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Water Law - The United States Supreme Court Expands the Public Trust Doctrine - Phillips Petroleum Co. v. Mississippi

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CASENOTES

WATER LAW—The United States Supreme Court Expands the Public Trust Doctrine. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

Before 1977, the Phillips Petroleum Company (Phillips) held an undisputed title, which it traced to a pre-statehood grant, to forty-two acres of land in southwestern Mississippi. The land was beneath eleven drainage streams, tributaries that flowed into the Gulf of Mexico, several miles from the disputed land. The streams were not navigable, nor were they beneath the ebb and flow of the ocean's tide.¹

In 1977, the State of Mississippi claimed title to the land, under the public trust doctrine, and issued leases for oil and gas exploration.² When Phillips learned of the leases it brought an action to quiet title. The Mississippi Supreme Court quieted title in Mississippi.³

Phillips appealed, and the United States Supreme Court granted certiorari to determine whether the land was within the scope of the public trust doctrine. The Court held that the public trust doctrine applied to all water influenced by the ocean's tide whether or not it was navigable or part of a navigable body of water.⁴ Therefore, the Court held that Mississippi had held title to the land since entering the Union.⁵

Phillips was a case of first impression because the Supreme Court had never applied the public trust doctrine to land so remotely associated with

1. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 793 (1988).

2. The dispute in *Phillips* arose from the Coastal Wetlands Protection Law enacted by the Mississippi Legislature in 1973. MISS. CODE ANN. §§ 49-27-1 through -69. This law charged the Mississippi Marine Resources Council (MMRC) with preparing maps identifying the state-owned wetlands.

These maps were made by state employees who "eyeballed" aerial photographs to determine the boundaries of the wetland areas. The purpose of these maps was to provide a method whereby the MMRC could determine whether any given event was occurring on land in its jurisdiction—that is, in a wetlands area. Contrary to instruction from the MMRC, who warned that the maps were inaccurate and only for jurisdictional purposes, the Mississippi Mineral Lease Commission used these wetland maps to delineate the state-owned land upon which it would then sell oil and gas leases.

Cinque Bambini Partnership v. State, 491 So. 2d 508, 511 (Miss. 1986).

A discussion concerning the mapping of coastal boundaries is found in Maloney & Aussen, *The Use And Significance Of The Mean High Water Line In Coastal Boundary Mapping*, 53 N.C.L. REV. 185 (1974). Trouble spots are discussed in Porro & Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323 (1972); Jampol, *The Questionable Renaissance Of The Tidelands Trust Doctrine In California*, 13 SW. U.L. REV. 1 (1982).

3. According to the Mississippi Supreme Court, the public trust doctrine includes lands under non-navigable water "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union." The Court does not even require that those water courses have been "susceptible" for navigation "for Commerce," as the Court insists in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Brief for Petitioner at 6, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870) [hereinafter Brief for Petitioner].

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

5. *Id.*

the tide.⁶ The public trust doctrine had traditionally included land beneath navigable water and the land beneath the shores of navigable water.⁷

The Supreme Court's decision in *Phillips* expanded the scope of the public trust doctrine and created uncertainty for property owners near navigable waters. This casenote analyzes the history and purpose of the public trust doctrine. It concludes that the Court's expansion of the public trust doctrine to land beneath non-navigable water, which was unassociated with a navigable body of water, was unwarranted.

BACKGROUND

The Public Trust Doctrine

The Romans developed the public trust doctrine⁸ because they believed that a person's right to the sea and to the shore was as basic as a person's right to the air.⁹ Roman law correspondingly gave the public unlimited access to the sea.¹⁰ The English recognized public rights in the sea in 1215 when the King of England signed the Magna Carta.¹¹ The Magna Carta restricted, among other things, individual ownership of the sea and the shore. As commerce expanded, English statutes¹² and case law strengthened the public's rights to the shore.¹³ Eventually, the English recognized the shore as property held by the King in trust for the public. From these developments, legal theorists and the courts created the public trust doctrine.¹⁴

In 1842, the United States Supreme Court adopted the public trust doctrine in *Martin v. Waddell*.¹⁵ The dispute in *Martin* concerned the public

6. *Id.* at 796.

7. "[A] grant from the sovereign of land bounded by the sea, or by any navigable . . . water, does not pass any title below high water. . . ." *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (emphasis added).

8. Many scholarly articles regarding the nature, scope and history of the public trust doctrine have been published. See, e.g., Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Sax, *Liberating The Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980); Comment, *The Public Trust In Tidal Areas: A Sometime Submerged Doctrine*, 79 YALE L.J. 762 (1970).

9. "By the Roman Law, the sovereignty of government extended over the sea, but the occupation of the sea belonged to all the subjects of the empire universally, for the unlimited exercise of fishing, navigating, and taking water; and as this privilege was illimitable and [not restrained], so, therefore, it was incapable of individual exclusive appropriation." Comment, *supra* note 8, at 763 n.7.

10. *Id.* at 764.

11. The great charter. A constitutional enactment granted by King John of England to the barons, at Runnymede, on June 15, 1215, and afterwards, with some alterations, confirmed in parliament by Henry III and Edward I. This charter is regarded as the foundation of English constitutional liberty. Among its thirty-eight chapters are found provisions for regulating the administration of justice, defining the temporal and ecclesiastical jurisdictions, securing the personal liberty of the subject and his rights of *property*. BLACKS LAW DICTIONARY 858 (5th ed. 1979) (emphasis added).

12. Comment, *supra* note 8, at 768.

13. *Id.*

14. *Id.*

15. 41 U.S. (16 Pet.) 367 (1842).

right to fish in the Raritan Bay.¹⁶ The *Martin* Court held that the original thirteen states gained the rights established by the English common law in the American Revolution, and therefore the states held title to land beneath navigable water in trust for the public.¹⁷ Thus, the Court held that the public could not be excluded from using the bay.¹⁸

Three years later in *Pollard's Lessee v. Hagen*,¹⁹ the Court expanded the public trust doctrine to all states later admitted to the Union.²⁰ The Court explained that during pre-statehood periods the federal government held all land beneath navigable water in trust for future states.²¹ The Court held that each state received the land beneath its navigable water from the federal government upon entering the Union,²² thus enabling the newly admitted states to enter the Union on equal footing²³ with the original states.²⁴

The Purpose of the Public Trust Doctrine

The United States Supreme Court explained the purpose of the public trust doctrine in *Packer v. Bird*.²⁵ The *Packer* Court stated that the purpose of the doctrine was to allow the states to maintain public access to water capable of supporting navigation.²⁶ Thus, the *Packer* Court held

16. *Id.* at 407.

17. *Id.* at 410.

18. *Id.*

19. 44 U.S. (3 How.) 212 (1845).

20. *Pollard's Lessee* was an action of ejectment. The defendants traced title to a Spanish land grant. They claimed that during the years 1819 and 1823 the land was covered by water of the Mobile River at common high tide. Therefore, the question for the Court was whether the land belonged to the state, by virtue of the fact that the land was beneath water when Alabama entered the Union. *Id.* at 219-20.

21. *Id.* at 220-21.

22. *Id.*

23. The Union was formed on the basis of equal rights among all the states. Under the equal footing doctrine, all new states had the same rights of sovereignty and jurisdiction as the original states. The original states were given ownership of the land beneath navigable waters and land beneath the ebb and flow of the tide. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977)(quoting *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867)).

24. The Act of March 1, 1817, authorizing the formation of the State of Mississippi provided that the new state should "be admitted into the Union upon the same footing with the original states in all respects whatever." 3 Stat. 348 (1817).

Having met the conditions of the March, 1817 enactment, the Congress of the United States on December 10, 1817 formally admitted Mississippi "into the Union on an equal footing with the original states, in all respects whatever." 3 Stat. 472, 473 (1817). *Cinque Bambini*, 491 So. 2d at 512 n.2.

25. 137 U.S. 661 (1891). *Packer* was an action for the possession of land within the ebb and flow of the tide located in the Sacramento River. The plaintiff claimed ownership of the land in 1867, and contended that the defendant unlawfully entered the land, causing several hundred dollars' damage. The Court ruled in the defendant's favor, noting that under common law title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream. The Court held, however, that where the waters of the river are affected by the tides, the title to land is limited to the ordinary high water mark. The Court reasoned that private ownership of land beneath navigable water is "inconsistent with the interest of the public at large in [its] use for purposes of commerce." *Id.* at 666-67.

26. *Id.* at 667.

that the states had the right to exclude private ownership of navigable water and the land beneath navigable water.²⁷

In *Illinois Central Railroad v. Illinois*,²⁸ the Supreme Court further explained the purpose of the public trust doctrine. In that case, the Illinois legislature conveyed fee title to the Chicago waterfront to Illinois Central Railroad.²⁹ Four years later, the legislature revoked the grant and the railroad brought an action to quiet title.³⁰ The Illinois Supreme Court quieted title in the state by upholding the legislature's revocation.

The United States Supreme Court affirmed the decision, holding that the original grant to the railroad was inconsistent with the purpose³¹ of the public trust doctrine.³² The *Illinois Central* Court emphasized that the public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment"³³ The Court held that navigable water and the land beneath navigable water belonged to the public,³⁴ and that such land and water could not be conveyed for private ownership.

The Scope of the Public Trust Doctrine

The United States Supreme Court adopted the public trust doctrine from the English common law.³⁵ The English common law, however, failed to distinguish between navigable water and water within the ebb and flow of the tide because all English navigable water was within the ebb and flow of the tide.³⁶ The Supreme Court's application of the common law created confusion because portions of navigable water in the United States were not within the ebb and flow of the tide.³⁷ The question for the American courts was whether the purpose of the public trust doctrine would be effectuated by limiting its applicability to lands beneath navigable water, or by limiting its applicability to lands beneath the ebb and flow of the tide.

The Supreme Court resolved the issue in *Shively v. Bowlby*.³⁸ The *Shively* case was a title claim to land beneath a navigable river.³⁹ In that case, Bowlby claimed title to the land from a state grant and Shively claimed title under a grant from the United States.⁴⁰ The Supreme Court

27. *Id.*

28. 146 U.S. 387 (1892).

29. *Id.* at 398-99.

30. *Id.* at 433.

31. The Court noted, however, that private individuals could own public trust land to build wharfs and docks. This was considered consistent with the public trust doctrine. *Id.* at 452.

32. *Id.* at 436.

33. *Id.*

34. *Id.* at 436-37.

35. *Shively*, 152 U.S. at 14.

36. *Illinois Central*, 146 U.S. at 435-36.

37. *Id.*

38. 152 U.S. 1 (1892).

39. *Id.* at 2.

40. *Id.* at 9.

held that the states owned the land beneath navigable water and the shores of navigable water where the water ebbs and flows.⁴¹ Therefore, the Court held that the grant from the United States to Shively was ineffective.⁴²

In *McGilvra v. Ross*,⁴³ sixteen years after *Shively*, the Supreme Court narrowed the scope of the public trust doctrine.⁴⁴ Citing *Shively*, the *Ross* Court held that when the Court referred to navigable water the Court meant water that was navigable in fact.⁴⁵

The Supreme Court decided that "navigable in fact" meant the ability to use water in its ordinary condition as a highway for commerce in *The Daniel Ball*.⁴⁶ The *Ball* Court explained that water used as a highway for commerce must be substantial enough to allow the passage of ships.⁴⁷ Although *Ball* was an admiralty case, the Court used navigability in fact to define the scope of the public trust doctrine in *United States v. Oregon*.⁴⁸

In *Oregon*, the Supreme Court found that water surrounding several lakes was non-navigable.⁴⁹ The *Oregon* Court held that the public trust doctrine included only navigable water and that the test to determine navigability was whether water was capable of transporting interstate or foreign commerce.⁵⁰ Because the water in *Oregon* was too shallow and weed infested to support trade or travel, the Court held that the water was non-navigable and therefore not within the scope of the public trust doctrine.⁵¹

PRINCIPAL CASE

The land at issue in *Phillips*,⁵² like the land in *Oregon*, was beneath shallow and non-navigable water. Nevertheless, the United States Supreme Court applied the public trust doctrine and held that the land belonged to the State of Mississippi.⁵³

Citing *Shively*, the Court explained that under English common law, the King held land beneath the ocean's tide in trust for the public. The Court held that after the revolution, each coastal state obtained a trust in the land beneath the ebb and flow of the ocean's tide.⁵⁴

41. *Id.* at 16, 43.

42. *Id.* at 56.

43. 215 U.S. 70 (1909).

44. *Id.* at 78.

45. *Id.*

46. 77 U.S. (10 Wall.) 557 (1870).

47. *Id.*

48. 295 U.S. 1, 14 (1935).

49. The *Oregon* case concerned a suit by the United States against the State of Oregon to quiet title to 81,786 acres of land. The land lay beneath the high water mark or meander line of five lakes. The question for the Court was whether the land underlay navigable waters at the time Oregon gained statehood. The court held that if the water could be considered navigable in fact, then the land belonged to the state, otherwise the land belonged to the United States. The water was found non-navigable. *Id.* at 14.

50. *Id.*

51. *Id.* at 15.

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

53. *Id.* at 799.

54. *Id.* at 794.

The Court rejected Phillips' interpretation of the English common law.⁵⁵ Phillips claimed that the *Illinois Central* Court used the terms ebb and flow and navigability synonymously and contended that the Crown's ownership of land beneath the tide depended upon navigability and not upon the ebb and flow of the tide.⁵⁶ Phillips cited *Martin*, which observed that it was the navigable waters of England that the Crown held in public trust.⁵⁷ The Court, however, distinguished *Martin* and *Illinois Central* from *Phillips* because they did not deal with non-navigable tide water.⁵⁸ The Court explained that under *Shively* the land beneath water influenced by the tide belonged to the states.⁵⁹

In a related argument, Phillips contended that American case law used navigability to determine the scope of the public trust doctrine.⁶⁰ Phillips cited several cases that criticized the ebb and flow test for navigability.⁶¹ The Court distinguished those cases, however, because they dealt with non-tidal freshwater lakes and rivers.⁶² The *Phillips* Court explained that determining title to navigable freshwater and title to tide water required different tests.⁶³ The Court held that the test for title to navigable freshwater was navigability and the test for tide water was ebb and flow.⁶⁴

The Supreme Court also discussed the property interests affected by its decision.⁶⁵ Phillips argued that application of the public trust doctrine would upset reasonable property expectations because Phillips had a recorded title and Phillips and its predecessors had paid taxes on the property for 150 years.⁶⁶ The Court held that Phillips' expectations of private ownership were unreasonable since the public trust doctrine had always included land beneath the tide.⁶⁷ The Court also noted that its holding was consistent with Mississippi case law. The Court held that property law was a state matter and under Mississippi law, the land could not be lost by adverse possession or by any other equitable doctrine.⁶⁸

Justice O'Connor dissented, and argued that the public trust doctrine did not apply to discrete, non-navigable water.⁶⁹ Using the navigability in fact test, Justice O'Connor argued that the non-navigable waters in *Phillips* were not subject to the doctrine. Justice O'Connor did not dis-

55. *Id.* at 796.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*; see, *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Barney v. Keokuk*, 94 U.S. (4 Otto) 324 (1876).

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

63. *Id.*

64. *Id.* at 797-98.

65. *Id.* at 798-99.

66. *Id.* at 798.

67. *Id.*

68. *Id.* at 799.

69. *Id.* at 800-03 (O'Connor, J., dissenting).

pute the usefulness of the ebb and flow test, but she did dispute the factual determination that the land in *Phillips* was within the ebb and flow of the tide.⁷⁰

Justice O'Connor also argued that *Phillips* disrupted reasonable property expectations in the coastal states.⁷¹ She stated that the *Phillips* expansion increased the land susceptible to a public trust challenge, thus causing record landowners to lose property rights. Finally, Justice O'Connor argued that the decision was unfair because Mississippi had failed to show interest in the land for 150 years.⁷²

ANALYSIS

In the majority opinion, Justice White explained that the land at issue in *Phillips* was neither beneath the ebb and flow of the tide nor beneath navigable water.⁷³ He also conceded that the Court had never decided a case concerning land so remotely associated to the tide.⁷⁴ Nevertheless, the Court quieted title to the land in Mississippi. That decision expanded the public trust doctrine to non-navigable water beyond the shores of navigable bodies of water. Neither precedent nor the purpose of the doctrine supports the Court's expansion, which creates uncertainty for property owners near the coast.

Traditionally, the scope of the public trust doctrine included navigable water and the non-navigable shores of navigable water.⁷⁵ In *Ball*, the Court defined navigable water as water capable of transporting commerce.⁷⁶ For the scope of the public trust doctrine to include the land in *Phillips*, the water covering the land would have to be substantial enough to support shipping.⁷⁷ Because the water in *Phillips* consists of a bayou and several drainage streams that cannot support vessels, it is not navigable under the definition articulated in *Ball*. In addition, the land in *Phillips* was not shore land traditionally subject to the public trust doctrine.⁷⁸ For the purposes of the public trust doctrine, shore land is defined by the ebb and flow test.

The *Phillips* Court's interpretation of the ebb and flow test extended the public trust doctrine to land beyond the shores of navigable water.

70. *Id.*

71. *Id.* at 804.

72. *Id.* at 803-04.

73. *Id.* at 793 (majority opinion).

74. *Id.* at 796-97.

75. *Shively*, 152 U.S. 1.

76. The *Ball* Court stated:

[R]ivers 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 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.

Ball, 77 U.S. at 563.

77. *Id.*

78. The *Phillips* Court stated that "It is true that none . . . [of the cases cited to support the Court's position] actually dealt with lands such as those involved in [*Phillips*]. . . ." *Phillips*, 108 S. Ct. at 796.

This interpretation, however, conflicts with the Court's decision in *Shively*. The *Shively* holding did not allow the ebb and flow test to extend beyond the shores of navigable water.⁷⁹

In *Shively*, the Court delimited the ebb and flow test to the shores of navigable water and to water below the high water mark.⁸⁰ The *Shively* Court defined land below the high water mark as land constantly covered and uncovered during high and low tides.⁸¹ The land in *Phillips* was above the high water mark, and therefore, the land was not within the scope of the traditional public trust doctrine.

The water in *Phillips* was factually similar to water the *Oregon* Court found to be non-navigable. The Court described the water in *Oregon* as shallow, weed infested and incapable of supporting navigation.⁸² Similarly, the land in *Phillips* was beneath ankle deep water.⁸³ Nevertheless, the *Phillips* Court granted the land to Mississippi under the public trust doctrine and expanded the doctrine's traditional scope.

Justice White, who wrote for the majority, compared the water in *Phillips* and the water traditionally included in the public trust doctrine.⁸⁴ He explained that "geographical, chemical and environmental qualities" created similarities between the water in *Phillips* and the water traditionally included in the public trust doctrine.⁸⁵ Justice White stated that the similarities between the two types of water justified applying the public trust doctrine in *Phillips*.⁸⁶

Justice White's analysis, however, redefined the scope of the public trust doctrine and created uncertainty for coastal landowners. If geographical, chemical and environmental similarities are sufficient to invoke the public trust doctrine, then the scope of the doctrine is unlimited. The traditional public trust doctrine applied uniformly to land beneath navigable water and to water subject to the ebb and flow of the tide.⁸⁷ Under *Phillips*, the public trust doctrine could apply to any water regardless of its proximity to navigable water. Thus, Justice White's analysis created uncertainty for landowners like *Phillips*.

Application of the *Phillips* decision illustrates how uncertain the public trust doctrine is if not restricted to navigable water and its shores. One example of the uncertainty occurs when a navigable river or lake overflows causing the submersion of the adjacent land. According to *Phillips*, the land below the water would become subject to the public trust doctrine regardless of the waters' depth or capacity to facilitate commerce.

79. *Shively*, 152 U.S. at 29.

80. *Id.* at 26.

81. *Id.* at 29 (quoting *United States v. Pacheco*, 69 U.S. (2 Wall.) 587 (1864)).

82. *Oregon*, 295 U.S. at 15.

83. Brief for Petitioner, *supra* note 3, at 6.

84. *Phillips*, 108 S. Ct. at 794-97.

85. *Id.* at 797.

86. *Id.*

87. The *Shively* Court held: "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow." *Shively*, 152 U.S. at 29.

Another example of uncertainty occurs when a storm causes the ocean to flood the adjacent land. The *Shively* decision prevents the flooded land from becoming part of the state's public trust.⁸⁸ The *Phillips* decision, however, goes beyond *Shively* and extends the public trust doctrine to the flooded land, thus creating uncertainty and unfairness for landowners.

The *Phillips* decision was unfair because Mississippi was uninterested in the land for over 150 years while collecting taxes on the land.⁸⁹ The *Phillips* Court, however, took the land from Phillips without equitable consideration. Consequently, the expanded public trust doctrine could similarly threaten homeowners' titles, grants and state deeds in every coastal state.⁹⁰ Admittedly, the Court is free to modify a common law doctrine. Such a modification, however, depends upon carrying out the purpose of the public trust doctrine. The *Phillips* Court did not support the expansion of the public trust doctrine with any rationale for effectuating the doctrine's purpose.

The purpose of the public trust doctrine does not justify the expansion of the doctrine in *Phillips*. The *Illinois Central* Court clearly stated that the function of the public trust doctrine was to insure public access to navigable waters for navigation, transporting commerce and fishing.⁹¹ In *Packer*, the Court emphasized that the primary purpose of the doctrine was to preserve navigable water for facilitating navigation.⁹² The water in *Phillips* was only a few inches deep and therefore incapable of supporting navigation. Hence, the Court's expansion of the public trust doctrine in *Phillips* failed to recognize the traditional purpose of the doctrine.

The Supreme Court's failure to effectuate the purpose of the public trust doctrine granted Mississippi title to land for non-public trust purposes. Mississippi used the public trust doctrine to assert ownership over land potentially rich in oil and gas reserves.⁹³ Apparently, the State's motive was to reap the benefit of anticipated oil and gas exploration. While the public may benefit from oil and gas on state lands, the Court should not have used the public trust doctrine as a vehicle for states to assert superior title to potentially rich non-navigable waters. If the majority

88. *Id.* at 26.

89. *Phillips*, 108 S. Ct. at 803.

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

Id. at 804 (O'Connor, J., dissenting) (quoting Porro & Teleky, *Marshland Dilemma: A Tidal Phenomenon*, SETON HALL L. REV. 323, 325-26 (1972)).

91. *Illinois Central*, 146 U.S. at 452.

92. *Packer*, 137 U.S. at 667.

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

claimed the land was subject to the public trust doctrine, it ought to have insured that Mississippi intended to use the land for public trust purposes.

CONCLUSION

In *Phillips Petroleum Co. v. Mississippi*, the Supreme Court included discrete water, influenced by the ebb and flow of the tide, within the scope of the public trust doctrine. The Court's holding expanded the ebb and flow distinction beyond its reasonable scope. The Court should have determined title to the submerged land according to the water's ability to transport commerce as established in *Ball*. The Court's departure from precedent inequitably divested Phillips' title to the land. The Court held that reasonable property expectations along the coast were not disrupted. However, under *Phillips*, any property owner near the coast with reasonable property expectations may lose property rights. The purpose of the public trust doctrine and the inequitable result in *Phillips* do not support the Court's expansion of the doctrine.

DOUGLAS J. GARDNER