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Murky Waters: The Supreme Court's Decision on Navigability and its Implications on Judicial Power

PPL Montana, LLC v. Montana¹

I. INTRODUCTION

Determining whether or not a river is navigable sounds like it should be a straightforward question, one that hardly seems worthy of consideration by the Supreme Court. However, that is exactly what the Court was tasked to consider in a recent decision in terms of how navigability applies to riverbed title.² The Court held that the test for navigability with regards to riverbed title should be on a segment-by-segment basis, which seems self-explanatory on its surface.³ However, the Court's reasoning goes beyond just solidifying the proper analysis for riverbed title. By including extensive research that was absent in the record, and by remanding back to a state supreme court with only one possible outcome, the Court deviated from its normal handlings of state supreme court appeals and made an outlier decision that has the potential of becoming a controversial trend.

II. FACTS AND HOLDING

The controversy in *PPL Montana, LLC v. Montana* arose over a dispute as to who owned sections of riverbeds on three rivers in Montana: the Upper Missouri, Madison, and Clark Folk Rivers.⁴ PPL, a limited liability power company based in Delaware, owns ten facilities on these rivers, all of which have been at their current locations for many years, some for over a century.⁵ The dams on the Upper Missouri and the Madison are called the Missouri-Madison project, and the facility on the

¹ 132 S. Ct. 1215 (2012).

² *Id.* at 1222.

³ *Id.* at 1230.

⁴ *Id.* at 1222.

⁵ *Id.* at 1225.

Clark Folk facility is called the Thompson Falls project.⁶ All the facilities serve Montana residents and businesses.⁷

The Court goes through a rather extensive breakdown of the histories of these three rivers, citing many materials that were not included in the record or any of the briefs submitted to the Court.⁸ Among the additional materials the Court references are multiple journals, letter, and diaries of Lewis and Clark as well as other historical sources which detail Montana's history.⁹ Justice Kennedy breaks down the topography of each river in what he calls "somewhat more detail."¹⁰ His first and most in-depth analysis goes into the history and topography of the Missouri River, detailing how it has "shifted and flooded often" and "contained many sandbars, islands, and unstable banks."¹¹ His historical research goes back to a newspaper from 1868, which he cites as describing the Missouri as "one of the most variable beings in creation" and as "inconstant [as] the action of the jury."¹² He also relies extensively on the journals of Lewis and Clark, pointing to Lewis' descriptions of many rocky and rapid-filled segments of the river.¹³ He cites to one specific passage where Lewis describes the Great Falls segment of the river as "a constant succession of rapids and falls," in which buffalo "were swept over the cataracts in considerable quantities and were instantly crushed."¹⁴ Justice Kennedy then turns his attention to the Madison River, noting how it was named such by Lewis and Clark for former Secretary of State James Madison.¹⁵ He notes how the river flows west out of the Rocky Mountains and then

⁶ *Id.* Both projects are licenses by the Federal Energy Regulatory Commission and were acquired by PPL from its predecessor, the Montana Power Company *Id.*

⁷ *Id.*

⁸ *See id.* at 1222-25.

⁹ *Id.*

¹⁰ *Id.* at 1222.

¹¹ *Id.*

¹² *Id.* (alteration in original)(internal quotations omitted).

¹³ *Id.* at 1223-24.

¹⁴ *Id.* at 1224.

¹⁵ *Id.*

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joins in Three Forks, Montana to form “the Upper Missouri.”¹⁶ Finally, he breaks down the Clark Fold River, describing it as “one of the wildest and most picturesque streams in the West, marked by many waterfalls and boxed gorges.”¹⁷ Justice Kennedy cites back to the Lewis and Clark journals, noting that they did not actually try to navigate the river because the lack of salmon made “Lewis believe there must be a considerable fall,” which it turns out he was right about.¹⁸ Kennedy introduced much of this background information through his independent research; very little of it was included in briefs or oral arguments submitted by the parties.¹⁹

Before this case, the State of Montana had never sought compensation for use of the riverbeds, and PPL paid rent to the United States.²⁰ The State of Montana was well aware of the facilities' existence, and many state agencies had even participated in the federal licensing proceedings for the facilities.²¹ The State never sought any compensation and PPL and its predecessor never paid any compensation for the ongoing use of the riverbeds.²²

¹⁶ *Id.*

¹⁷ *Id.* (quoting FED. WRITERS' PROJECTS OF THE WORKS PROGRESS ADMIN., IDAHO: A GUIDE IN WORD AND PICTURE 230 (2d ed. 1950)) (internal quotations omitted).

¹⁸ *Id.* (quoting H. FRITZ, THE LEWIS AND CLARK EXPEDITION 38-39 (2004)) (internal quotations omitted).

¹⁹ While there is some reference to the Lewis and Clark Journals in the respondent's brief, Kennedy cites to sections not referenced, as well as several encyclopedias and travel guides found nowhere in the record submitted to the Court. *Compare id.* at 1222-25 (citing authorities not in the record with respect to the history of the three rivers), *with* Brief for Respondent at 8-15, PPL Montana, v. Montana, 132 S. Ct. 1215 (2012) (No. 10-218), (2011 WL 5136226) at *8-15 (discussing limited reliance on journals and other historical materials as authority), *and* Transcript for Oral Argument, PPL Montana v. Montana, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 6077583 (stating no reference to the authorities the Court cites for historical background).

²⁰ PPL, 132 S. Ct. at 1225.

²¹ *Id.*

²² *Id.*

But, in 2003, parents of schoolchildren brought suit against PPL in the United States District Court for the District of Montana, alleging that the riverbeds underneath the facilities were state owned and part of the school trust lands.²³ The State later joined the suit, seeking compensation for unpaid rent for the first time, but the suit was dismissed for lack of diversity jurisdiction.²⁴ In response, PPL and two other power companies sued the State of Montana in the First Judicial District Court of Montana, seeking a declaratory judgment against the State in an attempt to bar the State from seeking compensation for the use of the specific riverbeds in question.²⁵ The State counterclaimed, seeking a declaration that it owned the riverbeds under the equal-footing doctrine, and therefore is entitled to rent for their previous and continued use by PPL.²⁶

The First Judicial District Court of Montana granted summary judgment for Montana as to navigability for purposes of determining title, deciding that Montana owned the riverbeds.²⁷ The court ordered PPL to pay the State \$40,956,180 in rent for using the riverbeds between 2000 and 2007.²⁸

On appeal, the Montana Supreme Court, in a divided decision, affirmed the trial court's decision.²⁹ The court applied a liberal interpretation of the navigability test and found that while certain stretches of the rivers were not navigable and required overland portage³⁰, these

²³ *Id.*

²⁴ *Id.*

²⁵ *See id.* The 10 PPL facilities are distributed as follows on the three rivers: the Upper Missouri River (7 dams), the Madison River (2 dams), and the Clark Fork River (1 facility). *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1225-26.

²⁸ *Id.* at 1226. Any lease for future periods and any potential rate was apparently left up to discretion of Montana Board of Land Commissioners. *Id.*

²⁹ *Id.*

³⁰ Portage is defined as "the carrying of boats or goods overland from one body of water to another or around an obstacle (as a rapids)." *Portage Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/portage>.

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were just short interruptions insufficient to find non-navigability as a matter of law.³¹ The court held that attempting to assess navigability of the particular segment of the river, rather than the river as a whole, had “limited applicability.”³² The court extensively relied upon evidence of present-day use of the Madison River and found that it was navigable as a matter of law at the time of statehood.³³ In his dissent, Justice Rice stated that the majority erred in not applying the “section-by-section” approach to determining navigability, and also erred in rejecting PPL’s evidence that showed the sections of the rivers in questions were “at the time of statehood, non-navigable.”³⁴

In its petition for certiorari, PPL argued there were contested issues of material fact undermining nearly all of the Montana Supreme Court’s findings, relying on Justice Rice’s dissent for much of its support.³⁵ PPL did not seek summary judgment for itself; it only contended that the Montana Supreme Court’s grant of summary judgment for the State was improper due to genuine issues of material fact.³⁶

The Supreme Court granted certiorari and reversed and remanded the case for further proceedings.³⁷ In an opinion written by Justice Kennedy the majority held: (1) the navigability test under the equal footing doctrine should be applied considering rivers on a segment-by-

³¹ PPL, 132 S.Ct. at 1226.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *See generally* Petition for Writ of Cert. At 16-38, PPL Montana v. Montana, 132 S. Ct. 1215 (2012) (No. 10-218), (2011 WL 3236721), at *17-38 (arguing that the Montana Supreme Court decision ignores established navigability precedent and principles of federalism).

³⁶ *See id.* at 17-18.

³⁷ PPL, 132 S. Ct. at 1226, 1235.

segment basis; (2) the analysis of navigability should be at time of statehood; and (3) the Great Falls Reach was not navigable.³⁸

III. LEGAL BACKGROUND

Several legal principles control the outcome of this case, beginning with the navigability doctrine.³⁹ English common law established that States as sovereigns, hold title to riverbeds under navigable waters.⁴⁰ English law distinguished between tidal waters, which were considered royal rivers and nontidal waters, which were considered public highways.⁴¹ The Crown held title to the riverbeds of royal rivers, but the public retained the right of passage and of fishing.⁴² As for public highways, the public had the same right of passage, but the title to the riverbeds was generally privately owned.⁴³ American law adopted this common law rule for riverbed title, but later developed a rule of “navigability in fact.”⁴⁴ States therefore held title to factually navigable waters within their borders.⁴⁵

The state riverbed title rule assumed constitutional significance under the equal-footing doctrine.⁴⁶ The Court declared in *Martin v. Lessee of Waddell* that for the original thirteen states, all the people of each individual state “hold the absolute right to all their navigable waters, and the soils under them” based on principles of sovereignty.⁴⁷ The Court expanded this principle to all states later admitted to the Union as all states

³⁸ *Id.* at 1229, 1232, 1233.

³⁹ *See id.* at 1226-29.

⁴⁰ *Id.* at 1226.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1226-27.

⁴⁴ *Id.* at 1227.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842)). These rights were subject to powers granted and rights surrendered by the Constitution. *Id.*

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are coequal sovereigns under the Constitution.⁴⁸ This precedent is the foundation for the equal-footing doctrine, under which the state's title is not granted "by Congress but by the Constitution itself."⁴⁹ The equal-footing doctrine applies to a title so that, upon statehood, a State gains title to beds of waters then navigable within its borders.⁵⁰ Thus, the United States retains title to any non-navigable waters and can transfer or license those waters at its discretion.⁵¹

The Court laid out the navigability test in *The Daniel Ball*, a case that addressed federal power in regulating navigation.⁵² In setting up a new rule for determining navigability, the Court held that if a river is "navigable in fact" then it must be regarded as a public navigable river.⁵³ The Court defined "navigable in fact" as any river that is or can be used as "a continued highway over which commerce is or may be carried on ... in the customary modes in which such commerce is conducted by water."⁵⁴

United States v. Utah applied these foundational principles and laid out the rest of the legal principles in the case at hand.⁵⁵ In *Utah*, the United States brought suit against the state of Utah in order to quiet title to certain portions of the Colorado River.⁵⁶ The U.S. claimed that the rivers were not navigable for purposes of determining title and that Utah was executing numerous leases granting rights and privileges that it did not have.⁵⁷ Utah attempted to show that the waters were in fact navigable and

⁴⁸ *PPL*, 132 S. Ct. at 1227.

⁴⁹ *Id.* (citing *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

⁵⁰ *PPL*, 132 S. Ct. at 1227-28.

⁵¹ *Id.* at 1228 (citing *United States v. Utah*, 283 U.S. 63, 75 (1931)).

⁵² *The Daniel Ball*, 77 U.S. 557, 563 (1871); *See also* *PPL Montana*, 132 S. Ct. at 1228.

⁵³ *The Daniel Ball*, 77 U.S. at 563; *See also* *PPL Montana*, 132 S. Ct. at 1228.

⁵⁴ *The Daniel Ball*, 77 U.S. at 563.

⁵⁵ *See generally* *United States v. Utah*, 283 U.S. 64 (1931).

⁵⁶ *See id.* at 71.

⁵⁷ *Id.* at 71-72.

that the State therefore was granted title upon admission to the Union.⁵⁸ The Court referred to the navigability test established in *The Daniel Ball*, but pointed out that “the controversy relates only to the sections of the rivers which are described in the complaint.”⁵⁹ The Court said that even in a generally navigable river, it must be determined “how far navigability extends” and that “the exact point at which navigability may be deemed to end ... should be determined precisely.”⁶⁰ The Court also emphasized that the question of navigability is assessed as of the time of statehood.⁶¹ Applying these principles, the Court determined that the Colorado River was navigable for roughly its first 4 miles, non-navigable for roughly the next 36 miles, and then navigable for its remaining 149 miles.⁶²

Another legal principle that bears discussion is the Court’s extensive review of evidence included in and outside of the record.⁶³ Through the doctrine of judicial notice, the Court may make findings, either on its own or upon the motion of either party, of any adjudicative fact that is “not subject to reasonable dispute” because it either: “(1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”⁶⁴ This rule concerns only “adjudicative facts” and not “legislative facts.”⁶⁵ Black’s Law Dictionary defines an “adjudicative fact” as “a controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties.”⁶⁶ Put more simply, adjudicative

⁵⁸ *Id.* at 76-77.

⁵⁹ *Id.* at 77, 90.

⁶⁰ *Id.* at 90.

⁶¹ *Id.* at 75.

⁶² *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1229 (2012) (citing *United States v. Utah*, 238 U.S. 64, 73-74, 79-81, 89 (1931)).

⁶³ *See, e.g., id.* at 1222-25.

⁶⁴ Fed. R. Evid. 201(b)(1)-(2).

⁶⁵ *Id.*

⁶⁶ *FACT*, Black’s Law Dictionary 275 (9th ed. 2009).

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facts are “simply the facts of the particular case.”⁶⁷ Generally, adjudicative facts are established through the introduction of evidence from witness testimony and document submission.⁶⁸ If certain facts are seen as virtually indisputable, the process of introducing the evidence can be “dispensed with as unnecessary,” although a “high degree of indisputability is the essential prerequisite.”⁶⁹

The Court's treatment of a State Supreme Court decision is the last issue that bears discussion.⁷⁰ The Supreme Court has jurisdiction over a decision of a state supreme court upon issues of the constitutionality of state statutes, or as in this case, upon issues where “any title, right, privilege, or immunity is specially set up or claimed under the Constitution.”⁷¹ The Montana Supreme Court affirmed the trial court's granting of summary judgment, which requires “no genuine dispute as to any material fact” which entitles the movant to “judgment as a matter of law.”⁷² To create a genuine issue of material fact, the non-moving party must “set forth facts showing that there is a genuine issue of material fact at trial.”⁷³ Upon review, the Supreme Court must determine whether the non-movant has presented “affirmative evidence in order to defeat a properly supported motion for summary judgment.”⁷⁴

IV. INSTANT DECISION

The Supreme Court granted certiorari to review the decision of the Montana Supreme Court.⁷⁵ The Court had to determine whether the

⁶⁷ Fed. R. Evid. 201(a) advisory committee's note.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ PPL Montana, LLC. v. Montana, 132 S. Ct. 1215, 1235 (2012).

⁷¹ 28 U.S.C. 1257(a) (2013).

⁷² PPL, 132 S. Ct. at 1219; Mont. R. Civ. P. 56(c)(3).

⁷³ Mont. R. Civ. P. 56(e)(2).

⁷⁴ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

⁷⁵ PPL, 132 S. Ct. at 1226.

Montana Supreme Court correctly applied the navigability test to the river segments in question.⁷⁶

The Court analyzed the Montana Supreme Court's application of the equal footing doctrine, the navigability test, and the issue of evidence of present-day use to the case at hand, ultimately finding the Montana Supreme Court used an incorrect interpretation of the equal-footing doctrine.⁷⁷ The Court said that when determining riverbed title, the river is to be considered on a segment-by-segment basis, not as a whole as the Montana Supreme Court did.⁷⁸ The Court cited cases that established this as precedent.⁷⁹ It explained that sovereign ownership of navigable riverbeds keeps private owners from altering the riverbeds in order to interfere with the public's right to use the waters as highways for commerce.⁸⁰ Giving States title to navigable riverbeds reduces the possibility of a conflict between private and public interests.⁸¹ Because segments of rivers that were non-navigable at the time of statehood do not allow for commerce, there is no reason for States to hold title to those segments under the equal-footing doctrine.⁸² The Court also pointed to practical reasons for the segment approach, such as the varying physical conditions of long rivers, such as the Missouri, which runs over 2,000 miles including "mountains, canyons, waterfalls, rapids, and sandy plains."⁸³

The Court also found error in the Montana Supreme Court's holding that necessity of portage does not undermine navigability.⁸⁴ The Court says that the Montana Supreme Court incorrectly relied on the

⁷⁶ *Id.* at 1219.

⁷⁷ *Id.* at 1229.

⁷⁸ *Id.* at 1229-1230.

⁷⁹ *Id.* See *United States v. Utah*, 283 U.S. 64, 77 (1931), *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 85 (1922).

⁸⁰ *PPL*, 132 S. Ct. at 1230.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1231.

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Court's decision in *The Montello*, which pertained to navigability for purposes of determining whether the Federal Government could regulate boats upon the waters, not for purposes of determining title.⁸⁵ In fact, the Court found that portage demonstrates the need to bypass a particular stretch of river because it is then actually non-navigable in fact.⁸⁶ The Court applied the proper rule to the Great Falls stretch, which the Montana Supreme Court found navigable, and found that the necessity of portage defeated navigability for title purposes in relation to that stretch.⁸⁷ The Court went on to say that there was a significant likelihood that some of the other stretches fail the navigability test for the purpose of determining title.⁸⁸ The Court did not go so far as to actually determine navigability for the remaining segments, but indicated that upon remand, the lower courts should assess the relevant evidence in light of the above-mentioned principles.⁸⁹ The Court again points out that the varying conditions allow for an easier means in determining the beginning and ending points of navigability.⁹⁰

The Court found that the Montana Supreme Court further erred in relying on present-day recreational use of the Madison River.⁹¹ The Court clarified that such evidence may be considered, but only insofar as showing that the river in question could sustain the kinds of commercial use that may have occurred at the time of statehood.⁹² The Court explained that navigability must be assessed at the time of statehood, and concerns the rivers usefulness for trade and travel, not other purposes.⁹³

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1232.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1233

⁹⁰ *Id.* at 1230.

⁹¹ *Id.* at 1233.

⁹² *Id.*

⁹³ *Id.*

Because of the several misinterpretations regarding the equal-footing doctrine, the segment-by-segment test for navigability, and the reliance on present day recreational use, the Court held that the Montana Supreme Court's decision should be reversed and remanded for further proceedings not inconsistent with their opinion.⁹⁴

V. COMMENT

The Court's decision in *PPL Montana, LLC v. Montana* has several interesting aspects worthy of discussion. The holding's clarification of precedent on the finding of navigability for riverbed title purposes goes a long way towards solidifying property rights in the future with factually similar cases, as well as clearing up what the specific navigability test should be depending on the inquiry at issue. But, far more controversial is the process the Court used to arrive at its holding by performing extensive research which was not included in the record. The Court seems to have overstepped its judicial notice rights by using evidence not offered to it as a means to reach the holding it desired. The Court also set a dangerous precedent by actually making a determination of the navigability of the Great Falls stretch. While this is apparently the correct holding, the fact that the Court made the holding itself takes away any discretion of the Montana Supreme Court to make its own holding and can lead to an improper broadening of the highest court's powers.

A. *The Court's Distinction on Precedent and Its Affect on Property Disputes and Public Access*

In making its decision in *PPL Montana*, the Court made sure to clarify the distinctions between the holdings in *United States v. Utah* and *The Montello*. The Court emphasizes that the holding in *Utah* is the rule to follow, and that *The Montello* applies to a completely different type of inquiry all together.⁹⁵ The distinction comes down to the difference between an inquiry into navigability for purposes of determining title to

⁹⁴ *Id.* at 1235.

⁹⁵ *Id.* at 1230-32.

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riverbeds, and an inquiry into determining whether the federal government can regulate boats upon a specific body of water. The Court correctly held that the proper test for determining navigability in regards to title was demonstrated in *Utah*, and that the Montana Supreme Court simply misapplied the rule.⁹⁶

The segment approach to determining navigability is the better approach for several reasons. Primarily, by only giving States the rights to specific segments of waters that were navigable at the time of statehood, the Court is able to insure that private owners are not building obstructions or improvements which block the public's right to use those waters as highways for commerce. States are able to make sure that navigable waters remain that way, but the states are not given more land rights than they originally had at the time of statehood. The Court did a good job in balancing the many factors at play, from states' rights to the public's right to usage of public waters, while still sticking to precedent and weeding out any potential legal loopholes for the contestation of riverbed title rights in the future.

The Court's clarification of the rule from *The Montello* also cleared up any issues on the impact of portage in an analysis of navigability.⁹⁷ In *The Montello*, the Court was determining whether the Colorado River was a "navigable water of the United States" for purposes of determining whether boats upon it could be regulated by the federal government.⁹⁸ In that case, the Court correctly concluded that the necessity of portage did not defeat a finding of navigability because the necessity of portage does not preclude a river from being "part of a channel of interstate commerce."⁹⁹ By contrast, when analyzing segments of a river's navigability for title purposes, the test is whether the segment

⁹⁶ *Id.* at 1230.

⁹⁷ *Id.* at 1231.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1232.

of the river is navigable in fact.¹⁰⁰ By definition, if the segment of the river requires portage, then it is not navigable in fact.¹⁰¹

This distinction is important for a few reasons. First, it keeps consistency with prior rulings on the issue of title of riverbeds, a consideration that is important to property owners. It would be unwise for the Court to change an established property rule upon which people have relied. The Court does not want to unintentionally cause heaps of litigation because it changed centuries old precedent about who holds title to certain types of riverbeds. Second, by reestablishing precedent, the Court keeps states from attempting to gain title to lands they did not originally have title to upon admission to the Union. While States must retain their powers as sovereigns, checks upon their power are equally important. This aspect of the Court's holding, while not very controversial, is still important as it clears up many of the previously confused legal principles in determining which navigability test should be used in which situation – navigability for purposes of determining riverbed title versus purposes of determining whether the federal government can regulate boats upon the waters in question.

B. The Court's Approach to Evidence Not Included in the Record or Briefs

An interesting aspect of the Court's approach to deciding this case comes in its analysis of many materials not included in the record. Justice Kennedy goes into the extensive history of all the rivers in question, and uses seemingly obscure materials such as the journals and letters of Lewis and Clark from their expedition west early in the history of the United State.¹⁰² Generally, in determining whether federal issues were properly decided in a case, the Supreme Court will stick to the record in an attempt to apply the law correctly to the case it has decided to adjudicate.¹⁰³ The

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1222-25.

¹⁰³ Thomas W. Merrill, *Opinion Analysis: Montana Dunked on Riverbeds*,

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Court is ordinarily only supposed to correct misapplication of federal law by lower courts, but here the Court performed independent research, submitting what it found to be “adjudicative facts” which were not included in the record by submission from either party.¹⁰⁴ The doctrine of judicial notice allows the Court to, on its own, make findings of adjudicative facts.¹⁰⁵ However, Justice Kennedy uses this power to the limit, instituting facts into the record without which the Court’s holding probably would not have the same solid foundation.¹⁰⁶ Much of the evidence offered in the briefs and oral arguments would probably have pointed to a finding of non-navigability, especially for the Great Falls stretch, even without the additional materials cited by Justice Kennedy. The implications of the Court’s independent research in *PLL Montana* set a dangerous precedent for future cases when the Court uses its discretion to introduce new evidence through the doctrine of judicial notice.

There are several types of cases where this kind of additional research by the Court would not only be improper, but could completely turn the outcome of the case in the opposite direction it would have originally been found. This additional research by the judges could sometimes simply be to better acquaint themselves with the subjects upon which they are tasked to rule. Because judges are normal people prone to biases and opinions, such research could lead them to believe a case should be decided a certain way, and they may use judicial notice as a means to introduce hand-picked facts into the case which will sway the decision in one way or the other.

Kenneth Culp Davis goes into some examples of these dangers.¹⁰⁷ In *Jay Burns Baking Co. v. Bryan*, Justice Brandeis went far outside the

SCOTUSBLOG1 (Feb. 23, 2012, 11:03 AM), <http://www.scotusblog.com/2012/02/opinion-analysis-montana-dunked-on-riverbeds>.

¹⁰⁴ *Id.*; Fed. R. Evid. 201(a)-(b).

¹⁰⁵ Fed. R. Evid. 201(a)-(b).

¹⁰⁶ *See generally PPL*, 132 S.Ct. at 1222-32.

¹⁰⁷ Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative*

record in an attempt to better learn “the art of break-making and the usages of the trade.”¹⁰⁸ In his opinion, Justice Brandeis references numerous “books, articles, reports of committees, testimony before congressional committees ... all in utter disregard of any rules of evidence that would control adjudicative facts.”¹⁰⁹ The requirement behind the use of judicial notice for adjudicative facts is that the fact “is not subject to reasonable dispute” because “it is generally known within the trial court’s jurisdiction; or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”¹¹⁰ Davis has a real problem with this, and many other previous uses of the judicial notice doctrine.¹¹¹ He points out, and it is hard not to agree, that the “intricacies of bread-making” are hardly generally-known within any kind of jurisdiction, and that “the accuracy of the sources – books, articles, reports, letters, testimony – is anything but indisputable.”¹¹² Davis further explains what a slippery slope conducting this extensive independent research can be for judges.¹¹³ He believes that “judge-made law would stop growing if judges ... were forbidden to take into account the facts they believe, as distinguished from facts which are clearly within the domain of the indisputable.”¹¹⁴

The same kind of concerns can easily be applied to the case at hand. Just like the “intricacies of bread-making” are not generally known facts, neither is the topography of any of the rivers in question, much less its topography at the time of statehood. Now, much of what Justice Kennedy introduces into the record could arguably be considered to be

Process, 55 HARV. L. REV. 364, 403-407 (1942).

⁹⁹ *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924).

¹⁰⁹ Davis, *supra* note 107, at 404.

¹¹⁰ Fed. R. Evid. 201(a)-(b).

¹¹¹ Davis, *supra* note 107, at 404-406.

¹¹² *Id.* at 405.

¹¹³ Fed. R. Evid. 201(a) advisory committee’s note (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 82 (1964)).

¹¹⁴ *Id.*

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“from sources whose accuracy cannot be reasonably questioned.”¹¹⁵ Justice Kennedy cited Lewis and Clark journals, several encyclopedias, different newspapers and historical guidebooks in his discussion of the topography of each river.¹¹⁶ However, this is a dangerous precedent to set, especially with the use of the Lewis and Clark’s journals and letters. Where are justices to draw the line when it comes to use of judicial notice with journals or letters of other historical figures, especially those with less significance than Lewis and Clark? By incorporating all of this independent research on his own, Justice Kennedy has made it possible for judges at all levels to feel they have more discretion than they do (or should) in terms of conducting their own factual research on materials not included in the record. There are many types of cases where this could present a real problem. Following this logic, judges could begin looking for their own experts in criminal cases; they could attempt to obtain medical records on their own in negligence or liability cases; or they could, like Justice Brandeis did, conduct research on the plight of a particular profession of people. This type of proceeding could possibly lead to the judges’ viewpoints on the matter being introduced into the record as adjudicative facts through judicial notice. The Court must be careful how it goes from here so that it does not overstep its bounds further in terms of the judicial notice doctrine.

C. The Court’s Unique Approach to an Appeal from a State Court Decision with Regards to Questions of Federal Law

Another noteworthy aspect of this case is the way the Court departs from the general procedure in determining whether the decision of a state supreme court was correct.¹¹⁷ On granting a writ of certiorari from a state supreme court, the Supreme Court only needs to determine whether there were genuine issues of material fact which precluded summary

¹¹⁵ *PPL*, 132 S. Ct. at 1222-25; Fed. R. Evid. 201(b)(2).

¹¹⁶ *PPL*, 132 S. Ct. at 1222-25; Fed. R. Evid. 201(b)(2).

¹¹⁷ *PPL*, 132 S. Ct. at 1231-33.

judgment for the State of Montana as a matter of law.¹¹⁸ Here, by holding that the Great Falls reach is not navigable for purposes of riverbed title¹¹⁹, the Court all but determines what the Montana Supreme Court's decision must be upon remand. The Court even tells the Montana Supreme Court that in addition to the Great Falls reach being not navigable, "there is a significant likelihood that some of the other river stretches in dispute also fail the federal test of navigability for purposes of determining title."¹²⁰ In essence, the Court treats the case as if it was an appeal from a lower federal court by applying its decisions on matters of law to the facts in the case, instead of simply correcting errors of federal law and then remanding for the state courts to apply them as it normally would.¹²¹ By basically dictating what the Montana Supreme Court must do upon remand, the Supreme Court deviates from well-established precedent and goes beyond its discretion. This is another potentially slippery slope upon which the Court has embarked, leaving open the question of how it will deal with state supreme court decisions in the future. If this is the beginning of a new trend in dealing with state courts, Justice Kennedy may have opened the Court up to a great deal of criticism on the infringement of rights of the state courts. The Supreme Court is able to review the decisions of the highest state courts in order to ensure that the lower courts do not infringe upon privileges and rights guaranteed by the Constitution.¹²² State courts are left to apply the corrected federal law as they see fit, giving them some sense of sovereignty as guaranteed by the Constitution under the equal-footing doctrine.¹²³ If the Supreme Court is going to begin simply making decisions for the state courts, it will likely open itself up to a strong backlash and possible litigation from the states claiming that their Constitutional rights have been infringed. The Court must tread carefully moving forward to ensure it does not overstep its bounds in terms of review of state supreme court decisions upon the granting of certiorari.

¹¹⁸ Fed. R. Civ. P. 56(a).

¹¹⁹ *PPL*, 132 S. Ct. at 1232.

¹²⁰ *Id.*

¹²¹ Merrill, *supra* note 103.

¹²² 28 U.S.C. § 1257(a).

¹²³ *PPL*, 132 S. Ct. at 1227.

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VI. CONCLUSION

The Court's decision in *PPL* cleared up confusion regarding precedent in property rights disputes for riverbed title. By affirming and clarifying the established precedent, the Court ensured that States' property rights were not infringed upon, and that members of the public (who have had property ownership stakes for centuries) were not suddenly deprived of property ownership stakes to which they were entitled. The segment-by-segment approach to determining navigability also ensures that waters, which should remain open for public use will not be unnecessarily obstructed and that those waters remain open as highways for commerce. But the Court has overstepped its bounds by abusing the judicial notice doctrine and introducing evidence from outside the record that Justice Kennedy hand-selected (in consideration of no rules regarding the introduction of evidence) in order to build a better foundation for the holding he saw as best. The Supreme Court justices must be more diligent in sticking to the record and resisting the temptation to bend the rules of procedure and evidence simply so they can solidify their holding they want to issue. The Court also must be to avoid holdings it is not required, and possibly not allowed, to make. By finding the Great Falls reach non-navigable and telling the Montana Supreme Court that other stretches of the rivers in question are likely not navigable either, the Court overstepped its bounds and made a ruling for the state, instead of simply remanding for proper application of the clarified federal rules. The Court is at a significant point in its history and does not need to do anything further to make the public and especially the states question whether its authority is being used properly and within the confines of the Constitution.

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