PUBLIC RECREATION AND THE NAVIGABILITY TEST: *STATE v. McILROY*

City dwellers have turned in increasing numbers to the rural streams in the area surrounding the Ozark Mountains of Arkansas and Missouri for recreation.[1] One of the most popular pastimes is the float trip by canoe.[2] Yet with canoeing, as with all other kinds of water recreation, a clear understanding of the relative rights of the riparian land owner[3] and the public must exist to avoid confrontations. To decide whether the public has a right to use a watercourse, courts employ the navigability test. Under the navigability test, the ability of a watercourse to provide a route for useful transportation determines the balance of public and private rights with respect to the watercourse.[4] In *State v. McIlroy*,[5] the Arkansas Supreme Court

1. The Current River is the best known and most popular stream in the Missouri Ozarks. Of the recreational visitors to the Current during the early and mid 1970's, 55% came from urban areas, primarily St. Louis and Kansas City, while only 1% came from the local counties through which the stream flows. Use of the stream for canoe float trips increased from 40,000 floater days in 1968 to over 243,000 in 1977. NATIONAL PARK SERVICE, RIVER RESEARCH AT OZARK NATIONAL SCENIC RIVERWAYS 1970-1977, at 35, 87-93 (1973) (hereinafter cited as CURRENT RIVER STUDY).

2. Two lesser known streams in the Missouri Ozarks are representative: the Gasconade and the Meramec. According to estimates by the Missouri Department of Conservation, the Gasconade, a small stream, accommodates 15,700 visits per year totaling 99,000 hours; on the upper 74 miles of the Meramec, a moderate-sized stream, there are 98,000 annual visits by canoeists spending 550,000 hours on the water. Telephone interview with George Fleener, Senior Resident Fisheries Biologist, Jefferson City, Missouri (Sept. 8, 1980). On the Mulberry River in Arkansas, the stream in question in the present case, an estimated 600 people per weekend float through McIlroy land. Brief for Appellant, State of Arkansas at 7, State v. McIlroy, __ Ark. __, 595 S.W.2d 659 (1980), *cert. denied*, 49 U.S.L.W. 3247 (1981).

3. A riparian owner is one whose land extends to or includes the banks of a stream or river. The owner of lake front property is called a littoral owner. *See* BLACK'S LAW DICTIONARY 842, 1192 (5th ed. 1979). Any reference in this comment to riparian rights or ownership includes those of the littoral owner except where specifically noted otherwise.

4. What forms of transportation are or should be included in the test is the subject of this comment.

5. __ Ark. __, 595 S.W.2d 659 (1980), *cert. denied*, 49 U.S.L.W. 3247 (1981).

changed the navigability test by holding that a stream having only recreational value is open to public use.

In *McIlroy*, a riparian land owner filed suit to enjoin an environmental group and a canoe rental company from using and publicizing the stream that flowed through his land.[6] The State of Arkansas intervened, claiming that the stream was navigable and that, therefore, the state had title to the bed.[7] The trial court found the stream nonnavigable, thereby upholding the riparian's private property interest along with his incidental right to exclude the public from canoeing on that portion of the stream that flowed through his land.[8] The Arkansas Supreme Court reversed. Recalling *Barboro v. Boyle*[9], an early case that recognized an important public interest in waterborne recreation,[10] the *McIlroy* court held that a stream which is canoeable for a substantial portion of the year is navigable and, therefore, open to public recreational use.[11]

Federal courts use the navigability test to determine the extent of federal power over the nation's waterways. Initially, in cases involving questions of admiralty jurisdiction,[12] the United States Supreme Court adopted the English common law approach, which considered rivers navigable only if tides affected the river level.[13] This restrictive test of navigability inadequately defined the limits of federal jurisdiction under the commerce clause,[14] especially for a country with vast, commercially useful inland waterways.[15] As a result, the Court rede-

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6. ___ Ark. at ___, 595 S.W.2d at 660. Due to the efforts of an environmental group, The Ozark Society, and a canoe rental company, Wayfarer Expeditions, people from Kansas, Louisiana, Michigan, Missouri and Texas have learned about and floated the Mulberry. Brief for Appellant, *supra* note 2, at 7.

7. ___ Ark. ___, 595 S.W.2d at 660.

8. *Id.*

9. 119 Ark. 377, 178 S.W. 378 (1915).

10. *Id.* at 382-83, 178 S.W. at 380. *Quoted in* State v. McIlroy, ___ Ark. at ___, 595 S.W.2d at 664. *See* notes 60-63 and accompanying text *infra*.

11. ___ Ark. ___, ___, 595 S.W.2d 663, 665.

12. The Constitution gives the federal courts the power to try all cases of maritime or admiralty jurisdiction. U.S. CONST. art. III, § 2, cl. 1.

13. *E.g.*, The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

14. U.S. CONST. art. 1, § 8, cl. 2. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), the U.S. Supreme Court held that commerce comprehends navigation and that the federal power to regulate commerce therefore includes the power to regulate navigation. *See generally* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 398-408 (1970).

15. Carson v. Blazir, 2 Binn. 475, 484 (Pa. 1810). The tidal theory meant that the

fined navigability by expanding the test to include all waters that were navigable in fact for commercially valuable transportation.[16] The Court did not consider recreation a commercially valuable pursuit.[17] Under the federal test, therefore, the ability of a watercourse to accommodate recreation will not support a finding of navigability where the watercourse lacks commercial usefulness.

The navigability of a watercourse determines its public or private status.[18] The states, upon joining the Union, received title to the beds of their commercially navigable waters as an incident of the transfer of local sovereignty.[19] These beds passed to the states subject to a preemptory public trust for navigation; regardless of the private or public status of the riparian property, the federal government retained ultimate control under the commerce clause.[20] Thus, in *Donnelly v. United States*,[21] the Supreme Court held that a state, in accordance with local property law, may assign its bed title to the riparian owner, but the assignment does not defeat the public trust.[22] In its role as public trustee, a state may allow whatever public use of

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Delaware River was "navigable" from Trenton, N.J. southward only, although vessels could navigate the river for commercial purposes well inland of Trenton. *Id.*

16. The Propeller Genesse Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). The Supreme Court gave the basic definition of "commercial navigability in fact" in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). A waterway is "navigable in fact" if it affords, in its natural condition, a highway for commerce. The Court has expanded the basic definition through the years to include man-made waterways, Ex Parte Boyer, 109 U.S. 629 (1884); waters that were originally navigable but are no longer so, Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); and waters that could be navigable if reasonable improvements were made, even though those improvements are not completed or authorized, United States v. Appalachian Power Co., 311 U.S. 377 (1940). For the development of the federal navigability standard, *see* Guinn, *An Analysis of Navigable Waters of the United States*, 18 BAYLOR L. REV. 559 (1966).

17. The Montello, 87 U.S. (20 Wall.) 430, 442 (1874) (Not every small creek accessible by a fishing skiff or gunning canoe is navigable. The stream must be useful for transportation in trade or agriculture.).

18. *See* note 34 and accompanying text *infra*.

19. United States v. Oregon, 295 U.S. 1, 14 (1934). The original thirteen colonies received their titles from the English Crown. Upon entering the Union they retained those titles. The states subsequently admitted received the same title rights in order that they might stand on an "equal footing." Shively v. Bowlbey, 152 U.S. 1, 11-18, 26-28, 57-58 (1893). *See generally* Leighty, *supra* note 14, at 408-23.

20. United States v. Oregon, 295 U.S. 1, 14 (1935). *See* note 40 *infra*.

21. 228 U.S. 243 (1913).

22. *Id.* at 262. *See* Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427, 432 (1961).

its waterways it deems appropriate, including recreation.[23] A riparian on a navigable stream may not exclude the public from using it even if he holds title to the bed.[24]

The status of bed title to commercially nonnavigable waters presents a more complicated issue. All federal riparian patents to private parties granted *before* statehood include title to the stream, or lake bed,[25] unless Congress specifically reserved those waters to public use.[26] The Supreme Court held in *Hardin v. Jordan*[27] that state law controls federal grants of riparian land occurring *after* statehood.[28] If the state has adopted a navigability test as strict as the federal test, courts shall construe federal grants to private riparians to include bed title.[29] Some states, however, have a more liberal navigability test; federal grants in these states may include a waterway considered unnavigable under the federal standard but navigable under the state standard. In such cases, the United States retains title

23. The Wisconsin Supreme Court, for example, has declared that the public right to fish, hunt, and boat for pleasure is an incident of navigability. Nekoosa Edwards Paper Co. v. Railroad Comm'n, 201 Wis. 40, 228 N.W. 144 (1929), *rehearing denied*, 229 N.W. 631 (1930), *aff'd*, 283 U.S. 787 (1931) (pleasure boating); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898) (fishing) Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335, 339. *See also* 1 WATERS AND WATER RIGHTS § 37.2(c) (1967).

24. The owner holds title subject to the same easement of navigation that would apply to the state if the state had retained title. *E.g.*, State ex rel. Brown v. Newport Concrete Co., 44 Ohio App. 2d 121, 123-24, 336 N.E. 2d 453, 454 (1975). *See* note 20 and accompanying text *supra*.

25. *E.g.*, Oklahoma v. Texas 258 U.S. 574, 584 (1922). *See also* 1 WATERS AND WATER RIGHTS § 37.2(c).

26. The Missouri Supreme Court found just such a reservation in the federal statute providing for the territorial government of Missouri. The statute proclaimed the Missouri and the Mississippi Rivers and "all the carrying places between the same" public highways. Act of June 4, 1812, § 15, 2 STAT. 747 (1850). In addition the act admitting Missouri to the Union declared the Mississippi and "waters leading to the same" common highways. Act of March 6, 1820, § 2, 3 STAT. 546 (1846). In Elder v. Delcour 364 Mo. 835, 269 S.W.2d 17 (1954), the Missouri Supreme Court held that the Meramec, although not navigable under the federal test, was a carrying place and a water leading to the Mississippi within the meaning of Congress, and therefore a public highway open to recreation.

27. 140 U.S. 371 (1891).

28. *Id.* at 380.

29. In *Hardin* the plaintiff sued to recover a portion of the bed of a small Illinois lake. The plaintiff based its claim on a federal grant made to its ancestor in 1841, twenty-three years after statehood. The court found that under Illinois law the lake was not navigable and that in Illinois riparian grants on nonnavigable waters included bed title. Accordingly it held for the plaintiff. *Id.* at 372, 379-88.

to the bed rather than conveying it to the private riparian or to the state.[30] Thus, in all cases involving a federal grant, any state claim to bed title raises a federal question in which the federal test of commercial navigability preempts state law.[31] Only when a private riparian holds his grant from the state, may the state claim bed title based on a navigability test more liberal than the federal test.[32]

Some states have found the federal navigability test too narrow to encompass the interests of their citizens. In the seminal case of *Lamprey v. State*,[33] the Minnesota court reasoned that since navigability determines whether a watercourse is public or private, a watercourse's ability to provide public benefit should determine its navigability.[34] The court rejected the commercial restriction of the federal test because the test did not include those recreational uses to which Minnesota's waters were especially well suited.[35] It extended the state navigability test to include any watercourse that could accommodate recreational boating.[36]

The *Lamprey* court based its authority to allow public recreational

30. United States v. Oregon, 295 U.S. 1 (1934). The use of state law in construing a conveyance by the United States determines if bed title impliedly passes to the grantee as an incident of the abutting upland expressly granted. If state law determines that bed title does not pass, the state derives no claim to it because the state is not a party to the grant. *Id.* at 28. A state may not claim title to the bed which remains the property of the United States by declaring the water over it navigable. *Id.* at 29.

31. United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926). This case deals specifically with pre-statehood grants, but its logic viewed in the light of United States v. Oregon, 295 U.S. 1 (1934), clearly extends to post-statehood grants.

32. Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77, 88 (1922) (state may not divest riparian of bed title by retroactive rule for determining navigability). Such state action would violate the Fifth and Fourteenth Amendments to the Constitution as a deprivation of property without just compensation. *See* Lauer, *The Riparian Right as Property*, UNIVERSITY OF MICHIGAN LAW SCHOOL, WATER RESOURCES AND THE LAW 131, 163-64 (1958).

33. 52 Minn. 181, 53 N.W. 1139 (1893).

34. *Id.* at 199, 53 N.W. at 1143. The court goes on to say that the navigable-nonnavigable nomenclature should be dropped in favor of public-private waters. *Id.* at 200, 53 N.W. at 1143-44. This approach would avoid the pecuniary commercial connotation which attaches to the concept of navigability. Some states ignore the navigability concept, using public benefit to determine which waters are public. *E.g.*, Lunt v. Hunter, 16 Maine 9 (1839) (all waters public for fishing even though nonnavigable); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) (navigability determines bed title, but does not affect public's right to lawful recreation on or in the state's waters).

35. 52 Minn. at 199, 53 N.W. at 1143.

36. *Id.* at 200, 53 N.W. at 1144.

use of the state's waterways upon a theory that the state owned the underlying beds.[37] The court construed *Hardin v. Jordan*[38] to hold that bed title to all water navigable under state law passed to the state.[39] The United States Supreme Court subsequently made it clear that in bed title disputes, navigability is primarily a federal issue to which state courts must apply the federal test.[40] In *State v. Adams*,[41] the Minnesota court admitted the error of its *Lamprey* decision in claiming title to the beds of recreationally but not commercially valuable waters.[42]

Once the riparian establishes his ownership in the bed of a water-

37. *Id.*

38. 140 U.S. 371 (1891).

39. Lamprey v. State, 52 Minn. at 192, 53 N.W. at 1140-41. *See* Hardin v. Jordan, 140 U.S. at 380 (the question of bed title must be decided by the local state law).

40. Considering the Supreme Court's language in deciding cases like *Hardin v. Jordan*, it is not surprising that state courts were confused about the role of state law in such disputes. *E.g.*, Donnelly v. United States, 228 U.S. 243, 262 (1913) ("what shall be deemed navigable water within the meaning of the local rules of property is for the determination of the several states"); *see* notes 21-22 and accompanying text *supra* and notes 69-72 and accompanying text *infra*. In 1922 the Court recognized that a state may retain bed title to federally nonnavigable waters involved in riparian grants by the state by imposing a more liberal definition of navigability. The state may not, however, alter property rights vested under a pre-statehood, federal grant. In the latter case, navigability *vel non* is a federal question. Brewer-Elliot Oil and Gas Co. v. United States, 260 U.S. at 89. *See* note 32 *supra*. As late as 1934, Oregon, citing *Hardin v. Jordan*, claimed bed title to certain waters by declaring that they were navigable under state law. The Supreme Court decided that while state law could be used to construe the federal government's intention with respect to federal riparian grants made after statehood, state law could not be used to divest the United States of its title. Where waters are not navigable under the federal test, a state finding of navigability means solely that bed title does not pass either to the private grantee or to the state—but remains in the United States. United States v. Oregon, 295 U.S. 1, 24-29 (1935); Bade, *Title, Points and Lines in Lakes and Steams*, 24 MINN. L. REV. 305, 311-18 (1940). *See* note 30 and accompanying text *supra*.

41. 251 Minn. 521, 89 N.W.2d 661 (1958) *cert. denied* 358 U.S. 826 (1958).

42. *Id.* at 554-58, 89 N.W.2d at 683-86. The *Adams* court points out that the language of *Hardin v. Jordan* is unclear on the point, causing confusion in state courts. The *Lamprey* decision was a result of that confusion in the Minnesota court. *Id.* at 557, 89 N.W.2d at 685. The *Adams* court does not resolve the question of recreational water rights. Instead, it answers the fears expressed in amicus curiae briefs concerning the future of water recreation by stating that the litigation did not involve that subject. The question before the court was one of bed ownership, not the state's right to protect and control the state's waters. *Id.* at 560-61, 89 N.W.2d at 687-88. The court leaves the door open for the state to continue to allow recreation on nonnavigable waters, but on grounds other than state ownership of the beds. *See* notes 50-51 and accompanying text *infra*.

course,[43] the question becomes what rights does he have in the water itself. In the older view, derived from English common law,[44] his property right extended upward to include the water over the bed.[45] Just as the riparian could exclude the public from his fields, so could he exclude the public from the surface of the water over his land.[46] The more modern view considers his interest in the water, as opposed to the bed, usufructory rather than possessive.[47] The riparian has the right to reasonable use of the water for domestic and commercial purposes provided he allows his fellow riparians to enjoy similar usage.[48]

43. A riparian whose upland extends along one bank of a stream owns the bed to the thread or middle of the stream. If his land encompasses both banks, he has title to the entire bed. The same is true for lakes except where the shore is rounded. In that case the littoral landowner's property extends in a pie-shaped wedge to the center of the lake. 3 AMERICAN LAW OF PROPERTY § 12-27a (A. Casner ed, 1952).

44. *See* 1 COKE ON LITTELTON, ch. 1 § (4a); Knuth, *Bases for the Legal Establishment of a Public Right of Recreation in Utah's "Non-Navigable" Waters*, 5 J. CONTEMP. L. 95, 96 (1978).

45. According to the maxim *cujus est solum, ejus est usque ad coelum* (whoever owns the soil owns up to the sky), the water over a privately-owned bed is the property of the riparian just as the trees and stones on his upland belong to him. J. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 7-10 (1877); *e.g.*, GA. CODE § 85-1301 ("Running Water, while on land, belongs to the owner of the land . . .").

46. RESTATEMENT OF TORTS, Introductory Notes §§ 850-57 at 349 (1939). Any unprivileged entry on a privately-owned stream bed or on the surface of the water over it constitutes trespass. *Id.*

47. Water, especially flowing water, differs from other inanimate objects because of its inherent instability; in that sense it resembles animals *ferae naturae*. The majority view holds that water, like wild animals, can be owned when reduced to possession, but in its natural state allows for only a right of use. 1 WATER AND WATER RIGHTS § 16.1 (R. Clark ed. 1967); Casner, *supra* note 43 at § 12-33; Leighty, *supra* note 14 at 161, 232-33; *e.g.*, Walbridge v. Robinson, 22 Idaho 236, 125 P. 812 (1912) (ownership of the bed does not confer ownership to the water above it); Higgins v. Board of Supervisors, 188 Iowa 448, 176 N.W. 268 (1920) (no vested interest in waters of lake from ownership of abutting lands); State v. Beardsley, 108 Iowa 396 (1899) (owner of soil does not own the stream).

48. The riparian's obligation to use the water flowing past his land reasonably is part of the riparian doctrine. This doctrine seeks to insure equitable allocation of the water resource among the riparians along a stream or lake. An unreasonable use of water by an upper riparian, *e.g.*, pollution or excessive diversion of the water, is an actionable tort. RESTATEMENT (SECOND) OF TORTS §§ 850, 850 A (1977); 1 WATERS AND WATER RIGHTS § 16 (R. Clark ed. 1967); Leighty, *supra* note 14 at 171-75. The rights of the riparian are generally the same in those western states termed "prior appropriation" states as in "riparian" states. In prior appropriation states, however, a non-riparian may acquire the right to use the water by having appropriated it for a certain length of time. Unlike the riparian's right of use, the prior appropriator's right ends with non-use. 5 WATERS AND WATER RIGHTS §§ 400-401.2 (R. Clark ed. 1967).

Adopting the modern view, some states have augmented the federal test, which determines bed title, with a more liberal state navigability test to determine the rights of public recreational use.[49] Some courts justify these tests by claiming state ownership rights in the water itself.[50] Other courts speak in terms of a public trust in streams

See Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930) (riparian rights include use of the water for general purposes such as bathing and domestic use).

It should be noted that riparian rights, other than exclusive use of the water's surface, do not depend on bed ownership. Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960) (whether waters are navigable has no material bearing on riparian rights since such rights do not arise from the ownership of the lake bed but as an incident of the ownership of the shore). Arkansas recognizes that the rights of riparians on navigable waters are similar to those of riparians on nonnavigable watercourses. They include: the right of access to the water; the right to wharf out to the line of navigability; the right to accretions; and the right to reasonable use of the water as it flows past the land. Anderson v. Reames, 204 Ark. 216, 222-23, 161 S.W.2d 957 (1942).

49. The following states have extended the navigability test to include recreational uses: California, Maryland, New York, North Dakota, Ohio, Oregon, South Dakota and Wisconsin. People v. Mack, 19 Cal. App. 3rd 1040, 97 Cal. Rptr. 448 (1971) (waters capable of being navigated by oar or motor-propelled small craft are navigable); Toy v. Atlantic Gulf & Pacific Co., 176 Md. 197, 4 A.2d 757 (1939) (waterways that permit passage by rowboats and small launches are navigable); Fairchild v. Kraemer, 11 A.D.2d 232, 204 N.Y.S.2d 823 (1960) (use of stream for pleasure boating is a consideration in determining its navigability); Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921) (water's usefulness for pleasure, public convenience and enjoyment may suffice for a finding of navigability); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1959) (the capacity of a water course for recreational boating may be a factor in determining navigability.); Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158 (1936) (commercial navigability includes recreation); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937) (the term navigable extended to include such public purposes as recreation); Muench v. Public Service Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952) (any stream is navigable in fact if it is possible to float a skiff or canoe of the shallowest draft.).

50. *E.g.*, Guilliams v. Beaver Lake Club, 90 Or. 13, 175 P. 437 (1918). The Oregon court held that streams that could not support the commerce required by the federal navigability test, but that were amenable to recreation, possessed a qualified navigability. *Id.* at 27, 175 P. at 442. Although the bed title to a qualifiedly navigable stream remains in the riparian owner, he does not own the water. The riparian's property interest in the stream is not great enough to defeat the public interest in the use of the surface for recreation. *Id.* at 27-28, 175 P. at 442.

In Iowa the legislature had declared that water in any watercourse or other natural body of water is public and public wealth of the people of the state. The control, development, and use of water for all beneficial purposes resides in the state. IOWA CODE § 455.A.2 (1966). Whether the Iowa courts will use the statute to extend navigability for recreation remains an open question. Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322, 1336-37 (1968).

In Wyoming, the state possesses title to the state's waters regardless of bed owner-

and lakes suitable for recreation.[51] They essentially hold that the riparian's title and usufructary rights must yield to a public recreational easement. Whatever theory the courts use,[52] the effect remains the same: they remove the riparian's right to exclude non-riparians from enjoying "his" portion of the watercourse from his bundle of property rights. The U.S. Supreme Court has never decided whether depriving the riparian of exclusive use of the water over his stream bed amounts to an unconstitutional taking.[53]

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ship. WYO. CONST. art. 8, § 1; WYO. STAT. §§ 1-409 to 1-1064 (1957). By virtue of its title to the water, the state has an easement for a right of way over the natural channels. WYO. STAT. §§ 41-527, 41-528 (1957). In *Day v. Armstrong*, the Wyoming Supreme Court used the state's statutory interest in the waters to circumvent the limitations of commercial navigability. It held that the public had a right to recreational boating on the state's watercourses regardless of navigability. Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961). Although statutes like Iowa's and Wyoming's offer a means of creating public recreational rights on federally nonnavigable waters, judicial definitions of navigability are determinative in the vast majority of states.

51. *E.g.*, Kelley *ex rel.* MacMullen v. Hallden 51 Mich. App. 176, 214 N.W.2d 856 (1974). The *Kelley* court, noting the demise of the timber industry and the rise of the tourist industry in Michigan, rejected the old "saw log" test of navigability in favor of a recreational use test. *Id.* at 187-88, 214 N.W.2d at 862. Under the saw log test a stream was navigable if it could float a raft of logs to the mill. *Id.* at 182, 214 N.W.2d at 859. The *Kelley* court held that the bed title of a riparian on a now recreationally navigable stream was subject to a perpetual trust to secure to the public its rights of fishing and navigation. *Id.* at 185, 214 N.W.2d at 860. This decision is presumably the court's reaction to unsuccessful efforts in the Michigan legislature to bypass the navigability doctrine in favor of a public ownership of water approach. *See* R. Bartke, *Navigability in Michigan in Retrospect and Prospect*, 16 WAYNE L. REV. 409, 452-56 (1970).

52. Other possible theories are custom and long use and the employment of the state's police power to open nonnavigable waters to public use. *E.g.*, State Game and Fish Comm'n v. Louis Fritz Co. 187 Miss. 539, 193 So. 19 (1940) (alternate holding) (long and customary use justified recreation on nonnavigable water by all who can gain access without trespass); Comment, *Water Recreation—Public Use of "Private" Waters*, 52 CAL. L. REV. 171, 182-83 (1964); *see also* 53 IOWA L. REV. *supra* note 50, at 1337-40. For a discussion of the possible use of the state's police power *see* Note, *The State v. the Riparian: A Problem of Water Use and Control*, 1961 WASH. U.L.Q. 257, 269-71.

53. *But see* Kaiser Aetna v. United States, 444 U.S. 164 (1979). In *Kaiser* the Court dealt with an analogous situation. There a littoral owner with bed title created a marina out of an Hawaiian fish pond. He had dredged it and opened it into a navigable bay. *Id.* at 165-66. Although the court admitted that the marina now qualified as navigable water under the federal test, it held that the government could not deprive the owner of his right to exclude the public without paying just compensation. *Id.* at 179-80. The Court relied on two factors that make this case unique and would hinder its general application: The littoral owner had created the navigability himself and had a large financial stake in the marina's exclusivenesss. *Id.* at 176. In addition,

The development of the navigability test in Arkansas parallels that of the federal test. At first the Arkansas court applied the English tidal test.[54] In 1882 the supreme court introduced the commercially navigable in fact criterion.[55] It held that to be navigable, a stream must have the ability to transport the products of the adjoining fields and forests.[56]

In adhering to the federal navigability standard, Arkansas never imposed restrictions on the riparian's bed title or his ownership rights in the water over the bed.[57] Arkansas law held the state had title to the beds of navigable watercourses while the riparian held title to the beds of nonnavigable ones.[58] State law recognized that bed ownership gave the private riparian the right to exclude the public from using the surface of the water.[59]

The court in *Barboro v. Boyle*, citing extensively from *Lamprey*, emphasized the public recreational benefits that accrue from a find-

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Hawaiian property law had treated the fish pond as fast (*i.e.*, solid or dry) land, not aquatic property. *Id.* at 179. Indeed, the court admits that the facts of the case make it quite atypical. *Id.* at 176. *Cf.* State v. McIlroy, __ Ark. at __, 595 S.W.2d at 668-69 (1980) (dissenting opinion).

It may be that not all riparian rights, among them that of exclusive use, are entitled to constitutional protection absent some special circumstance. Where a change in state law does not affect bed title but only exclusive use, the Supreme Court may be unwilling to reverse, except perhaps in a most flagrant instance. Lauer, *supra* note 32, at 166, 257.

54. Warren v. Chambers, 25 Ark. 120 (1867) (navigability determined by the effect of the ebb and flow of the tide).

55. Little Rock, M.R. & T. Ry. v. Brooks, 39 Ark. 403 (1882) (navigability of a stream determined by its usefulness for commercial transportation).

56. *Id.* at 409.

57. Medlock v. Galbreath, 208 Ark. 681, 187 S.W.2d 545 (1944). In *Medlock* the court employed the maxim *cujus est solum, ejus est usque ad coelum*. *Id.* at 683, 187 S.W.2d at 546; *see* note 45 *supra*. The court declared that ownership of the bed in fee included ownership of the water over the bed. Any use of the surface by another for boating constituted an infringement of the riparian's vested property rights. *Id.* In the case at hand, however, other littoral owners could fish on the one owner's water because Arkansas law allowed strangers to hunt wild game on unenclosed land. *Id.* at 684, 187 S.W.2d at 547. The owner may enclose the surface of this water by means of booms to exclude fellow littoral owners. *Id. Contra*, Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960) (each littoral owner on a lake suitable for recreation has the right to use the entire surface).

58. *E.g.*, McGahhey v. McCollum, 207 Ark. 180, 184, 179 S.W.2d 661, 663 (1944) (citing Barboro v. Boyle, 119 Ark. at 380, 178 S.W. at 380).

59. *See* note 57 *supra*.

ing of navigability.[60] Unlike the *Lamprey* court, which promulgated a new state test in order to make waters having only recreational value public, the *Barboro* court limited itself to a liberal interpretation of the federal, commercial test.[61] Indeed, the court later expressly rejected the notion that a watercourse's suitability for recreation sufficed to render it navigable.[62] Consistent with these limitations, as late as 1973 *Barboro* stood merely for the proposition that water commerce need not succeed financially to come within the navigability criteria.[63]

In *State v. McIlroy* the Arkansas Supreme Court admitted that heretofore the state had followed the federal test of commercial navigability.[64] It also recognized that the stream in question lacked commercial value in the traditional sense.[65] The *McIlroy* court saw in *Barboro*, however, a prophetic anticipation of the importance of water recreation to the public interest.[66] It considered decisions of other states that recognized recreational navigability.[67] Further, it

60. 119 Ark. at 382-83, 178 S.W. at 380. The riparian owner on a navigable waterway in Arkansas may not prevent the public from using the water or the bank up to the high water mark for purposes of bathing, hunting, fishing or boating. Anderson v. Reams, 204 Ark. 216, 223, 161 S.W.2d 957, 960 (1942). These incidents of navigability arise from the state's ownership of the beds of navigable waters. *See* St. Louis, I.M. & S. Ry. Co. v. Ramsey, 53 Ark. 314, 13 S.W. 931 (1890) (the state owns the beds of all navigable rivers in trust for the use of the public); *see* note 22 and accompanying text *supra*.

61. Although the lake in question had not been used, except at irregular intervals, for commercial transportation, testimony showed that it was susceptible to that use. 119 Ark. at 382, 178 S.W. at 380.

62. McGahhey v. McCollum, 207 Ark. at 185, 179 S.W.2d at 664. The fact that a lake is sufficient for pleasure boating or to float fishing skiffs and canoes did not render it navigable. *Id.*

63. Hayes v. State, 254 Ark. 680, 682, 496 S.W.2d 372, 374 (1973) (lake which had once supported small car ferry found navigable).

64. __ Ark. at __, 595 S.W.2d at 663.

65. *Id.* at __, 595 S.W.2d at 661. The court describes the Mulberry as an "intermediate stream," smaller than other commercially utilized rivers. Canoes and flat-bottomed boats can use the Mulberry for six months out of the year. *Id.*

66. *Id.* at __, 595 S.W.2d at 664. The *Barboro* court had speculated about the potential increased usage of Arkansas waters for such pursuits as pleasure boating, bathing and fishing. 119 Ark. at 383, 178 S.W. at 380.

67. Among the cases cited are: Kelley *ex rel.* MacMullan v. Hallden, 51 Mich. App. 176, 214 N.W.2d 856 (1974), *see* note 51 *supra*; People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158 (1936), *see* note 49 *supra*; and Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893), *see* notes 33-42 and accompanying text *supra*.

saw in *Donnelly v. United States*[68] a justification for imposing a liberal state test in the absence of such federal questions as admiralty jurisdiction and regulation of interstate commerce.[69] Implicitly holding that the public interest in recreation outweighed the riparian's interest in exclusive use, the court adopted a recreational standard of navigability.[70]

The *McIlroy* court fails to explain how the new state test will affect the bed title of federally nonnavigable, but recreationally useful streams.[71] If it finds that *Donnelly* sanctions the use of state law to assume title to the beds of these streams,[72] it makes the same mistake the *Lamprey* court made in misconstruing *Hardin v. Jordan*. There the Minnesota court failed to recognize that the federal test must govern bed title disputes.[73] Since divestiture of the riparian's bed title would be an unconstitutional taking, one must assume that the *McIlroy* decision does not affect bed title.

The court makes no mention, however, of the theory upon which it is basing its right to create new public watercourses. It imposes no public recreational trust by virtue of state ownership or control of the water over the stream bed.[74] Considering previous Arkansas law, which accorded the riparian on a commercially nonnavigable stream absolute ownership and control of the water over his portion of the bed,[75] the court's statement that times have changed and that the

68. 228 U.S. 243 (1913). See notes 21-22 and accompanying text *supra*.

69. __ Ark. at __, 595 S.W.2d at 663.

70. *Id.* at __, 595 S.W.2d at 663.

71. __ Ark. at __, 595 S.W.2d at 663.

72. According to *Donnelly*, state law applies when determining bed title to *navigable* waters. 238 U.S. at 261. Hence California by declaring a federally navigable river nonnavigable under California law, could pass its bed title to the riparian owner. *Id.*, *see* notes 23-24 *supra*. The *McIlroy* court interprets *Donnelly* as holding that federal navigability applies only where the bed title dispute is between a state and the federal government. __ Ark. at __, 595 S.W.2d at 663. The court misconstrues *Donnelly* if it believes that navigability *vel non* is not a federal question in determining bed title disputes between the state and the private riparian. *See* note 40 and accompanying text *supra*.

73. *See* notes 37-42 and accompanying text *supra*.

74. The court must have been aware of the possible theories since it mentions that Ohio had applied a "public trust" on a river to insure the public right of recreation. __ Ark. at __, 595 S.W.2d at 664, citing State ex rel. Brown v. Newport Concrete Co., 44 Ohio App. 2d 121, 336 N.E.2d 453 (1975).

75. *See* note 57 *supra*.

mounting public interest in recreation should be served,[76] without some theoretical undergirding, lacks persuasive force. The court's justification affords little comfort to the riparian who learns that the stream flowing through his land has become public property.[77]

As the *McIlroy* court points out, a determination of navigability translates into a declaration of public rights in a waterway.[78] In the formulation of the navigability test, the court had heretofore held that commercial benefits justified public access, but that recreational benefits like sport and esthetic enjoyment did not.[79] This dichotomy seems unwise in view of today's need for recreational outlets.

Though laudably motivated, the Arkansas court's attempt to redress this historical imbalance would deprive, without just compensation, the riparian of a property right previously accorded.[80] The

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76. The Court said that Arkansas had been primarily concerned with steamboat and barge traffic when the courts developed the previous state navigability test. __ Ark. at __, 595 S.W.2d at 664. While recreation has become much more important since the steamboat era, Arkansas courts after *Barboro* showed little concern for the benefits of water recreation when dealing with navigability. *See* Comment, *The Vitality of the Navigability Criterion in the Era of Environmentalism*, 25 ARK. L. REV. 250, 267 (1971). They allowed the riparian to gain a vested interest in the exclusive use of his nonnavigable water. On the other hand, Michigan, when it changed from its anachronistic saw log test to the modern recreational use test, took nothing from the majority of its riparians. Under the old test, a nonnavigable stream under the federal test could have a limited navigability to float logs. If so, the public could use it for recreational purposes. Kelley *ex rel.* MacMullan v. Hallden, 51 Mich. App. 176, 182, 214 N.W.2d 856, 859 (1974); *see* note 51 *supra*.

77. One Arkansas writer dealt with the riparian's expectations if someone should challenge his right to exclusive use of his commercially nonnavigable water. He speculated that:

> [W]hen the Arkansas court is faced with the problem of rights of private property owners versus the opening of streams for pleasure, recreation and attraction to tourists, . . . the case law already in force in this state will compel it to respect the landowner's exclusive right . . . and restrict the rights of the public to those waters that are navigable in fact.

Note, *Real Property—Right to Float-Fish through Another's Land*, 10 ARK. L. REV. 145, 149 (1955).

78. __ Ark. at __, 595 S.W.2d at 663.

79. Under the American impetus to reduce everything capable of ownership to an object of private property, the courts ignored the interests of the public while developing the riparian doctrine. Lauer, *supra* note 32, at 163. In 1882 the Arkansas court said that the true criterion of navigability is "the dictate of sound business common sense." Little Rock, M.R. & T. Ry. Co. v. Brooks, 39 Ark. 403, 409 (1882).

80. As Justice Brandeis once said, "An essential element of individual property is the legal right to exclude others from enjoying it." Int'l News Serv. v. Asso. Press, 248 U.S. 215, 250 (1918) (dissenting opinion).

Prior to *McIlroy*, one commentator wrote that the seed of broad public rights in

proper forum to implement new public policy is the legislature.[81] Should the legislature perceive the need for increased recreational opportunity, a democratically effectuated rather than judicially imposed solution would result. Furthermore, the legislature could, under its police power, regulate the exercise of this newly created public right. One can expect that the legislature would balance public and private interests to ensure that public recreational use will be reasonable,[82] just as the current law requires reasonable use by the riparian.[83]

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Barboro v. Boyle should be nurtured carefully and slowly. If the court recognized those rights at one stroke, it would arouse cries of violation of due process. 25 ARK. L. REV., *supra* note 76, at 285. Indeed the dissenting justice in *McIlroy* voices just those concerns. He argues that the navigability test is a rule of property; to liberalize it would continue confiscation of private property. State v. McIlroy, ___ Ark. at ___, 595 S.W.2d at 667-69. Although he speaks in terms of title, his remarks also apply to the right of exclusive use, especially since Arkansas never had a doctrine like limited navigability. *See* note 76 *supra*.

81. The dissenting justice in *McIlroy* makes the point that the court should not submit to public clamor. ___ Ark. at ___, 595 S.W.2d at 668. Rather, the legislature is the governmental branch whose duty it is to express the public will. Like the court, the legislature is forbidden by both the state and federal constitutions from taking private property without compensation. *See* U.S. CONST. amends. V & XIV, ARK. CONST. art. 2, §§ 22 & 23. The *McIlroy* decision itself is necessarily, if only implicitly, dispositive on the state constitutional question. How the U.S. Supreme Court would view an expansion of public rights of recreational usage is unclear. *See* note 53 *supra*.

82. Under the reasonable use doctrine, recreation is a lawful use of the water abutting the riparian's land. He may pursue recreational use so long as he does not infringe on the rights of his fellow riparians. *See* Harris v. Brooks, 225 Ark. 436, 445, 283 S.W.2d 129, 132 (1955). It would seem equitable to require a like reasonableness from the public vis a vis the riparian. In freeing the public to exercise, without restriction, the recreational incidents of navigability in the small streams of Arkansas, the *McIlroy* court may be allowing serious property and ecological damage. The deleterious effects of ever increasing canoe traffic on the Current River in the Missouri Ozarks has forced the National Park Service to contemplate strict recreational use controls. CURRENT RIVER STUDY, *supra* note 1, at 136.

83. *See* note 48 *supra*.