The Federal Common Law of Accretion: A New Element in Property Law

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Recent United States Supreme Court decisions have made federal law in-roads into what has been traditionally considered the exclusive province of state law, the rules governing real property.¹ Significant among these, especially in view of its potential effect on land titles in Louisiana, is Bonelli Cattle Co. v. Arizona.² The Court's approach to the question of ownership of accreted lands requires an understanding of the foundation of a state's rights to the beds of navigable waters as well as an examination of traditional common law rules of accretion.

Common Law Rights in Water Bottoms

Early in the history of English law there developed the general rule that the kind of water flowing over the land, either tidal or non-tidal, was the crucial factor in determining property rights in the land.³ At least by the time of Elizabeth I the notion had emerged that the Crown held dominion over land under tidal waters, while the public rights to navigation in these waters had been recognized well before that time.⁴ The tidal—non-tidal distinction was not carried over to the colonies because the geography of our country greatly diminished the utility of that dichotomy.⁵ Instead the more relevant concept of navigability was substituted for the English emphasis on tidal waters and thus ownership by the sovereign became linked to navigability.⁶ The revolution brought sovereignty to the peoples of the various states and the accompanying right to the soil beneath navigable waters.⁷ Though the states through the Constitution sur-

². 414 U.S. 313 (1973).
⁴. Fraser, Title to the Soil under Public Waters—A Question of Fact, 2 MINN. L. Rev. 313, 327 (1918) [hereinafter cited as Fraser].
⁵. "[N]avigable waters, not affected by the ebb and flow of the tide, such as the great lakes and the Mississippi River, were unknown to courts and jurists, when the rules of the common law were ordained." St. Paul & Pac. R. Co. v. Schurmeier, 74 U.S. (7 Wall.) 272, 288 (1869).
rendered the ultimate control over navigation to the federal government, “the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution to the United States but were reserved to the several states.”

Several theories have been advanced to explain the retention of these lands by the sovereign. One is that the notion of the sovereign’s dominion grew out of the judicial practice of strictly construing grants by the sovereign against the recipient. The rationale for this rule is that a liberal construction of grants by the sovereign would unduly diminish “the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use.” The necessary consequence of applying this rule to grants of land bordering waterbodies of tremendous public utility was the tendency to view the grant as stopping at the water-line, with control of the waters remaining with the sovereign. This process culminated in England with the emergence of the concept that dominion over all tidal waters and the soil beneath them resides in the sovereign.

American courts, though sometimes viewing this issue as but a matter of construction, have more often seen larger implications in their rulings that title to the beds of navigable waters vests in the sovereign. The United States Supreme Court’s decision in Shively v. Bowlby, which despite its vintage remains the fullest explication of the law governing water bottoms, explains that:

Such waters, and the land they cover . . . are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary purposes are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing. . . .

Some commentators have expressed skepticism at the claim that public use requires state ownership, and indeed, private ownership

10. Shively v. Bowlby, 152 U.S. 1, 10 (1894), quoting Sir Wm. Scott in The Rebeckah, 165 Eng. Rep. 158, 159 (1799); See also III Kent’s Commentaries 432 (2d ed. 1832).
11. Fraser 327.
13. 152 U.S. 1 (1894).
14. Id. at 11. “They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people.” Id. at 57.
of the beds of navigable waters has been approved by the United States Supreme Court. Nevertheless, the prevailing view remains that the “natural and primary” uses of waterways require that ownership of the soil beneath them be vested in the public.

The justification for state ownership also operates to impose limitations upon the state’s title. Soil below navigable waters is held “not only subject to, but in some sense in trust for, the enjoyment of certain public rights.” Admission of new states on an equal footing with the original thirteen served not only to give title to soil beneath navigable waters to the newly created sovereigns, but also required that such title be subject to the enjoyment of public rights. The leading exposition of the public trust imposed upon a state’s title is the United States Supreme Court’s opinion in Illinois Central Railroad Co. v. Illinois, where the validity of a legislative grant of lands below the highwater mark in Lake Michigan was at issue. After a lengthy review of the doctrine of public trust leading to the observation that the state’s title is “held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein free from the obstruction or interference of private parties,” the Court concluded that under the circumstances the grant created an unreasonable interference with public uses and therefore was invalid as beyond the

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19. Admission to the Union has given the new states the same “rights, sovereignty and jurisdiction . . . as the original states possessed within their respective borders.” Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867). Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-29 (1845); Withers v. Buckley, 61 U.S. (20 How.) 84, 93 (1857). Often the act admitting the new state declared that its admission was on an equal footing with the original states. For example, 2 Stats. 641 (Feb. 20, 1811) proposes that Louisiana “shall be admitted into the Union, upon the same footing with the original states.” This doctrine has been construed to accord the new states certain rights in the soil beneath navigable waters. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).
20. Barney v. Keokuk, 94 U.S. 324, 338 (1876); Weber v. Harbor Comm’rs., 85 U.S. (18 Wall.) 57, 69 (1873). “General language sometimes found in the opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with references to the special facts of the particular cases.” Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892). In Bonelli Cattle Co. v. Arizona, the courts speaks of “the limited nature of a sovereign’s rights in the riverbed.” 414 U.S. at 328.
22. Id. at 452.
legislature’s competence. Even when a grant of the bed of navigable waters to an individual has been upheld, the grantee’s title is burdened with the duty of non-interference with the primary public purposes of commerce, navigation and the like.

Traditionally, the doctrine of public trust has been limited to protection of navigation, commerce and fishing upon navigable waters. But as early as the last century recognition was growing of other public interests which were likewise deemed worthy of special protection. The Minnesota supreme court in 1893 looked to various economic, recreational and other purposes when it sought to give the term navigable a “sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses” of certain inland lakes. More recent enumerations of important public interests in waters have been equally expansive. For instance, when the California supreme court examined the public interest in lands between low and high tide lines in *Marks v. Whitney*, it found that preservation of the natural ecological balance was to be considered along with established recreation uses as a public interest worthy of special protection.

Federal interests in navigable waterways, though derived from the constitutional power of Congress to regulate commerce, have also been expanded beyond traditional notions of either commerce or navigation. In *Zabel v. Tabb* the question before the Fifth Circuit was whether the Secretary of the Army could consider conservation when determining if a permit for construction required by the Rivers

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23. "Such abdication (of the State's control over lands beneath navigable waters) is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public." *Id.* at 453. Lands one mile out from the shore had been granted in fee to the railroad, the total area being in excess of one thousand acres. The railroad constructed wharves, piers and docks upon these lands.

24. "Improvement by individuals [of lands beneath navigable waters] when permitted is incidental or subordinate to the public use and right." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Weber v. Harbor Comm'rs.*, 85 U.S. (18 Wall.) 57 (1873); *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 379, 98 Cal. Rptr. 790, 795 (1971): "[T]he buyer of land under these statutes receives the title to the soil, the *jus privatum*, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary."


27. *Id.* at 199, 53 N.W. at 1143.


and Harbors Act\textsuperscript{31} should be issued. Turning to the national policy favoring environmental conservation,\textsuperscript{32} the court refused to require that the Secretary “wear navigational blinders”\textsuperscript{33} and held his consideration of conservation proper. Even more inclusive is the \textit{Code of Federal Regulations}’ listing of factors that the Secretary should consider when assessing an application for construction in navigable waters. The effects of the project on fish and wildlife, conservation, pollution, aesthetics and ecology are included among the factors he must evaluate in reaching his decision.\textsuperscript{34}

\textit{Common Law Doctrines of Accretion, Reliction and Avulsion}

The equal footing doctrine granted to newly created states the same sovereignty and jurisdiction over territory within their borders, including navigable waterways, that the original states possessed, “subject to the common law.”\textsuperscript{35} The Submerged Lands Act of 1953\textsuperscript{36} confirmed the “title to and ownership of lands beneath navigable waters within the boundaries of the respective states”\textsuperscript{37} but allowed in this quitclaim\textsuperscript{38} for modification of these lands by erosion, accretion and reliction.\textsuperscript{39}

Accretion, or alluvion, has been defined as an “addition to riparian land, gradually and imperceptibly made by the water to which land is contiguous”;\textsuperscript{40} more technically, it is an addition made by the

\textsuperscript{31} 33 U.S.C. § 401 (1953).
\textsuperscript{33} Id. at 208.
\textsuperscript{34} “All factors which may be relevant to the proposal must be considered; among these are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage protection, land use classifications, navigation, recreation, water supply, water quality and, in general, the needs and welfare of the people.” 33 C.F.R. § 209.120(f) (1974).
\textsuperscript{35} Pollard v. Hagan, 44 U.S. (3 How.) 212, 228 (1845).
\textsuperscript{36} 43 U.S.C. § 1301 (1953).
\textsuperscript{37} Id. § 1311(a).
\textsuperscript{38} “The Act is not a grant of title to land but only a quitclaim of federal proprietary rights in the beds of navigable waterways.” Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 324 (1973).
\textsuperscript{39} 43 U.S.C. § 1301 (1953): “(a) The term ‘lands beneath navigable waters’ means—

1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable . . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction. . . .”
\textsuperscript{40} County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1874).
deposit of solid material by the water. Erosion is the opposite pro-
cess, whereby water removes soils. Reliction, which brings into play
the same rules as accretion, is the uncovering of land by the gradual
recession of water.

Common law courts have considered it to be a universal rule that accretion belongs to the owner of the land to which it attaches. Similarly title to relicted land passes to the owner of the adjacent shore. If the boundary of a tract is the waterline, the shifting of the waterline operates to shift the landowner’s boundary, causing him to gain in area if the processes of accretion or reliction have occurred and to lose if there has been erosion or overflow. At common law no distinction appears to be made as to the type of waterbody involved, with these rules applying alike to rivers, lakes and the sea. Nor do the causes of the various changes usually alter application of these rules, even when the activities of persons (other than the landowner claiming the accretions) cause or hasten the build-up of land.

41. 3 AMERICAN LAW OF PROPERTY § 15.26 (A.J. Casner ed. 1952) [hereinafter cited as CASNER]; cf. LA. CIV. CODE art. 509.
42. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Jones v. Johnston, 59 U.S. (18 How.) 150, 156 (1855); cf. LA. CIV. CODE art. 510. Reliction is often called accretion by the courts, but no harm results because of the similar legal treatment accorded both processes.
43. CASNER § 15.26; cf. LA. CIV. CODE art. 510.
45. See note 43 supra.
47. Hughes v. Washington, 389 U.S. 290 (1967) (ocean); Jeffries v. East Omaha Land Co., 134 U.S. 178 (1890) (river); Jones v. Johnston, 59 U.S. (18 How.) 150 (1855) (lake). The Louisiana laws which do not correspond to the usual rules of accretion with regard to land bordering the sea or lakes appear to be unique in this area. See LA. CIV. CODE art. 510 (the sea); Miami Corp. v. State, 186 La. 784, 173 So. 315 (1937); State v. Erwin, 173 La. 507, 138 So. 84 (1931) (lakes); CASNER § 15.33.
48. See, e.g., NEBRASKA v. IOWA, 143 U.S. 359, 370 (1892) where the court rejects the argument that normal rules on accretion should not apply to land along the Missouri river because of the peculiar character of the river.
In County of St. Clair v. Lovingston, the United States Supreme Court offered both the doctrine of accessions and the maxim "Qui sentit onus debet sentire commodum" as the basis for the landowner's right to future alluvion which it characterized as a vested right. Though often criticized, it is this second notion—that the riparian owner has an aleatory contract with nature—that courts most often see as the legal foundation for the rules governing accretion. Blackstone, while recognizing that the rules put the landowner in the position of a wagerer, justified them as an application of "de minimis non curat lex." Although the processes may result in the addition of rather large areas, it is usually required that there be a gradual increasing of land if the rule which states that accretion belongs to the owners of the adjacent land is to apply, and it is in this sense that Blackstone speaks of "de minimis."

Several other rationales for the accretion rules have been advanced by courts and commentators. One is the theory of productivity, the inverse of the basis for finding ownership of water bottoms in the public. When accreted land attaches to a riparian's holding, he is considered to be in a better position than either the state or a stranger to exploit it. It is land no longer "incapable of ordinary and private occupation, cultivation and improvement. . . ."

50. 90 U.S. (23 Wall.) 46 (1874).
51. "It is the same with that of the owner of a tree to its fruits . . . ." Id. at 69. In Note, 14 ARIZ. L. REV. 315 (1972) (referred to as "a perceptive discussion" by the Court in Bonelli), the author states that this rationale for the rules of accretion comes from Roman law. The articles of the Louisiana Civil Code dealing with accretions are found in the chapter on the right of accession (Bk. II, tit. 1, ch. 3).
52. The person who bears the burden should receive the advantage. 90 U.S. (23 Wall.) at 69 (trans. supplied).
53. See, e.g., 4 H. TIFFANY, REAL PROPERTY § 1219 (3d ed. 1939). The author states that the notion (riparian owner should receive the benefit because he takes the risk of loss) assumes the matter at issue.
54. This is often labeled the compensation theory. See, e.g., Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973); Note, 14 ARIZ. L. REV. 315, 323 (1972).
56. BLACKSTONE 262.
57. Id. at 261; Shively v. Bowby, 152 U.S. 1 (1893); Jefferies v. East Omaha Land Co., 134 U.S. 178 (1890); County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Jones v. Johnston, 59 U.S. (18 How.) 150, 156 (1855) ("if the same be by little and little").
58. See Note, 14 ARIZ. L. REV. 314, 322-24 (1972), where the author examines six reasons that have been advanced for these rules.
59. Id. at 323.
60. Shively v. Bowby, 152 U.S. 1, 11 (1893); see text at note 14 supra.
asset, a landowner should not be deprived of it because of the water’s movement. Access to the water and the other rights that flow from a land’s riparian character, often the “most valuable feature” of the land, would be subject to the frequently whimsical movement of rivers and streams if the established rules governing accretions and relictions were not applied. Corollary to this argument is the belief that if the water-line is a boundary of a tract, it should remain so despite its movement.

That the riparian quality of a tract may be its most valuable feature has not been deemed sufficient reason, however, to apply the usual rules of accretion when a change is classified as an avulsive one. Avulsion, the sudden change of a stream’s banks either by abandoning its channel for a newly created one or by the washing away from one bank and depositing on another a considerable quantity of soil, does not result in a change in boundary. Rather, title to soil thus affected remains in the former owner. Though attempts have been made to explain why the quality of being riparian is a consideration when the change is accretive, but not when it is avulsive, the legal distinction between these processes indicates that either the de minimis reasoning or the wager analogy is the true foundation for the rule of accretion.

The Bonelli Decision

In settling disputes involving rights in real property, state law usually governs. Federal courts hearing diversity cases, even in the days before Erie Railroad Co. v. Tompkins, looked to applicable state law for their rules of decision in matters involving real prop-

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63. “[W]here lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded.” Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973); Jefferies v. East Omaha Land Co., 134 U.S. 178 (1890); 6 R. Powell, Real Property § 983 (4th ed. 1969).
64. For an example of the different results that would flow from an avulsive change, and the evidence to be considered in making the classification, see Mississippi v. Arkansas, 415 U.S. 302 (1974).
69. “Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer.” Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring).
70. 304 U.S. 64 (1938).
Nor has the fact that a litigant's interest was traceable to a federal grant usually allowed for a shift to federal law. In *Joy v. St. Louis*, the United States Supreme Court refused to find federal question jurisdiction when the plaintiff, whose title derived from a federal patent, brought an action in ejectment for accretion along his land. Ownership of the accreted land, said the Court, was "a question of local or state law, and not one of a Federal nature."

At various times, however, the United States Supreme Court has disregarded state property rules and viewed certain property questions as requiring resolution according to federal law. In *Borax Ltd. v. Los Angeles*, for example, the extent of land conveyed by a post-statehood federal patent was considered a question of federal law, since it "concern[s] the validity and effect of an act done by the United States. . . ." This decision provided the basis for the Court's later holding in *Hughes v. Washington* that ownership of accretions to ocean-front property, conveyed to the plaintiff's ancestor in title by a pre-statehood federal patent, was governed by federal rather than state law.

It was on the basis of *Hughes* that the petitioner in *Bonelli Cattle Co. v. Arizona*, seeking to overturn the adverse ruling of the Arizona supreme court, urged that federal law govern his claim to land aban-

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71. In *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) the Court excluded from the realm of federal common law "rights and titles to things having a permanent locality, such as the rights and titles to real estate. . . ." Id. at 18.

72. "The constitution, for example, empowers Congress 'to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States.' Grants pursuant to the exercise of this power are the foundation of a large portion of the land titles in the country. Conceivably, Congress might have attempted to impose conditions on these grants governing the rights and powers of grantees and subsequent holders. But as the Supreme Court has read the legislation it provided instead that the interests of the grantees should be assimilated into the general mass of property interests in the state, and subject thereafter to the governance of the general land law of the states." Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 526 (1954).

73. 201 U.S. 332 (1906).
74. Id. at 342. See also *Hardin v. Jordan*, 140 U.S. 371 (1891).
75. 296 U.S. 10 (1935).
76. Id. at 22. The issue of navigability, which is determinative of whether ownership of lands beneath inland waters rests with the state has also been considered a federal question. United States v. Utah, 283 U.S. 64, 75 (1931).
77. 389 U.S. 290 (1967). The Court found the invocation of federal law to be further supported by the fact that the case involved "the vital interest of the nation in its boundaries." Id. at 293.
doned by the stream of the Colorado River. A pre-statehood federal patent had conveyed a parcel of land along the river to the Santa Fe Railroad, part of which land was later conveyed to Bonelli. Uncertainty as to whether the Bonelli portion of the land was riparian at the time of the federal patent was an obstacle to applying Hughes. But the holding of the Arizona supreme court that the equal-footing doctrine and the Submerged Lands Act extended the state's ownership to include the contested land enabled the United States Supreme Court to find another basis for choosing federal law, concluding:

The very question to be decided is the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a . . . 'right asserted under federal law.'

The United States Supreme Court found no objection to the Arizona court's construction of the equal-footing doctrine as giving the state title to land newly submerged by the movement of the river. "[U]nder federal law, the State succeeds to title in the bed of the river to its new high-water mark." The parting of ways came in determining the effect that the withdrawal of waters, due to a federal rechannelization project, had upon the state's title. The state court, applying state law to determine ownership, viewed the change as avulsive and therefore not divesting the state of its title. The United States Supreme Court reversed and found that under federal common law the exposed land was not due to avulsion, but was a "gradual and imperceptible accumulation of land on a navigable river-bank, by way of alluvion or reliction." Since Arizona made no showing that the accreted land was "related to furthering the navigational or related public interests," the Court declared that the land belonged to the riparian owner.

The unique factual context which gave rise to the decision in Bonelli could furnish a basis for its limitation. The movement of the

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83. Id. at 318.
86. Id. at 329 (1973).
87. Fashioning of federal common law has usually occurred when the Court has
Colorado River was influenced by the federal government’s operation of Hoover Dam and the rechannelization project had been undertaken by the Bureau of Reclamation. Basic notions of fairness also pushed very strongly for a decision in favor of Bonelli, for even with the Court’s award of the relicted land, the Bonelli tract still did not equal its former size. Nonetheless, the significance of Bonelli lies in the Court’s treatment of the broader issues concerning the federal common law of accretion and the effect it has upon a state’s rights under the equal-footing doctrine.

Bonelli magnifies the importance of two legal concepts of ancient origin: the doctrine of public trust and the rule that accretion belongs to the riparian. The decision makes it clear that the law of accretion is not to be disregarded in determining a state’s interest in soil presently or formerly beneath navigable waters, at least in those states whose interests can be traced to the equal-footing doctrine. But language in the opinion also indicates that the doctrine of the public trust, which lies at the base of the equal-footing grant to the states, conditions any state interest in these lands and may serve to vary whatever rights a state would obtain by application of the rules of accretion. Though the Court in Bonelli found specifically that application of the rules of accretion was most appropriate to the facts of

found “an overriding federal interest in the need for a uniform rule of decision,” Illinois v. Milwaukee, 406 U.S. 91, 105 n.6 (1972) or “a significant conflict between some federal policy or interest and the use of state law in the premises.” Wallis v. Pan American Petrol. Corp., 384 U.S. 63, 68 (1966). In Bonelli, federal government activity greatly influenced the waters movement. Since the awesome federal power over navigable waters may sometimes impose a heavy burden on riparians perhaps the Court was trying to interject some requirement of fairness into the overall scheme by allowing the riparian to gain when the government’s exercise of its servitude worked in his favor. 414 U.S. 313, 329-31. See also Bartke, The Navigational Servitudes and Just Compensation—Struggling for a Doctrine, 48 ORE. L. REV. 1 (1968).

88. “But federal law must be applied with a view towards the limited nature of the sovereign’s rights in the riverbed, and an analysis of the interests of the State and Bonelli, in light of the rationales for the federal common-law doctrines of accretion and avulsion . . .” 414 U.S. at 328.


90. “There has been no showing that the rechannelization project was undertaken to give the state title to the subject lands for the protection of navigation or related public goals.” 414 U.S. at 323. “[W]here land cast up in the Federal Government’s exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the state.” Id. at 329. “But there is no claim here by the state that depriving Bonelli of the subject land is necessary to any navigational or related purpose.” Id. at 331. See also Id. at 323 n.15.
the case, and concluded that the state had no right to the disputed property on the basis of those rules, it nevertheless went on to classify Arizona's attempted acquisition of the exposed land as "a windfall, since [it was] unnecessary to the state's purpose in holding title to the beds of navigable streams within its borders." The implication is that if retention by the state of the exposed lands is necessary to the furthering of "navigational and related public goals," the Court will not resort to a mechanical application of the rules of accretion.

Public Trust and Accreted Lands

Any effort to enumerate everything that might be included in the category of "related public goals" in connection with accreted land would certainly prove futile. This should not be surprising since it is presently impossible to define the exact parameters of the state's much longer established interest in navigation. However, decisions by several state courts holding that a state's public trust obligations with respect to navigable waters do not stop at the water's edge provide some inkling of the scope of the doctrine in this area. In Just v. Marinette County, where the issue was the validity of a shoreland zoning ordinance, the court stated that "lands adjacent to or near navigable waters exist in a special relationship to the state . . . and are subject to the public trust powers. . . ." Those powers included, in the court's opinion, the protection of fishing, recreation and scenic beauty. The Mississippi supreme court also recently considered the state's public trust obligations and held that the legislature had no authority to convey for private purposes marshlands and accreted land. Though the accreted land obviously no longer served primarily navigational purposes, the court felt that the "changing circumstances of the land did not displace the trust imposed upon the

91. Id. at 329. Certainly there will be situations where the reason for the rules on accretion will not justify their applications. The build-up of land may be so large or so swift that de minimis would be inappropriate. While the aleatory contract analogy fits in the case of a meandering river or stream, in a lake into which a sediment-laden stream flows the odds are overwhelmingly in favor of build-up. See R. GRESSWELL, THE PHYSICAL GEOGRAPHY OF RIVERS AND VALLEYS, 64-69, 103-05 (1962); RUSSELL, RIVER AND DELTA MORPHOLOGY, 36-37 (1967).

93. See note 90 supra.
95. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
96. Id. at 18-19, 201 N.W.2d at 769.
state for the public."

Similarly the California supreme court was unwilling in the Marks case to find an automatic termination of the public trust when tidelands were reclaimed.

The leading commentator on the public trust doctrine has seen its basis in three important interests of society, which interests could be found to affect the disposition of accreted lands. Society's interest in certain public rights, such as navigation and fishing, is paramount because general access to these rights is implied in the concept of citizenship. The second interest is in preserving for the public in general those things "so particularly the gifts of nature's bounty." Lastly, the private use of certain resources has been considered inappropriate, because of the peculiarly public nature of these resources. It is not difficult to envision numerous situations when any or all of these interests may be found to affect land bordering navigable waters. Certainly any of the various uses that courts have included within the public trust in navigable waters could conceivably be included in a public trust burdening accreted lands, and thus constitute a reason for retention of title by the state. Even if the land were found to be no longer "incapable of

98. 271 So. 2d at 399.
101. Id. at 484.
102. See the Congressional findings that preface the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64, which provide in part:
   (a) "There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone;
   (b) The coastal zone is rich in a variety of natural, commercial, recreational, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation;
   (c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion . . .
   (e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost. . . ."
103. In 1965 Wisconsin enacted a Water Resources Act, Wis. LAWS ch. 614 (1965), that required local governments to enact shoreland zoning. The stated purpose of the act was "to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural
ordinary cultivation,” it might nevertheless be best suited for, and best serve the public by some extraordinary use for which the state alone possesses the necessary resources.

Conclusion

The Court’s opinion in *Bonelli* invites a balancing of the interests that support application of the normal rules of accretion with those that support retention of state ownership of contested land, burdened by a continued and perhaps expanded public trust. When the weight is in favor of state control, especially if there is a legislative or administrative scheme for dealing with the lands in a manner consistent with public trust uses, the rules of accretion should give way. Just as American courts discarded the distinction between lands under tidal and non-tidal waters because the geographical makeup of our country indicated an expanding public interest, so should the courts approach the problem of ownership of accreted lands with a flexibility appreciative of the growing public interest in lands along navigable waters.

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beauty.” Wood, *Wisconsin’s Requirements for Shoreland and Flood Plain Protection*, 10 NAT. RES. J. 327 (1970). One authority has doubted whether there can be any type of satisfactory waterfront utilization, especially along lakes which are more ecologically delicate than streams, without public ownership. *Id.* at 327, 330, 333. This contention would seem to greatly aid any argument that the state should retain title to accreted lands.