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The Disdregarded Common Parentage of the Equal Footing and Public Trust Doctrines

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THE DISREGARDED COMMON PARENTAGE OF THE EQUAL FOOTING AND PUBLIC TRUST DOCTRINES

James R. Rasband[1]

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1. Copyright © 1996 by James R. Rasband. Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A. 1986, Brigham Young University; J.D. 1989 Harvard Law School. I am grateful to Kif Augustine Adams, Harrison Dunning, Albert Gidari Jr., and Kevin Worthen for their comments on earlier drafts. I am also grateful to Nathan Benson, Emily Lauritzen, Michelle Olsen, and Kevin Wilkinson for their research assistance.

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I. INTRODUCTION

Courts and commentators generally regard the issue of state ownership of and power over lands under navigable water and associated public resources as a function of two separate doctrines: the equal footing doctrine and the public trust doctrine.[2] The equal footing doctrine defines the United States' power to convey or retain land under navigable water prior to statehood and therefore describes the lands under navigable waters which a state acquires at statehood.[3] The public trust doctrine defines a state's power over the land under navigable water that it acquired at statehood.[4] Despite the fact that both doctrines describe sovereign power

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2. The equal footing doctrine has been the subject of relatively few articles and notes. *See, e.g.*, John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949). It has, however, received significant attention in several others. *See, e.g.*, Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980); Peter N. Davis, *State Ownership of Beds of Inland Waters—A Summary and Reexamination*, 57 NEB. L. REV. 665, 666-68 (1978). The number of analyses of the equal footing doctrine pales in comparison to the vast literature on the public trust doctrine. Since Professor Sax's seminal article in 1970, *see* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970), very few interested in natural resource law have been able to resist the temptation of weighing in on the public trust doctrine. *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-34 (1986); George A. Gould, *The Public Trust Doctrine and Water Rights*, 34 ROCKY MTN. MIN. L. INST. 25-1 (1988); Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1 (1985); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writing of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DEN. U. L. REV. 565 (1986) [hereinafter *Trusting the Public Interest to Judges*]. For additional articles on the public trust doctrine, see *Symposium: The Public Trust Doctrine in Natural Resources Law and Management*, 14 U.C. DAVIS L. REV. 181 (1980), and *Symposium: The Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, 19 ENTVL. L. 425 (1989). While these articles on the public trust and equal footing doctrines often make passing reference to the other doctrine, they generally do not explore the common principles that animate both doctrines or try to explain why, and if, two disparate standards should exist. That is the task of this article.

3. The equal footing doctrine, of course, applies to more than the issue of pre-statehood United States' conveyances of land under navigable water. *See infra* Part VI.B. More generally, it is the doctrine that requires that new states be admitted to the Union on an equal sovereign footing with their sister states. Thus, aside from its application to land under navigable water, the equal footing doctrine is a rule that requires political equality for states entering the Union. *See id.* Absent specific references to this broader context, however, this article's use of the term "equal footing doctrine" refers to the doctrine in the context of its application to ownership of land under navigable water.

4. At common law in England, the term navigable waters had application almost exclusively to the waters that ebbed and flowed with the tide. Barney v. Keokuk, 94 U.S. 324, 338 (1877). In the United States, by contrast, navigable waters have been expanded to include all water bodies that are navigable in fact. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-36 (1892) [hereinafter *Illinois Central*]; Packer v. Bird, 137 U.S. 661, 667 (1891); *Barney*, 94 U.S. at 338; The Genesee Chief v.

over submerged lands[5] and spring from the same source, courts and commentators have analyzed equal footing and public trust questions under different standards. Under the equal footing doctrine, the United States is understood to have the power to convey land under navigable water prior to statehood but is presumed not to have made any pre-statehood conveyance of such lands absent very plain and explicit language evidencing Congress' intent.[6] Under the public trust doctrine, by contrast, the inquiry generally does not focus on state *intent* to convey land under navigable water. It is rather a question of state *power* to grant land beneath navigable water, a question that turns on the size of the grant and the nature of the public's interest in the land granted.[7] In further contrast, the equal

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Fitzhugh, 53 U.S. (12 How.) 443, 455 (1851) (holding that the admiralty and maritime jurisdiction of the United States extend to all public, navigable waters although above the flow of the tide). The equal footing doctrine applies to all land under water navigable in fact. In keeping with its English tidewater heritage, however, the doctrine has also been held to apply to land subject to the ebb and flow of the tide even if the tidewaters are not navigable in fact. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988). The scope of the public trust doctrine was also initially limited to land under water navigable in fact but its reach has been expanded, particularly in recent years. *See infra* notes 9, 265-66.

5. The use of the term "submerged" lands here and elsewhere in the article is used to describe lands under navigable water subject to the equal footing doctrine. This non-technical use of the word "submerged" accords with language in a variety of equal footing cases, although it is not strictly accurate. Strictly defined, the equal footing doctrine applies to the beds of navigable rivers and tidelands between high and low water mark. In *United States v. California*, 332 U.S. 19 (1947), the Supreme Court refused to extend the equal footing doctrine to all submerged lands, holding that the United States owned the beds of the marginal seas below low water mark. *Id.* at 31-39. *See also* United States v. Texas, 339 U.S. 707 (1950) (holding that Republic of Texas implicitly conveyed ownership of its marginal seas to the United States when it entered the Union on an equal footing with its sister states). The effect of the California and Texas "tidelands" decisions was largely reversed by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-56 (1996), in which Congress expressly granted the states title to the bed of the marginal sea three miles seaward of their coasts. *See generally* Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209 (1988) (criticizing the Court's decisions in the California and Texas "tidelands" cases and discussing their ultimate reversal in the Submerged Lands Act). At other points, this article also uses the term "overflowed" lands to describe lands under navigable water subject to the equal footing doctrine.

6. *See, e.g.*, Montana v. United States, 450 U.S. 544, 552 (1981) ("A court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.") (citations and internal quotations omitted); United States v. Holt State Bank, 270 U.S. 49, 55 (1926) ("[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."); Utah Div. of State Lands v. United States, 482 U.S. 193, 197-98 (1987) (reconfirming the reasoning of *Holt State Bank* and *Montana*).

7. This introductory description of the public trust doctrine is plainly a generalization. As the

footing doctrine is said to apply only to land under navigable water;[8] whereas the public trust doctrine has been extended to encompass not only land but also the water flowing over that land, and associated public amenities.[9]

It is the contention of this article that the separation of the two doctrines is driven more by ideology than legal necessity. Both equal footing (as applied to land under navigable waters) and public trust are common law doctrines--the former federal common law and the latter state common law--and spring from the same source. There is no reason for two separate doctrinal constructs to describe sovereign responsibility and power over submerged lands and associated public resources. One uniform rule would suffice.

Returning to the source of both the equal footing and the public trust doctrines, this article begins with a review of the common law in England on the issue of sovereign ownership of, and obligations with respect to, land under navigable water. Specifically, it first traces the development of the so-called "prima facie theory" in England—the doctrine that the crown was presumed to own all land under navigable water absent a clear and express grant of such lands by the crown to a private individual. The article then reviews how this prima facie theory was accepted by the original 13 states following the Revolutionary War. In early American common law each state was understood to have plenary power and authority to alienate its submerged

public trust doctrine is a state common law doctrine there is necessarily diversity between the states in their articulation and acceptance of the doctrine. *Phillips Petroleum*, 484 U.S. at 475 ("individual states have the authority to define the limits of the lands held in public trust . . . "). That diversity is discussed *infra* Part VII.C. A number of states, however, have followed the lead of the United States Supreme Court in *Illinois Central*, 146 U.S. 387 (1892), which held that "[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453. *See infra* notes 265-66 and accompanying text. Unless otherwise specified, when this article uses the terms "public trust doctrine" or "modern public trust doctrine," it refers to the public trust doctrine of *Illinois Central* and its more recent progeny which have further expanded the doctrine. *See infra* notes 264-66 (citing cases following and expanding the public trust doctrine of *Illinois Central*).

8. *See, e.g.*, Arizona v. California, 373 U.S. 546, 597-98 (1963).

9. The state most frequently cited for extending the public trust doctrine beyond land under navigable water is California. In *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), the California Supreme Court held that the public trust protects environmental and recreational values associated with land under navigable water. *Id.* at 380. In *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) [hereinafter *Mono Lake*], the California Supreme Court expanded the public trust doctrine to include water rights obtained by prior appropriation and "non-navigable tributaries to navigable waterways." *Id.* at 721. Other state courts have similarly expanded the public trust doctrine beyond *land* under navigable water. *See infra* notes 265-66 (discussing such state court decisions).

lands and the associated public resources.

Having described the early common law with respect to state ownership of land under navigable water, the article turns to the issue that gave birth to the equal footing doctrine—whether subsequently admitted states would enjoy the same ownership of land under navigable water. The article traces the development of the equal footing doctrine from its inception in the Supreme Court's decision in *Pollard v. Hagan* to its maturity in *Shively v. Bowlby*. The article takes issue with the frequently advanced view that the source of the equal footing doctrine, as applied to land under navigable water, is in principles of constitutional law. The article rejects such an explanation for the equal footing doctrine because no such constitutional argument can coherently explain the case law which exhibits both confirmations and rejections of pre-statehood grants of submerged lands. The only coherent explanation of equal footing case law, as applied to land under navigable water, is that the doctrine is federal common law. The source of that federal common law is the longstanding prima facie theory, i.e., the presumption of sovereign ownership of land under navigable water absent an express grant of such land.

Focusing on the seminal case of *Illinois Central*,[10] the article then reviews the development of the public trust doctrine and its teaching that a grant of land under navigable water, no matter how explicit, is voidable as contrary to the public's interest, unless the grant actually promotes trust purposes or does not work a substantial impairment of the public interest in the lands and waters remaining.[11] The article argues that this modern public trust doctrine of *Illinois Central* and its progeny is a departure from the earlier common law understanding that the sovereign had power to convey land under navigable water and associated resources as long as it clearly expressed its intent to do so. Because the modern public trust doctrine departs from the early common law, it is necessarily irreconcilable with the teachings of *Shively* and other equal footing cases which are themselves grounded in that early common law.

The article then discusses the implications of the common heritage of the equal footing and public trust doctrines. To this end, the article hypothesizes the different reasoning that would have applied in equal footing cases if the rebuttable presumption approach of equal footing case law had been discarded in favor of the limited view of sovereign power exhibited in *Illinois Central* and its public trust progeny. Similarly, the article

10. 146 U.S. 387 (1892).

11. *See Illinois Central*, 146 U.S. at 452-53 (setting forth this two-part test). *See also infra* notes 264-66 and accompanying text (discussing development and adoption of *Illinois Central* by state courts).

explores the possibility of applying the presumption approach of equal footing and the early common law to public trust cases. This hypothesizing evidences that a commentator or a judge cannot simultaneously support or oppose the limited view of state conveyance power of *Illinois Central* and the more expansive view of sovereign conveyance power of equal footing cases. A consistent view of sovereign authority over, and public interest in, submerged lands and associated natural resources would dictate that the United States' authority to make a pre-statehood grant of land under navigable waters would be analyzed in the same way as a subsequent state's authority to make such a grant.

The article suggests that the reason why inconsistent approaches to sovereign power to grant submerged lands have been tolerated or even promoted may well be because the two doctrines have been perceived as addressing different issues: equal footing has been perceived as a states' rights doctrine whereas public trust has been perceived as a doctrine to protect natural resources. Support or criticism of either doctrine often seems to turn on one's perception of the value of states' rights or natural resource protection. In fact, support or criticism of either doctrine should turn on a different issue that is common to both doctrines, namely the power and intent of the sovereign to convey land under navigable water and associated resources.

Thus, the article concludes by arguing that the current inconsistent approach to equal footing and public trust must be eschewed. Sovereign grants of submerged lands and associated resources should either be governed by the public trust doctrine of *Illinois Central* or the rebuttable presumption approach of equal footing cases, but not both. Confronted with this dichotomy, the article comes down on the side of the rebuttable presumption approach to state ownership taken in equal footing cases because the approach in public trust cases has less historical support, unreasonably defeats investment-backed expectations of grantees, risks takings challenges, and, by requiring judges to divine the public interest rather than interpret a conveyance using a rule of construction, forces them to engage in a task for which they are not particularly well-suited. Ultimately, regardless whether one thinks that the uniform rule should be the current standard for public trust or equal footing, it is hoped that the discussion of the kinship between equal footing and public trust will provoke an inspection of the separate impulses that seem to drive the differential treatment of the two doctrines.

II. ENGLISH COMMON LAW ON SOVEREIGN RIGHTS AND RESPONSIBILITIES WITH RESPECT TO LAND UNDER NAVIGABLE WATER

To evidence that the current standard employed in equal footing cases is a relatively unadulterated version of the early common law and that the modern public trust doctrine is a thoroughgoing departure from that same source, it is necessary to inspect the historical origin and development of the law relating to public rights in land under navigable water. This subject is not unexplored territory,[12] but the history has been so often misstated and misapplied that a review of the issue is necessary.

A. *Early Understandings of Sovereign Power to Grant Land Under Navigable Water and Associated Resources*

Most historical accounts of sovereign ownership and control of land under navigable water begin with Roman law and its influence on the development of the common law.[13] The common citation is to the statement in *The Institutes* of Justinian that "all of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea."[14] The citation typically precedes the argument that common ownership of land under navigable water and the associated resources of water, fishery, and commerce has a long pedigree.[15] More

12. A number of articles explore the roots of the public trust doctrine. *See, e.g.*, Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975); Michael L. Rosen, *Public and Private Ownership Rights in Lands under Navigable Waters: The Governmental Proprietary Distinction*, 34 U. FLA. L. REV. 561 (1982); Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT LAW JOURNAL 13 (1976); Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 WISC. L. REV. 1403.

13. *See, e.g.*, Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 195-97 (1980); Stephen A. Delco, Note, Phillips Petroleum Co. v. Mississippi *and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U. L. REV. 571, 574 (1989); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970); Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 685-86 (1989). *See also* Deveney, *supra* note 12, at 16 (criticizing "recent writers in the field of public rights in coastal lands and waters" for holding up "Roman law as the paradigm of a lost Edenic state of perfect communal ownership of and public control over coastal area resources").

14. Deveney, *supra* note 12, at 23 (quoting THE INSTITUTES 2.1.1-5).

15. *See, e.g.*, Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) ("The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, . . . ") (citations omitted), *cert. denied*, 484 U.S. 1008 (1988); State v. Central Vermont Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989) ("The public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law.") (citations omitted), *cert. denied*, 495 U.S. 931 (1990); *Mono Lake*, 658 P.2d at 718; Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 167 (Mont. 1984) ("The theory underlying this doctrine can be traced from Roman Law through

detailed historical work on Roman law, however, has suggested that this statement from *The Institutes* was more aspiration than description. In practice, the Roman government made a variety of private grants of land under navigable water and associated resources.[16] This dichotomy between broad statements of common rights and actual practice of individual ownership continued in England's early common law.

Legal commentators have generally attributed the advent in English common law of the concept of public rights in navigable waters to Bracton's mid-thirteenth century treatise *On the Laws and Customs of England*.[17] In his treatise, Bracton relied on *The Institutes* for the suggestion that at common law the sea and seashore were common to all.[18] That Bracton's statement of the law, like *The Institutes* themselves, reflected what he thought the law should be rather than the actual state of the law is made clear in British barrister Stuart Moore's exhaustively researched 1888 treatise entitled *A History of the Foreshore*.[19] In fact, most of the foreshore[20] had been granted away by the crown,[21] and grants of several,[22]

Magna Carta to present day decisions."); McCurdy, *supra* note 13, at 685-86; Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 1995 ECOLOGY L.Q. 541, 544-45; Michael Blumm & Thea Schwartz, *Mono Lake and the Evolving Trust in Western Water*, 37 ARIZ. L. REV. 701, 713 (1995) ("The trust doctrine's common law origins can, in fact, be traced back to medieval England and ultimately to Roman law. Consequently, there are sound historical and conceptual reasons for grounding the public trust in common law.") (footnote omitted).

16. *See* Deveney, *supra* note 12, at 21-33. *See also id.* at 29 ("In actuality, *the sea and the seashore were 'common to all' only insofar as they were not yet appropriated to the use of anyone or allocated by the state.*") (emphasis in original); *id.* at 32-33 ("[T]here were no restraints whatever imposed by law on the power of the sovereign to convey public lands, including the sea and seashore."). Interestingly, Deveney suggests "that Roman law did contain a presumption that grants made by the state which operated to the detriment of the general public in their use of public ways . . . were to be strictly construed by the courts to avoid such detriment as far as possible." *Id.* at 32.

17. *Id.* at 36; Lazarus, *supra* note 2, at 635. *See generally* 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans., 1968).

18. H. BRACTON, *supra* note 17, at 39-40.

19. *See* STUART A. MOORE, A HISTORY OF THE FORESHORE 31-33 (3d ed. 1888); *id.* at 31 ("when dealing with high generalities . . . [Bracton] copies from the Roman law, but when dealing with concrete matters he draws his authorities from the records of the English courts."). Relying primarily on Moore, others have reached the same conclusion about Bracton. *See* Deveney, *supra* note 12, at 36-38 ("The tension between what Bracton obviously felt was the natural law and what was the law then obtaining in England is clear."); Lazarus, *supra* note 2, at 635 ("practice appears to have departed from pronouncement").

20. The "foreshore" is the land between the high and low water marks of the tide. Discussing the foreshore in English common law is essentially the equivalent of discussing land under navigable waters in the United States because in England, the term navigable waters had application almost exclusively to the those waters which ebbed and flowed with the tide, i.e., those waters over the foreshore. *See supra* note 4.

21. S. MOORE, *supra* note 19, at 24, 27, 28, 33, 108, 169. To say that the foreshore had been granted by the crown is not to say that the crown made a variety of separate grants to the foreshore. Rather, at early common law, the grants of the crown of the neighboring uplands generally included the adjacent foreshore. Prior to the Norman conquest in 1066 A.D., the territorial grants of Anglo-

private, fisheries were the rule rather than the exception.[23] Thus, contrary to the notion now so frequently expressed in American cases that the crown held title to the land under navigable waters in trust for the people,[24] the early common law indicates the opposite conclusion: the crown had granted most of the foreshore in severalty.[25]

Saxon kings included the foreshore. *See id.* at 1-12. William the Conqueror then continued this practice, granting church lands with privileges *"in terra et mari, on stronde and on streame." Id.* at 12. Most of the foreshore had been granted out before Magna Charta. *See id.* at 27 (relating that before the end of the reign of King John, the crown "had parted with almost all the sea-coast by grants to its subjects"). But, contrary to suggestions of early American courts reviewing the issue, *see, e.g.*, Arnold v. Mundy, 6 N.J.L. 1, 73-75 (N.J. 1821), and Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842), the crown's grants did not end with Magna Charta. After Magna Charta, the Tudor and Stuart sovereigns continued to grant any foreshore they were able to reacquire through forfeiture or attainder. S. MOORE, *supra* note 19, at 662.

22. The use of the term "several" to describe a private fishery appears to date from the time of Bracton when the term "several fishery" was "used to indicate a fishery owned exclusively by one person, in which no other had a right to fish in common." S. MOORE & H. MOORE, THE HISTORY AND LAW OF FISHERIES 37 (1903).

23. S. MOORE, *supra* note 19, at 908-15 (listing a vast number of private fisheries and concluding that "[t]he true fact is, as can be shewn from the records, that all, or almost all, tidal rivers and estuaries were in ancient times, and where the right still remains valuable still are, covered by several fisheries in the hands of the subject"). *See also* S. MOORE & H. MOORE, *supra* note 22, at 52.

24. The first suggestion of a "trust" responsibility for the crown came in an 1821 New Jersey Supreme Court opinion, *Arnold v. Mundy*, 6 N.J.L. 1, 70 (N.J. 1821), which is discussed *infra* at Part III.C. The "trust" language of *Arnold v. Mundy* was repeated by the United States Supreme Court in *Martin v. Waddell's Lessee*, and enshrined in *Illinois Central* and later state public trust decisions. *See infra* Parts IV, VII, and VIII.

25. Although a grant of the foreshore was understood to include only the *jus privatum* and not the *jus publicum*, *see* S. MOORE, *supra* note 19, at 33, the *jus publicum* retained by the crown was not the broad concept of public rights so often articulated by modern courts where the use of the word *jus publicum* has become little more than conclusory shorthand for finding that a certain stick in the bundle has public value and is subject to a public trust. *See, e.g.*, Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) (stating that the *jus publicum* includes the right of navigation together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters)(citation and internal quotations omitted). The *jus publicum* was merely the common right to navigation. Deveney, *supra* note 12, at 46; JOSEPH ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOILS AND SHORES THEREOF 101 (1826) (republished by Fred B. Rothman & Co. 1983). That the *jus privatum* included both ownership of the soil and ownership of those resources associated with the foreshore is made clear by the common grants of several fisheries. *See* S. MOORE, *supra* note 19, at 908. Such fisheries could be granted with the soil or separately. *See* ROBERT G. HALL, AN ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA-SHORES OF THE REALM (3d. ed. 1875), *reprinted in* S. MOORE, *supra* note 19, at 744-45 n.(n) ("In the tidal water the Crown might grant the fishery to one and the soil to another, or might grant the soil without the fishery, or the soil and the fishery *uno flatu* to one alone; but in every case it must be a *question of evidence* as to what the Crown did grant.") (emphasis in original); ANGELL, *supra* at 106. *See also* S. MOORE & H. MOORE, *supra* note 22, at 26, 35, 57, 63 (arguing that while fisheries could be granted separately, most several fisheries existed as an incident of ownership of the soil, i.e., as a corporeal hereditament). As long as the owner's use of the *jus privatum* did not interfere with navigation, i.e., create a purpresture, he was free to act. MATTHEW HALE, DE JURE MARIS, *reprinted in* S. MOORE, *supra* note 19, at 389.

While the fishery was not part of the *jus publicum*, in places Moore does loosely describe the *jus publicum* as including "the right of public fishery when it has not been excluded." S. MOORE,

By the time of the American Revolution, however, the understanding that the crown had granted most of the foreshore had been replaced with a different concept: what has been called the prima facie theory. Under that theory, the crown was presumed to own and never to have parted with the foreshore or fishery. An individual could acquire title to the foreshore or its associated resources by custom, prescription, or grant, but the foreshore was prima facie in the crown and would remain the crown's absent express proof. This change in the common law from the understanding that the crown had granted the foreshore, to a legal presumption that the crown still owned the foreshore, is the central focus of Moore's treatise,[26] and an interesting story.

B. The Development of the Prima Facie Theory

In an effort to augment the Exchequer's purse and to maintain power, the crown had continually made claims concerning purprestures, encroachments, and usurpations of its royal rights and prerogatives.[27] The crown had also variously sought to require forfeiture of lands previously granted.[28] Such efforts were often augmented by the work of so-called "title-hunters" who searched up and down the land for title defects, encroachments upon the royal prerogative, and forfeitable land allegedly concealed from the crown.[29] Prior to the reign of Queen Elizabeth I, however, the crown had not made claims to ownership of the foreshore as part of the sovereign prerogative, but only in those situations where the

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supra note 19, at 654. Such a statement contradicts the generalization that the *jus publicum* could not be alienated by suggesting that the *jus publicum*, or at least any fishery portion of the *jus publicum*, was only presumptively public but still subject to grant. *See* Rosen, *supra* note 12, at 567 & n.37 ("unlike the freedom to navigate in tidal waters, which was absolute, public fishing rights were only presumptive and did not apply in areas where either the king or an individual had acquired an exclusive right"). Moore's use of the term *jus publicum* is only one further example of the relative inadequacy of deciding what the sovereign can and cannot convey by labeling a grant as part of the *jus privatum* or *jus publicum*. A court interested in an accurate determination of what public resources can be conveyed in severalty should look at whether the particular resource was subject to conveyance at the time of the grant instead of identifying the general common law principle that the *jus publicum* could not be conveyed and then labeling as *jus publicum* whatever resource it fancies as appropriate for common ownership.

26. *See* S. MOORE, *supra* note 19, at xxvii-xxviii (explaining that the treatise was written "with a view of setting forth the true history of the commencement and growth of the theory of the *prima facie* title of the Crown to the foreshore . . . "). In criticizing the prima facie theory as an invention, Moore emphasized that he did not consider the theory to be bad law. *Id.* at xxviii. Moreover, he thought that the prima facie theory was a useful one to apply to any of the foreshore that remained in the crown. *Id.* at xxix.

27. *Id.* at 169.

28. *Id.* at 169-79. During the Reign of Henry VIII, for example, there was a constant stream of forfeitures of estates of subjects charged with treason and of monastic lands. *Id.* at 169.

29. *Id.* at 170-79.

foreshore was adjacent to one of the crown's own manors.[30] Some 10-11 years into Elizabeth's reign, however, this changed. Thomas Digges, a lawyer and courtier of Elizabeth published a tract titled *Arguments prooving the Queenes Majesties propertye in the Sea Landes, and salt shores thereof, and that no subject cann lawfully hould eny parte thereof but by the Kinges especiall graunte.*[31] As suggested by the title, Digges' tract was the birth of the prima facie theory.[32] Citing Bracton and others, he argued that no man could hold property in the seashore, and for that reason, the seashore must be the king's by his royal prerogative, unless the king manifestly approved private ownership in a specific subject.[33]

Despite persistent efforts by Digges and Elizabeth, their prima facie theory was not accepted by the courts.[34] Undaunted, the crown continued to assert prima facie ownership and had its first success in 1632 during the reign of Charles I in the dubious decision of *Attorney General v. Philpott.*[35] It was not until approximately 1666, however, that the prima

30. *Id.* at 169.

31. *See* T. Digges, *Arguments prooving the Queenes Majesties propertye in the Sea Landes, and salt shores thereof, and that no subject cann lawfully hould eny parte thereof but by the Kinges especiall graunte*, *in* S. MOORE, *supra* note 19, at 185-211.

32. Both Elizabeth I and Digges purposed to benefit from this theory which set up a claim by the crown not only to the foreshore but also to reclaimed land and salt marsh. S. MOORE, *supra* note 19, at 182. In the wake of Digges's tract, Elizabeth commissioned him to inquire into various foreshore ownerships, for example "whether do ye knowe any Mannors, Landes, tenements, Medowes, pastures, fedynges or other heredytaments whatsoever within or adjoyninge to the Countye of Kente at any tyme heretofore covered or surrounded with the salte water or the Sea ye or no, or landes which the sea or salt water hathe lefte drye and forsaken?" *Id.* at 212. In responding, Digges suggested that practically the whole of the shore of the county of Kent belonged to the crown, and Elizabeth rewarded him with a grant of certain foreshore in Kent "which should be revealed and found out." *Id.* at 214-15. *See generally* MacGrady, *supra* note 12, at 559-60 (describing the manner in which title hunters like Digges were compensated).

33. *See* T. Digges, *in* S. MOORE, *supra* note 19, at 187 ("For yt is a sure Maxime in the Common Lawe that whatsoever lande there is within the kinges dominion whereunto no man cann justly make propertye yt is the kinges by his prerogatiue. But the same maye thus bee manifestly approoued."); *see also id.* at 190 ("Yt maye be farder alledged a greate noomber in this realme haue of the salt shore, and thinck they haue as good propertye in yt as in enye other of their lande or inheritance. I answere, true yt is, a greate noomber in this Realme possesse part thereof, and hould yt iustly, for they haue yt by pattent from the prince as they haue wracks faulling against their Lordshippes also, but whosoever hould yt otherwyse then by the princes graunte, they intrude . . . "). As Moore points out, a more factually accurate presumption would have been the opposite: "There is a presumption under the theory, *not* that only a small portion of the foreshore has been granted out, but a presumption that *scarcely any of the foreshore remains in the Crown.*" *Id.* at 650 (emphasis in original).

34. S. MOORE, *supra* note 19, at 215-24. *Id.* at 242 ("Throughout the reign of Elizabeth numerous commissions were issued out of the Exchequer to inquire concerning . . . lands gained from the sea, the claim of the Crown to such lands being pushed to the uttermost . . . . So far as we can trace, . . . there appears to be no decree or judgment in favour of the Crown in any one case.").

35. *See Attorney Gen. v. Philpott*, 145 Eng. Rep. 895-907 (Ex. 1795), *in* S. MOORE, *supra* note 19, at 895-907. *See generally id.* at 262-81. The decision in *Philpott* was dubious authority for

facie theory took real root, and even then, it did not begin to flourish for another century. The catalyst for the theory's acceptance was Lord Chief Justice Hale's famous treatise *De Jure Maris et Brachiorem Ejusdem* (Concerning the Law of the Sea and its Arms), written around 1666 but not published until 1786.[36]

Hale's work wholly adopted the prima facie theory of Digges: "the shore of the sea doth *prima facie* belong to the king, viz. between the ordinary high-water and low-water mark, . . . though it may also belong to a subject . . . ."[37] Hale, of course, mustered only

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the prima facie theory given Charles's well known abuses of the prerogative. Indeed, included in the Long Parliament's Grand Remonstrance, which was a precursor to the Great Rebellion and Charles I losing his head, was a complaint against Charles I in Article 26 for the "taking away of men's right under colour of the King's title to land between high and low water marks." S. MOORE, *supra* note 19, at 310. Article 47 also complained "that the Common Law Courts, seeing all men more inclined to such justice there where it may be fitted to their own desires, are known frequently to forsake the rules of the common law and strain beyond their bounds upon pretence of equity to do injustice." *Id.* *See* MacGrady, *supra* note 12, at 562 (further describing the Grand Remonstrance). The judges who decided the *Philpott* case were later impeached by the House of Lords. *See id.* at 563.

36. Hale's treatise was written in approximately 1666, *see* S. MOORE, *supra* note 19, at 317, but it was not published until 1786 when Francis Hargreaves published it as part of his *Law Tracts*. *See* 1 F. HARGREAVES, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (1786). Hale's treatise is reprinted in S. MOORE, *supra* note 19, at 370-413. Moore's treatise also reproduces Hale's initial draft, titled *A Narratiue Legall and Historicall Touchinge the Customes*. *Id.* at 319-69. Hale's *De Jure Maris* is also republished in R. HALL, AN ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM (2d rev. ed. 1875). Moore relates that "Lord Hale's statement of the theory has ever since his time been looked upon as the 'law taken for granted' and the theory has been stated in varying language by judge after judge from that time to the present day . . . ." S. MOORE, *supra* note 19, at xxxii. *See also* Rosen, *supra* note 12, at 568 & n.43. It is somewhat unclear whether the prima facie theory took hold in 1670, about the time that Hale was writing, or whether it took hold following the publication of Hale's treatise in 1786. *Compare* S. MOORE, *supra* note 19, at 574 (stating that the theory had been "accepted" since 1670) *with* S. MOORE, *supra* note 19, at 414-433 and MacGrady, *supra* note 12, at 565 (suggesting that it was some nine years after the publication of Hale's treatise, in 1795, that English courts finally and firmly adopted the prima facie theory in *Attorney Gen. v. Richards*). The confusion about when the prima facie theory was adopted in England is not particularly crucial for its influence on American law because either date is prior to the primary American cases and commentary. The confusion over the date of acceptance of the prima facie theory may result, in part, from a failure to distinguish foreshore cases from fishery cases. While the 1795 decision in *Attorney Gen. v. Richards* may have been the first to firmly decide that the foreshore was prima facie in the crown, earlier decisions had articulated that the prima facie theory applied to the fishery. Thus, in *Carter v. Murcot*, 14 Burrow's Rep. 2162, 2164 (1768), *reprinted in* ANGELL, *supra* note 25, at App. 32-35, Carter brought an action in trespass against Murcot for entering what Carter claimed to be an exclusive fishery. While Lord Mansfield recognized the several fishery and gave judgment for Carter, he stated the law that

> in *navigable* rivers, the *proprietors of the land* on each side have it *not*; the *fishery is common*: it is, *prima facie*, in the *king*, and is *public*. If any one claims it *exclusively*, he must *shew a right* . . . . Here it is claimed, *and found*. It is therefore consistent with all the cases, "that he *may* have an exclusive privilege of fishing, although it be an arm of the sea." Such a right shall not be *presumed*; but the contrary, *prima facie*: but it is *capable of being proved*; and must have been so in the present case.

Id. at App. 34 (emphasis in original).

37. *De Jure Maris*, *in* S. MOORE, *supra* note 19, at 379. Hale made clear that this same prima

slight precedent to support the rule that the foreshore was prima facie in the crown,[38] but he provided ample support for the exception that an individual may have a private right either to the foreshore or a fishery by grant or prescription.[39] Whatever the precedent supporting the prima facie theory, following the publication of *De Jure Maris*, the prima facie theory became the undisputed common law in England,[40] and was to have a profound effect on the work of courts and commentators in the newly formed United States.

III. THE INCORPORATION OF THE PRIMA FACIE THEORY INTO THE EARLY COMMON LAW OF THE UNITED STATES

A. *Early Courts and Commentators' Adherence to the Prima Facie Theory*

The influence of *De Jure Maris* on the American common law was every bit as great as its influence on the English common law. Writing in the early part of the nineteenth century on sovereign ownership of land under navigable water, influential treatise writers Joseph Angell and James Kent both accepted as gospel the prima facie theory of *De Jure Maris*. Angell, who in 1826 published the first American treatise on rights to tidelands and the fishery,[41] relied on Hale to incorporate the

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facie rule applied to the fishery:

> But though the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.

Id. at 377. *See also* S. MOORE & H. MOORE, *supra* note 22, at 98 ("It is therefore now settled law that the right of the public to fish depends upon the water being tidal and not comprised within the limits of any several fishery. This is founded on the theory that the soil of the sea and tidal water up to the flow of the ordinary tides, . . . is *prima facie* vested in the Crown, and the right of the public is co-extensive with and depends upon the limit of the *prima facie* right of the Crown to the soil covered by the tidal water."). *See id.* at 107.

38. *See supra* notes 27-36 and accompanying text, discussing the lack of acceptance of the prima facie theory, other than in the *Philpott* case, prior to Hale's advancement of the doctrine. Given the paucity of authority for the prima facie theory, Hale's commitment to it is rather perplexing. Perhaps his prior advocacy for the prima facie theory as counsel for the crown, *see* S. MOORE, *supra* note 19, at 310-312, is a partial explanation for his attachment.

39. *De Jure Maris*, *in* S. MOORE, *supra* note 19, at 384-86.

40. *See* Bagott v. Orr, 2 Bosanquet & Puller's Rep. 472, (1801), *reprinted in* ANGELL, *supra* note 25, at App. 20, 26 ("One may have a manor, and another the right of fishing in the water; but if a man would claim a right of fishing in the water of another, the proof of the right lies upon him."); Rogers v. Allen, 1 Camp. Rep. 309 (1808), *reprinted in* ANGELL, *supra* note 25, at App. 136-40. *See generally* MacGrady, *supra* note 12, at 550-51 (citing the nineteenth century English treatise writers who adopted the prima facie rule as articulated by Lord Hale).

41. *See* ANGELL, *supra* note 25. Angell's treatise was expanded for a second edition in 1847.

prima facie theory in his description of the common law.[42] Like Hale, Angell noted that although the foreshore was prima facie in the sovereign, it could be acquired by an individual by custom, prescription, or grant.[43] Writing during the same time frame, Kent, considered by many as the leading authority on the early American common law,[44] stated:

> It is a settled principle in the English law, that the right of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to the high-water mark; and the shore below common, but not extraordinary high-water mark, belongs to the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private property.[45]

According to Kent, therefore, the prima facie theory had crossed the sea and the only difference was who constituted the sovereign. In England, the sovereign was the crown, whereas in the United States, the sovereign is the people. Thus, in England, the foreshore and the fishery were prima facie in the crown, absent a conveyance by the crown; in America, land under navigable water and the associated resources were prima facie in the people, absent a grant by the people through their state legislature.

Kent's equating of the state legislatures' power to the power of the crown sowed the seeds for potential confusion, however, because it failed to recognize that a state legislature was heir to the sovereignty of not only the crown but also the Parliament.[46] The failure to recognize the states' sovereign inheritance from Parliament does not create particular confusion

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See MacGrady, *supra* note 12, at 547.

42. *See* ANGELL, *supra* note 25, at 20-24, 105.

43. *See id.* at 22-23, 96, 101; *see also id.* at 105 ("although it is an incontrovertible principle of the common law, that the fishery in the sea, &c. is, *prima facie*, public to high-water mark, yet as has been shewn, this right may be abridged by the existence of an exclusive right in some individual"). Following Hale, Angell noted that the *jus publicum* did not include the fishery or title to the soil of the foreshore but was limited to navigation:

> Piscarial rights, of whatever nature, and in whatever manner acquired, are always subservient to the rights of the public, that is to the right of navigation. "For the *jus privatum*," (says lord Hale,) "that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected for public use."

Id. at 93-94 (citations omitted); *see also id.* at 100-01 (equating the *jus publicum* with the right of navigation and regulation by the sovereign).

44. *See* MacGrady, *supra* note 12, at 548-49.

45. *Id.* at 548 (quoting 3 J. KENT, COMMENTARIES ON AMERICAN LAW 344 (1828)). Kent's four volume work went through some 14 editions and was last published in 1896. *Id.*

46. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 15 (1894); Langdon v. Mayor of New York, 93 N.Y. 129, 155 (1883) ("In this country the State has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them . . .").

as long as the prima facie theory is understood to allow the crown to grant land under navigable water. However, with the advent of the notion, discussed below,[47] that the crown was obligated to hold land under navigable water in trust for the people and could not grant such land, equating a state legislature's powers solely to the crown's becomes problematic.

It is a problem because, whatever doubts the prima facie theory sowed about the crown's power to convey land under navigable water, there was never an impediment on Parliament's authority to grant such lands. Parliament, as the representative of the people, was free to alienate the foreshore and the fishery if it believed such alienation to be in the public's interest.[48] Thus, as long as courts recognized the crown's authority to make explicit grants of the foreshore and the fishery, there was no need to distinguish between crown and Parliament, and no need to focus on the distinctive sovereignty inherited from crown and Parliament by the original 13 states. Once the crown's authority to grant land under navigable water was questioned, determining the sovereign inheritance of the original 13 states re-

47. *See infra* Parts III.C. and VII.

48. *See, e.g.*, ANGELL, *supra* note 25, at 107 ("[I]t will not be denied, that parliament is vested with the power of alienation . . . . If the public right of fishery then, in an arm of the sea, is subservient to the will and power of parliament in England, it must, on the same principle, be subservient to the will and power of the legislatures in this country. There can, in fact, be no question but that the legislative power may destroy a common right, by prohibiting the use of it entirely, or by converting it into an exclusive right . . . . The legislature, in fact, are the public, and no one can deny the authority of the public to relinquish what belongs to them, without at the same time denying that it does belong to them."); Gough v. Bell, 22 N.J.L. 441, 457-58 (1850), *aff'd*, 23 N.J.L. 624 (1852); Rex v. Montague, 107 Eng. Rep. 1183 (K.B. 1825); ALLEN S. WISDOM, THE LAW OF RIVERS AND WATERCOURSES 63 (3d ed. 1970); Langdon v. Mayor, 93 N.Y. 129, 155 (1883) ("In England, Parliament had complete and absolute control over all the navigable waters within the kingdom. It could regulate navigation upon them, could authorize exclusive rights and privileges of navigation and fishing, could authorize weirs, causeways and dams for private use to be constructed in them, and could interrupt and absolutely destroy navigation in them."); HUMPHREY W. WOOLRYCH, A TREATISE ON THE LAW OF WATERS 274 (1853) (same); Deveney, *supra* note 12, at 50 ("Despite these restrictions on the king's power to alienate Crown lands and the gradual recognition that such lands were in some ways 'public,' there has never been a doctrine of public trust in England. What the king alone might not be able to do after 1701 has never been beyond the power of the king and Parliament together to do, or beyond the power of Parliament alone."); 1 HENRY P. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 213 (1904) ("There were no limitations upon the right to grant several fisheries, because the limitation which existed upon the power of the Crown was effected simply by transferring the power to Parliament, and the states had succeeded to all the power of Parliament."); Rosen, *supra* note 12, at 569 (suggesting that the "rights of navigation and fishery . . . could only be conveyed by Parliament"). Clearly, attributing to the early English Parliament status as a representative of the entire populace leaves much to be desired as a description of reality. Nevertheless, the theory underlying parliamentary democracy and the common law was that Parliament was representative of the people.

quired an investigation of Parliament's power as well as that of the crown.[49] Unfortunately, courts have generally failed to undertake this investigation. They thus assert that the crown, contrary to its historical practice, could not, or should not, grant land under navigable water and then compound their error by equating a state legislature's obligations with those erroneously attributed to the crown.[50]

Kent and Angell's conclusion that the prima facie theory had crossed the sea was amply supported by the early common law decisions in the new states. Often citing to Hale's *De Jure Maris*, state courts consistently reiterated the principle that land under navigable water was prima facie in the state as sovereign but was capable of conveyance.[51] Like their English counterparts, the American courts reviewed claimed grants to determine whether the legislature had plainly intended to make a grant.[52]

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49. A separate investigation of the sovereign inheritance from Parliament would reveal that Parliament had the authority to alienate not only the *jus privatum* of rights in the foreshore and the fishery but also the *jus publicum* of rights in navigation. *See* Rosen, *supra* note 12, at 571 & n.64 (quoting *Langdon*, 93 N.Y. at 155); WOOLRYCH, *supra* note 48, at 272 ("It was never doubted that an act of Parliament would operate to extinguish any public right of passage . . . "). While each state inherited Parliament's right to convey navigational rights, the right to control navigation was given up to the federal government under the Constitution. *See* United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926).

50. *See, e.g.*, *Utah Div. of State Lands*, 482 U.S. at 195-96; *Mono Lake*, 658 P.2d at 718.

51. *See, e.g.*, Commonwealth v. Inhabitants of Charlestown, 18 Mass. (1 Pick.) 180, 182 (Mass. 1822) (citing Hale for the prima facie rule), *reprinted in* ANGELL, *supra* note 25, at App. 48-58; Peck v. Lockwood, 5 Day 22 (Conn. 1811) (citing Lord Hale and Lord Mansfield and asserting that "a man may have an exclusive privilege of fishing in an arm of the sea; but such right is not presumed; it must be proved."), *reprinted in* ANGELL, *supra* note 25, at App. 116-23; Brink v. Richtmyer, 14 Johns. 255 (N.Y. 1817) (citing Hale and applying the prima facie theory to conclude that the grant at issue did not show "an intention in the government to grant any fishery"), *reprinted in* ANGELL, *supra* note 25, at App. 29-32; Palmer v. Hicks, 6 Johns. 133 (N.Y. 1810), *reprinted in* ANGELL, *supra* note 25, at App. 123-25; Arundel v. M'Culloch, 10 Mass. (1 Tyng) 70 (1813), *reprinted in* ANGELL, *supra* note 25, at App. 96-98; McKenzie v. Hulet, 4 N.C. 578, 580, Taylor's N.C. Reports 613, 614 (1817) ("The right of taking fish in the sea . . . belongs to every one as a common of Piscary; but even this may be restrained, where an individual hath gained exclusive property. Hale, de Jure Maris, 11. And this may be acquired by grant or prescription, Ibid 43; but it being considered as a royalty, it would not pass without special and express words."); Palmer v. Mulligan, 3 Cai. R. 307, 317 (N.Y. Sup. Ct. 1805); Bailey v. Philadelphia, W. & B. R. Co., 4 Del. (4 Harr.) 389 (Del. 1846). The reporter's note to *Ex Parte Jennings*, 6 Cow. 518 (N.Y. 1826) well illustrates courts' adherence to the principles laid down in *De Jure Maris*:

> The treatise of sir *Matthew Hale, De Jure Maris* has been so often recognized in this country, and in *England*, that it has become the text book, from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water . . . . In *England*, even on rights of prerogative, the courts scan his words with as much care as if they had been found in *Magna Charta*; and the meaning, once ascertained, they do not trouble themselves to search any farther.

Id. at 536 n.(a). *See generally* MacGrady, *supra* note 12, at 550-51 (discussing the "preeminent esteem" in which Hale and his treatise were held).

52. *E.g.*, Brink v. Richtmyer, 14 Johns. 255 (N.Y. 1817), *reprinted in* ANGELL, *supra* note 25, at App. 29-32; Chalker v. Dickinson, 1 Conn. 382 and 510, 6 Am. Dec. 250 (Conn. 1815), *reprinted in*

B. *The Greater Validity of Applying the Prima Facie Theory in the American Situation*

The early courts and commentators' incorporation of the prima facie theory into American law was justified by more than adherence to English precedent. The presumption of prima facie ownership by the state was more appropriate in the new American situation because rather than presuming ownership in the crown for purposes of augmenting the royal purse, the prima facie theory in America presumed ownership on behalf of the people. Thus, the prima facie theory's recognition that the foreshore could be granted was more compelling because the sovereign doing the granting was the people themselves, through their legislature, for an alternative public benefit, rather than the crown for its own purposes. Admittedly, the presumption of crown ownership ultimately was justified as necessary for the crown to fulfill a trust obligation to the people and not simply to fill its coffers,[53] but in America, no such post hoc apology for the prima facie theory was necessary. The presumption of sovereign ownership of *public* resources made immediate sense because the people themselves, through their legislature, were sovereign.

Adopting the prima facie theory's presumption of state ownership also made more sense in America because it coincided more closely with factual circumstances in the new United States. Whereas in England the presumption of crown ownership flew in the face of the crown's vast grants of the foreshore and fishery, in America the presumption in favor of state ownership reflected the reality that the sovereign states were more

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ANGELL, *supra* note 25, at App. 74-83; City of East Haven v. Hemingway, 7 Conn. 186, 199 (Conn. 1828) (public rights may be conveyed but only with "words so unequivocal, as to leave no reasonable doubt concerning the meaning"). *See generally* 1 FARNHAM, *supra* note 48, at 217-25 (citing variety of cases applying the prima facie rule to grants of tidelands). Despite such cases, some have suggested that Angell, Kent and early American jurists changed the prima facie rule from an evidentiary presumption that title was in the sovereign into an absolute rule that the sovereign owns all lands underlying navigable waters. *See, e.g.*, Rosen, *supra* note 12, at 569-70; MacGrady, *supra* note 12, at 567-68. This argument seems incorrect. The premise underlying the prima facie theory is that at one point the crown owned all the foreshore. The presumption is applied to determine whether the crown intended to alienate a portion of its ownership. To state, as did early jurists and commentators, that the state owned all lands underlying navigable waters was not to do away with the prima facie theory. It was to state the precondition for application of the theory. Once decided that the state, as sovereign, owned its land under navigable water, the prima facie rule still governed the decision whether a claimed grantee had acquired title from the state. The sense in which the English evidentiary presumption became an American rule of law was with respect to the ownership of landowners adjacent to non-navigable streams. In America, such owners were automatically allocated title to the mid-point of non-navigable streams. *See generally* Deveney, *supra* note 12, at 54.

53. *See infra* notes 77, 105-08 and accompanying text (describing advent of notion that the purpose of the prima facie theory was to locate ownership of overflowed lands in the crown as trustee for the people rather than as part of the royal prerogative).

reluctant to part with public resources.[54] An excellent illustration of this coincidence between legal presumption and factual reality is in the early state laws relating to ownership of oyster beds.[55] Those laws exhibit that, in conformance with the premises underlying the prima facie theory, state legislatures fully understood that both the foreshore and the fishery could be conveyed into severalty, but they were cautious and sparing in granting away the public's resources.[56]

During the early years of the republic, the oyster industry was an important contributor to the economy along the eastern seaboard.[57] Oystermen "fished" for oysters by taking them from the large natural oyster reefs or banks that formed along the coast and selling them into markets. Oystermen were not simply fishermen, however. Many were also farmers.[58] In some cases, oystermen kept a portion of their catch and spread it out on adjacent tidelands to grow and fatten. Once the oysters were spread out and marked with stakes, the oystermen might tend their crop by such activities as breaking oyster clusters to improve their shape and marketability or removing predators such as starfish.[59] Oystermen would also work to start oyster crops

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54. Of course, various states conveyed riparian rights for purposes of wharfing out and other development, but such grants were generally still subject to a public right of navigation and fishery. *See generally* Shively v. Bowlby, 152 U.S. 1, 18-26 (1894) (reviewing variety of state laws); 1 FARNHAM, *supra* note 48, at 207-12 (setting forth doctrine of American states as to ownership of shores).

55. The author was introduced to early state shellfish laws as counsel to a group of Washington shellfish farmers known as the Puget Sound Shellfish Growers. The author represented the Growers in litigation disputing the treaty shellfish harvesting rights of western Washington Indian tribes. *See* United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994), *appeal docketed*, No. 96-35014, 96-35082, 96-35142, 96-35196, 96-35200, 96-35223 (9th Cir. Feb. 20, 1996).

56. The early laws on ownership of natural oyster beds are also a useful example because they show the early understanding about a state's ability to alienate not only title to land under navigable waters but also the resources associated with that land. They illustrate that if only the *jus privatum* could be conveyed by the sovereign, the fishery must have been considered part of the *jus privatum*. Alternatively, if the fishery was in fact part of the *jus publicum*, a so-called "common of piscary," then the *jus publicum* was understood to be alienable by the legislature, except for the navigation servitude pledged to the United States in the Constitution. U.S. CONST. art. I, § 8.

57. An 1853 article in the New York Herald relates that over 50,000 people were employed in the oyster industry in the vicinity of New York and observes that the industry was one in which "every person feels an interest . . . ." *The Oyster Trade of New York*, NEW YORK HERALD, March 12, 1853. The discovery of a new oyster bed in New York waters made the front page of the New York Times in 1859. *The Great Oyster Bed*, N.Y. TIMES, Oct. 3, 1859, at 1.

58. For a discussion of the nineteenth century oyster industry, see generally ERNEST INGERSOLL, THE HISTORY AND PRESENT CONDITION OF THE OYSTER INDUSTRY (1881); PAUL DEBROCA, ON THE OYSTER-INDUSTRIES OF THE UNITED STATES (1876); H.F. MOORE, OYSTERS AND METHODS OF OYSTER-CULTURE (1900); ERNEST INGERSOLL, THE OYSTER, SCALLOP, CLAM, MUSSEL AND ABALONE INDUSTRIES (1887); WILLIAM K. BROOKS, THE OYSTER (1891).

59. *See generally* H.F. MOORE, *supra* note 58, at 314 ("The oyster-growers of Long Island Sound, who have had more experience in fighting starfish than those of any other section, find that eternal vigilance is the price which they must pay for even the comparative safety of their beds."); *id.* at 313 ("Even if the oysters are to be left upon the spatting-bed, it is often better to work over the

from scratch by "cultching." Cultching included a variety of methods designed to catch floating shellfish larvae, the most common of which was to spread out on tidelands empty oyster shells or shell fragments on which the floating oyster larvae could catch and begin to grow.[60]

With the growth of the oyster industry, the question of what tidelands should be made available for oyster cultivation became a significant issue. Specifically, the question the states faced was whether to convey to oystermen private rights to exploit and farm existing natural oyster banks or whether such natural beds should remain in the public fishery.[61] In the first half of the nineteenth century, most states provided by legislation that tidelands without commercially significant quantities of naturally existing oysters—i.e. tidelands without a natural bed—could be leased or purchased for oyster cultivation but that tidelands with a natural bed could not be purchased or leased and would remain part of the public fishery.[62] Other states, however, infrequently granted or leased to private parties tidelands containing natural oyster beds,[63] although the practice became

ground during the first year, removing the debris and breaking up the clusters of young oysters, so as to insure a greater survival and superior shape."); INGERSOLL, THE OYSTER, SCALLOP, CLAM, MUSSEL AND ABALONE INDUSTRIES, *supra* note 58, at 545; BROOKS, *supra* note 58, at 108.

60. *See generally* H.F. MOORE, *supra* note 58, at 296-97, 305 ("By these terms [cultch, collectors, stool] is understood any firm and clean body placed in the water for the purpose of affording attachment to the spat or young oyster. A great variety of objects have been suggested and used for this purpose, both here and abroad . . ."); BROOKS, *supra* note 58, at 111 ("At present no spat-collector seems to be better adapted for use in our waters upon hard bottoms than oyster shells, and they are now the cheapest collectors that can be used.").

61. This issue should, of course, be distinguished from the issue whether the state had the power to privatize natural oyster beds. On this question there was no dispute. A state was free to grant a right to an exclusive fishery free of any public participation in that fishery.

62. An Act to Encourage and Protect the Planting of Oysters, 1849, Ch. 142, § 1, 1849 Me. Acts 124, 125 (allowing oystermen to mark with stakes and claim certain tidelands to "lay down or plant oysters, below low water mark" but not allowing oystermen to "stake off or enclose any natural oyster bed"); An Act for the Protection of Persons Who Have Planted Oysters in the Navigable Waters of this State, § 3 1821 N.J. Laws 21 (same); Act of June 13, 1845, ch. 45, §§ 43-44, 1845 Conn. Pub. Acts 399, 400 (same); An Act Relative to the Fishery in Certain Waters, ch. 62, § XI, 1813 N.Y. Laws 240 (making it unlawful to stake off certain oyster beds "until the sense of the legislature shall be otherwise declared"); An Act Concerning Oysters and Terrapins and the Penalties in Regard to Them, 1847 Va. Acts ch. 86 § 14 (same); An Act Concerning the Planting of Oysters, ch. 152, § 1, 1848 Mass. Acts 88 (same).

63. For example, Rhode Island, in 1844, created a committee of three persons to serve as state shellfish commissioners. They were given the authority to "lease to such person or persons, for a term not less than five, nor more than ten years in duration, *any* piece of land covered by the public waters of this State . . . as a private or several oyster ground or oyster fishery, for the planting of oysters . . . ." An Act for the Preservation of Oysters and Other Shell Fish within this State, § 9, 1844 R.I. Acts & Resolves 91, 92 (emphasis added). The statute, however, also instructed the commissioners to inspect any land to be leased and decide "upon the propriety of leasing the same, taking special care not to include in the land so leased, any old oyster bed, or any part of any old oyster bed which in their opinion can for the greater advantage of the public be used as a free and common oyster fishery . . . ." *Id.* § 10. The 1844 Act allowing natural beds to be leased was amended in 1852

more common later in the nineteenth century.[64]

The state oystering statutes illustrate the general understanding in the early states of state ownership of and authority over land under navigable water and the associated resource of the fishery.[65] The states understood that they owned both the land under navigable water and the fishery and that both were freely alienable if the legislature deemed it to be in the public interest.[66] States were relatively quick to grant tidelands without natural shellfish beds because it promoted commerce without diminishing navigation or the public fishery. States, however, were slower to grant fisheries in severalty because to do so was to diminish the public's opportunity to fish. For state courts reviewing a claimed oyster grant, therefore, it made eminent sense to apply the prima facie theory. While a court understood the power of the legislature to grant away the public's resources, a court could

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to prohibit such leasing, *see* An Act in Amendment of an Act Entitled "An Act for the Preservation of Oysters and Other Shell Fish within this State," § 2, 1852 R.I. Acts & Resolves 37, and then re-amended in 1864 to again allow the leasing of natural beds. An Act in Amendment of Chapter 97, Title XVI, of the Revised Statutes, "of Private and Several Oyster Fisheries, ch. 513, § 3, 1864 R.I. Acts & Resolves 162, 163. New Jersey, which generally retained natural beds in the public fishery, likewise allowed in some instances ownership of shellfish embedded in the foreshore. *See* An Act for the Preservation of Clams and Oysters, § 12, 1820 N.J. Laws 759 (prohibiting staking only of natural beds below low water).

While conveyances of natural beds to private individuals were relatively infrequent, states much more often granted control over shellfish beds to coastal towns. *See, e.g.*, ch. 179, § 2, 1821 Me. Laws 891 (delegating authority to the Selectmen of coastal towns to grant permits to take oysters from the town's beds); An Act to Prevent the Destruction of Oysters and Other Shell Fish in This Commonwealth, ch. 129, § 1, 1826 Mass. Acts 209, 210 (same); An Act for the Protection of the Shell Fishery in Ipswich, ch. 64, 1841 Mass. Acts 364 (allowing a town to exclude non-residents from participation in its shell fishery); An Act for Encouraging and Regulating Fisheries, para. 2, 1796 Conn. Pub. Acts 203; An Act for Encouraging and Regulating Fisheries, tit. 35, ch. 1, § 1, 1835 Conn. Pub. Acts 236. Thus, even in those cases where a state ostensibly maintained a common fishery, all state residents did not share uniformly in the resource.

64. Later in the nineteenth century, some states decided to privatize existing natural beds of oysters, and others carefully mapped out choice natural beds while opening depleted natural beds to cultivation. *See* JAMES L. KELLOGG, SHELL-FISH INDUSTRIES 190-205 (1910); *supra* note 63 (discussing Rhode Island's laws); *infra* note 163 (discussing Washington's laws). As supposed by Garrett Hardin's *Tragedy of the Commons*, 162 SCIENCE 1243 (1968), the natural beds, open to all, were being over-exploited and depleted. *See* KELLOGG, *supra* at 176-85; H.F. MOORE, *supra* note 58, at 295.

65. One evidence of the states' understanding that they owned land under navigable water and the shellfish embedded within that land is the various laws passed by states that excluded non-residents of the state from taking any shellfish from state bedlands. *See, e.g.*, An Act Regarding the Taking of Oysters, ch. 116, § 1, 1848 Conn. Pub. Acts; An Act for the Preservation of Oysters, § 5, 1798 N.J. Laws 263. Such acts were found to be constitutional under the commerce clause in *McCready v. Virginia*, 94 U.S. 391, 394-97 (1877).

66. *See generally* 2 FARNHAM, *supra* note 48, at 1433 ("For the most part, the shell fisheries exist on land the title to which is in the public, and the public has, therefore, a prima facie right to enjoy them. This right is subject to regulation by the public itself, or to grants from the public which have placed the title to the beds in private ownership.").

comfortably apply the presumption against such a grant because the states were so sparing in making such grants. As revealed in the shellfish context, the prima facie theory was not simply a sterile rule of construction but an accurate approximation of the way state legislatures acted. It was fair to presume that the legislature would not alienate public resources because the legislature most often did not.

Thus, while early American courts and commentators might be criticized for adopting whole the invented prima facie rule of Digges and Hale, their adoption of the rule can be independently justified for the American situation by recognizing that the prima facie theory was more accurate as a factual description of state treatment of land under navigable water and more compelling because the presumption operated on behalf of public rather than crown ownership.

C. *A Critical Departure from the Prima Facie Theory:* Arnold v. Mundy

In contrast to the variety of early state court decisions and legislative enactments recognizing that land under navigable water was prima facie in the state but was capable of conveyance by the legislature, stands one prominent case—*Arnold v. Mundy*,[67] an 1821 decision by the New Jersey Supreme Court and the progenitor of the modern public trust doctrine. The case arose when Robert Arnold claimed that Benajah Mundy had unlawfully trespassed on his oyster bed and stolen his planted oysters.[68] The primary issue before the court was whether Arnold possessed a valid title to the oystery by virtue of mesne conveyances dating back to a Seventeenth Century royal charter from Charles II, King of England, to his brother, the Duke of York.[69] New Jersey Chief Justice Kirkpatrick concluded that Arnold's title depended on the King's power to convey that title.[70]

The law, said Kirkpatrick, had placed title to land under navigable water in the hands of the sovereign "to be held, protected, and regulated for the common use and benefit."[71] In support of this proposition, Kirkpatrick cited *De Jure Maris* and various cases that had espoused the prima facie theory's presumption of sovereign ownership,[72]

67. 6 N.J.L. 1 (N.J. 1821).

68. *Id.* at 65.

69. *Id.* at 66, 70.

70. *Id.* at 71 ("Those things, therefore, which were, properly speaking, the subjects of property, and which the king himself could divide and grant severally to the settlers, the duke, by virtue of this charter, could also divide and grant . . . .").

71. *Id.*

72. *Id.* at 72.

but he rejected the second half of Lord Hale's formulation of the theory, suggesting for the first time, and based on what he admitted was rather cursory research,[73] that the crown could not grant land under navigable water.[74] To Kirkpatrick, Hale's statement that "the king may grant fishing within a creek of the sea, and that he may also grant a navigable river that is an arm of the sea, with the water and soil thereof," was only a recognition that prior to Magna Charta the crown had made such grants.[75] After Magna Charta, Kirkpatrick argued, the crown had no right to grant land under navigable waters[76] and was obligated to hold such lands "as a trustee to support the title for the common use."[77] Accordingly, he ruled that Arnold's grant was void and discharged the trespass claim.[78]

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73. *Id.* at 69-70 ("As to the right of the proprietors to convey. This is the great question in the cause, and though we have taken time since last term to look into it, yet I must confess, for myself, that I have not done so in so full and satisfactory a manner as could have been wished; and my apology must be, that during a very great part of the vacation, I have been necessarily abroad, attending to other official duties . . . . I have, nevertheless, so far looked into it as to satisfy myself of the principle that must prevail.").

74. *Id.* at 72-73.

75. *Id.* at 74-75.

76. *Id.* at 70-75. Kirkpatrick argued:

> in *Magna Charta*, which is said to be nothing more than a restoration of the ancient common law, we find this usurpation [granting several fisheries] broken down and prohibited in future. That charter, as passed in the time of king John, enacts, *"that where the banks of rivers had first been defended in his time*, (that is, when they had first been fenced in, and shut against the common use, in his time) *they should be from thenceforth laid open."* And, by the charter of Henry III, which is but an amplification and confirmation of the former, it is enacted, *"that no banks shall be defended* (that is, shut against the common use) *from henceforth, but such as were in defence in the time of king Henry our grandfather, by the same places and the same bounds as they were wont to be in his time."* By this charter, it has been understood, and the words fairly import, that all grants of rivers, and rights of fishery in rivers or arms of the sea, made by the kings of England before the time of Henry II. were established and confirmed, but that the right of the crown to make such royal grants, and by that means to appropriate to individuals what before was the common right of all, and the means of livelihood for all, for all future time, was wholly taken away.

Id. at 73 (emphasis in original). For a contrary explanation of the purpose and effect of the Magna Charta chapters cited by Kirkpatrick, see Deveney, *supra* note 12, at 39-41; S. MOORE & H. MOORE, *supra* note 22, at 6-18; Rosen, *supra* note 12, at 565-66; MacGrady, *supra* note 12, at 554-55.

77. *Arnold*, 6 N.J.L. at 70. It was pure fiction to suggest that the crown's claims to title in the foreshore and its aggressive forfeiture efforts to reacquire that title were on behalf of its responsibilities to the public. It was to augment the royal purse. *See* Rosen, *supra* note 12, at 564-65 ("The English sovereign's title to lands under navigable waters did not arise from a perceived need for a 'public trust' enforceable by the crown; rather, it emerged from the feudal notion that all property rights emanate from the sovereign and the common law precept requiring that all property be owned by someone.").

78. *Arnold*, 6 N.J.L. at 78. For additional discussions of Kirkpatrick's opinion, see Deveney, *supra* note 12, at 55-56; Rosen, *supra* note 12, at 571-72; MacGrady, *supra* note 12, at 590-91; 1 FARNHAM, *supra* note 48, at 203-05.

Kirkpatrick's conclusion that after Magna Charta the crown lacked all power to grant land under navigable water was inaccurate.[79] The inaccuracy, however, did serve the useful purpose of clearing New Jersey's title to the foreshore. That utilitarian commendation does not apply to Kirkpatrick's dicta. Compounding his erroneous conclusion about the crown's lack of power, Kirkpatrick failed to address Parliament's authority to grant land under navigable water[80] and then mistakenly equated the crown's obligations with those of New Jersey's, suggesting that New Jersey, like the crown, was without power to grant land under navigable water.[81] Unsurprisingly, this suggestion was expressly disavowed by later New Jersey decisions.[82]

79. *See supra* note 21, discussing Stuart Moore's treatise and relating that even though the crown had granted out most of the foreshore prior to Magna Charta, thereafter it continued to make such grants whenever it could re-acquire the foreshore by attainder or forfeiture. *See e.g.*, S. MOORE, *supra* note 19, at 214-15 (describing the grant from Elizabeth I to Thomas Digges of "as much of the manors, lands, tenements, and hereditaments of the same lady the Queen whatsoever within or adjacent to her county of Kent theretofore covered by the sea and by the work of God, or otherwise recovered from the sea . . . which thenceforth hereafter by the industry or means of the same Thomas Digges, his heirs or assigns, should be so recovered . . . ."); *id.* at 171-72 (discussing the broad use of grants similar to Digges' so-called "fishing grant").

80. Judge Kirkpatrick's failure to recognize Parliament's powers was corrected by later New Jersey courts:

> Whatever doubts may exist in regard to the power of the king to dispose of common rights, there exists none in regard to the power of parliament. Parliament not only may, but does exercise the power of aliening the public domain, of disposing the common rights, and of converting arms of the sea, where the tide ebbs and flows, into arable land, to the utter destruction of the common rights of navigation and fishing.
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> . . . . in every organized government, whatever may be its form, there must be vested somewhere ultimate dominion, the absolute power of disposing of the property of every citizen. In this consists eminent domain, which is an inseparable attribute of sovereignty. This constitutes the omnipotence of parliament. If the legislature may dispose of the property of individual citizens for the public good, it would seem to be no greater exercise of power to dispose of public property or the common rights of all the people for the same end. The objection to an alienation of the public domain by the king is, that he is but a trustee for the community. But the legislature are not mere trustees of the common rights for the people. These rights are vested in the people themselves; the legislature, in disposing of them, act as their representatives, in their name and in their stead. The act of the legislature is the act of the people, not that of a mere trustee holding the legal title for the public good.

Gough v. Bell, 22 N.J.L. 441, 457-58 (1850) (citations omitted), *aff'd*, 23 N.J.L. 624 (1852).

81. *Arnold*, 6 N.J.L. at 78 ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."). Kirkpatrick's conclusion has been severely criticized. *See* Rosen, *supra* note 12, at 571 n.67 (calling Kirkpatrick's conclusion a "wholly fabricated statement of law . . ."); Deveney, *supra* note 12, at 55-56 ("As a policy decision to reclaim for the people the coastal area of the state which would otherwise have been *entirely* in private hands, *Arnold v. Mundy* is an impressive display of judicial dexterity; as history it is nonsense.") (emphasis in original); MacGrady, *supra* note 12, at 590-91 (describing Kirkpatrick as "an obscure and unprepared state court judge . . .").

82. As the Judge observed in Gough v. Bell, 22 N.J.L. 441, 459 (1850), *aff'd*, 3 N.J.L. 624 (1852), if Kirkpatrick's dicta in *Arnold*

Although *Arnold* was an exceptional departure from the prima facie theory recognized by other early courts and state legislatures, and despite its flawed reasoning, the opinion was to have great influence on the development of American law. Its suggestion that the crown served as a "trustee" over land under navigable water planted the seed for the Supreme Court's acceptance of the notion of a trust relationship between crown and subjects.[83] And its suggestion that such a trust relationship operated as a constraint on legislative power laid the foundation for the adoption of the modern public trust doctrine in *Illinois Central*.[84]

IV. *MARTIN V. WADDELL'S LESSEE*: THE SUPREME COURT'S FIRST PRONOUNCEMENT ON THE NATURE OF PUBLIC RIGHTS TO LAND UNDER NAVIGABLE WATER

The United States Supreme Court's first opportunity to opine on public and private rights in land under navigable water did not come until 1842 in the case of *Martin v. Waddell's Lessee*.[85] *Martin*, like *Arnold v. Mundy*, involved a dispute over ownership of oyster lands. The lessee of William Waddell claimed title to an 100 acre tract of oyster lands below the high water mark in Raritan Bay in New Jersey.[86] Waddell's lessee, as had Arnold, claimed the oyster lands by virtue of mesne conveyances tracing back to the royal charter from Charles II to the Duke of York. He sued Merrit Martin in ejectment.[87] Unlike Mundy's claim to a right to the oysters as part of the common fishery, however, Martin claimed title to the oyster lands under an 1824 New Jersey law allowing him to lease the oyster land. Thus, both plaintiff and defendant claimed an exclusive right to the oyster lands.[88]

The issue before the Court was whether the submerged lands and fishery were private property of Waddell's lessee by virtue of the charter to the Duke and subsequent conveyances or whether New Jersey properly leased the

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> is meant only to assert that a grant of all the waters of the state, to the utter destruction of the rights of navigation and fishery, would be an insufferable grievance, it is undoubtedly true . . . . But if it be intended to deny the power of the legislature, by grant, to limit common rights or to appropriate lands covered by water to individual enjoyment, to the exclusion of the public common rights of navigation or fishery, the position is too broadly stated . . . .

Id.

83. *See infra* Part IV.

84. *See* Rosen, *supra* note 12, at 572 (arguing that *Arnold* "laid the foundation from which the Supreme Court would ultimately develop the concept of an inalienable public trust").

85. 41 U.S. (16 Pet.) 367 (1842).

86. *Id.* at 407.

87. *Id.*

88. *Id.* at 408.

land and fishery to Martin. The former question was the classic one of English common law that Kirkpatrick had addressed in *Arnold*: what were the rights of the crown in land under navigable waters and what could the crown convey. The latter question was a new question for the American situation: could a state convey land under navigable waters. The Court deftly avoided the former question and, by ruling in Martin's behalf, assumed an affirmative answer to the latter.

Justice Taney, writing for a 7-2 majority, evaded the question whether the crown could convey land under navigable water[89] by asserting that the charter by which the Duke of York acquired the land from Charles II was "not a deed conveying private property to be interpreted by the rules applicable to cases of that description," but "an instrument upon which was to be founded the institutions of a great political community."[90] The charter's purpose was to give the Duke the power to establish and administer a colony, not to give the Duke the land under navigable waters as private property to be dispensed with for his own personal benefit. He took the land under navigable waters and held them "in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown."[91] Thus when the Duke, in turn, conveyed all his rights to the so-called 24 Proprietors of East New Jersey,[92] they too took the land under navigable waters and held it in the same manner and for the same purposes as the crown.[93] In 1702, when Queen Anne required that the 24 Proprietors surrender back to her all of the powers and authorities associated with the initial charter,[94] any power to convey land under navigable water, which had initially resided in Charles II and which had then passed to the Duke of York and the Proprietors, went back to the crown. And, upon the Revolution, the power of the crown was taken possession of by the new state of New Jersey.[95] By this reasoning, Taney was able to avoid the question of the crown's right to grant land under navigable water. The authority to make a grant of land under navigable water or a several fishery—whatever that authority was—had been transferred from the crown, to the Duke, to the Proprietors, back to the crown, and then finally to New Jersey without ever having been exercised in behalf of Waddell's lessee.[96]

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89. *Id.* at 410. Taney stated: "[w]e do not propose to meddle with the point which was much discussed at the bar, as to the power of the king since Magna Charta to grant to a subject a portion of the soil covered by the navigable waters of the kingdom . . . ." *Id.*

90. *Id.* at 411-12.

91. *Id.* at 413-14.

92. *See id.* at 407 (discussing conveyance to the Proprietors of East New Jersey).

93. *Id.* at 415.

94. *Id.* at 415-16.

95. *Id.* at 416.

96. Presumably, Taney would have needed to address the crown's power if the Duke or the 24

Taney's creative approach served a useful purpose. It allowed the Court to confirm New Jersey's clear title to its land under navigable water without requiring the Court to finally resolve the issue that had tripped up Kirkpatrick in *Arnold*. Nevertheless, while Taney was clearly uncomfortable basing his holding on Kirkpatrick's view of the crown's power, he was willing to offer dicta agreeing with Kirkpatrick. Paraphrasing Kirkpatrick's erroneous reasoning, Taney offered that the question whether the crown could grant submerged lands and an exclusive fishery was "not free from doubt,"[97] but that the "the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant."[98]

While Taney may have agreed with Kirkpatrick's view of the crown's right, he disagreed that the same limitations necessarily applied to state legislatures. Essentially, Taney considered the whole issue a moot point in the new American situation:

> We the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation.[99]

Perhaps Taney was so quick to paraphrase Kirkpatrick's research because whatever the standard in England, Taney believed that state grants of land under navigable water and associated public resources would be decided by a different rule.[100] Unlike a grant by the crown, a grant by the state

Proprietors had made the grant to Waddell's Lessee or his successor in interest prior to 1702, but after that date, they had lost their chance.

97. *Id.* at 410.

98. *Id.*

99. *Id.* at 410-11. This statement was a straightforward recognition that the rights and obligations of the crown with respect to land under navigable water had little to say about the rights and responsibilities of a state. It is this statement that explains why the Court felt no need to address whether the New Jersey law granting the oyster lands was valid. The Court assumed that it was.

100. In dissent, Justice Thompson, probably because he had concluded that the king had full authority to grant land under navigable waters, professed to see no difference between the position of the crown and New Jersey. *Martin*, 41 U.S. (16 Pet.) at 432 (Thompson, J., dissenting) ("if the king

legislature was a grant "by their [the people's] authority."

Further undermining his suggestion in dicta that the crown could not make grants of land under navigable water, Taney gave support to the prima facie theory.[101] While stating that it was not "necessary to examine . . . the degree of strictness with which grants of the king are to be construed," he observed in dicta that grants of "dominion and property in navigable waters" were to be "construed strictly—and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it."[102]

Despite Taney's affirmance of the prima facie theory, despite Taney's recognition that the scope of the crown's power was essentially irrelevant because state legislatures acted on the people's authority, and despite his implicit conclusion that Martin's title to his oyster land resulted from a valid exercise of the New Jersey legislature's authority,[103] Taney's opinion has been called an abandonment of the prima facie theory[104] and the birthplace of the public trust doctrine.[105] While Taney's

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held such lands as trustee for the common benefit of all his subjects, and inalienable as private property, I am unable to discover on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals"). This statement fails to recognize that the states acquired the authority of both the crown and Parliament.

101. If the crown were prohibited from making grants of land under navigable water, the prima facie theory would serve no purpose, except perhaps for grants before Magna Charta. The existence of a rule of construction presuming that the crown did not grant land under navigable waters necessarily implies that the crown could grant land under navigable waters. *See* Everett Fraser, *Title to the Soil Under Public Waters — The Trust Theory*, 2 MINN. L. REV. 429, 436 (1918) (arguing that the prima facie theory "admits the alienability of the lands, at least in respect to the jus privatum").

102. *Martin*, 41 U.S. (16 Pet.) at 411. In dissent, Justice Thompson agreed with Taney's dicta on the prima facie theory. *Id.* at 424 (Thompson, J., dissenting) ("The true rule on the subject is, that prima facie a fishery in a navigable river is common, and he who sets up an exclusive right, must show title either by grant or prescription . . . . [S]uch a right shall not be presumed; but the contrary, prima facie; but it is capable of being proved . . . ."). He took issue, however, with Taney's dicta that the crown was precluded from making grants of land under navigable water. After giving prior cases the thorough review that Taney had eschewed, Thompson stated: "I think the law is too well settled, that a fishery may be the subject of a private grant, to be at this day drawn into question." *Id.* at 427. In Thompson's view it was necessary to reach the issue of the crown's authority to grant land under navigable water because he believed the grant from the crown to the Duke of York had conveyed not simply the king's authority over land under navigable water but the actual title to such land. *Id.* at 427-31.

103. By sustaining Martin's ejectment action, the Court necessarily recognized the validity of Martin's exclusive right to take oysters from the disputed acreage pursuant to the 1824 New Jersey statute. *Martin*, 41 U.S. (16 Pet.) at 408.

104. Other commentators have argued that the decision in *Martin* rejected the prima facie rule of a rebuttable presumption of crown ownership in favor of a substantive rule of law vesting ownership in the state of all land under navigable waters. *See, e.g.*, MacGrady, *supra* note 12, at 567-68; Rosen, *supra* note 12, at 569-70 & n.54. Without doubt, Taney's decision in *Martin* that the states gained title to all of their land under navigable water upon the Revolution paints with the same broad title-clearing brush that Chief Justice Marshall had employed in developing the doctrine of discovery

citation to *Arnold* and its dicta that the king held lands under navigable water "as a public trust" and could not convey them[106] certainly assisted the development of the public trust doctrine,[107] Taney cannot be credited with, or criticized for, the invention of the public trust doctrine.[108] That credit should go to New Jersey Chief Justice Kirkpatrick in *Arnold* and to Justice Field in *Illinois Central*.[109] Taney, likewise, should not be credited with rejecting the prima facie theory because he argued, in dicta, that it was the appropriate rule of construction by which to judge the validity of sovereign grants of public resources.[110] What Taney should instead be credited with is finding an inventive way to clear the title to the foreshore of New Jersey and the other young states while maintaining the core of the prima facie theory.[111]

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in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). But recognizing state ownership of land under navigable water was not a rejection of the prima facie rule, it simply resolved one dispute under the rule—the status of initial ownership in the sovereign state. The rule maintained its vitality with respect to any subsequent disputes over whether the state had made a grant. The state would be presumed, prima facie, to have maintained the title it acquired upon the Revolution in the absence of a clear and especial grant to the contrary.

105. *See* MacGrady, *supra* note 12, at 589 (arguing that from Taney's opinion "was born into federal law what has subsequently become known as the 'public trust doctrine'"); *id.* at 610-11.

106. *Martin*, 41 U.S. (16 Pet.) at 411 ("The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit.").

107. There is no disputing that Taney's suggestion of a "trust" relationship was relied upon by future courts to describe the relationship between sovereign and citizen. *See, e.g.*, *Illinois Central*, 146 U.S. at 457-58 (citing cases); *Mono Lake*, 658 P.2d at 718-21.

108. Rosen suggests that the view of *Martin* as advancing the public trust doctrine may partially be the result of Justice Thompson's suggestion in dissent that Taney's majority opinion "must rest on the ground that the land under the water of a navigable river is not the subject of a private right." *See* Rosen, *supra* note 12, at 574 n.84 (quoting *Martin*, 41 U.S. (16 Pet.) at 419 (Thompson, J., dissenting)). Thompson's interpretation of Taney's opinion was, of course, mistaken because Taney had expressly declined to address that issue and had argued that whatever the crown's power to convey a private right, a state's power was different. *See supra* note 99 and accompanying text.

109. 146 U.S. 387 (1892). For a discussion of *Illinois Central*, *see infra* Part VII.A. Whereas Kirkpatrick argued that a state could not "make a direct and absolute grant of the waters of the state," *Arnold*, 6 N.J.L. at 78, and Justice Field in *Illinois Central* was to agree that certain circumstances existed under which states could not make a grant, Taney nowhere made such a suggestion. In fact, he stated that a legislature was different than the crown, *Illinois Central*, 146 U.S. at 410-11, and implicitly upheld a legislative grant. *See supra* note 103.

110. *See supra* notes 101-02 and accompanying text.

111. Taney's opinion confirmed the first prong of the prima facie theory—that the soil under navigable water was prima facie in the sovereign. And although it suggested that the crown could not grant such lands, it confirmed the states' power to do so, thus making the prima facie rule wholly applicable to the American situation. Nor does Taney's suggestion of a "trust" relationship negate the fact that Taney also accepted the prima facie theory. The notion of a trust responsibility is wholly consistent with the idea that the sovereign would be presumed to have kept for the public land under navigable water and the associated common resources but that, in certain instances, the sovereign could decide, consistent with that trust, to grant such land and resources into private ownership.

V. THE UNITED STATES' POWER AND OBLIGATIONS WITH RESPECT TO LAND UNDER NAVIGABLE WATER IN THE TERRITORIES OUTSIDE THE ORIGINAL 13 STATES

Having cleared the title of the original 13 states to their overflowed lands, the Court was soon to be faced with another title-clearing issue: the ownership of overflowed lands by the new states entering the Union. Three years after *Martin*, the Court addressed this issue in *Pollard v. Hagan*.[112] Unlike the question of New Jersey's title in *Martin* which turned on the power and intent of the crown to convey land under navigable water, Alabama's title in *Pollard* depended on the power of the United States to own and convey land under navigable water. Thus, the issue presented to the Court was whether the United States could properly retain or reserve for itself at the time of statehood land under navigable water within Alabama and then grant that land to private individuals.[113] Put another way, the question was whether Alabama, like New Jersey, would begin with clear title to its overflowed lands. To address this issue, the Court articulated for the first time what has become known as the equal footing doctrine.[114] Before addressing the Court's explanation of the equal footing doctrine, it seems necessary to set forth briefly the origin of the "equal footing" terminology and concept.

A. *The Origin of the "Equal Footing" Terminology and Concept*

After the Revolution, the Continental Congress had the monumental task of paying war debts and organizing the federal union. Absent ratifi-

112. 44 U.S. (8 How.) 212 (1845).

113. *Pollard*, like *Martin*, was an action in ejectment. Pollard and the other plaintiffs claimed title to certain land, which had once been overflowed by the Mobile River and the tidal action in Mobile Bay, by virtue of an act of Congress in 1836 for which a patent from the United States had been issued in 1837, confirming an 1809 Spanish grant. *See also* Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850) (describing how the purpose of the 1836 Congressional Act was to confirm an inchoate grant of title to Pollard by virtue of an 1809 Spanish grant). Alabama had entered the Union in 1819, some 18 years before the disputed patent. *Pollard*, 44 U.S. at 219. *See* Act of Dec. 14, 1819, ch. 157, 3 Stat. 608 (Resolution admitting Alabama into the Union).

114. While to the late-twentieth century lawyer the dispute may seem rather esoteric or academic, the importance of the case at that time can hardly be overstated. Writing for the majority, Justice McKinley intoned: "[W]e now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones." *Pollard*, 44 U.S. at 220 (noting that "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the State governments, over the subject in controversy . . . ."). Likewise, Justice Catron, adding the hyperbole of dissent, suggested: "this is deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds . . . ." *Id.* at 235 (Catron, J., dissenting).

cation of the Articles of Confederation, the Continental Congress' authority to carry out important tasks was limited. A significant obstacle to ratification was that the western lands were held by only seven of the states, Virginia chief among them.[115] Led by Maryland, the non-landholding states argued that all of the states had sacrificed to liberate the western territories and thus those territories should be ceded to the United States for the common benefit of all.[116] After considering the issue, the Continental Congress recommended to the legislatures of the landholding states that they cede their western territories to the confederation.[117]

Before any cessions were made to the United States, the questions of how to govern the territories and when, or if, a territory might gain statehood were the subject of debate. Thomas Jefferson was one of the powerful voices in that debate.[118] Jefferson understood that the western territories were key to the balance of power in North America.[119] The British and Spanish could entice away the loyalty of disgruntled occupants of the territory, shifting the balance of power in favor of old adversaries

115. *See* 17 JOURNALS OF THE CONTINENTAL CONGRESS, 806-08 (Sept., 1780) (Gaillard Hunt ed. 1910); Patterson, *supra* note 2, at 46; Eugene R. Gaetke, *Refuting the "Classic Property Clause" Theory*, 63 N.C. L. REV. 617, 624 (1985). The seven land-holding states were Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49 (1968).

116. 14 JOURNALS OF THE CONTINENTAL CONGRESS 621 (May 1779) (Worthington Chauncy Ford ed. 1909) (arguing that the western territories were "wrested from the common enemy by the blood and treasure of the thirteen states [and] should be considered as common property"). *See also* 17 JOURNALS OF THE CONTINENTAL CONGRESS, 806-08 (Sept., 1780) (Gaillard Hunt ed. 1910). Following Maryland's example, New Jersey refused to ratify the Articles of Confederation until the Western territories were recognized as the property of the confederation. 11 JOURNALS OF THE CONTINENTAL CONGRESS 650 (June 1778) (Worthington Chauncy Ford ed. 1908) ("It was ever the confident expectation of this State [New Jersey], that the benefits derived from a successful contest, were to be general and proportionate; and that the property of the common enemy, falling in consequence of a prosperous issue of war, would belong to the United States, and would be appropriated to their use."); Joseph G. Smoot, Freedom's Early Ring: The Northwest Ordinance and the American Union 16-17 (1964) (unpublished Ph.D. dissertation, University of Kentucky). As the primary target of Maryland and New Jersey's complaints, Virginia responded that the complaints were the result of more cynical motives. The legislatures of Maryland and New Jersey were both heavily influenced by prominent individuals who had invested in land companies and speculative land ventures. If the western territories were redistributed among the states, and the states allowed private companies to buy, sell, and distribute the land, these individuals stood to make a handsome profit. *See* GATES, *supra* note 115, at 50-51.

117. 17 JOURNALS OF THE CONTINENTAL CONGRESS 807 (Sept., 1780) (Gaillard Hunt ed. 1910); GATES, *supra* note 115, at 51; Gaetke, *supra* note 115, at 624-25 & n.51.

118. Jefferson headed up the congressional committee established to develop the form of territorial government and the conditions under which a territory was to become a state. 26 JOURNALS OF THE CONTINENTAL CONGRESS 113, 118 (March, 1784) (Gaillard Hunt ed. 1928).

119. Gordon T. Stewart, *The Northwest Ordinance and the Balance of Power in North America*, *in* THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY, 25 (Frederick D. Williams ed., 1988).

and jeopardizing the stability of the United States.[120] Alternatively, subservient colonies might easily become disgruntled with a secondary political status given to them by the United States and seek their independence.[121] Many in the East had serious doubts about the western settlers' loyalty to the United States. By offering fair and equitable terms of admission into the Union, the fledgling nation could better ensure the ongoing loyalty of the territories and the further expansion of the Union.[122]

The language found in Virginia's instrument of conveyance of her territories northwest of the Ohio River reflected Jefferson's views and the original compromise suggested by the Continental Congress to the land-holding states.[123] The instrument stipulates that "the territory so ceded, shall be laid out and formed into states . . . ; and that the states so formed, shall be distinct republican states, and admitted members of the federal union; having the same rights of sovereignty, freedom and independence, as the other states."[124] On the same day that Virginia's Act of Cession became effective, a congressional committee chaired by Jefferson presented to Congress a proposal for western government and the prerequisites necessary for a territory to gain statehood.[125] The Continental Congress adopted Jefferson's proposal which became known as the Ordinance of 1784.[126] The Ordinance of 1784 contains the first specific use of the term "equal footing," stating:

> That whensoever any of the said states shall have, of free inhabitants as many as then shall be in any one the least numerous of the thirteen original States, such State shall be admitted by its Delegates into the Congress of the United States, on an equal footing with the said original States . . . .[127]

The reference to "equal footing" reflected Jefferson's objective that territories should obtain statehood after reaching a sufficient population, and that, as states, they would be politically equal to the original 13 states.[128]

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120. *Id.* at 33-34.

121. *Id.* at 28-29.

122. *Id.* at 24-35. *See also* PETER S. ONUF, STATEHOOD AND UNION 49 (1987).

123. *Compare* 26 JOURNALS OF THE CONTINENTAL CONGRESS 113, 114 (March, 1784) (Gaillard Hunt ed. 1928) (Virginia's cession) *with* 18 JOURNALS OF THE CONTINENTAL CONGRESS 915-16 (1780) (Gaillard Hunt ed. 1910) (Congressional resolution of 1780 setting forth the terms of the requested cessions).

124. 26 JOURNALS OF THE CONTINENTAL CONGRESS 114 (March, 1784) (Gaillard Hunt ed. 1928).

125. *Id.* at 118.

126. ONUF, *supra* note 122, at 46. *See generally* Smoot, *supra* note 116, at 43-57 (discussing Jefferson's role in the drafting of the 1784 Ordinance).

127. 26 JOURNALS OF THE CONTINENTAL CONGRESS 119 (March, 1784) (Gaillard Hunt ed. 1928).

128. *See* CHARLES A. & MARY E. BEARD, THE RISE OF AMERICAN CIVILIZATION 510 (1927) (arguing that in the Ordinance of 1784, "Congress enunciated the fateful principle that the territories

Ultimately, Congress decided that the powers afforded settlers and the territorial governments under the Ordinance of 1784 were too broad.[129] Thus, another committee was organized to revisit the question of territorial government. The result of this committee's efforts was the Northwest Ordinance.[130] While the Northwest Ordinance adopted a more restrictive approach to territorial government, it retained the "equal footing" language of the Ordinance of 1784.

The "equal footing" language is found in two places in the Northwest Ordinance—Section 13 and Article V. Section 13 is part of the introduction to the Articles of Compact and reassures that one of the purposes of the Compact is ultimately to "provide . . . for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States."[131] The Articles of Compact, which comprise the second half of the Northwest Ordinance, outline Congress' goals for the western territories and offer guarantees to the people of the western territories that fundamental rights and basic precepts of good government would be honored by the United States. Article V affirms Congress' intent that the territories should become states in the Union, proclaiming that:

> [W]henever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates,

to be organized in the West should be ultimately admitted to the Union as states enjoying all the rights and privileges of the older commonwealths—not kept in the position of provinces in another Roman Empire ruled by pro-consuls from the capital").

129. *See* Dennis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 936 (1995). *See also* ONUF, *supra* note 122, at 49-50; Smoot, *supra* note 116, at 64-78 (discussing efforts to amend 1784 Ordinance); John M. Merrian, *The Legislative History of the Ordinance of 1787*, 5 THE PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY 303-42 (1888) (setting forth the legislative history of the Ordinance of 1787).

130. Duffey, *supra* note 129, at 937. The Northwest Ordinance is often referred to as the "Ordinance of 1787," *id.* at 930 n.7, and the title of the document contained at volume one of the United States Code is "Ordinance of 1787: The Northwest Territorial Government." Because the document was not binding on the states after the ratification of the Constitution, it was readopted by the first Congress of George Washington's administration. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (readopting the Northwest Ordinance with minor technical revisions). *See* Patterson, *supra* note 2, at 52 ("'With respect to what has taken place in the N.W. Territory,' James Madison said that the Ordinance of 1787 was passed by the old Congress, acting, 'with the best of intentions,' but under a charter which contains 'no shadow of the authority exercised.' Again, enumerating the various arrangements provided by the Ordinance of 1787, he said: 'All this has been done, and done without the least colour of constitutional authority.'") (quoting THE FEDERALIST NO. 38); Duffy, *supra* note 129, at 940 n.77.

131. 1 U.S.C.A. 20 (West 1987). The reference to "shar[ing] in the Federal councils on an equal footing with the original States" is not explained but it supports the longstanding interpretation of the equal footing doctrine as a requirement of political equality within the federal system and not a mandate for resource or economic equality. *See infra* note 200 (citing cases holding that equal footing is a rule of political equality).

> into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government . . . .[132]

The historical record thus reveals that the equal footing language arose out of a concern that if western territories were not promised admission to the Union on an equal sovereign footing, insurrection from within or influence from without could entice them away from the United States. Equal footing was a principle considered crucial to the development and expansion of the Union. Each new state would be endowed with equal sovereignty and would participate as an equal member of the Union. It is against this background that the reasoning of *Pollard* must be investigated.

B. Pollard v. Hagan *and the Development of the Equal Footing Doctrine*

As discussed above, the issue in *Pollard* was whether the United States could retain or reserve ownership of land under navigable water at the time of statehood and then later grant that land into private ownership. The Court, however, did not limit itself to addressing that issue. Instead, it framed the issue more broadly, discussing whether the United States had any power to convey prior to statehood, or to retain at statehood, either overflowed land *or* non-overflowed land.

Discussing these questions, the Court articulated for the first time the equal footing doctrine, observing that under the deeds of cession executed by Virginia and Georgia, and under the Northwest Ordinance, any new states created out of the ceded territory must enter the Union on an equal sovereign footing with the original 13 states.[133] It then stated that for Alabama to enter the Union on an equal footing she must succeed to "all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right

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132. 1 U.S.C.A. 22 (West 1987) . It has been argued that this "in all respects whatever" language added by the Ordinance of 1787 "forbids either economic or political limitations on statehood . . . ." Patterson, *supra* note 2, at 56. But given the reference in Section 13 to "shar[ing] in the Federal councils on an equal footing with the original States," it seems more likely that the "in all respects whatever" language simply emphasized that the word "equal" meant "equal," and that nothing should deprive an entering state of equal political sovereignty.

133. *Pollard*, 44 U.S. at 221-22. Virginia's statute authorizing the cession provided that "the States so formed shall be republican States and admitted members of the federal Union, having the same rights of sovereignty, freedom, and independence, as the other states." *Id.* at 221. Georgia's deed of cession provided that the territory ceded "shall form a State . . . on the same conditions and restrictions, with the same privileges, and in the same manner as is provided in the [Northwest Ordinance]." *Id.* at 222. And as discussed in Part V.A, *supra*, the Northwest Ordinance required that new states be admitted "on an equal footing with the original States in all respects whatever." *Id.*

was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it."[134] "[A]s soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease."[135] Thus, the Court seemed to suggest that the United States did not have the power to convey or retain public lands within Alabama,[136] except as was temporarily necessary to fulfill its trust obligations under the deeds of cession.[137]

If the Court intended its references to "public lands" to include land under navigable water, then presumably, the United States' power, under the deeds of cession, temporarily to retain public lands would have allowed it to grant the patent to Pollard. But that does not seem to have been the Court's

134. *Pollard*, 44 U.S. at 223. The Court later reemphasized: "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding." *Id.* at 228-29.

135. *Pollard*, 44 U.S. at 224. In fact, the Court was quick to point out that to the extent the enabling act had permanently granted such power to the United States it would have been "void and inoperative." *Id.* at 223. The other component of plaintiffs' enabling act argument was that Alabama had surrendered control over these lands because the act stated that "all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State." The Court rejected the suggestion that this language somehow created a federal right in land under navigable water. Instead, said the Court, the provision was nothing more than a recognition of the navigational servitude and of the United States' plenary authority to regulate commerce. *Id.* at 229. The Court emphasized the distinction between the navigation servitude and the other sticks in the bundle that make up ownership of the shoreline and riverbeds. While the navigational servitude had been granted by the states to the United States in the Constitution, the Court was emphatic that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively." *Id.* at 230.

136. The plaintiffs attempted to avoid the issue of the United States' right to grant them title by arguing that the United States had derived title from Spain and that the title was thus subject to the laws and usages of Spain. *Pollard*, 44 U.S. at 225-28. The Court rejected this argument. Reviewing what was then rather recent history, the Court concluded that the relevant land had never been the undisputed territory of Spain. Georgia had always had a competing claim to the territory, which claim the United States later possessed by virtue of Georgia's cession of its western lands. *Id.* The 1819 Treaty with Spain, said the Court, was not a treaty of cession but an adjustment of a controversy between two nations, which could be viewed as "an admission that the right was originally in the United States." *Id.* at 226. Thus, because Georgia, and then the United States, had always asserted title, the laws and usages of Spain could not apply.

137. *Pollard*, 44 U.S. at 221. Professor Patterson has argued in support of the Court's suggestion that the deeds of cession imposed a trust obligation on the United States by requiring that lands within the territories "'be faithfully and bona fide disposed of for [a common fund for the use and benefit of the United States], and for no other use or purpose whatsoever.'" Patterson, *supra* note 2, at 49 (quoting 2 THORPE, FEDERAL AND STATE CONSTITUTIONS 955-56 (1909)). Because Congress was obligated to *dispose* of the land, he argues, it "could not retain a foot of this property." *Id. But see* Gaetke, *supra* note 115, at 625-29 (arguing that the deeds of cession did not necessarily require Congress to *dispose* of the lands but allowed for their retention as well).

intention, because it emphasized that the United States had no right at all "to transfer to a citizen the title to the shores and the soils under the navigable waters."[138] The Court's differentiation between public lands and land under navigable water is hardly a model of clarity, nor is the rest of the opinion, but two basic propositions do emerge from the Court's reasoning. First, each new state was entitled to enter the Union on an equal sovereign footing with the original 13 states. Second, for a state to enter the Union on an equal footing, it must have ownership of both its uplands[139] and its land under navigable water, although the former could be temporarily held by the United States as necessary to fulfill the deeds of cession. To the Court, state ownership and control of both uplands and overflowed lands was an essential aspect of state sovereignty and thus necessary to equal footing.[140]

While *Pollard* was correct that each state must enter the Union on an equal sovereign footing,[141] the Court's other reasoning is largely dicta and has little to recommend it. By serving up broad dicta rather than carefully addressing the precise issue before it—whether the United States could or did retain the disputed land under navigable water at statehood[142]—the Court stumbled into error and injected confusion into the law that persists today. Specifically, because the grant at issue was of land under navigable water, *Pollard*'s suggestion that the United States was obligated to transfer uplands to a state upon its admission to the Union was dicta; and it was error. If ownership of public lands was an essential aspect of state sovereignty, then the deeds of cession themselves would have defeated their own equal footing mandate by allowing the United States to sell such lands. The fact that the deeds of cession and the Northwest Ordinance allowed for the sale of such lands strongly evidences that

138. *Pollard*, 44 U.S. at 230 ("To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty . . . ."). If the United States' power under the Property Clause did not include the right to transfer land under navigable water, as the Court's conclusion suggests, *id.* ("[t]he right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case"), then the Court's earlier statement that public lands could be retained temporarily by the United States to fulfill the purposes of the deeds of cession must not have referred to land under navigable water.

139. The term "uplands" is used to denote those public lands not overflowed by navigable water.

140. *Pollard*, 44 U.S. at 223 (concluding that for Alabama to enter the Union on an equal footing it must succeed to all the eminent domain possessed by Georgia except so far as those public lands possessed to fulfill the deeds of cession); *id. at* 230 ("This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it.").

141. *See infra* Part VI.B (discussing constitutional basis of equal footing).

142. For a discussion of how the Court's decision implicitly resolved these two issues, see *infra* note 145.

equal footing was not understood to require state ownership of all public lands within its boundaries.[143] And in fact, since *Pollard*, the Court has consistently held that the United States has power under the Constitution to withhold from the state non-overflowed lands.[144]

Likewise, because the grant in *Pollard* was made *after* statehood, the Court's suggestion that the United States had no power to convey land under navigable water was merely dicta as to grants *prior* to statehood.[145]

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143. *See infra* note 200, discussing how equal footing is an issue of political equality and not resource equality. For an argument that ownership of land was essential to state sovereignty and that the United States was never intended to have the ability to retain public lands of any sort, see Patterson, *supra* note 2, at 45 (arguing that "ownership of land by the settlers or colonists is inherent and inseparable from the development of self-government, providing alone for a basis of both the suffrage and economic independence" and "that this experience suggests for future colonization by America that the central government be completely divorced from the lands of territories as was true under the English system or that its relation to the territories be that of a trusteeship for statehood"). *But see* Gaetke, *supra* note 115, at 643 (disputing Patterson's view that equal footing applies to land equality).

144. *See* John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 336-37 (1980) (citing cases); *see also* United States v. Gratiot, 39 U.S. (14 Pet.) 526, 538 (1840) (pre-*Pollard* case concluding that "the words 'dispose of' [in the Property Clause] cannot receive the construction contended for at the bar; that they vest in Congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of Congress."). The chief result of this particular *Pollard* dicta has been to encourage various incarnations of the County Control and Sagebrush Rebellion movements through the years. *See generally* Leshy *supra* at 336 ("the rebels' argument is based principally on *Pollard v. Hagan*"); Erik Larson, *Unrest in the West*, TIME, Oct. 23, 1995, at 52-66; Christopher A. Wood, *The Land Everybody Wants*, July/August 1995 THE ENVIRONMENTAL FORUM, 14-21; *Western Delegates Seek State Control of Lands*, N.Y. TIMES, Sept. 8, 1979, at 10, col. 6; Resolution of the 3d Ann. Conf. of Western Governors, § 1, (1914), *reprinted in* 51 Cong. Rec. 6894-95 (1914); GATES, *supra* note 115, at 9, 27-28, 30. Other articles on the Sagebrush Rebellion include Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982), and Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505. *See also infra* note 206 (discussing county control movement's arguments).

145. Because the Court can be credited with holding that the United States could not make a post-statehood grant of land under navigable water, it necessarily also decided that the United States did not have the power to retain land under navigable water at the time of statehood. As with its dicta that pre-statehood grants were impermissible, *see* discussion *infra* notes 146-47 and accompanying text, this decision seems plainly incorrect. *Cf. Gratiot*, 39 U.S. (14 Pet.) at 537-38 (holding that the Property Clause gave Congress the power to reserve non-overflowed lands prior to statehood); Light v. United States, 220 U.S. 523, 536-37 (1911) (same). In contrast to its dicta about pre-statehood *grants*, however, its conclusion that the United States does not have power to *reserve* land under navigable water after statehood has not been expressly overruled, although the Court has suggested that pre-statehood reservations of overflowed land are probably permissible. *See Utah Div. of State Lands*, 482 U.S. at 202 ("Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land."). This issue is discussed in greater detail *infra* note 218. Arguably, the *Pollard* Court could have reached the same result had it decided the case under the test articulated in *Utah Div. of State Lands*. Alabama's disclaiming, in its enabling act, of "all right and title to the waste and unappropriated lands lying within the said territory," *Pollard*, 44

And this dicta was also mistaken. As evidenced by the previous sections, ownership of land under navigable water was no more an essential aspect of sovereignty than ownership of non-overflowed lands.[146] Although overflowed lands and associated resources were presumed to be owned by the sovereign, they could still be conveyed just like non-overflowed lands. Unfortunately, unlike *Pollard*'s erroneous dicta that uplands were essential to sovereignty, which was easily rectified, the Court's dicta describing land under navigable water as an attribute of sovereignty necessary to equal footing took longer to correct, and even then was corrected only tacitly, by way of application rather than rhetorical recognition. Thus, the courts now hold that the United States has the power to make a pre-statehood grant of land under navigable water,[147] and employ only a rebuttable presumption against such grants. Yet notwithstanding this tacit concession that ownership of land under navigable water is not essential to an equal sovereign footing, the courts continue to use *Pollard*'s equal footing and essential sovereignty rhetoric when ruling upon the validity of a pre-statehood grant. As discussed in the next section, the reality is that the courts' use of a rebuttable presumption is not the result of a concern for equal footing but simply an application of the longstanding common law presumption against alienation of submerged lands.

C. *The Development of the Equal Footing Doctrine from* Pollard *to* Shively

In the years following *Pollard* the Court extended the equal footing doctrine to states whose admission was not governed by the deeds of cession or the Northwest Ordinance,[148] making it clear that equal footing was not a contractual or statutory obligation.[149] In each application, save those where there was an express grant from a prior sovereign,[150] the

U.S. at 224, may not have been a plain enough statement of United States intent to defeat Alabama's title to land under navigable waters.

146. It seems entirely plausible that the deeds of cession and the Northwest Ordinance in fact envisioned the sale of land under navigable water to help retire the war debt. The development of the 13 colonies had proceeded along bays, inlets and navigable rivers. If not outright ownership of land under navigable water, then riparian rights, would surely have been perceived as necessary for development of the territory.

147. As discussed in Part VI.B, *infra*, the United States' power to grant land under navigable water is generally located in the Property Clause, U.S. CONST. art. IV, § 3, cl. 2.

148. For example, states created from territory acquired by the Louisiana purchase, 8 Stat. 200 (1803), the Treaty of Guadalupe Hidalgo, 9 Stat. 926 (1848), or the 1846 treaty with Great Britain, 9 Stat. 869, were not covered by the deeds of cession.

149. *See, e.g.*, Weber v. State Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); Packer v. Bird, 137 U.S. 661, 666 (1891); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867); United States v. Pacheco, 69 U.S. (2 Wall.) 587 (1864).

150. For example, in *Knight v. United Land Ass'n*, 142 U.S. 161 (1891), the Court held:

> Upon the acquisition of the territory from Mexico the United States acquired the title to

Court rejected a pre-statehood conveyance in light of the United States' obligation to hold land under navigable water in trust for the future state.[151] While the Court after *Pollard* had remarked that the federal government had authority to convey land under navigable water,[152] with each new rejection of a pre-statehood grant the dicta of *Pollard* suggesting that Congress could not constitutionally make a pre-statehood conveyance seemed firmer, and questions about the source and scope of the equal footing doctrine grew. Such questions were finally and largely answered in 1893 in *Shively v. Bowlby*,[153] the Supreme Court's seminal pronouncement on the equal footing doctrine as applied to land under navigable waters.

Shively involved a quiet title action to tidelands along the Columbia River at Astoria, Oregon. Shively traced his title to the tidelands through several conveyances back to the Oregon Donation Act of 1850,[154] and a recorded plat of his claim which included not only up-

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tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. But this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. . . . [W]hen the *United States acquired California from Mexico by the treaty of* Guadalupe Hidalgo, they were bound under the 8th article of that treaty to protect all rights of property in that territory emanating from the Mexican government previous to the treaty."

Id. at 183-84 (citing San Francisco v. Le Roy, 138 U.S. 656, 671 (1891)) (other citations omitted).

151. *See, e.g., Packer*, 137 U.S. at 671-72 (applying prima facie theory that ownership of land along a navigable stream is presumed to stop at the high water mark "unless the claim confirmed in terms embraces the land under the waters of the stream," and concluding that a patent from the United States, confirming a Mexican grant bounded by the Sacramento River, did not include title below the high water mark); *Weber*, 85 U.S. (18 Wall.) at 65-66 (following *Pollard* and holding that upon its admission to the Union, California gained "absolute property in 'and dominion and sovereignty over' all soils under tide-waters within her limits"); *Mumford*, 73 U.S. (6 Wall.) at 423 (concluding that although a pre-statehood grant by the alcalde, mayor, of an underwater lot in San Francisco Bay was invalid, a California statute confirming that pre-statehood grant was valid to convey title); *Pacheco*, 69 U.S. (2 Wall.) at 590 (applying prima facie theory and concluding that a grant from the Mexican government of land bounded "by the bay" of San Francisco and confirmed by a United States court under the authority of Congress presumptively did not convey any land below the high water mark).

152. In 1850, in *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 478 (1850), which arose on the identical patent at issue in *Pollard*, the plaintiff attempted to distinguish *Pollard* by arguing that it had not addressed the effect of the Spanish grant to Pollard which had occurred prior to statehood and prior to the Congressional conveyance. *Id.* at 477-78. The Court, relying on its own prior decisions, observed that no Spanish grant made after the Treaty of St. Ildefonso in 1800 could convey any right in the soil to plaintiff and thus this case was wholly controlled by the decision in *Pollard*. *Id.* Justice Taney, who was a member of the *Pollard* majority, did, however, offer dicta contradicting a portion of *Pollard*'s reasoning: "Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done." *Id.* at 478.

153. 152 U.S. 1 (1894).

154. Act of Congress of September 27, 1850, chap. 76 (9 Stat. 496).

lands but also adjacent tidelands and a portion of the bed of the Columbia.[155] The United States had issued a patent for Shively's donation land claim in 1865, stating in the patent that the land was bounded by the Columbia River.[156] Bowlby claimed title to the tidelands by virtue of deeds executed by the State of Oregon.[157] Thus, the issue in the case was whether the United States could and did grant Shively title to the tidelands in question.

In the process of addressing these two questions, the Court took the opportunity to expound at length upon the "scope and effect of the previous decisions of this court upon the subject of public and private rights in land below high water mark of navigable waters."[158] Following this lengthy discussion, much of which was pure dicta, the Court answered the questions before it. It ruled that the United States, acting through the Congress, had the constitutional authority to make prestatehood conveyances of land under navigable water but that it had not done so in this case.

The Court's holding that the United States could make grants of land under navigable water was a conscious departure from *Pollard*'s dicta that such grants were necessarily void and inoperative. The Court asserted that any portion of *Pollard* that suggested the United States could not grant lands below high water mark was dicta because the case involved a grant made by Congress *after* Alabama's admission into the Union.[159] The Court also rejected, as dicta, similar statements in some of the Court's later opinions,[160] which had applied *Pollard*'s equal footing doctrine beyond the territory ceded in the deeds of cession.[161] In place of such dicta, the Court stated the rule:

155. *Shively*, 152 U.S. at 2.

156. *Id.* at 3.

157. *Id.* Oregon had made such lands available for purchase pursuant to an 1872 statute. The statute recited that annual encroachments of the sea upon the land were washing away shores and shoaling harbors and that the only way to prevent such damage was to encourage improvement of the tide lands by selling them into private ownership. *Id.* at 52-53.

158. *Id.* at 10-11. The Court expounded on the common law in England, *id.* at 11-14, and then on the common law in the original 13 states, concluding that "there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public." *Id.* at 26. The Court then discussed the doctrines of navigability and riparian rights and the early development of the equal footing doctrine. *Id.* at 26-47.

159. *Id.* at 28 ("So much of the reasoning of the learned justice as implied that the title in the land below high-water mark could not have been granted away by the United States after the deed of cession of the territory and before the admission of the state into the Union, was not necessary to the decision, which involved only a grant made by Congress after the admission of Alabama . . .").

160. *Id.* at 47 ("Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.").

161. Citing such cases the Court also emphasized that the equal footing doctrine did not "rest

> By the Constitution, 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.
>
> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.[162]

As discussed in Part VI.B, below, the Court's conclusion that Congress had authority under the Constitution to make grants of land below navigable waters was surely correct. Yet, as the Court observed, Congress had, as a matter of policy, "never undertaken by general laws to dispose of such lands."[163]

Despite its claim that the reasons for Congress' policy were "not far to seek,"[164] the Court's articulation of those reasons was confusing and unpersuasive. First, the Court returned to *Martin* for the proposition that the title and dominion over tide waters and the soil under them "vested absolutely in the people of each state for their own common use, subject only to the rights since surrendered by the Constitution to the general government."[165] Congress, like the states, held land under navigable

solely upon the terms of the deed of cession from the state of Georgia to the United States," but applied to all subsequently admitted states. *Shively*, 152 U.S. at 28.

162. *Id.* at 48 (citations omitted).

163. *Id.* While Congress may not have undertaken to dispose of submerged lands by its general land laws, territorial legislatures did in fact make grants of land under navigable water and several fisheries to private individuals. *See, e.g.*, "An Act to Amend an Act Entitled An Act to Encourage the Cultivation of Oysters," (Approved November 14, 1879), Laws of the Washington Territory, enacted by the Legislative Assembly in the Year 1879 (Olympia: C.B. Bagley, Public Printer, 1879) (Act of Washington territorial legislature allowing citizens to claim exclusive rights to natural oyster beds); *see also* Ralph W. Johnson, *The Public Trust Doctrine in Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 533-35 (1992) (discussing pre- and post-statehood tideland legislation in Washington and noting that the Washington Constitution invalidated prior acts of the territorial legislature granting tidelands to railroad companies and establishing riparian rights).

164. *Shively*, 152 U.S. at 48.

165. *Id.* at 49 (internal quotation and citation omitted). Like others before it, the *Shively* Court cited *De Jure Maris* as one of the leading authorities on sovereign rights in land under navigable water. Addressing the dispute whether Hale had authored *De Jure Maris*, the Court cited Stuart Moore's treatise as finally resolving that Hale had authored *De Jure Maris*, but curiously ignored

waters in the territories "for the benefit of the whole people."[166] During the territorial period, the United States owned and could dispose of tidelands in the same manner as a state owned and could dispose of tidelands after statehood. Both had the power to grant tidelands but neither made a practice of conveying the public's resources.

Had the Court stopped there, the reasons for Congress' policy would have been sufficient and the Court's explanation unassailable. Instead, the Court went on and offered a second reason why Congress generally had not made pre-statehood dispositions of land under navigable water: "title to the shore and lands under tide water, . . . 'is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.'"[167] But this argument relied on the very dicta that the Court had just criticized as contrary to its holding that Congress had the power to grant land under navigable water.[168] In other words, in trying to justify Congress' practice of not granting land under navigable waters, the Court fell back on the very argument it had just rejected: that Congress was without power over such lands because they were an incident of sovereignty and necessary to a state's equal footing status. But title to land under navigable waters cannot be both an essential aspect of state sovereignty, necessary for equal footing status with the original states, and, at the same time, subject to disposal by the United States prior to statehood.[169]

Moore's entire thesis that the prima facie theory of Lord Hale was pure invention. *Id.* at 11. *See also* MacGrady, *supra* note 12, at 567 n.296 (discussing this curious omission).

166. *Shively*, 152 U.S. at 57.

167. *Id.* at 49 (quoting Hardin v. Jordan 140 U.S. 371, 381 (1891)).

168. *See Shively*, 152 U.S. at 47 (holding that Congress had the power to grant such lands, "[n]otwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States . . . "). One of those opinions which the Court had just quoted was that of Justice Bradley in *Hardin v. Jordan*. In the passage quoted by the *Shively* Court, and rejected as dicta, Justice Bradley had written: "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States." *Id.* at 46 (quoting Hardin v. Jordan, 140 U.S. 371, 381 (1891)). Thus, the truncated passage from *Hardin* which the *Shively* Court quotes as part of its argument for why Congress had chosen, despite its power, to hold lands under navigable water in trust for the future state, in its full form, was actually an argument that Congress did not have power to convey such lands. As Justice Bradley saw it, the fact that title to the shore and lands under water was "incidental to the sovereignty of the state," was the reason why the United States did not have the authority to dispose of such lands prior to statehood. *Hardin*, 140 U.S. at 381.

169. There are two alternative answers to the Court's explanation of why Congress had not undertaken to dispose of lands under navigable water. First, the Court could be suggesting that while ownership of land under navigable water was incidental to the sovereignty of the state, ensuring equal sovereignty for entering states was merely a congressional policy. But, as discussed in Part VI.B, *infra*, equal sovereignty between states was a constitutional imperative, not a congressional prerogative. Second, the Court could be suggesting that, while not required to do so for purposes of assuring equal sovereignty, Congress had a policy of holding land under navigable waters for the future state

That the Court's state-sovereignty rationale for Congress policy was mistaken and unnecessary is further evidenced by the rule the Court used to decide whether Congress had, in this case, departed from its policy of holding land under navigable water in trust for the future state. For the relevant rule the Court returned to its first rationale for Congress' policy and used the basic prima facie rule of construction advocated by Taney in *Martin*[170]:

> All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.[171]

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because such lands were better suited to state ownership. Under this reading, the Court's citation of Bradley's language in *Hardin v. Jordan* was only meant to emphasize the greater importance to the public of land under navigable water as opposed to uplands. Congress' policy of maintaining land under navigable waters was a recognition of its importance to the future state but not a belief that the ownership was necessary for sovereign status. As discussed in Part VI.C, *infra*, if this was not the Court's explanation, it should have been.

170. The Court had previously suggested application of the prima facie theory in equal footing cases. *See, e.g.*, Packer v. Bird, 137 U.S. 661, 672 (1891) (ownership of land along a navigable stream is presumed to stop at the high water mark, "unless the claim confirmed in terms embraces the land under the waters of the stream"); United States v. Pacheco, 69 U.S. (2 Wall.) 587, 590 (1864) (applying prima facie theory and concluding that a grant from the Mexican government of land bounded "by the bay" of San Francisco and confirmed by a United States court under the authority of Congress presumptively did not convey any land below the high water mark).

171. *Shively*, 152 U.S. at 10 (internal quotation and citation omitted). In support of the quoted passage, the Court cited not only to *Martin*, but also to cases not involving land under navigable water. *Id.* (citing Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 546-48 (1837) (holding that "[a] state ought never to be presumed to surrender . . ." those powers which the "whole community have an interest in preserving . . . undiminished")). The citation of these other cases should not be understood as suggesting that *Shively* was not following the longstanding prima facie theory. Rather, their citation simply indicates that the prima facie theory is not the only instance of a presumption against sovereign grants. *See* Massachusetts v. New York, 271 U.S. 65, 89 (1926) (concluding that "grants [of soil under navigable waters] are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction") (citations omitted). The primary difference is that the presumption against grants of land under navigable water has been applied more aggressively than the presumption against other types of sovereign grants. *Compare* Montana v. United States, 450 U.S. 544, 552 (1981) (emphasizing that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a *strong* presumption against conveyance") (emphasis added) *with* Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979) (declining to apply canon of construction favoring government "in its full vigor to grants under the railroad Acts") *and* United States v. Denver & Rio Grande Ry., 150 U.S. 1, 14 (1893) (observing that "public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given *either expressly or by necessary or fair implication*") (emphasis added).

Under this rule, the Court said there was nothing in the Oregon Donation Act to indicate a congressional intent to grant land under navigable waters to Shively or other grantees.[172] Nor was there any indication in Oregon law of an express grant to Shively. Indeed, the only express grant under Oregon law was the grant of the tidelands at issue to Bowlby.[173] Given the difference in the two grants, the Court concluded that the United States had not made a pre-statehood grant to Shively and that Oregon was within its rights in granting the tidelands to Bowlby.[174] Thus, the Court's decision whether Congress had acted according to its policy in Shively's case was an application of the prima facie theory. In essence, the Court identified a congressional policy—holding land under navigable water in trust for the future state—and then, as a matter of federal common law, adopted a rule to decide whether Congress had acted according to that policy. The rule was essentially the prima facie theory of Hale, Kent, Angell and *Martin*.[175]

The prima facie theory, therefore, provided the court a rule by which it could determine whether Congress had acted in accordance with its policy. It allowed the departures from that policy that the Court otherwise recognized were constitutionally permissible.[176] The Court's sovereignty rationale, by contrast, provided no rule for determining a circum-

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172. *Shively*, 152 U.S. at 51.

173. *See id.* at 52-54 and *supra* note 157. Despite *Illinois Central*, neither the United States nor the Oregon Supreme Court perceived anything inappropriate about Oregon's conveyance of the tidelands into private ownership. As the Supreme Court stated: "The whole question is for the state to determine for itself. It can say to what extent it will preserve its rights of ownership in them, or confer them on others." *Shively*, 152 U.S. at 56.

174. *Id.* at 57-58.

175. Some might argue that *Shively*'s presumption against conveyance is distinct from the prima facie rule of the common law because the Court stated that "Congress has the power to make grants of lands below high water mark of navigable waters . . . whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory." *Id.* at 48. Under this argument, *Shively* describes not so much a rule of construction but a substantive list of those instances in which Congress has power to convey land under navigable water. As explained below, *infra* notes 253-60 and accompanying text, *Shively*'s list is better understood as a description of the types of situations in which Congress will depart from its policy of holding land under navigable water. The only limitation on Congress' power is that a pre-statehood grant must be made for a public purpose. *Id.* This insignificant limitation, however, is a function of Congress' limited, enumerated power under the Property Clause and not a limitation that inheres in common law understandings of the sovereign's power to convey land under navigable water. *Id.* In other words, the states had plenary power to convey land under navigable water and gave that power to the United States in the territories subject only to the requirement that the United States dispose of land under navigable water in the territories for a public purpose. Once the public purpose constitutional threshold is crossed, the judicial inquiry is solely whether Congress manifested its intention in terms so express as to overcome the presumption of continued sovereign ownership of land under navigable water.

176. *Shively*, 152 U.S. at 48.

stance under which Congress would depart from its policy because, by definition, the sovereignty rationale excluded any situation in which Congress could depart from its policy. If state sovereignty was the reason for Congress' policy, equal footing necessarily prohibited a grant, no matter how express.[177]

If the state sovereignty rationale was not necessary to explain Congress' practice of holding land under navigable waters in trust, why was it offered? A possible explanation is that the Court wanted to soften the impact of re-locating in policy rather than constitutional obligation Congress' practice of holding land under navigable water in trust for the future state. In essence the Court sugar-coated its holding in the rhetoric of sovereignty and equal footing so that states would more readily swallow the rule that Congress could make pre-statehood grants of land under navigable water. In the long run, however, *Shively*'s continued reliance on the state sovereignty rationale for Congress' policy of holding land under navigable waters in trust for the future state only allowed the confusion engendered by *Pollard* to continue.

VI. UNPACKING THE RHETORICAL CONFUSION IN EQUAL FOOTING CASES AND COMMENTARY

A. *Application of the Equal Footing Doctrine after* Shively

Since *Shively*, courts have consistently applied the presumption against pre-statehood grants of land under navigable waters. The Supreme Court's most recent decision on the equal footing doctrine—*Utah Division of State Lands v. United States*[178]—is illustrative:

> The principles articulated in Shively have been applied a number of times by this Court, and in each case we have consistently acknowledged congressional policy to dispose of sovereign lands only in the most unusual circumstances . . . . It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made

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177. The Court's reliance on the state sovereignty rationale of *Pollard* is further dubious because in *Pollard* there was an independent basis for recognizing an interference with sovereignty: the specific commands of the deeds of cession.

178. 482 U.S. 193 (1987). *Utah Div. of State Lands* involved a claim by the United States that it had reserved prior to statehood a portion of the bed of Utah lake. The Court ultimately concluded that the reservation was not sufficiently clear to overcome the presumption that the land under the navigable lake was to be held in trust for the state of Utah. *Id.* at 203.

> very plain. We have stated that [a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.[179]

The result of courts' adherence to *Shively*'s presumption against conveyance has, in some instances, resulted in rejection of claims of prestatehood grants.[180] In other instances, most notably those involving Indian claims, courts have found that the presumption against conveyance has been overcome.[181]

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179. *Id.* at 197-98 (quoting Montana v. United States, 450 U.S. 544, 552 (1981), and United States v. Holt State Bank, 270 U.S. 49, 55 (1926)) (internal quotations omitted). The Supreme Court's articulation of the presumption against conveyance could just as easily have been penned by Lord Hale. While the language is somewhat altered, the message is the same: the sovereign will be presumed to have retained land under navigable water, but such land is capable of conveyance and thus the presumption may be overcome. If there has been any substantive change from Hale's prima facie theory, it has been in the increasing emphasis on the presumption of sovereign ownership as a "strong" presumption. *Id.* at 197. The additional strength accorded the presumption could be in part due to the constitutional rhetoric surrounding equal footing. It can just as easily be understood, however, as a recognition of the importance of the public resource involved and the strong desire to presume that the resource was left to the people in common rather than privatized.

180. *See, e.g.*, Montana v. United States, 450 U.S. 544, 552 (1981) (ruling that Montana owned the bed of the Big Horn River within the exterior boundaries of the Crow Tribe Reservation); United States v. Holt State Bank, 270 U.S. 49, 57-59 (1926) (ruling that Minnesota owned title to the bed of Mud lake within the Red Lake Indian Reservation); Summa Corp. v. California ex rel. State Lands Comm'n, 466 U.S. 198, 205 (1984) ("[A]n ordinary federal patent purporting to convey tidelands located with a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State."); United States v. Aranson, 696 F.2d 654, 664-66 (9th Cir. 1983) (ruling that the easterly half of the Colorado River bed had not been conveyed as part of the Colorado River Indian Reservation), *cert. denied*, 469 U.S. 982 (1983); Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963) (concluding that tidelands adjacent to Skokomish tribe's reservation had passed to state of Washington), *cert. denied*, 376 U.S. 943 (1964); Taylor v. United States 44 F.2d 531, 536 (9th Cir. 1930) (holding that Presidential order setting aside for the Quileute Indian tribe land bordering on navigable river did not reserve submerged lands), *cert. denied*, 283 U.S. 820 (1931); Wisconsin v. Baker, 524 F. Supp. 726, 734 (W.D. Wis. 1981) (rejecting tribal claim to regulate hunting and fishing in navigable waters lying within the exterior boundaries of the Lac Courte Oreilles Reservation), *modified by* 698 F.2d 1323 (7th Cir. 1983), *cert. denied*, 463 U.S. 1207 (1983).

181. *See, e.g.*, Choctaw v. Oklahoma, 397 U.S. 620, 635 (1970) (finding tribal title to the bed of the Arkansas River in part because the United States had promised that no part of the land granted to the tribe would ever become part of a state); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 87-90 (1918) (holding that the United States had granted the submerged land around the Annette Islands as part of the Metlakahtla Indian reservation); United States v. Winans, 198 U.S. 371, 382-84 (1905) (holding that Yakima Indian tribe had easement to fish at certain shore lands along the Columbia River); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257-58 (9th Cir. 1983) (ruling that *Shively* presumption was overcome because the particular "grant of real property to an

Unfortunately, the courts have not simply adopted the *Shively* presumption, they have also replicated over and over *Shively*'s confusion about the theoretical foundation for the presumption against United States conveyances of land under navigable water. Thus, like the Court in *Shively*, they often simultaneously assert or accept three irreconcilable positions: [1] that ownership of land under navigable water is an essential aspect of sovereignty; [2] that each state must enter the Union on an equal sovereign footing with the original 13 states; but [3] that Congress nevertheless has the power under the Constitution to grant land under navigable water.[182]

It is simply not possible to maintain all three positions at once; one of the propositions must be false. Thus, if ownership of land below high water mark is an essential aspect of sovereignty and if states must exist on an equal sovereign footing, then Congress cannot make pre-statehood grants of land under navigable water. If, on the other hand, Congress can make pre-statehood grants and if ownership of land under navigable water is an essential aspect of state sovereignty, then states can enter the Union on an unequal footing. Alternatively, if Congress has the power to convey land under navigable water and if each state must enter the Union on an equal sovereign footing, then state ownership of land under navigable water cannot be an essential aspect of state sovereignty. As the below analysis shows, it is this third alternative that is correct. The only way to coherently and persuasively explain equal footing case law is to recognize that Congress has the power to convey submerged lands, that each state is entitled to equal sovereign footing, but that ownership of submerged lands is not essential to state sovereignty.

Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival"), *cert. denied*, 465 U.S. 1049 (1984); Muckleshoot Indian Tribe v. Trans-Canada Enterprises, 713 F.2d 455, 457-58 (9th Cir. 1983) (companion case to *Puyallup*), *cert. denied*, 465 U.S. 1049 (1984); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 961-62 (9th Cir. 1982) (holding that the Indians had acquired title to a lake bed within the boundaries of the reservation where they were dependent on the fishery at the time the treaty was signed), *cert. denied*, 459 U.S. 977 (1982) (Justices Rehnquist and White dissented from the denial of certiorari based on *Montana v. United States*); United States v. Washington, 694 F.2d 188 (9th Cir. 1982) (following *Confederated Salish*), *cert. denied*, 463 U.S. 1207 (1983); United States v. City of Anchorage, 437 F.2d 1081, 1084-85 (9th Cir. 1971) (concluding that Congress intended to reserve tidelands and submerged lands for a railway along the coast); United States v. Alaska, 423 F.2d 764, 766-68 (9th Cir. 1970) (Tustumena lake bed within the Kenai National Moose Range properly reserved as part of a Wildlife Refuge Area), *cert. denied*, 400 U.S. 967 (1970); United States v. Stotts, 49 F.2d 619, 620-21 (W.D. Wash. 1930) (finding presumption overcome where Lummi Indian tribe had clearly been granted certain tidelands adjacent to its reservation); Montana Power Co. v. Rochester, 127 F.2d 189, 191 (9th Cir. 1942) (finding United States' intent to reserve title to bed of Flathead Lake for the tribes of the Flathead Indian Reservation).

182. *See, e.g.*, *Utah Div. of State Lands*, 482 U.S. at 195 (observing that "ownership of this land [under navigable water] was considered an essential attribute of sovereignty"); *id.* at 195-97 (noting that Congress has power under the Property Clause to grant such lands).

B. Congress' Power under the Property Clause to Convey Land Under Navigable Water Prior to Statehood

Shively, and an unbroken line of cases thereafter, have held that the Congress has power under the Constitution to make pre-statehood conveyances of land under navigable water.[183] This proposition is correct but its basis deserves careful examination, in part because of what it says about state power over submerged lands. Returning to first principles, it is basic constitutional law that the federal government can act only pursuant to the enumerated authority given to it by the states in the Constitution.[184] Two propositions must therefore be established to conclude that the United States has authority to convey land under navigable water. Initially, the power of the original states to convey land under navigable water must be established. If the states could not convey land under navigable water, then that power could not have been given to the federal government under the Constitution.[185] As discussed above,[186] the states had plenary authority to convey submerged lands and associated trust resources,[187] and thus they could have given such authority to the federal government in the Constitution. The question then becomes whether the states, in the Consti-

183. As the Court put it in *Shively*,

> By the Constitution, 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.

Shively, 152 U.S. at 48. *See also Winans*, 198 U.S. at 383-84; *Alaska Pac. Fisheries*, 248 U.S. at 88; *Montana*, 450 U.S. at 551-52.

184. *See* PAUL M. BATOR ET. AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (2d ed. 1973). Whereas an action by a state government is valid under federal law unless preempted or unless it violates some specific limitation imposed by the Constitution, a federal action must fall within one of the enumerated powers listed in the Constitution; there is no federal power to legislate for the general welfare. As Justice Taney stated in *Pollard*, "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted." *Pollard*, 44 U.S. (8 How.) at 223.

185. The only area in which the federal government arguably has power to act beyond its enumerated powers in the Constitution is with respect to matters of so-called "external sovereignty," such as with respect to the marginal seas. *See generally* Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056 (1974) (arguing that United States possessed inherent sovereignty over the marginal seas).

186. *See supra* Part III.

187. To the extent states lack the power to dispose of land under navigable water and associated trust resources, that same power is necessarily denied to the United States. The United States could not have received a power that the states did not possess. Thus, it is not possible to simultaneously assert that a state is prohibited from granting a several fishery free of the trust or a water right free of the trust but that the United States was free to grant such several fisheries and water rights prior to statehood. The fact is that a state has always had power to do so, and that power is the source of the United States' power in the Constitution.

tution, actually gave the federal government power to grant land under navigable water.[188]

The most obvious constitutional source of the federal government's power to make grants of land beneath navigable water and associated resources is the Property Clause, which gives Congress the "*Power to dispose of* and make all needful Rules and Regulations respecting *the Territory and other Property belonging to the United States*."[189] Solely as a textual matter, the Property Clause appears to give Congress the power to dispose of submerged lands. And, in fact, from *Shively* forward, the Court has identified the Property Clause as the source of Congress' power to dispose of land under navigable water in the territories.[190]

If the Property Clause gives Congress power to convey land under navigable water in the territories and other property belonging to the United States, the question is whether that power is in any way bounded by the language of the Property Clause itself or by another provision of the Constitu-

188. Some would argue that the issue is not whether the *states* gave the federal government power, but whether the *people*, as a whole, gave the federal government the power to convey submerged lands. *See, e.g.*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446-66 (1987) (arguing that both state and federal governments derived their powers from all of the American people). *Compare* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (majority opinion of Stevens, J. and concurring opinion of Kennedy, J. arguing that the right to establish additional qualifications for Congressional office is not within the original powers of the States and thus is not reserved to the States by the Tenth Amendment) *with id.* at 1875-77 (Thomas J., dissenting, arguing that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole"). That dispute need not be resolved here. To the extent the people, whether perceived as ratifying the Constitution through their individual state legislatures or collectively through state conventions, gave power to the United States to convey land under navigable water, the people necessarily had that same power to begin with.

189. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added). For an investigation of the constitutional debates on the Property Clause, *compare* Patterson, *supra* note 2, at 53-54 (arguing that the framers envisioned a narrow view of Congress' Property Clause power) *with* Gaetke, *supra* note 115, at 630-38 (arguing for a broader view). If the federal power to grant land under navigable water is not located in the Property Clause, it could also be located in the treaty-making power, U.S. CONST. art. II, § 2, cl. 2, or the war-making power, U.S. CONST. art. I, § 8, cl. 11, in conjunction with the necessary and proper clause. U.S. CONST. art. I, § 8, cl. 18. *See* American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542-43 (1828) ("Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory [under the treaty or war-making powers]. Whichever may be the source, whence the power is derived, the possession of it is unquestioned.") Locating Congress' authority in the treaty and war-making powers seems particularly appropriate for those grants of land under navigable water to Indian tribes which have been among the most hotly disputed of equal footing cases. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); United States v. Holt State Bank, 270 U.S. 49 (1926).

190. *See, e.g.*, *Shively*, 152 U.S. at 48; *Utah Div. of State Lands*, 482 U.S. at 200-01.

tion. Because the Court often speaks of the equal footing doctrine in constitutional terms,[191] one might suppose that equal footing is a constitutional limitation on Congress power under the Property Clause to convey submerged lands. As discussed below, this supposition is inaccurate.[192]

The question whether the equal footing doctrine is a constitutional limit on Congress' power under the Property Clause[193] is a difficult one

191. *See, e.g.*, Oregon ex. rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977) (states' "title to land underlying navigable waters within [their] boundaries is conferred . . . by the Constitution itself"); Summa Corp v. California ex rel. State Lands Comm'n, 466 U.S. 198, 205 (1984) ("The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution."); United States v. Holt State Bank, 270 U.S. 49, 55 (1926) ("under the constitutional principle of equality among the several States the title to the bed of Mud Lake then passed to the State, if the lake was navigable . . . ."); Arizona Ctr. for Law in the Public Interest v. Hassell, 837 P.2d 158, 161 (Ariz. 1991) ("The Supreme Court has grounded the states' watercourse sovereignty in the Constitution."). As a consequence of such judicial language, state litigants also use constitutional rhetoric, arguing that the United States was constitutionally obligated to hold land under navigable water in trust for the future state. *See, e.g.*, Brief of the States of California, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, South Dakota, Utah, Washington and Wisconsin as Amici Curiae in Support of Petitioners at 17, Coeur D'Alene Tribe v. Idaho, 42 F.3d 1244 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 1416 (1996), *and cert. granted*, 116 S. Ct. 1415 (1996) (Docket No. 94-1474) ("The Constitution Requires the United States to Hold the Bed and Banks of Navigable Waters in Trust for the Future States under the Equal Footing Doctrine.").

192. Two additional arguments could be raised for a limitation on Congress' power under the Property Clause to convey submerged lands. One commentator has suggested a Tenth Amendment limitation, but, as explained in note 259, *infra*, the flaws in this argument are insurmountable. A second possible limitation on Congress' power is to infer a public trust limitation embedded in the Property Clause. This argument is discussed in detail, *infra* notes 253-60 and accompanying text, following the article's discussion of *Illinois Central* and the expanding public trust doctrine. It too is incorrect for at least two reasons. First, the Supreme Court has stated that "the only *constitutional* limitation on the right to grant sovereign land is that such a grant must be for a 'public purpos[e] appropriate to the objects for which the United States hold[s] the Territory.'" *Utah Div. of State Lands*, 482 U.S. at 200-01 (emphasis in original) (quoting *Shively*, 152 U.S. at 48). If the "public purpose" requirement is a limitation, it is akin to a rational basis test. See cases and commentary cited at note 259, *infra*. It is certainly not a public trust limitation on sovereign power of the type articulated in *Illinois Central* and its progeny, which amounts to a significant constraint on the power to convey land under navigable waters and trust resources. *See infra* note 260. Second, the Property Clause does not have embedded within it the public trust doctrine of *Illinois Central* and its progeny because at the time of the Constitution, states were not operating under that doctrine. They were free to dispose of land under navigable waters and associated resources as long as they did so in clear and express terms. *See supra* Part III. Admittedly, had the states always been bound by the public trust doctrine, the same limitation on Congress' power would necessarily have been embedded in the Constitution. If the states possessed no power to grant land under navigable water and associated resources unencumbered by the public trust, Congress could not have received power in the Property Clause to make unencumbered grants. Stated simply, Congress could not have received greater enumerated powers than the states themselves possessed. *See supra* notes 184-88 and accompanying text. Thus, those who reject this article's suggestion that the original 13 states had plenary power to convey land under navigable water must necessarily conclude that the United States' enumerated power in the Property Clause is constrained by the same trust obligations as the original states.

193. *Cf.* Touton, *supra* note 2, at 833-38 (arguing for "the equal footing doctrine as a continuing limitation on the property power" but not focusing on land under navigable water).

that requires explication. The basic principle underlying the equal footing doctrine—that new states must enter the Union on an equal footing with the original 13 states—is indeed constitutional in nature. The seminal case on this point is *Coyle v. Smith*,[194] where a 1910 Oklahoma act that moved the state capitol from Guthrie to Oklahoma City was challenged as violative of Oklahoma's enabling act which required that the capitol remain at Guthrie until 1913.[195] The Court held that the challenged portion of the enabling act was an unconstitutional violation of the principle of equal footing. The Court located the equal footing doctrine in art. IV, § 3[1] of the Constitution which gives Congress the power to admit states into the Union.[196] It held that Article IV, § 3[1] gave Congress no power to admit a state with less sovereignty than the other states in the Union.[197] Thus, if it wishes to create a state, Congress cannot take actions prior to statehood that would preclude it from admitting the new state with equal sovereignty.[198] To the extent Congress takes an action that diminishes, vis-a-vis

194. 221 U.S. 559 (1911).

195. *Coyle*, 221 U.S. at 563-65.

196. *Coyle*, 221 U.S. at 566. Article IV, § 3, cl. 1 states: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State, nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of Congress." In an earlier decision, a district court had located the equal footing doctrine not in Article IV, § 3, but in structural constitutional notions of federalism. In *Case v. Toftus*, 39 F. 730 (D. Or. 1889), the court stated:

> The doctrine that new states must be admitted into the Union on an "equal footing" with the old ones does not rest on any express provision of the constitution, which simply declares (article 4, Sec. 3) "new states may be admitted by congress into this Union," but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution,—a union of political equals.

Id. at 732. For a list of provisions in the Constitution guaranteeing equality among the states, see Touton, *supra* note 2, at 833 n.108.

197. *Coyle*, 221 U.S. at 566-67. The Court emphasized:

> The power is to admit "new states into *this* Union."
>
> "This Union" was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

Id. at 567 (emphasis in original).

198. *Coyle*, 211 U.S. at 573 ("when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions,

existing states, the sovereignty of a future state, a court may properly strike down or void that action as an unconstitutional violation of the principle of equal footing.[199]

To say that a state is constitutionally entitled to enter the Union on an equal sovereign footing, however, only begs the question of what ownership and authority is a necessary concomitant of state sovereignty.[200]

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compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.").

199. *Coyle*, 221 U.S. at 573. Of course, Congress, when acting pursuant to its enumerated powers, can act to "diminish" state sovereignty because a state, or nascent state, has necessarily agreed to give up, or potentially to give up, that portion of its sovereignty in the Constitution. What Congress cannot do, because of the equal footing doctrine of art. IV, § 3, cl. 1, is diminish a future state's sovereignty in a way that would cause the state to be admitted into the Union with less sovereignty than the existing states. At least one commentator has disputed this view of equal footing. Professor Patterson has argued that equal footing has no constitutional basis at all and that *Coyle* was merely a decision that Congress had exceeded its enumerated powers in violation of the Tenth Amendment:

> The first draft of the Constitution made by the Committee of Detail states that "the new states shall be admitted on the same terms with the original states." When this part of the report of the committee came up for discussion in the Committee of the Whole, on motion of Gouverneur Morris on August 29, this clause was struck out and the following was substituted: "New states may be admitted by the Legislature into this Union." After the Constitution had given Congress the power to make all needful rules and regulations respecting the territory of the United States, it readopted the Ordinance of 1787 in 1789 and thus accepted the "equal footing" doctrine which was part of the Ordinance of 1787. Under the admission clause it had the right to do this, but it also had the right to reject the "equal footing" doctrine. The point is that it is a mere matter of the policy of the Congress, and is, therefore, subject to modification in any particular instance of admission. The "equal footing" doctrine, therefore, is not a constitutional matter. It is completely subject to the discretion of the Congress outside of the reserved powers.

See also Patterson, *supra* note 2, at 63. Patterson, *supra* note 2, at 66-67; Gaetke, *supra* note 115, at 634 & n.127 (arguing that the deletion of the requirement that new states "shall be admitted on the same terms with the original states" was an express rejection of the equal footing doctrine). In support of the argument that the principle of equal footing is not constitutional, Patterson also contends that Congress has taken a variety of actions that arguably diminished the sovereign status of new states. Patterson, *supra* note 2, at 64-66 ("The general rule of the Congress has been to pretend to practice the 'equal footing' doctrine but at the same time to violate it repeatedly."). Professor Patterson's view has certainly not been accepted by the Court, which has viewed equal footing as a separate constitutional mandate located not in the Tenth Amendment but in art. IV, § 3, cl. 1. *See Coyle*, 221 U.S. at 566-67; *see also supra* note 191 (citing cases affording the equal footing doctrine constitutional status). It also is unclear that the Tenth Amendment applies to *pre*-statehood obligations. But even if Professor Patterson were correct that equal footing is merely a Tenth Amendment doctrine, it would not detract from the point made in the text, *infra*, that, as applied to land under navigable waters, the equal footing doctrine is little more than the application of a long-standing common law presumption of sovereign ownership.

200. Ownership of all non-overflowed lands, for example, has not been considered essential to state sovereignty, other than in the *Pollard* dicta. The Court has long been clear that equal footing does not require that economic status and land ownership be equal; the necessary equality is "as respects political standing and sovereignty." United States v. Texas, 339 U.S. 707, 716 (1950). In the *Texas* case, the Court emphasized:

> The "equal footing" clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never

As the first portion of this article discussed, ownership of land under navigable water and associated resources is not an essential attribute of sovereignty,[201] and certainly was not conceived as such at the time the Northwest Ordinance and Constitution were drafted.[202] Had states understood ownership of submerged lands and related resources to be crucial to sovereignty, they would not have made the grants of tidelands and private fisheries that they did.[203] Despite its constitutional rhetoric,[204] since *Shively* the Supreme Court and lower courts have also plainly understood that state ownership of land under navigable water is not an essential attribute of sovereignty necessary for equal footing. This understanding is evidenced in two ways. First, despite calling the strong presumption of *Shively* the "equal footing doctrine," the presumption is not treated as a limit on congressional power but merely as a requirement that Congress expressly exercise that power. Second, if land under navigable water were truly an essential aspect of sovereignty, courts should have consistently held that any pre-statehood transfer of land under navigable waters was unconstitutional. But that, quite obviously, has not been the case. A number of pre-statehood transfers of land under navigable water have been

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> been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil . . . . Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

Id. at 716. For additional cases discussing the application of equal footing to political equality as opposed to resource equality, see Stearns v. Minnesota, 179 U.S. 223, 244-45 (1900); United States v. Gardner, 903 F. Supp. 1394, 1400 (D. Nev. 1995); Nevada v. Watkins, 914 F.2d 1545, 1554 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991); Nevada ex rel. Nevada State Bd. of Agric. v. United States, 512 F. Supp. 166, 171 (D. Nev. 1981). *See also* George C. Coggins, *et al.*,, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 575 (1982) ("The doctrine was formulated to assure political parity, not economic or geophysical equality."); Gaetke, *supra* note 115, at 643 (arguing same).

201. *See supra* Part III.

202. *See supra* Part III. Of course, applying the logic of *Illinois Central* that ownership of overflowed lands and related resources is every bit as important to state sovereignty as the police power, *Illinois Central*, 146 U.S. at 453-54, some might argue that ownership of land under navigable water is essential to sovereignty. As discussed *infra* Part VIII, such an argument seems a logical one for a supporter of *Illinois Central* and the modern public trust doctrine, but those supporters do not seem to be advocating the notion that pre-statehood transfers of land under navigable water were an unconstitutional violation of state sovereignty.

203. *See supra* Part III. The early state legislatures presumably believed that their police and eminent domain power, however limited, were sufficient to exercise any necessary sovereignty over the submerged lands and fisheries granted to individuals. As Professor Lazarus' work shows, subsequent expansion of the police power has made it even more clear that ownership of land under navigable water and related resources is not essential to sovereignty. *See* Lazarus, *supra* note 2, at 633-34 (arguing that the expansion of police powers and relaxation of standing requirements has made the public trust doctrine largely unnecessary).

204. *See supra* note 191 and accompanying text.

validated.[205] Such holdings show that whatever the courts' constitutional and equal footing rhetoric, they have not treated ownership of land under navigable water as an essential aspect of sovereignty.

Because ownership of overflowed lands and related resources is not essential to state sovereignty, a state can enter the Union on an equal footing regardless whether it receives those lands and resources upon statehood.[206] Yet, if ownership of land under navigable water is not required for equal sovereign footing, the obvious question is why the presumption against pre-statehood conveyance is called the "equal footing doctrine" and why cases continue to use constitutional rhetoric in discussing pre-statehood transfers of land under navigable water. The answer is that, as applied to pre-statehood grants of land under navigable water, the term "equal footing doctrine" is something of a misnomer derived from the combination of *Pollard* and *Shively*. The equal footing rationale originated in *Pollard* because the Court had concluded that ownership of land under navigable water, and even uplands, was an essential attribute of sovereignty and thus necessary to equal footing.[207] However, when, in *Shively*, the Court departed from *Pollard* and recognized that Congress had the authority to make pre-statehood grants of land under navigable waters, the reason for describing the issue as one of "equal footing" was

205. *See supra* note 181 citing cases upholding such transfers.

206. Plainly, this conclusion is directly contrary to the argument of Sagebrush Rebels and county control advocates who argue that not only ownership of land beneath navigable water but also of non-overflowed lands is essential to state sovereignty and thus was required to be transferred to the states upon their admission to the Union. *See* United States v. Nye County, 920 F. Supp. 1108, 1114-17 (D. Nev. 1996); United States v. Gardner, 903 F. Supp. 1394, 1401 (D. Nev. 1995). *See also supra* note 144 (citing descriptions of sagebrush rebellion and county control movements); Patterson, *supra* note 2 (arguing that Congress was without power to retain either overflowed lands or non-overflowed lands). The Sagebrush Rebels' arguments have been rejected many times. *E.g.*, *Nye County*, 920 F. Supp. at 1117 ("The Supreme Court has not held that the ownership of dry lands, or lands submerged by non-navigable and non-tidal waters, was an attribute of the original thirteen states' sovereignty. Rather, it has held that these lands do not pass to states upon admission. In sum, the entire weight of the Supreme Court's decisions requires a finding that title to the federal public lands within Nye County did not pass to the State of Nevada upon its admission pursuant to the equal footing doctrine."); Mann v. Tacoma Land Co., 153 U.S. 273, 284 (1894) (observing that *Shively* applied only to land under navigable water and not federal public lands not covered by navigable water); United States v. Gardner, 903 F. Supp. 1394, 1400-01 (D. Nev. 1995). *See generally* Leshy, *supra* note 144, at 336-38 (discussing cases limiting *Pollard* to land under navigable water). Because they view ownership of both uplands and submerged lands as essential components of state sovereignty, one might expect that county control advocates would be opposed to any grant that diminished public sovereignty over a resource. Yet, they are not noted for their advocacy of the public trust doctrine. Of course, the other side of the coin is that those advocating expansion of the public trust doctrine beyond land under navigable waters, *see, e.g.*, Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); McCurdy, *supra* note 13, are unlikely to argue that the federal government was obligated to transfer to the state all wildlife and non-overflowed lands as an essential part of its sovereignty.

207. *See supra* Part V.B.

eliminated.[208] If such lands could be conveyed, they were not an essential attribute of sovereignty necessary to equal footing. Yet because *Shively* based its explanation of congressional policy partly on state sovereignty and did not totally disavow *Pollard*, the "equal footing" appellation stuck.[209] The result has been the application of a common law presumption, in essence the prima facie theory,[210] under a constitutionally-titled doctrine.

Thus, under the banner of the "equal footing doctrine," there is both a constitutional and a common law doctrine.[211] The constitutional doctrine is that of *Coyle*,[212] and the common law doctrine is the presumption of

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208. The term "equal footing" only obscures the fact that the presumption of *Shively* is a common law rule of construction designed to prevent inadvertent or implied grants of public resources. The term may have more descriptive value for the presumption against United States' retention of overflowed lands. *See infra* Part VI.C, discussing application of the presumption to questions of United States' reservations of land under navigable water.

209. This understanding of the origin of the "equal footing" language helps explain observations like that of the Supreme Court in *United States v. Texas*, 339 U.S. 707 (1950), that despite the equal footing doctrine's purpose of protecting political equality, the doctrine has also "long been held to have a direct effect on certain property rights," namely ownership of land under navigable water. *Id.* at 716.

210. *See supra* notes 170-77 and accompanying text, identifying the strong presumption of *Shively* as a continuation of the prima facie theory.

211. References to the common law component of the equal footing doctrine and to "federal common law" refer generally "to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." BATOR ET. AL., *supra* note 184, at 770. The description of the equal footing doctrine, as applied to land under navigable water, as a "common law" doctrine should not be understood as a post-*Erie* pejorative. Deciding whether Congress adhered to a policy of not disposing of submerged lands prior to statehood is precisely the type of issue that calls for the development of federal common law. *See generally* CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 60 (1983); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (holding that federal common law exists "in such narrow areas as those concerned with the rights and obligations of the United States"). *Cf.* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) (holding that the Court may articulate federal common law to "fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress"). In fact the Supreme Court has recognized that the equal footing doctrine is a source of federal common law. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977) ("Upon full reconsideration of our decision in *Bonelli*, we conclude that it was wrong in treating the equal-footing doctrine as a source of federal common law *after* that doctrine had vested title to the riverbed in the State of Arizona as of the time of its admission to the Union.") (emphasis added). What is confusing about the *Corvallis* case is that it also refers to equal footing as a constitutional doctrine. *Id.* at 374 (states' "title to lands underlying navigable waters within [their] boundaries is conferred . . . by the Constitution itself"). It is this kind of mixed rhetoric that is a continuing by-product of *Shively* and *Pollard*. *See supra* Parts VI.A, VI.B, and note 191. The equal footing doctrine, as applied to land under navigable waters, would be subject to more clear-headed application if such constitutional rhetoric were simply eliminated.

212. While most often cited, *Coyle* is not the only case applying the equal footing doctrine in the context of political equality rather than in the context of land under navigable water. *See, e.g.*, Hawkins v. Bleakly, 243 U.S. 210 (1917) (under equal footing doctrine, Iowa must be allowed to choose to dispense with a jury trial in workers' compensation cases even though Northwest Ordinance guaranteed residents of territory a jury trial); Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912) (holding that Ohio could not be stripped of its eminent domain power by a provision of the Northwest Ordinance because to do so would be to deny it an equal footing); Ward v. Race

Shively. The Court's constitutional rhetoric in cases with respect to land under navigable water conflates these two. Separating out the two components is, however, the only way to explain the disparate application of the equal footing doctrine in the *Coyle* context and in the land under navigable water context. It explains why, in *Coyle*, the precise and unambiguous language of the enabling act[213] falls before the mandate of equal footing and equal sovereignty, but in cases involving land under navigable water, such precise language overrides any "equal footing" concerns with respect to the future state. In *Coyle*, the Court is guarding state sovereignty and the basic federal structure of the polity.[214] In "equal footing" cases involving land under navigable water, the Court is applying a common law evidentiary presumption to guard against squandering public resources.[215]

In sum, the only approach that explains all equal footing case law—both cases with respect to submerged lands and others—in a coherent fashion, is to recognize that Congress is indeed constitutionally obligated to admit a new state with sovereignty equal to that of all other states, but that ownership of land under navigable waters and associated public resources has never been an essential attribute of sovereignty.[216]

Horse, 163 U.S. 504 (1896) (under equal footing doctrine, Wyoming has right to apply its laws, which place limits on the killing of game, to off-reservation hunting by a member of the Bannock tribe, despite Bannock tribe's pre-statehood treaty right to hunt "upon the unoccupied lands of the United States"); Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) (following *Race Horse*), *cert. denied*, 116 S. Ct. 1851 (1996).

213. *Coyle*, 221 U.S. at 564 ("The capital of said state shall temporarily be at the city of Guthrie . . . and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen . . . .") (citation and internal quotations omitted).

214. *Coyle*, 221 U.S. at 560 ("the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."). *See also supra* Part V.A, discussing origins of equal footing language.

215. Interestingly, the Court as much as admitted that the presumption is of common law origin when it said, in its most recent equal footing decision, that "[i]n *Shively*, this Court concluded that the only *constitutional* limitation on the right to grant sovereign land is that such a grant must be for a 'public purpos[e] appropriate to the objects for which the United States hold[s] the Territory.'" *Utah Div. of State Lands*, 482 U.S. at 200-01 (emphasis in original) (quoting *Shively*, 152 U.S. at 48). As discussed in note 192, *supra*, and note 259, *infra*, the requirement that the grant serve a "public purpose" is an extremely slight limitation on Congress' power, akin to the rational basis test under the commerce clause. If the only limitation on the exercise of the Property Clause power to convey land under navigable water is that the grant serve a public purpose, then the Court is essentially stating that under the equal footing doctrine, the constitutional requirement of equal footing is not applicable.

216. Accepting both the proposition that ownership of land under navigable water was essential to statehood and that Congress could not constitutionally create a state that was not on an equal footing would lead to the rather odd result that if Congress had alienated land under navigable water prior to statehood, Congress would be constitutionally precluded from making a new state because that new state would not have equal sovereignty. *Coyle*, 221 U.S. at 566-67. Alternatively, if Congress went ahead and created the state, there would need to be an irrebuttable presumption that Congress concluded that it had not permanently alienated any land under navigable water prior to statehood because

Thus, when Congress does expressly and unequivocally grant land under navigable water prior to statehood, it is not violating the constitutional command of equal footing. For that matter, Congress does not violate the Constitution even if it fails to use express language; it only fails to overcome the rebuttable presumption of the common law and thus fails to accomplish the grant.

C. *Application of the Presumption Against United States' Retention of Overflowed Lands*

Whereas the fact that ownership of overflowed lands was not an essential attribute of sovereignty explains the use of a presumption against, rather than a prohibition of, pre-statehood grants, it does not explain as well the need for a presumption against United States' retention of all *non-granted* land under navigable water.[217] Because the presumption is designed to protect common ownership and a reservation by the United States does not necessarily involve a transfer out of common ownership, there is arguably no need to employ the presumption.[218] In other words,

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doing so would have been unconstitutional.

217. *See* Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) (presuming strongly against United States' claim that it had reserved the bed of Utah Lake prior to Utah's admission to the Union).

218. Far from concluding that the presumption is less necessary in cases of federal retention of land under navigable water, the Court has suggested that the presumption may not be enough in such situations, suggesting that if reservations are permissible at all, they are to be more strictly construed than grants to a third party:

> When Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land. When Congress reserves land for a particular purpose, however, it may not also intend to defeat a future State's title to the land. The land remains in federal control, and therefore may still be held for the ultimate benefit of future States . . . .
>
> Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself. Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

Utah Div. of State Lands, 482 U.S. at 202. Despite the Court's unwillingness to assert that a reservation could overcome the strong presumption, the United States surely has power under the Property Clause to reserve lands under navigable water just as it has power to grant such lands. *Cf.* United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537-38 (holding that the Property Clause gave Congress the power to reserve non-overflowed lands prior to statehood); Light v. United States, 220 U.S. 523, 536-37 (1911) (same). Indeed, prior to *Utah Div. of State Lands*, lower courts had previously found that the presumption applies equally to pre-statehood reservations or withdrawals by the United States. *See* United States v. City of Anchorage, 437 F.2d 1081, 1084-85 (9th Cir. 1971) (concluding that Congress intended to reserve tidelands and submerged lands for a railway along the coast); United

when the presumption is employed against United States' retention of submerged lands, it is arguably unnecessarily employed to protect an illusory aspect of state sovereignty instead of to protect public ownership which is its longstanding purpose.[219]

Given that ownership of submerged lands is not essential to state sovereignty, it has been argued that there is no more reason to presume against United States' retention of overflowed lands than there is to presume against retention of non-overflowed public lands and that the Supreme Court's nineteenth century decisions up through *Shively* were extraordinarily activist in reaching this result.[220] While it is true that overflowed land is constitutionally indistinct from non-overflowed land,[221] it is not clear that the Court acted in such an extraordinary manner by implying a transfer to the states of the former.[222] Overflowed land has always been treated differently. Thus, even though the prima facie theory presumed that land under navigable water could be granted just like uplands, it made the grant more difficult to prove.[223] Such grants require

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States v. Alaska, 423 F.2d 764, 766-68 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970).

219. The purpose of the presumption is to protect common ownership, not to decide the federalism question of whether the United States or a state should be the repository of that common ownership. Despite the fact that the presumption does not make sense as a protection of state sovereignty, it continues to be most often phrased as a protection for state title as opposed to public rights. *See, e.g.*, *Utah Div. of State Lands*, 482 U.S. at 197 ("we do not lightly infer a congressional intent to defeat a State's title to land under navigable waters"). This emphasis on the presumption as protecting state title, however, is best understood as the protection of state title for the benefit of the citizens of the state. *See infra* notes 220-27 and accompanying text.

220. *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 446 n.86, 448 (1989) [hereinafter *Headwaters*] ("We need to appreciate how extraordinary it was for the Court to be so activist, to make so many leaps of doctrine, and finally to embed this far-flung implied land transfer to the states as a constitutional mandate.")

221. *See supra* Part VI.B (discussing how ownership of overflowed lands is no more essential to state sovereignty than ownership of non-overflowed public lands).

222. Some might argue that only presuming a transfer to the states of land under navigable water is actually far too generous to the United States because the United States had no power to retain either land under navigable water or non-overflowed lands. *See* Patterson, *supra* note 2, at 58-62 (arguing that the Property Clause gave Congress power to "dispose" of lands in the territories and then to distribute the funds to the states but not to retain lands in the territories). This narrow view of Congress' powers has been thoroughly rejected in the Court's twentieth century jurisprudence. *See* Leshy, *supra* note 144, at 331, 336-37 (citing variety of cases); Hanna, *supra* note 2, at 529 ("The power of the nation to retain such ownership and control of public lands is so well settled that any citation of authority is superfluous."). *See generally* Gaetke, *supra* note 115 (disputing narrow view of Congress' power under the Property Clause); Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 806-07 (1993) (discussing the so-called "classical," "moderate classical," and "sovereign" views of the Property Clause and citing cases and articles). But if Professor Patterson is right that as originally intended Congress was not to have power to retain public lands, then the nineteenth century Court's decisions presuming a transfer of all non-granted submerged lands to the states were not activist at all.

223. Criticism of the suggestion that ownership of land under navigable water is an essential

more proof because they are contrary to the preferred, but not immutable, position of public ownership of the common resource.[224] If submerged land is more closely identified with common ownership than non-overflowed lands, even though not essential to sovereignty, it would have seemed sensible, at least in the nineteenth century before the vast expansion of federal power, to assume, absent an explicit reservation by Congress, that ownership of submerged lands should go to the state as the primary repository of the people's rights in the federal system.[225] This is

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aspect of sovereignty should be distinguished from recognition that ownership of such lands is best lodged in the sovereign for the benefit of the people. By recognizing a presumption against grants of the common resource, the prima facie theory, and ultimately *Shively*, identify ownership with sovereignty without making it essential to sovereignty. A Texas court explained this dichotomy in the public trust doctrine context:

> The reason for this distinction between ordinary public lands and those covered by navigable waters is obvious. It has always been the policy of the State to dispose of ordinary public lands to settlers, and under usual circumstances it may be presumed that the State has parted with title; but navigable waters and streams are reserved to the State for the use of the public generally, and no one should have an exclusive right to the enjoyment of such property, unless and until the Legislature has granted such right. Therefore, it has been the policy of the State to retain title to lands covered by navigable waters, and the presumption is that there has not been any act of the State divesting itself of title.

Lorino v. Crawford Packing Co., 175 S.W.2d 410, 414 (Tex. 1943). *See also* United States v Pend Oreille County Pub. Util. Dist. No. 1, 585 F. Supp. 606, 610 (E.D. Wa. 1984) (refusing to dismiss a tribal claim of aboriginal title to the bed of the Pend Oreille river because "although navigable waters are considered an incident of sovereignty, that alone should not be enough to overcome aboriginal title, since the states and federal government can convey lands under navigable waters to private interests. Thus, these lands are not irrevocably tied to the sovereign."); Massachusetts v. New York, 271 U.S. 65, 89 (1926) ("The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership. Such grants are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction.") (citations omitted).

224. For an interesting theory of why, in the original position, non-overflowed lands should be subject to individual possession and overflowed lands held in common ownership, although either may be reallocated upon payment of just compensation, *see* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987). *See also* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (exploring historical understandings of what she calls "inherently public property").

225. Professor Wilkinson has argued that the various state enabling acts are evidence of the Court's activism because none of the enabling acts, the land transfer provisions of which were so closely negotiated by each new state, contain an express grant to the state of land under navigable water. Wilkinson, *Headwaters*, *supra* note 220, at 442-44. Applying the maxim of construction, *inclusio unius est exclusio alterius* (the inclusion of the one is the exclusion of another), Professor Wilkinson contends that the careful negotiation and express transfer of non-overflowed lands shows that the United States did not intend to transfer overflowed lands to the states. *Id.* This argument is probably valid with respect to enabling acts negotiated prior to *Pollard*. But the *inclusio unius est exclusio alterius* argument does not work as well for post-*Pollard* enabling acts, which include all the tideland-rich west coast states and the major public land states in the west. *See* GATES, *supra* note 115, at 804 (listing dates of admission). After *Pollard* and its sweeping dicta, *see supra* Part V, the

particularly true in light of the generally prevailing view in the nineteenth century that the federal government's primary interest in the public lands was in its proprietary capacity, the same as any other private property owner.[226] To the extent the federal government was perceived as acting in a proprietary capacity, it would make sense to presume against its retention of submerged lands in favor of the state as the receptacle of the common ownership.[227]

United States could well have assumed that it could not grant or retain land under navigable water for any purpose. As both Congress and the President are charged with knowledge of Supreme Court precedent, *see* United States v. Perini North River Assocs., 459 U.S. 297, 319-20 (1983), the United States' silence in the negotiations on the transfer of land under navigable water seems more properly interpreted as acquiescence in *Pollard*'s dicta. There was no reason for the states to bargain for what the Court had already awarded them. *Shively*, of course, later disavowed the *Pollard* dicta and clarified that Congress did have power to convey overflowed lands. Thus, after *Shively*, the United States at least had the argument it would later make in *Utah Div. of State Lands*, 482 U.S. 193 (1987)—that its power to reserve overflowed lands was identical to its power to grant them as long as its reservation was express. But the United States' continuing silence after *Shively*, when it could have sought to expressly reserve land under navigable water, also seems like it should be interpreted as acquiescence to the transfer of overflowed lands to the states.

226. *See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 294-96 (1980) ("In the 19th century, the inland public lands and resources were used as inducements to subsidize the opening of the West. Ranchers were allowed to graze their stock on the open public domain at no cost and without federal regulation. Free land was made available to settlers through various preemption and homesteading laws. Timberlands were available for homesteading and through railroad land grants. Public minerals, water and wildlife were readily available to the first takers. The United States did not manage its timberlands, even in the loosest sense, until 1905, and the General Land Office existed almost exclusively to divest the United States of land and resources—not to manage them. *Trust notions were antithetical to the public lands policies that prevailed during these early days.*") (emphasis added); GEORGE C. COGGINS ET. AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 184 (3d ed. 1993) ("Pollard v. Hagan and several other nineteenth century federal and state cases seemed to limit federal power to that of a proprietor."); Note, *Proprietary Duties of the Federal Government under the Public Land Trust*, 75 MICH. L. REV. 586, 599 (1977) ("Traditionally, the public lands have been treated as proprietary property, and the public land trust has been employed to enforce the public's interest in the furtherance of proprietary objectives, such as revenue generation and resource exploitation.") (footnotes omitted).

227. Whether the *Shively* Court consciously decided to imply the transfer of submerged lands to the state because it perceived the state, rather than the federal government, as the repository of common ownership is debatable. The Court's discussion of *Waddell's Lessee* as a foundation for Congress' policy of retaining submerged lands, *Shively*, 152 U.S. at 48-49, suggests the Court believed the policy was grounded in Congress' understanding of the relationship between a state and its people. Such a view of *Shively* and equal footing is voiced in a more recent treatise:

> In forming new states out of its territories, the United States reserved to itself vast landholdings, but tidelands and lands under navigable waters were not among the reserved lands. Those lands have been held securely in trust for the people of the future states, and upon admission to the Union, each new state took title and succeeded to the trusteeship.

Stone, *Public Rights in Water Use and Private Rights in Land Adjacent to Water*, *in* 1 WATERS & WATER RIGHTS, § 36.4(A) (R. Clark ed., 1967). The *Shively* Court, however, also stated: "the title and dominion of the tide waters and the lands under them are held by the United States *for the benefit of the whole people* and, as this court has often said in cases above cited, "'in trust for the future states.'" *Shively*, 152 U.S. at 49 (emphasis added; citation omitted). The reference to "the whole people" is ambiguous whether it applies to the citizens of the United States or the citizens of the future

In any event, even if one wanted to revisit the question whether the strong presumption of *Shively* should apply to United States' reservations of overflowed lands,[228] it is now generally a moot point. The Submerged Lands Act essentially codified that the equal footing doctrine's presumption applies to overflowed lands claimed to be reserved by the United States, by confirming that the states have title to all land under navigable waters not expressly reserved or granted by the United States prior to statehood.[229] Thus, this article focuses on the issue of pre-statehood conveyances to third parties which is the issue involved in most equal footing cases,[230] and the issue on which the equal footing doctrine contrasts so

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state. To the extent it refers to the latter, it supports the presumption of a transfer of overflowed lands to the state because it suggests that the state, and not the federal government, is the protector of common ownership. To the extent it refers to all the citizens of the United States, the reference supports the idea that there was no need to presume against United States' retention because the only purpose for the presumption is to protect common ownership. *Shively*, of course, did not decide the question of the United States' power to retain submerged lands because its focus was on a third-party grant. But it also did not question the conclusion of *Pollard* and intervening cases that Oregon had acquired title to all of its overflowed lands upon entering the Union. It is possible that the Court was not willing to go any further in dismantling *Pollard* than to reject *Pollard*'s dicta that pre-statehood conveyances of land under navigable water were impermissible. To have concluded that the United States not only could make pre-statehood grants but also that the United States actually retained for itself all land under navigable water, even without passing express legislation, would surely have been too dramatic a departure from the states' understanding of their ownership of overflowed lands.

228. Of course, if the United States had continued its ownership of land under navigable water after statehood, there is no reason why a rebuttable presumption would not still be the rule of decision for judging the validity of a grant by the United States to a third party. This analysis would also apply to those few instances in which the United States has reacquired land under navigable water. *See* Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 226, at 300-01 n.145 (identifying such United States' acquisitions as "coastal areas in the Point Reyes National Seashore in California, the Gateway National Recreation Area in New York and the Golden Gate National Recreation Area in San Francisco."). Professor Wilkinson suggests that such acquired areas are subject to the public trust doctrine of *Illinois Central*. *Id.* at 273 n.17. But there is no reason why the United States' current power to convey such lands would be less, as would be the case under *Illinois Central*, than its power prior to statehood.

229. The Submerged Lands Act of 1953 confirms the states' title to land under navigable water subject to certain exceptions. *See* 43 U.S.C. §§ 1301(a), 1311(a) (1996) ("It is hereby 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 hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof"). One of those exceptions is for "all lands *expressly* retained . . . by the United States when the state entered the Union (otherwise than by a general retention . . . of lands underlying the marginal sea)." *Id.* § 1313(a) (emphasis added). While the "expressly retained" language falls short of the suggestion of the Court in *Utah Div. of State Lands* that Congress must show not only a clear and plain reservation but also must establish that it "affirmatively intended to defeat the future State's title to such land," *Utah Div. of State Lands*, 482 U.S. at 202; *see also supra* note 218, it is nevertheless a concession on Congress' part that it must prove an express reservation in order to have title to land under navigable water.

230. Most equal footing cases have involved questions about the validity of grants to third parties. *See, e.g.*, Packer v. Bird, 137 U.S. 661, 671-72 (1891) (individual patent bounded by the

vividly with the public trust doctrine. It is to that contrast that this article now turns.

VII. THE DEPARTURE FROM THE PRIMA FACIE THEORY IN PUBLIC TRUST CASE LAW

Perhaps because of its constitutional disguise, or perhaps because it has been viewed primarily as a protection of states' rights rather than public rights,[231] the prima facie theory has maintained its integrity under the equal footing label. The standard today of *Montana* is largely the standard articulated by Lord Hale over two centuries ago. This long adherence to the prima facie theory in the equal footing context is curious in light of courts' willingness to depart from, or modify, the theory in the public trust context. Thus, the adoption of the prima facie theory for determining congressional intent to convey land under navigable water was not inevitable. Indeed, just one year prior to *Shively*, when faced with the question of state intent to grant land under navigable water, the Court had departed from the prima facie theory, focusing not on state intent to convey but on state power to do so. The occasion was *Illinois*

Sacramento River); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867) (grant by the alcalde, mayor, of underwater lot in San Francisco bay); United States v. Pacheco, 69 U.S. (2 Wall.) 587, 590 (1864) (grant from the Mexican government of land bounded "by the bay" of San Francisco and confirmed by a United States court under the authority of Congress); Montana v. United States, 450 U.S. 544, 552 (1981) (reservation of the bed of the Big Horn River on behalf of Crow Tribe); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 87-90 (1918) (holding that the United States had granted the submerged land around the Annette Islands as part of the Metlakahtla Indian reservation). In fact, in *Utah Div. of State Lands*, the Court observed that it had "never decided whether Congress may defeat a State's claim to title by a federal reservation or withdrawal of land under navigable waters." 482 U.S. at 200. One could argue that the Court had previously addressed Congress' power to reserve, rather than grant, submerged land in cases involving reservations by the United States on behalf of Indian tribes. In fact, the argument is currently before the Supreme Court in *Coeur D'Alene Tribe v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 1416 (1996), *and cert. granted*, 116 S. Ct. 1415 (1996) (Docket No. 94-1474). Idaho is arguing that the more rigorous test of *Utah Div. of State Lands* should apply to the decision whether Congress delegated authority to the President to reserve submerged lands on behalf of the Tribe. *See* Brief of Petitioners at 43-46, *Coeur D'Alene* (No. 94-1474). The Tribe is arguing that the Court should continue to treat reservations for Indian tribes as the functional equivalent of a "conveyance" as it has done in prior cases. *See* Brief for Respondents at 45-46, *Coeur D'Alene* (No. 94-1474).

231. In contrast to the expanding notions of public rights and the reinvigoration of *Illinois Central* in the last few decades, *see infra* notes 263-66 and accompanying text, there has been no push to afford states broader rights over public lands. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) ("while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that the power over the public lands thus entrusted to Congress is without limitations") (internal quotations and citation omitted). At least in part then, one reason the prima facie theory is still embedded in the equal footing doctrine and has not given way to the modern public trust doctrine may be because of the perception of the equal footing doctrine as a doctrine of states' rights rather than public rights.

Central, the most celebrated public trust doctrine case in American law.

A. Illinois Central

Illinois Central involved an 1869 grant by the Illinois legislature to the Illinois Central Railroad Company of something more than one thousand acres of submerged lands extending out one mile under Lake Michigan from the Chicago waterfront.[232] In consideration of a percentage of the Railroad's annual earnings, the 1869 legislation "granted in fee" to the Illinois Central Railroad the acreage and all "the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan."[233] In 1873, the legislature repealed the grant,[234] and the state attorney general brought an action to have the original grant declared invalid.

Had the Supreme Court applied the prima facie rule of the common law, its analysis would have been short. The legislation left no ambiguity concerning the 1869 legislature's intent to convey the submerged lands to the Railroad. Rather than analyzing the legislature's intent, however, the Court, in 4-3 decision authored by Justice Field,[235] analyzed the legislature's power to convey.[236] Harking back to "public trust" language first fathered by *Arnold* and *Martin*, Justice Field argued that the State held submerged lands in trust for the people.[237] While the notion of a trust responsibility did not have the lengthy common law pedigree Field suggested, the trust concept itself was not a particular departure from the prima facie theory. It simply offered a different basis for the theory,

232. *Illinois Central*, 146 U.S. at 433, 439, 454.

233. *Illinois Central*, 146 U.S. at 448. As the Court noted, "[t]he act, if valid and operative to the extent claimed [by Illinois Central], placed under the control of the railroad company nearly the whole of the submerged lands of the harbor . . . " *Id.* at 451. The Act did, however, prohibit Illinois Central from obstructing Chicago harbor or impairing the public right to navigation. *Id.* at 449.

234. *Illinois Central*, 146 U.S. at 449.

235. Mr. Justice Field's majority opinion was joined by Justices Lamar, Brewer, and Harlan. Mr. Justice Shiras dissented and was joined by Justices Gray and Brown. Chief Justice Fuller and Justice Blatchford did not participate in the case. The Chief Justice had been of counsel in the court below and Justice Blatchford was a stockholder in the Illinois Central Railroad Company. *Id.* at 464-65. *See* 2 CHARLES WARREN, THE SUPREME COURT IN U.S. HISTORY 761-62 (1926).

236. As the Court saw it, the question "to be considered is whether the [1869] Legislature was competent to . . . deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters." *Illinois Central*, 146 U.S. at 452. This framing of the issue is revealing of the Court's direction. Implicit in the Court's statement is the notion that the "Legislature" is an entity separate and apart from the "State" and its people. The language partially obscures the anti-majoritarian nature of the rule the Court was to adopt. If the legislature is somehow different than the embodiment of the majority's will, then setting aside the legislature's grant is more easily viewed as protecting the "public" right.

237. *Illinois Central*, 146 U.S. at 452, 457-58.

presuming ownership as the fulfillment of the trust responsibility rather than as part of the royal prerogative.[238] Nevertheless, rather than understanding the public trust as an explanation for the prima facie rule of construction, Field, like Kirkpatrick in *Arnold*, viewed the public trust as setting substantive limits on state power. Thus, making the leap that Taney and the *Martin* Court had not been willing to make,[239] Field concluded that the legislature lacked plenary power to grant land under navigable water:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[240]

Applying this new standard, Field and the majority concluded that Illinois lacked the power to make the original grant to the Illinois Central Railroad because the Chicago harbor was simply too valuable and the public's interest in continuing common ownership was simply too great.[241]

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238. *See supra* note 111.

239. As discussed above, *supra* notes 100-03 and accompanying text, Taney, and the *Martin* majority, had argued that a legislature's trust responsibilities were different than those of the crown, *see* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410-11 (1842) ("A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation"), and had implicitly affirmed the New Jersey legislature's power to grant land under navigable water by affirming Martin's right to exclude Waddell's lessee.

240. *Illinois Central*, 146 U.S. at 453. As examples of acceptable grants, Field cited "grants of parcels of land under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining . . . ." *Id.* at 452. Field could hardly have concluded that such grants were inappropriate given the widespread state common law rights of riparian proprietors to wharf out and build docks off of their property. *See Shively*, 152 U.S. at 18-26 (describing such state laws).

241. *Illinois Central*, 146 U.S. at 453-55. To be precise, the Court did not expressly hold that the state could not make the conveyance; rather it held that "any grant of this kind is necessarily *revocable*." *Id.* at 455 (emphasis added). *See generally* 4 WATERS AND WATER RIGHTS § 30.02(d)(1) (Robert E. Beck ed., 1991) (suggesting that the proper interpretation of *Illinois Central* and its progeny is not as limiting state power but as recognizing state power to revoke, modify, or limit prior grants). This distinction is not really relevant to the broader doctrinal issue. If a grant is "necessarily revocable," the state is without power to convey a fee simple absolute and can only convey a fee simple subject to revocation. The Court's holding is still that the state lacks plenary power to dispose of its submerged lands. The distinction also has little relevance in more current public trust litigation where the relative relaxation of standing requirements has allowed third parties to seek revocation of such grants. *See* Lazarus, *supra* note 2, at 646 ("courts generally have held that groups of private citizens can maintain actions against governmental and private parties to vindicate public trust doctrine interests") (citing cases); Blumm & Schwartz, *supra* note 15, at 712-13 (discussing standing to bring public trust doctrine challenges).

Unsurprisingly, the majority's support for this new rule was scanty.[242] Field made no attempt to locate in the Constitution this new constraint on legislative power.[243] Instead, in fine pre-*Erie*[244] form, he turned to the common law. And the only case Field mustered directly supporting his theory of limited state power over land under navigable water was *Arnold v. Mundy*.[245]

The one sense in which the distinction is important is that it generated the Court's encouragement that Illinois "ought" to pay for any expenses incurred by the railroad for improvements in reliance upon the grant. *Id.* The Court's encouragement that a grantee be reimbursed for any expense incurred in reliance upon a grant up to the point of revocation is curious. To the extent the fiction is indulged that Illinois Central Railroad, or another grantee, always understood that an easement in favor of the public existed, there should be no need for compensation. The payment of compensation for improvements seems like little more than a nod toward Fifth Amendment equity when the takings clause is otherwise being dismissed. Courts subsequent to *Illinois Central* have also suggested that where the state takes over the grantee's improvements to promote trust uses, it must pay compensation. *See, e.g.*, State of California v. Superior Court (Fogerty), 625 P.2d 256 (Cal. 1981); *Mono Lake*, 658 P.2d at 723 n.22; City of Berkeley v. Superior Court, 606 P.2d 362, 374 (Cal. 1980).

242. Field conceded that he could not "cite any authority where a grant of this kind has been held invalid." *Illinois Central*, 146 U.S. at 455. Professor Epstein has suggested that part of what impelled the Court to its decision was a sense that the compensation Illinois had received from the railroad company for the public lands had been inadequate. *See* Epstein, *supra* note 224, at 424-25. On Epstein's theory of the public trust doctrine, the inadequate compensation works a taking of public property for private use because the public trust doctrine contains a just compensation component that is a mirror image of the takings clause—"Nor Shall Public Property Be Transferred to Private Use, Without Just Compensation." *See id.* at 417-26; *see also* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 245-49 (1992) (discussing Epstein's theory).

243. The absence of a constitutional basis for the public trust rule of *Illinois Central* has been the subject of much commentary for the obvious reason that the rule works as a limitation on the power of the legislature, something the common law theoretically cannot do. Because a constitutional grounding would legitimize the anti-majoritarian nature of the doctrine, various constitutional homes for public trust have been proposed. *See, e.g.*, Epstein, *supra* note 224, at 426-28 (equal protection and due process clauses); Wilkinson, *Headwaters*, *supra* note 220. (commerce clause). Locating the public trust doctrine in the Constitution, however, runs contrary to *Shively*'s recognition that "each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy," *Shively*, 152 U.S. at 26, and the Court's more recent conclusion in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), "that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.* at 475. It would also be strikingly odd if the states agreed in the Constitution to give the United States the right to dispose of the people's rights in land under navigable water prior to statehood, *see supra* Part VI.B, but simultaneously divested themselves of that power after statehood. *It seems exceedingly difficult to legitimize Illinois Central* as a constitutional decision.

244. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (rejecting federal common law as an appropriate rule of decision in federal court).

245. *See Illinois Central*, 146 U.S. at 456 (citing Arnold v. Mundy, 6 N.J.L. 1 (1820)). Ironically, Justice Field justifies his use of *Arnold* in part by referencing Justice Taney's suggestion in *Martin* that *Arnold v. Mundy* was the product of "great deliberation and research." *Id.* New Jersey Chief Justice Kirkpatrick had actually apologized for the paucity of his research on the issue. *Arnold*, 6 N.J.L. at 69-70. In addition to *Arnold*, Field cited a number of cases for the proposition that the state owns the soil in trust for the public, including *Martin* and *Pollard*, *see Illinois Central*, 146 U.S. at 456-58, but those cases never suggested that a legislature did not have power to alienate land under navigable water or trust resources. Finally, Field justified his rejection of the Illinois grant with the idea that the *jus privatum* had always been subject to the *jus publicum*. *Id.* at 457-58. This argument, which has been oft-repeated by courts ever since, offered no justification for a public trust limitation on state power to convey. Historically, the *jus publicum* which the crown could not convey was only

Field's recognition that the trust could be disposed of in certain instances stopped short of Kirkpatrick's bold suggestion that the "sovereign . . . cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."[246] Field, nevertheless, was on the same shaky ground as *Arnold*[247] in suggesting that the notion of a common law trust responsibility operated as a constraint on the legislature's power to convey land under navigable water.[248]

B. Shively *and* Illinois Central *Are Irreconcilable*

Illinois Central's view of limited sovereign power is irreconcilable with the Supreme Court's decision in *Shively* just two years later. Whereas *Shively* concludes that the United States has plenary power to convey land under navigable water and divest the public of their common right;[249] *Illinois Central* holds that the states, from whom the United States derived its power,[250] do not have plenary power to convey land under navigable water.[251]

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the right of navigation. *See supra* note 25. In *Illinois Central* there was no need to revoke the original grant to protect navigation because the original grant expressly prohibited the Railroad from acting to impair navigation. 146 U.S. at 449. And even if the grant had not reserved the public's right to navigate, the grant would not have been invalid under the common law because, unlike the crown, Parliament, and therefore a state legislature, had the power to convey the *jus publicum* as well as the *jus privatum*. *See supra* note 48.

246. *Arnold*, 6 N.J.L. at 78. That *Illinois Central* recognized instances where a state could grant land under navigable water is made clear in the Supreme Court's 1926 opinion in *Appleby v. New York*, 271 U.S. 364 (1926), which upheld the New York legislature's right to grant a deed in fee simple to approximately two blocks of land under tidal waters "upon clear evidence of its intention and of the public interest in promotion of which it acted." *Id.* at 384.

247. As discussed *supra* notes 71-82 and accompanying text, *Arnold*'s history was flawed, and its reasoning was contrary to then-extant legislation in New Jersey privatizing tidelands and was rejected by subsequent New Jersey decisions.

248. As discussed above and as pointed out by the dissenters, it had long been the law that a state had the power to convey or grant land under navigable water in the same manner that it could convey "the other public lands of the State" subject to the United States' navigational servitude. *Illinois Central*, 146 U.S. at 465 (Shiras, J., dissenting).

249. While the Court saw no common law limitation on Congress' power to convey land under navigable water, as discussed below, *see infra* notes 258-59 and accompanying text, it did suggest a *de minimis* limitation on Congress' power under the Property Clause: Congress only had power to convey land under navigable water for a public purpose.

250. *See supra* Part VI.B, discussing source of United States' power under the Constitution to convey land under navigable waters in the territories.

251. The conflict with *Illinois Central* should have been the all the more evident to the *Shively* Court after its lengthy explication of how the different states had made different decisions with respect to their land under navigable water. *Shively*, 152 U.S. at 26 ("The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations . . . as it considered for the best interests of the public."). *See also* Hardin v. Jordan, 140 U.S. 371, 382 (1891) ("it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised").

Shively views the question of validity of sovereign grants of land under navigable water as one of intent. *Illinois Central* views the question as one of power.[252] *Illinois Central* and *Shively* cannot both be right.

To reconcile the two cases, *Shively*'s equal footing doctrine would need to be changed to incorporate substantive limits on the United States' power to convey land under navigable water, or *Illinois Central*'s public trust doctrine would need to be changed to inquire purely into legislative intent. While it is difficult to construct any argument that the public trust doctrine of *Illinois Central* is merely an inquiry into legislative intent, it is at least possible to read *Shively* as incorporating limits on sovereign power. Such a reading of *Shively* would emphasize the Court's statement that:

> Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, *whenever it becomes necessary to do so* in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.[253]

From this language, one could argue that Congress is absolutely without power to grant land under navigable water unless it is performing, effecting, or carrying out one of these enumerated duties, just like, under *Illinois Central*, a state is without power to convey such lands unless the conveyance promotes "the interests of the public therein" or works no "substantial impairment of the public interest in the lands and waters remaining."[254]

While such a reading of *Shively* would return some of the symmetry to the equal footing and public trust doctrines, it should be rejected because it achieves reconciliation only by duplicating *Illinois Central*'s mistaken view of a sovereign's limited common law power to convey land under navigable water and because it is not the rule of decision that the

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252. *Shively* actually cites *Illinois Central* with approval, although it makes no effort to apply the *Illinois Central* standard in ruling on Shively's claim. *Shively*, 152 U.S. at 46-47.

253. *Shively*, 152 U.S. at 48 (emphasis added).

254. *Illinois Central*, 146 U.S. at 453. In fact, Professor Wilkinson makes precisely this argument, suggesting that the quoted language from *Shively* evidences that "the United States was bound by the limitations imposed by the public trust doctrine in much the same way that states have been limited by the trust since statehood. Just as Illinois was limited in the disposition of the Chicago Harbor by the reasoning in *Illinois Central*, so too was Congress limited before statehood in its ability to transfer navigable watercourses located in federal territory." Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 226, at 301-02 & n.146.

Shively Court itself employed in resolving the title dispute before it. Rather than suggesting Congress was without power to make a private grant to Shively, the Court reviewed Congress' intention in the Oregon Donation Act and concluded: "[i]t contains nothing indicating any *intention* on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers."[255] The *Shively* Court's reference to grants in the service of "international obligations," promotion of "commerce with foreign nations," and "public purposes appropriate to the objects" of the territory, should thus be understood as a description of instances in which Congress is likely to depart from its policy of not disposing of land under navigable water prior to statehood. And that is how subsequent courts have generally understood *Shively*, treating the list of exceptions, not as a ceiling on Congress' power, but as an interpretive guide to aid in determining congressional intent.[256] In those instances where there is, for example, evidence of "international duty or public exigency,"[257] a court is more likely to find a clear congressional intent to convey.

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255. *Shively*, 152 U.S. at 51 (emphasis added). While the *Shively* Court was unwilling to dispose of the case merely by noting that the grant in question was a private grant, subsequently the Court has suggested that pre-statehood private grants are impermissible. *See* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 205 (1984) (stating that "an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State") (citing Borax, Ltd. v. Los Angeles, 296 U.S. 10, 15-16 (1935)). The Court's statement in *Summa Corp.*, however, is not as categorical as it sounds. Even in *Summa Corp.*, the Court upheld the pre-statehood private patent at issue because Congress had made the grant for a public purpose--its obligations under the treaty of Guadalupe Hidalgo to confirm pre-statehood Mexican land grants. *Id.* at 205-06. Because private grants are permissible whenever they serve a public purpose, *see infra* notes 258-59 and accompanying text, they will be permissible in most cases, as long as clear congressional intent to convey can be found. Given *Shively*'s finding that Congress never intended to dispose of land under navigable water by general land laws, *Shively*, 152 U.S. at 48, the suggestion that private patents to land under navigable water are invalid is better viewed as a statement of Congress' intent rather than a limitation on Congress' power. *See* Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850) (stating in dicta that Congress "[u]ndoubtedly" could have granted the land under navigable water at issue to a private patentee).

256. *See, e.g.*, *Utah Div. of State Lands*, 482 U.S. at 208 ("*In light of the congressional policy* of defeating the future States' title to the lands under navigable waters only in exceptional instances in case of international duty or public exigency, we find it inconceivable that Congress intended to [reserve the land at issue]") (internal quotations and citation omitted); *id.* at 197-98 (*Shively* "inferred a congressional policy (although not a constitutional obligation) to grant away land under navigable waters only in case of some international duty or public exigency") (internal quotations omitted); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257-59 (9th Cir. 1983) (concluding that the government's awareness that tribe was dependent on fishery for its survival, along with principle of construction resolving ambiguities in favor of Indian tribes, warranted the conclusion that the United States had very plainly intended to convey the submerged lands within the reservation), *cert. denied*, 465 U.S. 1049 (1984).

257. *Shively*, 152 U.S. at 49.

If *Shively* intended there to be a limit on Congress' *power* to grant land under navigable water, it intended that limit as a lack of enumerated power in the Property Clause rather than any limit inherent in the common law. Indeed, the Supreme Court has stated that "[i]n Shively, this Court concluded that the only *constitutional* limitation on the right to grant sovereign land is that such a grant must be for a 'public purpos[e] appropriate to the objects for which the United States hold[s] the Territory.'"[258] And given Congress' broad power under the Property Clause, the limitation that grants of land under navigable water must serve a "public purpose" is exceedingly slight.[259] It is not at all a public trust doctrine limitation akin to *Illinois Central*'s suggestion that grants must promote "the interests of the public therein" or work no "substantial impairment

258. *Utah Div. of State Lands*, 482 U.S. at 200-01 (emphasis in original) (quoting *Shively*, 152 U.S. at 48). The Court was clear that the other "exceptions" listed in *Shively* were not limitations on Congress' power but statements of Congress' policy. *Id.* at 197-98 (concluding that the *Shively* Court "inferred a congressional policy (although not a constitutional obligation) to grant away land under navigable waters *only* in case of some international duty or public exigency") (emphasis in original; internal quotations omitted). The Court's statements in *Utah Div. of State Lands* evidence that, contrary to Professor Wilkinson's argument, *see supra* note 254, the Court at least does not perceive there to be an *Illinois Central*-like limitation on Congress power to make pre-statehood conveyances of land under navigable water. Of course, when Professor Wilkinson made his argument, *Utah Div. of State Lands* had not been decided. *See* Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 226 (published in 1980).

259. *See Kleppe*, 426 U.S. at 539 ("while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "the power over the public land thus entrusted to Congress is without limitations.") (internal quotations and citations omitted). If the "public purpose" requirement is a limitation, it is something in the nature of the almost imperceptible rational basis test. *Cf.* Carolene Products Co. v. United States, 323 U.S. 18, 31-32 (1944) ("When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat."); Hirabayashi v. United States, 320 U.S. 81, 102 (1943) (exercise of war powers). *See also* Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 226, at 309 n.185 (arguing that Congress' power under the Property Clause is at least circumscribed by the rational basis test); Blake Shepard, *The Scope of Congress' Constitutional Power under the Property Clause: Regulating Non-federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479, 532-37 (1984) (arguing for a rational basis test for congressional acts under the Property Clause). One commentator has also argued that Congress' power under the Property Clause is limited by the Tenth Amendment. *See generally* Touton, *supra* note 2, at 825-833. The argument is grounded in the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that even where legislation was "undoubtedly within the scope of the Commerce Clause," it could violate the Tenth Amendment if it infringed too greatly on state sovereignty. *Id.* at 841 (paraphrasing plaintiff's argument). *Id.* at 845. This Tenth Amendment argument does not work to limit Congress' power to grant land under navigable water for two reasons. First, *Usery*'s view of the Tenth Amendment was overruled. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *But cf.* New York v. United States, 505 U.S. 144 (1992) (suggesting that the Tenth Amendment maintains some limited vitality). Second, just as with the suggestion that equal footing limits Congress' power to grant overflowed lands, the Tenth Amendment argument depends on those lands being an essential attribute of sovereignty. Because they are not, their pre-statehood alienation could not violate the Tenth Amendment.

of the public interest in the lands and waters remaining."[260]

Thus, to the extent courts analyzing an equal footing issue engage in any inquiry into Congress' power to grant land under navigable water, the inquiry is constitutional and almost perfunctory. *Shively* and other equal footing cases make no suggestion that there is an additional common law limitation on sovereign power to convey land under navigable water. Once the *de minimis* constitutional threshold is passed, the equal footing cases focus on the presumption against a sovereign grant in land under navigable water and on whether there is clear evidence of congressional intent to rebut that presumption. In other words, the equal footing cases focus on the prima facie theory. *Shively*'s view of virtually unlimited sovereign power to convey land under navigable water is thus incompatible with *Illinois Central*'s view of a common law limit to state power. And that incompatibility is inappropriate. The power to grant away land under navigable water and associated resources should not depend on whether the grant is made before or after statehood. The same common law standard should apply in both situations.

C. *The Intent/Power Distinction in* Illinois Central *and Subsequent Public Trust Cases*

Before proceeding to the implications of a unified common law standard for equal footing and public trust, it is necessary to give a slightly more fulsome account of the departure in *Illinois Central* and other public trust cases from the prima facie theory. While the preceding discussion generalized that *Shively* and subsequent equal footing cases are about sovereign (Congress) intent and *Illinois Central* is

260. *Illinois Central*, 146 U.S. at 453. In contrast to the United States' broad power under the equal footing doctrine to make any grant that has a "public purpose," a state's power, under *Illinois Central*, to make grants of such "parcels as are used in promoting the interests of the public therein," 146 U.S. at 453, has been interpreted narrowly to apply only to "uses and activities in the vicinity of the lake, stream, or tidal reach at issue." *Mono Lake*, 658 P.2d at 723. Moreover, it applies only to uses which can be said to promote the public's interest in the trust resource. *Id.* at 724 ("the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."); California v. Superior Court (Lyon), 625 P.2d 239, 248 (Cal. 1981) ("[U]nless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public"); Caminiti v. Boyle, 732 P.2d 989, 994-95 (Wash. 1987) (the conveyance must promote the interests of the public in the *jus publicum*), *cert. denied*, 484 U.S. 1008 (1988); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1114, 1119 (Alaska 1988) (same). The public purpose requirement of *Shively* would be a noteworthy limitation only if it were interpreted in the same narrow way the public purpose requirement has been interpreted in the public trust context. A purpose of furthering the general objects of the territory would be insufficient; the purpose would need to be consistent with actually promoting the public's use of the trust resource.

solely about sovereign (state) power, that generalization, as with most, is not wholly accurate. To explain, *Illinois Central* certainly departed from the prima facie theory's underlying premise that the sovereign had plenary power to grant land under navigable water.[261] It did not, however, necessarily abandon the prima facie theory's presumption of state ownership. *Illinois Central* can instead be viewed as articulating a two-step inquiry. First, a court applies the basic prima facie rule and presumes that a state did not intend to make the grant absent clear and especial words to the contrary. If this presumption against state conveyance is rebutted, then second, a court decides whether the state had power to make the conveyance, using a two-prong test: whether the grant promoted the interests of the public trust or substantially impaired the public's interest in the lands and waters remaining.[262] Although this two-step inquiry is not evident on the face of Justice Field's opinion, it seems likely that it is missing only because there was never any doubt about the 1869 Illinois legislature's intent to convey the lands at issue. Indeed, had the grant been the least bit ambiguous, Field and the majority may well have never seen the need to exhume *Arnold* and its suggestion that a state's power to convey public resources was limited. The prima facie presumption would have been sufficient to invalidate the grant.

In the years since *Illinois Central*, and particularly during the last 25 years since Professor Sax's article on the public trust doctrine,[263] state courts have taken up the public trust doctrine of *Illinois Central*[264] and expanded[265] and elaborated upon it.[266] A few state courts have refused to

261. *See supra* note 101.

262. *Illinois Central*, 146 U.S. at 454. *See also id.* at 455-56 ("The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."). Subsequent state court decisions have generally treated the two exceptions articulated by *Illinois Central* as a two-prong test. *See, e.g.*, Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1089 (Idaho 1983) ("a two part test emerges to determine the validity of the grant of public trust property. One, is the grant in aid of navigation, commerce or other trust purposes, and two, does it substantially impair the public interest in the lands and waters remaining?").

263. Sax, *supra* note 2.

264. Even today, when the public trust doctrine has returned to its proper home of state common law, *Illinois Central* remains the leading precedent. *See, e.g.*, *Mono Lake*, 658 P.2d at 721 ("the decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois* remains the primary authority even today, almost nine decades after it was decided") (internal quotations and citation omitted); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988) ("*Illinois Central* remains the leading case regarding public rights in tide and submerged lands conveyed by the state."); Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1088 (Idaho 1983) ("*Illinois Central* . . . is the seminal case on the scope of the public trust doctrine and remains the primary authority today.").

265. The public trust doctrine has been expanded in a variety of ways beyond its application to

follow *Illinois Central* and have instead applied a presumption akin to the approach taken in the equal footing cases and in keeping with the prima facie theory.[267] More often, however, the state courts have followed *Illi-*

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land under navigable water. The trust, for example, has been expanded to include water rights obtained by prior appropriation. *See, e.g.*, *Mono Lake*, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983); Shokal v. Dunn, 707 P.2d 441 (Idaho 1985); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976). It has been enlarged to include non-navigable tributaries of navigable waters, *Mono Lake*, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983). Other states have enlarged the reach of the public trust doctrine by adopting a more expansive definition of navigability than that of the federal navigability test. *See, e.g.*, Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 169-71 (Mont. 1984). The trust has also been expanded beyond the traditional purposes of navigation, commerce and fishery to include various forms of recreation. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (public trust protects environmental and recreational values associated with land under navigable water); Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) (public trust includes the right of navigation "together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters"), *cert. denied*, 484 U.S. 1008 (1988); Menzer v. Village of Elkhart Lake, 186 N.W.2d 290, 296 (Wis. 1971) (public trust encompasses all public uses of water). *See generally* Scott Reed, *The Public Trust Doctrine: Is It Amphibious?* 1 ENVTL. L. & LIT. 107, 116-21 (1986) (collecting cases extending the public trust doctrine beyond its traditional scope); Lazarus, *supra*, note 2, at 649-50 (discussing the doctrine's expansion); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines At Work*, 3 J. LAND USE & ENVTL. L. 171, 190-91 (1987) [hereinafter *Avoiding the Takings Clause*] (same). *But cf.* Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text and Context*, 27 ARIZ. ST. L.J. 1155, 1156 (1995) (concluding that *Mono Lake*'s "marriage of the public trust doctrine and the western water rights system has produced few offspring").

266. A significant number of states have now adopted the public trust doctrine of *Illinois Central* in some form. *See* Arizona Ctr. for Law in the Public Interest v. Hassell, 837 P.2d 158, 167 n.13 (Ariz. 1991) (listing 38 state court decisions, in addition to Arizona, concluding that the state holds lands beneath navigable waterways in trust for the public, although not all of the decisions apply the modern public trust doctrine of *Illinois Central* and *Mono Lake*); Gould, *supra* note 2, at 39-42 (discussing Western States that have adopted the public trust doctrine in the context of appropriative water rights); Blumm & Schwartz, *supra* note 15, at 720-37 (reviewing development of public trust doctrine in western states as it applies to water rights).

267. In *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133 (S.C. 1979), the South Carolina Supreme Court quieted title in a grantee claiming title under a 1737 royal grant, recognizing a public trust in the tidelands at issue, but observing that tidelands could still be conveyed if the language was sufficiently specific. *Id.* at 135-36. Upon concluding that the grant in question was clear and specific, the Court ended its inquiry and found for the grantee. *Id.* at 136. *See also* Coburg Dairy, Inc. v. Lesser, 458 S.E.2d 547, 548 (S.C. 1995) (applying same rule but rejecting grantee's claim because there was "no evidence of specific language in the grant"). North Carolina also treats the public trust doctrine as a rule of construction to determine the legislature's intent:

> we conclude that the General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, *but only if the special grant does so in the clearest and most express terms.*

Gwathmey v. State Dept. of Envtl. Health, and Natural Resources, 464 S.E.2d 674, 684 (N.C. 1995) (emphasis added). *See also* RJR Technical Co. v. Pratt, 453 S.E.2d 147, 149 (N.C. 1995) ("Unless

nois Central and have concentrated their public trust inquiry on state power to convey and have generally ignored application of a strong presumption against finding any conveyance at all. Bearing out the surmise that *Illinois Central* did not simply abandon the intent inquiry, some state courts have subsequently articulated a two-step inquiry, looking first at the legislature's intent and then at the legislature's power to make the conveyance, although in reviewing the legislature's intent they have made no mention of a presumption against conveyance.[268] Other courts have mentioned the presumption against grants of land under navigable water, or at least an explicit conveyance requirement, but have generally conflated the intent inquiry (the product of the historical prima facie theory) and the power inquiry (the product of *Illinois Central*).[269]

For those courts that have ignored the presumption or conflated it with the inquiry into permissibility of the grant, a more deliberate and self-conscious two-step inquiry—looking first at legislative intent[270] and

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clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights."). Texas likewise uses the public trust doctrine as a rule of construction akin to the equal footing doctrine. *See* State v. Lain, 349 S.W.2d 579, 583 (Tex. 1961) (rejecting *Illinois Central* as precedent and confirming that under Texas law the state may grant submerged lands "in derogation of the public rights of navigation, etc." as long as there is clear intent); Lorino v. Crawford Packing Co., 175 S.W.2d 410, 414 (Tex. 1943) (applying presumption that the state has not divested itself of land under navigable water).

268. *See, e.g.*, Caminiti v. Boyle, 732 P.2d 989, 994-95 (Wash. 1987) ("we must inquire as to: (1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it."), *cert. denied*, 484 U.S. 1008 (1988).

269. *See* City of Berkeley v. Superior Court, 606 P.2d 362, 367, 369-70 (Cal. 1980) ("What is required and is missing from the act is a clear intent expressed or necessarily implied that the purpose of the act was to further navigation or some other trust use."), *cert. denied*, 449 U.S. 840 (1980). The Alaska Supreme Court's decision in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), is another good example. The Court first observes that "[b]efore any tideland grant may be found to be free of the public trust under the 'public trust purposes' theory [i.e. the two exceptions of *Illinois Central*], the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer." *Id.* at 1119 (citation omitted). Yet, after finding nothing that expressed a "clear legislative intent to convey state tidelands free of the public trust," *id.* at 1119-20, the Court needlessly proceeds to the "substantial impairment" issue from *Illinois Central*. *Id.* at 1120. *See also* Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981); Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092-93 (Idaho 1983). *But see* State v. Central Vermont Ry., Inc., 571 A.2d 1128, 1133 (Vt. 1989) ("We need not resolve this fundamental question of legislative power, however, because we hold that the legislature did not intend to grant the lands at issue free from the public trust."), *cert. denied*, 495 U.S. 931 (1990). For a brief discussion of these cases employing the public trust doctrine as a rule of construction, see Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 587-89 (1989).

270. When a court asks whether the legislature intended to grant the land free of the public trust, the temptation is to require the legislature to have uttered words like "free of the public trust" in the grant itself. *See, e.g.* State v. Central Vermont Ry., Inc., 571 A.2d 1128, 1133-34 (Vt. 1989)

then at legislative power—would be preferable. While it would not change many results or bring public trust more into line with equal footing, it would serve two useful functions. First, it would allow courts in some instances to avoid using a common law doctrine to invalidate legislative action.[271] Second, articulating a deliberate two-step test would promote transparency by requiring a court to identify and resolve the clear, unequivocal will of the legislature and then to decide whether or not to abide by that will.

VIII. IMPLICATIONS OF THE COMMON HERITAGE OF THE EQUAL FOOTING AND PUBLIC TRUST DOCTRINES

Although there is room within the *Illinois Central* framework for the presumption against state ownership of land under navigable water, it does not change the fact that, at bottom, *Shively*'s focus on intent is incompatible with *Illinois Central*'s articulation of limits on state power to convey. This incompatibility grows out of something other than law or logic. A consistent theory of sovereign power would result in application of the same standard to equal footing and public trust cases. Thus, Congress, acting under its enumerated powers, would presumably be subject to the same injunction prestatehood as the future state. If the state's power to convey land under navigable water and associated resources is constrained by the public trust, Congress' power is necessarily similarly restrained.[272] Instead of arguments

(reviewing statutes to determine whether legislature intended to grant lands free of the public trust), *cert. denied*, 495 U.S. 931 (1990). Given the relative recency of the broad public trust doctrine, it is highly doubtful that any but the most recent legislatures would have thought to include such language. The equal footing equivalent would be validating a pre-statehood congressional grant to an Indian tribe only if the grant expressly stated that it was not subject to the trust obligation to the future state. It seems that a more principled approach to the intent issue would look to whether the legislature or Congress intended to grant the land or fishery in question.

271. A number of commentators have criticized the anti-democratic nature of the public trust doctrine. *See* Huffman, *Trusting the Public Interest to Judges*, *supra* note 2, at 574-76; Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 81 (1982); Stephen M. Jawetz, Comment, *The Public Trust Totem in Public Land Law: Ineffective—and Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455, 457 (1982). Professor Blumm has argued that the public trust doctrine's power to constrain legislative action can be implied in state constitutional provisions. *See* Blumm, *supra* note 269, at 576-77. But the provisions that Professor Blumm cites generally declare state ownership and control over water. *Id.* at 576 n.12. They do not prohibit conveyance of the resource. If state constitutional provisions could be identified that plainly proscribed state transfer of land under navigable water or other associated resources, a court invalidating a conveyance based on such a provision would not be relying on the common law to invalidate legislative action but would be engaging in mainstream judicial review. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

272. *See supra* note 187. To the extent one chooses to emphasize that the public trust doctrine operates, not as a limit on state power, but as a recognition of state power to revoke, modify, or limit a prior grant, *see, e.g.*, 4 WATERS AND WATER RIGHTS § 30.02(d)(1) (Robert E. Beck ed., 1991) (suggesting this

for a coherent standard,[273] however, case law and literature reveal contradictory and counter-poised arguments for the expansion of one doctrine and the narrowing of another. Thus, some who see no limit on state power to convey trust resources take a miserly approach to those trust resources that the United States had power to convey prior to statehood.[274] Others who advocate limited state power to convey trust resources simultaneously support an expansive understanding of the United States' power to convey trust resources prior to statehood.[275] The tensions that underlie such contradictory positions

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interpretation of *Illinois Central* and its progeny), Congress would necessarily have the same power to revoke, modify, or limit prior grants of overflowed lands and associated resources. *But see supra* note 241 (arguing that the public trust doctrine is necessarily a limitation on state power).

273. Professor Dunning has recognized the "close link" between equal footing and public trust because both doctrines tie "state sovereignty to property rights." Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 524 (1989). He does not, however, discuss the different standards applied by the two doctrines and thus does not address which standard is more appropriate.

274. *Compare* Nollan v. California Coastal Comm'n, 483 U.S. 825, 832-33 (1987) (Rehnquist, C.J., joining in Justice Scalia's dicta rejecting California state constitutional public trust easement for access to navigable waters) *with* Montana v. United States, 450 U.S. 544 (1981) (Rehnquist, J., joining opinion aggressively presuming against any pre-statehood conveyance of land under navigable water) *and* Namen v. Confederated Salish and Kootenai Tribes, 459 U.S. 977 (1982) (Rehnquist, J., dissenting from denial of certiorari) (arguing that Ninth Circuit erred in concluding that the United States had overcome strong presumption and retained the bed of Flathead Lake on behalf of the tribes).

275. *Compare Nollan*, 483 U.S. at 832-33 (Brennan, J., dissenting) (arguing against precise nexus between burden on public and condition on property use so that the State is not hampered in fulfilling its public trust mandate), *with* Montana v. United States, 450 U.S. 544 (1981) (Brennan, J., dissenting) (arguing in favor of recognition of pre-statehood grant of land under navigable water). *See also* Johnson, *supra* note 163, at 564-67 (arguing for expansion of public trust concepts but concluding that the public trust doctrine may not apply to lands conveyed prior to statehood and lands covered by Indian treaties). An apparent exception to this trend is Professor Wilkinson, who has argued that, at least in general terms, the United States' pre-statehood grants were subject to the same public trust strictures as state grants following statehood. *See supra* note 254. He does not, however, address why the Court has always found the rebuttable presumption of *Shively* to provide sufficient protection against federal conveyance of trust resources and why the test of *Illinois Central* has never been the measure by which a pre-statehood grant is judged. Nor does he explore the significant implications of applying the public trust doctrine to pre-statehood grants.

Professor Wilkinson likely does not explore the implications of his argument because the focus of his article is on application of the public trust to non-overflowed public lands. With respect to non-overflowed public lands, he concludes that there is "ample reason to believe the Property Clause does not include an implied trust." Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 226, at 307. Other commentators beside Professor Wilkinson have discussed whether some form of the public trust doctrine should apply to federal public lands and have offered different explanations of its scope and content. *See* John F. Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application to the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L. J. 135 (1972); Johnson, *supra* note 163, at 549-51; Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977); Touton, *supra* note 2, at 455 (arguing that the public trust doctrine should not be applied in the public land context). Those articles have not, however, addressed whether the public trust doctrine should be applicable to judging the validity and scope of pre-statehood grants of *submerged* lands. *But see id.* at 465 n.55 (briefly stating agreement with Professor Wilkinson that prior to statehood, public trust doctrine applied to the Untied States' control of submerged lands). Nor have they addressed the differential treatment afforded under the equal footing and public trust doctrines.

can be illustrated by a couple of examples.

A. *Equal Footing in* Winters v. United States *Compared with Public Trust in* Mono Lake

Indian reserved water rights have been a source of significant dispute in the West. The reserved water rights doctrine holds that when the United States sets apart lands for an Indian tribe, whether by treaty or executive order, it impliedly reserves the water necessary to fulfill the purposes of the reservation.[276] In the seminal case on Indian reserved water rights, *Winters v. United States*,[277] it was argued that the equal footing doctrine precluded the United States from reserving water rights on behalf of the Indian tribes of the Fort Belknap Reservation because Montana was entitled to that water, presumably as an essential facet of its sovereignty, upon its admission into the Union.[278] The argument was tersely rejected, however, on the grounds that the federal government had power to reserve water rights under both the Commerce Clause and the Property Clause.[279] The Court's rejection of the equal footing contention was clearly correct, but its reasoning was hardly thorough. Initially, the Court neglected the detail that the Milk River was non-navigable, a fact that alone would have justified a rejection of the equal footing argument.[280] Moreover, without saying so, the Court necessarily assumed that congressional reservations or grants of water were no different than reservations or grants of non-overflowed lands.[281] Had the Court believed

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276. Winters v. United States, 207 U.S. 564 (1908). The reserved rights doctrine has subsequently been expanded beyond Indian reserved rights to include reserved water rights for other federal reservations. Arizona v. California, 373 U.S. 546, 595-601 (1963). *See also* United States v. New Mexico, 438 U.S. 696, 702 (1978) ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.").

277. 207 U.S. 564 (1908). In *Winters*, the Supreme Court held that the United States had reserved water from the Milk River for the tribes of the Fort Belknap Indian Reservation, giving the tribes superior rights to non-Indian prior appropriators upstream of the reservation. For articles offering a more thorough exploration of *Winters* rights, see generally Richard B. Collins, *The Future Course of the* Winters *Doctrine*, 56 U. COLO. L. REV. 481 (1985); Harold A. Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639; Harry B. Sondheim & John R. Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 S. CAL. L. REV. 1 (1960).

278. *See Winters*, 207 U.S. at 577.

279. *Id.*

280. In his preliminary statement, Justice McKenna noted that the "Milk River, designated as the northern boundary of the reservation, is a non-navigable stream." *Winters*, 207 U.S. at 565-66.

281. In *Arizona v. California*, 373 U.S. 546 (1963), the Court expressly rejected an equal foot-

that ownership of water was akin to ownership of overflowed lands, it would have needed to decide that an *implied* reservation of water was somehow "definitely declared" as required by the equal footing doctrine,[282] a difficult task indeed.[283] Whatever the acumen of the Court's

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ing argument on the grounds that the doctrine applied only to land under navigable waters, stating:

> Arizona's contention that the Federal Government had no power, after Arizona became a state, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in Pollard's Lessee v. Hagan, 3 How. 212 (1845) . . . . But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under [the Property Clause]. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

Arizona, 373 U.S. at 597-98. The reserved rights doctrine does not run afoul of equal footing for a reason in addition to the fact that the doctrine does not apply to water. Pre-statehood reservations and grants of water also do not violate equal footing because ownership of water is not an essential aspect of state sovereignty. States do not need control of their waters to enter the Union on an equal footing. Of course, states do generally have authority over their waters but that is a result of federal law and Supreme Court interpretation, not the equal footing doctrine. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158, 162 (1935) (construing the Desert Land Act of 1877, § 1, 19 Stat. 377, to effect "a severance of all waters on the public domain, not theretofore appropriated, from the land itself" and to reserve such non-navigable waters "for the use of the public under the laws of the states and territories").

282. *See Utah Div. of State Lands*, 482 U.S. at 197-98.

283. While it seems unlikely that an *implied* reservation could meet the plain and especial words requirement of the equal footing doctrine, the facts of the case certainly made a powerful argument for construing the treaty as reserving water rights for the tribes. *See Winters*, 207 U.S. at 576 ("The lands were arid, and, without irrigation, were practically worthless."). Nevertheless, in the face of what the Court recognized was a "conflict of implications," *id.*, finding the equal footing test satisfied would have been a stretch. If the Court did give unspoken consideration to the strong presumption of equal footing, what apparently moved the Court to give such short shrift to the presumption was the competing rule of construction that ambiguities in treaties are to be interpreted in favor of the tribal signatories. *Id.* at 576-77. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) ("treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor."). The Court since appears to have rejected the notion that the rule of construction favoring tribes generally operates to dilute the force of the strong presumption of the equal footing doctrine. *See* United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1510-11 (9th Cir. 1991), *cert. denied*, 502 U.S. 956 (1991); United States v. Aranson, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983); *Montana*, 450 U.S. at 552; *Holt State Bank*, 270 U.S. at 55. *But see* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918) (finding a pre-statehood grant of submerged lands around the Annette Islands and emphasizing the tribe's reliance on the fishery for survival); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1258 (9th Cir. 1983) (concluding that the strong presumption of equal footing was defeated because the claimed grant was within the boundaries of the reservation and "the grant [was] made to a tribe dependent on the fishery resource in that water for survival"), *cert. denied*, 465 U.S. 1049 (1984). This conflict between the strong presumption of the equal footing doctrine and the rule of construction interpreting ambiguities in favor of Indian tribes has spawned a number of articles. *See, e.g.*, Russel L. Barsh & James Y. Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways before and after* Montana v. United States, 56 WASH. L. REV. 627 (1981); Note, *Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction under the Equal Footing Doctrine vs. Tribal Sovereignty*, 55 N.D. L. REV. 453 (1979); Rebecca S. Thiem, Note, Montana v. United States—*Effects on Liberal Treaty Interpretation and Indian Rights to lands Underlying*

equal footing analysis, it is interesting to compare the Court's approach with the approach that presumably would be taken by adherents to the modern public trust creed.

Applying the logic of *Illinois Central* and its state court progeny, a consistent public trust advocate would presumably disagree with the suggestion in *Winters* that Congress had plenary power to reserve waters solely for the tribes of the Fort Belknap Indian Reservation.[284] Steady advocates of an expansive public trust seemingly would argue that Congress only had power to reserve the water if the reservation promoted the interests of the public in the trust resource or did not substantially impair the public interest in the lands and waters remaining.[285] Thus, a champion of the public trust doctrine of *Mono Lake*[286] can hardly advocate that the

Navigable Waters, 57 NOTRE DAME LAWYER 689 (1982); D.H. Cole, *Tribal Bedlands Claims Since* Montana v. United States, 6 PUB. LAND L. REV. 119 (1985).

284. Presumably, a public trust advocate would disagree with the conclusion, implicit in *Winters* and express in *Arizona v. California*, that the United States' trust responsibility applied only to *land* under navigable water. *See supra* note 281 and accompanying text. To the advocate, the trust is an expansive and dynamic doctrine that applies to a variety of related resources and values. *See infra* note 308. A proponent of modern public trust theory would seemingly be untroubled by applying the doctrine to water resources, *see Mono Lake*, 658 P.2d 709 (Cal. 1983) (applying public trust to appropriative water rights), *cert. denied*, 464 U.S. 977 (1983), or to the non-navigable Milk River. *See, e.g.*, Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 169-71 (Mont. 1984) (extending public trust to non-navigable streams). A public trust proponent would also view the implied nature of the reserved right as a reason to reject it. *See supra* Part VII.C.

285. *Illinois Central*, 146 U.S. at 453. *See also* California v. Lyon, 625 P.2d 239, 248 (Cal. 1981) ("[U]nless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public"), *cert. denied*, 454 U.S. 865 (1981); Caminiti v. Boyle, 732 P.2d 989, 994-95 (Wash. 1987) (the conveyance must promote the interests of the public in the *jus publicum*), *cert. denied*, 484 U.S. 1008 (1988).

286. 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). In *Mono Lake*, the National Audubon Society and other plaintiffs filed a suit seeking to enjoin the Department of Water and Power of the City of Los Angeles (DWP) from diverting water from four of the five tributaries flowing into Mono Lake. The Court described Mono Lake thusly:

> Mono Lake, the second largest lake in California, sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. The lake is saline; it contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migratory birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of Northern Pharalope, Wilson's Pharalope, and Eared Greve. Towers and spires of tufa on the north and south shores are matters of geological interest and a tourist attraction.

Id. at 711. In 1940, the DWP had received a permit from the California Water Resources Board to appropriate water from the tributaries. Once the DWP began diverting, however, the lake level began to drop. The lake level eventually diminished by one-third, converting one of the two islands into a peninsula and exposing the gull rookery there to coyotes and other predators. *Id.* There was no reasonable dispute that the diversions "imperiled" the scenic beauty and ecological values of the lake. *Id.* On these facts, the California Supreme Court ruled that the DWP's water right was subject to a public trust easement which allowed the state to reconsider prior allocation decisions. *Id.* at 728 (holding that allocation decisions should balance public trust values against the need for appropriation). For more detailed investigations of the *Mono Lake* decision, see generally Dunning, *supra* note

reservation in *Winters* should be judged by a different standard.[287] If the State of California lacked power to expressly grant Los Angeles a permanent property right to take water from the tributaries of Mono Lake, perhaps the United States lacked power to impliedly reserve for the Fort Belknap Reservation tribes a permanent[288] property right to take water

2; Koehler, *supra* note 15; Blumm & Schwartz, *supra* note 15.

287. One might argue, however, that neither the equal footing doctrine nor the public trust doctrine should apply to rights *reserved* by treaty. Such an argument relies on the Supreme Court's statement in *United States v. Winans*, that "the treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted." 198 U.S. 371, 381 (1905). Under this argument, to the extent a treaty reserves to a tribe its aboriginal title, it is reserving to the tribe a portion of title that the United States never possessed. Accordingly, the United States could not have held such land in trust for the people of the future state. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 503-04 (1982) (arguing that it is difficult to reconcile the decision in *Montana* and *Holt State Bank* with "the concept that reservations of aboriginal lands are reservations by the tribes, not grants to them") (footnote omitted); Andrea Geiger Oakley, Note, *Not on Clams Alone: Determining Indian Title to Intertidal Lands*, 65 WASH. L. REV. 713, 715 n.16 (1990) (arguing that "[a] grant to a private party is distinguishable from a grant to a sovereign body such as an Indian tribe" because the latter is a reservation); Patti Goldman, *Riverbed Ownership Law Metamorphosed into a Determinant of Tribal Regulatory Authority*—Montana v. United States, 1982 WIS. L. REV. 264, 274. Such an argument was recently accepted by one federal district court in a case in which the author served as counsel for shellfish farmers in Washington's Puget Sound. *See* United States v. Washington, 873 F. Supp. 1422, 1443 (W.D. Wash. 1994), *appeal docketed*, No. 96-35014, 96-35082, 96-35142, 96-35196, 96-35200, 96-35223 (9th Cir. Feb. 20, 1996). The argument, however, presents two difficulties. First, it seems unlikely to be accepted by the Supreme Court which has treated reservations as grants for purposes of the equal footing doctrine. *See* Montana v. United States, 450 U.S. 544 (1981); Coeur D'Alene Tribe v. Idaho, 42 F.3d 1244, 1256 (9th Cir. 1994) ("in *Montana* . . . , the Supreme Court had already dealt with an Indian reservation created by language very similar to that at issue in the present appeal, and explicitly treated the interest possessed by Indians in a 'reservation' as a 'grant' or 'conveyance.'"), *cert. denied*, 116 S. Ct. 1416 (1996), *and cert. granted*, 116 S. Ct. 1415 (1996); United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1510-11 (9th Cir.) (applying equal footing doctrine to claimed reservation of right of a riverbed), *cert. denied*, 502 U.S. 956 (1991). Second, to the extent a tribe claims to have reserved anything more than its aboriginal title, it is necessarily claiming a grant from the United States, assuming one accepts the legitimacy of the doctrine of discovery which suggests fee title in the United States. *See generally* COHEN, *supra* at 487 ("Chief Justice Marshall first concluded 'that discovery gave title to the [European] government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.' The Court found that the European sovereigns held 'ultimate dominion' in the land 'subject only to the Indian right of occupancy,' generally called 'original Indian title,' 'aboriginal Indian title,' or sometimes merely 'Indian title.'") (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)). For example, a tribes' reserved water rights are not subject to abandonment upon non-use. *See id.* at 588 (citing cases); 4 WATERS AND WATER RIGHTS § 37.02(a)(1) (Robert E. Beck ed., 1991). And tribes' treaty rights may not be taken by the United States except upon payment of just compensation. *See, e.g.*, United States v. Creek Nation, 295 U.S. 103, 110 (1935). But both such rights go beyond aboriginal title, which is subject to abandonment, *see* Williams v. City of Chicago, 242 U.S. 434 (1917), COHEN, *supra* at 492-93, and which the United States may take without paying just compensation. *Id.* at 491. Presumably, to the extent a tribe claims rights in land under navigable water beyond aboriginal title, that additional increment would necessarily be subject to equal footing or public trust.

288. Even if a public trust advocate believes that the public trust doctrine would not limit the United States' power to make the initial reservation on behalf of the tribes, presumably that advocate would not consider the reservation permanent but rather to be subject to revocation, modification, or limitation without payment of compensation under the public trust doctrine. *See generally* 4 WATERS AND WATER RIGHTS § 30.02(d)(1) (Robert E. Beck ed., 1991) (suggesting that *Illinois Central* and its

from the Milk River.[289] The point is not, of course, that one cannot take a different view of which grant promotes the public interest.[290] The point is that a supporter of the modern public trust doctrine should demand that the same inquiry be undertaken in both situations.[291]

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progeny are better interpreted not as limiting state power but as retaining state power to revoke a prior grant). *See also supra* notes 241 and 272 discussing this issue.

289. Professor Dunning would likely disagree with this assertion. He has argued that the public trust doctrine of *Mono Lake* and the reserved rights doctrine of *Winters* are similar limitations on the excesses of the prior appropriation system. Dunning, *supra* note 2, at 43-45. Reserved rights is the antidote to the "destruction" wreaked by federal deference to state appropriation law; and public trust is the antidote to the states' own misguided appropriation policies. *Id.* As a description of the motivation and purpose animating the two doctrines, Professor Dunning's insight is hard to dispute. What Professor Dunning arguably does not explain is how a public trust advocate can be comfortable with the approach taken in *Winters* for any reason other than its outcome. If one is convinced that the public trust doctrine offers a legitimate doctrinal explanation for narrowly construing state power to grant water resources, surely that same explanation should apply to federal power to grant or reserve water resources to a tribe. If water resources are essential to state sovereignty for the operation of the public trust doctrine, they should be essential to state sovereignty for operation of the equal footing doctrine. For a different critique of Professor Dunning's discussion of the similarity between reserved rights cases and public trust cases, see Huffman, *Avoiding the Takings Clause*, *supra* note 265, at 196-201 (arguing that both reserved rights and public trust rights improperly avoid the takings clause by finding unexpressed rights in the public that supersede vested private rights).

290. An advocate of applying the public trust doctrine to pre-statehood conveyances could argue, for example, that the United States' trust obligation to Indian tribes should play a role in the inquiry of whether a grant promotes the public interest. *See generally* COHEN, *supra* note 287, at 220-28 (discussing federal trust responsibility); Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994) (same).

291. A supporter of the public trust doctrine might proffer two arguments against this conclusion. First, one could argue that the public trust doctrine should not apply to rights *reserved* by Indian tribes. The difficulties with this argument are discussed above. *See supra* note 287. Second, even if the disputed land or resource is treated as a grant to an Indian tribe rather than a reservation by it, one could argue that the canons of construction and the United States' trust responsibility preclude the application of the public trust doctrine to Indian tribes. A similar argument has been made in the context of the rule of no compensation for assertions of the United States' navigation servitude. Robert J. Ericsson, *The Navigation Servitude and Reserved Indian Property: Does the Rule of No Compensation Apply to Indian Interests in Navigable Waters?* 1979 UTAH L. REV. 57. Ericsson argues that the typical rule allowing the United States to avoid compensation when it exercises its navigation servitude to take or destroy individual property should not apply to Indian tribes. *Id.* at 70-72. Citing the canons of construction and the United States' trust responsibility, he argues that the no compensation principle should not apply to Indian tribes because they could not have "anticipate[d] that their recognized ancient claims would be sacrificed to 'the public interest in navigable waters' without just compensation." *Id.* at 72. In other words, the tribes could not have known of the unstated navigational servitude embedded within their property interest. Ericsson's analysis of equity and Indian understanding seems wholly correct and would seem to be equally relevant to whether public trust easements are embedded within grants to Indian tribes. But the argument does not explain why the application of either the no compensation principle or the public trust doctrine to *non*-tribal interests is any less unfair. Rather, by looking at the notice and fairness question in the context of tribal rights, the analysis only paints in the starkest terms the broader unfairness of springing public trust easements. Ultimately, a suggestion that the public trust doctrine should apply to pre-statehood grants, except with respect to grants to Indian tribes, would be little more than an awkward gerrymander around tribal interests. The suggestion would merely promote avoidance of the hard questions about the legitimacy of the public trust doctrine and the necessity of a choice between the intent inquiry of

And, of course, the opposite is also true. A critic of *Mono Lake* who disagrees with the California Supreme Court's notion that California's control over its waters is, like the police power, an essential attribute of sovereignty,[292] and who is opposed to the expansion of the public trust doctrine to non-navigable waters,[293] should presumably see no impediment at all to *Winters'* conclusion that the United States had the power to reserve water rights in the non-navigable Milk River for the tribes. Or, viewed in another light, an ardent states' rights advocate, opposed to *Winters* on the ground that Montana was deprived of its rightful sovereignty over its waters,[294] can hardly contest California's reclaiming a measure of its natural resource sovereignty by taking back control of the tributaries of Mono Lake.

B. *Equal Footing in* Montana v. United States *Compared with Public Trust in* Illinois Central

Another case useful for exploring the tension between views on equal footing and public trust is Montana v. United States.[295] In *Montana*, the United States sought to quiet title to the bed of the Big Horn river which flowed through the Crow Tribe of Montana's reservation, formed pursuant to the Second Treaty of Fort Laramie.[296] Applying the presumption against a pre-statehood United States' conveyance, the Court held that the treaty language setting apart the reservation "for the absolute and undisturbed use and occupation" of the Crow tribe was not sufficiently clear to evidence United States' intent to grant the riverbed.[297] The

Shively and the power inquiry of *Illinois Central*.

292. *See Mono Lake*, 658 P.2d at 721 ("The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.") (quoting *Illinois Central*, 146 U.S. at 453-54).

293. In *Mono Lake*, the Court held that the public trust doctrine "protects navigable waters from harm caused by diversion of nonnavigable tributaries." *Mono Lake*, 658 P.2d at 721.

294. "[U]se of the Winters Doctrine has been vigorously protested by many in the western states." Dunning, *supra* note 2, at 43. The protest against *Winters* has typically taken the form of calls to limit or control reserved rights in such a way as to make them "inoffensive to western states' prior appropriation schemes." Note, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077, 1091 (1984). *See generally* Eva H. Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966); Eva H. Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33 (1968).

295. 450 U.S. 544 (1981).

296. *Montana*, 450 U.S. at 547-48. The quiet title issue arose because the Crow Tribe had enacted a resolution restricting hunting and fishing on the Big Horn River to tribal members. Montana claimed the right to continue regulating hunting and fishing by non-Indians who owned fee simple allotted lands adjacent to the River and within the reservation. *Id.* at 547-49. Montana based its claim on its purported title to the bed of the Big Horn River. *Id.* at 550-51.

297. *Id.* at 553-57. In addition to the language setting aside the reservation, the treaty promised

Court's conclusion that the treaty language was insufficiently clear to manifest United States' intention to grant the riverbed is certainly subject to criticism.[298] Yet putting aside the merits of the Court's actual application of the presumption, it is hard to see how a supporter of *Illinois Central*'s public trust doctrine could come to a different result than the *Montana* Court.

Presumably, a public trust devotee would agree with the *Montana* Court's reluctance to conclude that the treaty language was sufficiently clear.[299] But even if the treaty language did constitute an express grant, a public trust advocate might well deny that the United States had power to grant away the bed of the Big Horn River because the conveyance likely would not fall within the exceptions articulated in *Illinois Central*.[300] It is hard to see how the grant promoted the interests of the public in the trust

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> that no persons, except those herein designated and authorized to do so, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians.

Id. at 553-54. The Court seemed to suggest that the presumption would only be overcome by an "express reference to the riverbed . . . ." *Id.* at 554.

298. The decision has also been criticized on two other grounds. Some have argued that applying the equal footing doctrine to the reservation of aboriginal rights is illogical because the United States never owned those aboriginal rights in the first place. *See* COHEN, *supra* note 287, at 503-04. This argument is explored *supra* in note 287. Others have criticized the Court for failing to take account of the rule of construction that any ambiguities in treaties must be interpreted in favor of the signatory tribes. *See, e.g.*, Barsh & Henderson, *supra* note 283; Thiem, *supra* note 283. Subsequent Courts have suggested that the rule of construction favoring Indian tribes can be given effect where the Tribe can show dependence on the land and its attached fishery resource "for survival." *See* Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1258 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). Presumably, the relative weight to be afforded the competing presumptions would depend in large part on whether ownership of land under navigable water is an essential aspect of sovereignty. If ownership of public resources is as important to sovereignty as the police power, seemingly there would be no occasion for applying a rule of construction to interpret ambiguities in favor of a tribe. In other words, if the United States had no power to make a grant, ambiguity is largely irrelevant. Conversely, if ownership of overflowed lands is not a crucial attribute of sovereignty, seemingly there would be a need to balance the two presumptions, perhaps in the manner suggested by the Ninth Circuit in *Puyallup*.

299. *See supra* notes 269-70 discussing state courts that require a clear expression of legislative intent as part of their inquiry of whether a grant of public resources is a permissible exercise of state power.

300. *Illinois Central*, 146 U.S. at 453. Professor Johnson, who can surely be described as a public trust advocate, has nevertheless suggested that the public trust doctrine would not apply to the conveyance in *Montana* "because state law does not apply to Indian reservations unless Congress clearly mandates otherwise." Johnson, *supra* note 163, at 566. But the public trust limitation imposed on the conveyance would be one of federal common law, not state law. And presumably, a public trust advocate like Professor Johnson would believe that the states never have had plenary power to convey trust resources, necessarily implying that the United States' powers would be limited in the same fashion. *See supra* note 187.

resource or to argue that the grant did not substantially impair the public interest in the lands and waters remaining.[301] If the grant of 1000 acres of the harbor of Chicago was too large a conveyance of public resources,[302] presumably the conveyance of such a significant swath of the bed of the Big Horn River would also be invalid as beyond the type of modest grant permitted by *Illinois Central*.[303]

On the other side of the ledger, a critic of *Illinois Central*, and a proponent of Illinois' right to convey all of Chicago harbor should support *Montana* only tepidly,[304] if at all. If Illinois could grant Chicago harbor without impermissibly diminishing its sovereignty and the common rights of the public, then surely the United States, exercising its power under the Property Clause, could grant the bed of the Big Horn River to the Crow tribe without impermissibly diminishing the sovereignty of the future state or violating public rights. It is illogical for a *Montana* proponent to justify the decision on the basis of state sovereignty, if that proponent does not view continued state ownership of riverbeds as a crucial aspect of sovereignty in the public trust context.

As these examples illustrate, one cannot consistently advocate the presumption approach to pre-statehood United States' grants and simultaneously support the public trust approach to state grants. The two ap-

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301. Nor can the *Montana* grant be distinguished from the conveyance in *Illinois Central* by the unique sovereign status of the Crow Tribe. The *Illinois Central* Court suggested that the public trust doctrine applied with even greater force to grants to a foreign State or nation:

> It is hardly conceivable that the Legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the Legislature transferring the title to its submerged lands and the power claimed by the railroad company to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held.

Illinois Central, 146 U.S. at 454-55.

302. *Id.* at 454-55.

303. Other pre-statehood grants by the United States that, unlike *Montana*, were validated also presumably would have been rejected if they had been subjected to the *Illinois Central* test and the notion that only small grants of trust resources, which do not substantially impair the public's interest in what remains, are permissible. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (affirming treaty right of tribes in Western Washington of up to 50% of the state's salmon runs). For a case raising similar comparisons between equal footing and public trust, but in a context not involving tribal rights, see United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971). In that case, the Ninth Circuit concluded that Congress intended to reserve tidelands and submerged lands for a railway along the coast, and thus rejected the equal footing argument. *Id.* at 1084-85. The *Illinois Central* standard was not applied to the United States' actions. Presumably, a public trust advocate would disagree with the Court's approach.

304. Criticism of *Illinois Central* can only be reconciled with support of *Montana* by emphasizing that the grant in *Illinois Central* expressly included submerged lands, whereas the grant in *Montana* did not, and by then arguing that for that reason only the *Montana* grant failed to rebut the presumption of sovereign ownership.

proaches conflict, just as *Shively* is irreconcilable with *Illinois Central*. The conflict presents the obvious question of why disparate doctrines exist to judge the validity of sovereign grants of land under navigable water. It seems most likely that the conflict between the two doctrines is a function of the separate lenses through which they are viewed. Equal footing has traditionally been seen as a doctrine whose purpose is to protect state sovereignty; it has been seen through a "states rights" lens. And given the post-Fourteenth Amendment track record of states' rights, it may well be that the doctrine has not expanded beyond the original common law presumption precisely because of that states' rights perspective.[305] Public trust, on the other hand, has been viewed as a doctrine to protect natural resources and public access to them; it has been viewed through the lens of environmental protection. And it is quite plainly that perspective that has caused the doctrine's recent growth.

Of course, to explain the reasons for the differential treatment of sovereign grants of overflowed lands before and after statehood is not to justify the differential treatment or to reconcile the two doctrines. There is no way to reconcile or justify a rule for pre-statehood United States' grants to third parties that is different from the rule for post-statehood state grants. Indeed, this inability to reconcile the two approaches is the primary purpose to which the above examples are directed. By reviewing both doctrines from the opposite perspective, by, as it were, reversing the normal ideological polarity, it becomes evident that commentators and courts cannot have their cake and eat it too. A choice between the two approaches—between *Shively* and *Illinois Central*, and between a focus on sovereign intent and a focus on sovereign power—must be made.

305. One could argue, and indeed some have, that in recent years the equal footing doctrine has grown beyond the prima facie theory and, as articulated by the Supreme Court in *Montana* and *Utah Div. of State Lands*, has become an irrebuttable presumption against conveyance. *See* Barsh & Henderson, *supra* note 283, at 681-84 ("the Irrebuttable Rebuttable Presumption"). The legal rule, however, has not changed, only its application. And as long as the doctrine is perceived as a states' rights issue, one would expect application of the presumption to fluctuate depending on the Court's view of federalism. In recent years, of course, the Court has been much more solicitous of states' rights in its reading of the Constitution. *See, e.g.*, Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (Eleventh Amendment); United States v. Lopez, 115 S. Ct. 1624 (1995) (commerce clause); New York v. United States, 505 U.S. 144 (1992) (Tenth Amendment). To the extent the presumption is understood as a protection of public resources, the hope is that the fluctuation in application would diminish.

IX. A UNIFIED STANDARD FOR SOVEREIGN CONVEYANCES OF LAND UNDER NAVIGABLE WATER TO THIRD PARTIES

If a choice between the intent inquiry of equal footing and the power inquiry of public trust must be made, the better approach is that of equal footing and its rebuttable presumption against sovereign grants of land under navigable water. Thus, like North Carolina, South Carolina, and Texas,[306] state courts reviewing claimed grants of land under navigable water or associated public resources should presume that the state did not intend to grant away common resources absent very plain and explicit granting language. This rebuttable presumption approach of *Shively* is superior to the public trust approach of *Illinois Central* for several reasons.

Procedurally, the rebuttable presumption rule is superior because it requires judges to do that for which they are best suited—determining the intent of a legislative body or administrative agencies through the review of legislation or conveyancing documents. Applying rules of construction to interpret legislation and documents has been the bread and butter of common law judges for centuries. By contrast, the public trust doctrine of *Illinois Central* and *Mono Lake* asks judges to do that for which they are least suited—divining the public interest. Determining whether a grant promotes the public interest or is a substantial impairment of public rights, as required by *Illinois Central*, is largely subjective[307] and defies any consistency of result.[308] More importantly, determining the public

306. *See supra* note 267.

307. The subjectivity of judicial application of the trust doctrine is evidenced by the factors courts have articulated to guide decision on whether *Illinois Central*'s two exceptions have been met:

> [T]he court will examine, among other things, such factors as the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e. commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club Inc., 671 P.2d 1085, 1092-93 (Idaho 1983). To the extent such factors are not the type of subjective, value-laden decision best left to legislatures, they involve technical environmental decisions that are more within the competence of administrative agencies than judges. *See* Lazarus, *supra* note 2, at 712 (arguing that courts "may lack sufficient competence" to administer the public trust doctrine).

308. That the public trust doctrine defies consistent results is admitted by its supporters, who regard the doctrine's dynamic quality as one of its chief benefits. *See, e.g.*, Blumm, *supra* note 269, at 577, 595 ("the doctrine's flexibility is also the source of its strength"); Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 226, at 315 ("In natural resources law generally, the unique qualities of some resources have impelled courts to apply the public trust doctrine as a flexible, loosely connected set of rules that allow maximum public utilization."); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) (arguing for even greater flexibility in the public trust doctrine); Ralph W. Johnson, *Public Trust Protec-*

interest in how the public's resources should be used, conserved, or conveyed is the quintessential legislative task.[309] Whereas the modern public trust doctrine operates as an extra-constitutional restraint on legislative action, the *Shively* presumption validates the democratic process,[310] and continues to offer a measure of protection to public resources.

The *Shively* approach is also superior because it safeguards both the legitimate expectations of grantees and the public in quiet enjoyment of their property rights. Grantees—whether Indian tribes or private individuals—can rely on clear and unequivocal conveyances of land under navigable water or associated resources without concern that, at some time in the future, a court may determine that the sovereign, whether the United States or a state, was without power to make the conveyance.[311] Likewise, the public is assured that it has not lost any of its common resources by implication. The rebuttable presumption approach also better protects legitimate expectations because it is grounded in a more accurate historical understanding of sovereign power over land under navigable water. While recent grantees in those states which have adopted and expanded the public trust doctrine of *Illinois Central* could not make such a claim, other grantees or their successors would reasonably have understood that a state had power to grant land under navigable water and associated resources, except for the navigation servitude given to the federal gov-

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tion for Stream Flows and Lake Levels, 14 U.C. DAVIS L. REV. 233, 234 (1980). Such inconsistency, however, undermines respect for the judicial process. And, in any event, destabilizing private property rights is a dubious recommendation for a legal doctrine that claims to be grounded in the common law.

309. Professor Huffman has observed: "In a democratic state, the legislature is by definition the final arbiter of the public interest. Indeed, the concept of the public interest is what justifies majoritarian, democratic government. It is therefore illogical to urge judicial activism as a means of protecting the public interest." Huffman, *Avoiding the Takings Clause*, *supra* note 265, at 209 (citation and internal quotation omitted). *See also* Gould, *supra* note 2, at 47 ("Because of the broad social and economic issues inevitably raised by resource allocation decisions, the responsibility for making such decisions properly resides with the legislature, the most democratic of our institutions.").

310. A number of commentators have debated whether the public trust doctrine is truly antidemocratic. Supporters of the doctrine generally claim that it is not. *See, e.g.*, Sax, *supra* note 2, at 509 (arguing that the public trust doctrine is a "medium for democratization"); Blumm, *supra* note 269, at 580 (calling the public trust doctrine "a democratizing force"). Opponents of the doctrine claim that it is. *See, e.g.*, Huffman, *Avoiding the Takings Clause*, *supra* note 265, at 209 ("Absent . . . violations of individual rights, courts should refrain from interfering in the democratic process not because democratic decision making is the ultimate objective of our constitutional government, but because the courts have no capacity to make the kinds of decisions which our Constitution allocates to the legislative branch of government."); Huffman, *Trusting the Public Interest to Judges*, *supra* note 2; Gould, *supra* note 2, at 47-48 ("the public trust doctrine is contrary to our democratic tradition"). I do not propose to delve deeply into that debate here.

311. *See* Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 436 ("The California court's approach in *National Audubon* is inconsistent with a system of stable and secure water rights.").

ernment in the Constitution.[312] Finally, by protecting the reasonable expectations of grantees, the presumption approach, unlike the public trust doctrine, avoids any implication of an unconstitutional taking[313] of private property without just compensation.[314]

A number of other arguments for the flaws in the modern public trust doctrine could be, and have been, made.[315] The primary purpose of this article is not, however, to replow that ground. Instead, it is to suggest that a choice between the approach of *Shively* and the approach of *Illinois Central* is necessary. Whatever one thinks of the relative merits of each doctrine, only one may be espoused consistently. Thus, if one disagrees with the suggestion that a rebuttable presumption is the better approach and instead prefers the approach of the modern public trust doctrine and its view of limited sovereign power, one must then accept the consequences of that approach not only for state conveyances but also for pre-statehood conveyances by the United States. Whatever the choice, there may be some ideological discomfort. With either choice, it is hoped that the recognition of the relationship between equal footing and public trust will suggest a more cautious and consistent application of both doctrines than might be the case if each were not recognized to be a two-edged sword.

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312. *See* U.S. CONST. art. I, § 8 (commerce clause); *see also* Gould, *supra* note 2, at 49 ("in the usual public trust case, the title was not qualified when the conveyance occurred.").

313. The Fifth Amendment Takings Clause, provides, in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment applies to the states by virtue of the Fourteenth Amendment. *See* Chicago, Burlington and Quincy R.R. v. City of Chicago, 166 U.S. 226, 233 (1897).

314. Courts and commentators adopting the public trust doctrine of *Illinois Central* have generally rejected the suggestion that the public trust doctrine can work an unconstitutional taking, asserting that a public trust servitude was necessarily imposed on any grant and thus the exercise of that servitude takes nothing from the grantee. *See, e.g., Mono Lake*, 658 P.2d at 721 ("parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust"); Blumm, *supra* note 269, at 584-87; Johnson, *supra* note 163, at 583-86. Several commentators, however, have persuasively argued that an uncompensated revocation of a grant of overflowed lands or associated resources can constitute a taking. *See, e.g.*, Gould, *supra* note 2, at 49 ("the public trust doctrine is intellectually dishonest . . . . No compensation is owed, it is asserted, because the private party received only a qualified title as a result of the public trust with which the resource was impressed and, thus, nothing is "taken" when the trust requires that the private party's interest be terminated or restricted. But in the usual public trust case, the title was not qualified when the conveyance occurred.") (footnote omitted); Huffman, *Avoiding the Takings Clause*, *supra* note 265. *See generally* Douglas L. Grant, *Wester Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423 (1995) (discussing implications of the Supreme Court's takings jurisprudence for state and judicial action pursuant to the public trust doctrine).

315. *See, e.g.*, Lazarus, *supra* note 2, at 633-34; Huffman, *Trusting the Public Interest to Judges*, *supra* note 2, at 574-76; James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); Gould, *supra* note 2; *See* Jawetz, *supra* note 271, at 455.

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X. CONCLUSION

The equal footing doctrine, as applied to land under navigable water, and the public trust doctrine are estranged offspring of the same parent—the prima facie theory of Thomas Digges and Lord Hale. Whereas equal footing's presumption against pre-statehood conveyances bears close resemblance to its parent doctrine, the roots of the expanded public trust doctrine are barely recognizable. Recognizing this common parentage and current estrangement challenges our view of the two doctrines by allowing us to view each doctrine through its sibling's lens. Our comfort with that counter-perspective says much about whether our view of equal footing or public trust is grounded in legal reasoning and logic or simply in support for a particular outcome. In the end, there is no reason to continue the estrangement of the two doctrines. The validity of a grant of submerged lands and associated resources should not depend upon the pre- or post-statehood timing of the grant, but on a consistent view of sovereign power and public interest.