

Note

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The Dividing Line: Applying the Navigability-for-Title Test after *PPL* *Montana*

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The development of oil, natural gas, and hydropower has made title to the beds and banks underlying navigable waters increasingly valuable. Whether such title belongs to the federal

government or to an individual state depends on navigability for title—the principle that upon entry into the Union, states gained title to the beds and banks underlying navigable-for-title waters within their borders. If a waterway is navigable for title, then title passes from the federal government to the state; if not, title remains with the federal government. While this principle seems straightforward, recent litigation reveals a deeper complexity and a striking lack of clear precedent on how navigability for title is to be determined.

The litigation history surrounding navigability for title is relatively sparse.¹ Major questions about the application of the navigability-for-title test seemed, until recently, hopelessly muddled. On February 22, 2012, the U.S. Supreme Court answered the fifty-million-dollar question of how to apply the navigability-for-title test in *PPL Montana, LLC v. Montana* (“*PPL II*”).² The difference in outcome between that case and the lower court’s ruling in *PPL Montana, LLC v. State* (“*PPL I*”) exposes the confusion and ambiguity surrounding the test for navigability.³ In *PPL I*, the Montana Supreme Court considered whether the navigability-for-title test applied segment by segment or in consideration of the river’s overall susceptibility to

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¹ While waters found navigable for title may be subject to the public trust doctrine, navigable-for-title waters have surprisingly been a generally uncontroversial issue. Public trust doctrine scholars continue to argue heatedly about the extent of the public trust, but the question of whether navigable waterways are held in trust is rarely contested. See generally Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 708–09 (1995) (arguing the litigation surrounding Mono Lake significantly expanded the scope of the public trust “beyond navigable water to reach nonnavigable tributaries that affect navigable waters”); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 9 (2007) (contending that precedent does not support an expansion of the public trust doctrine); Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENVTL. L. 189, 193 (2008) (arguing that the public trust extends to groundwater resources in addition to the traditionally held lands beneath navigable waters).

² *PPL Mont., LLC v. Montana (PPL II)*, 132 S. Ct. 1215 (2012); Robert Barnes, *Lewis and Clark and Roberts and Alito: Montana Case Asks Court to Interpret 1805 Expedition*, THE WASHINGTON POST (Nov. 27, 2011), http://www.washingtonpost.com/politics/lewis-and-clark-and-roberts-and-alito-montana-case-asks-court-to-interpret-1805-expedition/2011/11/26/gIQAT37r2N_story.html (noting the fifty million dollar estimate of liability includes interest since the forty-one million dollar Montana Supreme Court decision).

³ *PPL Mont., LLC v. State (PPL I)*, 229 P.3d 421, 426 (Mont. 2010), *cert. granted in part*, 131 S. Ct. 3019 (2011), and *rev’d and remanded*, 132 S. Ct. 1215 (2012).

commerce,⁴ ultimately ruling for the latter proposition.⁵ The U.S. Supreme Court, however, announced that the Montana Supreme Court's decision "was based upon an infirm legal understanding of this Court's rules of navigability for title under the equal-footing doctrine"⁶ and unanimously held that the test must be applied segment by segment.⁷

This Note discusses the recent litigation surrounding PPL Montana and the application of the navigability-for-title test. Part I provides a brief overview of the background of navigability-for-title law, including the equal-footing doctrine, navigability in fact, the *Daniel Ball* test,⁸ and *United States v. Utah*.⁹ Part II summarizes the Montana Supreme Court's holding in *PPL I* with a focus on the navigability issue. Part III reviews the broad issues and precedent through the parties' briefs leading up to *PPL I* and *PPL II*. Part IV analyzes the recent U.S. Supreme Court decision in *PPL II*. Finally, Part V identifies possible holes in the Court's opinion, surmising that the correct application of the navigability-for-title test may not be as "well settled" as the Court indicates.¹⁰

I

THE NAVIGABILITY-FOR-TITLE TEST

The confusion over navigability for title is understandable in light of the wide range of law needed to comprehend the deceptively simple-sounding navigability-for-title test; a chronological overview of the history of navigability for title thus follows. Part I discusses the following: (1) what constitutes navigability for title; (2) the controversial public trust doctrine, with roots in ancient Roman law, and the subsequent adoption of this principle in English common law; (3) the adoption into the U.S. Constitution of a part of the English common law regarding navigable waters through the equal-footing doctrine; (4) the *Daniel Ball* test, which determines which waters the equal-footing doctrine includes;¹¹ (5) *United States v. Utah's*

⁴ *Id.* at 438.

⁵ *Id.* at 449.

⁶ *PPL II*, 132 S. Ct. at 1235.

⁷ *Id.* at 1229.

⁸ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

⁹ *United States v. Utah*, 283 U.S. 71 (1931).

¹⁰ *PPL II*, 132 S. Ct. at 1229.

¹¹ *The Daniel Ball*, 77 U.S. at 563.

application of the *Daniel Ball* test;¹² and (6) a summary of the ensuing confusion over the different types of navigability and the various navigability tests.

A. From Ancient Roman Law to the English Crown

The Roman Emperor Justinian voiced the principle that the public possesses inviolable rights to certain natural resources, including navigable water. “By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”¹³ Justinian further stated that “rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.”¹⁴ This ancient principle is thought to lay the groundwork for the present-day public trust doctrine¹⁵ and the subdoctrine of navigability-for-title law.

The common law courts of England later adopted the Justinian doctrine of a public right to use certain waters. A U.S. court summarized this transition as follows:

For centuries, land below the low water mark has been recognized as having a peculiar nature, subject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics. Historically, no developed western civilization has recognized absolute rights of private ownership in such land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman Law nor the English common law as it developed after the signing of the Magna Charta would permit it.¹⁶

English courts continued the doctrine by noting “title in the soil of the sea, or of arms of the sea, or below ordinary high-water mark, is in the King” and is “held subject to the public right.”¹⁷

¹² *United States v. Utah*, 283 U.S. 71 (1931).

¹³ *THE INSTITUTES OF JUSTINIAN* 158 (Thomas Collett Sandars trans., Callaghan & Co., 5th ed. 1876) (c. 533 B.C.E.).

¹⁴ *Id.*

¹⁵ *Lawrence v. Clark County*, 254 P.3d 606, 608 (Nev. 2011).

¹⁶ *United States v. 1.58 Acres of Land Situated in the Commonwealth*, 523 F. Supp. 120, 122–23 (D. Mass. 1981) (citation omitted).

¹⁷ *Shively v. Bowlby*, 152 U.S. 1, 13 (1894).

*B. America's Adoption of the Public Right to Waters Through the
Equal-Footing Doctrine*

As legal successors to the English king, American colonies took ownership of submerged land beneath navigable waters.¹⁸ Thus, the original thirteen colonies received rights to the beds and banks beneath their navigable waters to be held for the public.¹⁹ This right was later extended to new states upon entering the Union under the equal-footing doctrine.²⁰

While the original thirteen colonies took ownership of such beds and banks when the Union was established, the federal government held title to the remaining beds and banks in trust for the future states.²¹ Upon admittance into the Union, a new state took title to the lands beneath its navigable waters from the federal government.²² Thus, the new state entered the Union on equal footing with the original states.²³ The U.S. Supreme Court has emphasized that such land is valuable for public purposes and cannot be routinely alienated from state ownership.²⁴

Notably, the American pronouncements of the English common law doctrine differ in one important respect. The English Crown held rights to navigable tidal waters, whereas states took title to all navigable waters. The U.S. Supreme Court noted and explained this distinction in 1988.²⁵ The Court reflected on the different topography of America and the “thousands of miles of public navigable water[s] . . . in which there is no tide” and concluded this fact required “jurisdiction [be] made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide.”²⁶ Thus, while the

¹⁸ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

¹⁹ Sidney F. Ansbacher, *Stop the Beach Renourishment: A Case of MacGuffins and Legal Fictions*, 35 NOVA L. REV. 587, 626–27 (2011) (discussing the origin of American navigability for title).

²⁰ *Shively*, 152 U.S. at 49–50; *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 222–23, 228–30 (1845).

²¹ *Pollard*, 44 U.S. at 228–29.

²² *Id.* at 216; *Shively*, 152 U.S. at 49–50.

²³ *Shively*, 152 U.S. at 49–50.

²⁴ *Id.*

²⁵ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478 (1988).

²⁶ *Id.* (alteration in original) (quoting *The Genesee Chief*, 53 U.S. (12 How.) 443, 457 (1851), *superseded by statute*, Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C. § 740 (1948), *as recognized in* *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)).

equal-footing doctrine derives from English common law, the doctrine has expanded to all navigable waters.

C. *The Daniel Ball Test*

The *Daniel Ball* test determines which waters are navigable for title and thus which waters pass to the state under the equal-footing doctrine. Whether a waterway is navigable for title is a question of federal law.²⁷ In *The Daniel Ball*, the United States sued the owners of a steam ship for violating a law requiring the inspection and licensing of ships transporting passengers or cargo over navigable waters of the United States.²⁸ The ship had not been inspected or licensed in its travels over Michigan's Grand River between the Grand Rapids and Grand Haven.²⁹ The U.S. Supreme Court considered whether the ship operated on a navigable water of the United States.³⁰ The Court concluded that the Grand River was navigable because it was navigable in fact,³¹ and a river is navigable in fact when it is capable of being used for commerce.³² Further, the Court established a "test" to determine which rivers are navigable in fact. Rivers are navigable in fact when they are (1) used or susceptible to being used (2) in their ordinary condition (3) as a highway for commerce (4) in the customary modes of trade and travel (5) at the time of statehood.³³ Although the *Daniel Ball* test originally applied only to rivers, it has since been applied to all watercourses.³⁴

Four years after establishing the *Daniel Ball* test, the U.S. Supreme Court applied and clarified the test in *The Montello*.³⁵ The *Montello* Court considered whether the Fox River in Wisconsin was a navigable water of the United States.³⁶ Rapids and falls once filled the Fox River but were subsequently eliminated by locks, canals, and dams,³⁷ allowing commerce to proceed.³⁸ Based on that fact, the

²⁷ *United States v. Oregon*, 295 U.S. 1, 14 (1935).

²⁸ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 558–59 (1870).

²⁹ *Id.* at 558.

³⁰ *Id.* at 562.

³¹ *Id.* at 564.

³² *Id.* at 563.

³³ *Id.*

³⁴ *United States v. Oregon*, 295 U.S. 1, 14 (1935).

³⁵ *The Montello*, 87 U.S. (20 Wall.) 430, 439 (1874).

³⁶ *Id.* at 433.

³⁷ *Id.* at 434.

³⁸ *Id.* at 442.

Court concluded that the river was a navigable waterway.³⁹ It articulated the following test: “[T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers.”⁴⁰ Further, the Court concluded the mode by which commerce may be conducted does not matter; the river must simply “be capable in its natural state of being used for purposes of commerce.”⁴¹

D. *United States v. Utah*

In *United States v. Utah*, the United States brought suit to quiet title to portions of the beds and banks of the Green, Colorado, and San Juan Rivers in Utah.⁴² The United States’ complaint alleged that the federal government acquired title to the riparian lands and riverbeds in Utah through the Guadalupe-Hidalgo Treaty.⁴³ Utah contended that the State acquired title to the riverbeds upon admittance to the Union because the rivers were navigable at the time of statehood.⁴⁴ Furthermore, Utah executed a number of oil and gas leases over portions of the riverbeds in question without the consent of the United States.⁴⁵

The U.S. Supreme Court referred the case to a special master to determine the navigability of the rivers at the time of statehood.⁴⁶ The master found that certain portions of the rivers were navigable and passed to state ownership under the equal-footing doctrine, while nonnavigable portions remained the possessions of the United States.⁴⁷ Both the United States and Utah filed exceptions to the master’s findings.⁴⁸

³⁹ *Id.* at 443.

⁴⁰ *Id.*

⁴¹ *Id.* at 441.

⁴² *United States v. Utah*, 283 U.S. 64, 71 (1931).

⁴³ *Id.* at 71–72.

⁴⁴ *Id.* at 72.

⁴⁵ *Id.*

⁴⁶ *Id.* at 73.

⁴⁷ *Id.* at 73–74.

⁴⁸ *Id.* at 74.

On appeal, the U.S. Supreme Court explicitly noted that the controversy concerned specific facts, not principles of law.⁴⁹ Before delving into the particular facts at issue, the Court summarily described two applicable legal principles: first, the navigability-for-title test from *The Daniel Ball*;⁵⁰ second, the *Montello* Court's clarification that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation."⁵¹ The *Utah* Court also noted the recent holding in *United States v. Holt State Bank* in which the Court similarly applied *The Daniel Ball* and *The Montello*.⁵² The *Utah* Court reiterated the *Holt State Bank* statement that the navigability test concerns whether "the stream in its natural and ordinary condition affords a channel for useful commerce."⁵³

Stating that each determination of navigability must be made on a case-by-case basis, the *Utah* Court analyzed the master's findings for each segment in question, noting, "[t]he question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise nonnavigable. We are concerned with long reaches with particular characteristics of navigability or nonnavigability."⁵⁴

While the facts before the *Utah* Court did not include any short or negligible interruptions in navigability, the Court's language vaguely indicates such facts could require an alternative holding. The *Utah* Court divided the rivers into segments, determining navigability with respect to particular portions.⁵⁵ The *Utah* Court held the first 4.35 miles of the Colorado River in Utah to be navigable, the following 36.15 miles through Cataract Canyon to be nonnavigable, and the next 149 miles to be navigable.⁵⁶ Cataract Canyon had never been fully portaged; no type of boat had ever passed through the entire canyon, so that segment was held nonnavigable.⁵⁷ Thus, the *Utah* Court's language about a channel for useful commerce was forgotten

⁴⁹ *Id.* at 75.

⁵⁰ *Id.* at 76 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

⁵¹ *Id.* (citing *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874)).

⁵² *Id.* (citing *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)).

⁵³ *Id.*

⁵⁴ *Id.* at 77. This is the language used to argue both for segmentation and for the overall susceptibility to commerce application of the navigability-for-title test.

⁵⁵ *Id.*

⁵⁶ *See id.* at 79–80.

⁵⁷ *Id.* at 80.

in its segment-by-segment application of the *Daniel Ball* test and *The Montello*.

E. Navigability in Fact and the Ensuing Confusion

A waterway must have been navigable in fact at the time of statehood to be navigable for title.⁵⁸ The standard is often defined as follows: “Those rivers must be regarded as public navigable rivers in law which are navigable in fact.”⁵⁹ The general term *navigability* may be used in reference to many types of legal navigability, including federal navigational servitude, federal navigability for regulation, state law navigability, and navigability for admiralty jurisdiction.⁶⁰ These different types of navigability have varying standards and applications, but the common term *navigability in fact* often leads courts to apply the wrong type of navigability precedent.⁶¹

II

NAVIGABILITY-FOR-TITLE LAW TESTED IN *PPL I*

The rich history behind navigability-for-title law was tested in a recent decision before the U.S. Supreme Court. The controversial Montana Supreme Court decision in *PPL I* brought gaps in navigability law to light. Despite the significant consequences of navigability-for-title law, namely ownership of often very valuable lands, *The Daniel Ball* and its progeny left a burning question with sparse legal history to be decided: is the *Daniel Ball* test to be applied to the particular segment of the river at issue or with respect to the entire river’s overall susceptibility to commerce?

In *PPL I*,⁶² the Montana Supreme Court upheld the Montana trial court’s ruling that PPL Montana, LLC (“PPL”) owed the State of Montana over forty million dollars for using state-owned riverbeds.⁶³

⁵⁸ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 472 (1892).

⁵⁹ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

⁶⁰ JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 525 n.10 (4th ed. 2006).

⁶¹ *PPL Mont., LLC v. Montana (PPL II)*, 132 S. Ct. 1215, 1235 (2012) (noting the Montana Supreme Court’s decision “was based upon an infirm legal understanding of this Court’s rules of navigability for title under the equal-footing doctrine”).

⁶² The Montana Court opined on six major issues in *PPL I*, but this Note will only discuss the issue of segmentation for navigability for title.

⁶³ *PPL Mont., LLC v. State (PPL I)*, 229 P.3d 421, 426 (Mont. 2010), cert. granted in part, 131 S. Ct. 3019 (2011), and rev’d and remanded, 132 S. Ct. 1215 (2012).

The Montana Supreme Court applied the *Daniel Ball* test to a whole river's overall usefulness for commerce,⁶⁴ in determining that the river was navigable-for-title purposes.⁶⁵

PPL is a Delaware-based corporation operated as a wholesale electricity generator and, as such, is exempt from state public utility regulations.⁶⁶ PPL purchased hydroelectric facilities on the Clark Fork, Missouri, and Madison Rivers from the Montana Power Company.⁶⁷ The Federal Energy Regulatory Commission licensed the facilities under the Federal Power Act.⁶⁸

In October 2003, parents of public school children sued PPL in the United States District Court of Montana, demanding compensation for the use of State riverbeds under the theory that the riverbeds were school trust lands.⁶⁹ The State of Montana joined the federal suit in June 2004 and filed its own complaint seeking compensation from PPL pursuant to the school trust theory, argued by the original plaintiffs, and under the Hydroelectric Resources Act.⁷⁰ The federal case was dismissed for lack of subject matter jurisdiction, but not before PPL filed a declaratory judgment action against the State in the First Judicial District Court of Montana.

In its complaint, PPL argued that under the Hydroelectric Resources Act, the State's claims were preempted by both the Federal Power Act and federal navigational servitude.⁷¹ Montana counterclaimed for compensation for PPL's years of prior and continuing use of state lands under the Hydroelectric Resources Act.⁷² Montana argued that the federal government gave the State title to the beds and banks of the Missouri, Clark Fork, and Madison

⁶⁴ *Id.* at 446.

⁶⁵ *Id.* at 460–61.

⁶⁶ *Id.* at 426.

⁶⁷ *Id.*

⁶⁸ *Id.* The Montana Power Company had also never compensated the State for using the riverbeds. *Id.* at 427. The Federal Energy Regulatory Commission's authority to issue licenses for the construction, operation, and maintenance of dams arises from the Federal Power Act. 16 U.S.C.A. § 791(a) (West 2006). Additionally, the Federal Power Act preserves the role of state law within the federal licensing structure. *Id.*

⁶⁹ *PPL I*, 229 P.3d at 426.

⁷⁰ *Id.* at 427. The Hydroelectric Resources Act provides that the sale or advertisement for sale of state land power sites capable of creating hydroelectric power in commercial quantities is unlawful. MONT. CODE ANN. § 77-4-201 (2011).

⁷¹ *PPL I*, 229 P.3d at 427. The federal navigational servitude is the power retained by the United States to keep navigable rivers open to interstate commerce. *Id.*

⁷² *Id.* at 428.

Rivers at the time of statehood under the equal-footing doctrine.⁷³ On cross-motions for summary judgment, the court held that the rivers were navigable at the time of statehood, and the State of Montana received title to the beds and banks of these rivers when it entered the Union in 1889.⁷⁴ PPL appealed, arguing summary judgment was inappropriate.⁷⁵

On appeal, the Montana Supreme Court upheld the trial court's grant of summary judgment.⁷⁶ The Montana Supreme Court reversed the trial court's finding that the riverbeds were school trust lands, finding instead that the riverbeds were public trust lands under article X, section 11 of the Montana Constitution.⁷⁷ Additionally, the Montana court held PPL did not receive a grant to use the state land when it received the right to appropriate water for hydroelectricity production.⁷⁸ While the Hydroelectric Resources Act applied to projects on two of the rivers, the State had a constitutional and statutory duty to seek full market value for the use of its riverbeds.⁷⁹ Therefore, the Federal Power Act did not preempt the Hydroelectric Resources Act.⁸⁰

On the issue of navigability for title, the Montana Supreme Court held the trial court correctly interpreted *Utah's* broad definition of navigability.⁸¹ The key issue was whether the rivers were susceptible to commerce at the time of statehood; the rivers need not have experienced actual use.⁸² Additionally, the navigability determination was not dependent on which type of vessel could navigate the river.⁸³ Portages, carrying places, and other obstructions would not

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 434. First, PPL presented historical documents and expert testimony disputing the navigability finding. *Id.* Second, PPL claimed the lower court misapplied precedent in relying on *United States v. Utah*. *Id.* at 431 (citing *United States v. Utah*, 283 U.S. 64 (1931)).

⁷⁶ *Id.* at 447.

⁷⁷ *Id.* at 450. This section of the Montana Constitution states riverbeds are held "in trust for the people" and are not to "ever be disposed of except in pursuance of general laws providing for such disposition" or when full market value compensation is assessed and paid to the State. MONT. CONST. art. X, § 11.

⁷⁸ *PPL I*, 229 P.3d at 451.

⁷⁹ *Id.* at 454.

⁸⁰ *Id.* at 453.

⁸¹ *Id.* at 447 (citing *United States v. Utah*, 283 U.S. 64, 83 (1931)).

⁸² *Id.* at 446.

⁸³ *Id.*

necessarily defeat a finding of navigability.⁸⁴ Accordingly, the existence of nonnavigable portions of a river would not defeat a finding of navigability for title.⁸⁵

The Montana Supreme Court also held that the lower court correctly applied the navigability-for-title law to the facts of the particular case.⁸⁶ Although the Missouri and Clark Fork Rivers required portage, the rivers were nevertheless navigable at the time of statehood.⁸⁷ The Montana Supreme Court based its decision on historic evidence of use, government reports of navigability, and current commercial activity.⁸⁸ Relying on a diary entry from the Lewis and Clark journal, the Montana Supreme Court found the Missouri River navigable at the time of statehood, despite the expedition's decision to portage around the Great Falls.⁸⁹ Additionally, the Court looked to evidence of nineteenth-century use of a log float as well as modern recreational uses to find the Madison River navigable at statehood.⁹⁰ The Montana court held that PPL did not raise any genuine issue of material fact regarding the navigability of the three rivers.⁹¹

The Montana court specifically limited its holding, responding to concerns that its judgment would affect water appropriation.⁹² Additionally, the court noted that the State's constitutional obligation to seek full market value for disposing of public trust land was limited to the specific facts of the case and provisions of the Hydroelectric Resources Act.⁹³

Justice Rice, dissenting, argued that the majority misinterpreted the precedent set forth in *Utah* and that the Montana court should have undertaken a section-by-section analysis of navigability.⁹⁴ Justice Rice stated that PPL's argument for particular portions of the rivers at issue to be declared nonnavigable was consistent with the approach of

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *Id.* at 447.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 449.

⁹² *Id.* at 460.

⁹³ *Id.*

⁹⁴ *Id.* at 461 (Rice, J., dissenting). Justice Rice was joined by Judge Salvagni, sitting for the recused Justice Morris. Petition for Writ of Certiorari at 15, *PPL I*, 229 P.3d 421 (Mont. 2010) (No. 10-218).

the *Utah* Court.⁹⁵ Further, Justice Rice contended that the majority erred in treating *Utah*'s section-by-section approach as an "anomaly" rather than a general "framework of analysis."⁹⁶

Additionally, Justice Rice found it "disturbing" that the majority dismissed the sections of the rivers in question as too short to matter without providing any explanation or analysis concerning what constitutes a negligible segment.⁹⁷ The majority also failed to engage in extensive fact-finding, unlike the *Utah* Court, which analyzed topography, history, impediments, and the use and susceptibility to use for commerce.⁹⁸ Emphasizing that summary judgment was an "extreme remedy," Justice Rice concluded that the majority's judgment was inappropriate.⁹⁹

PPL successfully sought certiorari,¹⁰⁰ characterizing the Montana Supreme Court's holding as an unfounded state land grab.¹⁰¹ Specifically, PPL argued that the Montana court incorrectly applied the navigability-for-title test to the rivers as a whole when precedent dictated that the test should be applied segment by segment.¹⁰² That argument was based almost entirely on the precedent set forth in *Utah*, the very same precedent relied on by the majority in *PPL I*.

III

ISSUES ON APPEAL AFTER *PPL I*

On appeal, both PPL and Montana relied on *Utah* to argue how the navigability-for-title test was to be applied. Both parties also argued about whether the portages required by two of the rivers constituted negligible breaks in navigability. PPL and the State continued to debate which case law was binding and which was persuasive in light of the type of navigability at issue.

A. PPL's Argument

In its petition for writ of certiorari to the U.S. Supreme Court, PPL argued that the Montana court's decision could not be squared with

⁹⁵ *PPL I*, 229 P.3d at 462.

⁹⁶ *Id.* at 463.

⁹⁷ *Id.* at 464.

⁹⁸ *Id.* at 470.

⁹⁹ *Id.* at 464.

¹⁰⁰ Petition, *supra* note 94, at 17.

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 19.

the U.S. Supreme Court's navigability precedent in *Utah*.¹⁰³ PPL characterized *Utah* as establishing "bedrock principles" of applying navigability segment by segment, which the Montana Supreme Court brazenly disregarded.¹⁰⁴ Further, PPL warned that *PPL I* would serve as a "roadmap" to "circumvent federal law on navigability" and overturn hydropower companies' longstanding reliance on their perceived ownership of riverbeds and banks.¹⁰⁵

Reviewing the facts and holding of *Utah*, PPL read the case to determine that a 4.35-mile segment is sufficiently long to constitute more than a merely negligible river segment.¹⁰⁶ However, the Montana court held that the much longer seventeen-mile segment was too short to constitute more than a negligible break in navigability.¹⁰⁷ PPL cautioned that the Montana court's decision demonstrated how *Utah*'s negligible interruptions language could become the exception that swallowed the rule when misapplied.¹⁰⁸

Additionally, PPL cited *United States v. Appalachian Electric Power Company*, a Commerce Clause case, to demonstrate that navigability for title was to be determined on a segment-by-segment basis.¹⁰⁹ In that case, after dividing the river at issue into three sections, the U.S. Supreme Court eventually held that all the relevant segments of the river were navigable for purposes of commerce.¹¹⁰ Based on this precedent, PPL argued that the Montana court erred because "[c]ourts should not assume that certain sections of a river are navigable or non-navigable merely because the river taken as a whole may be characterized as generally navigable or non-navigable."¹¹¹

PPL's petition also defined the dividing line amid nonbinding precedent in the segment-by-segment versus river-as-a-whole application of the navigability-for-title test.¹¹² Many state and federal

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 18.

¹⁰⁶ *Id.* at 22–23.

¹⁰⁷ *Id.* at 23.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 21 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 24.

courts applied the navigability-for-title test segment by segment.¹¹³ However, some courts applied the test to the river as a whole; those courts were primarily state courts.¹¹⁴ PPL suggested this division reflected “the temptation for state courts to err on the side of the states.”¹¹⁵

In the Reply Brief for Petitioner, PPL accused Montana of conflating the “long-settled” distinction between navigability for commerce and navigability for title.¹¹⁶ PPL conceded that some segments of the river were navigable for commerce purposes, and as such, subject to federal regulation.¹¹⁷ However, PPL vehemently denied it ever conceded any of the relevant stretches were navigable for title.¹¹⁸ PPL further argued that Montana conflated the different tests for navigability in claiming certain cases discussing federal regulatory navigability were binding on the present navigability-for-title issue.¹¹⁹ Therefore, PPL contended that even if the federal regulatory cases Montana cited were relevant, they would not support a finding of navigability for title.¹²⁰

B. The State of Montana’s Argument

In contrast, the State argued that *The Montello* indicated navigability determinations depended on a river’s actual use or susceptibility to use as a channel for commerce.¹²¹ In its brief to the U.S. Supreme Court, the State argued that *Utah* did not support the

¹¹³ *Id.* (citing *Muckleshoot Indian Tribe v. Fed. Energy Regulatory Comm’n*, 993 F.2d 1428, 1432–33 (9th Cir. 1993); *City of Centralia v. Fed. Energy Regulatory Comm’n*, 851 F.2d 278, 279–80 (9th Cir. 1988); *Loving v. Alexander*, 745 F.2d 861, 867 (4th Cir. 1984); *Utah v. United States*, 304 F.2d 23, 26 (10th Cir. 1962); *Nw. Steelheaders Ass’n v. Simantel*, 112 P.3d 383, 395 (Or. Ct. App. 2005)).

¹¹⁴ *Id.* at 24–25 (citing *Nw. La. Fish & Game Preserve Comm’n v. United States*, 574 F.3d 1386, 1391 (Fed. Cir. 2009); *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009); *Ryals v. Pigott*, 580 So. 2d 1140, 1152 (Miss. 1991); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 166 (Mont. 1984)).

¹¹⁵ *Id.* at 24.

¹¹⁶ Reply Brief for Petitioner at 3, *PPL Mont., LLC v. State (PPL I)*, 229 P.3d 421 (Mont. 2010) (No. 10-218).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (“[A]ny reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of ‘navigability’ was invoked in a particular case.”)).

¹²⁰ *Id.*

¹²¹ Brief for Respondent at 19, *PPL Mont., LLC v. State (PPL I)*, 229 P.3d 421 (Mont. 2010) (No. 10-218).

segment-by-segment approach.¹²² Montana summarized the law set forth in *Utah* by emphasizing the need for a case-by-case analysis of navigability on particular facts.¹²³

Montana contended that the canyon in *Utah* was never fully portaged “so the highway of commerce came to a dead end at the canyon.”¹²⁴ But the Great Falls presented a mere difficulty in navigation requiring portage.¹²⁵ Thus, evidence of the need to portage around the Great Falls, as detailed in the Lewis and Clark journal, did not defeat a finding of navigability in fact.¹²⁶ The State argued that in relying on *The Montello*, *Utah* stood for the rule that short, portageable interruptions in navigability do not defeat a finding of navigability in fact.¹²⁷

Additionally, Montana called attention to the absence of a definition of “negligible” interruption in navigability.¹²⁸ The absence of this definition was especially worrisome because it could potentially invite litigation by riparian owners seeking to isolate “non-navigable” parts of the river.¹²⁹ Montana’s brief recalled *The Montello*’s language to argue that the key question was whether the river served as a continuous highway of commerce and not the particular length of a nonnavigable segment.¹³⁰ The Lewis and Clark expedition, among others, successfully portaged around the Great Falls.¹³¹ Thus, the river served as a useful channel for commerce despite difficulties in navigation.¹³² If the law allowed a determination of navigability in fact to be defeated by a stretch of

¹²² *Id.* at 22.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 34–35.

¹²⁶ *Id.*

¹²⁷ *Id.* at 22.

¹²⁸ *Id.*

¹²⁹ *Id.* at 21. Earlier in the brief, Montana noted that from the time of statehood, “it has been generally recognized that the riverbeds at issue belong to the people of Montana in public trust, and not private riparian owners.” *Id.* at 5. Upon admission into the Union, a state receives title to the land underlying its navigable waterways and may either hold title to the lands in trust for the benefit of the people or grant title to private riparian owners. In this case, Montana clearly claimed that the State retained title. Therefore, this particular concern about litigation from private landowners does not seem applicable to Montana (but perhaps would be of concern to states that had granted title to private riparian landowners).

¹³⁰ *Id.* at 20.

¹³¹ *Id.* at 9 (citing 4 THE JOURNALS OF THE LEWIS & CLARK EXPEDITION 284 (Gary E. Moulton ed., Univ. of Neb. Press 1987)).

¹³² *Id.* at 2.

nonnavigable water, navigability for title would be a defunct principle; rivers of the United States are simply too wild.¹³³

Additionally, Montana responded to PPL's contention that *The Montello* did not apply because it was not a title navigability case.¹³⁴ Montana argued that because the *Montello* Court applied the *Daniel Ball* test, *The Montello* is relevant case law on the subject of how to apply the *Daniel Ball* test.¹³⁵ Furthermore, the U.S. Supreme Court has repeatedly relied on both *The Daniel Ball* and *The Montello* when discussing the test for navigability for title for over 140 years.¹³⁶ Montana explained that the Court adopted *The Daniel Ball* and *The Montello*'s test for navigability in three contexts: (1) regulatory cases involving a river's natural condition, (2) title cases concerning navigability at the time of statehood, and (3) title cases analyzing whether the river was a part of a useful channel for commerce.¹³⁷

Therefore, Montana contended that regulatory navigability cases informed navigability-for-title cases where the tests overlapped.¹³⁸ Abruptly ending the Court's long history of relying on nontitle navigability cases as precedent would upset principles of *stare decisis*.¹³⁹ Montana argued that going forward, the Court must continue to rely on relevant nontitle navigability cases such as *The Montello*.¹⁴⁰ Therefore, the key navigability-for-title question, according to Montana, was whether the river served as a useful channel for commerce.¹⁴¹

IV

THE U.S. SUPREME COURT'S OPINION IN *PPL II*

Justice Kennedy delivered the unanimous opinion for the U.S. Supreme Court shortly after the hearing on December 7, 2011. The Court reversed the Montana Supreme Court's grant of title to

¹³³ *See id.* at 22.

¹³⁴ *Id.* at 30.

¹³⁵ *Id.* (citing *The Montello*, 87 U.S. (20 Wall.) 430, 439 (1874)).

¹³⁶ *Id.* at 30–31 (citing *United States v. Oregon*, 295 U.S. 1, 15 (1935); *United States v. Utah*, 283 U.S. 64, 76, 83 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922); *Packer v. Bird*, 137 U.S. 661, 667 (1891)).

¹³⁷ *Id.* at 31.

¹³⁸ *Id.* at 31–32.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 31.

¹⁴¹ *See id.* at 2.

Montana and the award of forty-one million dollars in rent for the riverbeds between 2000 and 2007 and remanded on the issue of whether the particular segments were navigable.¹⁴² As for the issue of how to apply the *Daniel Ball* test, the Court decisively held that the test is to be applied segment by segment.¹⁴³

A. *Justification for the Segment-by-Segment Approach*

In addressing navigability in fact, Justice Kennedy first quoted the five-element test from *The Daniel Ball*.¹⁴⁴ Previous courts similarly relied on *The Daniel Ball* in determinations concerning federal regulatory authority under the Constitution, federal statutory navigability, and title to land beneath navigable waterways under the equal-footing doctrine.¹⁴⁵ However, Justice Kennedy noted, “the test for navigability is not applied in the same way” and varies according to the type of navigability at issue.¹⁴⁶

Refreshingly, the Court takes the time to point out several of the differences in the long-muddled application of navigability.¹⁴⁷ Federal commerce power navigability cases such as *The Daniel Ball* historically concentrated on interstate commerce.¹⁴⁸ The Court contrasted federal commerce power navigability analysis with that of navigability for title.¹⁴⁹ A court’s navigability-for-title determination is independent from whether navigation is for interstate travel.¹⁵⁰ Each application of the *Daniel Ball* test will likely reveal additional variations.¹⁵¹ While applying the *Daniel Ball* test, the U.S. Supreme Court noted that the navigability-for-title question is distinct from the *Daniel Ball* case. Thus, the Court applied the *Daniel Ball* test but without the emphasis on interstate commerce.

The U.S. Supreme Court held that determinations of navigability for title are decided on a segment-by-segment basis.¹⁵² The Court based this rule on the following language from *Utah*: “Even where the

¹⁴² PPL Mont., LLC v. Montana (*PPL II*), 132 S. Ct. 1215, 1233 (2012).

¹⁴³ *Id.* at 1228.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1228–29.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1229.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

navigability of a river . . . is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends.”¹⁵³ Additionally, the Court read the *Utah* Court’s factual determinations to support the segment-by-segment approach.¹⁵⁴

Furthermore, the Court relied on *Brewer-Elliott Oil and Gas Company v. United States*, a case not cited by either party or the Montana Supreme Court in *PPL I*, as precedent for segmentation.¹⁵⁵ The *Brewer-Elliott* Court held that the segments in question were not navigable in fact and title did not pass to the State even though another stretch of the river was navigable.¹⁵⁶ This case further demonstrated that the “segment-by-segment approach to navigability for title is well settled, and it should not be disregarded.”¹⁵⁷

The Court explained that the segment-by-segment approach was supported not only by precedent but also by the underlying practical justification for sovereign ownership of land under navigable waterways.¹⁵⁸ Sovereign ownership of the beds and banks of navigable waterways protects against private owners interfering with the public right to use navigable waterways as highways for commerce.¹⁵⁹ Commerce is not possible over nonnavigable segments, so “there is no reason that these segments also should be deemed owned by the State under the equal-footing doctrine.”¹⁶⁰

Further, the Court justified the segment-by-segment application of the *Daniel Ball* test by taking practical considerations into account.¹⁶¹ One practical consideration is the physical conditions affecting navigability.¹⁶² Long rivers run through varying terrain, causing the flow of the rivers to fluctuate.¹⁶³ Such fluctuations can be used to divide the river into distinct portions for the segment-by-segment

¹⁵³ *Id.* (citing *United States v. Utah*, 283 U.S. 64, 77 (1931)).

¹⁵⁴ *Id.* at 1220.

¹⁵⁵ *Id.* at 1229 (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 85 (1922)).

¹⁵⁶ *Id.* at 1230.

¹⁵⁷ *Id.* at 1229.

¹⁵⁸ *Id.* at 1229–30.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1230.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

approach.¹⁶⁴ A further practical consideration favoring the segment-by-segment approach is consistency.¹⁶⁵ Private landowners gain title to riverbeds segment by segment, which demonstrates the division method is administrable.¹⁶⁶ Maintaining a similar approach to allocation under the equal-footing doctrine promotes consistent treatment of private and sovereign landowners.¹⁶⁷

B. Short Interruptions in Navigability

PPL II decisively stated that even if the river segments in question constituted short interruptions in navigability, the segment-by-segment application of the *Daniel Ball* test remains appropriate.¹⁶⁸ Interpreting the language from *Utah*, Justice Kennedy noted that there could be nonnavigable river segments so short that they merit treatment as part of a long, navigable segment.¹⁶⁹ This application supports administrability and prevents the creation of worthless segments.¹⁷⁰ However, a court would err by comparing a nonnavigable segment's length to the overall length of the river; such a comparison "would be simply irrelevant," because the test is not determined by the navigability of particular segments.¹⁷¹ The segments at issue were "discrete" and "substantial," and thus Justice Kennedy refrained from delineating how short a nonnavigable segment must be to be negligible.¹⁷²

The need to portage, while demonstrating an interruption in navigability, does not constitute a mere short interruption in navigability "[i]n most cases."¹⁷³ While the boundaries are hazy, Justice Kennedy dictated that even the need to portage for one day would defeat navigability.¹⁷⁴ Justice Kennedy continued by noting

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* "Even if the law might find some nonnavigable segments so minimal that they merit treatment as part of a longer, navigable reach for purposes of title under the equal-footing doctrine . . . the Great Falls reach—certainly would not." *Id.* The Court went on to note, "the State sought and was awarded rent in the amount of \$41 million for PPL's various hydroelectric facilities attached to the riverbeds, half of which are along the Great Falls reach." *Id.* at 1231.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

that “the Great Falls reach [] certainly would not” meet the negligible segment exception.¹⁷⁵

PPL II also concluded that the Montana court erred in relying on *The Montello* in determining how to apply the navigability-for-title test.¹⁷⁶ Citing the *Daniel Ball* test, the *Montello* Court addressed whether a river was a navigable waterway of the United States by determining whether a river “forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water.”¹⁷⁷ Justice Kennedy cited and relied on this language in *PPL II*.¹⁷⁸ However, Justice Kennedy concluded that the analysis for portages in deciding *The Montello* did not apply to the title issue before the Court.¹⁷⁹ Thus, Justice Kennedy noted that a nonnavigable river segment or portage could be so short as not to defeat navigability, but the likelihood of such a finding is limited.¹⁸⁰

V

RETHINKING *PPL II*

PPL II clarifies a body of law plagued by conflated terms and split authority. The U.S. Supreme Court decisively held that the navigability-for-title test is to be applied segment by segment and not to a river’s overall susceptibility to commerce. Considering the value of many of the contested lands underlying navigable waterways, the clarification was long overdue. Additionally, this clarification provides for better predictability of title disputes in the future.

Nevertheless, the law concerning the application of the navigability-for-title test was not as “well settled” as the Supreme Court claimed. After all, the Court saw fit to grant certiorari on the issue. Furthermore, the lower courts—and even the U.S. Supreme Court’s own prior decisions—exemplify the split between segment-by-segment and overall-susceptibility-to-commerce applications of

¹⁷⁵ *Id.* at 1230. *PPL II*’s holding is a remand, but Justice Kennedy’s statement about how the Great Falls “certainly would not” meet the exception sounds like a reversal.

¹⁷⁶ *Id.* at 1231.

¹⁷⁷ *The Montello*, 87 U.S. (20 Wall.) 430, 439 (1874) (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

¹⁷⁸ *PPL II*, 132 S. Ct. at 1231 (citing *The Montello*, 87 U.S. (20 Wall.) at 439).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1230.

the *Daniel Ball* test. While Justice Kennedy penned a thorough opinion, three matters in particular require additional clarification.

A. *Ambiguity in Utah*

First, *PPL II* oversimplified the incredibly unclear precedent set in *Utah*. While the factual holdings support the inference that *The Daniel Ball* is to be applied segment by segment, the *Utah* Court's language suggests that the navigability-for-title test is to be determined with respect to the river's overall susceptibility to commerce. Both *PPL* and *Montana* made persuasive arguments supporting their preferred method of applying the navigability-for-title test based on *Utah*, but the *PPL II* Court ignored *Utah*'s ample language about susceptibility to commerce.

Utah could also be read as supporting neither method suggested by the parties in *PPL II*, but rather a flexible balancing test. The *Utah* opinion accounted for a number of issues including portages, susceptibility to commerce, history of use, and the length of nonnavigable stretches. The Court in *Utah* held one segment of the river navigable, the next nonnavigable, and the following navigable. The segments were analyzed as much as individual segments as they were based on how each affected the river's overall susceptibility to commerce. The *Utah* Court reasoned that the middle segment was nonnavigable because it could not be portaged around. Further, nonnavigability need not defeat a finding of navigability if the stretch is merely negligible. The determinative factor in finding the segment nonnavigable was that it could not be portaged around and thus could not serve as a useful channel for commerce. Balancing tests are characteristically unpredictable, but *PPL II*'s method would require rivers to be segmented in a way that denies the natural flow of the ecosystems and rivers themselves.

By definitively citing *Utah* as standing for a segment-by-segment application of the navigability-for-title test, the Court bordered on misreading the case. *Utah* can be reasonably read as supporting an overall-susceptibility-to-commerce application. At a minimum, *Utah* required a thorough analysis before being summarily cited as supporting a segment-by-segment application of *The Daniel Ball* and not an overall-susceptibility-to-commerce application.

B. Practical Considerations

PPL II's practical justifications for the segment-by-segment approach are less than persuasive. For instance, the historical rationale for giving lands beneath navigable waters to the state in order to better maintain the navigability of the overlying waters is no longer relevant. The concern is that if the land was privately held, owners could create structures that interfere with navigability. The federal navigational servitude now adequately protects this interest.¹⁸¹

Similarly, the Court's claim that the physical attributes of rivers support a segment-by-segment application of the *Daniel Ball* test falls short of persuasiveness. Justice Kennedy suggested that a river's physical variations make the segment-by-segment approach easy to administer. However, what one considers a physically distinct segment will often vary. While certainly there will occasionally be clearly distinct segments, such as Cataract Canyon in *Utah*, most distinctions will be highly subjective. The physical attributes of rivers are important and the law should acknowledge such natural distinctions. Nevertheless, these physical attributes are often insufficiently distinctive to justify a segment-by-segment application of the *Daniel Ball* test.

The final justification, to promote consistency by applying the navigability-for-title test segment by segment, is also unconvincing. While the private title allocation process uses a segment-by-segment approach, the purpose differs from navigability determinations. Navigability for title originates from the equal-footing doctrine, which was created to ensure that new states entered the Union with similar rights as the original colonies. This is a distinct purpose in comparison to the purposes behind acquiring private property. There is no need for consistency between these discrete title issues; states and private landowners need not be treated the same.

C. Overlooking The Montello

The *PPL II* Court treated precedent inconsistently, sometimes dismissing and sometimes adopting precedent concerning other navigability issues. The Supreme Court found *Utah* and not *The*

¹⁸¹ Federal navigable servitude arises from the Commerce Clause in the U.S. Constitution and gives the federal government the right to regulate navigable waterways, even by taking private property without providing compensation. *United States v. Rands*, 389 U.S. 121, 122–23 (1967).

Montello relevant precedent. *The Montello* is not a navigability-for-title case, but the *Utah* Court relied on *The Montello* to interpret the *Daniel Ball* test. While navigability law is conflated and requires clarification, *The Montello* is still relevant to interpreting the *Daniel Ball* test.

PPL II stretched logic in finding *The Montello* inapplicable. The *PPL II* Court cited a sentence from *The Montello* concerning waters over which commerce is conducted as an example of what is not navigability-for-title law. However, this language originated in the *Daniel Ball* test. The language of the *Daniel Ball* test and *The Montello*'s interpretation of that language suggest that the test is to be applied to a river's overall susceptibility to commerce. The Court did not adequately distinguish this contrary precedent.

PPL II adopted some law from the Commerce Clause cases while omitting others as not based on navigability-for-title law. Like *The Montello*, *The Daniel Ball* concerns navigability issues other than navigability for title. The *PPL II* Court properly emphasized the importance of not conflating different navigability tests. *PPL II* adopted the five-element test from *The Daniel Ball* but not language articulating the key inquiry of whether the river served as a highway for commerce. The Court failed to explain why some concepts in a nontitle navigability case were relevant while other concepts within the same case were not.

CONCLUSION

The U.S. Supreme Court's decision in *PPL II* clarified a long-muddled area of law. Explaining the framework and background of navigability for title, the Court eloquently elucidated nuances surrounding the *Daniel Ball* test. The Montana Supreme Court's decision and parties' briefs demonstrate that the application of the test was not as well-settled as the Supreme Court suggested. In its holding, the Supreme Court oversimplified precedent, stretched for nonlegal justifications, and overlooked a relevant body of law. However, the holding is decisive; the test for navigability in fact is to be applied segment by segment.

While Justice Kennedy's language is clear, the exception for negligible segments remains. *PPL II* emphasized the rareness of finding negligible segments so short as to merit treatment as part of a longer segment. As *PPL* contended in its writ for certiorari, the negligible segments exception could swallow the rule. Because *PPL* and most hydropower companies locate facilities on the turbid

segments of rivers, future litigation is imminent. Both states and the federal government have incentives to argue zealously for favorable navigability determinations in light of the vast amounts of rent money potentially owed by hydropower companies. The State of Montana did not sue for back rent, but such a claim would not be unjustified. If the title owner could collect back rent in addition to future rent, the financial implications of navigability-for-title determinations would be immense. Therefore, courts will soon be pressed to define what precisely constitutes a negligible segment.

