the common law.

Had the majority looked beyond the face of the broad language of *Shively* to the historical and stated purpose of the trust, it would have been confronted with a persuasive contention that navigability is the true *sine qua non* of the public trust. The Supreme Court has consistently stated that the trust exists for the purposes of "commerce and navigation, to be exercised for the public advantage and convenience."¹⁹⁷ In fact, the Court in *Shively* noted the purposes of the trust to be "commerce, navigation, and fishery."¹⁹⁸ The traditional purposes thus indicate that the navigability of the water, as opposed to the ebb and flow of the tide, is most closely related to the true nature for which the public trust was created.

Perhaps to preempt this argument, the majority stressed that prior holdings have recognized uses for trust lands which do not concern navigability, including land reclamation for urban ex-

¹⁹⁵ *Shively*, 152 U.S. at 57.

¹⁹⁶ *Phillips Petroleum*, 108 S. Ct. at 796.

¹⁹⁷ *Barney*, 94 U.S. at 338.

¹⁹⁸ *Shively*, 152 U.S. at 57.

pansion, and oyster harvesting.¹⁹⁹ The majority therefore reasoned that navigability could not possibly be the determinative test for the scope of the public trust. The Court, however, confused the supplemental uses of the public trust with its traditional purpose. To the contrary, such additional uses are permitted at the discretion of the state, and are merely incidental to the primary function of the public trust. By no means should the incidental uses be construed as expanding the physical borders of the trust. Because property may be fit for fishing, oyster harvesting or land reclamation does not necessarily qualify it for public trust coverage, but such is the logical implication of the majority's reasoning.

Another shortcoming of the majority's holding is the manner in which it disregards the petitioners' arguments in opposition to the stance ultimately endorsed by the Court. Justice White distinguished the authorities cited by the petitioners in support of a navigability rule because the cases "did not deal with tidal, non-navigable waters."²⁰⁰ Immediately thereafter, however, the Court reinforced the ebb and flow rule with cases that were conceded to not actually concern lands such as those involved in this case.²⁰¹ If the persuasiveness of the one argument is diminished or nullified for not devolving from the issue of non-navigable, tidally influenced land ownership, then the Court's conclusions must similarly be erroneous.

In reaching its conclusion, the *Phillips Petroleum* Court denied that there were different kinds of tidelands. To concede as much would weigh in favor of the petitioners' argument that the term "tidewaters" does not necessarily refer to all lands subject to the tide's ebb and flow. Hence, the Court admitted that there was "a difference in degree between the waters in this case, and non-navigable waters on the seashore that are affected by the tide."²⁰² The Court emphasized, however, that the difference was only one of degree, and not of kind, because "in the end, all tidewaters are connected to the sea."²⁰³ Again, the logic of the majority must be questioned. Based on the Court's reasoning, one might conclude that rivers, streams and lakes, regardless of their navi-

¹⁹⁹ *Hardin v. Jordan*, 140 U.S. 371, 381-82 (1891); *Phillips Petroleum*, 108 S. Ct. at 795 (citing *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855)).

²⁰⁰ *Id.* at 796.

²⁰¹ *Id.*

²⁰² *Id.* at 797.

²⁰³ *Id.*

gability, are just a varying degree of the public trust lands since, in the end, they are connected to the sea.

Moreover, the Court criticized as inconsistent the petitioners' concession to state ownership of tidelands bordering bays, oceans and estuaries, even if such waters were not navigable.²⁰⁴ Such a position, however, is not inconsistent with a navigability test, since tidelands which border navigable waters have always been considered a part of the public trust.²⁰⁵ As the *Pollard* Court noted, lands subject to the ebb and flow of the tide are part of the public trust precisely because they constitute "shores of navigable waters."²⁰⁶ The *Phillips Petroleum* Court failed to reconcile how lands which are not only non-navigable, but also discrete, not bordering on any navigable body of water, could possibly serve the purposes for which tidelands were entrusted to the king and subsequently the states: for the purposes of commerce and navigation, to be exercised for the advantage and convenience of the public.²⁰⁷

The *Phillips Petroleum* Court warned that to decide in favor of the navigability test would upset settled expectations.²⁰⁸ Nonetheless, the Court neglected to indicate how it could upset a state's expectations if the state had never before determined ownership of non-navigable, tidally influenced lands. Additionally, one must ask how a state's expectations would be upset. While it is true that small non-navigable streams and drainage ditches influenced by the tide's ebb and flow would not be a part of the trust lands, the boundaries of the trust would be otherwise relatively unaffected. Certainly, the public would not be losing its access to the beaches or its right to navigate, for the navigability test includes tidelands which border on navigable waters, regardless of whether they themselves are navigable.²⁰⁹ Hence, the only tidelands not included in the trust would be those which are discrete, non-navigable, and not bordering on any navigable watercourses. Excluded from the public trust would be small streams like those in *Phillips Petroleum* which traverse private up-

²⁰⁴ See *id.*

²⁰⁵ See, e.g., *Massachusetts v. New York*, 271 U.S. 65, 92-93 (1926) ("seashore" belongs to the public since it provides "access to the sea"); *Baker v. Moran Bros. Co.*, 153 U.S. 287, 288-289 (1894) (public title to tidal lands allowed because lands usable "in facilitating approach to the navigable waters from the upland").

²⁰⁶ *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

²⁰⁷ See *Shively*, 152 U.S. at 57.

²⁰⁸ *Phillips Petroleum*, 108 S. Ct. at 796.

²⁰⁹ *Id.* at 798.

land properties, and which are outside the true scope of the public trust doctrine. The Court's holding, however, will upset expectations of thousands of property owners (not to mention the insurers) in every coastal state, who reasonably believed that they held lawful title to certain tidally influenced lands.²¹⁰ In light of the *Phillips Petroleum* holding, many states will now have the capability to take back property they once trusted away, as long as they can find or create a legal loophole to justify their actions.²¹¹

Still, one might contend that the public does have an interest in the marshes, meadowlands, and small streams that would be excluded from a public trust measured by the navigability standard. If the Supreme Court's goal in validating the expansive reading of "tidelands" was to protect the wetlands for ecological and environmental reasons, then its motives were truly admirable.²¹² This goal, however, could have been achieved without subjecting all tidally influenced lands to a public trust, and upsetting the settled expectations of many.

Through legislation, for instance, the states or even federal government could create a servitude such as a public easement. These easements would afford the public access rights to such properties for fishing, swimming, nature study or any other public interest. As the majority acknowledged, tidelands in some states are privately owned, but the public's right to use such property for purposes like hunting, fishing and bathing has long been protected.²¹³ Additionally, legislation could be passed prohibiting the development or exploitation of any wetlands. Legislation of this nature would not only protect the environment, but also prevent private landowners from being dispossessed of the titles which they reasonably believe to be their own.

The protection of the environment, however, does not appear to be the guiding force behind the Court's decision. Indeed, the majority's holding allowed the State of Mississippi to exploit the small tidal streams in question by leasing them out for oil and gas exploration under the guise that any profits derived would benefit the public. Whatever its motivations, the full effects of the Court's holding in *Phillips Petroleum* remain to be seen.

²¹⁰ *High Court Extends States' Rights to Tidelands Miles from the Ocean*, N.Y. Times, Feb. 24, 1988, at A16, col. 3.

²¹¹ *Id.*

²¹² It is anticipated that the ruling will help some states to protect their environmentally sensitive tidelands. *Id.* at A16, col. 1.

²¹³ *Phillips Petroleum*, 108 S. Ct. at 799 n.12.

For now, though, many landowners must stand by to see whether the non-navigable, tidally influenced lands which they have quietly enjoyed will be reclaimed by the state for the "benefit of the public."

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