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Water and Watercourses—Federal Jurisdiction—Federal Common Law Determines Ownership of Re-Exposed Navigable River Beds—Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)

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WATER AND WATERCOURSES—FEDERAL JURISDICTION—FEDERAL COMMON LAW DETERMINES OWNERSHIP OF RE-EXPOSED NAVIGABLE RIVER BEDS—*Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)

Plaintiff Bonelli Cattle Company (Bonelli) brought a quiet title action against the State of Arizona to determine ownership of newly re-emerged land purchased by Bonelli in 1955 from a federal grantee, the Santa Fe Railroad. When the Santa Fe obtained the parcel in 1910, it comprised 280 acres of dry land. In that year the Colorado River, a navigable stream,[1] formed the boundary between Arizona and Nevada and flowed more than one-quarter mile to the west. However, the Colorado moved slowly eastward so that in 1955 it covered all but 60 acres of the parcel.[2] The submerged portion was re-exposed as a result of dredging and rechannelization of the river in 1959 and 1960 by the United States Bureau of Reclamation. The trial court and the intermediate appellate court upheld Bonelli's claim[3] to the re-exposed portion of the parcel. The Arizona Supreme Court reversed, holding that the re-emergence was caused by artificial, avulsive forces, and hence under state law the re-exposed land belonged to the state (whose title to the river bed had moved with the river).[4] On certiorari the United States Supreme Court reversed. *Held:* Under the federal common law of accretion, a state's ownership of the newly exposed

1. The river is navigable not because it ever was or could have been an artery of commerce, but because the United States Supreme Court found it to be so when deciding that the Boulder Canyon Act of 1928 was constitutional under the commerce clause. *See* Arizona v. California, 283 U.S. 423 (1931).

2. Operation of Hoover Dam reduced the Colorado's flow and checked its encroachment of the land. Thus, the 60 remaining acres of fastland in the parcel stayed relatively intact from 1938 until 1955 when Bonelli purchased it. *See* United States v. Claridge, 279 F. Supp. 87, 89–90 (D. Ariz. 1967), *aff'd*, 416 F.2d 933 (9th Cir. 1969); Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ. L. REV. 315, 331 (1972).

3. 11 Ariz. App. 412, 464 P.2d 999 (1970). The Arizona Court of Appeals held that Bonelli received title under either the "artificial accretion theory" or the doctrine of re-emergence. 464 P.2d at 1005–06. Under the artificial accretion theory, Bonelli as riparian owner was entitled to accretions resulting from conditions created by third persons in which it had no part. *Id.* at 1005. Under the re-emergence doctrine, the river must inundate riparian land so that adjoining nonriparian land becomes riparian; then the river must return to its original bed so that the submerged riparian land re-emerges. *Id.* at 1006, *citing* Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965). *See* Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956); Hunzicker v. Kleeden, 161 Okla. 102, 17 P.2d 384 (1932); Allard v. Curran, 41 S.D. 73, 168 N.W. 761 (1918).

4. State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971). The opinion of the Arizona Supreme Court is analyzed in Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ. L. REV. 315 (1972).

bed of an inland navigable waterway is defeasible in favor of the riparian federal grantee, absent the state's showing of any need to protect a public benefit or purpose. *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973).[5]

Broadly applied, *Bonelli* effectively clouds the title to large amounts of real property adjacent to "navigable water"[6] in western, public lands states. It represents a significant intrusion of federal common law into an area previously thought reserved for the states. This note will explore the pre-and post-*Bonelli* status of the equal footing doctrine,[7] of state riparian property rights and of federal common law effects on those rights. The reasoning in *Bonelli* will be critically examined in light of prior doctrine. It will be shown that *Bonelli* represents an unwarranted and unmanageable extension of federal law into areas reserved for the states. This note concludes that the doctrinal infirmity of *Bonelli*'s reasoning, and the impracticality of its enunciated rule, mandate that the decision be limited to its own peculiar facts.

I. THE LAW PRIOR TO *BONELLI*

A. The Equal Footing Doctrine

In 1845, the United States Supreme Court held that each new state is "admitted into the Union on an equal footing with the Original States . . . ."[8] The Court reiterated this doctrine some 20 years later

5. Justice Stewart, in a vigorous lone dissent, argued that the Court's holding emasculated the time-honored equal footing doctrine, *see* Part I–A *infra,* and inadvisedly required states other than the original 13 and Texas to "knuckle under to this Court's supervisory view of 'federal common law.' " 414 U.S. at 336.

6. The term "navigable" is used to decide a host of legal relationships covering title, rights of use and powers to legislate. *See* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams,* 7 NAT. RES. J. 1, 4–5 (1967); Johnson, *Riparian and Public Rights to Lakes and Streams,* 35 WASH. L. REV. 580 (1960).

7. *See* Part I–A *infra.*

8. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845). The doctrine that states newly admitted to the Union would enter with the same rights and sovereignty as accorded to the original 13 states, is fundamental to the federal system of government as conceived when several individual colonies banded together to form our nation. Indeed, an early draft of the United States Constitution provided that "the new States shall be admitted on the same terms with the original states." *See* The Constitution as Reported by the Committee of Detail, Aug. 6, 1787, art. XVII, in C. ROSSITER, 1787 THE GRAND CONVENTION 328 (1966). Several theories have been offered to explain the omission of this clause from the final draft of the Constitution. One theory attributes the omission to the fear of the Atlantic states, particularly Pennsylvania, that the new states would have too much power if admitted on an equal basis. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 583 (M. Farrand ed. 1911).

declaring that new states have the same "right, sovereignty, and jurisdiction . . . as the original states possess within their respective borders."[9] *Coyle v. Smith*[10] represents the Court's fullest constitutional justification for the equal footing doctrine. In *Coyle,* the Court held that Congress could not impose conditions on admission of a state that would limit that state's sovereignty. The Court reasoned that each state must be admitted with equal power, dignity and authority. To allow Congress to condition admission would mean that the power of the original 13 states would be limited only by the Constitution, while that of the new states would also be restricted by the conditions Congress sought to impose. Moreover, allowing conditional admission would enlarge Congressional powers vis-a-vis the new states by the conditions so imposed in contradiction of the tenth amendment to the United States Constitution. The Court concluded that "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized."[11]

One aspect of state sovereignty under the equal footing doctrine is the absolute ownership of the beds below the high water mark[12] of navigable waters within the state.[13] This ownership is derived from the

Another suggests the omission was part of the price South Carolina paid to Pennsylvania in order to secure a political compromise on the slavery issue. C. WARREN, THE MAKING OF THE CONSTITUTION 596 (2d ed. 1937). Finally, the clause may have been thought unnecessary in light of the Resolution of October 10, 1780 and the Northwest Ordinance of 1787, in which the Continental Congress had already guaranteed equal footing to new states. *See generally id.* at 590–98.

9. Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867).

10. 221 U.S. 559 (1911). *Coyle* involved the validity of a section in the Enabling Act admitting Oklahoma into the Union which provided that that state's capital would be located in Guthrie, Oklahoma until 1913. In December 1910, the Oklahoma Legislature provided for removal of the capital to Oklahoma City. Coyle, a citizen of Guthrie owning large amounts of land there, challenged the proposed move, urging that it was contrary to the Enabling Act. On appeal from a judgment of the Oklahoma Supreme Court upholding the act authorizing removal, the United States Supreme Court affirmed. The Court held that the power to locate its own seat of government is essentially a state power which Congress cannot withhold from a state by conditioning its admission to the Union. To allow Congress to do so would create a union of states unequal in power, for Congress could reserve for itself some powers belonging to newly admitted states. Congress' powers would thus be enlarged beyond those granted by the Constitution as to those states which had bargained away such powers as conditions to admission. *See generally* Hanna, *Equal Footing in the Admission of States,* 3 BAYLOR L. REV. 519 (1951).

11. 221 U.S. at 567. Clearly, the doctrine does not guarantee equality of economic stature. This plainly is not possible since area, location and natural resources will cause great differences in economic power. United States v. Texas, 339 U.S. 707, 716 (1950).

12. The high water mark constitutes the limit below which the United States cannot convey since the land belongs to the state under the equal footing doctrine. Packer v. Bird, 137 U.S. 661, 672 (1891).

13. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

United States which holds the submerged beds of navigable waterways in federal territories in trust for future states.[14] The federal government could convey the beds of navigable waters located in territories for certain purposes, but has never done so in any wholesale fashion.[15] Upon statehood, the states in turn must hold the beds in trust for public purposes, such as navigation and fishery. But the state has the right to convey the land received upon statehood to private individuals.[16] In addition, the Court has traditionally respected the state's power to decide under its own law the rights of a riparian owner to the bed of a stream or other body of water, whether navigable[17] or non-navigable.[18]

B. State Jurisdiction over the Incidents of Title

In *Packer v. Bird*,[19] the Court held that the incidents and rights attaching to the ownership of property conveyed by the federal government are to be determined by state law.[20] The *Packer* Court carefully noted, however, that state law could neither define the extent of a federal grant nor impair its efficacy or the use or enjoyment of the

14. Shively v. Bowlby, 152 U.S. 1, 49 (1894).

15. *See id.* at 51 (Congress has "settled policy of not granting to individuals lands under . . . navigable rivers."); *accord,* United States v. Holt State Bank, 270 U.S. 49, 55 (1926); United States v. Alaska, 423 F.2d 764, 767 (9th Cir. 1967).

16. 152 U.S. at 56. This was the source of dispute in *Shively*. The plaintiff had purchased from the State of Oregon certain tidelands along the Columbia River. The defendant purchased upland property from the United States and claimed the plaintiff's land as part of that grant. The Court held for plaintiff finding that Oregon could convey the land in question since it owned and controlled it. *Id.* at 53.

17. Nebraska v. Iowa, 406 U.S. 117, 126 (1972); Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 655 (1927); Packer v. Bird, 137 U.S. 661 (1891).

18. *See* Hardin v. Jordan, 140 U.S. 371 (1891); Choctaw & Chickasaw Nations v. Seay, 235 F.2d 30, 35 (10th Cir. 1956). If the body of water is non-navigable, the title of the United States to the submerged land remains unaffected by the admission to the Union of the state in which the waterway is located. United States v. Oregon, 295 U.S. 1, 14 (1935). When the federal government conveys the surrounding upland, the rights of the grantee to the submerged bed are determined under common law which recognizes grantee's rights in the submerged land up to the center of the stream. Hardin v. Jordan, *supra* at 384.

19. 137 U.S. 661 (1891).

20. *Id.* at 670. In *Packer,* the Court was asked to determine whether a federal grantee's patent stopped at the high water mark of the stream or extended to its middle. The Court reasoned that since Congress meant to preserve for the states ownership of the beds of navigable streams, a federal patent must be construed to extend only to the high water mark of a navigable stream. If a state wished to define riparian rights to include part of the stream bed which belonged to the state, then the Court would not interfere; it was up to the state to determine whether to resign its rights in the beds to the bordering riparian owners. *See also* Joy v. St. Louis, 201 U.S. 332 (1906) (federal grantee's action dismissed for lack of jurisdiction on the basis that ownership of accreted land is governed by state law).

property granted.[21] But, as the Court noted in *St. Anthony Falls Water-Power Co. v. St. Paul Water Com'rs*:[22]

> It does not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee, to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the federal government, has been held . . . not to include title over navigable waters within or bounded by the states.

Moreover, the Court suggested in *Shively v. Bowlby*[23] that the principle that state law governs the adjudication of riparian property rights is necessarily implied from the equal footing doctrine:[24]

> [T]he new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

Nonetheless, federal common law[25] has been fashioned in at least

21. 137 U.S. at 669. Thus, a state rule of property which extended the high water mark beyond the federal definition, thereby reducing the amount of land in a federal grant, would be ineffective.

22. 168 U.S. 349, 363 (1897).

23. 152 U.S. 1 (1894).

24. *Id.* at 57–58.

25. To speak of federal common law is also to speak of state common law, for the two complement each other and the role of one limits the role of the other. State law deals with and is responsible for governing most problems of "private behavior which have failed of satisfactory adjustment at either the private or local level." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954). Thus, the states have developed a vast, valuable reservoir of law for resolving controversies for which there would otherwise be no law. Furthermore, it is assumed that state legal systems are "competent . . . to handle most of the immediate exigencies of government, even in spheres which were subject to a power of control by the United States." *Id.* at 497.

This is not to say that there is no need for federal "common law." The ability to create and declare what is the federal law is essential to the effective implementation of federal legislation. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decisions*, 105 U. PENN. L. REV. 797, 799 (1957). A federal court must be able to interpret the meaning, and fill the interstices, of a federal statute, to apply it to particular problems and to fashion remedies to carry out the law. But the mere fact that the activity is federal is not sufficient. The Court has said that state rules should be overridden by federal courts "only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." United States v. Yazell, 382 U.S. 341, 352 (1966). *See also* Comment, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1517 (1969).

three areas to govern issues—none of which was present in *Bonelli*—arising from property disputes. First, since at the time of statehood the federal government releases to the newly formed state all land beneath "navigable" waters[26] and can convey title to riparian property only to the "high water mark"[27] of a navigable body of water, federal law must govern the determination of "navigability" and "high water mark" for purposes of determining the extent of a federal grant.[28] As the Court noted in *United States v. Oregon*:[29]

> Since the effect upon title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the state under which the lands lie are navigable or nonnavigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts . . . .

Second, federal law must govern property disputes when national sovereignty is at issue. Thus in *United States v. California*,[30] the Court held that protection and control of submerged seabeds out to the 3-mile limit was a function of national sovereignty and was necessary to the assertion by the federal government of its rights under interna-

26. United States v. Utah, 283 U.S. 64 (1931). The Court held that Utah's own test of navigability did not govern the question of whether title to the beds of certain rivers, including portions of the Colorado, was held by the State of Utah. *Id.* at 75. As previously noted, title to the submerged bed passes to the state only if the waters are navigable. *See* note 18 *supra*.

27. Of course, state law may extend the limit of the grant by conferring upon riparian owners rights to the low water mark or even the thread of a navigable stream. United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908). "The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the state, the bed will pass to the patentee by the help of that law . . . ." *Id.* at 451; *accord,* Hardin v. Shedd, 190 U.S. 508 (1903).

28. Borax Consol. v. City of Los Angeles, 296 U.S. 10, 22 (1935).

29. 295 U.S. 1, 14 (1935), *citing* United States v. Utah, 283 U.S. 64 (1931).

30. 332 U.S. 19 (1947). The United States brought an action against California, seeking a declaration that the bed of the marginal sea belonged to the United States. California claimed that it owned the land as part of its sovereign rights. The Court noted that the original states had never claimed a 3-mile ocean belt, and that the limit was a later creation of the federal government. The Supreme Court recently reaffirmed the claim of the United States to the bed of the marginal sea in United States v. Maine, 95 S. Ct. 1155 (1975). Again the United States had brought an action against Maine and other Atlantic coastal states, which claimed the marginal seabed beyond 3 miles as successors in title to grantees of the Crown of England. The Court rejected the states' claim, citing United States v. California and emphasizing that paramount rights in the marginal sea and seabed were incidents of national sovereignty.

tional law.[31] Similarly, in *Shively v. Bowlby*,[32] the Court held that Congress could convey beds beneath navigable waters in order to meet international treaty obligations[33] and to promote international commerce.[34] More recently, the Court in *Hughes v. Washington*[35] extended its national sovereignty rationale to allow federal law to govern issues concerning the rights of federal grantees to tideland accretions:[36]

> The rule [of *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935), that the issue of rights asserted under a federal grant raises a federal question] deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

Third, federal common law is necessary to adjudicate interstate

31. It was the national interest in foreign affairs which empowered Congress to convey the submerged beds of navigable waters in federal territories, even though the land was held in trust for future states. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221–22 (1845); Shively v. Bowlby, 152 U.S. 1, 49 (1894). Six years after United States v. California, Congress quitclaimed its rights in submerged beds of the marginal sea out to the 3-mile limit by the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.* (1970).

32. 152 U.S. 1 (1894).

33. An example is the Treaty of Guadalupe Hidalgo with Mexico which recognized title conveyed by Mexican land grants. Treaty of Peace, Friendship, Limits, and Settlement with Mexico, Feb. 2, 1848, 9 Stat. 922 (1851), T.S. No. 207 (effective July 4, 1848).

34. The Court specifically noted, however, that Congress had never attempted to convey the lands by general laws. 152 U.S. at 48.

35. 389 U.S. 290 (1967).

36. *Id.* at 293. *Hughes* originated as a quiet title action brought in state court by the successor in title to the original federal grantee of land on the Washington coast. The State of Washington, as owner of the tidelands, was the defendant. The issue before the Court was whether article XVII, § 1 of the Washington State Constitution denied the owner of upland property the right to future accretions. (Article XVII, § 1 asserts the ownership by the State of Washington to the beds and shores of all navigable waters in the state up to the line of ordinary high water mark, including both tidelands and the banks of all navigable rivers and lakes.) The land in question had been conveyed to the plaintiff's predecessor in title prior to Washington's admission into the Union in 1889. Although the trial court found that the right to accretion was subject to federal law, the Washington Supreme Court reversed, holding that under Washington law, the state owned any land accreted after statehood. Hughes v. State, 67 Wn. 2d 799, 410 P.2d 20 (1966). The United States Supreme Court reversed. Although noting that the principal case relied upon, Borax Consol. v. City of Los Angeles, 296 U.S. 10 (1935), did not involve accretions, the *Hughes* Court did find relevant the assertion in *Borax* that the extent of ownership under a federal grant is governed by federal law. 389 U.S. at 292. The *Hughes* Court went on to decide

boundary disputes.[37] The constitutional grant of judicial power[38] allows the Court to create federal law to govern such controversies. In such cases, the application of state law would be unworkable since there would be no more reason to apply one state's law than the other's. Over the years the Court has developed an interstate common law to be applied in ascertaining the relative rights of states. In creating this federal common law, the Court considers federal, state and international law. The result is a body of law which follows the common law of most states concerning accretion and avulsion.[39]

II. THE COURT'S REASONING IN *BONELLI*

The dispute between Bonelli and the United States arose out of the rechannelization of the Colorado in 1959 and 1960 as part of a fed-

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that under federal law, the federal grantee of uplands had a right to any future accretions.

The application of *Borax* to accretion disputes resulted from a misinterpretation of the following language: "The question as to the extent of *this* federal grant, that is, as to the limit of the land conveyed, or the *boundary* between the upland and the tideland, is necessarily a federal question." 296 U.S. at 22 (emphasis added). *Borax* decided only the boundary line of the federal grant, which in the case of tidelands was held to be the line of mean high tide as averaged over the 18.6 year tidal cycle. The only federal question involved in *Borax* was the definition of "mean high tide," the functional equivalent of "high water mark" on navigable streams and lakes. *Id.* As previously explained, *see* text accompanying notes 26–28 *supra*, the Court has always held that the definition of high water mark of navigable waterways is governed by federal law. Thus, *Borax* does not support the contention in *Hughes* that the right to future accretions to federally patented land is always a federal question.

Moreover, the Court in *Hughes* ignored, as did the Court in *Bonelli*, a precedent more directly in point—Joy v. St. Louis, 201 U.S. 332 (1906). *Joy* involved an action for ejectment of the defendant from lands created by accretion, which had attached to the plaintiff's federally patented riverfront land. The Court affirmed a dismissal for lack of jurisdiction holding that ownership of the accretive land was to be decided under state, not federal law. The Court held that the mere fact that the accretions attached to federally patented land did not produce a federal question since the accretions involved were clearly not a part of the land originally conveyed. *Id.* at 343. Thus, the only possible reading of *Hughes* which does not conflict with *Borax* or *Joy* is one which construes *Hughes* as deciding that federal law controls the ownership of accretions when the land is bordered by the "international sea" on an international boundary thesis. *See Hughes*, 389 U.S. at 293.

For further discussion of *Borax* in relation to *Hughes* and the problem of determining the "mean high tide" line, see Corker, *Where Does the Beach Begin, and to What Extent Is This a Federal Question*, 42 WASH. L. REV. 33, 54–72 (1966). *See also* Beck, *Hughes v. Washington: Some Federal Common Law in the Real Property Area*, 47 N.D.L. REV. 77 (1970).

37. *See, e.g.*, Mississippi v. Arkansas, 415 U.S. 302 (1974); Arkansas v. Tennessee, 246 U.S. 158 (1918).

38. U.S. CONST. art. III, § 2.

39. Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931). For discussion of the doctrines of accretion and avulsion, see notes 42 & 43 *infra*.

eral reclamation project. The project's purpose was to deepen and narrow the river channel so as to reduce evaporation losses. As the river was dredged, mud was piled on Bonelli's shore. The dredging process apparently stirred up large amounts of sediment, thereby facilitating the deposits on Bonelli's land. The result was the "re-emergence" of much of the land which had been gradually inundated by the Colorado's eastward movement between 1910 and 1938.[40]

It was not possible, however, to determine accurately to what degree the exposure of the Bonelli's land was natural rather than artificial. If the Colorado had dried up or moved gradually, the ownership question[41] would have been decided by the application of the accretion rule.[42] Thus, the land exposed would belong to Bonelli under Arizona law, the common law of most states and the federal law as understood prior to *Bonelli*. On the other hand, if the river's movement was determined to be sudden and noticeable, then the avulsion rule would apply and the property boundaries would remain unchanged.[43] Because it considered the movement avulsive, the Arizona

40. 414 U.S. at 316.

41. The question was of some consequence. Approximately 70 acres of the east half of the parcel was still covered by the river or was now in Nevada as a result of the river's movement and, therefore, not bound by the outcome of the Arizona action. But the disputed Arizona land consisted of approximately 150 acres of land formerly covered by the river. Moreover, the area surrounding the land had been improved and developed into a recreational area and had greatly increased in value. Petitioner's Brief at 49, Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

42. Accretion is the "process by which the area of owned land is increased by the gradual deposit of soil due to the action of a bounding river, stream, lake, pond, or tidal waters." 6 R. POWELL, THE LAW OF REAL PROPERTY ¶ 983 (1971). Thus, a riparian owner acquires whatever accretion attaches to his or her land, and the boundary is moved to accommodate this increase. Several rationales are offered for the doctrine. It permits the boundary to follow the stream bank, a desirable result since it allows land originally riparian to remain so, assuring the upland owners the advantage of access to the water. It also allows a body of water which constitutes a legal boundary to remain the boundary, even as it moves. In addition, as noted by the Court in *Bonelli*, it serves the function of compensating owners for any losses of land due to erosion by the river. 414 U.S. at 326. *See also* 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1219 (3d ed. 1939); Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ. L. REV. 315, 322–23 (1972).

As a general rule, if accretion is produced or hastened by artificial constructions, the doctrine still applies, providing the benefited owner is not responsible for the interference. Thus, in United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), the Ninth Circuit Court of Appeals held that erection of Hoover Dam did not alter application of the accretion doctrine because it was not erected for the purpose of causing accretions and was an insignificant factor in the process. *Accord*, Beaver v. United States, 350 F.2d 4 (9th Cir. 1965).

43. Avulsion may be defined as the sudden and violent removal of land by the water's action. In the case of a river, it may involve the stream suddenly and perceptibly abandoning its old channel. 4 H. TIFFANY, *supra* note 42, at § 1222. Avulsive shifts do not result in changes of boundaries; the old boundary, which in the case of

Supreme Court held that the boundaries did not change and that the State of Arizona owned the land in question.[44]

A. The Federal Question

In framing the issue as "not what rights the State accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine,"[45] the *Bonelli* Court appears to have treated the passage of title from the federal government to the state as a federal grant of the submerged land, much like the federal grant to Mrs. Hughes' predecessor in title in *Hughes v. Washington*.[46] In fact, the *Bonelli* Court refers to the transaction at statehood as a "grant to the States."[47] But is it truly a grant? The word "grant" seems to imply a choice on the part of the grantor to decide whether to convey the land at all. Although *Shively v. Bowlby*[48] supports the view that this choice existed as to private grantees *before* statehood, the choice disappeared upon admission of Arizona to the Union; the Court clearly held in *Coyle v. Smith*[49] that Congress is without authority to withhold from new states any power or aspect of sovereignty held by the original states.[50]

In addition, even if one accepts the Court's statement that Arizona received its land by a federal grant, under *Joy v. St. Louis*[51] a federal question does not arise merely because the grantee can trace title to a federal patent. In *Joy,* the Court dismissed for want of jurisdiction

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a river would be the old channel, remains the boundary. Nebraska v. Iowa, 143 U.S. 359 (1892). The rationale for the avulsion rule is that in fixing their boundary with reference to the water, the owners of the riparian land were aware of the probability that the boundary could change gradually over the years, but did not have in mind the possibility of a sudden and imperceptible change. 4 H. TIFFANY, *supra* note 42, at § 1222. In close cases, when it is difficult to determine whether the movement was perceptible and sudden, courts presume that the movement was by accretion or erosion, reasoning that it is easier to prove a sudden, visible change than a gradual, imperceptible one. *See* Hall v. Brannan Sand & Gravel Co., 158 Colo. 201, 405 P.2d 749, 750 (1965).

44. State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699, 703 (1971).

45. 414 U.S. at 319. The *Bonelli* Court quoted the same language from *Borax* that it had used in Hughes v. Washington, 389 U.S. 290 (1967), for the proposition that a federal court can determine the incidents of federal title. 414 U.S. at 320. This results from an incomplete reading of *Borax*. *See* note 36 *supra*.

46. *See* notes 35–36 and accompanying text *supra*.

47. 414 U.S. at 323.

48. 152 U.S. 1, 48 (1894).

49. 221 U.S. 559, 567 (1911).

50. *See* note 10 and accompanying text *supra*.

51. 201 U.S. 332 (1906).

where the issue was merely "whether the plaintiff is entitled to land formed by accretion, which has taken place many years since the patent was issued ...."[52] Thus, unless the issue "really and substantially involves a dispute or controversy respecting the validity, construction or effect"[53] of a federal patent[54] or act of Congress,[55] and the result of the case depends on this determination, there is no federal question upon which the Court can base its jurisdiction.[56]

Under *Joy*, a federal court's role is limited to determining the boundary at the time of the grant and before statehood. By holding that the Court has jurisdiction to decide the effects of post-patent movements of the river on the boundaries of federally granted land because the federal government is the source of title, the *Bonelli* Court has impliedly overruled *Joy* and created a new federal question of doubtful validity.[57]

B. The Federal Common Law Applied in Bonelli

1. The public purpose limitation to the state's title to submerged lands

The *Bonelli* Court delineated a public trust doctrine which limits the state's title to submerged beds. In short, the state's title is subject to a trust to protect public navigation, commerce, fishery and certain other public purposes such as conservation.[58]

52. *Id.* at 342.
53. Shulthis v. McDougal, 225 U.S. 561, 569 (1912).
54. United States v. Oregon, 295 U.S. 1, 28 (1935) (construction of grants by the United States is a federal not a state question).
55. Hopkins v. Walker, 244 U.S. 486, 489 (1917).
56. This doctrine was reaffirmed most recently in dicta in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). There the Court distinguished the case at bar from the general rule that "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Id.* at 676, *quoting* Shulthis v. McDougal, 225 U.S. 561, 570 (1912), *and citing* Florida C. & P.R. Co. v. Bell, 176 U.S. 321, 328–29 (1900); Joy v. St. Louis, 201 U.S. 332, 341–42 (1906). In *Oneida,* the assertion of federal controversy was held to depend upon "the not insubstantial claim that federal law now protects, and has continuously protected" the petitioner Indian tribe's possessory right to tribal lands. 414 U.S. at 677.
57. In Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), Shively v. Bowlby, 152 U.S. 1, 49 (1894), and *Borax,* the Court held that the United States conveyed fastland down to the high water mark on navigable bodies of water, as determined at the time of statehood. In *Bonelli,* the Court appears to have determined the boundary not at the time of statehood, but rather as affected by the movement of the Colorado River in years following.
58. 414 U.S. at 323 n.15. *See also* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

The public trust doctrine was first formulated in *Illinois Central R.R. v. Illinois*.[59] In that case, the Court held that a state could convey land beneath navigable waters *only* if such a conveyance would not frustrate the purpose of the public trust. Any conveyance of such property was deemed subject to revocation by the state if the public interest was impaired. The *Bonelli* Court, however, modified that doctrine by indicating that if a state no longer needs re-exposed lands to fulfill the public trust, the state may not keep the land:[60]

> [T]he advance of the Colorado's waters, divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently, the State, as sovereign, has no need for title.

Thus, the state's title to the land is defeasible in favor of the riparian owner when it is no longer submerged and no longer protects a public benefit. By this strange result, the federal government, through its courts, retains a measure of control over state-owned submerged land, inconsistent with the equal footing doctrine and the Court's reasoning in *Coyle v. Smith*.[61]

The Court also stated in *Bonelli* that "[t]he State's title is to the '[river]bed as a bed' . . . ."[62] This language, read in context, appears designed to support the denial of the "windfall" which would accrue to Arizona by reason of the Arizona Supreme Court's finding that the re-emergence had been avulsive under state law.[63]

2. *The new federal common law of accretion*

In discussing the applicable federal law, the *Bonelli* Court detailed the generally accepted views of the accretion and avulsion doctrines and their underlying rationales. The applicability of these doctrines to particular fact situations is obscured, however, by the Supreme Court's

59. 146 U.S. 387, 452–53 (1892).
60. 414 U.S. at 323–24.
61. 221 U.S. 559 (1911); *see* text accompanying notes 10 & 50 *supra*.
62. 414 U.S. at 322 (footnote omitted).
63. Indeed, the Court stated:
Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land identifiable as part of his original parcel. In that sense, we have embraced the re-emergence concept.
Id. at 330 n.27.

equal footing analysis.

The federal law of accretion, the Court stated, must be applied with a view to the limited nature of the state's rights in the riverbed. Arizona holds title to the bed of navigable streams "in trust for the public purposes of navigation and fishery,"[64] as well as to protect the public's right to enjoyment of the watercourse. Under the Court's analysis, the equal footing doctrine limits Arizona's interest in the land to the protection of those public rights. Thus, if reliction exposes and dries the land and there is no public benefit to be protected, the state's retention of the land can, according to the Court, only result in a windfall not intended by the equal footing doctrine. In essence, in order to avoid awarding this "windfall" to the state, the Court was compelled to reject the Arizona court's holding that the change was avulsive since application of the avulsion doctrine would leave Arizona with the former river bed.[65] The Court ruled that the doctrine of accretion applies because the accretion rule supports the result favored by the Court.[66] By this result-oriented and cavalier treatment of the doctrines of avulsion and accretion, the Court effectively gutted the traditional distinctions between the two doctrines. Before *Bonelli,* even a federal court was required to determine factually whether the movement of the river was slow and imperceptible or rapid and visible. If it were the the former, the movement was accretive; if the latter, the movement was avulsive. In reversing the factual finding of the Arizona Supreme Court that the movement was avulsive, and in refusing to apply the traditional factual method[67] of distinguishing between the two doctrines, the *Bonelli* Court effectively denied the states power "to decide [a] controversy under [that] law . . . in a way that [the Court] might think is wholly wrong."[68] The new doctrine comprehends a type of ad hoc interest balancing whereby windfalls, public purposes, traditional principles of property law and possibly other factors heretofore unknown are weighed and applied as the Court sees fit.[69]

64. *Id.* at 321–22, *quoting* Hardin v. Jordan, 140 U.S. 371, 381 (1891).
65. *See* note 43 *supra.*
66. 414 U.S. at 328–29.
67. *Id.* at 330 n.27. For earlier decisions applying traditional accretion rules, see County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).
68. 414 U.S. at 337 (Stewart, J., dissenting).
69. In addition, if the application of federal law is based on the federal nature of the project or upon the fact that commerce clause powers were executed, it is at least arguable that Congress, not the federal courts, should decide the consequences of any river movement produced by the project.

III. THE EFFECTS OF *BONELLI*

A. The Future of the Equal Footing Doctrine

The Court, by holding that federal law governs a dispute concerning ownership of re-emerged land along the Colorado River, has virtually emasculated the equal footing doctrine. As dissenting Justice Stewart noted, the Court's source of title analysis would not work in the original 13 states or Texas, where the federal government is not the source of title.[70] In short, the original 13 states and Texas have the right to decide the legal consequences of the movement of a navigable stream, but Arizona and 35 other states do not.[71] This result, Stewart noted, is clearly contrary to the theory and purpose of the equal footing doctrine.

B. The Effects on Substantive Property Rights

The wisdom of our federal system, in which state substantive law is presumed to govern absent constitutional preemption,[72] Congressional action or interstitial federal adjudication,[73] becomes most apparent when federal courts ignore the delicate balance of that system to "create" substantive federal law.

After *Bonelli,* federal law now intrudes uncertainly upon property law in all but the original states and Texas.[74] The *Bonelli* Court rea-

70. 414 U.S. at 336.

71. The upshot of the Court's decision is that the 13 Original States are free to develop and apply their own rules of property law for the resolution of conflicting claims to an exposed bed of a river, while those States admitted after the Constitution's ratification must under today's decision knuckle under to this Court's supervisory view of "federal common law."

Id. at 336 (Stewart, J., dissenting).

72. *See* note 25 *supra.*

73. Federal law is interstitial in nature:

It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the same way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 471 (2d ed. 1973).

74. A Washington case analogous to *Bonelli* involved the lowering of Lake Washington in the early 1900's. In *Bilger v. State,* 63 Wash. 457, 116 P. 19 (1911), the Washington Supreme Court held that upland owners had no right to the newly exposed land resulting from the lowering of the lake in connection with a federal project. Since Washington's source of title to the lakebed was the federal government, under the *Bonelli* rule federal law would have controlled. The manner in which the *Bonelli* Court balanced interests leads one to conclude that, had the facts in *Bilger* been before the *Bonelli* Court, the upland owners, not the State of Washington, would

soned that title to the re-exposed land must be in the federal grantee, or his or her successor, "[b]ecause of the limited interest of the State in the former riverbed."[75] Although the warranty deed which conveyed the land to Bonelli included nearly all the re-emerged land in its description,[76] arguably both grantor and grantee assumed that only the remaining 60 acres of dry land were being conveyed. Moreover, it seems unfair to give the land to Bonelli since, in 1950, it could have purchased only the 60 acres because the submerged land was owned by Arizona as part of a bed of a navigable river. In brief, the warranty deed to Bonelli included rights which were neither envisioned by the parties to the transaction nor allowable under the law at the time of purchase. The Court's decision in *Bonelli* necessarily clouds property titles in the great majority of states wherever a navigable river has changed course; the ownership of any land affected by the wanderings of a navigable river will be determined under the *Bonelli* rule of federal common law interest balancing. In the future, every federal project involving a navigable waterway may result in a change of ownership.

Although the *Bonelli* Court specifically refrained from determining the law applicable to an action between private parties,[77] the state's title in a riverbed is such that it can be conveyed to a private owner.[78] Since Arizona cannot convey any greater title than it has, and since its title is governed by federal law, it follows that the federal law created in *Bonelli* must govern private disputes where one party can trace title to the state.[79] If, in fact, federal law does *not* apply to disputes between private individuals tracing their title to the state, then in the future, in order to avoid the application of *Bonelli,* a state should convey the land to a private individual. Such a circumvention of *Bonelli,* however, would totally vitiate the rule it purports to adopt.

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probably have received title to the land exposed in order to avoid awarding the state any windfall. Since Washington has a great deal of federally-patented land fronting on navigable bodies of water, broad application of *Bonelli* would have far-reaching impact on this state's property law. *Bilger* is distinguishable in that none of the land in dispute had ever been dry land. The lake's level dropped for the first time as a result of the canal project. Thus, there were no re-emergence equities with which to deal. But the respondents in that action were federal grantees. *Id.* at 463, 116 P. at 22.

75. 414 U.S. at 330 n.27.

76. Appendix to Petition for Writ of Certiorari at 14, Bonelli Cattle Company v. Arizona, 414 U.S. 313 (1973).

77. 414 U.S. at 330 n.27.

78. *See* Packer v. Bird, 137 U.S. 661 (1891); Shively v. Bowlby, 152 U.S. 1 (1894).

79. This result was noted by Justice Stewart in dissent. 414 U.S. at 332 n.1.

Yet, the confusion surrounding conveyance of state lands to private parties exists in a more legitimate sense. Many states have already conveyed and will continue to convey certain interests in submerged lands, such as mineral leases, for legitimate purposes not impairing the public trust. If the submerged land on Bonelli's parcel had been subject to an oil lease,[80] would its re-exposure divest the private lessee? Since the state's interest under *Bonelli* is limited to the riverbed as bed, then the lessee might lose its investment, and a riparian in the position of Bonelli would be unjustly enriched.

These and other questions raised by *Bonelli* will give rise to much litigation. Undoubtedly, natural and artificial processes have exposed many areas of submerged tide and shorelands and left them situated above receding high water marks. State grantees whose titles to such land have been clouded will attempt to clear their title by court action. Upland owners whose water access has been cut off by receding water and dredging spoil piled along the shore, will see in *Bonelli* a chance to increase their ownership.

Moreover, states have little power over agencies which alter river movement. Neither nature nor the United States Army Corps of Engineers, which is responsible for dredging navigable channels,[81] is amenable to state control.

IV. CONCLUSION

The *Bonelli* decision represents an overly broad and unjustifiable expansion of federal law into the real property area. It clouds the title of nearly all property riparian to navigable waters in all but the original states and Texas, resurrects the old ghost of pre-*Erie* federal common law and the problems that spectre involved, and destroys the equality between states necessary for the Union by undercutting the equal footing doctrine. It has done all this without a solid constitutional basis.

In the final outcome, the Court should limit *Bonelli* to its peculiar facts, as it apparently has *Hughes v. Washington*.[82] The application of *Bonelli's* unusual rationale in future cases would lead to great prob-

80. *See* United States v. Utah, 283 U.S. 64 (1931), involving oil leases along the Colorado and other rivers in Utah.
81. 33 U.S.C. §§ 540, 603(a) (1970).
82. 389 U.S. 290 (1967).

lems, with few corresponding benefits. Justice Brandeis was correct: No clause in the Constitution confers upon the federal courts the power to declare the substantive rules of common law applicable in a state; any interference with either the legislative or judicial action of the states, except as permitted by the Constitution, is "an invasion of the authority of the state, and, to that extent, a denial of its independence."[83]

Richard A. Hopp

83. Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938).