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The Source and Scope of Public and Private Rights in Navigable Waters

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This is the first of a two part article on the scope of public and private rights in navigable waters under federal and state law. This first part deals with the federal sources of public and private rights in navigable waters and the second part will consider the scope of these rights under state law. Although volumes of books could easily be written on these subjects, Professor Leighty has succinctly defined and offered penetrating observations into the problems and possible solutions.

THE SOURCE AND SCOPE OF PUBLIC AND PRIVATE RIGHTS IN NAVIGABLE WATERS

*Leighton L. Leighty**

THIS article is published in two parts in this review. This first part will cover the source or origin of public and private rights in navigable waters. Since it may be fairly stated that most of these rights are determined under relevant state law,[1] and since the impact of federal law on these rights is usually by way of limitation, it seems appropriate to handle federal controls first. Moreover, many of these rights have had their origin in the federal test for navigability and in the transfer of sovereignty from the federal government to the respective states upon their admission to the union.

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1. Shively v. Bowlby, 152 U.S. 1 (1894); *see* United States v. Texas, 339 U.S. 707 (1950) (exception made when paramount federal rights asserted *in marginal sea*); Skiriotes v. Florida, 313 U.S. 69 (1941); United States v. Oregon, 295 U.S. 1 (1935). *But see* Arizona v. California, 373 U.S. 546 (1963).

Outside the problem of federal projects and programs which are naturally paramount and have a significant limiting impact on rights un-

The second part of this article will deal with the scope of public and private rights under state law. As an early United States Supreme Court case indicated,[2] the rights in navigable waters vary so greatly from state to state, despite the fact that "trends" may be indicated,[3] that one must be extremely cautious in using cases from other jurisdictions. Precedents in other jurisdictions are particularly deceptive because they appear to be dealing with identical subject matter and employ similar language (or may even perfunctorily quote from cases in other states),[4] but frequently they are dealing with a peculiarly local matter[5] and may fail to cite (much less distinguish) a prior inconsistent case in that same jurisdiction.[6]

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der state law via the supremacy clause, perhaps the only major impingement on state law is the question of title to the beds of navigable waters. *See* United States v. Texas, *supra;* United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947); United States v. Oregon, *supra;* United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960); Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.* (1964). Moreover, it appears that the federal test of navigability controls only when some property claim is made under federal authority.

Compare Shively v. Bowlby, *supra with* United States v. Utah, *supra, and* United States v. Holt State Bank, *supra.*

2. Shively v. Bowlby, 152 U.S. 1, 26 (1894).

3. *E.g.,* Johnson, *Riparian and Public Rights to Lakes and Streams,* 35 WASH. L. REV. 580, 605 (1960).

4. *See, e.g.,* Attorney General *ex rel.* Hoffmaster v. Taggart, 306 Mich. 432, 11 N.W.2d 193 (1943); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937).

5. *See, e.g.,* County Bd. of Supervisors of Mecosta County v. Department of Conservation, 381 Mich. 180, 160 N.W.2d 909 (1968) (statutory lake level proceeding). The limited nature of the local issue before the court ruling on the issue of navigability may not even be apparent to courts in the same jurisdiction. *Compare* Pigorsh v. Fahner, ___ Mich App. ___, ___ N.W.2d ___, Civil No. 5602 (Ct. App. Mich. February 25, 1970) *with* County Bd. of Mecosta County v. Department of Conservation, *supra.* Beyond the pleasure-versus-commerce dichotomy, there may even be distinctions between different types of "commerce." For example, there may be a "manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs. . . ." City of Grand Rapids v. Powers, 89 Mich. 94, 111, 50 N.W. 661, 666 (1891).

6. *See, e.g.,* Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949). No attempt was made to distinguish a prior case using an inconsistent test for navigability. *See* Roberts v. Taylor, 74 N.D. 146, 181 N.W. 622 (1921). *Compare* Johnson v. Seifert, *supra* note 1; State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957); County of Becker v. Shevlin Land Co., 186 Minn. 401, 243 N.W. 433 (1932). For a comprehensive study of the development of the test of navigability in one jurisdiction see Bartke, *Navigability in Michigan in Retrospect and Prospect* (1970) (unpublished manuscript on file at Wayne State University Law School). This manuscript will appear in May of 1970 at 16 WAYNE L. REV. ___ (No. 2) (1970) and was graciously loaned to this author while this article was being written. *See also* Munro, *Public v. Private: The Status of Lakes* 10 BUFFALO L. REV. 459

Throughout this article an attempt will be made to reach a meaningful and workable definition of navigability in the context of specific issues. Some states may be found which have more than one definition of navigability depending on the issue to be decided.[7] An important question to keep in mind is whether "navigability" is so inherently unworkable that it can no longer be employed as a meaningful standard under which public and private rights are determined. In this context, the second part of this article will develop the legislative enactments which have attempted to define navigability. Nonetheless, "navigability" has strong roots in the common law of England and this country as the criteria for determining public and private rights:

> The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters,— a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits. In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and nonnavigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and nonnavigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely float-

(1961). State courts frequently confuse prior cases dealing with bed title with prior cases concerning surface use. *See, e.g.*, Kemp v. Putnam, 47 Wash. 2d 530, 288 P.2d 837 (1955).

7. This is apparently one of the problems in Michigan. Depending on the specific issue before the court, the test of navigability may change, and these multiple tests for navigability have produced no small amount of confusion. *See* Bartke, *supra* note 6. For subsequent development of both the confusion and the tests *see* Pigorsh v. Fahner, *supra* note 5.

> able for logs at certain seasons of the year. Most of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.[8]

While the *source* of public and private water rights in navigable waters is a matter of historical development, a description of the *scope* of these rights could exhaust the pages of several volumes. Hence, a manageable approach[9] to

8. Lamprey v. Metcalf, 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893).

9. An alternate approach might be to start with the hypothetical situation of plenary private control of navigable waters. The discussion would then be directed toward carving away layers of "rights" in favor of federal and state constraints. This approach, however, is so far removed from the development of Anglo-American legal history concerning sovereignty that it would have little utility. In fact, from the federal perspective, private control may be restricted to a narrow set of usufructuary interests with no true ownership in the proprietary sense. In United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913), the Court indicated that private ownership in a great navigable stream is inconceivable. In like manner, United States v. Willow River Power Co., 324 U.S. 499, 510 (1945), indicates:

the extent of *private* rights in navigable waters is first to delineate the scope of *public* rights in these waters and then to attribute the remainder of the bundle[10] of water rights to private control. Of course, a demarcation of public rights in nonnavigable lakes and streams will also be required. This approach appears to be sound for three reasons. First, private rights in water (whether navigable or otherwise) have been adequately refined in hundreds of articles and in several excellent treatises on the ramifications of the riparian and appropriation doctrines.[11] Second, a review of the relevant cases seems to indicate that the legal principles which control the extent of public rights in navigable and nonnavigable waters have developed independently, without regard to which system of law governs private water rights in a given jurisdiction. This pattern appears to emerge in riparian states, in appropriation states, and in states which have a combination of these doctrines.[12] Third, the distinctions

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Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

10. This is analogous to the traditional concept of a "bundle-of-sticks" in the law of real property. The "bundle" as described in this article is composed of federal powers exercised under the supremacy clause, federal proprietary interests, state proprietary interests, state exercises of internal sovereignty, public rights to surface use, private controls over surface use, and private proprietary interests. In the order just stated, each of these elements carved out of a theoretically absolute bundle of water rights is (roughly speaking) subject to all preceeding elements. Private rights in navigable waters are, therefore, the most limited.

11. *See, e.g.*, 1 WATERS AND WATER RIGHTS §§ 15-29 (Clark ed. 1967). *See also* THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES (Haber & Bergen eds. 1958); UNIVERSITY OF MICHIGAN LAW SCHOOL LEGISLATIVE RESEARCH CENTER, WATER RESOURCES AND THE LAW (1958); FARNHAM, THE LAW OF WATERS AND WATER RIGHTS (1904); GOULD, LAW OF WATERS (2d ed. 1891); ANGELL, THE LAW OF WATERCOURSES (7th ed. 1877). Two other major theories of water law are worth mentioning, in addition to the familiar California doctrine. One is *res communes* which is the original source of the problems developed in this article and which can be traced to Roman civil law. See SAX, WATER LAW—CASES AND COMMENTARY 7 (1965). The other may be called the "law of necessity" because it operates in a given jurisdiction in spite of the applicable riparian or appropriation theory when imperative "needs" are manifest. *See* SAX, *supra* at 75-88, 368-72; Garrity & Nitzchke, *Survey of Water Law*, 6 LAW NOTES 7, 8 (1969).

12. *Compare, e.g.*, Duval v. Thomas, 114 So.2d 791 (Fla. 1959); Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957) (lakes); Attorney General *ex rel.* Hoffmaster v. Taggart, 306 Mich. 432, 11 N.W.2d 193 (1943) (streams); Johnson v. Seifert, *supra* note 1; Snively v. Jaber, 48 Wash.2d

between public and private rights at common law frequently began by first describing the extent of rights available to the public. *Jus privatum* was always subject to *jus publicum.* As Chief Justice Shaw said in an early Massachusetts case, *jus publicum* is the royal prerogative:

> by which the king holds such shores and navigable rivers, for the common use and benefit of all the subjects, and indeed of all persons of all nations at peace with England, who may have occasion to use them for the purposes of trade. This royal right or *jus publicum,* is held by the crown in trust for such common use and benefit and cannot be transferred to a subject, or alienated, limited, or restrained, by the mere royal grant, without an act of parliament. The King's Grant, therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon, as to disturb the common rights of navigation; and such obstruction, not withstanding such grants, held to be a public or private nuisance as the case may be.[13]

Another point that emerges from the cases dealing with navigable waters is a distinction between those areas in which public and private rights are governed by federal law and those in which state law controls. This point became important in organizing this article. Since most conflicts between public and private rights are determined by relevant state rules, with the notable exception of the issue of ownership of title to beds of navigable waters,[14] a discussion of state law becomes meaningful under the heading of the *scope* of these rights. Moreover, state control over navigable waters had its origin in the transfer of territorial sovereignty from the federal government to the respective states[15] upon their admission to the union.[16] By contrast, federal law appears in most cases, as a result of some paramount national in-

815, 296 P.2d 1015 (1956) (lakes); Strand v. State, 16 Wash.2d 107, 132 P.2d 1011 (1943) (streams); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

13. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 90 (1851). *See also* United States v. Willow River Power Co., *supra* note 9.
14. United States v. Holt State Bank, *supra* note 1.
15. Special exceptions exist with respect to Texas and to the original 13 colonies. *See* notes 67-72 *infra* and accompanying text.
16. *See* United States v. Holt State Bank, *supra* note 1; Shively v. Bowlby, *supra* note 2.

terest, by way of limitation on both public and private rights under state law. Thus it seems appropriate to discuss federal controls over navigable waters in the context of the origin or *source* of rights in these waters and to defer discussion of the varying state rules to the second half of this article.

I. SOURCES OF PUBLIC RIGHTS IN NAVIGABLE WATERS

"Navigability" or "navigable waters" is the touchstone for determining many sovereign, private, and public rights in waters.[17] A significant problem is the matter of defining "navigability." More precisely, the problem is that of clearly delineating navigability for the specific purpose at hand and distinguishing that test of navigability from other tests employed in varying contexts.

Navigability has meaning only with respect to the factual issue before the court. Under English common law the test of navigability related solely to the existence of the ebbing and flowing of the tide.[18] This test covered most of the major rivers in England but excluded most of the inland lakes and streams in this country.[19] Hence, the federal criteria for navigability and most state tests have adopted some form of the navigable-in-fact rule.[20] Despite these variations, meaningful differences can be made only with respect to the purpose for which navigability is used as the standard. Thus, navigability may be used to determine: title to beds of lakes and streams for federal purposes,[21] title to these beds for state purposes,[22] the validity of various federal statutes

17. *See supra* note 8 and accompanying text.
18. *See* Hardin v. Jordan, 140 U.S. 371 (1891). Although the English rule has nearly vanished from American jurisprudence, some early cases measured navigability with this standard. For example, the issue of bed title was determined by the ebb and flow test:
> "All the cases in which waters above the ebb and flow of the tide, such as great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for the purposes of navigation, are confessedly a departure from the common law." *Id.* at 395.

19. Shively v. Bowlby, *supra* note 2, at 32.
20. *E.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
21. *E.g.*, United States v. Utah, *supra* note 1; United States v. Holt State Bank, *supra* note 1.
22. *See, e.g.*, State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Obrecht v. Nat'l Gypsum Co., 361 Mich. 399, 105 N.W.2d 143 (1960); Nedtweg v. Wallace, 237 Mich. 14, 208 N.W. 51 (1926); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947); Coxe v. State, 144 N.Y. 396, 39 N.E. 400 (1895); Pacific Milling & Elevator Co. v. Portland, 65 Ore. 349, 133

and the legitimate scope of authority of Congress with respect to water under specific express and implied powers within the federal constitution,[23] the extent of public rights to surface use under state law when the beds are privately owned,[24] the correlative rights of surface use by riparians when the bed is privately owned,[25] the right of access to the water by both the general public and by private riparians,[26] specific rights under specific state statutes that may or may not otherwise be limited by the navigability of the water in question.[27] Moreover, differences may appear in the context of whether the body of water in question is characterized as a lake or as a stream. Therefore, the first section of this article related to the source of rights will describe those purposes and factual issues which are controlled by federal rules or legislation.

A. The Federal Test of Navigability

The initial consideration is the federal test that is used to determine the "navigable waters of the United States."

P. 72 (1913); Milwaukee v. State, 193 Wis. 423, 214 N.W. 820 (1927). There is a substantial body of authority to the effect that once state ownership is determined under the federal test, as indicated by the authorities cited note 21 *supra*, disposition of that title is purely a matter of state law. See United States v. Texas, *supra* note 1 (implication with respect to *inland* waters); Shively v. Bowlby, *supra* note 2; Hardin v. Jordan, *supra* note 18; Barney v. Keokuk, 94 U.S. 324 (1876). See also Port of Seattle v. Oregon & W.R.R., 255 U.S. 56 (1921).

23. *E.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

24. *E.g.*, Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Day v. Armstrong, *supra* note 12.

25. *E.g.*, Harris v. Brooks, 225 Ark. 436, 283 S.W. 129 (1955); Duval v. Thomas, *supra* note 12; Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957); Johnson v. Seifert, *supra* note 1; Snively v. Jaber *supra* note 12. *See also* Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473 (1967) (rights in artificially created watercourse).

26. *E.g.*, Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. 532 (1907); Driesbach v. Lynch, 71 Idaho 501, 234 P.2d 446 (1951); McGlone v. Maynard, 303 Ky. 415, 197 S.W.2d 918 (1946); Lundberg v. Univ. of Notre Dame, 231 Wis. 187, 282 N.W. 70 (1938) [explanatory memorandum at 285 N.W. 839 (1939)]. *See also* Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335.

27. For example, riparian bank rights may be affected. LA. CIV. CODE ANN. art. 455 (West 1952):

> The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees . . . to unload his vessels, to deposit his goods, to dry his nets, and the like.
>
> Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands.

The basic test is described in the classic case handed down by the United States Supreme Court in 1870 in *The Daniel Ball:*

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they consitute navigable waters of the United States . . . in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.[28]

This basic test has been embellished and expanded over the years:

> The true test of navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation. . . . The capability of use by the public for purposes of transportation and commerce affords the true criteria of the navigability of a river, rather than the extent and manner of that use. . . . It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.[29]

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28. 77 U.S. (10 Wall.) 557, 563 (1870).

29. The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874). For a complete development of the federal test, these basic cases should be considered: United States v. Rands, 389 U.S. 121 (1967); United States v. Grand River Dam Authority, 363 U.S. 229 (1960); United States v. Willow River Power Co., *supra* note 9; United States v. Appalachian Elec. Power Co., *supra* note 23; United States v. Oregon, *supra* note 1; United States v. Utah, *supra* note 1; United States v. Holt State Bank, *supra* note 1; Brewer-Elliott Oil & Gas Co. v. United States, *supra* note 1; Oklahoma v. Texas, 258 U.S. 574 (1922); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); United States v. Cress, 243 U.S. 316 (1917); United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899); Packer v. Bird, 137 U.S. 661 (1891); *Ex parte* Boyer, 109 U.S. 629 (1884); The Montello, *supra;* The Daniel Ball, *supra* note 20. See also Guinn, *An Analysis of Navigable Waters of the United States,* 18 BAYLOR L. REV. 559 (1966).

However, the fully developed and most expansive statement of the federal test for navigability is given in *United States v. Appalachian Elec. Power Co.*:[30]

> The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times, our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. We draw from the prior decisions in this field and apply them . . . to the particular circumstances presented by the New River. . . .[31]
>
> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and ordinary condition" refers to volume of water, the gradients, and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. [T]here are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.
>
> Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. Although navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission

30. 311 U.S. 377 (1940).
31. *Id.* at 404

> to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly non-navigable. There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents. The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. . . .[32]

This passage from the case succinctly states much of what is to be discussed in the first half of this article. Individual sentences either summarize whole areas of federal involvement in public and private rights in navigable waters under state law or provide the origin for confusion as to the extent of the limitations imposed on these rights when state and federal tests for navigability conflict.

B. Applying the Federal Test

The exercise of any control over navigable waters by the federal government and any limitations imposed on any public or private rights therein must arise under the express or implied powers of the federal constitution or under laws or treaties made under the authority of the federal constitution. Hence, in the event of a conflict with state regulations for navigable waters or rights in navigable waters created by state law, the federal exercise of power (including the federal test of navigability, when that is an issue) will prevail.[33] The specific provisions of the federal constitution under which navigability may become an issue are the treaty power, the war power, admiralty jurisdiction, the general welfare clause, the property clause, and the commerce clause.

1. *The Treaty and War Powers.*

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two

32. *Id.* at 407-09.
33. U.S. CONST. art. VI.

thirds of the Senators present concur."[34] This particular constitutional provision has rarely involved the issue of navigability.[35] However, when the issue is raised it is important to remember that the federal rather than the state test of navigability controls. For example, in *Oklahoma v. Texas,*[36] the Court specifically adopts the test used in *The Daniel Ball.*[37] Thus only those segments of the Red River and Arkansas River which are navigable in fact are navigable in law. Interestingly it was the states themselves in this case that attempted to invoke a federal treaty which would have made the entire lengths of these rivers navigable and hence under state control. The Court instead employed the usual federal test of navigability.

Similarly, the war power[38] has only infrequently appeared in the same context with the issue of navigability. Given a sufficient state of emergency, the exercise of the war power could perhaps absorb all rights related to navigable waters. However, in actual cases the war power has normally been employed to legitimize an expansion of federal authority only in conjunction with other express constitutional provisions. In *Ashwander v. Tennessee Valley Authority,*[39] authority for the development of navigable waters and related activities was justified on the basis of both the war and commerce powers. Wilson Dam was constructed under these express powers for the purposes of national defense (the production of munitions) and the improvement of navigation. In *United States v. California*[40] the war power was combined with the treaty power and with federal control over commerce (both foreign and interstate) and international affairs to raise the implication that the United States has "paramount rights" in the navigable waters within the territorial boundaries of the various states.[41] As a result of the *Tideland*

34. U.S. CONST. art. II, § 2.
35. For an exhaustive discussion of the treaty power in this context see Laurent, *Judicial Criteria of Navigability in Federal Cases,* 1953 WIS. L. REV. 8.
36. 258 U.S. 574 (1922).
37. *Id.* at 586.
38. U.S. CONST. art. I, § 8.
39. 297 U.S. 288 (1936).
40. 332 U.S. 19 (1947).
41. *Id.* at 34-36; *accord* United States v. Louisiana, *supra* note 1, at 704. The question of whether these paramount national interests extend to nontidal

Cases,[42] the states lost at least the ownership of submerged lands under the marginal seas. The Court in *United States v. Texas*[43] indicated that *dominium* (proprietary control in the context of ownership of title) and *imperium* (sovereign control in the context of authority to regulate), though normally separable and separate, are virtually inseparable. At least for purposes of the marginal seas, the Court declared: "property is so subordinated to the rights of sovereignty as to follow sovereignty."[44]

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waters, particularly the Great Lakes and inland navigable waterways, has not been directly answered by the United States Supreme Court. However, a definitive statement in favor of state ownership and control was made by Congress in the Federal Submerged Lands Act. 67 STAT. 29 (1953), 43 U.S.C. §§ 1301-1315 (1964). Nonetheless, prior to this enactment many noncoastal states had grave concern with respect to the scope of this new jurisdictional limitation. For example, Nicholas Olds, Assistant Attorney General for the State of Michigan, frequently stated during this period of uncertainty that the beds of the Great Lakes within Michigan's boundaries were in danger of falling into the hands of the federal bureaucracy. *See generally Submerged Lands Hearing before Senate Committee on Interior and Insular Affairs,* 81st Congress, 1st Session, 2 U.S. CODE, CONG. & ADM. NEWS 1395 (1953). Moreover, there is language in United States v. California, *supra,* which creates some ambiguity with respect to this issue:

> The belief that local interests are so predominant as constitutionally to require state dominion over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean's bottom. . . . *Id.* at 34.

See also, Hyder, *United States v. California,* 19 MISS. L. J. 265 (1948).

The extent of the authority to regulate navigable waters given by the Federal Submerged Lands Act to the respective states remains an open question. However, it seems safe to assume that the states have broad areas of control over these waters, subject only to the supremacy clause in the event of a direct conflict with a federal regulation. *Compare* 43 U.S.C. §§ 1311 (a), 1301 (a) *with* Skiriotes v. Florida, *supra* note 1.

42. The three specific cases normally referred to as the *Tideland Cases* are: United States v. Texas, *supra* note 1; United States v. Louisiana, *supra* note 1; United States v. California, *supra* note 1.

These cases are thoroughly discussed in a symposium in 3 BAYLOR L. REV. 115-266 (1951) entitled: *Submerged Lands: A Case Study in Federal Power. See* Pound, *Critique on the Texas Tidelands Case,* 3 BAYLOR L. REV. 120 (1951); Moore, *Expropriation of the Texas "Tidelands" By Judicial Fiat,* 3 BAYLOR L. REV. 130 (1951); Hyde, *The International Law of the Texas Tidelands Case,* 3 BAYLOR L. REV. 172 (1951); Graves, *The Conduct of the Litigation in United States v. Texas,* 3 BAYLOR L. REV. 188 (1951); Hanna, *The Submerged Lands Cases,* 3 BAYLOR L. REV. 201 (1951); Daniel, *Sovereignty and Ownership in the Marginal Sea,* 3 BAYLOR L. REV. 441 (1951). *See also* Comment, *Constitutional Law— Relation of Federal and State Governments—Title of United States to Tidelands,* 50 MICH. L. REV. 114 (1951).

For a discussion of current issues with respect to these submerged lands see Shalowitz, *Boundary Problems Raised by the Submerged Lands Act,* 54. COLUM. L. REV. 1021 (1954); Note, *The Seaward Extension of States; A Boundary for New Jersey Under the Submerged Lands Act,* 40 TEMP. L. Q. 66 (1966).

43. 339 U.S. 707 (1950).

44. *Id.* at 719. An excellent discussion of the fallacies of the *Texas* case has been written by Dean Roscoe Pound. See Pound, *supra* note 42.

2. *Admiralty and Maritime Jurisdiction.*

Beyond the major commercial shipping activities and related supporting services that are subject to some form of federal regulation, public recreational water uses and private riparian interests may also be subject to some federal controls. Here our concern is only the source of those controls. Article III, Section 2, of the United States Constitution extends the federal judicial power "to all cases of admiralty and maritime jurisdiction." Nearly all the cases that have been subject to this jurisdiction have involved tort litigations rather than conflicts concerning rights to surface use of navigable waters.[45] Nonetheless, there is reason to believe that the admiralty jurisdiction may be extended by federal legislation to affect rights in navigable waters.[46] In the last two decades major growth patterns have emerged in water-based outdoor recreation, particularly in the field of motor-powered pleasure craft. These patterns are expected to expand rapidly in the near future.[47] The potential conflicts between commercial and noncommercial users and between

45. *See* Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427 (1961); Note, *Pleasure Boating and the Admiralty Jurisdiction*, 10 STAN. L. REV. 724 (1958).

46. At least when the waters form part of an interstate waterway there seems to be a sound basis for this conclusion. For example, if negligent activity related to the recreational uses of the waterway create navigational hazards, federal controls such as use zones may be required. Similarly, the danger of a gasoline explosion on a small pleasure craft and the possibility of a chain-reaction destruction of nearby ships might foster federal legislation. *See* Coryell v. Phipps, 317 U.S. 406 (1943). For a brief overview of federal involvement in navigable inland waters and the impact of recreation activities on these waters see UNITED STATES WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES ch. 6-7 (part 4) (1968). Moreover, legislation to implement the admiralty and maritime jurisdiction has a constitutional base separate and distinct from the power over interstate commerce. *See* Dragon v. United States, 76 F.2d 561, 563 (5th Cir. 1935).

47. U.S. OUTDOOR RECREATION RESOURCES REVIEW COMM'N. OUTDOOR RECREATION FOR AMERICA, A REPORT TO THE PRESIDENT AND TO THE CONGRESS 221 (1962). For example, in a recent Michigan study it was found that "sales of outboard motors increased at five times the rate of population increase in the past 25 years." MICH. DEPT. OF CONSERVATION, MICHIGAN'S RECREATION FUTURE 13 (Sept. 1966). For an extensive study of many of the problems of recreational boating as a water use in the Great Lakes region see MICH. DEPT. OF CONSERVATION, WATERWAYS DIVISION TRANSPORTATION PREDICTIVE PROCEDURES—RECREATIONAL BOATING AND COMMERCIAL SHIPPING (Technical Report No. 9C) (December 1966). *See also* Waite, *supra* note 45; Reis, *Policy and Planning for Recreational Use of Inland Waters*, 40 TEM. L. Q. 155 (1967); Note, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171 (1964).

There were approximately 8,074,000 recorded pleasure craft in use in the United States in 1966. Predictions for the year 2020, based on current trends, have reached the 30 million mark. UNITED STATES WATER RESOURCES COUNCIL, *supra* note 46 at 4-5-8, 4-5-9.

public and private recreational interests are therefore obvious.[48] In light of the magnitude of this business activity (both the manufacture and distribution of boating equipment) and its impact on interstate commerce, a sound prediction might include further federal regulation of these activities under the auspices of admiralty jurisdiction standing alone, the commerce clause discussed below, or some combination thereof.

Historically, admiralty jurisdiction was created under English law to handle problems of the high seas.[49] Early American cases adopted this concept by limiting admiralty jurisdiction to navigation problems in waters subject to the ebb and flow of the tides.[50] This narrow jurisdictional rule was soon replaced by the Supreme Court in *The Propeller Genesee Chief v. Fitzhugh*:[51] "The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution."[52] This rule was subsequently extended to man-made waterways by the Supreme Court in *Ex Parte Boyer*:[53]

> Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different states . . . is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State. . . .[54]

48. One solution to these conflicts may be the zoning of surface waters—based on both the time of use and the area of use. *See* Waite, *supra* note 45 at 429-30, 443-47. Enabling legislation at the state level already exists. *E.g.*, MICH. COMP. LAWS ANN. §§ 281.1001-.1017 (Supp. 1969) (Marine Safety Act).
49. *See* Waite, *Admiralty Jurisdiction and State Waters*, 11 MICH. L. REV. 580 (1913).
50. *See* The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).
51. 53 U.S. (12 How.) 443 (1851).
52. *Id.* at 457
53. 109 U.S. 629 (1884). *See also* Laurent, *supra* note 35 at 21-23.
54. *Ex parte* Boyer, *supra* note 53, at 632. This canal was wholly within the state of Illinois.

But the rule has not been extended to bodies of water upon which all maritime transactions, as a result of geographical limitations, must originate and terminate in a single state.[55] However, outside this latter exception, the federal test of navigability for purposes of admiralty jurisdiction is essentially the same as the test developed in *The Daniel Ball* and *Appalachian Elec. Power Co.* cases. As indicated above in the extensive passage from the *Applachian* case (which was a commerce clause case), obstructions in the waterway (which may require reasonable, artificial improvements to create navigability-in-fact) have never prevented admiralty jurisdiction from attaching. Hence the federal test for navigable waters in admiralty cases is virtually the same test as the one employed in commerce clause cases.[56]

3. *The General Welfare Clause.*

The General Welfare Clause of the United States Constitution, Article I, Section 8, is another potential source of federal authority under which federal standards may be applied to public and private rights in "navigable waters": "Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as is its power to accomplish the same results indirectly through resort to strained interpretation of the power over naviga-

55. *See* The Robert W. Parsons, 191 U.S. 17, 28 (1903); ***Ex parte*** Boyer, *supra* note 53, at 632; Stapp v. Steamboat Clyde, 43 Minn. 192, 45 N.W. 430 (1890). See also Waite, *supra* note 49.

56. For a comprehensive study of this point see Guinn, *supra* note 29.

It appears that at least one court, the Fifth Circuit, has attempted to make a clear distinction between the navigability tests used in admiralty cases and commerce clause cases:

> Appellants, to support their view that the Franicovich Canal is not a navigable water to which the admiralty and maritime jurisdiction extends, rely on . . . United States v. Doughton (C.C.A.), 62 F.(2d) 936; Leovy v. United States, 177 U.S. 621 . . . United States v. President, etc., of Jamaica (C.C.A.) 204 F. 759. These cases are concerned not with admiralty and maritime jurisdiction, but with the power of Congress over public waters susceptible of being used as highways for interstate or foreign commerce. The argument that they measure the limits of admiralty jurisdiction "is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another . . . but depends upon the jurisdiction conferred in article 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction."

Dragon v. United States, *supra* note 46, at 563.

tion."[57] The cases have arisen largely in the context of reclamation projects, a context which does not *necessarily* have anything to do with the navigable waters of the United States.[58] However, the implication seems clear that if state-created recreational programs or other rights in navigable waters conflict with federal programs, the latter programs will prevail.[59]

4. *The Property Clause.*

The property clause of the federal constitution is found in Article IV, Section 3: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." This power, when exercised, is absolute and plenary[60] and it has had an impact on rights in navigable waters in at least three areas. Hence the following questions need to be raised: (1) What rights were created by federal territorial legislation and by federal land grants? (2) What operative legal consequences resulted from the federal terri-

57. United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950). Dean Trelease has suggested how far this interpretation has been strained.

> Federal jurisdiction over navigable waters depends upon a rather attenuated construction of Article I, § 8, of the Constitution, giving Congress the power to "regulate commerce . . . among the several States." Although the Supreme Court itself has termed its constructions "strained" and "highly fictional," commerce has been held to include transportation, which in turn includes navigation; the power to regulate navigation comprehends the control of navigable waters for the purposes of improving navigation; this power to control includes the power to destroy the navigable capacity by damming the waters to protect adjacent lands from flood. The power to obstruct leads to the power to generate electrical energy from the dammed water. Congress can protect the navigable capacity of water by preventing diversions or obstructions, and the power to prevent obstruction leads on to powers to license obstructions. Congress need recognize no rights of private persons in or to navigable waters; any such rights are subject to a dominant servitude that the United States may impose to destroy the right without compensation.
>
> These national powers are broad indeed, and it imposes little added strain to read into them the power to distribute the waters of the destroyed river to those persons and to those states the United States may designate. . . .
>
> Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation,* 1963 SUP. CT. REV. 158, 177-78.

58. *See, e.g.,* Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958). *See also* Sax, *Problems of Federalism in Reclamation Law,* 37 U. COLO. L. REV. 49 (1964).

59. *See* Arizona v. California, 373 U.S. 546 (1963) (broad administrative powers of the Secretary of Interior upheld).

60. Alabama v. Texas, 347 U.S. 272 (1954).

tories achieving statehood? (3) What is the significance of the Submerged Lands Act?[61]

A. SOVEREIGNTY AND THE PUBLIC DOMAIN

Under international law territory is normally acquired by conquest, by discovery and claim, or by specific cession.[62] Governmental control over territory then has two aspects, depending on the mode of acquisition. These two aspects are *imperium* and *dominium*. *Imperium* refers to political authority or "sovereignty" in the true sense of the word. Sovereignty has its origin in the power to control a given territory, relates to political legitimacy, and may be collectively defined as that combination of powers which is essential for the functioning of a governmental structure, as the regulatory agency, over a nation or state.[63] Traditionally this "combination of powers" has included the power to tax, to exercise eminent domain, and to establish general police regulations with respect to human activity and the natural resources within the territorial jurisdiction. These are inherent powers. By contrast, *dominium* refers to ownership of title in the property sense. Thus *dominium* can be granted or conveyed, while sovereignty or *imperium* cannot be alien-

61. 43 U.S.C. §§ 1301-1315 (1964).

62. *See* United States v. California, *supra* note 1, at 44 (dissent) (Mr. Justice Frankfurter, dissenting). *See generally* Shively v. Bowlby, *supra* note 2; Martin v. Waddell, 41 U.S. (16 Peters) 367, 408-16 (1842); SWIFT, INTERNATIONAL LAW: CURRENT AND CLASSIC 120-200 (1969).

63. *See* United States v Texas, *supra* note 1; Skiriotes v. Florida, *supra* note 1. *See generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472 (1793); SWIFT, INTERNATIONAL LAW: CURRENT AND CLASSIC 120-200 (1969).

Mr. Justice Frankfurter discussed this topic in his dissenting opinion concerning the tidelands in United States v. California, *supra* note 1, at 43-45:

> To speak of "dominion" carries precisely those overtones in the law which relate to property and not to political authority. Dominion, from the Roman concept *dominium*, was concrned with property and ownership, as against *imperium*, which related to political sovereignty. One may choose to say, for example, that the United States has "national dominion" over navigable streams. But the power to regulate commerce over these streams, and its continued exercise, do not change the *imperium* of the United States into *dominium* over the land below the waters. Of course the United States has "paramount rights" in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. . . . Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and by claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land? . . . . . That has not been remotely established except by sliding from absence of ownership by California to ownership by the United States.

ated.[64] This distinction is important in the context of title to the beds of navigable inland waters and of the marginal seas.

Under the common law of England the King had both *jus privatum* and *jus publicum*.[65] Therefore, except as modified by colonial charter, the King of England had both *dominium* and *imperium* with respect to colonial territory. This was the natural result of the right of discovery and claim, possession having been taken in the name of the King of England.[66] Subsequently, subject only to those rights surrendered to the national government under the Constitution (either expressly or by implication),[67] "upon the American Revolution all the rights of the Crown and of Parliament vested in the several states."[68] Thus, except for rights relinquished for the purposes of federalism, the original thirteen colonies and states later carved out of them[69] had both *dominium* and *imperium* as part of their territorial sovereignty. This included the title to lands beneath inland navigable waters and, until the tideland cases,[70] included submerged lands under the marginal sea. These states were entirely free to develop their own tests with respect to both title of beds and surface use for their navigable waters.[71] The state of Texas, having once been a separate nation, could

64. *See* United States v. California, *supra* note 63 (dissenting opinion). For a lucid explanation of these distinctions see Pound, *supra* note 42.

65. Shively v. Bowlby, *supra* note 2; Martin v. Waddell, *supra* note 62, at 409-11 (1842); Commonwealth v. Alger, *supra* note 13, at 53, 90.

66. Shively v. Bowlby, *supra* note 2, at 14.

67. In United States v. Texas, *supra* note 1, the Court indicates two major implications: (1) The original 13 states, as an inherent attribute of sovereignty, reserved *dominium* over the beds of inland navigable waters. (2) But by granting to the federal government such express powers as those related to international relations, *by implication* the original states must have granted dominium over the submerged lands in the marginal seas, since according to the Court property must follow sovereignty. See *Id.* at 716-17.

68. Shively v. Bowlby, *supra* note 2, at 14-15.

69. The carved-out states were: Maine, Tennessee, Kentucky, West Virginia, and Vermont. *See* authorities notes 73, 104 *infra* and accompanying text.

70. United States v. Texas, *supra* note 1; United States v. Louisiana, *supra* note 1; United States v. California, *supra* note 1. *Compare supra* note 67.

71. *See* United States v. Texas, *supra* note 1, at 716-17; United States v. Oregon, *supra* note 1, at 14. *But see* United States v. Utah, *supra* note 1; United States v. Holt State Bank, *supra* note 1. *See also* Hardin v. Jordan, *supra* note 18, at 381-82.

also claim this broad base of authority over its navigable waters.[72]

The rest of the nation gained control over inland navigable waters under a different set of principles. Through a series of vast land acquisitions,[73] the federal government became the complete territorial sovereign over the land mass that would eventually become the remaining states. The United States was sole sovereign (*imperium*) and sole proprietor (*dominium*). As the Supreme Court stated the situation with respect to the public domain: "as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition."[74]

B. PRIVATE AND FEDERAL LAND GRANTS

Federal land grants during the period of territorial status are the source of some rights in navigable waters. Since theUnited States was the sole proprietor, Congress was free to dispose of territorial lands for reasons sufficient

72. When Texas was admitted, it reserved its territorial sovereignty but acquired equal footing. "Equal footing" with respect to the tidelands became a two-edged sword. *Compare* 5 Stat. 797 (1845); 9 Stat. 108 (1845) *with* United States v. Texas, *supra* note 71.

73. The first public domain lands were acquired by cession from the original colonies to the United States between 1780 and 1802. These "western lands" included all or part of the present states of Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Tennessee, Alabama, and Mississippi. In 1803 the Louisiana Purchase included most of the plains states west of the Mississippi River. Other important acquisitions included: the acquisition of the Red River Basin from Great Britain in 1818; the acquisition of Florida from Spain in 1819; the Oregon Compromise of 1846 with Great Britain (including Washington, Oregon, Idaho, and parts of Montana and Wyoming); the cessions from Mexico in 1848 of the southwestern corner of the United States (including California, Nevada, Utah, most of Arizona, and the western edges of some of the plains states); the purchase from Texas in 1850 of parts of New Mexico, Colorado, and Wyoming that remained between the Louisiana Purchase and the Mexican cessions of 1848; the Gadsen Purchase of 1853 from Mexico; and the purchase of Alaska from Russia in 1867.

Federal controls over inland navigable waters through ownership of public domain lands has never been a significant problem in Texas or Hawaii. Texas was annexed in 1845 but had never surrendered territorial sovereignty. Similarly, Hawaii was annexed in 1898 following the war with Spain, but by the time Hawaii became a state in 1959 there was virtually no remaining unalienated public domain. *See* PUBLIC LAND LAW REVIEW COMM'N., HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49-86, 285-318 (1968). *See also*, Laurent, *supra* note 35, at 15-21.

74. Shively v. Bowlby, *supra* note 2, at 48.

to itself.[75] Of course here the pertinent lands are those under or adjacent to navigable waters. With respect to these lands, Congress, from the time of some of its early dispositions, adopted the policy of reserving these lands, "save in exceptional instances when impelled to particular disposals by some international duty or public exigency."[76] Disposition was generally limited to situations which required transfers for the improvement of foreign or interstate commerce or the "carrying out other public purposes appropriate to the objects for which the territory was held."[77] The primary object in reserving title to the beds of navigable waters was that of preserving them as public highways, forever free for transportation and related public uses. This objective was founded on the theory that as territorial sovereign the United States should serve as trustee for the citizens of new states to be carved out of the various territorial possessions and that this trusteeship was incumbent on the United States as a result of the nature of their land acquisitions.[78] This is consistent with the common law concept of *jus publicum*.[79] Nonetheless, some federal land transfers did include the beds to waters navigable under the federal test. The issue of ownership of these beds turns on whether the waters are navigable-in-fact under the federal tests and on whether the United States intended to alienate.[80] While this issue may be raised in any context in which a pre-statehood land claim is made,[81] frequently this issue has occurred in cases involv-

75. *See* Alabama v. Texas *supra* note 60; United States v. Holt State Bank, *supra* note 1 (dictum); Brewer-Elliott Oil & Gas Co. v. United States, *supra* note 1; Shively v. Bowlby, *supra* note 2. *See generally* PUBLIC LAND LAW REVIEW COMM'N., *supra* note 73.

76. United States v. Holt State Bank, *supra* note 1, at 55.

77. *Ibid.*

78. *See* Shively v. Bowlby, *supra* note 2, at 49; Hardin v. Jordan, *supra* note 18, at 381-82; Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-22 (1844).

79. *See* Shively v. Bowlby, *supra* note 2, at 48-49.

80. There is strong presumption against any intent to grant lands below the high water mark. *See* Shively v. Bowlby, *supra* note 2. But the extent of the grant and the intent to alienate remain federal questions. *See* Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935).

81. *E.g.*, Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10 (1935) (whether tideland included); Shively v. Bowlby, *supra* note 2 (street dedication under title from federal grant); Hardin v. Jordan, *supra* note 18 (limits of government survey and patent); Knight v. United Land Ass'n., 142 U.S. 161 (1891) (grant confirmed by federal treaty); Beard v. Federy, 70 U.S. (3 Wall.) 478 (1865) (prior Mexican grant confirmed by United States); McKnight v. Broedell, 212 F. Supp. 45 (E.D. Mich. 1962) (title to artificially filled-in lands in Lake St. Clair).

ing Indian treaties. For example, in *Brewer-Elliot Oil & Gas Co. v. United States,*[82] one issue was the validity of a grant to the Osage Tribe; in *United States v. Holt State Bank*[83] the title to lands ceded by the Chippewas of Minnesota was challenged.

When territorial beds to federal navigable waters have in fact, by clearly expressed intention on the part of the United States, been conveyed and alienated, then purely private rights are created.[84] Federal grants to riparians on navigable waters (under the federal test of navigability) will not be presumed. The grant must be clear and unequivocal.[85] However, when the grant is unambiguous, these property rights are protected under the property clause *vis-a-vis* the states through the supremacy clause. In the normal course of events, under clearly established law,[86] title to beds of navigable waters measured by the federal test would have passed from the United States to each new state upon its admission to the union, impressed with the same trust indicated above in favor of public transportation and related surface uses.[87] The transfer of sovereignty to the new state would have included these beds since that was the character of the territorial sovereignty of the United States.[88] *Dominium* over territorial lands *generally* was separable from the *imperium* transferred to the new state, and the United States, consistent with common law tradition, held the beds of navigable waters in trust. There is even *dicta* in early cases that this trusteeship precluded the United States from alien-

82. 260 U.S. 77 (1922). *See also* Curry v. Hill, 460 P.2d 933 (Okla. 1969).

83. 270 U.S. 49 (1926).

84. *E.g.,* Klais v. Danowski, 373 Mich. 262, 129 N.W.2d 414 (1964); *accord;* Jeffries v. State, 373 Mich. 287, 129 N.W.2d 426 (1964). *Dicta* in many cases support this position. See United States v. Holt State Bank, *supra* note 1, at 55 (several cases cited).

Whether these private rights are limited to the use and enjoyment of the subaqueous lands(as in the case of extracting minerals) or extend to exclusive surface use remains an open question to be determined by state law. Only bed ownership is a federal question. *See* Johnson v. Seifert, *supra* note 1, at 694 (1960).

85. United States v. Oregon, *supra* note 1; United States v. Holt State Bank, *supra* note 1; Knight v. Broedell, *supra* note 81; *accord,* People v. Broedell, 365 Mich. 201, 112 N.W.2d 517 (1961); *see* Shively v. Bowlby, *supra* note 2.

86. *E.g.,* United States v. Holt State Bank, *supra* note 1.

87. *See, e.g.,* Obrecht v. Nat'l. Gypsum Co., *supra* note 22.

88. *See* note 78 *supra* and accompanying text. *See also* United States v. Texas, *supra* note 1.

ating these beds.[89] However, in *Shively v. Bowlby*,[90] the Supreme Court rejected this position and found clear authority for the power of Congress to make grants of territorial lands below the high water mark of navigable waters, when consistent with public purposes inherent in the trusteeship.[91] In short, the federal grant would limit the effective area over which the state could exercise its local public trust doctrine and the area which would normally have been allocated exclusively to public rights and uses.[92]

In proper perspective, however, federal land grants to private individuals have played an insignificant role in the development of public and private rights in navigable waters. This is largely because Congress has rarely granted lands below high water mark when the riparian parcel abuts navigable water:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away

89. *E.g.*, Hardin v. Jordan, *supra* note 18, at 381; Barney v. Keokuk, *supra* note 22, at 338.
90. 152 U.S. 1 (1894).
91. *Id.* at 47-48.
92. This, of course, is true only when local state law restricts public surface use to navigable waters for which the state obtained bed ownership from the United States. Most states are not so restrictive. *See e.g.*, Johnson v. Seifert, *supra* note 1, at 694. An exhaustive discussion of the scope of public rights will be found in part two of this article. For a complete discussion of the public trust doctrine see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). However, the implication of the limitations created by federal grants can be found in Brewer-Elliott Gas & Oil Co. v. United States, *supra* note 1, at 87-88:

> The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title.

> during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.[93]

C. TERRITORIAL ORDINANCES AND STATEHOOD

Territorial regulations imposed by Congress have had a recognizable but very limited impact on rights in navigable waters. The extent of this impact has been measured for the most part by the degree to which state courts have been willing to adopt pre-statehood restrictions in post-statehood cases.[94] The prevailing view is that these restrictions have no operative effect in any state by their own force or authority, are not a federal mandate, but may be adopted voluntarily by appropriate state constitutional provisions,[95] legislation,[96] or case decisions.[97]

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93. Shively v. Bowlby, *supra* note 2, at 49-50.

94. *See* Sands v. Manistee River Improvement Co., 123 U.S. 288, 296 (1887); Elder v. Delcour, *supra* note 24; Lundberg v. Univ. of Notre Dame, *supra* note 26. In *Elder* the Court adopted pre-statehood restrictions found in federal statutes providing a governmental structure for the Missouri Territory, in enabling legislation for statehood, and in the state constitution itself. Hence the adoption might be characterized as indirect. Similarly, in *Lundberg* the court could have based its decision solely on the Wisconsin Constitution. Instead *Lundberg* held the Northwest Ordinance *directly* operative in that state, "regardless of the inclusion or exclusion of its terms by the state constitution." Lundberg v. University of Notre Dame, *supra* note 26, at 73.

95. *See* WIS. CONST. art. IX, § 1.

96. George Dahl, Michigan Department of Natural Resources, has recently suggested adopting a legislative definition of "navigability" based on the language of the Northwest Ordinance. However, state statutory definitions have tended to use the language of the federal test in *The Daniel Ball*, *supra* note 20. *E.g.*, N. H. REV. STAT. ANN. § 271:9 (1966).

97. *See* Sands v. Manistee River Improvement Co., *supra* note 94; Shepard v. Gates, 50 Mich. 495, 497 (1883); Burroughs v. Whitwam, 59 Mich. 279, 283 (1886). Thus, the Northwest Ordinance may be one source of the "strict test" of navigability in Michigan. For a comprehensive discussion of this "strict test" *see* Bartke, *supra* note 6. Thorough treatment of the impact of the Northwest Ordinance on Wisconsin case law has been done.

Most of the territorial legislation concerning navigable waters had its origin in the Northwest Ordinance of 1787 which was adopted under the Articles of Confederation to provide for the government of the territory that eventually would include the states of Michigan, Indiana, Illinois, Ohio, Wisconsin, and part of the State of Minnesota. Although it might technically be argued that this legislation was superseded by the federal constitution,[98] the First Congress avoided this problem by stating that the Northwest Ordinance would "continue to have full effect."[99] The relevant provision of the Ordinance is found in Article IV:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Similar language may be found in subsequent federal legislation providing for territorial government[100] or for admission of a new state to the Union.[101] The position taken

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Waite, *supra* note 26; Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542; Note, *Constitutional Law—Ordinance of 1787—Navigable Waters—Carrying Places Between the Same*, 1939 WIS. L. REV. 547. An important suggestion made by this latter group of authorities is that the Ordinance is still controlling on *interstate* waters. To support this view, a dictum in Economy Light & Power Co. v. United States, 256 U.S. 113, 120-21 (1921), is cited.

98. *See* note 105 *infra* and accompanying text. *See also* Huse v. Glover, 119 U.S. 543 (1886).

99. 1 Stat. 50 (1789).

100. For example, in 1812 federal legislation provided for a governmental structure for the Missouri Territory:
> The Mississippi and Missouri Rivers, and the navigable waters flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of the said territory and to the citizens of the United States, without any tax, duty or impost therefor. 2 Stat. 743, 747 (1812).

101. The enabling legislation for Louisiana is illustrative:
> *Provided*, that it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state; and that the above condition, and also all other the [sic] conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union. 2 Stat. 701, 703 (1812).

by the Supreme Court concerning the continuing efficacy of these enactments is found in *Sands v. Manistee River Improvement Co.*[102] That all new states be admitted to the Union on an "equal footing" is a constitutional requirement.[103] To place restrictions on new states that were not placed on the thirteen original states (and states carved out of them),[104] as a result of pre-statehood legislation, would be a denial of "equal footing:"

The following states entered the Union under federal enabling legislation which included language similar to that used in the Northwest Ordinance concerning navigable waters: 11 Stat. 383 (1859) (Oregon); 11 Stat. 166 (1857) (Minnesota); 9 Stat. 452, 453 (1850) (California); 9 Stat. 56, 57 (1846) (Wisconsin); 9 Stat. 117 (1846), 5 Stat. 742 (1845) (Iowa); 3 Stat. 545, 546 (1820) (Missouri); 3 Stat. 489, 492 (1819) (Alabama) (subject to rejection or adoption); 3 Stat. 348, 349 (1817) (Mississippi); 2 Stat. 701, 703 (1812) (Louisiana). By implication Arkansas might also be added to the list. See 5 Stat. 50, 52 (1836) (cross reference to Missouri).

Authorization for statehood for Hawaii and Alaska was expressly made subject to the Submerged Lands Act of 1953. 73 Stat. 4 (1959) [§ 5 (i)]; 72 Stat. 339 (1958) [§ 6(m)].

102. 123 U.S. 288, 296 (1887).

103. *See* Coyle v. Smith, 221 U.S. 559, 566-67 (1911).

104. For a list of "carved-out" states see note 69 *supra*.

Federal enabling legislation authorized statehood for all states subsequent to the original 13. Nearly all this legislation employed "equal-footing" language:
Alabama—3 Stat. 608 (1819);
Alaska—72 Stat. 339 (1958);
Arizona—37 Stat. 39 (1911); 37 Stat. 1728 (1912);
Arkansas—5 Stat. 50 (1836);
California—9 Stat. 452 (1850);
Colorado—18 Stat. 474 (1875); 19 Stat. 665 (1876);
Florida—5 Stat. 742 (1845);
Hawaii—73 Stat. 4 (1959);
Idaho—26 Stat. 215 (1890);
Illinois—3 Stat. 428 (1818); 3 Stat. 536 (1818);
Indiana—3 Stat. 289 (1816); 3 Stat. 399 (1816);
Iowa—5 Stat. 742 (1845);
Kansas—12 Stat. 126 (1861);
Louisiana—2 Stat. 641 (1811); 2 Stat. 701 (1812);
Maine—3 Stat. 544 (1820);
Michigan—5 Stat. 49 (1836); 5 Stat. 144 (1837);
Minnesota—11 Stat. 166 (1857); 11 Stat. 285 (1858);
Mississippi—3 Stat. 348 (1817); 3 Stat. 472 (1817);
Missouri—3 Stat. 545 (1820);
Montana—25 Stat. 676 (1889); 26 Stat. 1551 (1889);
Nebraska—13 Stat. 47 (1864); 14 Stat. 391 (1867);
Nevada—13 Stat. 30 (1864);
New Mexico—37 Stat. 39 (1911); 37 Stat. 1723 (1912);
North Dakota—25 Stat. 676 (1889); 26 Stat. 1548 (1889);
Ohio—2 Stat. 173 (1802);
Oklahoma—34 Stat. 267 (1906); 35 Stat. 2160 (1907);
Oregon—11 Stat. 383 (1859);
South Dakota—25 Stat. 676 (1889); 26 Stat. 1549 (1889);
Tennessee—1 Stat 491 (1796);
Texas—5 Stat. 797 (1845); 9 Stat. 108 (1845);
Utah—28 Stat. 107 (1894);
Washington—25 Stat. 676 (1889); 26 Stat. 1552 (1889);
West Virginia—12 Stat. 633 (1862);
Wisconsin—9 Stat. 56 (1846);
Wyoming—26 Stat. 222 (1890).

There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory north-west of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a State and admitted to the Union. The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles "shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent." And, for many years after the adoption of the constitution, its provisions were treated by various acts of congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet, from the very conditions on which the States formed out of that territory were admitted to the Union, the provisions of the ordinance became inoperative except as adopted by them. All the States thus formed were, in the language of the resolutions or acts of Congress, "admitted into the Union on an equal footing with the original States, *in all respects whatever.*" Michigan, on her admission, became therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original States, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United

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When this language was omitted, the ommission does not appear to have been intentional. *See* 1 Stat. 189 (1791) (Kentucky); 1 Stat. 191 (1791) (Vermont). The fact that Kentucky and Vermont were carved out of the original 13 states and therefore may have acquired "original" sovereignty rather than equal footing does not appear to have been significant. *Compare* Maine, Tennessee, and West Virginia, *supra.*

> States, and laws of Congress passed in pursuance thereof. . . .[105]

The Supreme Court has reached the same position with respect to territories not covered by the Northwest Ordinance.[106] Once a state adopts its own constitution, all federal pre-admission legislation is superseded.[107]

The exception is the situation in which a state *voluntarily* adopts these restrictions for its intrastate navigable waters. For example, Wisconsin adopted the wording of the Northwest Ordinance almost verbatim in its state constitution.[108] The impact of this language on rights in navigable waters could be said to operate by force of the state constitution standing alone, with no weight given to the Ordinance. However, the highest court in Wisconsin has chosen to make the Ordinance operative: "article 4 of the Northwest Ordinance applies to and is in full force in Wisconsin, and this regardless of the inclusion or exclusion of its terms by the state constitution."[109] A similar position is taken by Missouri. Territorial legislation to establish a governmental structure in pre-statehood Missouri included language not unlike that found in the Northwest Ordinance.[110] In *Elder v. Delcour*,[111] the Missouri Supreme Court sitting *en banc* extended a broad range of public rights to waters that would not have been navigable even under the federal test. The primary basis for this extension was the same freedom-of-navigable-waters language found in pre-statehood statutes for both governmental structure and for admission to the Union, and in the state constitution.

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105. Sands v. Manistee River Improvement Co., *supra* note 94, at 295-96; *accord*, Huse v. Glover, *supra* note 98. *See also* Chapin v. Fye, 179 U.S. 127 (1900); Palmer v. Cuyahoga County, 18 Fed. Cas. 1026 (No. 10,688) (C.C. Ohio 1843).

106. *See* Hawkins v. Bleakly, 243 U.S. 210, 216-17 (1917); Permoli v. First Municipality of New Orleans, 44 U.S. (3 How.) 589, 610 (1845).

107. See authorities notes 105-06 *supra*. An exception may exist for *interstate* waters. *See supra* note 97.

108. *See supra* note 95, 99-100 and accompanying text.

109. Lundberg v. University of Notre Dame, *supra* note 26, at 282 N.W. 73. *Compare* Muench v. Public Service Comm'n., 261 Wis. 492, 53 N.W.2d 514 (1952), *with* Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898).

110. *Supra* note 100.

111. 364 Mo. 835, 269 S.W.2d 17 (1954).

D. STATEHOOD AND BEYOND

As indicated earlier, under traditional principles of common law and international law *dominium* and *imperium* are normally separable and separate.[112] Thus a specific cession or grant would be required before a transfer of sovereignty would carry with it proprietary ownership and title to territorial lands including submerged lands beneath navigable waters. The Supreme Court has reversed this theoretical basis for jurisdiction over (and title to) lands underlying navigable waters. With respect to the submerged lands under the marginal sea, which are discussed below, the Court held that property interests (*dominium*) are so subordinated to sovereignty that title must follow the sovereign.[113] Thus title is transferred *by implication* when sovereignty is transferred;[114] this applies to the beds to navigable waters in contradistinction to other public domain lands. The Court has apparently taken this same position of tranfser by judicial fiat rather than by express conveyance with respect to inland and nontidal navigable waters in public domain states.[115] This position is reached by a merger of two lines of reasoning. One line is a simple, straight forward negation of the separate character of *dominium* and *imperium,* as discussed above. The other centers around the constitutional requirement known as the "equal footing" doctrine.[116] It is assumed by the Court that the Republic of Texas and the original states within the limits of territorial sovereignty by virtue of obtaining political independence, and the United States with respect to the public domain, had complete *dominium.*[117] Though the words "equal footing" may not appear in every[118] federal enabling statute which authorizes admission to a new state, equal footing is implied and required. Equal footing does not establish equality of economic advantage; it creates

112. United States v. Texas, *supra* note 1.
113. *Id. Accord,* United States v. Louisiana, *supra* note 1; United States v. California, *supra* note 1.
114. *See* United States v. Oregon, 295 U.S. 1, 14 (1935).
115. The exceptions are the 13 original states, states carved out of them, and Texas; all these retained *complete internal* sovereignty. *See supra* notes 65-74 and accompanying text.
116. *See supra* notes 103-04 and accompanying text.
117. *See* United States v. Texas, *supra* note 1; Shively v. Bowlby, *supra* note 2.
118. *See supra* note 104.

parity with respect to political standing and sovereignty. Hence, to be on an equal footing with the original states, the states carved out of the public domain must also have complete *dominium* over beds of navigable waters. *United States v. Texas*[119] summarizes these two lines of reasoning:

> Yet the "equal footing" clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves. See Pollard's Lessee v. Hagan, 3 How. 212, 228-229. . . . Shively v. Bowlby, 152 U.S. 1, 26. The theory of these decision was aptly summarized by Mr. Justice Stone speaking for the Court in United States v. State of Oregon, 295 U.S. 1, 14, as follows: "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership *or transfer of sovereignty* itself. . . . For that reason, upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."[120] [Emphasis added.]

State ownership of the beds of navigable waters almost always guarantees the public the right to surface use of these waters for transportation and other public recreational pur-

119. 339 U.S. 707 (1950).
120. *Id.* at 716-17.

poses.[121] Although the precise scope of these rights will be delineated in part two of this article, it is important to note that under state tests for navigability (and the resulting right of public user) public use of navigable surface waters may be protected under variations of the public easement theory or the public trust doctrine even though the state has relinquished bed ownership,[122] or perhaps without regard for the issue of subaqueous title.[123] Nonetheless, when the issue is the *source* of public and private rights in navigable waters under state law *vis-a-vis* the impact of federal standards or limitations on these rights, the question of bed title is important. In addition to the general limitations on state-created rights in navigable waters under the major federal powers discussed in this paper (including the commerce power discussed below), the federal test for navigability is also applied to the issue of bed title.[124] Waters which are *not* navigable under the federal test may still be subjected to state controls, as decsribed in part two of this article, but this is a function of the state's exercise of internal sovereignty rather than a reflection of a federal mandate. In brief, subject to any pre-statehood federal grants below the high water mark, the beds of navigable waters passed to the respective states upon their admission to the Union. This transfer of bed title is an inherent element of the transfer of territorial sovereignty from the federal government.[125] The federal enabling acts authorizing statehood did not expressly convey any of these lands. In fact they normally

121. *But see* Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905). A complete discussion of this point is found in part two of this article. *See generally* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NATURAL RESOURCES J. 1 (1967); Waite, *Public Rights in Indiana Waters*, 37 INDIANA L. J. 467 (1962); Note, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV 171 (1964).

122. *E.g.*, Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); *accord*, Muench v. Public Service Comm'n., *supra* note 109; Day v. Armstrong, *supra* note 12. *See generally* Sax, *supra* note 92.

123. *E.g.*, Ne-Bo-Shone Ass'n. v. Hogarth, 81 F.2d 70 (6th Cir. 1936); Elder v. Delcour, *supra* note 24; State *ex rel.* Game Comm'n. v. Red River Valley Co., 51 N. M. 207, 182 P.2d 421 (1945); Luscher v. Reynolds, 153 Ore. 652, 56 P.2d 1158 (1936); *accord*, People v. Kraemer, 7 Misc. 2d 373, 164 N.Y.S.2d 423 (1957); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1959); Muench v. Public Service Comm'n., *supra* note 109. *But see* Hartman v. Tresise, *supra* note 121.

124. United States v. Utah, *supra* note 1; United States v. Holt State Bank, *supra* note 1.

125. *See* notes 119-20 *supra* and accompanying text.

made express general reservations of public domain lands.[126] All of the public domain lands, including beds to nonnavigable waters, were to pass into private control under federal grants. Thus the source of state controls over navigable waters (from the perspective of federal constraints) is measured by bed ownership, which in turn is limited by the federal test of navigability.[127]

If the waters in question were navigable under the federal test on the date when the state was admitted to the Union, the beds automatically passed into state ownership. If they were not then navigable under this test, title remained in the United States. This issue cannot be determined under state rules for property or water rights. "To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."[128] The Supreme Court in *United States v. Utah*[129] has declared that inconsistent state tests for navigability cannot be employed to determine bed title:

> [N]avigability is thus determinative of the controversy, and that is a federal question. State laws cannot affect titles vested in the United States.
>
> The test of navigability has frequently been stated by this Court. In The Daniel Ball . . . .[130]

The Court went on to indicate that the test to be applied as of the admission date is the more narrow characterization of the federal rule as expressed in *The Daniel Ball.*[131] Thus, for purposes of determining state ownership of bed title, those waters are deemed "navigable" which were "susceptible of being used, *in their natural and ordinary condition,* as highways for commerce"[132] on the date indicated. The rivers in question in the *Utah* case flowed through a very sparsely settled region. Hence little past history of navigation could

126. Authorities cited note 104 *supra.*
127. United States v. Utah, *supra* note 1; United States v. Holt State Bank, *supra* note 1; *accord,* Borax Consol., Ltd. v. Los Angeles, *supra* note 80.
128. United States v. Holt State Bank, *supra* note 1, at 56.
129. 283 U.S. 64 (1931).
130. *Id.* at 75-76.
131. 77 U.S. (10 Wall.) 557 (1870). *See* note 28 *supra* and accompanying text. *See generally* Johnson & Austin, *supra* note 121.
132. United States v. Utah, *supra* note 1, at 76 (quoting from *Holt State Bank*). (Emphasis added.)

be shown under the navigation-in-fact aspect of the federal test. Nonetheless:

> Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the state either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.[133]

It is interesting that while the Court in *Utah* had not yet reached the expanded federal test applied in *United States v. Appalachian Elec. Power Co.*,[134] the passage just quoted could be interpreted by the present Court to include recreational uses of waters. Recreational boating might be construed as "commerce" in light of the size of the industry and the impact of boat manufacturing and sales and related services on interstate commerce. However, *dicta* in the *Appalachian* case seems to indicate that the more narrow conceptualization of the federal test as stated in *The Daniel Ball* will control the issue of bed title.[135] Hence, any state controls over public and private rights in navigable waters which depend on state ownership of these beds will also depend on the navigability test in *The Daniel Ball*. The expanded federal test which includes the concept of reasonable improvements and navigational aids is therefore, by implication, limited in application to cases of admiralty jurisdiction and to cases under the commerce clause.

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133. *Id.* at 83.

134. 311 U.S. 377 (1940).

135. *See* note 32 *supra* and accompanying text. For a good discussion of this point see Johnson & Austin *supra* note 121, at 15-20.

E. THE SUBMERGED LANDS ACT

The only remaining federal source of rights in navigable waters under the property clause is the Submerged Lands Act.[136] As a factual matter, the tidelands cases[137] related only to the submerged lands beneath the marginal sea. However, there was sufficient language in these cases to form the basis for the apprehension by non-coastal states that federal control over inland navigable waters and their beds had also been declared.[138] The specific holding in each of these three cases was that state ownership of submerged lands in the marginal sea ended at the low water mark. Moreover, there are clear implications in *United States v. Texas*[139] that the Court is making a distinction between tidal waters and inland navigable waters for purposes of sovereign control.[140] In any event, whether well-founded or not, the indicated apprehension expressed itself strongly in the halls of Congress. The result was the Submerged Lands Act. This enactment provides:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters * * * be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States . . . .[141]

The phrase, "lands beneath navigable waters" as defined in the Act includes:

> all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water

136. 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-1315 (1964).
137. *Supra* note 42.
138. *See* notes 41-42 *supra* and accompanying text.
139. 339 U.S.. 707 (1950).
140. *Id.* at 717-19.
141. 43 U.S.C. § 1311(a) (1964).

> mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . .[142]

This act was upheld in *Alabama v. Texas*[143] wherein the Court indicated in a per curiam opinion that, under the property clause, Congress has unlimited powers of disposition of the lands within the public domain. The tidelands cases had clarified ownership of the submerged lands within the marginal sea and had declared that ownership to be in the United States. Hence Congress could dispose of it (giving it to the states) "as a private individual may deal with his farming property."[144]

There is some authority for the proposition that the states never had *dominium* over the beds of inland navigable waters prior to the enactment of the Submerged Lands Act.[145] However, the cases can more easily be rationalized by recognizing that the Supreme Court simply refused to follow the traditional rule of separating *imperium* and *dominium*. From this premise the Court could logically conclude that the states (1) never owned the submerged lands within the marginal sea below ordinary low water mark and (2) had always reserved to themselves (or acquired under the equal footing doctrine) the beds of inland navigable waters. The actual source of state ownership of these inland beds, therefore, is left to historical conjecture. In any event, *after* the Submerged Lands Act state ownership was clearly established and has been upheld in subsequent cases.[146] The resulting state control is the source of many public and private rights in state navigable waters.

5. *The Commerce Clause*

As emphasized in all of the foregoing discussion, all state-created rights in navigable waters are subject to the

142. 43 U.S.C. § 1301(a)(1) (1964).
143. 347 U.S. 272 (1954).
144. *Id.* at 273.
145. Green, *The Source of State Ownership of the Beds of Nontidal Navigable Waters*, 6 LAND & NAT. RES. DIV. J. 367 (1968). See also Swarth, *Offshore Submerged Lands—An Historical Synopsis*, 6 LAND & NAT. RES. DIV. J. 109 (1968).
146. See, *e.g.*, Bowes v. Chicago, 3 Ill.2d 175, 120 N.E.2d 15, *cert. denied*, 348 U.S. 857 (1954); Obrecht v. National Gypsum Co., *supra* note 22. Both cases dealt with the beds of the Great Lakes.

exercise of paramount constitutional powers by the United States in areas of national concern which require uniform regulation.[147] Perhaps the most extensive of these powers is the power to regulate foreign and interstate commerce. Mention has already been made of areas in which powers under the commerce clause have been combined with other expressly granted constitutional powers to legitimize the exercise of federal authority. Some of the cases dealt with in this section of the article involve such combinations, but these aspects will not be repeated. Here the concern is with the extent and scope of the limitations, under the commerce clause, that are placed on public and private rights established under state law. Of course any state law or property rule, inconsistent with the federal exercise of power described here, cannot withstand a challenge which raises the federal question. On the other hand, the public is relatively free to exercise recreational surface uses of navigable waters under fedreal control when these uses are consistent with the paramount federal program or national interest.[148]

The impact of the commerce clause on public and private rights falls into two major categories. Both areas require the "taking" of property interests, but the distinction between the two is that one category of "takings"[149] requires compensation while the other does not. No attempt will be made here to exhaust either of these areas. This would be beyond the scope of this article and has, to a large degree, already been accomplished by other authors.[150] The concern of this article is to highlight the major areas of impact and

147. See United States v. Texas, *supra* note 1, at 717.

148. *Compare* State v. Jones, 143 Iowa 398, 122 N.W. 241 (1909), *aff'd sub nom.*, Marshall Dental Mfg. Co. v. Iowa, 226 U.S. 460 (1913) *with* Curry v. Hill, 460 P.2d 933 (Okla. 1969). See also Note, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171 (1964).

149. See generally Sax, *Taking and the Police Power*, 74 YALE L. J. 36 (1964); HINES, A DECADE OF EXPERIENCE UNDER THE IOWA WATER PERMIT SYSTEM 73-84 (Univ. of Iowa Agricultural Law Center Monograph No. 9, 1966).

150. *See* Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963); Sato, *Water Resources—Comments on the Federal-State Relationship*, 48 CALIF. L. REV. 43 (1960); Silverstein, *The Legal Concept of Navigability v. Navigability in Fact*, 19 ROCKY MT. L. REV. 49 (1946); Comment, *Just Compensation and the Navigation Power*, 31 WASH. L. REV. 271 (1956).

to describe the source of federal limitations imposed on rights created under state tests for navigability.

In both of these areas the federal test of navigability as stated in the *Appalachian Elec. Power Co.*[151] case is controlling. However, the source of this expanded doctrine and, more importantly, the basis for applying it to nearly all waters is found in earlier cases. The first major case in this area is *Gibbons v. Ogden.*[152] In *Gibbons* Chief Justice Marshall established the basis for federal involvement in navigable waters by pointing out the obvious—that "commerce" includes the concept of "navigation."[153] Thus, when a state license which grants exclusive rights to navigation in waters within the territorial limits of New York conflicts with a federal license, the state license is invalid. Though acts of Congress are limited to specific constitutional objectives, as to those objects, the federal power is plenary.[154] Therefore, if "commerce" includes control over "navigation,"[155] then *a fortiori* the federal test of navigability limits state-created rights in interstate waters.

However, even under the statement of the test in *The Daniel Ball,* the waters may be wholly within a single state.[156] Once the federal test is satisfied with respect to a particular body of water, the federal power over commerce (navigation) extends to the farthest reaches of that stream. For example, in *United States v. Rio Grande Dam & Irrigation Co.,*[157] federal control over nonnavigable segments of a stream was validated because this exercise of control would protect the navigable capacity of downstream segments which were in fact navigable. Moreover, the federal test includes the concept of indelible navigability—once navigable, always navigable. Thus in *Economy Light & Power Co. v. United States,*[158] the Court had to reach back into early American fur trading history to find evidence of useful commercial

151. 311 U.S. 377 (1940).
152. 22 U.S. (9 Wheat.) 1 (1824).
153. *Id.* at 190.
154. *Id.* at 197.
155. This may require a strained interpretation. *Supra* note 57.
156. The Grand River is entirely within the State of Michigan. The Daniel Ball v. United States, *supra* note 20.
157. 174 U.S. 690 (1899).
158. 256 U.S. 113 (1921).

trade and travel to establish navigability in fact. Of course historical searches may not be necessary if "navigability" can be established under the *Appalachian* concept of reasonable improvements, which need not yet be even authorized. Moreover, the *Appalachian* court clearly indicated that federal control over navigation extends to any activity that may have a substantial impact on water-based commerce:

> Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control . . . . Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government.[159]

Cases subsequent to *Appalachian* have clarified federal authority over *nonnavigable* waters under the federal test. A fair reading of these cases seems to indicate that federal control *does* extend to nonnavigable waters as long as Congress has expressly stated that some aspect of the program or project will have a definite impact on navigation. Frequently navigation is protected by controlling floodwaters. A common congressional response to flood control has been projects requiring huge impoundments. While these frequently create new recreational areas, some rights established under state tests of navigability may have to be subordinated. Nonetheless, when Congress has decided to protect navigation, the exercise of power is authorized.[160] The Court stated this position in *Oklahoma v. Guy F. Atkinson Co.*:[161]

> There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional ne-

159. United States v. Appalachian Elec. Power Co., *supra* note 23, at 426-27. "The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment." *Ibid.*

160. United States v. Grand River Dam Authority, *supra* note 29; United States v. Twin City Power Co., 350 U.S. 222 (1956); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); Arizona v. California, 283 U.S. 423 (1931).

161. 313 U.S. 508 (1941).

> cessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river, ... [I]t is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself. . . . [T]he power of flood control extends to tributaries. . . . For, just as control over the nonnavigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. As repeatedly recognized by the Court from McColloch v. Maryland, 4 Wheat. 316, to United States v. Darby, 312 U.S. 100, the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies, which though intrastate, affect that commerce.[162]

This position has recently been reaffirmed in *United States v. Grand River Dam Authority.*[163] In addition, the congressional decisions in this area come within the judicial protection given to legislative discretion and hence are not reviewable except under extreme circumstances.[164]

> It is not for the courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. . . . The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown to involve an impossibility. . . .[165]

The preceding examination of federal cases has identified the potential range of limitations imposed on rights in navigable waters in the broad sense. On the other hand, in every federal activity developed under the auspices of the

162. *Id.* at 525-26.

163. 363 U.S. 229 (1960).

164. United States v. Grand River Dam Authority, *supra* note 29; United States v. Twin City Power Co., *supra* note 160; United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chandler-Dunbar Water Power Co., *supra* note 9.

165. United States v. Twin City Power Co., *supra* note 160, at 224.

commerce clause in which property rights are taken,[166] including the right to use the surface of navigable waters, just compensation becomes an issue.[167] Therefore, from a more narrow perspective of potential limitations, the compensation issue provides another potential restriction on rights under state law. If adequate compensation is paid and the only objection raised by the one whose property interest has been taken is a basic disagreement concerning the justification for the federal program, the remedy is the ballot box. On the other hand, if no compensation is required, the "no-compensation" rule[168] becomes another source of federal restrictions on public and private rights under state law.

The origin of the no-compensation rule is a peculiar characterization of property rights in the overlying waters in navigable lakes and streams. Bed ownership is a separate issue and has already been discussed. The implication in the cases that have developed the no-compensation rule is that navigable waters are nationally owned. The Court stated this concept in *United States v. Chandler-Dunbar Water Power Co.*:[169] "Ownership of a private stream wholly upon lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."[170] While "ownership" in this context is perhaps a poor choice of terminology,[171] the implication of national proprietary control of navigable waters seems clear. Therefore, the extent of public and private rights in navigable waters to be distributed under state law, when the federal navigational servitude applies, is left to the discretion of Congress. One author has concluded that the unifying principle in the development of these compensation cases is "frank recognition . . . that the federal navigation servitude is proprietary in character."[172]

166. *See generally* authorities cited notes 149-50 *supra* and accompanying text.
167. "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.
168. Authorities cited note 150. *supra.*
169. 229 U.S. 53 (1913).
170. *Id.* at 69.
171. Several authors have discussed this passage. Bartke, *supra* note 150, at 8-9; Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 616 (1957); Morreale, *supra* note 150 at 37.
172. Bartke, *supra* note 150, at 41.

It is important to keep in mind that compensation is required for most exercises of the commerce clause in the broad sense. "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases."[173] Moreover, the navigational easement or federal navigational servitude has definite limits. Congress has broad powers over navigation.[174] But the navigational servitude does not extend beyond the bed of navigable water. This is measured by and limited to the ordinary high-water mark.[175] If the water does not in fact reach that level, artificial devices may be employed to maintain the area covered by the servitude at its maximum.[176] Below ordinary high-water mark all property rights, including usufructuary interests, are held at the discretion of Congress.[177] As the Court in *United States v. Willow River Power Co.*[178] explained, these proprietary and usufructuary interests are mere privileges, "permissible so long as compatible with navigation interests."[179] "Property" in the true sense of the word exists only when the interest in the tangible or intangible is protected by law. *Willow River* goes on to explain that interests below the ordinary high-water mark are not "protected by law when . . . [they become] inconsistent with plans authorized by Congress for improvement of navigation."[180] Since there is no "property," nothing is "taken." Hence no compensation is required. In short, "When the United States appropriates the

173. United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).
174. *E.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960) (control over wastes dumped into navigable waters); United States v. Commodore Park, Inc., *supra* note 164 (power to destroy navigability); United States v. Willow River Power Co., 324 U.S. 499 (1945) (alteration of water levels); Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925) (water diversion); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (bridges across navigable waters).
175. United States v. Willow River Power Co., *supra* note 174, at 509.
176. *See* United States v. Kansas City Life Ins. Co., *supra* note 173.
177. *See* United States v. Twin City Power Co., *supra* note 160 (property values related to stream flow); United States v. Chandler-Dunbar Water Power Co., *supra* note 9 (right to water level as a head for power production); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913) (ownership and use of beds); Scranton v. Wheeler, 179 U.S. 141 (1900) (appurtenant right of access).
178. 324 U.S. 499 (1945).
179. *Id.* at 509.
180. *Ibid.*

flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."[181] This rule also applies to nonnavigable tributaries so long as Congress expressly indicates that the power is exercised for the protection or improvement of navigation on the navigable mainstream.[182] In addition, property values above the ordinary high-water mark, which are attributable to the location of the property in relation to the navigable water, are not compensable.[183]

II. SUMMARY AND ANALYSIS

As water resources become increasingly more important in the quest to improve environmental quality and to satisfy the economic requirements of the respective states, the determination of public and private rights in these resources will assume a significantly expanded role. To date the issue has been "navigability." Tomorrow the determinative criterion may be some generic concept of "public waters," stripped of all the historic trappings that have encumbered the navigability touchstone. However, unless such a change is accomplished by legislative activity, the transition may be time consuming.[184] The courts have struggled with the concept of navigability, and with the issue of bed ownership, so long that they may be unable to extricate themselves from their self-created confusion.

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181. United States v. Grand River Dam Authority, *supra* note 29, at 233.

182. *See* United States v. Grand River Dam Authority, *supra* note 29.

183. United States v. Twin City Power Co., *supra* note 160.

184. An important issue in this context is whether legislative declarations that certain waters are "public" involves a "taking" for which compensation must be paid. *See generally* authorities cited note 149 *supra*. Thus the legislative declaration itself may foster time-consuming constitutional challenges. For example, recently proposed legislation in Michigan would define a "navigable stream" as any watercourse which has ever been capable of "providing a public fishery." Mich. House Bill No. 2377 (March 3, 1969) (as amended). An internal working document for the Michigan Department of Natural Resources, dated March 2, 1970, will amend House Bill No. 2377 to define a "public fishery" as any part of a stream which "contains a supply of fish of such numbers and legal sizes as to be capable of meeting public demand." In addition to the question of whether there is a "taking," there is still the issue of whether the legislation is reasonable in its appliation. In the analogous area of land use controls, for example, zoning is not per se a taking. This premise allows the court to turn to a determination of the reasonableness of the legislation. *See* ANDERSON, AMERICAN LAW OF ZONING §§ 2.09-.10 (1968).

The first half of this article has demonstrated that the federal test for navigability has a potentially broad range of areas in which it may control or restrict public and private water rights. As one author has stated, the scope of federal power in these areas is "almost embarrassingly extensive."[185] However, it is the view of this author that the shadow of federal jurisdiction that hangs over state-created rights in navigable waters is at least neutral if not benevolent. This view is supported by the following propositions which summarize the first part of this article and which place federal restrictions on these rights in their proper perspective:

(1) Federal controls over navigable waters have been exercised only in areas of legitimate national concern.[186]

(2) The federal test for navigability is mandatory only in the narrow situation in which ownership of the beds of navigable waters is determinative.[187]

(3) State-owned beds may be disposed of under state law.[188]

(4) Rights to surface use both by the public and by private riparians is determined, for the most part, by state law.[189]

(5) There is a strong likelihood that the Supreme Court, if directly confronted today with the issue of whether the federal test of navigability or a conflicting state test of navigability is controlling in the context of conflicts over surface uses of water, would hold that the state test controls.[190]

It is almost unnecessary to state that political considera-

185. SAX, WATER LAW—CASES AND COMMENTARY 413 (1965).
186. *See* United States v. Texas, *supra* note 1; United States v. Appalachian Elec. Power Co., *supra* note 23; Borax Consol., Ltd. v. Los Angeles, *supra* note 81; United States v. Holt State Bank, *supra* note 1; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
187. *See* United States v. Texas, *supra* note 1; United States v. Utah, *supra* note 1; United States v. Holt State Bank, *supra* note 1; Brewer-Elliott Gas & Oil Co. v. United States, *supra* note 1.
188. Shively v. Bowlby, *supra* note 1; Barney v. City of Keokuk, *supra* note 22; Nedtweg v. Wallace, *supra* note 22; *accord,* United States v. Oregon, *supra* note 1; *see* United States v. Texas, *supra* note 1.
189. *See* authorities cited notes 121-23 *supra.*
190. *See* United States v. Texas, *supra* note 1, at 716-17; United States v. Oregon, *supra* note 1, at 14.

tions have entered into most, if not all, federal exercises of power over navigable waters. Nonetheless, when challenged, federal programs have for the most part been found to fall within a legitimate area of constitutional authority. This may not be a satisfying answer to those who view state sovereignty as paramount, but these manifestations of federal control are a realistic expectation under our federal system. With the notable exception of the natural resources removed from state control by the *Tidelands Cases,*[191] implemented federal controls on navigable bodies of water seem to come within the gamut of legislative discretion. The paramount national interests that may be expressed under the treaty and war powers or under the admiralty jurisdiction are inherent in national sovereignty. Federal controls over navigable waters under the general welfare clause possess a more ambivalent status, but from a national perspective, the benefits can normally be expected to outweigh the costs.[192] Similarly, there can be little objection to uniform regulations with respect to interstate commerce, commercial navigation, and related land-water management practices which have an impact on these forms of surface use.[193] Moreover, if the federal control of navigable waters in situations in which the federal navigational servitude applies is in fact proprietary in character,[194] then in those situations the federal government should be entitled to the same reasonable use and enjoyment of its property interests that individuals enjoy. In addition, one cannot help but look with optimism on an emerging basis for private litigation which may compel federal agencies and programs to consider state and local interests when a project is implemented.[195] As a result, public rights in surface use, and even private considerations, under state tests for navigability may, in the near future,

191. Authorities cited note 42 *supra.*

192. *Policies, Standards and Procedures in the Formulation, Evaluation and Review of Plans for Use and Development of Water and Related Land Resources,* S. Doc. No. 97, 87th Cong., 2d Sess. (1962).

193. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

194. *See generally* Bartke, *supra* note 150. *See also* Alabama v. Texas, *supra* note 60, at 273.

195. *E.g.,* Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965); *see* Note, *Standing to Sue and Conservation Values,* 38 U. COLO. L. REV. 391 (1966). *See also* The Conservation Foundation, CF LETTER (September 30, 1969).

be protected under the public trust doctrine or some creative legal theory related to environmental quality.[196] Finally, if the conflicting state regulation does not fall within an area of commerce in which national uniform control is imperative, the state law may prevail.[197]

Future expansions of federal programs may be required in order to handle problems which individual states cannot control. The extent of these expansions remains an open question. One likely area of expansion is that of improved environmental quality. For example, in recent remarks to Congress President Nixon stated: "Specifically, I propose a seven-point program . . . to give the states more effective backing in their own efforts. . . . I propose that the Federal pollution-control program be extended to include *all navigable waters,* both inter- and intra-state, all interstate ground waters, the United States' portion of boundary waters, and waters of the Contiguous Zone." [Emphasis added.][198]

Ownership of beds is an issue that forces its way into the discussion of public and private rights in navigable waters. *United States v. Utah*[199] and *United States v. Holt State Bank*[200] clearly indicate that bed ownership is a federal question and that use of the federal test for navigability is mandatory. However, placed in its proper perspective, this mandate has a very narrow area of application. Surface use is not *necessarily* controlled by the federal test, unless the state has voluntarily adopted that rule. Thus, even after title to the bed of navigable water is determined, the public may have extensive rights to surface use under state law.[201] Similarly, state-owned beds may be disposed of as the state chooses.[202] Frequently they are transferred to private owner-

196. For a comprehensive discussion see Sax, *supra* note 92.
197. Cooley v. Board of Wardens, *supra* note 193, at 319; *cf.* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).
198. 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 158, 163-64 (1970). *See also* Baldwin, *The Impact of the Commerce Clause on the Riparian Rights Doctrine,* 16 U. FLA. L. REV. 370 (1963); Comment, *Constitutional Validity of a Federal Reforestation Program for Upper Tributaries of Navigable Waters,* 25 Mo. L. REV. 317 (1960) (possible federal land use controls).
199. 283 U.S. 64 (1931).
200. 270 U.S. 49 (1926).
201. *See* Authorities cited notes 1, 22, 24-27 *supra.*
202. Authorities cited note 188 *supra.*

ship impressed with a trust in favor of public surface uses.[203] The scope of these public and private rights will be developed in the second half of this article, but it is important to note that the issue of bed ownership itself only arises when a property claim is made under federal authority. In short, entirely too much emphasis has been placed on the issue of title to beds of navigable waters.[204] That issue is now largely a matter of historical interest. Today the more frequent issue is surface use, particularly for recreational purposes. This is a matter of state law.

As will be indicated in the second half of this article with respect to state tests for public waters, "navigability" may have outlived its usefulness as a meaningful standard by which water rights are determined. This is also true of the federal test for navigability. In the first instance, the test has been expanded to the point that either by definition or by application under the substantial-impact-on-commerce theory, there are few waters indeed that are not subject to it. A standard that excludes nothing has little meaning as a "standard." Secondly, all the areas in which the federal test is applied are areas of paramount national concern. There appears to be little utility in the continuation of the practice of extending federal controls over these areas through a strained interpreation of "navigation" or "commerce."[205] A more direct approach under the general welfare clause might be more understandable, regardless of its historical appropriateness. However, "navigability" is so entrenched as a judicial touchstone that its general abandonment seems unlikely.[206]

203. *See, e.g.*, Brown v. Chadbourne, 31 Me. 9, 21 (1849); Collins v. Gerhardt, *supra* note 122; Muench v. Public Service Comm'n, *supra* note 109.
204. *See generally* Johnson & Austin, *supra* note 121; Note, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171 (1964).
205. See Trelease, *supra* note 57.
206. One of the major problems with the use of the term "navigability" is the resort to history to establish navigability-in-fact. This may no longer be a problem under the federal test. See United States v. Appalachian Elec. Power Co., *supra* note 23; United States v. Utah, *supra* note 1. However, it is a frequent and substantial problem when an historically-based state test for navigability is employed. For example, one issue may be the past history of the stream with respect to log floating. Here you may have to obtain testimony from persons nearly 100 years old. See Brief for Dept. of Conservation at 29a (Supplemental Appendix), County Bd. of of Supervisors for Mecosta County v. Department of Conservation, *supra* note 5. Similarly, when the narrow issue of bed ownership is determina-

On the other hand, in the context of federal restrictions on state determinations of water rights, the Supreme Court may be persuaded to allow the states to develop their own tests—based on navigability or some related concept.[207] This issue may become relevant in two situations: bed ownership and commercial surface use. As already indicated bed ownership *vis-a-vis* the federal test for navigability has a narrow range of application. The federal mandate does not extend to the determination of other public and private rights. A clear recognition of this point is made by the Minnesota Supreme Court in *Johnson v. Seifert*:[208]

> It is not to be overlooked that the Federal test of navigability is designed for the narrow purpose of determining the ownership of lake [or stream] beds, and for the additional purpose of identifying waters over which the Federal government is the paramount authority in the regulation of navigation. Whether waters are navigable has no material bearing on riparian rights since such rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore.[209]

Moreover, a comparison of the *Appalachian, Holt* and *Utah* cases indicates that the test applied to bed ownership cases is the test in *The Daniel Ball* considered as of the date of the relevant state's admission to the Union. Michigan, for example, was admitted in 1837.[210] Evidence of navigability-in-fact becomes increasingly more difficult to obtain with the passing of years. The Court, in other areas of law,[211] has not hesitated to abandon rules based solely on historical

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tive, the federal test as described in *The Daniel Ball, supra* note 20 may be controlling. This may in turn require an investigation of commercial uses of the stream in question during the period of admission to the union. See United States v. Utah, *supra* note 1.

207. *See, e.g.*, United States v. Texas, *supra* note 1, at 716-17; United States v. Oregon, *supra* note 1, at 14. *But see* Arizona v. California, *supra* note 1, at 595-601.

208. 257 Minn. 159, 100 N.W.2d 689 (1960).

209. *Id.* at 100 N.W.2d 694.

210. 5 Stat. 49 (1836); 5 Stat. 144 (1837).

211. For example, the prematurity doctrine as a limitation on habeas corpus and other post-conviction remedies continued to have validity primarily for historical reasons. See McNally v. Hill, 293 U.S. 131 (1934). *McNally* has now been overruled. Peyton v. Rowe, 391 U.S. 54, 67 (1968). See generally Note, *Prematurity Doctrine in Habeas Corpus— A Critique*, 1966 WASH. U. L. Q. 345.

efficacy. Thus, rights *related to* bed ownership, perhaps even rights to bed title in cases in which the federal question is raised, may eventually be determined under broader state tests of navigability.

The other area in which the Court may arguably allow the states to develop their own standards for determining rights in navigable waters is that of commercial surface use. It was indicated in a well-developed article nearly a decade ago that recreational uses (particularly boating) might be expected to impose increasing demands on navigable waters.[212] This prognosis has proven valid and would seem sound if made today with respect to future recreation demands.[213] Demand has exploded as the result of increased amounts of leisure time and has been stimulated by projects aimed at expanding the resource base for water-oriented outdoor recreation. For example, one might point to the successful introduction of coho salmon into the waters of the Great Lakes.[214] By contrast, traditional commercial traffic has frequently turned to other forms of transportation. Recreational surface use may become identified as the "new commerce." In view of the magnitude of the recreational boating industry and the related supporting services, one might predict increased federal regulations of recreation waters under admiralty jurisdiction and the commerce clause.[215] On the other hand, the following arguments might persuade the Court that *state* determination of navigability and resulting surface-use rights should control. The *first* argument is consistent with the common law concept of *jus publicum,* that the King could not alienate his trust in navigable waters *without authorization from parliament.*[216] The original states as recipients of territorial sovereignty from the King, transferred under the Treaty of 1783,[217] acquired

212. Waite, *supra* note 45.
213. See authorities cited notes 45-48 *supra.* At the end of 1969, there were 358,546 power-driven pleasure craft registered in Michigan. U.S. DEPT. OF TRANSPORTATION, U.S. COAST GUARD, ANNUAL REPORT TO MICH. DEPT. OF STATE (February 1970).
214. *See generally* TODY AND TANNER, COHO SALMON FOR THE GREAT LAKES (Mich. Dept. of Conservation 1966).
215. *See* Waite, *supra* note 45.
216. Commonwealth v. Alger, *supra* note 13, at 90.
217. 8 STAT. 80 (1783). *See generally,* Olds, *Law of the Lakes,* 44 MICH. S. B. J. 14, 15 (Feb. 1965).

their navigable waters impressed with the same trust but open to the same exception in favor of legislative authorization to allocate surface uses. Public domain states have the same control over inland navigable waters under the protection of the equal footing doctrine.[218] Hence, the states should be able to develop their own tests of navigability, to determine their own disposition of state-owned submerged lands, and to regulate rights to surface use, in the absence of some conflicting paramount national interest in the given body of water. In fact Supreme Court cases both before and after *Holt* and *Utah* have indicated that the respective states do have this power as an inherent attribute of their sovereignty.[219] It is only the federal mandate with respect to the narrow issue of bed title under a federal property claim, as declared in *Holt* and *Utah,* that has caused the confusion. The *second* argument is less historical in its orientation and addresses itself to the broad limitation of "conflicting paramount national interest." The specific question to be answered is what is inherent in the character of recreational surface uses of navigable (or nonnavigable) waters that would require national supervision. One author has indicated that increased numbers of pleasure craft will endanger navigation by larger ships, will increase the volume of accidents between pleasure boats themselves, and therefore will subject recreational boating to admiralty jurisdiction and implementing federal legislation.[220] Similarly, as a billion dollar industry with an impact on interstate commerce, these activities may possibly be subject to regulation under the commerce clause. These predictions are sound, but it must not be overlooked that state and federal legislation may coexist in the same subject area.[221] Moreover, a conflict in state and federal controls is likely to occur only on the larger inland navigable waters, ones commonly used by vessels with significant commercial loads. Here the need for uniform controls in the interest of interstate commerce seems obvious.

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218. *See* authorities cited notes 103-05 *supra* and accompanying text.
219. *See, e.g.,* United States v. Texas, *supra* note 1, at 716-17; Shively v. Bowlby, *supra* note 2.
220. *See generally* Waite, *supra* note 45.
221. Cooley v. Board of Wardens, *supra* note 193, at 318-19. *Compare* 46

By contrast, in many states (Michigan and Wisconsin, for example) there are hundreds of miles of streams that only have a carrying capacity for light recreational boating.[222] What paramount national interest can there be that would require these to be subjected to national supervision? The recreational uses of those surface waters which are not navigable in their natural and ordinary condition as highways of commerce, but which are "navigable" and hence subject to public use only under a state "saw-log" or "pleasure boat" test, would seem to fall within the range of activities "of predominantly local interest." [223] The solutions to these problems and a clear statement of the extent of this potential source of federal limitations on water rights under state law will have to wait until new cases appear. The test, however, was established long ago:

> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.[224]

Having developed the federal *sources* of public and private rights in navigable waters, the second half of this article will consider the *scope* of these rights under state law.

U.S.C. §§ 527-527h (Supp. 1970), *with* MICH. COMP. LAWS ANN. §§ 281-.1001-.1017 (Supp. 1969).

222. *See, e.g.*, Attorney General *ex rel.* Hoffmaster v. Taggart, *supra* note 4; City of Grand Rapids v. Powers, 89 Mich. 94, 50 N.W. 661 (1891) (description of the Grand River); Lamprey v. Metcalf, *supra* note 8; Muench v. Public Service Comm'n, *supra* note 109.

223. California v. Zook, 336 U.S. 725, 728 (1949).

224. Cooley v. Board of Wardens, *supra* note 193, at 319.