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Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception

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Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception

Andrea B. Carroll*

In this Article, Andrea B. Carroll inquires whether riparians on a nonnavigable lake (1) have mutual rights to access the entire surface of the lake or, rather, (2) merely have the limited right to access the portion of the surface overlying the bed they respectively own. Carroll observes that the resolution of this question depends almost entirely on the state in which the parties litigate and that most American jurisdictions use one of two approaches: the so-called "common law approach" or the so-called "civil law approach." Carroll argues that courts that accept the distinction between the common law and the civil law approaches are perpetuating a false choice, because the "civil law rule" is not actually a rule of the civil law at all. It is, instead, the relatively modern and spontaneous generation of one European jurisdiction in response to peculiar policy choices. The rule of civil law is exactly the same as that of the common law; indeed, the common law rule has civilian roots. Carroll further asserts that the United States Supreme Court made an error of interpretation over one hundred years ago that brought this distorted distinction into American jurisprudence and that courts throughout the country have perpetuated the error. In this Article, Carroll demonstrates that there are not, in fact, divergent civil and common law rules of riparian access, and she encourages courts to change the nomenclature to correct the persistent error.

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[T]he great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic.¹

The purported differences between the common and civil law systems are legendary. Battles have raged for centuries on both academic and political fronts over these differences. Hostilities have grown so intense that complete censorship once took hold; the study of

1. Commencement Address at Yale University, PUB. PAPERS 470 (June 11, 1962) (speech of President John F. Kennedy).

the civil law, particularly Roman law, for example, was once banned in England.² Even today, in “mixed jurisdictions” such as Louisiana and Quebec—heavily influenced by the Anglo-American common law, yet with a largely “civilian” body of private law³—wars are being waged by various groups to prevent further perceived intrusion by foreign systems.⁴ The parties involved in these disputes view the stakes as high. The differences between the common and civil law systems are perceived to be so great that acceptance by a staunch believer of one system of the other’s validity or desirability is nearly inconceivable. The reality as we move further into the twenty-first century, though, is that the two systems are coming together much more closely. Many of the supposed differences between them—particularly that they involve diametrically opposed substantive rules—are mere myths.

A pertinent example of such a myth has presented itself recently. Specifically, this long-debated question of the degree to which the common and civil law systems differ has come to a head on an issue relating to water rights. That water presents itself as a battleground here is perhaps not too surprising; waters and fighting have long been closely associated.⁵ One need only glance at etymology to understand the pervasiveness of the connection. The words “rivals” and “rivalry” are derivatives of ancient words relating to waters, specifically, the Roman word “*rive*,” which referred to riparian landowners.⁶ Fifteen centuries have not brought much change; use of rivers and lakes remains a hotly contested issue. Professional anglers participating in fishing tournaments have been shot at by angry riparian landowners in both Alabama and Louisiana.⁷ And a new controversy is currently

2. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 302 (5th ed., Little Brown & Co. 1956) (1929).

3. See T.B. Smith, *The Preservation of the Civilian Tradition in “Mixed Jurisdictions”*, in *CIVIL LAW IN THE MODERN WORLD* 3, 10 (Athanasios N. Yiannopoulos ed., 1965).

4. See José Trias Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 *TUL. L. REV.* 333, 333 (2003); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *LA. L. REV.* 677, 737-38 (2000).

5. Mark Twain is even claimed to have remarked, “Whisky’s fer drinkin’, water’s fer fightin’.” But see John R. Brown, “*Whisky’s fer Drinkin’; Water’s fer Fightin’!*” *Is It? Resolving a Collective Action Dilemma in New Mexico*, 43 *NAT. RESOURCES J.* 185, 186 n.3 (2003) (questioning the propriety of the attribution).

6. See Samuel C. Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 *CAL. L. REV.* 245, 255 n.46 (1918); see also *ROMAN WATER LAW* 90 (Eugene F. Ware trans., 3d ed. 1985) (defining “rivals” as “two persons who lead water through the same channel” (quoting *DIG.* 43.20.1.26 (Ulpian, *Edict*, bk. 70))).

7. See *Sports Briefs*, *THE ADVOCATE* (Baton Rouge), Jan. 7, 2004, at 5D; *Shooting Shocks BASS Angler*, *MONTGOMERY ADVERTISER*, June 4, 2004, at B1.

brewing in courts across the nation among riparian landowners that purportedly involves both the common law and the civil law, and serves as an interesting context within which to study the true differences between the two systems.

The question is essentially one of riparian access to water for nonconsumptive purposes. In other words, do riparian landowners⁸ on a nonnavigable lake have mutual rights to access the entire surface of the lake for fishing and boating, or are they limited to accessing that portion of the surface overlying bed they own?⁹ The resolution of this question depends almost entirely on the state in which the parties litigate. Most American jurisdictions that have considered the question have chosen one of two approaches: the so-called "common law approach" or the so-called "civil law approach."

The truth is that these courts are perpetuating a false choice. In fact, the "civil law rule" adopted by at least six of our states' high courts is not actually a rule of the civil law at all. It is, instead, the relatively modern and spontaneous generation of one European jurisdiction in response to peculiar policy choices. The rule of civil law is exactly the same as that at common law; indeed, the so-called "common law rule" has civilian roots. But the United States Supreme Court made an error of interpretation over one hundred years ago that pulled a distorted rule into American jurisprudence and falsely attributed it to civilian sources. That error has been perpetuated by courts around the country ever since.

The goal of this Article, then, is to demonstrate that there are not divergent civil and common law rules of riparian access. Part I will provide a brief example of the context that gives rise to the problem of riparian surface access to nonnavigable lakes for recreational or nonconsumptive purposes¹⁰ and then detail the two major divergent

8. The word "littoral" more correctly applies to the description of property abutting a lake, while the word "riparian" technically refers only to property abutting rivers. 1A GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 259, at 311 (Replacement 1980). Nowadays, though, "riparian" is generally used to refer to both types of property. *Id.*

9. The issue is only controversial when its application is restricted to water bodies that state laws deem nonnavigable. In most states, waters that meet state definitions of navigability are open to public use. See A. WILLIAM GOLDFARB, WATER LAW 85-87 (1984); DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 8.28, at 8-45 to -52 (2002 & Supp. 2005). If members of the general public are entitled to access and make nonconsumptive uses of the waters of these navigable bodies, *a fortiori*, riparian landowners may do the same. It is only over nonnavigable waters, for which state law generally imposes no right of public use, that the rights of riparian landowners to use water are questionable.

10. This Article considers only the gulf between the two primary approaches to resolving disputes regarding nonconsumptive uses such as fishing, boating, swimming, and

approaches to solving this problem. Part II will then trace the history of the two approaches. It will demonstrate that the “civil law rule” is not, in fact, civilian at all; indeed, both the common and civil law rules came from the same source. Instead, the so-called “civil law rule” is a distortion that was imported into the United States erroneously and has been perpetuated by our appellate courts for centuries. Finally, Part III will offer a proposal for changing the nomenclature, and most importantly, provide some observations about why it is important that courts and legal scholars correct this 200-year-old mistake.

I. A TIMELY CONTEXT FOR REAPPRAISING THE DIFFERENCES
BETWEEN CIVIL AND COMMON LAW SYSTEMS

A. *The Problem of Surface Access to Nonnavigable Water Bodies*

The Connecticut Supreme Court is the latest in a long string of state high courts to have decided a case that presents just the sort of controversy that spawned the historical error.¹¹ *Ace Equipment Sales, Inc. v. Buccino* involved a dispute between two riparian owners on a nonnavigable lake.¹² The plaintiffs, including two recreational fishing clubs, were owners of ninety-nine percent of the bed of a twenty-acre manmade lake.¹³ They stocked the lake and used it for recreational fishing.¹⁴ Defendants, the Buccinos, owned almost none of the bed of the lake, but owned the property on which the dam controlling the lake was erected.¹⁵ After the Buccinos began granting permission to a fly fishing club to use the lake, the plaintiffs constructed a twelve-foot-high fence along the lake’s border.¹⁶ The intent was clearly to prevent use by the defendant-riparians. The plaintiffs filed suit, seeking an injunction to prevent the Buccinos and their guests from “trespassing” on the water.¹⁷

bathing. There are significant divisions among jurisdictions in resolving questions of the entitlement of landowners to make consumptive uses of lakes, e.g., for irrigation. The doctrines adopted for those scenarios—most notably, the riparian landowner rights and prior appropriations doctrines—are discussed exhaustively elsewhere and are beyond the scope of this work. See, e.g., Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9 (2002).

11. See *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 637 (Conn. 2005).

12. *Id.* at 628.

13. *Id.* at 628-29.

14. *Id.*

15. *Id.* at 629. There was some dispute as to whether the Buccinos owned any portion of the lake bed at all. The Connecticut Supreme Court remanded to the trial court to resolve this factual question. *Id.* at 637 n.14.

16. *Id.* at 629.

17. *Id.*

Essentially, the plaintiffs argued that because they owned nearly the entire bed of the lake, they were entitled to exclude others from the water overlying that bed.¹⁸ The Buccinos, in contrast, urged that their fellow riparian landowners on a nonnavigable lake had no right of ownership in the water and that, as owners of land abutting a lake, they were entitled to make recreational use of those waters, even when covering bed owned by another.¹⁹

The trial court ruled for the Buccinos, finding that “owners of land abutting a nonnavigable body of water have riparian or littoral rights that are not dependent on the genesis of the body of water as artificial or natural, or on the ownership of the subaqueous land.”²⁰ The Connecticut appellate court agreed, finding case law in Minnesota and Michigan instructive.²¹ Both Minnesota and Michigan allow all riparian owners to access the entirety of the surface of nonnavigable lakes, “provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners . . . regardless . . . of the ownership of bed thereof.”²² Thus, the plaintiffs were required to remove their fence and allow the Buccinos access.²³

In April 2005, though, the Connecticut Supreme Court rendered a decision reversing the trial and appellate court rulings and granting the plaintiffs the exclusive use of the waters above lakebed they own.²⁴ It is this decision that highlights the controversy these facts present with regard to the differences between the common law and the civil law. The Connecticut Supreme Court correctly pointed out that most state courts that have considered similar questions label the rule of free access proffered by the Buccinos, but rejected by the court, as the “civil law rule,” and that urged by the plaintiffs as the “common law rule.”²⁵ Whether other state high courts will ultimately make similar decisions to adopt the “common law rule” remains to be seen. Appellate courts around the country are quite sharply divided on this

18. *Id.* at 631.

19. *Ace Equip. Sales, Inc. v. Buccino*, 848 A.2d 474, 478-79 (Conn. App. Ct. 2004), *rev'd*, 869 A.2d 626 (Conn. 2005).

20. *Id.* at 477-78.

21. *See id.* at 480.

22. *Id.* (quoting *Flynn v. Beigel*, 102 N.W.2d 284, 290-91 (Minn. 1960)).

23. *See id.* at 482.

24. *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626 (Conn. 2005).

25. *Id.* at 634-35. The Connecticut court of appeals purposefully avoided this issue, noting that it did “not perceive this case as requiring a choice between the application of ‘civil law’ or ‘common law.’” *Buccino*, 848 A.2d at 479 n.10.

issue; before *Buccino*, the high courts of at least six states had thus far chosen the “civil law rule,” and at least six the “common law rule.”²⁶

B. The Solution Articulated by American Courts: A Choice Between the “Common Law Rule” and the “Civil Law Rule”

1. The “Common Law Rule”

The so-called “common law rule” is easy to understand. It is merely a logical extension of the familiar Latin maxim *cujus est solum, ejus est usque ad coelum et ad inferos*, meaning “[t]o whomever the soil belongs, he owns also to the sky and to the depths.”²⁷ Under this rationale, a landowner’s right to property is understood “to extend from heaven to hell.”²⁸ The common law rule regarding access to the surface of nonnavigable lakes, then, is consistent with concepts of absolute ownership.²⁹ An owner “is entitled to exclusive dominion over his land, including the areas above and below its surface.”³⁰

That right to exclusive dominion does not cease merely because the privately owned land is covered by water. The landowner has the right to the exclusive use and control of everything above and below his land, including the waters lying immediately above his bed. In essence, the common law rule treats the waters overlying privately

26. See DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 234 (3d ed. 1997). Compare *Duval v. Thomas*, 114 So. 2d 791, 791 (Fla. 1959); *Beacham v. Lake Zurich Prop. Owners Ass’n*, 526 N.E. 2d 154, 154 (Ill. 1988); *Burt v. Munger*, 23 N.W.2d 117, 120 (Mich. 1946); *Johnson v. Seifert*, 100 N.W.2d 689, 689 (Minn. 1960); *State Game & Fish Comm’n v. Louis Fritz Co.*, 193 So. 9, 9 (Miss. 1940); and *Botton v. State*, 420 P.2d 352, 352 (Wash. 1966) (adopting the civil law rule), with *Wehby v. Turpin*, 710 So. 2d 1243, 1243 (Ala. 1998); *Medlock v. Galbreath*, 187 S.W.2d 545, 547 (Ark. 1945); *Lanier v. Ocean Pond Fishing Club, Inc.*, 322 S.E.2d 494, 494 (Ga. 1984); *Sanders v. De Rose*, 191 N.E. 331, 333-34 (Ind. 1934); *Baker v. Normanoch Ass’n*, 136 A.2d 645, 645 (N.J. 1957); and *Smoulter v. Boyd*, 58 A. 144, 147 (Pa. 1904) (adopting the common law rule).

It is likely that only thirteen state supreme courts have yet decided this question because of the interplay between issues of surface access and navigability. States (such as California) which adopt a very expansive, recreation-based test of navigability (in lieu of the traditional commerce-based test), are much less likely to confront the surface access question. See, e.g., *Nat’l Audubon Soc’y v. Super. Ct.*, 658 P.2d 709, 720 n.17 (Cal. 1983) (“A waterway usable only for pleasure boating is . . . a navigable waterway . . .”). The navigability of the water body would provide all riparian landowners with surface access, without the need for consideration of the civil or common law rule. *Id.* at 719-20; TARLOCK, *supra* note 9, § 8.28, at 8-45 to -52.

27. BLACK’S LAW DICTIONARY 378 (6th ed. 1990); accord RUSS VERSTEEG, *ESSENTIAL LATIN FOR LAWYERS* 127 (1990); see also Clement L. Bouvé, *Private Ownership of Airspace*, 1 AIR L. REV. 232, 244 (1930) (tracing the origins of *cujus est solum*).

28. GETCHES, *supra* note 26, at 234.

29. *Id.*

30. 1 S.V. CIRIACY-WANTRUP ET AL., *WATERS AND WATER RIGHTS* 52 (Robert Emmet Clark ed., 1967).

owned lakebed as if they were dry land.³¹ Thus, the common law rule finds that one riparian landowner crossing the boundary lines by steering his boat into water overlying bed owned by another riparian landowner, or indeed merely casting a fishing line into water overlying bed owned by another, commits a trespass.³²

The beauty of the rule is in its consistent application. Under the common law rule, a landowner is entitled to insist upon exclusive dominion, applied both to dry land and to any waters that might cover those lands.³³ It follows that under this rule, the right to make nonconsumptive or recreational uses of the waters of nonnavigable lakes lies solely in the owner of the bed immediately beneath that water.³⁴

Pennsylvania's application of the rule is illustrative. In the 1904 case of *Smoulter v. Boyd*, the Pennsylvania Supreme Court resolved a controversy between two landowners bordering a nonnavigable lake about one mile long and one-half mile wide.³⁵ The plaintiffs sued a defendant who owned approximately 215 acres of land, including the bed of and all of the land surrounding the lake, with the exception of about five acres.³⁶ Plaintiffs owned the other five acres of land, which included about one and one-quarter acres of bed.³⁷ Approximately eight years after purchasing the property, the defendant "built a boom of heavy logs fastened together at the ends by iron links, and thereon erected a barbed wire fence across the surface of the lake."³⁸ The boom followed the boundary lines of defendant's property, and sought to exclude other riparian landowners on the lake from fishing or boating over any portion of bed owned by the defendant.³⁹ The minority bed owners sought an injunction ordering defendant to remove the boom and allow free surface access to all riparian landowners "for the purposes of boating and sailing."⁴⁰

31. Recent Cases, *Waters and Watercourses—Non-Navigable Lakes—Right of Use in Bed Owners*, 26 MINN. L. REV. 569, 570 (1941-1942).

32. James W. Cullis, Note, *Extent of Private Rights in Nonnavigable Lakes*, 5 U. FLA. L. REV. 166, 176 (1952).

33. Joseph B. Gaudet, *Water Recreation—Public Use of "Private" Waters*, 52 CAL. L. REV. 171, 174 (1964).

34. *Id.*

35. 58 A. 144, 144-45 (Pa. 1904).

36. *Id.* at 145.

37. *Id.*

38. *Id.* (internal quotation omitted).

39. *Id.*

40. *Id.* at 145-46.

In analyzing the respective rights of the parties to make nonconsumptive uses of the surface of the lake, the Pennsylvania court first noted that the defendant's deed to a portion of property including the bed of the lake "gave him title *ad cælum et ad inferos*, and hence the waters on his land were subject to his use and enjoyment."⁴¹ The court viewed the plaintiffs' boating and swimming activities on the defendant's property as trespasses, just as if that property were dry land.⁴² Any use of the defendant's property by an unauthorized person—even a fellow riparian landowner for the purpose of boating or fishing—was held to be "an infringement of the rights of property vested in the owner of the land."⁴³ The court, therefore, found the defendant to be within his rights in erecting the boom, and denied the plaintiffs' request for an injunction.⁴⁴

In the century since *Smoulter*, the courts of a number of other states have used the principle *cujus est solum* to come to the same conclusion: a riparian landowner on a nonnavigable lake may make nonconsumptive uses of the water only above bed he owns.⁴⁵ *Cujus est solum* is the antithesis of a rule of free surface access for all riparian landowners. As applied to water bodies, it protects the landowner's exclusive dominion in his property as if it were dry land, for the landowner's rights extend to anything found above or below the surface of that land.

2. The "Civil Law Rule"

The so-called "civil law rule" is quite the opposite. It rejects the principle *cujus est solum* and instead embraces free access for all riparian landowners.⁴⁶ While the rule admits the existence of a "technical trespass," it sanctions that result in favor of the sharing of waters in which the parties have a common interest.⁴⁷ Simply stated, the civil law rule permits a riparian landowner "to use the surface of the entire lake for fishing, boating, and bathing as long as he does not

41. *Id.* at 146.

42. *Id.* at 147.

43. *Id.*

44. *Id.*

45. *See, e.g.,* *Medlock v. Galbreath*, 187 S.W.2d 545, 546 (Ark. 1945); *see also* 2 HENRY P. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 375, at 1383 (1904) ("An exclusive right of fishery in the water adjacent to property is not one of the rights of the riparian owner. He can claim such a right only when he owns the soil under the water . . ."); *Recent Cases*, *supra* note 31, at 570 (citing some jurisdictions' dispositive use of the principle).

46. *Cullis*, *supra* note 32, at 176.

47. *See* CIRACY-WANTRUP ET AL., *supra* note 30, at 54; *Cullis*, *supra* note 32, at 176.

unduly interfere with the rights of the other [riparian landowner] proprietors."⁴⁸

American courts adopting this civil law rule often give no real justification for their choice.⁴⁹ Occasionally though, state courts espouse one of four common reasons for departing from traditional notions of an owner's right to exclusive dominion above and below his land: (1) the common law rule is too difficult to follow with regard to lakes;⁵⁰ (2) there can be no private ownership in the waters or in the fish of a nonnavigable lake and, thus, use of the surface should be open to all riparian landowners;⁵¹ (3) common use of the surface of nonnavigable lakes is customary;⁵² or (4) economic policy requires the adoption of the civil law rule.⁵³

48. Cullis, *supra* note 32, at 176.

49. See, e.g., *Burt v. Munger*, 23 N.W.2d 117, 119-20 (Mich. 1946); *Botton v. State*, 420 P.2d 352, 356 (Wash. 1966).

50. Problems with determining exact boundaries and developing a mechanism to ensure a landowner's exclusive dominion in water overlying his bed are viewed as insurmountable under this justification for a rule of free riparian landowner access. See *1 CIRACY-WANTRUP ET AL.*, *supra* note 30, at 54. The trouble with determining precise limits of ownership inherent in surveying water bodies is certainly exacerbated when lakes are involved. Particularly when the bed of a lake is divided among a number of riparian landowners, it is not so simple as merely drawing a line down the middle, as with a river. The problem of enforcement is inextricably tied to the difficulty of demarking clear lines. A riparian owner fishing or boating on lake waters over bed he owns "could not be conveniently arrested the moment he arrived at the *medium filum aquæ ex adverso* of his land, or the moment he traversed the boundaries." *Mackenzie v. Bankes*, (1878) 3 App. Cas. 1324, 1329-30 (H.L.) (appeal taken from Scot.). Thus, the sheer difficulty of accurately applying *cujus est solum* to nonnavigable lakes has persuaded some jurisdictions to adopt the "civil law rule." See Cullis, *supra* note 32, at 177.

51. The Mississippi Supreme Court offers this unpersuasive justification for adopting the "civil law rule." See *State Game & Fish Comm'n v. Louis Fritz Co.*, 193 So. 9, 11 (Miss. 1940). That any owner's land contains wildlife, which are things insusceptible of ownership, should not justify public intrusion of the landowner's dominion solely for the sake of pursuit. Such an intrusion without permission would be a clear trespass on dry land. I find a distinction simply because land is covered with water untenable.

52. See *id.* (favoring the "civil law rule" in order to respect a practice honored by the people "for time out of mind").

53. This is, in my view, the most persuasive and honest justification for adopting the "civil law rule" given by American courts. It is also the most pragmatic. The fact is that economic development may be stymied by the adoption of any rule other than one allowing all riparian landowners access to the entire surface of the water body on which they border. Unfortunately, far too few jurisdictions proffer such a reasonable explanation. In fact, Florida and Minnesota are alone in admitting economic or public policy as the primary force behind their adoption of the "civil law rule." See, e.g., *Duval v. Thomas*, 114 So. 2d 791, 795 (Fla. 1959); *Recent Cases*, *supra* note 31, at 570-71. Florida has recognized that many of the state's important recreational water bodies are relatively small lakes not accessible to the general public, but that a significant volume of sporting activity essential to the state economy, in particular water-skiing and sailing, is conducted on those "private" lakes. See *Duval*, 114 So. 2d at 795. Preventing public use would simply place an unacceptable strain

Some of these policies are certainly legitimate and may deserve protection. The problem is that all too often, courts choose to adopt the civil law rule or the common law rule seemingly because of their labels, or because of the purported sources of the rules, rather than because an exhaustive analysis of state goals points in a particular direction.⁵⁴ Jurisdictions considering whether to adopt a rule of free riparian landowners access to nonnavigable lakes should consider the above-articulated, and other, policies and develop a rule that best protects the policies the particular jurisdiction deems important.⁵⁵ They should not, however, refer to, or rely upon, incorrect labels or the misguided impressions those labels give.

II. A CRITICAL HISTORICAL REVIEW

The truth is that there is no dichotomy between the civil and common law rules in this area. In other words, there is no civil law rule that is different from a common law rule regarding riparian landowners' surface access to nonnavigable lakes. The idea that there are divergent common law and civil law rules is the result of an error that is more than 200 years old. The rule of surface access was, in fact, historically the same at both common and civil law. Specifically, the rule was that a riparian landowner's access was limited to the surface waters over his bed—a mere application of the principle *cujus est solum* to land covered by water. The creation of a different civil law rule can be traced to an identifiable point: a series of early nineteenth-century Scottish cases. That distortion of the rule was incorporated into American jurisprudence by the United States Supreme Court, and then further complicated by the Court through a series of errors in interpreting its sources. This Part will explain the historical rule in

on an economy heavily dependent on tourism. See *id.* at 791; Recent Cases, *supra* note 31, at 570-71. Similarly, Minnesota has taken the position that while its nonnavigable lakes cannot be opened to the entire public in accordance with state definitions of navigability, they should at least be made accessible to the greatest number of people possible. See Recent Cases, *supra* note 31, at 570-71.

54. See, e.g., *Wehby v. Turpin*, 710 So. 2d 1243, 1249 (Ala. 1998) (adopting the common law rule solely because Alabama is a "common law state").

55. States occasionally adopt both the civil and common law rules, depending upon whether the lake at issue is natural or artificial or whether the bed is owned by virtue of a deed or merely by virtue of the ownership of riparian landowner lands. Compare *Duval*, 114 So. 2d at 791 (adopting the civil law rule for natural lake), with *Anderson v. Bell*, 433 So. 2d 1202, 1202 (Fla. 1983) (adopting the common law rule for manmade lake); compare *Improved Realty Corp. v. Sowers*, 78 S.E.2d 588, 592 (Va. 1953) (adopting the civil law rule when bed is owned by virtue of ownership of riparian landowner lands), with *Wickowski v. Swift*, 124 S.E.2d 892, 895 (Va. 1962) (adopting the common law rule where bed ownership is expressed in deed).

both common and civil law jurisdictions, detail the point at which the rules are supposed to have diverged, and set out how American courts came to view the newly divergent rules as stemming from the differences in the common and civil law systems.

A. The History of the “Common Law Rule”

The history of the common law rule of restricted access is, essentially, the history of the development of the doctrine *cujus est solum*—a rule of civilian origin. It was the application of that doctrine to cases involving water that gave rise to what came to be known as the common law rule regarding riparian landowner access.

1. Tracing the Origins of the Doctrine *Cujus Est Solum*

a. On the Continent: The Birth of a Doctrine

The history of the doctrine *cujus est solum, ejus est usque ad coelum et ad inferos* is indeed fascinating. The doctrine is often referred to as “one of the oldest rules of property known to the law,”⁵⁶ for quite good reason. While the maxim is most commonly believed to have originated with the well-famed seventeenth-century judge and jurist Lord Coke,⁵⁷ the truth is that it was around many, many centuries before Coke popularized it in Britain. *Cujus est solum*’s origins can actually be traced back to Roman times. It is likely a creation of the twelfth-century school of Roman law devotees known as the Glossators.

Although recorded Roman legal history dates back as far as five centuries B.C., perhaps the most important and widely celebrated development in Roman law is the completion of the sixth-century compilations at the behest of Emperor Justinian.⁵⁸ Justinian commanded a team of legal elites to develop a number of Roman law works in the hopes of preserving the best of the classical Roman literature from prior centuries and of providing a statement of the law in force in his own day.⁵⁹ His team proved quite prolific, producing a number of important works of Roman law—most notably, Justinian’s

56. See Howard H. Hackley, *Trespassers in the Sky*, 21 MINN. L. REV. 773, 774 (1937) (quoting *Hannabalon v. Sessions*, 90 N.W. 93, 95 (1902)).

57. See, e.g., Note, *Trespass by Airplane*, 32 HARV. L. REV. 569, 569 (1919).

58. See GEORGE MOUSOURAKIS, *THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW* 118, 395 (2003).

59. *Id.* at 388.

Digest.⁶⁰ Although it is a relatively crude “Code” by modern standards, Justinian’s *Digest* has profound historical significance as one of the earliest and most comprehensive collections of written law.⁶¹

The method of the *Digest* was not to establish a wholly new law, but merely to collect and detail the best surviving works of the Roman Empire.⁶² Thus, the *Digest* took the form not of a scientifically organized and systematized work, but rather of a compilation of the writings of many legal scholars.⁶³ Among the dozens of legal scholars whose works were included in the *Digest* were the second-century Roman jurists Paul and Venuleius.⁶⁴

As groundbreaking as the *Digest* was, its influence waned in the centuries after its preparation.⁶⁵ Part of the problem was linguistic; the *Digest* was written in Latin, and thus was inaccessible to later generations of legal scholars, many of whom read only Greek.⁶⁶ Further, legal scholars and practitioners began preparing their own commentaries on the *Digest*, which over time became more influential than the *Digest* itself.⁶⁷ Thus, Roman law fell into a period of decline for nearly 600 years.

In the late eleventh century, though, scholars in Pisa, Italy, stumbled upon a manuscript of Justinian’s *Digest*.⁶⁸ The discovery sparked a renewed interest in Roman law, prompting a number of legal scholars to abandon their work on local law to focus on the *Digest*.⁶⁹ One group of legal scholars in particular, the Glossators, came to devote its life’s work to commenting upon these newly discovered Roman law works.⁷⁰

The Glossators focused their attention primarily on Justinian’s sixth-century *Digest*.⁷¹ For the Glossators, it was just beneath the divine.⁷² The *Digest* was considered intellectually superior to the

60. *Id.* at 393.

61. *Id.* at 395.

62. *See id.* at 388.

63. *See id.* at 387; Peter Stein, *Justinian’s Compilation: Classical Legacy and Legal Source*, 8 TUL. EUR. & CIV. L.F. 1, 1 (1993).

64. *See* HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 119 (1951); Stein, *supra* note 63, at 1.

65. MOUSOURAKIS, *supra* note 58, at 402.

66. *Id.* at 401-02.

67. *Id.* at 402.

68. *Id.* at 423; *see also* PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 43 (1999) (discussing the rediscovery of the *Digest* in Pisa).

69. *See* MOUSOURAKIS, *supra* note 58, at 423.

70. *See* STEIN, *supra* note 68, at 45, 47.

71. *See id.* at 47.

72. *Id.* at 46.

contemporary works of the day, and, surprisingly, more suited to serving the burgeoning mercantile economy in Italy.⁷³ As such, the Glossators came to view Justinian's texts as nearly perfect—free from contradiction and sufficient for solving any legal problem that might arise.⁷⁴ The Glossators, therefore, directed their efforts at providing cross-references to various provisions of Justinian's works, explaining seemingly contradictory passages, and elaborating upon the texts.⁷⁵ The Glossators' works initially took the form of "interlinear glosses" (and gave rise to the name by which the school would be known), but eventually expanded to commentary in the margins of the texts of the *Digest*.⁷⁶

The most influential gloss was that prepared by Accursius (perhaps the most famed member of the Glossators' school) and published (together with the original text of the *Digest*) around 1235.⁷⁷ With over 96,000 glosses,⁷⁸ the Accursian Gloss was viewed as not only thorough but also exceptional. "For centuries, the Accursian Gloss was the basis of any doctrine which claimed to be derived from Roman law. The maxim came to be accepted that 'What the Gloss does not recognise, the Court does not recognise.'"⁷⁹

The phrase *cujus est solum* was first used by Accursius in glosses explaining two separate provisions of Justinian's *Digest*.⁸⁰ The first passage is one penned by the Roman jurist Paul to describe the rights of the owners of two estates between which lies some public property.⁸¹ Paul explained that the intermediate public property does not prevent the landowners from establishing servitudes between them, such as those regulating the height of their buildings.⁸²

But this situation does prevent the existence of a servitude giving a right to insert a beam or to have a roof or other structure projecting from a building or to discharge a flow of rainwater or rainwater dripping from the eaves of a house. The reason is that the air space above such ground must be kept clear.⁸³

73. MOUSOURAKIS, *supra* note 58, at 423-24.

74. STEIN, *supra* note 68, at 46.

75. *Id.* at 46-47.

76. *Id.* at 46.

77. *Id.* at 48; DITLEV TAMM, ROMAN LAW AND EUROPEAN LEGAL HISTORY 205 (Michael Murphy et al. trans., 1st ed. 1997).

78. STEIN, *supra* note 68, at 48; TAMM, *supra* note 77, at 205.

79. STEIN, *supra* note 68, at 49.

80. See J.M. SPAIGHT, AIRCRAFT IN PEACE AND THE LAW 54 (1919).

81. DIG. 8.2.1 (Paul, Edict, bk. 1).

82. *Id.*

83. *Id.*

The second relevant passage in Justinian's *Digest* was drafted by the jurist Venuleius and explains the rights of landowners vis-à-vis those acting "by force or stealth" on their land.⁸⁴

If someone overhangs a tomb with a projection or water drip, even though it does not touch the tomb itself, an action can rightly be brought against him, because it has been done by force or stealth to the tomb. For the tomb is not only the place which receives the burial, but all the sky above it; and for this reason an action can also be brought for tomb violation.⁸⁵

Seven centuries after Justinian's *Digest* was complete, Accursius used *cujus est solum* as an annotation to these passages,⁸⁶ and the maxim's long life began. While the maxim arguably gives much broader effect to the above-quoted passages than is necessary—some even accuse Accursius of a tautology for the extreme breadth⁸⁷—the intent of the phrase is clear and gives some depth to an ancient and fundamental tenet of property law: a landowner has the "right of freedom from interference in the use and enjoyment of his land,"⁸⁸ and that right to enjoy without interference exists above and below the ground owned as well. The ancient jurists quoted in Justinian's *Digest* expressed this freedom in the context of the right of a landowner to complain about dripping water from a neighbor's constructs onto his property or tomb.⁸⁹ Accursius' vision of the concept, articulated with the maxim *cujus est solum*, merely acknowledges that the freedom of a landowner extends beyond the interference of dripping and beyond the context of public property and tombs.⁹⁰

84. See DIG. 43.24.22.4 (Venuleius, Interdicts, bk. 2).

85. *Id.*

86. See SPAIGHT, *supra* note 80, at 54; Bouvé, *supra* note 27, at 244-48; Hackley, *supra* note 56, at 777.

87. See EUGÈNE SAUZE, LES QUESTIONS DE RESPONSABILITÉ EN MATIÈRE D'AVIATION 26 (1916) ("Accurse . . . ne fait que commettre une tautologie . . ."); Bouvé, *supra* note 27, at 247 ("Accursius . . . is merely guilty of tautology").

88. Hackley, *supra* note 56, at 777.

89. DIG. 43.24.22.14 (Venuleius, Interdicts, bk. 2).

90. Given this historical backdrop, there is some debate over whether *cujus est solum* is truly a "Roman" rule. See, e.g., SPAIGHT, *supra* note 80, at 54; Bouvé, *supra* note 27, at 243-46. Some suggest that any principle of law not found in the "Roman Code" (referring primarily to Justinian's *Digest* and *Institutes*) is not one of Roman origin. See SPAIGHT, *supra* note 80, at 54. Under this theory, then, a principle set out for the first time in the Accursian Gloss on Justinian's works is not "Roman." I view the distinction as irrelevant. First, I believe that Justinian's *Digest*, as modified by the Glossators and Commentators in the twelfth and thirteenth centuries, is the body of work most modern scholars have in mind when they reference "Roman law." It is, at least, the *ius commune*—almost universally characterized as Roman law—that was widely received in Europe in the fourteenth and fifteenth centuries. See TAAM, *supra* note 77, at 203. Second, a principle originating with the

The doctrine might have lived on only in the Accursian Gloss were it not for the Glossators' tenacity. The Glossators were extremely successful in contributing to the development and influence of the civil law because they spread their teachings throughout Europe.⁹¹ In the thirteenth century, they established a program at the University of Bologna, the sole purpose of which was to spread the teachings of Roman law.⁹² Accursius was a prominent faculty member at the University of Bologna,⁹³ but his son, Franciscus (also a prominent jurist and eventual professor at the University of Bologna⁹⁴), would prove to play a greater role in disseminating the doctrine of *cujus est solum* outside of Italy.

b. Crossing the English Channel: *Cujus Est Solum* Finds a Home in Great Britain

On his return from a visit to Bologna in 1273, the English king, Edward I, persuaded Franciscus to accompany him back to England and deliver lectures on Roman law at Oxford University.⁹⁵ Franciscus agreed, and worked for Edward I for nearly ten years, holding, among other positions, that of *consiliarius* to the king, a position "of trust and confidence close to the king's person."⁹⁶ It is believed that Franciscus passed his father's phrase on to his pupils and colleagues in England, where the maxim became extremely popular,⁹⁷ and that Franciscus' lofty position and influence with the king explains "how and why the English judges of Edward I came to accept as a principle of law the maxim coined by" Accursius.⁹⁸

Accursian Gloss is at worst a thirteenth-century barbarization of or extension of Roman law. It is, in any event, a rule of civilian origin.

91. See TAAM, *supra* note 77, at 203.

92. Bouvé, *supra* note 27, at 246.

93. Hackley, *supra* note 56, at 777.

94. TAAM, *supra* note 77, at 205; Bouvé, *supra* note 27, at 248.

95. Bouvé, *supra* note 27, at 248; Hackley, *supra* note 56, at 777.

96. Bouvé, *supra* note 27, at 248.

97. *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 934 (N.D. Ohio 1930).

98. Bouvé, *supra* note 27, at 248; see also Hackley, *supra* note 56, at 777 (discussing the maxim in English cases). At least one scholar argues that the maxim *cujus est solum* originated not with Accursius, but with his fellow Glossator Gino da Pistoia. See LUIGI MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY* 474-75 (John Lisle trans., Augustus M. Kelley 1968) (1912) (stating that to determine the ownership of title to minerals beneath the soil's surface, many scholars "invoke Roman law," which they argue provides that the "owner of the soil is the owner of a column of air to heaven and of a column of earth to 'infernus,' but such statements are a hyperbole invented by Gino da Pistoia and have no foundation in the sources of Roman law"). Support for such a theory is waning, as it is backed by no documentary evidence and is belied by notes showing the Accursian Gloss as the earliest discovered use of the phrase. See SPAIGHT, *supra* note 80, at 54.

While the maxim was developed and spread to England without his assistance, it undoubtedly owes its survival there to Lord Coke. In his influential *Institutes of the Laws of England*, first published in the early seventeenth century, Lord Coke, in defining and describing land and all its appurtenants, noted “the earth hath in law a great extent upwards, not only of water . . . but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cælum*.”⁹⁹ After its recognition in Coke’s *Institutes*, the maxim was applied in two nearly contemporaneous seventeenth-century English cases, also decided by Lord Coke.¹⁰⁰ In both *Penruddock’s Case* and *Baten’s Case*, the defendants’ buildings were placed in such a way that their eaves projected rainwater onto the plaintiffs’ land.¹⁰¹ The court held, in each case, that the projection gave rise to a good claim of nuisance for which plaintiff was entitled to an injunction.¹⁰² Lord Coke offered the following language in support of the nuisance finding in *Baten’s Case*: “Also *cujus est solum, ejus est usque ad cælum* . . . and by the overbuilding upon part of the house of the plaintiffs, he has deprived them of the air; also he has prevented them from building their house higher”¹⁰³

After its recognition by Lord Coke, *cujus est solum* continued to be a part of England’s body of legal literature. Eminent common law scholars such as Blackstone and Kent described and applied the maxim in their commentaries on English property law.¹⁰⁴ And though

99. 1 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND OR COMMENTARY UPON LITTLETON* bk. 1, § 4a, at 198 (19th ed. 1853).

100. See *Penruddock’s Case*, (1597) 5 Coke’s Rep. 100(b), 101(a)-(b) (C.P.); *Baten’s Case*, (1611) 9 Coke’s Rep. 53(b), 54(a)-(b); see also *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 934 (N.D. Ohio 1930) (discussing the history of the maxim).

101. *Penruddock*, 5 Coke’s Rep. at 101(a); *Baten*, 9 Coke’s Rep. at 54(a).

102. *Penruddock*, 5 Coke’s Rep. at 102(b); *Baten*, 9 Coke’s Rep. at 54(b)-55(a).

103. *Baten*, 9 Coke’s Rep. at 54(a)-(b).

104. See 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 18 (1766) (“*Cujus est solum, ejus est usque ad cælum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another’s land; and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface So that the word ‘land’ includes not only the face of the earth, but every thing under it, or over it.”); 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 401 (O.W. Holmes, Jr., ed., 12th ed. 1873) (“Corporeal hereditaments are confined to *land*, which, according to Lord Coke, includes not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include every thing terrestrial, under or over it.” (footnotes omitted)).

Kent’s use of the maxim is somewhat less surprising than Blackstone’s, as Kent is often considered a shameless borrower of civilian concepts. See, e.g., Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 904 n.64 (2002);

the maxim was not cited often in English jurisprudence until the mid-nineteenth century,¹⁰⁵ by 1884 English courts were “conceding that the maxim was part of the common law of England.”¹⁰⁶

2. The Doctrine’s Lengthy (and Continuing) Life

The maxim was warmly received in the United States as well, with its principle gaining recognition in American courts as early as 1832.¹⁰⁷ *Cujus est solum* has since been cited countless times in the courts of virtually every state in a wide variety of contexts.¹⁰⁸ It has even been twice recognized by the United States Supreme Court (though the extension of the doctrine to prevent alleged trespasses by aircraft was rejected in both cases).¹⁰⁹

In addition to being adopted by common law jurisdictions such as England and the United States, *cujus est solum* found a home early on in the modern civilian world. The first true codification of French law, Napoleon’s 1804 *Code civil*, included a statement that “[p]roperty in

Charles L. Barzun, Note, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1058 (2004).

105. See *Fay v. Prentice*, (1845) 135 Eng. Rep. 769, 771, 773 (C.P.); *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 934 (N.D. Ohio 1930) (same); see also Hackley, *supra* note 56, at 779 (discussing the history of the maxim).

106. Hackley, *supra* note 56, at 781 (citing *Wandworth Bd. of Works v. United Tel. Co.*, (1884) 13 Q.B. 904, 915).

107. See *Winton v. Comish*, 5 Ohio 477, 478 (1832) (“He who owns a piece of land . . . is the owner of everything underneath in a direct line to the center of the earth and everything above to the heavens.”). For an early American recognition of the maxim with full use of the Latin phraseology, see *Lyman v. Hale*, 11 Conn. 177, 179 (Conn. 1836).

108. See, e.g., *Hannabalsen v. Sessions*, 116 Iowa 457, 461 (Iowa 1902) (finding trespass in “thrust[ing]” fist across boundary line of another’s property); *Smith v. New Eng. Aircraft Co.*, 170 N.E. 385, 388 (Mass. 1930) (finding technical trespass, but no injunctive relief granted, for aircraft flying over plaintiffs’ property); *Jones v. Vt. Asbestos Corp.*, 182 A. 291, 303 (Vt. 1936) (finding title to gold and silver mines).

109. *Laird v. Nelms*, 406 U.S. 797, 799 (1972); *United States v. Causby*, 328 U.S. 256, 260-61 (1946). *Cujus est solum* was and still is often criticized by both English and American jurists as “grievously misunderstood and misapplied,” particularly as it relates to questions involving air space and developments in aviation. See, e.g., William M. Wherry & Cyril Hyde Condon, *Air Travel and Trespass*, 68 U.S. L. REV. 78, 84 (1934) (quoting ARNOLD MCNAIR, *THE LAW OF THE AIR* 33 (1st ed. 1932)); see also John A. Eubank, *The Doctrine of the Airspace Zone of Effective Possession*, 12 B.U. L. REV. 414, 417 (1932) (discussing *cujus est solum* in the context of forbidding aerial navigation over one’s private property); George E. Hise, *Ownership and Sovereignty of the Air or Air Space Above Landowner’s Premises with Special Reference to Aviation*, 16 IOWA L. REV. 169, 174-75 (1931) (same). At least one scholar has argued that the maxim “has no authority in English law. Only in so far as it has been adopted as part of our law by the judges or by textwriters of a very special degree of authority, need it concern us.” Wherry & Condon, *supra*, at 84 (quoting McNair, *supra*, at 33). But whatever its origin or suitability to modern times, it can hardly be argued that the principle behind the maxim is a part of the common law in both England and the United States.

the soil imports property above and beneath.”¹¹⁰ Germany’s first major codification, the 1900 *Bürgerliches Gesetzbuch*, provided similarly: “[T]he right of the owner of a piece of land extends to the space above the surface and to the terrestrial body under the surface.”¹¹¹ Both countries retain the principle in their current codifications.¹¹² The maxim’s homeland, Italy, has kept it.¹¹³ And civil law codifications in Spain, Argentina, Japan, Switzerland, and many other countries also include the principle.¹¹⁴

In sum, the history of *cujus est solum* is the story of a civilian maxim incorporated virtually worldwide, in both civil and common law systems. Whether the doctrine is Roman or a mere “gloss” upon or barbarization of Roman law,¹¹⁵ it is civilian. And thus, the backbone of the common law relating to airspace, subsurface minerals and mines, and, most importantly for this discussion, water, is a Latin maxim with its genesis in the civil law.

B. The Point of Distortion: The Application of Cujus Est Solum in Scottish Water Cases

Nearly as quickly as the doctrine of *cujus est solum* spread across the continents, it was applied in cases involving access to water.¹¹⁶ And it is in the maxim’s application to this highly controversial area that the discontinuity began.

As one would expect, as applied to cases involving access to the surface of nonnavigable water bodies, the maxim has long provided

110. C. CIV. art. 552 (1804).

111. Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 1, 1975, 150, as amended, § 905 (Ian S. Forrester et al. trans., 1975).

112. See C. CIV. Art. 552 (2006), available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm; Bürgerliches Gesetzbuch [BGB] [Civil Code]—Jan. 1, 1992, Reichsgesetzblatt [RGB1] 3, as amended, § 905, available at http://www.gesetze2me.net/bgb/bgb_0929.htm; see also Bouvé, *supra* note 27, at 246 (discussing the maxim in the French Civil Code); Hiram L. Jome, *Property in the Air as Affected by the Airplane and the Radio*, 62 AM. L. REV. 887, 900 (1928) (discussing the maxim in the French and German civil codes).

113. See Eubank, *supra* note 109, at 416.

114. *Id.*; Jome, *supra* note 112, at 900-01. The right of freedom from interference is limited under the German and Swiss codifications of *cujus est solum* to heights or depths at which the landowner has an “interest . . . in . . . prevention” or only “so far as the exercise of the ownership requires.” Jome, *supra* note 112, at 900-01. The basic principle, though, is unchanged.

115. See *supra* notes 77-80 and accompanying text.

116. See, e.g., *Wheatley v. Baugh*, 25 Pa. 528, 528-30 (Pa. 1855) (finding no cause of action for mining company’s operations on its own land which interfered with the supply of percolating water to springs on the plaintiff’s land; given the doctrine of *cujus est solum*, the plaintiff was “justified in all that he did” on his own land).

justification for the so-called common law rule. Specifically, the application of *cujus est solum* to such a scenario yields the result that each riparian landowner is entitled to access only the surface of waters overlying lakebed that he owns.

So, how did the so-called civil law rule come about? If *cujus est solum* applies plainly to grant a riparian landowner surface access to waters overlying his bed alone, why have some American courts begun pronouncing a rule of free riparian landowner access to the entire surface of nonnavigable lakes? The rule of free access is said to come from the civil law,¹¹⁷ but the civil law rule, as demonstrated above, is actually *cujus est solum*.

The point of origin of the rule of free access, and more pointedly, its divergence from the widely adopted rule *cujus est solum*, is, in fact, identifiable. The rule of free access is actually not a civil law rule at all, but rather the product of a series of eighteenth- and nineteenth-century Scottish cases. The Scots distorted the widely adopted rule of limited surface access and, in so doing, became the lone civilians to recognize the right of a minority bed owner to fish, fowl, and boat over the entire surface of a nonnavigable lake, despite his ownership of only a portion of the bed.

Although the genesis of this Scottish rule might be traced back as far as 1797,¹¹⁸ the generally prevailing view among Scottish courts is that the rule of free surface access first gained legitimacy with the House of Lords'¹¹⁹ 1856 decision in *Menzies v. Macdonald*.¹²⁰ The water body around which the dispute in *Macdonald* centered was a lake approximately two miles wide and eleven miles long.¹²¹ Two barons owned the majority of the land surrounding the lake, but there was also a minority owner, General Macdonald, who owned property

117. See *supra* Part I.B.2.

118. *Mackenzie v. Bankes*, (1878) 3 App. Cas. 1324, 1341 (H.L.) (appeal taken from Scot.).

119. The House of Lords, though most commonly known as the high court of England, was also the high court of Scotland until a Supreme Court was created for the United Kingdom in 2005. DAVID MAXWELL, *THE PRACTICE OF THE COURT OF SESSION* 3 (1980) see also Susanna F. Fischer, *Playing Poohsticks with the British Constitution? The Blair Government's Proposal To Abolish the Lord Chancellor*, 24 PENN. ST. INT'L L. REV. 257, 262-63 (2005). Although it was a primarily parliamentary body, it also exercised the functions of an appellate court. See MAXWELL, *supra*, at 3.

120. [1856] L.R.H.L. Sc. 463, 463 (H.L.) (appeal taken from Scot.)

121. *Id.* Scotland follows the use rules of the United States in this regard. Thus, because the lake at issue in *Macdonald* was nonnavigable, it was not open to the general public's use. 3 DAVID M. WALKER, *PRINCIPLES OF SCOTTISH PRIVATE LAW* 107, 108 (4th ed. 1989).

with a waterfront of only about 1200 yards.¹²² General Macdonald claimed that his ownership of lands surrounding the lake, and of a portion of the bed of the lake, entitled him to sail and fish not merely on the waters of the lake over the bed he owned, but over the entirety of the lake.¹²³ In essence, General Macdonald argued that he be recognized as “on a footing of perfect equality” with the two barons, at least for purposes of “boating, fishing, floating timber, and every other use of which the lake was susceptible.”¹²⁴ Much to the barons’ chagrin, General Macdonald also built a tavern on his lakefront property, and invited its patrons to join him in sailing and fishing over the entirety of the lake.¹²⁵ The barons sued to enjoin General Macdonald from using the waters of the lake over the bed they owned, and to stop him from inviting his guests at the tavern to do so; they wanted a judgment recognizing the rights of all lakefront owners to use only the waters covering land within their boundaries.¹²⁶

The House of Lords denied the barons’ request for an injunction, holding that the right of fishing and sailing over the entire lake flowed naturally from the ownership of a mere portion of riparian landowner land.¹²⁷ Thus, all riparian landowners, no matter their percentage share of ownership, held full rights of surface access on the lake. Those rights to use the waters of the entire lake were not granted without limitation though. The House of Lords recognized that where there is more than one riparian landowner, judicial regulation may be required; one riparian landowner may attempt to make more use of the water body than that to which he is entitled.¹²⁸ The court did not actually

122. *Macdonald*, (1856) L.R.H.L. Sc. at 463.

123. *Id.*

124. *Id.*

125. *Id.* at 464.

126. *Id.* at 465.

127. *Id.* at 466.

128. *Id.* at 466, 473. As an illustration of a scenario that might give rise to a “right of action for the regulation of the enjoyment,” the *Macdonald* court offered the following hypothet and commentary:

Suppose it were not possible for more than any given number of boats, say a thousand, to be simultaneously engaged in fishing upon the lake, [one riparian landowner] would be entitled to have five hundred so employed, and [another riparian landowner] would be entitled to have five hundred so employed [One riparian landowner] could not, by alienating to others, give a right to more than his due share. But if he keeps within that limit [other riparian landowners have] no right to complain.

Id. at 473. The House of Lords gives no indication of whether its solution to this hypothet depends upon roughly equal percentages of bed ownership. If, for example, there were ten owners instead of two, on the same lake, would each owner be entitled to have 100 boats on

engage in any such "judicial regulation," or quantify the rights of use of each party. Rather, its judgment is limited to a declaration of the right of all riparian landowners to access the surface of the entire lake.

Interestingly, the House of Lords neither articulated a rationale for the rule it espoused in *Macdonald*, nor cited any authorities implying such a rule. Yet it departed significantly from the application of *cujus est solum* and its typical result of limited surface access in riparian landowners.

Nearly twenty years later though, in its 1878 decision in *Mackenzie v. Bankes*, the House of Lords further developed and articulated the rationale behind the rule first laid out in *Macdonald*.¹²⁹ Mackenzie and Bankes owned neighboring lands along an eight-mile nonnavigable lake.¹³⁰ Mackenzie's lands were situated near the west and south sides of the water body, while Bankes owned land on the north and southeast sides.¹³¹ At the southeast corner of the water body, its width suddenly contracted substantially.¹³² A "narrow low-lying ridge" in that area caused a significant increase in depth before the lake widened out again further to the southeast of the ridge.¹³³ The areas on either side of the ridge eventually came to be known differently, with that on the northwest side of the ridge dubbed "Fionn loch," and that on the southeast side of the ridge called "Dubh loch."¹³⁴

Mackenzie made free use of the waters of Dubh lake (for fishing, fowling, and boating) for more than thirty years without challenge.¹³⁵ But in 1876, Bankes stopped Mackenzie from fishing on Dubh lake, arguing that, as riparian landowner proprietor of all of the land surrounding Dubh lake, Bankes held the sole right to use the surface of its waters.¹³⁶ Apparently Bankes had become concerned that fishermen on Dubh lake would frighten the newly present deer on the lake's banks, and therefore set aside his prior "neighborly" behavior of

the water, or would each owner's relative use of the water depend upon the percentage of the bed to which he held title?

129. *Mackenzie v. Bankes*, (1878) 3 App. Cas. 1324, 1324 (H.L.) (appeal taken from Scot.).

130. *Id.*

131. *Id.* at 1324-25.

132. *Id.* at 1325.

133. *Id.*

134. *Id.*

135. *Id.* At least one judge in *Bankes* suggested that, regardless of its ruling as to whether Bankes held the right to free access of the entire surface, he may have acquired a right to the water by virtue of his lengthy possession. *Id.* at 1345.

136. *Id.* at 1325.

allowing surface access to the lake.¹³⁷ Mackenzie sued, arguing that he and Bankes were riparian landowner proprietors on the same water body.¹³⁸ As such, Mackenzie sought a judicial declaration that both he and Bankes held a “joint right of boating, fowling, fishing, and exercising all other rights in or over” the entire surface of the lake.¹³⁹

Finding that Fionn and Dubh were actually two different lakes, the House of Lords dismissed Mackenzie’s suit.¹⁴⁰ The court found that Mackenzie, as a riparian landowner proprietor on Fionn only, had no right to access the surface of a wholly separate lake.¹⁴¹ The dispute between Mackenzie and Bankes was resolved, and the opinion should have ended with that finding. The House of Lords went on, though, to engage in a relatively lengthy discussion of what the result might have been had the lakes instead been one water body.¹⁴² The digression is important, though purely dicta, as it is perhaps the best articulation of the rationale behind the Scottish rule of free riparian landowner surface access.

Lord Selborne, voting with the majority in *Mackenzie*, best explained the Scottish rule with regard to surface access of nonnavigable lakes.¹⁴³ He began by setting out the Scottish rules of bed ownership.¹⁴⁴ In the absence of title documents establishing the contrary, a lake “surrounded by the land of a single proprietor” belongs solely to that proprietor.¹⁴⁵ Thus, when one riparian landowner on a nonnavigable lake owns the entirety of the riparian landowner land, yet neither his deed nor anyone else’s declares the owner of the bed of the lake, the riparian landowner owns the entire bed. When there are multiple riparian landowners on one water body, the bed—“the *solum* or *fundus* of the lake”—is owned “rateably” by all.¹⁴⁶ To determine precise boundary lines, Scottish law calls for lines to be drawn from the center of the lake to the boundaries of the proprietor’s land, just as

137. *Id.*

138. *Id.* at 1326.

139. *Id.* at 1324.

140. *Id.* at 1336.

141. *Id.*

142. *Id.* at 1338.

143. *See id.* at 1336, 1340.

144. *See id.* at 1338.

145. *Id.*

146. *Id.*

with a river.¹⁴⁷ This rule of ownership is widely held and is perfectly consistent with traditional notions of property law.¹⁴⁸

What makes Scottish law in this area a departure from the mainstream, though, is the rule the *Mackenzie* court goes on to articulate regarding surface access. Lord Selborne continued, “for reasons which may be presumed to be founded in part, if not wholly, on the irregularity of configuration, frequent in lakes,” Scottish law does not apply the same rule with regard to the rights of “boating, fishing, and fowling” on lakes.¹⁴⁹ Riparian landowners are not constrained by the bed ownership rule when it comes to accessing the surface of lakes. The rights of boating, fishing, fowling, or any other surface activities “are to be enjoyed over the whole water space, by all the riparian landowner proprietors in common, subject (if need be) to judicial regulation.”¹⁵⁰

Selborne did not offer any further explanation of the rule of free access other than that it is founded upon “the irregularity of configuration” of most lakes.¹⁵¹ Lord Blackburn’s dissent in *Mackenzie* offered an expansion of the rationale behind this dicta though.¹⁵² Blackburn noted that Scottish law (in particular, *Macdonald*) generally supports the idea that “surface rights, which from their nature [cannot] conveniently be exercised except jointly over the whole” lake, are to be viewed as held in common.¹⁵³ The *Mackenzie* court, then, offered the first justification for an emerging, and divergent, Scottish rule: the oddity in shape of lakes and the inconvenience of limiting surface access.

Finally, in *Menzies v. Wentworth*,¹⁵⁴ the Scottish courts had occasion to engage in “judicial regulation” of the common surface rights of multiple riparian landowners. The lake at issue in *Wentworth* (Lake Rannoch) was the same as that involved in *Macdonald*, litigated nearly fifty years prior.¹⁵⁵ This time, Menzies sued, requesting that a court step in and provide the type of judicial “regulation” the House of

147. *Id.*

148. See, e.g., GOLDFARB, *supra* note 9, at 94-95 (explaining that the same rule obtains in the United States).

149. *Mackenzie*, (1878) 3 App. Cas. at 1338.

150. *Id.*

151. *Id.*

152. See *id.* at 1340-50.

153. *Id.* at 1343.

154. (1901) 3 S.C. 941.

155. Likewise, Menzies acted as the plaintiff in both cases. Compare *id.* with *Menzies v. Macdonald*, (1856) L.R.H.L. Sc. 463, 463 (H.L.) (appeal taken from Scot.).

Lords noted might be necessary in both *Macdonald* and *Mackenzie*.¹⁵⁶ By the time of the *Wentworth* decision, the number of riparian landowners with land along Lake Rannoch had grown from three to six (with the lake frontage owned by these riparian landowners varying from about 150 yards to just over ten miles¹⁵⁷), several hotels had been built along the lake, and the number of boats using the lake had increased from approximately nineteen to fifty-one.¹⁵⁸ Menzies argued that the increased activity was damaging, and even threatening to destroy altogether, the trout fishing on the lake.¹⁵⁹ He sought a judgment limiting the number of boats on the lake to sixteen, allocated among riparian landowners according to their respective lake frontage.¹⁶⁰

The Court of Session¹⁶¹ denied Menzies' request for intervention and dismissed his suit.¹⁶² The court first explained that it would refuse to regulate use of the lake in the absence of proof that the right to fish on it was being "materially injured or destroyed."¹⁶³ While Menzies produced proof that the fish caught on Lake Rannoch at the time of the suit were generally smaller in size than those caught years before, he did not produce evidence that fewer fish were caught on the lake at the time of suit as compared to some prior point.¹⁶⁴ The court found that proof of the reduced weight of individual fish did not satisfy plaintiff's burden of proof.¹⁶⁵

Wentworth is significant for its recognition of the emerging Scottish doctrine of free access, and its dicta with regard to what exactly judicial regulation of that free access might look like. Although the court denied Menzies' request that it regulate the surface

156. *Wentworth*, (1901) 3 S.C. at 941.

157. *Id.* at 941, 943.

158. *Id.* at 943.

159. Only the right to fish for trout was questioned in *Wentworth*. Scottish law provides specially for rights to fish for salmon. *Id.* at 955. The right of salmon fishing in Scotland is a separate feudal estate. *Id.* Thus, unlike that of trout fishing, the right of salmon fishing does not flow merely from ownership of lands bordering a river or lake. 3 WALKER, *supra* note 121, at 113.

160. *Wentworth*, (1901) 3 S.C. at 942.

161. The Court of Session is the highest ranking civil court of appeal located in Scotland. MAXWELL, *supra* note 119, at 3. It is not, however, the court of last resort for Scottish cases. Appeals from the Court of Session could be heard by the House of Lords (which maintained a physical location only in England) until 2005, and by a new Supreme Court after that. See MAXWELL, *supra* note 119, at 262-63.

162. *Wentworth*, (1901) 3 S.C. at 941.

163. *Id.* at 955.

164. *Id.* at 956.

165. *Id.*

use of the riparian landowners, the case serves as yet another judicial recognition that *Macdonald* set out a "joint right" and that courts may need to interfere in the case of abuse of the right.¹⁶⁶ The *Wentworth* court noted that the joint right articulated in *Macdonald* was "consistent with the dicta on the subject in other cases," namely *Mackenzie*.¹⁶⁷ Thus, by the time of *Wentworth*, the highest Scottish civil court considered the rule of free access to be the law in Scotland.

And though the majority did not reach the question of what type of judicial regulation it might provide for the owners of Lake Rannoch, Lord M'Laren's concurrence espoused a theory of just what sort of judicial regulation a court could undertake.¹⁶⁸ M'Laren argued that, even if Menzies could have shown an injury sufficient to necessitate judicial regulation, the relief he sought would not have been possible.¹⁶⁹ M'Laren read *Macdonald* to provide all riparian landowners with equal rights of use over the entire surface of the lake, with no regard to their percentage of riparian landowner ownership.¹⁷⁰ The *Wentworth* court, therefore, could not have made "an order allocating the use of [Lake Rannoch] in proportion to 'frontage'," as Menzies requested.¹⁷¹ Such a decision, in M'Laren's view, would not have comported with the House of Lords' judgment in *Macdonald*.¹⁷²

M'Laren's concurrence, then, is more than just a recognition of a strong Scottish rule of free riparian landowner access to the entire surface of nonnavigable lakes. It is an amplification of it to provide for equal percentage (and not merely frontage-based) use. The importance of that amplification, in this context, is that it serves to illustrate how well entrenched the basic rule of free riparian landowner access to the entirety of lake surfaces was by the time of *Wentworth*.

After the decision in *Wentworth*, the new and unusual Scottish doctrine was well-recognized and its parameters nearly fully developed. The rule of free access was born, not of the civil law, but of the courts of Scotland.¹⁷³

166. *Id.* at 947.

167. *Id.* (citing *Mackenzie v. Bankes*, (1878) 3 App. Cas. 1324 (H.L.) (appeal taken from Scot.)).

168. *Id.* at 957.

169. *Id.*

170. *See id.*

171. *Id.*

172. *Id.*

173. If the rule of free access stems from Scottish roots, can we not call it a "civil law rule"? What does it mean to be a "civil law rule"? The question is one to which there is no clear answer. But the simplest one, I think, is that to be a "civil law rule," the rule must come from a civilian source. As a jurisdiction with a civilian (or, at least, a mixed) legal system, but

This series of Scottish cases highlights an important point about the origin of the Scottish rule of surface access. To appreciate fully the rationale behind the Scottish rule, it is necessary to first understand a bit about the Scottish rule of riparian landowner access on nonnavigable rivers. Though it seems counterintuitive, the Scots did not allow the free access to riparian landowners along a nonnavigable river that they provided to those on a nonnavigable lake.¹⁷⁴ Because the running waters of a river are generally viewed as more transient and incapable of containment or possession than those of a lake, there may be some rational justification for providing free access to riparian landowners on a river while denying it to those on a lake. Any logical grounding for the opposite rule—free riparian landowner access on lakes, but not on rivers—is untenable. Yet the Scots have adopted exactly such a rule.

This just emphasizes the importance of the *Macdonald*, *Mackenzie*, and *Wentworth* decisions. The series demonstrates that the rule of free access to the surface of nonnavigable lakes has its genesis nowhere but in the Scottish legal system, and that it was born out of the Scots' desire to simplify the problems of boundary demarcation and enforcement on those water bodies.¹⁷⁵

Essentially, the Scots adopted and developed the rule solely as a matter of convenience. It is neither a rule borrowed from a civil law source nor a rule with its primary basis in any civilian notions of the ownership or use of water. It was both generated and elaborated upon by the Scots, merely as a convenient distortion of the typical rules of surface access.

C. *The American Incorporation of the Scottish Interpretation*

While the precise parameters of the rule of free access were still being articulated and narrowed in Scotland, the doctrine made its way to the United States. The door to its application here, surprisingly, was opened by the United States Supreme Court in its 1891 decision in

without a civil code, Scotland's law is civilian only insofar as it is Roman. See S.A. Bayitch, *Codification in Modern Times*, in *CIVIL LAW IN THE MODERN WORLD*, *supra* note 3, at 177-79; F.H. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 26 (Greenwood Press 1977) (1955). And Roman law provided no rule of free access, nor any basis for such a rule. See discussion *supra* Part II.C.1.c. This is an idiosyncratic Scottish generation, not a "civilian" rule.

174. See *Mackenzie v. Bankes*, (1878) 3 App. Cas. 1324, 1338-40 (H.L.) (appeal taken from Scot.).

175. *Id.* at 1338.

Hardin v. Jordan.¹⁷⁶ Interestingly, *Hardin* did not set out a general rule of free access to the surface of a nonnavigable lake for recreational use. Indeed, surface access was not even the issue under consideration in *Hardin*. Rather, the Court was called upon to determine the bounds of bed ownership for litigants with property bordering on a nonnavigable lake.¹⁷⁷ But loose dicta by the *Hardin* Court regarding recreational use imported the Scottish rule into the United States and compounded the problem by incorrectly suggesting a civilian source for the rule.¹⁷⁸ The mistake has since persisted in a long line of jurisprudence.¹⁷⁹ In short, the considerable confusion of American courts with regard to the authorities supporting and the source of the rule of free riparian landowner access was born of the United States Supreme Court's decision in *Hardin*.

1. The *Hardin* Decision

The plaintiff in *Hardin* brought an ejectment action, seeking a declaration that she was the rightful possessor of a tract of land bordering and underneath a portion of the waters of a small lake.¹⁸⁰ Plaintiff's title described her ownership to extend "along the margin of the lake";¹⁸¹ thus, her title did not describe her ownership as including any portion of the bed of the lake. Plaintiff sought to oust the defendant from an area of land covered by water, and, thus, outside of the land strictly described in the plaintiff's title, but still between the plaintiff's dry boundary and the center of the lake. In support of this attempt, plaintiff argued that as a riparian landowner, the boundaries of her ownership did not stop at the water's edge, but rather, extended to the center of the lake.¹⁸² In essence, the issue in *Hardin* was "the effect of [the plaintiff's] title in reference to the lake and the bed of the lake in front of the lands actually described in the grant."¹⁸³ In other words, does a landowner with a title establishing ownership of land abutting a

176. 140 U.S. 371, 371 (1891).

177. *Id.* at 372.

178. *See id.* at 390-91.

179. A number of jurisdictions that have considered the question have either referenced the *Hardin* decision or used the inept label "civil law rule." *See, e.g., Wehby v. Turpin*, 710 So. 2d 1243, 1249 (Ala. 1998); *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 634-35 (Conn. 2005); *Lanier v. Ocean Pond Fishing Club, Inc.*, 322 S.E.2d 494, 496 (Ga. 1984); *Beacham v. Lake Zurich Prop. Owners Ass'n*, 526 N.E.2d 154, 156-57 (Ill. 1988); *Sanders v. De Rose*, 191 N.E. 331, 333 (Ind. 1934).

180. *Hardin*, 140 U.S. at 372.

181. *Id.* at 374.

182. *Id.* at 379.

183. *Id.* at 380.

lake also own a portion of the bed of that lake (in the absence of specific title to the bed in another)?

The Supreme Court first noted that ownership of some portion of the bed of a water body, even where a landowner's title prescribes specific boundaries that include no portion of the bed, is not inconsistent with general principles of property or boundary law.¹⁸⁴ Survey lines that reference a water body exist "not for the purpose of limiting the title of the grantee to such" boundaries, but to "ascertain[] the exact quantity of the upland to be charged for."¹⁸⁵ Thus, it is typical for a surveyor to reference a water body as a property's boundary line merely for convenience and the necessity of establishing some stable line, all the while intending that the true boundary be within the waters.¹⁸⁶

Finding no precedent for a determination of the bounds of ownership on a nonnavigable lake, the Supreme Court turned to prior jurisprudence involving rivers and streams.¹⁸⁷ The English common law clearly provided that landowners with property bordering on nonnavigable rivers also owned the bed of the water body, up to the thread of the stream, even where their titles described the river as the bounds of their ownership.¹⁸⁸ The Court then noted that circumstances in the United States (particularly in Illinois, the state around which the *Hardin* dispute centered) were not so different as to justify a different rule from that applied in England.¹⁸⁹ Moreover, the Court found no reason to distinguish between rivers and lakes for the purpose of providing a rule of title to the bed.¹⁹⁰ In either case, the water "constitutes one of the advantages of [the land's] situation, and a material part of its value, and enters largely into the consideration for acquiring [the land]. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water."¹⁹¹ The Court, therefore, held that the plaintiff owned the portion of the bed of the lake extending from the dry border, as described in her title, out to the center of the lake.¹⁹²

184. *See id.* at 379.

185. *Id.* at 380.

186. *Id.*; *see also* FRANK E. CLARK, CLARK ON SURVEYING AND BOUNDARIES § 25.14, at 867 (Walter G. Robillard & Lane J. Bouman eds., 6th ed. 1992) (expanding upon the process of surveying property).

187. *Hardin*, 140 U.S. at 387-88.

188. *Id.*

189. *Id.* at 386.

190. *See id.* at 391.

191. *Id.*

192. *Id.* at 401-02.

a. Importing the Scottish Rule Through Dicta

The problem in *Hardin* is that, in discussing the rule of ownership of the bed of rivers, particularly while trying to explain that the English rule regarding rivers should also be applied to determine ownership of the bed of lakes, the Court describes Scottish law.¹⁹³ The comparison is, at first, helpful, because it serves to explain why the English bed ownership rule was never extended, in that country, to lakes: There simply are not enough lakes or ponds of substantial size to prompt litigation.¹⁹⁴ The majority of sizeable interior waters in England are rivers.¹⁹⁵ Scotland, on the other hand, has a well-developed law regarding private ownership of lakes, necessitated by their prevalence there.¹⁹⁶ The *Hardin* Court, then, appropriately notes that the Scottish rule of ownership of nonnavigable lake beds is that multiple riparian landowner proprietors own "the space inclosed by lines drawn from the boundaries of each property *usque ad medium filum aquae* [up to the middle of the stream]¹⁹⁷ being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river."¹⁹⁸

The sentence and citations immediately following that legal principle, though, are what wreak havoc. The Court continues:

But as to the rights of boating, fishing and fowling . . . [t]hese are to be enjoyed over the whole water space by all the riparian proprietors in common, subject (if need be) to judicial regulation. [Citing *Mackenzie v. Bankes*, (1878) 3. App. Cas. 1324, 1338 (H.L.) (appeal taken from Scot.).] See, also, to the same purport, Burge, Col. & For. Law, vol. 3, p. 425; Justinian's Digest, lib. 8, tit. 3, f. 23, § 1. And centuries before Justinian, Cicero spoke of the many lands, houses, *lakes, ponds, places* and possessions confiscated by Sylla and conferred upon his own favorites. Agra. Law, Orat. 3, c. 2:7.¹⁹⁹

The Court's description of the Scottish rule allowing riparian landowners mutual access to the entire surface of a lake for recreational purposes is certainly unnecessary to its resolution of the controversy at hand. The dispute hinged upon ownership of a portion of the bed of a lake, not upon whether the parties were each entitled to access the surface of the body. But the Court's mention of the Scottish

193. See *id.* at 391.

194. *Id.* at 388.

195. *Id.*

196. *Id.* at 390.

197. BLACK'S LAW DICTIONARY 1544 (6th ed. 1990).

198. *Hardin*, 140 U.S. at 390.

199. *Id.* (internal quotations omitted).

rule served to import that line of cases into the United States, unnecessarily, and with no explanation of the rationale behind or the soundness of the rule.

b. Compounding the Problem with Erroneous Citation

Moreover, to the extent the *Hardin* Court cites the works of Burge, Justinian, and Cicero to support the proposition that riparian landowner ownership grants the privilege of use for boating or fishing on the entire surface of the lake, such citation is simply incorrect. The Court compounds the problem of importing the idiosyncratic Scottish rule by suggesting that other authorities support such a rule. To the extent the authorities the Court mentions are civilian—and thus imply the existence of a civilian source for the rule of free access—the erroneous citation is particularly egregious.

British jurist William Burge's work on late eighteenth- and early nineteenth-century colonial law simply states that "[l]akes surrounded by grounds of various proprietors are common property."²⁰⁰ While this might be authority for the idea that multiple landowners with titles described as bounding on a lake own the bed "in common" to the center, it does not suggest that colonial law gave each riparian landowner proprietor free access to the entire surface of the body. The two issues are independent,²⁰¹ and Burge did not speak to the latter.

The section of Justinian's *Digest* cited by the *Hardin* Court provides even less support for a rule of mutual riparian landowner access to the entire surface of a lake. In defining and detailing the rules of predial servitudes,²⁰² the *Digest* provides: "If there is a permanent lake on your land, a servitude of boating across it can be created, to allow access to a neighboring estate."²⁰³ The passage in no way suggests that surface access to the entire lake exists in all riparian

200. 3 WILLIAM BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS: GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER AND WITH THE LAW OF ENGLAND 425 (1838).

201. Lord Hale's prominent treatise on English water law, for instance, explains that "[f]resh rivers . . . do of common right belong to the owners of the soil adjacent," but that this "common right" means only that multiple riparian landowners on a river own its bed to the center line. Matthew Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370 (Stuart A. Moore ed., 3d ed. 1888). The "common right" has no bearing on surface rights. Indeed, Hale noted that a riparian landowner would hold the right to fish over the entire surface of a river only if he owned the land on both sides of it. *Id.*

202. Predial servitudes are akin to easements in the common law. W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 127 (2d ed. 1952).

203. DIG. 8.3.23.1 (Paul, Sabinus, bk. 16).

landowners. To the contrary, the suggestion that a servitude *can be created* to provide such a right indicates that the position of the *Digest* was that no mutual right of surface access existed in the absence of the creation of a servitude.

Cicero's orations on Roman law and politics likewise lend no credence to the mutual surface access rule the *Hardin* court draws into American jurisprudence. In delivering an oration on the need for the development of and debate over a body of Roman agrarian law around the year 62 B.C., Cicero sought to stem criticism that he opposed agrarian law because it would deprive him of property granted him and other elites by the then-ruling Roman general, Lucius Cornelius Sylla.²⁰⁴ Arguing that Sylla gave more to private parties than any prior ruler, Cicero asked his listeners to remember what "has been given, or assigned or sold, or granted by public authority, whether lands, or houses, or lakes, or marshes, or sites, or properties."²⁰⁵ This is obviously no authority for any rule of access to the surface of a lake. At most—stretching the meaning nearly to its breaking point—it might be considered authority for the idea that lakes were susceptible of private ownership (by grant from the political authority of the time) as early as 62 B.C.

Of course, it is possible that the Court meant to cite these authorities in support of its prior point: in the absence of any title documents indicating otherwise, riparian landowners take the bed of a lake to the center. It would, at least, be easier to characterize the comments of Burge and Cicero as supporting that point, though even that requires an extremely generous interpretation. The placement of the citation immediately after a discussion of the Scottish right of full surface use in all riparian landowners belies that intent though. And regardless of the *Hardin* Court's intent in citing Burge, Justinian, and Cicero, subsequent American judicial decisions have interpreted the opinion to stand as authority for the proposition that a rule of full surface access stems from the civil law.²⁰⁶

c. Ignoring Other Relevant Roman Authorities

Finally, the Supreme Court ignored relevant Roman authorities in favor of erroneous citation to Burge, one provision of Justinian's *Digest*, and Cicero. The Court was clearly looking for some Roman

204. 2 CICERO, THE ORATIONS OF MARCUS TULLIUS CICERO 257 (C.D. Yonge B.A. ed., trans., George Bell & Sons 1890).

205. *Id.* at 259.

206. See, e.g., *Wehby v. Turpin*, 710 So. 2d 1243, 1249 (Ala. 1998).

source for the rule of free access; otherwise, it would not have bothered to cite the works of Justinian and Cicero. But it failed to fully consider the quintessential Roman law authorities. Had the Court properly considered Roman law, it would have concluded that nothing there supports the Scottish rule of free access. The *Hardin* Court's failure to properly consider relevant Roman law merely pronounces its mistake in citation. Without a full and accurate discussion of Roman law, the discussion of the Scottish cases and the erroneous citations leave the reader—and left a number of American courts—with the flawed impression that the rule of free access is one that stems from the civil law.

The paramount sources of Roman law—Justinian's *Digest*, the previously discussed compilation of the writings of ancient Roman jurists,²⁰⁷ and Justinian's *Institutes*, a sixth-century textbook of Roman law aimed at law students²⁰⁸—say nothing specific about a riparian landowner's right to access the surface of a nonnavigable lake for recreational purposes. In fact, Justinian's *Digest* and *Institutes* say very little about water at all.²⁰⁹ Nevertheless, they are considered the foundation of all modern water law.²¹⁰ Some even argue that the Romans far exceeded any modern society in terms of their understanding of the important issues and in their ability to develop responsive legal principles surrounding water.²¹¹

At the time of the preparation of the *Digest* and *Institutes*, there were, of course, no jet-skis or motorboats; even with more archaic devices, water use as "recreation" was virtually unheard of. Other nonconsumptive uses of water were important to the Romans though. Fishing (along with boating, for this purpose) and bathing were of particular concern.²¹² So it is that the *Digest* and *Institutes* contain just a few provisions that arguably relate to use of the surface of water

207. See *supra* text accompanying notes 52-57.

208. MOUSOURAKIS, *supra* note 58, at 390.

209. See ROMAN WATER LAW, *supra* note 6, § 10, at 25-26.

210. "All the Civil Law of recent centuries concerning water comes from the old Roman Law . . ." *Id.* § 2, at 16.

211.

It will surprise any one who reads the translation of the Roman water law to see how perfectly and fully they understood the whole question. They had worked out every problem, and we may safely say that they understood the subject as well as we do to-day, and no one can say that the old Romans did not bring to their law of water a common sense and equity not exceeded by our courts to-day.

Id. § 9, at 240.

212. See, e.g., THE INSTITUTES OF JUSTINIAN 2.1.2 (Thomas Cooper ed., John S. Voorhies 1852) [hereinafter INSTITUTES].

bodies.²¹³ Not one of these provisions lends any support to the idea of free access to the surface of a nonnavigable lake by all riparian landowners.

The sections of the *Digest* and *Institutes* relating to nonconsumptive uses of waterways might be collected under three basic headings. First, there are provisions laying out the fundamental principles of ownership and use of all water bodies, including rivers and the sea.²¹⁴ Second, there are particular provisions regarding use of rivers, especially for fishing.²¹⁵ And third, there are a few scant provisions speaking of lakes.²¹⁶

The basic principles underlying the framework of Roman water law can be found in Justinian's *Institutes*, section 2.1.1:

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, etc. which are not in common as the sea is.²¹⁷

The tenet that there are some things, including "running water" and "the sea," which are not susceptible of private ownership is carried forward in the modern law of almost every civilian nation.²¹⁸ Indeed, it has long been the common law of England as well.²¹⁹ Both traditions recognize that the transient and uncontainable nature of the waters of the high sea and those flowing in rivers simply does not lend itself to concepts of ownership.²²⁰ Thus, these waters are "common things,"²²¹ owned by no one and subject to free use by everyone.²²² Landowners with property bordering on the sea or on rivers, of course, are included.

213. See *infra* notes 214-217, 223-226, 228-230 and accompanying text.

214. See, e.g., *INSTITUTES*, *supra* note 212, at 2.1.1.

215. See, e.g., *id.* at 2.1.2; DIG. 43.14.1 (Ulpian, Edict, bk. 68); DIG. 43.12.1 (Ulpian, Edict, bk. 68).

216. See, e.g., DIG. 43.14.1 (Ulpian, Edict, bk. 68); DIG. 8.3.23. 1 (Paul, Sabinus, bk. 15).

217. *INSTITUTES*, *supra* note 212, at 2.1.1; see also DIG. 1.8.2.1 (Marcian, *Institutes*, bk. 3) ("And indeed by natural law the following belong in common to all men: air, flowing water, and the sea . . .").

218. See 2 A.N. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE: PROPERTY 38-42 (4th ed. 2001) (discussing French, Louisianan, German, and Greek law).

219. JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 175 (2004).

220. *Id.* at 174-75; BUCKLAND & MCNAIR, *supra* note 202, at 97.

221. See LA. CIV. CODE ANN. art. 449 (2005); WARE, *supra* note 6, § 395, at 141-42 (translating provisions of the early Spanish *Siete Partidas*).

222. See, e.g., LA. CIV. CODE ANN. art. 449 (2005).

Under these most basic Roman water law principles, they have access to the entirety of the surface of the sea or river on which they border.²²³

The Romans went even further in protecting the rights of the people to make nonconsumptive uses of rivers. Justinian's *Institutes* expressly recognized the right of fishing in rivers to be a right shared by all men.²²⁴ As a corollary to that right came the obligation of landowners along a river to refrain from using any force to prohibit members of the public from making use of the river, or from acting in a way that would otherwise impede navigation.²²⁵ And the obligation of the riparian landowner went beyond merely interfering with navigation; the landowner was also required to suffer use of his bank—his private property—incidental to that navigation.²²⁶ Again, if such rights to navigate, fish in, and use the banks of a river were held by the general public at Roman law, riparian landowners, as members of that public, certainly held at least these rights.

The Romans did not extend the same protection of public use to lakes, though. At Roman law, lakes were not common things. They were distinguished from rivers and the high seas—things insusceptible of private ownership by their nature.²²⁷ Lakes, on the other hand, were capable of being privately owned, and the public's rights to use the waters of a lake for fishing or any other purpose extended only to public lakes.²²⁸ Private lakes were outside the domain of public use. Thus, Roman citizens were not entitled to fish in others' private lakes.

Moreover, as previously mentioned, the *Digest* says nothing about the rights of riparian landowners sharing borders on a nonnavigable lake—as opposed to the general public—to fish and boat over its entire surface.²²⁹ But it strongly suggests that these riparian landowners were not entitled to free access to the entirety of the surface: “If there is a permanent lake on your land, a servitude of boating across it can be created, to allow access to a neighboring estate.”²³⁰ The need to create a servitude allowing riparian landowners access to neighboring estates

223. See DIG. 1.8.4 (Marcian, *Institutes*, bk. 3) (“No one, therefore, is prohibited from going on to the seashore to fish . . .”).

224. *INSTITUTES*, *supra* note 212, at 2.1.2 (“Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common.”).

225. DIG. 43.14.1 (Ulpian, *Edict*, bk. 68).

226. *Id.* at 43.12.1 (Ulpian, *Edict*, bk. 68).

227. See BUCKLAND & MCNAIR, *supra* note 202, at 97.

228. DIG. 43.14.1.2 (Ulpian, *Edict*, bk. 68) (“If the [lake] should be private, the interdict [not to use force against a person navigating the body] does not apply.”).

229. See *supra* notes 216-217, 223, 225-226, 228 and accompanying text.

230. DIG. 8.3.23. 1 (Paul, *Sabinus*, bk. 15).

simply would not exist if all riparian landowners held a right to use the surface of the lake on which they bordered.

Nothing in the *Digest* or *Institutes* specifically gives, or even suggests, that there exists in a landowner with property bordering on a nonnavigable lake the right to access and use its entire surface for fishing, boating, bathing, or any other purpose. That Roman law did support the existence of those rights on rivers is inapposite. The waters of a river, as "running waters," have long been distinguished from the more contained, possibly even stagnant, waters of a lake. Thus, while the entirety of the surface waters of a river were, at Roman law, subject to public use, and, therefore, the use of the riparian landowners as well, the waters of a lake were not subject to this same use. Plainly, an analysis of Roman law just does not yield any support for the proposition that riparian landowners share the mutual right of free access to the surface of nonnavigable lakes.²³¹

The *Hardin* Court should have come to this same conclusion in analyzing the one provision of Justinian's *Digest* it did cite. The Court did engage in at least some study of Roman law to support its dicta regarding surface access. But had it considered Roman law more fully, it should have concluded that Roman law does not support the Scottish rule.

The *Hardin* Court unnecessarily imported the Scottish doctrine of free access, which is contrary to traditionally held notions of the meaning of private ownership, as embodied in *cujus est solum*. The importation occurred with no critical analysis, and through dicta.²³²

231. If one doubts the efficacy of an analysis of Roman law to prove any conclusions about the "civilian" heritage of a given legal rule, see ROMAN WATER LAW, *supra* note 6, § 2, at 16 ("The basis of all the Civil Law which comes to any state . . . whether directly or indirectly, is the law of imperial Rome."), one need only turn to an analysis of the substantive water law of any of the great number of jurisdictions living under the civil law. As discussed, *supra* text accompanying notes 112-114, the principle *cujus est solum* has retained its place in the civilian tradition through the centuries and remains to this day a codified principle in France, Germany, Spain, Italy, Argentina, and Japan. And while some civilian jurisdictions still admit of an exception to that principle in favor of free use of "running waters," which cannot be privately owned, see, e.g., La. Civ. Code art. 450 (2005), they do not allow public, or even mutual riparian landowners, access to the surface of nonnavigable lakes. See J.C. Senter, Jr., Comment, *Ownership of the Beds of Navigable Lakes*, 21 TUL. L. REV. 454, 454 (1947).

232.

Although it is the duty of courts of justice to decide questions of fact on principle if they can, they must take care in such formulation of principles to limit themselves to the requirements of the case in hand. That is to say, they must not lay down principles which are not required for the due decision of the particular case, or which are wider than is necessary for this purpose.

That misstep was then multiplied by erroneous citation and incomplete consideration of the sources of the Scottish rule, which is especially problematic for the misimpression it gives about the origins and history of the rule. In any event, with *Hardin*, the Supreme Court opened the door to a rule of free access. Appellate courts around the country soon came calling.

2. Subsequent Judicial Application of the *Hardin* Dicta

The mistake made in *Hardin* quickly proved to be an influential one. State courts resolving disputes over surface access to nonnavigable lakes searched far and wide for precedent, and considered the *Hardin* dicta sufficient.²³³ A Texas appellate court seeking to resolve a 1935 dispute among riparian landowners over fishing on a nonnavigable lake, for example, found *Hardin* an authority on the question.²³⁴ The Texas court cited *Hardin* in a manner telling of the quick infiltration of its dicta:

It may be conceded as a general proposition . . . that . . . a riparian landowner whose land abuts on a nonnavigable lake . . . impliedly owns the land under the water to the center of the lake and that all riparian owners whose lands abut on such a lake have a right to the joint use of the entire lake for fishing and boating.²³⁵

Thus, *Hardin* was generally accepted as having promulgated a rule of free access by 1935.

Shortly afterward, that rule was being called a civil law rule. In a 1959 decision, the Florida Supreme Court noted that “under the common law doctrine only the owner could use the water overlying his fee, while under the doctrine of the civil law the whole lake could be used by any owner of a part of the bottom subject, of course, to the rights of those in like situation.”²³⁶ The false labels have been carried

EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 433 (rev. ed. 1978) (quoting John Salmond, *The Theory of Judicial Precedents*, 16 L.Q. REV. 376, 388 (1900)).

233. While an appellate court is certainly free to reject the application of dicta or to view it as merely persuasive authority, the danger is that “many judges will be disinclined to examine prior decisions alleged to be relevant with razor-blade sharpness and discernment in order to determine whether the principle laid down by the prior court was, in the exact form in which it was phrased, truly necessary for the determination of the case.” *Id.* at 435; see also K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 67-69 (1960) (discussing the role of precedent in a judge’s decision).

234. *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935).

235. *Id.*

236. *Duval v. Thomas*, 114 So. 2d 791, 793 (Fla. 1959) (internal citations omitted).

forward and persist even today, with the Connecticut Supreme Court's 2005 *Buccino* decision serving as the most recent example.²³⁷

Perhaps most disturbing though is the effect the *Hardin* error and its subsequent heralding as a civil law rule have had on judicial decision-making. A few courts have considered the potential rules without regard to their labels, and apparently with due regard to their policies and effects.²³⁸ But others have adopted the so-called common law rule merely for its purported origin. The Alabama Supreme Court, for example, in *Wehby v. Turpin*, was called upon to determine the surface access rights of riparian landowners on an artificial lake.²³⁹ The court explained the civil law rule, but rejected it in favor of a rule of restricted access.²⁴⁰ The superficial rationale with which the court supported its decision highlights the real problem with the *Hardin* error. The *Wehby* court first noted that "Alabama is a common law state" and then concluded that, as a result, it was "bound to follow the majority common law rule."²⁴¹

The *Wehby* court's questionable rationale for adopting the common law rule shows the need to rectify the mistake made years ago—beginning with the Scottish line of free access cases and continuing with *Hardin* and its progeny. Courts should certainly strive to solve their litigants' problems with a thorough examination of all possible solutions. The *Wehby* court should not be faulted for considering rules of both free and restricted access. But appellate courts, including *Wehby* and *Buccino* can, and should, be faulted for lazy reliance on labels that are incorrect. There is, in fact, no civil law rule of surface access that differs from the purported common law rule. Courts must begin recognizing that and issuing opinions that reflect a truly reasoned decision as to what they believe is the most desirable rule of riparian landowner surface access.

237. *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 634-35 (Conn. 2005).

238. *See, e.g., Beach v. Hayner*, 173 N.W. 487, 488-89 (Mich. 1919); *Johnson v. Seifert*, 100 N.W.2d 689, 695-96 (Minn. 1960).

239. 710 So. 2d 1243, 1246 (Ala. 1998).

240. *Id.* at 1247-49.

241. *Id.* at 1249. The Court of Appeals of South Carolina recently issued a similarly careless decision in *White's Mill Colony, Inc. v. Williams*, 609 S.E.2d 811, 820 (S.C. Ct. App. 2005). The court adopted the "common law rule," after noting that South Carolina "generally hews closely to the common law" and that its courts "when confronted with a decision whether to follow a common law approach or follow a civil law rule . . .—absent any other considerations—would generally follow the common law rule." *Id.*

III. DEBUNKING THE MYTH

It is time for this ancient false dichotomy to finally be laid to rest. The need to stop the persistence of the incorrect labels may seem, at first, superficial. The problem is solved, after all, by merely changing the nomenclature. The rule allowing free riparian landowner surface access should no longer be called a civil law rule. It must be done, though, for it is an important step towards preserving judicial integrity and fostering greater understanding of the differences between the common and civil law systems.

A. *Recognizing That We Are Truly Children of the Same Parents*

Despite what the labels of common law rule and civil law rule suggest, the truth is that there is no difference between the systems insofar as a rule of surface access for riparian landowners goes. Both systems' rules can be traced to the same ancestor: a Latin maxim of civilian origin. So, both traditions follow the civil law rule. Or, if you prefer, the civil law rule is the common law rule, and vice versa. The rule governing surface access for riparian landowners on nonnavigable water bodies in both the common and civil law traditions comes from the doctrine of *cujus est solum*, as articulated by ancient commentators on Roman law.

There is, then, no civil law rule of free surface access to nonnavigable water bodies. The civil law rule was and is *cujus est solum*. And under that rule, a riparian landowner on a nonnavigable lake may make use of the water's surface only above bed he owns; any other unauthorized use is an interference with his fellow riparian landowner's right to exclusive dominion and control over his land—a trespass.

It is true that Scotland has a rule of free access. But to call the rule invented by the Scots "civilian" is a mistake, and a serious one, for it serves to perpetuate a myth about the difference between common and civil law systems that is false. We should view the Scottish rule for what it is: a self-generated solution to a perceived problem that plagues all jurisdictions trying to resolve the question of surface access by riparian landowners—that of articulating a rule that can be realistically complied with, given the difficulties of determining precise boundaries when water is involved. The Scots chose free surface access for riparian landowners as the solution to the problem. The solution is certainly a pragmatic, and perhaps even laudable one, but is not a civilian one. It is directly contrary to the ancient civilian

principle of *cujus est solum* and, indeed, requires one to set aside that doctrine (at least in this context) altogether.

B. A Modest Proposal: Renaming the Rules

There is a simple solution to the problem. We must just begin using terminology that properly characterizes the rules. We might call the rule allowing free access “the Scottish rule,” and the rule giving a riparian landowner exclusive dominion of the waters overlying his bed “the Roman rule.” We might refer to them as the “traditional” and “modern” rules, or the rules of “free access” and “exclusive dominion.” Nearly anything will do, anything, that is, but the inept and erroneous labels, “civil law rule” and “common law rule.”

C. The Necessity of Recognizing and Correcting the Error

This is not, though, merely a petty point of semantics. The real problem with the erroneous labels is twofold. First, the error stands as an obstacle to judicial transparency. Without transparency, some of the most significant values of judicial decision-making, including accessibility and consistency, fall. Judicial integrity is weakened in the process.

Even more importantly, the erroneous labels say something about the difference between the common and civil law systems that is untrue. The perceived—and flawed—notion of a difference on this issue of water access is just one example of the perpetuation of the myth that the true distinction between the systems is in their substantive legal rules. It is important that this misimpression be corrected, because recognizing that the common and civil law are one and the same, at least on this score, may help us get closer to discovering and benefiting from our true differences.

1. Fostering Judicial Transparency

Correcting the two-century-old error is important because the error stymies judicial transparency, and, thus, integrity. Most scholars agree that a court best serves the interests of justice when it not only articulates its ultimate decision, but also details the logic behind and reasons for that decision in an open manner.²⁴² Transparency is

242. See, e.g., Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1313 n.348 (2002) (“Although scholars agree on the value of judicial transparency[,], they disagree over how best to achieve it.”).

necessary to make law fully accessible and, at least in common law jurisdictions,²⁴³ to allow judicial decisions to effectively serve as precedent.²⁴⁴ Moreover, values such as consistency and accountability suffer when courts do not fully and accurately describe their reasoning.²⁴⁵

All too often, though, courts issue opinions similar to those in *Wehby*²⁴⁶ and *Buccino*,²⁴⁷ relying on authorities and labels without a critical analysis of their accuracy.²⁴⁸ Such judicial laziness is serious, but its negative effects pale in comparison with those created by “judicial reliance on . . . rhetoric to disguise interpretive priorities” or policies.²⁴⁹ Whichever misstep is being made by courts on the issue of riparian landowner surface access, it deserves correction. Courts should choose to adopt whichever rule best serves the citizens of their states, but to do so with a full exploration of those policies and an acknowledgement of them as the basis for their decisions. Relying,

243. The problem is less severe, at least in theory, in civilian jurisdictions, which do not adhere to the doctrine of *stare decisis*. Civilian judges are not bound by a single judicial decision, but only by *jurisprudence constante*, a long line of judicial decisions interpreting a legislative provision in the same way. Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 LA. L. REV. 1, 6 (2002). Today though, “[t]here is an open clash between the civilian theory . . . (jurisprudence is only a secondary source of law . . .) and the realist’s empirical observation that even a single decision by the Supreme Court of Louisiana binds every lower court to follow it.” Vernon Valentine Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1118 n.148 (2002).

244. See Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1393-94 (1990); Molot, *supra* note 242, at 1321-22.

245. See Merritt, *supra* note 244, at 1393-94; see also Bradley T. King, Note, “Through Fault of Their Own”—Applying Bonner Mall’s Extraordinary Circumstances Test to Heightened Standard of Review Clauses, 45 B.C. L. REV. 943, 947 (2004) (“[J]udicial integrity is enhanced when courts apply uniform analytical frameworks consistently.”).

246. *Wehby v. Turpin*, 710 So. 2d 1243, 1249 (Ala. 1998).

247. *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 634-35 (Conn. 2005).

248.

[W]e learn from an early age to defer to the authority of parents and established institutions We do not entirely lose that tendency when we grow up to be judges who decide cases The less time we have to decide a case . . . the more pressure there is to decide quickly and we may be less likely to analyze and reflect on the condition and circumstances of the individual’s case Such cases can become a ritual in which the court searches quickly for a legal defense . . . without seriously contemplating possible injustices to the individual party or other members of the community. The need for haste may make the court search for “safe” rather than just decisions and may push the process toward ritual rather than reflection.

Merritt, *supra* note 244, at 1394-95.

249. Molot, *supra* note 242, at 1322.

instead, on a false civil law-common law dichotomy hinders judicial transparency, and thus judicial integrity.

2. Properly Characterizing the Difference Between the Common and Civil Law Systems

Many, both inside and outside the realm of the civil law world, envision a major distinction between civil and common law systems. Volumes could be, and have been, devoted to exposition of these differences.²⁵⁰ Yet our view of the gulf is becoming increasingly nuanced in the twenty-first century. As common law systems become more systematized²⁵¹ and civil law systems more focused on jurisprudence as an authoritative source of law,²⁵² the two systems are coming together more closely than one might guess. There certainly remain many differences between the systems, but they are less stark today than they once were.

The Alabama Supreme Court's decision in *Wehby* and the Connecticut Supreme Court's decision in *Buccino*, along with other appellate opinions, are perpetuating an error of law that is outdated in this new world. It encourages the common misconception that the gap between the systems lies in their divergent substantive treatment of particular legal issues. That is a position I find untenable today.

Some recent scholarly commentary strives to explain the difference between common and civil law systems as one of differing priorities, or different moral and philosophical bents. For example, one writer remarked, in attempting to describe Louisiana's "mixed" common and civil law system,²⁵³ that it "places more emphasis on the rights of individuals as opposed to government."²⁵⁴ Likewise, another scholar speaks of divergent "souls" or "spirits" in the two systems.²⁵⁵

250. A full discussion of these disparities is beyond the scope of this Article. For a good explanation of some of the differences, and a recognition of the complexity and impossibility of thoroughly addressing them in a work of any length, see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 149-50 (2d ed. 1985). What follows, then, is an intentionally simplistic discussion, more focused on what the differences are not than on what they are.

251. The promulgation of the Uniform Commercial Code (UCC) is but one example of the common law's increasing systematization. For an excellent comparison of the UCC to "true" civilian codes, see William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 231-47 (1995).

252. See Palmer, *supra* note 243, at 1118 n.148.

253. See Smith, *supra* note 3, at 10.

254. Steven Frederic Lachman, *Should Municipalities Be Liable for Development-Related Flooding?*, 41 NAT. RESOURCES J. 945, 952 n.22 (2001).

255. Robert A. Pascal, *Louisiana Civil Law and Its Study*, 60 LA. L. REV. 1, 3 (1999).

The “soul of the modern civil law” is said to be “dedicated to liberty, equality, and fraternity.”²⁵⁶ On the other hand, Robert Pascal wrote:

The Common Law . . . seems . . . to be very differently oriented. I see it dominated even in this day by two factors, one its feudal origins, which continue to be manifest strongly in the law of property . . . and the other, its original sole other concern, that of providing such redress or remedy as was necessary to maintain . . . peace, or to obviate civil disorder, rather than of articulating an order for the maximum securing of freedom, dignity, and cooperation. Each of these factors has resulted in the Common Law’s failure to respect human dignity, freedom, and equality in the same degree as the civil law, and the second has resulted in a failure of the Common Law to give as much respect to cooperative action.²⁵⁷

Beyond the “soul” of the systems, scholars often argue a fundamental distinction in substantive rules. A common law attorney with considerable knowledge of the civil law remarked in the 1950s, for example, that “the leading differences” between the common and civil law systems are not differences in sources of law or methodologies, “but in the concepts themselves.”²⁵⁸

The sphere of real property, in particular, is one in which the civil law and common law systems are alleged to differ substantially.²⁵⁹ The divergence in the substantive rules of property between the two systems—as is the divergence in fundamental values or philosophy (or more metaphorically, if you prefer, “spirit or soul”)—is greatly exaggerated. The gulf is viewed as so deep that it has prompted the observation that “the civil law of property, which does have an internal logic . . . does not easily correspond to anything known in the complex common law of property, with its ‘veritable jungle of concepts.’”²⁶⁰

256. *Id.*

257. *Id.* at 3-4.

258. LAWSON, *supra* note 173, at 209.

259. See Ottavio Campanella, *The Italian Legal Profession*, 19 J. LEGAL PROF. 59, 60 (1994) (“The similarities between the civil-law systems and their differences with common-law systems are especially marked in . . . the classifications and rules of what is traditionally private law, having to do with . . . property . . .” (quoting ALAN WATSON, *THE MAKING OF CIVIL LAW* 1 (1981))); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3, 9 (1994) (Property is “an area of the law where most of the notable differences between the common law and the civil law can be found.”); Michael J. Reppas II, *The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the “Elgin Marbles” Must Be Returned to Greece*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 911, 947-48 n.204 (1999) (“The rules on property in a common law country are vastly different from those of a ‘civil law’ country . . .”).

260. Jacques du Plessis, *Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems*, 78 TUL. L. REV. 219, 249 (2003).

A historical look at the single legal concept presented in this Article—that of riparian landowner access to the surface of nonnavigable water bodies—is a useful exercise in comparison. It is just one of many concepts for which comparative historical study serves to counter the myths about the differences between the common law and the civil law. In fact, neither the substance of the private law rule, nor the evidence of the “spirit” of the rule, evinces differs across traditions.

The substance of this riparian landowner rule is the same in both the civil and common law traditions. Indeed, the rule used by both “camps” was drawn from the same source. The rule of civil law systems, *cujus est solum*, then, does “easily correspond” to something in the common law; the rule of the “veritable jungle” that is the common law is also the civilian-born *cujus est solum*! In an area in which the common and civil law systems are widely viewed to differ substantially, a comparison of this riparian landowner access rule, at least, tends to show the opposite.²⁶¹ Close study of the development of other civilian and Anglo-American legal concepts often will, I believe, remind us of how “the same problems have occupied us all on both sides of the channel; how our methodology has often been different and how, despite the preceding observation, our final results have, invariably, been analogous.”²⁶² The difference between the common and the civil laws is “more than a set of different legal rules.”²⁶³

Emphasis of this point is one small step toward showing that the substantial difference between the common and civil law systems is likewise not one of differing souls or spirits, at least not as that soul or spirit is measured by the systems’ respective commitment to values such as fraternity, human dignity, freedom, and equality. This example suggests that both systems rank those values identically. Fraternity and freedom (which would presumably favor a rule allowing free access to all neighboring riparian landowners) must yield to traditional notions surrounding the landowner’s right to exclusive dominion over his

261. This is not to say, of course, that differences in the substantive rules of property across systems do not exist. They, of course, do. For a detailed comparison of particular rules of property in both systems, see James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1859-69 (2000).

262. Basil Markesinis, *Two Hundred Years of a Famous Code: What Should We Be Celebrating?*, 39 TEX. INT’L L.J. 561, 564 (2004).

263. MERRYMAN, *supra* note 250, at 150.

property. Neither system, in this context, fosters greater “cooperative action.” Both systems place an equal premium on individual rights.²⁶⁴

Are there substantial differences across systems? Absolutely. I submit, though, that the differences are not often in substance or in striking different balances with respect to the above-described values. A detailed exploration of such purported differences often shows them to be “more false than true.”²⁶⁵ I believe the more important differences between the common and civil law systems are “subtler . . . and more pervasive.”²⁶⁶

Shifting the focus away from rumored substantive differences that do not, in fact, exist will allow us to study and benefit from these truly substantial differences. Two hundred years after the creation of a rule of free riparian landowner access, it is time to acknowledge the source of the rule, or more particularly, that there is no civil law rule which departs from a common law rule. The civil law and common law nomenclature, at least as it relates to the substantive rules of riparian landowner surface access, creates the mirage of a gulf between the systems, when in fact no such gulf is present. It does us a disservice, and for that, should be abandoned.

264. See Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34 H.K.L.J. 339, 343 (2004) (“Both . . . [systems] share similar fundamental social objectives, which include the protection and encouragement of individual and personal rights and are both enrolled in a liberal philosophy and conception of the world.”).

265. See Danielle Conway-Jones, *Mongolia, Law Convergence, and the Third Era of Globalization*, 3 WASH. U. GLOBAL STUD. L. REV. 63, 71 (2004).

266. See MERRYMAN, *supra* note 250, at 150 (describing the historical and cultural dimensions of the differences). Specifically, I believe the true differences are of style, terminology, and a philosophy of how law is best articulated and responsive to change. See Hermida, *supra* note 264, at 343.