

SPEAKING OF INCONVENIENT TRUTHS—A HISTORY OF THE PUBLIC TRUST DOCTRINE

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ABSTRACT

In the nearly four decades since Professor Joe Sax published an article in the Michigan Law Review, there has been a flood of academic writing and court decisions on the public trust doctrine. The vast majority of these articles and judicial opinions give a brief synopsis of the doctrine's Roman, English and early American roots. In a nutshell, the generally accepted history is that from Justinian's Institutes through Magna Carta and Bracton, Hale and Blackstone reporting on English law, and Chancellor Kent acknowledging the reception of English and Roman law in America, the public has deeply rooted rights in access to and use of resources important to the public welfare. Arnold v. Mundy, Martin v. Waddell and Illinois Central Railroad v. Illinois are cited repeatedly as precedent for present day recognition of a doctrine that will limit the authority of the state to alienate resources while imposing constraints on governmental and private use of those resources. As propounded by Professor Sax and the many adherents to his argument, an expansive public trust doctrine will restore the wisdom of antiquity while serving as a powerful tool for the protection and preservation of natural resources and the environment.

The only problem with these ambitions for the public trust doctrine is that they rely on a mythological history of the doctrine. There was nothing resembling the modern idea of public trust in Roman law and the claimed restraint on alienation of state owned waters and lands is belied by a history of pervasive private ownership

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in both Rome and England. Magna Carta had little or nothing to do with such public rights, nor is there significant support in Bracton, Hale, or Blackstone for the imagined doctrine. The one concept of English law on which the modern public trust doctrine relies – the prima facie rule pursuant to which title to submerged lands is presumed to be in the Crown absent a showing to the contrary – was a sixteenth century fabrication that did not take hold in England until late in the nineteenth century, well after American law had developed on its own. Ironically, the invented prima facie rule served to feather the nest of the Crown, not to protect the rights of the public. American law would serve the same government self-dealing many centuries later in Phillips Petroleum v. Mississippi, though in the name of the public good.

American public trust law, even today, is founded on a New Jersey decision that misunderstood the Roman and English history and contradicted the contemporary law and practice of that state. That decision was overruled less than three decades later and only eight years after the United States Supreme Court had embraced its public trust theories in a title dispute to which it had no relevance. A half century later, the Supreme Court revived the public trust concept, along with the mistaken history, in a case that has been badly misconstrued both legally and sociologically. Professors Kearney and Merrill have set the record straight on the economic and political history, but the legal significance of Illinois Central continues to be misunderstood, notwithstanding the Court's clear explanation of Illinois Central's narrow holding only three decades later in Appleby v. City of New York.

Relying on both original and secondary sources, this paper sets the historical record straight. While the courts will do what they choose, those with expansive ideas about the public trust doctrine should be discomfited by the conclusions reached. Presumably they and their academic enablers make persistent reference to the history of Roman and English law because they understand that precedent is important in a rule of law system. If their claims for precedent are incorrect, as demonstrated in this paper, they must look to other justifications for a doctrine that threatens the property rights of millions of individuals while recognizing in the courts expansive powers to invalidate the democratic choices of the elected representatives of the people.

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I. INTRODUCTION

At the dawn of the modern environmental movement, on the heels of the first Earth Day and before the enactment of most of today's environmental regulations, Professor Joe Sax published an article that anticipated the challenges environmentalists would face in the legislative process and the successes they would achieve in the courts.¹ The little known public trust doctrine, wrote Sax, could be a powerful tool for "effective judicial intervention" on behalf of environmental protection and natural resource conservation.² Sax's article spawned a still raging flood of academic commentary on the public trust doctrine and encouraged environmentalists across the country to petition for judicial intervention in the name of the public trust. Sax later recognized the limited application of the doctrine historically,³ but he was optimistic about how the general concept of public rights might be expanded to impact all manner of natural resource and environmental management issues.⁴

1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970).

2. *See id.* at 474 ("Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application.").

3. He later wrote an article suggesting how some of these historic limitations might be circumvented. *See infra* note 21.

4. Sax, *supra* note 1, at 473.

Ambitions for an expanded public trust doctrine are numerous. Many writers have followed up on Professor Sax's article with concrete proposals for application of the public trust doctrine to natural resource conservation and environmental protection. A few examples are illustrative. With the financial support of the federal government and under contract to the state of Connecticut, David Slade and several coauthors wrote an entire book on how the public trust doctrine might be applied to the management of the "lands, waters and living resources" of coastal states.⁵ Gary Meyers has argued that the public trust doctrine can be the vehicle for a more holistic approach to the management of wildlife and wildlife habitat.⁶ Robert Fishman, noting that the public trust doctrine "has long held attraction for advocates of federal public land conservation," suggests the legislative "mandate to make affirmative contributions toward the [National Wildlife Refuge] System mission provides a statutory basis for application of the public trust doctrine."⁷ Samantha Bohrman argues that coalbed methane development "exacerbates an inequity between gas giants and farmers, ranchers, and common citizens[,] . . . [leaves] counties struggling to fund and maintain programs and infrastructure they can no longer afford[,] . . . [and] compromises the environment, . . . [all of which] present[] a classic violation of the public trust doctrine."⁸ Kristen Carpenter suggests that the public trust doctrine "may support the right of citizens (including American Indian citizens) to use public lands for religious and cultural purposes."⁹ Alison Rieser makes the case for ecological preservation as a public property right under the public trust doctrine.¹⁰ A bibliography of papers suggesting innovative uses of the public trust doctrine in natural resources and environmental law would go on for many pages, and it would be even longer if it included proposals for applying the doctrine in other areas of the law. For example, noting

5. DAVID C. SLADE ET AL., *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES* (1990).

6. Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 723 (1989).

7. Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L. Q. 457, 581 (2002).

8. Samantha Bohrman, *Groundwater Conservation and Coalbed Methane Development in the Powder River Basin*, 24 LAW & INEQ. 181, 200-01 (2006).

9. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1119-20 (2005).

10. Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 432-33 (1991).

that “[t]he public-trust doctrine has proved useful in the past to correct government misallocations,” Patrick Ryan suggests that “it can also do so with the regulation of the electromagnetic spectrum.”¹¹ Keith Aoki suggests that the public trust doctrine provides a useful analogy for asserting public rights in intellectual property.¹² The possibilities, it seems, are only limited by the imagination.

While some commentators have been proposing concrete applications of the public trust doctrine, they and others have been considering the theoretical justifications for judicial intervention in the name of public, as opposed to individual, rights. In a rule of law system committed to democratic government, this is not a simple problem since judicial intervention will often be in contravention of the actions of elected legislatures and executives. In his 1970 article, Sax asserted, counter-intuitively, that the public trust doctrine is rooted in the requirements of democracy,¹³ a theory later elaborated on by Michael Blumm.¹⁴ Charles Wilkinson and Richard Epstein have made very different arguments for the doctrine having roots in the United States Constitution.¹⁵ William Araiza suggests that the doctrine has roots in state constitutional provisions to the extent that they guarantee appropriate consideration of environmental values in government decision making.¹⁶ Based on perceived convergences in ecology and economic theories, Alison Rieser suggests that the public trust doctrine might have its roots in the police powers of the states.¹⁷ Carol Rose has looked beyond public trust law to public prescription and custom to find a unifying theme rooted in the idea of “inherently

11. Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285, 335 (2004).

12. Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11, 39-40 (1998).

13. Sax, *supra* note 1, at 491-556.

14. Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989).

15. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 458-59 (1989); Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 426-28 (1987).

16. William D. Araiza, *Democracy, Distrust, and the Public Trust: Process Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 450-51 (1997).

17. Rieser, *supra* note 10, at 395.

public property” held and managed by the “unorganized public.”¹⁸ In a paper written many years ago, I examined several possible theoretical foundations for the public trust doctrine and concluded that it is best understood as an aspect of property law.¹⁹

Despite thirty-seven years of litigation and a flood of academic speculation on how Sax’s public trust vision might emerge as the beacon for judicial intervention in conservation and environmental protection, there has not been widespread application of the doctrine beyond the waters and submerged lands to which it originally applied.²⁰ As early as 1980, Professor Sax himself recognized the problem. It seemed the reach of the public trust doctrine was limited by its “historic shackles.”²¹ Many courts, it turns out, have been less inclined to active intervention in resource management than Professor Sax and his many followers have hoped. But the drumbeat continues in the academy and among environmental groups, and a few courts have taken up the invitation to “liberate” the doctrine by applying it to non-navigable waters for an expanded array of uses and to resources having little or nothing to do with navigable waters.²²

Most courts responding favorably to Professor Sax’s urging that the historic shackles of the doctrine be removed have done so in one of two ways, both of which keep the doctrine tied to water. One

18. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 721 (1986).

19. See generally James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989).

20. However, the doctrine has been employed expansively by some states within the context of water and submerged lands. The most publicized case is *National Audubon Society v. Superior Court*, 658 P.2d 709 *passim* (Cal. 1983). Other state cases dramatically expanded the reach of the doctrine. See *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 167-71 (Mont. 1984); *Matthews v. Bay Head Imp. Ass’n*, 471 A.2d 355 *passim* (N.J. 1984); *Just v. Marinette County*, 201 N.W.2d 761, 768-69 (Wis. 1972) (expanding the doctrine to include shorelands).

21. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980).

22. For example, the Illinois case of *Paepcke v. Public Building Co.*, 263 N.E.2d 11 (Ill. 1970), has been cited often as an example of the application of the public trust doctrine to park lands unrelated to any navigable waters. While the court does speak of public parks as subject to a public trust, it upholds a challenged change of use on the basis of a clear legislative authorization of the change. *Paepcke*, 263 N.E.2d at 21. As recently as 2003, the Illinois court reaffirmed the holding in *Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161, 170 (Ill. 2003). In *In re Steuart Transportation Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980), a federal district court stated that “[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.”

approach has been to expand public trust uses beyond navigation, commerce, fishing and bathing. In the most celebrated modern public trust case of *National Audubon Society v. Superior Court*,²³ the California Supreme Court held that the public trust doctrine protects ecological and recreational uses as well as navigation, commerce and fishing. The other approach has been to extend the geographic reach of the doctrine by applying it to waters that are neither tidal nor navigable in fact. The *National Audubon* case extended the doctrine in this way,²⁴ as did the Montana Supreme Court decision in *Montana Coalition of Stream Access v. Curran*.²⁵ The geographic scope also has been expanded to uplands in some states. For example, the New Jersey Supreme Court has held that the public trust doctrine guarantees a public right of beach access across private, non-tidal uplands.²⁶

Few cases or commentaries on the public trust doctrine fail to mention the Roman roots of the doctrine. Specifically, they have reference to Justinian and quote this language: “Things common to mankind by the law of nature, are the air, running water, the sea, and, consequently the shores of the sea.”²⁷ Upon these few words from antiquity, environmental advocates, and at least a few American courts, have sought to build the foundation of what they hope will become a grand edifice of public rights in natural resources and environmental protection. But Justinian is not the hero in this struggle against the forces of development and environmental destruction – he was merely summarizing the laws of his time for the benefit of young law students.²⁸ The hero is Professor Joe Sax whose 1970 article called for “effective judicial intervention” in natural resource management through resort to the public trust doctrine.²⁹

Much ink has been spilled over the past four decades, both in academic articles and judicial decisions, on the public trust doctrine and its historic foundations. This is as it should be in a rule of law,

23. *Nat'l Audubon Soc'y*, 658 P.2d at 719.

24. *Id.* (including tributaries of navigable waters in the geographic reach of the public trust doctrine).

25. *Curran*, 682 P.2d at 171 (holding that the doctrine applied to all waters in the state capable of recreational use).

26. *Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 335, 368. The New Jersey court reaffirmed the *Matthews* holding in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112, 113 (2005), but said that the private beach club could impose a reasonable fee.

27. JUSTINIAN, THE INSTITUTES OF JUSTINIAN 2.1.1 (Thomas Cooper trans. & ed., 1841).

28. *See id.*

29. Sax, *supra* note 1, at 474.

precedent-based legal system. What can one more study of the subject add to what we already know? A fair amount, it turns out, because what we think we know about the history of the public trust doctrine is often a distortion and sometimes just plain wrong. Even a cursory review of the literature and case law reveals a lot of wishful thinking and not very much sound historical research. In a sense, the widespread misrepresentation of the history of the public trust doctrine is apt because the lawmakers themselves often have been party to the distortions. Bracton, often cited for the notion that the English common law had embraced the Roman law as described by Justinian, either misunderstood or misrepresented the law of Rome,³⁰ and, most probably, was himself stating an aspiration for the common law rather than reporting on the actual laws of his time.³¹ Hale endorsed a rule of presumptive Crown ownership of submerged, tidal lands that had been fabricated from whole cloth by a title hunter in service to himself and the Crown.³² Chancellor Kent, with reference to English law, announced an American law of title to submerged lands that reflected neither the law nor the fact of English practice.³³ And so it is with most modern advocates of the expansive public trust doctrine proposed by Professor Sax almost four decades ago. They are making it up as they go, but in the tradition of some of the common law's greatest lawyers.

The history of the public trust doctrine remains important for several reasons. First, where a generation of scholars and several generations of judges have misunderstood or misrepresented the history of a legal doctrine, the record should be corrected for its own

30. Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 37 (1976) ("Bracton omits, for example, the passage from the *Institutes* which said that the property of the seashore was in no one, probably because he was well aware that some of the foreshore was held by private individuals.").

31. *Id.* at 36 ("[W]here Bracton relies on Roman law, and specifically where he lays down the rule that the sea and seashore were common to all and asserts that the general public had the right to use river banks for towing and mooring and the foreshore for cottages and the drying of nets, he is most probably describing a rule of law he thought desirable, relying on the codified wisdom of the Roman law as a model for the common law, and not stating a rule that actually obtained in England at the time.").

32. MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (1670), reprinted in STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 373 (1888).

33. English law was set forth in *The Royal Fishery of the River Banne*, (1611) 80 Eng. Rep. 540 (see discussion *infra* note 160). In *Palmer v. Mulligan*, 3 Cai. 307 (N.Y. 1908), Chancellor Kent misinterpreted the rule of *River Banne* in stating the rule of title to submerged lands. Kent repeated this error in his Commentaries. See Merritt Starr, *Navigable Waters of the United States – State and National Control*, 35 HARV. L. REV. 154, 166 (1921).

sake. Second, the fact that both academics and judges have consistently felt obliged to demonstrate that the laws of today and tomorrow have historic pedigree indicates their understanding that precedent remains important in our legal system. To the extent they are prepared to press ahead with legal interpretations not supported by precedent, particularly where those interpretations come in the form of judicial intervention in legislative and administrative law making and enforcement, they are implicitly, though seldom explicitly, urging (or undertaking, in the case of judges) a law and policy making role for judges. They should be expected to articulate their theory of judging and not be permitted to hide behind false claims of adherence to precedent. Finally, there is a wisdom of experience reflected in the laws of Rome, England, and early America that can inform today's resource allocation and environmental protection challenges, but only if we understand what those laws actually were.

What follows is straightforward. The first section recounts the myth that is the generally accepted version of public trust history. The second section examines relevant Roman law precedent. English common law origins of the doctrine are examined in the third section. The fourth part of the paper is a review of nineteenth and early twentieth century public trust law in the United States, including Supreme Court case law to the present. Because American law has generally linked the public trust doctrine to state ownership of resources, the fifth section discusses the law of state ownership, first with respect to submerged lands and then with respect to wildlife. The sixth and concluding section argues that expansions of the public trust doctrine cannot be rooted in history, and therefore must be founded upon a sound theory of judicial intervention in the decisions of democratic government, if a suitable such theory can be devised.

II. THE MYTHOLOGICAL HISTORY OF THE PUBLIC TRUST DOCTRINE

In a nutshell, the generally accepted storyline goes like this. Roman law, as communicated to us across the centuries by Justinian, recognized and protected public rights in especially important natural resources.³⁴ These public rights constituted the *jus publicum*.³⁵ We suspect that the Romans inherited the idea from earlier civilizations

34. JUSTINIAN, *supra* note 27.

35. *Id.*

(of the Golden Age during which resources belonged to no one and everyone was well provided for, but that is a different story),³⁶ but we place the provenance of this public trust at least as early as the Romans because Justinian recorded – to paraphrase – that air, flowing water, the sea and the shores of the sea are by natural law common to all.³⁷ Here is Professor Sax’s summary of this part of the story:

Long ago there developed in the law of the Roman Empire a legal theory known as the “doctrine of the public trust.” It was founded upon the very sensible idea that certain common properties, such as rivers, the seashore, and the air, were held by the government in trusteeship for the free and unimpeded use of the general public.³⁸

Sax goes on to suggest that “[o]ur contemporary concerns about ‘the environment’ bear a very close conceptual relationship to this venerable legal doctrine.”³⁹ In fact there is no evidence whatsoever that the Roman concept of *jus publicum* has even a distant relationship to contemporary concerns for the environment, nor is there any indication that Roman law had anything resembling the modern notion of trust, but I digress.

Commentators and the occasional judge pick up the story about seven centuries later with the English judge Henry of Bracton who reported in his *De Legibus et Consuetudinibus Angliae* that the *jus publicum* of Roman law was also the law of England.⁴⁰ Sometimes Magna Carta is part of the story, notwithstanding the inconvenient fact that it “is primarily a protest by the landed barons against infringement on their property rights,”⁴¹ rather than a declaration of the rights of the general public. However, it bolsters the public trust concept to assert that “[t]he main purpose of the Magna Charta was to restrict the king’s power by pronouncing that the sovereign was subject to the citizens,” making it “a defining moment in public rights to the coastline.”⁴²

Our story continues across the Atlantic. “British settlers brought the concept of the public trust to America when they claimed

36. See Deveney, *supra* note 30, at 26.

37. See *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 167-71 (Mont. 1984).

38. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* 163-64 (1971).

39. *Id.* at 164.

40. See, e.g., Deveney, *supra* note 30, at 36.

41. *Id.* at 39.

42. James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 *FORDHAM L. REV.* 1913, 1921 (1995).

ownership by the right of discovery.”⁴³ Actually, it was the English Crown that claimed by right of discovery.⁴⁴ Most settlers claimed ownership pursuant to grants from the Crown,⁴⁵ grants one might expect to be important to subsequent resource allocation disputes. Lord Chief Justice Matthew Hale’s treatise *De Jure Maris et Brachiorum Ejusdem*⁴⁶ is most often cited as the authority relied upon by American courts, although “[t]here is no suggestion whatsoever of a public trust in Lord Hale’s writings”⁴⁷ The New Jersey Supreme Court decision in *Arnold v. Mundy* is generally cited as the first case to apply the doctrine on American soil.⁴⁸ But it is always best to have a United States Supreme Court opinion to rely upon, even when we are talking about state law, so the story of the history of the public trust doctrine concludes with *Illinois Central Railroad Co. v. Illinois*.⁴⁹ However, what public trust advocates generally ignore is that *Illinois Central* actually was a contract clause case, and the Court was ambivalent as to whether the contract was invalid because the state violated the trust or because the revocation of the grant was not an impairment of contract in light of the trust.⁵⁰

Upon the foundation of this widely accepted history of the public trust doctrine, advocates for resource conservation and environmental protection have sought to erect the grand edifice of judicial intervention proposed by Professor Sax in his 1970 article. Supporters of the Sax project have had some successes, but many courts have declined invitations to expand the doctrine, and at least a few fellow-travelers have expressed concerns about the wisdom and viability of the public trust doctrine as the silver bullet of environmental protection.⁵¹

43. *Id.* at 1924.

44. Deveney, *supra* note 30, at 41.

45. *Id.*

46. HALE, *supra* note 32.

47. Deveney, *supra* note 30, at 48.

48. 6 N.J.L. 1 (N.J. 1821).

49. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 460 (1892).

50. *Id.* at 462-63.

51. See, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 715 (1986) (stating that the public trust doctrine is a step backwards); Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of Environmental Protection and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1226 (1991) (stating that Sax’s theory “forestalled more serious consideration of humanity’s relationship with the natural world”); Rose, *supra* note 18, at 781 (stating that “[i]n the absence of the

Of course there is another century of public trust doctrine history, but most of that is the story of what has happened since Professor Sax wrote his seminal 1970 article. I will comment on that history later in this paper, but my central purpose is to explain the errors and deficiencies in the generally accepted story recounted above. I recognize that I may be tilting at windmills in trying to set the story straight, but in that case I will not be the first.⁵² As we have learned in so many contexts, including many cases of false forecasts of environmental hazard, truth often struggles in the face of repetitious assertions of myth.

III. ROMAN LAW AND THE PUBLIC TRUST DOCTRINE

An enthusiastic Yale law student, writing at the same time as Sax, urged “proponents of the public trust . . . [to] hold the original Roman law up as a useful model of doctrinal purity to which we should return.”⁵³ “If Roman citizens had these rights,” asks the student rhetorically, “why shouldn’t we?”⁵⁴ Indeed, why shouldn’t we? As we shall see, it turns out Roman citizens had no such rights.⁵⁵ Of course, that is no reason we should not have them, but it is a reason we should not base our claim on the precedent of Roman law, as public trust advocates have done consistently over four decades.

What we know about Roman law is relatively little compared to what we know about our own law or even the law of medieval England. We are limited to a relatively few sources that have survived, many of which are seen through the gloss of much later translations and edits. More significantly, we are limited by our own frame of reference. The challenge of understanding historic laws in their own time is great, even within our own legal system over a mere century or two. The challenge is twofold: first, words do not have constant meaning over time, even assuming nothing has been lost in translation from one language to another; and second, our moral judgments can easily influence our understanding and assessment of

socializing activities that take place on ‘inherently public property,’ the public is a shapeless mob”).

52. I have relied heavily on the work of two individuals, Patrick Deveney, *supra* note 30, and Glenn MacGrady, *infra* note 58, whose historical research and analyses have been generally ignored. Before them, Stuart Moore’s comprehensive treatise, *supra* note 32, was similarly ignored.

53. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L. J. 762, 764 (1970).

54. *Id.* at 787 n.113.

55. *See infra* pp. 14-23.

past laws. This latter challenge of what some have called “presentism”⁵⁶ can lead us to misunderstand or misrepresent the motivations of historic lawmakers either because our own morality condemns what we take to be the intended results of historic laws or because, out of its historic context, the law’s purpose appears consistent with that to which we aspire – as in the case of the public trust doctrine.

A charitable view of the widespread reliance by environmental advocates on a mistaken understanding of Roman law would hold that they, like me, have neither the time nor language skills to do a thorough study of the Roman law as it related to the sea, seashore, and navigable waters of the Roman Empire. My solution has been to do what research I can without fluency in Latin and to rely heavily on two superb articles: *Title, Jus Publicum, and the Public Trust: An Historical Analysis* by Patrick Deveney⁵⁷ and *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don’t Hold Water* by Glenn MacGrady.⁵⁸ What is puzzling, and might be cause for less charity, is how seldom these articles have been cited in the vast public trust literature,⁵⁹ most of which begins with a brief reference to the Roman law. One suspects that Deveney and MacGrady have been ignored not because their work is questioned, but because their conclusions are inconvenient for the judicial intervention project

56. Various defined as the application of current standards to historical figures and events. See Lynn Hunt, *Against Presentism*, AM. HIST. ASS’N PERSP., May 2002, at 7-9, available at <http://www.historians.org/Perspectives/issues/2002/0205/0205pre1.cfm>.

57. Deveney, *supra* note 30.

58. Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don’t Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975).

59. Since 1990, there have been over 1700 articles that make reference to the public trust doctrine. Of these, over 420 mention Roman history. Deveney’s article, *supra* note 30, is cited in only thirty-six and MacGrady’s, *supra* note 58, in only thirty-one. Among the few articles citing both Deveney and MacGrady (seventeen of the 420) is Carol Rose’s *The Comedy of the Commons*, *supra* note 18. Rose acknowledges that the historical foundations of the public trust doctrine are shaky at best. She looks largely to nineteenth century American case law in an effort to explain the persistence of the idea of public rights (in the context of public trust, prescription and custom) in the face of a generally pervasive acceptance of private property as the better way to allocate scarce resources. For a discussion of Rose’s conclusion, see *infra* text accompanying note 186. Deveney and MacGrady were not the first to be ignored. As MacGrady notes, Stuart Moore, author of *A HISTORY OF THE FORESHORE*, *supra* note 32, at 552, wrote at length on the Roman and English laws of submerged lands yet “remains relatively unknown.”

launched by Professor Sax.⁶⁰ Indeed, I have found no work that challenges either author's conclusions about Roman or English law.⁶¹

The gemstone of modern public trust law, widely quoted in the literature and case law, is Justinian's declaration that "[t]hings common to mankind by the law of nature, are the air, running water, the sea, and, consequently, the shores of the sea; no man therefore is prohibited from approaching any part of the seashore"⁶² The first clue that something might not be as it seems in this oft quoted language is the ellipses appearing at the end of the quotation, at least when properly quoted. What follows immediately in the same sentence after "seashore" is "whilst he abstains from damaging farms, monuments, [and buildings], which are not in common as the sea is."⁶³ But is not the point that Roman law protected the sea and seashore from private use to assure free access for all the public? What are these farms, monuments and buildings that the public must not harm doing on the seashore? Here is what Deveney has to say on the subject:

[T]here was . . . a sentiment, primarily Stoic and philosophical, that *unless* and *until* a private person or the state required exclusive control of the resource, the sea and shore should be open for the use of all. In light of the vast coastal area of the Roman *Mare Nostrum*, the generally low population density outside the cities, and the even lower percentage of the population with sufficient means to utilize coastal lands, such an attitude was not impractical. However, to concentrate on this aspect of Roman law to the exclusion of its complements – state grants of exclusive rights and

60. Neither Deveney nor MacGrady takes an "anti-environmentalist" stance, indeed one suspects that either could be supportive of many of the objectives of public trust advocates. But one can only guess about their policy preferences because their focus is on the role of the law and the courts in resolving the "conflict between bona fide competing interests" in coastal areas. "This conflict," says Deveney, "cannot be avoided by the use of such historical talismans as the public trust or by simple appeal to supposed moral imperatives and uncritical sentiment rooted in myth." Deveney, *supra* note 30, at 81.

61. To their credit, Michael Blumm and Lucas Ritchie acknowledge that "recent scholarship has questioned Justice Kirkpatrick's interpretation of English precedent" in *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821), citing Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 367 (1996), and MacGrady, but not Deveney. Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture*, 35 ENVTL. L. 673 (2005). The more common reaction to the contrarian history of MacGrady and Deveney has been in the vein of what Professor Eric Freyfogle wrote in commenting on Blumm's and Ritchie's draft article: "My bottom line is that the public trust doctrine did build upon a solid body of English legal materials; the only thing new was the phrasing of the idea." *Id.* at 694 n.137.

62. JUSTINIAN, *supra* note 27.

63. *Id.*

individual acquisition of ownership by occupation – is to misunderstand the Roman law and to ignore the economic realities of the time.⁶⁴

That the Roman law did not really guarantee an inalienable public right to use and access the sea and seashore does not mean that the public had no rights at all. Roman law provided for several forms of injunctive and restitutionary relief (*interdicta*), including popular injunctions that granted standing to all citizens to protect the public's rights.⁶⁵ One popular injunction allowed citizens to challenge obstructions to navigation or docking and to shoreline footpaths, with restoration of the status quo ante as the remedy (though only damages could be sought for obstructions to navigation and fishing on the sea).⁶⁶ Another cause enforced a prohibition on changing stream flows by blocking or diverting waters, whether or not it affected navigation.⁶⁷ Individual citizens could seek an injunction against interferences with navigation or with anyone bringing cattle to drink at the shore.⁶⁸ Anyone actually injured by the building of a pier or breakwater was entitled to injunctive relief and presumably damages.⁶⁹ But, says Deveney, “[t]he actual effect of these injunctions was negligible They were granted *ex parte* and without investigation into the actual situation; consequently, the interdicts were phrased hypothetically and amounted to no more than a mere statement of the rule the praetor recognized.”⁷⁰

Legal remedies aside, references to Roman law have suggested a strong philosophical commitment to the notion of common or public rights. Justinian wrote “[r]ivers and ports are public; hence the right of fishing in a port, or in rivers are in common.”⁷¹ While acknowledging that Justinian may not have been stating the law as it was in fact, commentators Smith and Sweeney recently have written that “[u]nder a remarkable philosophy of natural resource

64. Deveney, *supra* note 30, at 21-22. MacGrady notes that the Digests explicitly recognize the private right to appropriate shore lands by building on them. “If one builds in the sea or on the seashore, although not on his own land, yet nevertheless he by the *jus gentium* makes it his.” MacGrady, *supra* note 58, at 533 (citation omitted).

65. See MacGrady, *supra* note 58, at 521, for a discussion of the enforcement of rights on public rivers by interdict and for a discussion of the difference in Roman law between private and public rivers.

66. Deveney, *supra* note 30, at 24.

67. *Id.*

68. *Id.*

69. *Id.* at 24.

70. *Id.*

71. JUSTINIAN, *supra* note 27, at 2.1.2.

preservation, the Romans implemented a concept of ‘common property’ and extended public protection to the air, rivers, sea, and seashores, which were unsuited to private ownership and dedicated to the use of the general public.”⁷² They go on to suggest that “this public trust concept resonated throughout medieval Europe”⁷³ But what did the Romans really mean by “common to all,” and is it really plausible that a continent of warring kings and barons embraced a philosophy of sharing?

Deveney concludes that the concept of “things common to all” originated with the third century jurist Marcian who adopted the idea of a Golden Age from the classical poets and philosophers.⁷⁴ In this Golden Age of antiquity, writes Deveney, “until greed gave birth to private property, all things were held in common and the earth naturally produced its fruits for the benefit of all.”⁷⁵ But then there was trouble. There arose “the age of hard iron [T]he land which had previously been common to all, like the sunlight and the breezes, was now divided up far and wide by boundaries, set by cautious surveyors.”⁷⁶ Marcian’s list of things common to all included air, flowing water, the sea and the seashore.⁷⁷ Dry land was not included, suggests Deveney, probably “because it had long been ‘divided up far and wide by boundaries, set by cautious surveyors.’”⁷⁸ And it was already divided up because of the economic realities of third century Rome. This myth of a Golden Age of antiquity, in which there was no private property and all shared equally the bounty of the earth, is very similar to the modern day myths about the relationship between aboriginal Americans and the earth and water they depended upon for survival.⁷⁹ In both cases, “things common to all” were so in part because of the physical nature of the particular resources and the limits of technology, but mostly because supply was abundant and demand slight. “In actuality,” says Deveney, “*the sea and the seashore were ‘common to all’ only insofar as they were not yet appropriated to*

72. George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 310 (2006).

73. *Id.*

74. Deveney, *supra* note 30, at 26.

75. *Id.*

76. *Id.* at 27 (quoting THE METAMORPHOSES OF OVID 31-32 (Mary M. Innes, trans., 1966)).

77. *Id.*

78. *Id.*

79. James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 901 (1992).

the use of anyone or allocated by the state."⁸⁰ "It was their character as 'things common to all' that made the sea and seashore capable of individual appropriation."⁸¹ The law of private acquisition was set forth clearly in the Digest:

If I drive piles into the sea . . . and if I build an island in the sea, it becomes mine at once, because what is the property of no one becomes that of the occupier.⁸²

What a person builds on the seashore becomes his, because beaches are not public in the same way as those things which are in the patrimony of the people, but as those things which were at first produced by nature and which have not yet come into ownership of anyone; their condition is not unlike that of fish and wild beasts, which, as soon as they are taken, become without doubt the property of those into whose hands they have fallen.⁸³

That "things common to all" are those things free for the taking and conversion to private property turns on its head the modern reliance on Roman law as the foundation for the public trust doctrine. Worse yet for the modern public trust doctrine, which most often is offered as a limit on the states' ability to dispose of state owned lands and waters, is "that there were no restraints whatever imposed by law on the power of the sovereign to convey public land, including the sea and seashore. All such restraints were in fact made impossible by the basic premise of Roman Law: 'That which pleases the Emperor has the force of law.'"⁸⁴ While most advocates of the public trust doctrine will have few sympathies for the Roman emperors, they may have sympathies for democratic government, which causes a theoretical problem for the modern public trust doctrine to which I will return.⁸⁵

Another problem for those who rely on Roman law as precedent for the modern public trust doctrine is that Roman law made no distinction, until very late in the Empire, between the public and the personal status of the ruler.⁸⁶ Without this distinction, the concept of the *jus publicum* (as distinguished from *jus privatum*), upon which the public trust doctrine depends, makes no sense. Unless all properties

80. Deveney, *supra* note 30, at 29 (emphasis in original).

81. *Id.* at 30.

82. *Id.*

83. *Id.*

84. Deveney, *supra* note 30, at 32-33. Of course this is the same principle that gave the English Parliament unlimited authority to dispose of any and all public lands of Britain. See *infra* text following note 122.

85. See *infra* text accompanying notes 308-09.

86. Deveney, *supra* note 30, at 17.

held by the ruler are in the nature of *jus publicum*, which was clearly not the case in the Roman Empire, there must be some basis for distinguishing those resources the ruler can alienate or in which he can grant private rights of use from those he cannot. It is one thing to hold that “things held in common” are open for all to use “*unless and until* a private person or the state required exclusive control of the resource,”⁸⁷ as Roman law did. It is quite a different thing to hold that the state cannot alienate or grant exclusive rights of use to common resources because the sovereign’s title is held subject to a restraint in the nature of an easement held by the public independent from the sovereign, as modern public trust advocates would have it.⁸⁸ As a theoretical matter, the latter rule is plausible where the sovereign is independent of the people, although it was not the case in Rome. But where the sovereign is the people, as in the United States, advocates of the latter approach have some theoretical scrambling to do. As we will see later in this paper, the distinction between the public and personal status of the king came late to the English common law as well, but that is a problem for reliance on common law precedent to which we will turn imminently.⁸⁹

Contrary to the ubiquitous assertion that the public trust doctrine originated with the Romans, the reality is:

Roman law was innocent of the idea of trusts, had no idea at all of a “public” (in the sense we use the term) as the beneficiary of such a trust, allowed no legal remedies whatever against state allotment of land, exploited by private monopolies everything (including the sea and the seashore) that was worth exploiting, and had a general idea of public rights that is quite alien to our own.⁹⁰

Thus, Roman law seems to offer little to those seeking the comfort or reassurance of well pedigreed legal precedence. The reality of life in the Roman Empire was that “all of the marine and coastal area resources that it was possible for the technology of the Romans to exploit were either in private ownership or were leased to monopolies”⁹¹ The Stoics and other philosophers of classical Greece provided both Romans and modern Americans with lovely visions of a plentiful earth without boundaries. But this Golden Age

87. *Id.* at 21.

88. *See, e.g.*, Blumm, *supra* note 14, at 580.

89. *See infra* Part IV.

90. Deveney, *supra* note 30, at 17.

91. *Id.* at 33. MacGrady agrees with this conclusion: “Roman law evidently tolerated appropriations of the seashore in the nature of private ownership.” MacGrady, *supra* note 58, at 533.

existed only in legend and myth. “The [Roman] rule that ‘the sea and seashore are by nature common to all’ reflected a philosophic commitment to the freedom of elemental things for all men, even though its legal effect was to make the sea and shore available for private appropriation.”⁹²

IV. COMMON LAW AND THE PUBLIC TRUST DOCTRINE

Roman law with respect to navigable waters was formally introduced to the common law by Bracton who included parts of Justinian’s commentary on the sea and seashore in his thirteenth century work.⁹³ Although Bracton purported to be restating the law of England at the time he wrote, “he is most probably describing a rule of law he thought desirable, relying on the codified wisdom of the Roman law as a model for the common law, and not stating a rule that actually obtained in England at the time.”⁹⁴ Thus, modern public trust advocates have not only the precedent of Roman law as they wish to understand it, but the precedent of Bracton’s summation of English law as he wished to understand it. But before Bracton wrote, there was Magna Carta which contained two chapters of possible relevance.

Chapter 16 of Magna Carta states: “No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.”⁹⁵ This provision was a reaction to the kings having placed “as well fresh as salt rivers *in defense* for [the kings’ recreation]; that is, to bar fishing and fowling in a river till the King had taken his pleasure or advantage of the writ *de defensione ripariae*.”⁹⁶ Although this limitation on the Crown would eventually resemble the kind of public right imagined for the modern public trust doctrine, at the time it appears that the writ *de*

92. Deveney, *supra* note 30, at 34.

93. BRACTON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 39-40 (1256), available at <http://hls15.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+English+2+40+public>.

94. Deveney, *supra* note 30, at 36. MacGrady suggests that Bracton was not distorting Roman law, rather that he was borrowing from the language of the Institutes to the extent that it conformed to his understanding of English law at the time. MacGrady, *supra* note 58, at 556.

95. MAGNA CARTA CHAPT. 16, art. 20 (Eng. 1225). The quoted language is from the 1225 version of Magna Carta. It was derived from Chapter 47 of the 1215 version that provided: “All forests that have been made such in our time shall forthwith be disafforsted; and a similar course shall be followed with regard to river banks that have been placed ‘in defense’ by us in our time.”

96. HALE, *supra* note 32.

defensione ripariae was objected to because it required the riparian owner to repair, at his own expense, roads and bridges in preparation for the king's fishing expeditions.⁹⁷ Eventually Chapter 16 would be understood as a prohibition on the king's granting of exclusive fisheries, but not until the nineteenth century.⁹⁸ As late as 1768 the courts still acknowledged the king's authority to grant exclusive fisheries,⁹⁹ although the burden of proof was on the party claiming the exclusive grant.¹⁰⁰ Thus, the Roman rule that the coastal area resources were open for common use until occupied or granted by the ruler remained the law of England for several centuries after Magna Carta with the not unimportant later modification that the right was *prima facie* in the Crown, placing the burden on anyone claiming an exclusive right. But this *prima facie* rule did not become fully accepted until late in the nineteenth century¹⁰¹ and the law with respect to fisheries was not the same as the law with respect to submerged lands.¹⁰²

Chapter 23 of Magna Carta provides that: "All weirs for the future shall be utterly put down on the Thames and Medway and throughout all England, except on the seashore."¹⁰³ "This simple provision of the Magna Charta would not even bear mentioning," says MacGrady, "were it not for the fact that some writers and jurists have expanded it 'almost unrecognizably' over the years."¹⁰⁴ Although the provision was relied upon by later writers and courts to support a prohibition on obstructions to navigation, its immediate purpose was to prevent the king from blocking fish passage upstream to the exclusive fisheries of the barons who, after all, were the other party of interest in the negotiation of Magna Carta.¹⁰⁵ Chapter 23

97. S. MOORE & H. MOORE, *THE HISTORY AND LAW OF FISHERIES* 6-18 (1903).

98. *See generally* Gann v. Free Fishers, (1865) 11 Eng. Rep 1305 (H.L.), Malcomson v. O'Dea, (1863) 11 Eng. Rep. 1155, 1155-56 (H.L.).

99. Carter v. Murcot, (1768) 98 Eng. Rep. 2162.

100. Lord Fitzwalter's Case, (1762) 86 Eng. Rep. 766 (K.B.).

101. Deveney, *supra* note 30, at 48.

102. *See* Royal Fishery of the River Banne, (1611) 80 Eng. Rep. 540 (applying the law with respect to fisheries).

103. MAGNA CARTA, CHAPT. 23 (Eng. 1225). The quoted language is from the 1225 version of Magna Carta. It was derived from Chapter 33 of the 1215 version that provided: "All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore." MAGNA CARTA, CHAPT. 33 (ENG. 1215).

104. MacGrady, *supra* note 58, at 554 (quoting from *The Public Trust in Tidal Areas*, *supra* note 53, at 767).

105. *See* Deveney, *supra* note 30, at 39.

“had nothing to do with the question of *title* to land under waters.”¹⁰⁶
In fact the provision was relied upon by Lord Hale to demonstrate that private ownership of such lands was possible:

The exception of weares upon the sea-coast[s] . . . makes it appear that there might be such private interests not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark; But in all of these statutes, though they prohibit the thing, yet they do admit, that there may be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea itself contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty, but also a right of property of soil.¹⁰⁷

Thus, Magna Carta Chapters 16 and 23 are very thin reeds upon which to rest an expansive public trust doctrine. The modern doctrine as applied to navigable waters relies heavily upon the state’s having title to the submerged lands. But at the time of Magna Carta, and for many centuries later, there was no concept in England of lands owned by the king (who, according to modern public trust theory, was the predecessor in title to the states) as trustee for the general public:

Then again, no line is drawn, at least no marked line, between those proprietary rights which the king has as king and those which he has in his private capacity. The nation, the state, is not personified; there are no lands which belong to the nation or to the state. The king’s lands are the king’s lands; the king’s treasure is the king’s treasure: there is no more to be said.¹⁰⁸

Magna Carta reflects clearly that the king had special standing in relation to the barons, but “if the medieval king’s property differed in any way from that of his barons, it was only to the extent that he held more of it.”¹⁰⁹

Every legal system that recognizes private property requires an explanation for how any particular claimant came into title to particular land or resources. The Roman theory, at least with respect to submerged lands and those subject to the ebb and flow of the tides, was that the land was held in common which, as we have seen, means that owners came into title by appropriation or occupation.¹¹⁰ Modern advocates have interpreted the Roman *res communes* to

106. *Id.* at 40.

107. HALE, *supra* note 32, at 389.

108. F. POLLOCK & F. W. MAITLAND, THE HISTORY OF ENGLISH LAW 518 (2d ed. 1952).

109. Deveney, *supra* note 30, at 38.

110. *See supra* pp. 19-23.

suggest resources belonging to the public in the sense we might understand it today, but in reality there was little to distinguish *res communes* from *res nullius* in Roman law.¹¹¹ That is, no one owned the land until someone occupied it.¹¹² This theory was consistent with the myth of the Golden Age, and was the theory in English law at least until the seventeenth century when John Selden posited the *mare clausum* (the closed sea) as the property of the English Crown.¹¹³ While the king did not object to this break with antiquity, Selden, and Blackstone after him, turned to the Bible to justify this claim of *private* title on behalf of the Crown:

In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to men “dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth.” This is the only true and solid foundation of man’s dominion over external things, whatever metaphysical notions may have been started by fanciful writers upon this subject.¹¹⁴

The Bible justified private ownership, including by the king, but in English theory the act by which the king acquired title was the Norman Conquest.¹¹⁵ This meant that all property held by anyone other than the king, including title to submerged and riparian lands, came by grant from the king.¹¹⁶ Of course this was mostly theory, without evidence of actual grants, that served to explain and justify the status quo, but the king did in fact make many grants so that “[b]y the reign of King John almost all of the foreshore and the rivers of the kingdom either were still held by the Crown as private property or had been granted in fee to individual holders.”¹¹⁷ Of particular importance to modern public trust theory that seeks precedent in Magna Carta and English law is that the foreshore and rivers to which

111. “[A]ll [of the Roman sources] except Celsus use language in the nature of *res communes* and *res nullius* – terms which . . . represent a distinction without a real difference.” MacGrady, *supra* note 58, at 533.

112. This concept of land held in common forms the basis for the famous “tragedy of the commons” commentary inspired by Garrett Hardin. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968). It might be argued that Hardin’s starting point was common ownership as opposed to non-ownership, but it comes to the same thing since the private uses that lead to the tragedy of the commons are, for practical purposes, the equivalent of private title, albeit nonexclusive private title.

113. JOHN SELDEN, *MARE CLAUSUM: THE RIGHT AND DOMINION OF THE SEA* 127-35 (1663).

114. WILLIAM BLACKSTONE, 2 *COMMENTARIES* *2, *2-*3.

115. Deveney, *supra* note 30, at 38-39.

116. *Id.* at 39.

117. *Id.*

the Crown still had title could be and often were granted to other private owners.¹¹⁸ “There was no concept of a public trust in the early common law – that is, of the idea that the *title* of certain lands was held inalienably by the Crown for the common use.”¹¹⁹

Nonetheless, Magna Carta has been relied upon repeatedly in modern times for claims of broad public rights, notwithstanding its origins in the struggle between the king and his barons. “[T]hrough the process of creative judicial misunderstanding in favor of the public’s rights,”¹²⁰ and with some help from Blackstone,¹²¹ the English courts did eventually embrace the rule that the Crown could not grant exclusive fisheries in tidal waters.¹²² But this late recognition of public rights in English law was more symbolic than real since many exclusive fisheries had been granted in the past and the prohibition had nothing to do with ownership of submerged and riparian or tidal lands. That past grants of private right were to be respected was evident from Magna Carta which in Chapter 16 expressly excepted defenses (exclusive Crown fisheries) established in the time of King Henry and in Chapter 23 prohibited all weirs “for the future.” That future conveyances and grants of land still could be made by the king was inherent in his private property rights, so long as the lands were his in his personal capacity, or in the sovereignty of the king and Parliament, to the extent the property was held in the king’s public role.

What changed to the benefit of public rights, at least in the long run, was the *prima facie* rule for ownership of submerged and tidal lands, pursuant to which the lands were presumed to remain with the

118. “Bracton clearly states what the Romans left in doubt: the soil of the shore can be privately owned, at least by building on it.” Significant evidence of this, according to MacGrady, is Bracton’s statement that “the soil cedes to the building.” MacGrady, *supra* note 58, at 556.

119. Deveney, *supra* note 30, at 38. MacGrady concludes that there was still no concept of a public trust in English law by the time of the American Revolution. “At the time the public trust doctrine was supposedly vesting the Crown title to submerged beds and the foreshore in the newly sovereign American states, there was virtually no legal support for such a doctrine in English common law.” MacGrady, *supra* note 58, at 590.

120. Deveney, *supra* note 30, at 39.

121. “A free fishery, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed: though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John’s great charter, and the rivers that were fenced in his time were directed to be laid open” BLACKSTONE, *supra* note 114, at *39.

122. *Carter v. Murcot*, (1768) 98 Eng. Rep. 2162.

king unless expressly granted. The new rule was first stated in the case of *Attorney-General v. Philpott*,¹²³ but that case was decided by a corrupt court doing the king's bidding and was not cited as authority by an English court for another 164 years,¹²⁴ after which at least another century passed without a single English jury deciding in favor of the Crown "against evidence of user on the part of the subject."¹²⁵ The *Philpott* decision was a factor leading to the beheading of Charles I for, among other things, "taking away of men's rights under color of the King's title to land between high and low-water mark."¹²⁶ Note that the objection was not to the king's taking public rights, but to taking the private rights of those claiming title to the lands in question. Indeed, the Crown's objective in pressing the prima facie rule was not to protect the lands for the public, but rather "to expropriate lands long in private hands in order to resell them to replenish their coffers."¹²⁷ Although the prima facie theory was invented from whole cloth in the sixteenth century to facilitate the Crown's taking of long vested private rights and did not become the fully accepted law of England for three centuries, we will see that its pedigree would gain luster at the hands of American commentators and judges. But even then, "under the prima facie theory the power of the Crown to make grants of the foreshore and land under water was never in question. None of the parties involved [in the sixteenth and seventeenth centuries] was interested in expanding the interests of the general public in the coastal area."¹²⁸ Notwithstanding its sordid past, however, the prima facie rule did serve the eventual

123. The case is unreported and may never have been acted upon. It appears in MOORE, *supra* note 32, at 896-907.

124. *Attorney General v. Richards*, (1795) 145 Eng. Rep. 980, 981 (Ex.).

125. MOORE, *supra* note 32, at 616.

126. Article 26 of the Grand Remonstrance presented to Charles I on December 1, 1641, in MOORE, *id.* at 310.

127. Deveney, *supra* note 30, at 42. MacGrady provides a vivid account of the title hunting and title hunters who relied on the prima facie rule to identify submerged properties on which private title would be difficult to prove. With adequate payments to the Crown, these lands would then be expressly granted to the title hunters. Among the title hunters was a certain Thomas Digges who is credited with inventing the prima facie rule in his 1568 treatise *Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof*. MacGrady, *supra* note 58, at 559-63. See also James Rasband, *The Disregarded Common Law Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 11-12 (1997). As noted below, *infra* text accompanying note 405, there is an interesting similarity between the Crown's motives in pressing for the prima facie rule and the motives of the state of Mississippi in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472-76 (1988), the United States Supreme Court's most recent public trust decision.

128. Deveney, *supra* note 30, at 43.

claims of public right under the public trust theory. With resources of such value as submerged and tidal lands, it was not to be presumed that title passed with the conveyance of the uplands. But, of course, the prima facie rule did not preclude express grants of such lands.

Writing not long after Magna Carta, Bracton played an important role by introducing Justinian's *Institutes* to the mix of sources that might be relied upon.¹²⁹ He did not, however, introduce all of Justinian. He left out the statement that "the ownership of the beaches is in no one,"¹³⁰ perhaps because the phrase seemed inconsistent with the existence of farms and buildings that were not to be injured by public use of the seashore and because he recognized that many beaches in England were in fact private. But if this explains Bracton's elimination of Justinian's statement that the seashore belongs to no one, it would seem to reflect a misunderstanding of the significance of that phrase. It did not mean that the seashore could not be owned, rather it meant that it belonged to no one until occupied or put to private use. Modern public trust advocates who have relied on Justinian's language in asserting that *jus publicum* is an inalienable public right in state ownership of beaches and submerged lands have misunderstood the language in the same way, whether or not misunderstanding explains Bracton's omission. Bracton did acknowledge, indirectly, that the beaches belonged to no one by taking pains to explain, contrary to the usual rule that a building belongs to the owner of the underlying land, that on the seashore the land belongs to the owner of the overlying building.¹³¹

The most influential source on the English law of the sea among nineteenth century American courts and commentators was Lord Chief Justice Matthew Hale's treatise *De Jure Maris*.¹³² Although he endorsed the prima facie theory, he acknowledged that title to submerged and tidal land could be and most often was privately owned and that it could be acquired by usage, custom, prescription, or conveyance from the Crown.¹³³ "There was no question in Hale's mind that the king could convey title to land below the sea, several

129. *Id.* at 36-37.

130. BRACTON, *supra* note 93.

131. *See id.* at 40.

132. HALE, *supra* note 32. The treatise of Sir Matthew Hale, *De Jure Maris*, has been so often recognized in this country, and in England, that it has become the text book, from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water. *Ex parte Jennings*, 6 Cow. 518 n.(a) (N.Y. 1826).

133. HALE, *supra* note 32, at 370-72.

fisheries, and even property in a delimited part of the sea itself or in navigable rivers.”¹³⁴

Lord Hale identified three categories of coastal property. The *jus privatum* is held by individuals or by the Crown, and, as we have seen, the king’s private interests were not different from the holdings of other individuals except in amount.¹³⁵ The *jus regium* he described as the royal right which was the equivalent of what we would call the police power today.¹³⁶ Finally, the *jus publicum* are the rights of the general public.¹³⁷ Hale described these public rights as follows:

[T]he people have a publick interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions. . . . [F]or the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king’s subjects; as the soil of an highway is, which though in point of property it may be a private man’s freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified.¹³⁸

Taken together these three categories of coastal property fit neatly together, although not precisely as modern public trust advocates would like. There is private (including crown or state) ownership of coastal land; there is a public right of navigation over and past those lands, meaning that obstructions to navigation (nuisances) are forbidden; and there is the power in the king or state to enjoin or remove such obstructions. However, there is no public right to fish in navigable waters, though the public may be granted the liberty to do so.¹³⁹ Additionally, there is no constraint on private ownership of submerged or tidal lands or on the power of the king to convey those lands,¹⁴⁰ though private owners are prohibited from creating nuisances that obstruct navigation. In sum, “[t]here is no suggestion whatsoever

134. Deveney, *supra* note 30, at 45.

135. HALE, *supra* note 32, at 372-74.

136. *See id.* at 373 (“[W]e are bound to provide for the safety and preservation of our realm . . .”) (internal quotation omitted).

137. *See id.* at 374.

138. *Id.* at 404-05.

139. *Id.* at 377 (“But though the king is the owner of this great wast [the sea], and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.”).

140. Deveney, *supra* note 30, at 49 (“Neither the changes following the beheading of Charles I nor the revolution of 1688 reduced in any way the power of the sovereign to alienate the coastal area resources of the kingdom.”).

of a public trust in Lord Hale's writings, and he recognizes no limitations on the power of the Crown to convey title to the coastal area."¹⁴¹

V. EARLY AMERICAN PUBLIC TRUST LAW

The American Revolution created some interesting theoretical problems for those required to design the new governments and create legal systems that could carry on where the English government and law left off. The law part was relatively easy, particularly since the American revolutionaries, for the most part, only sought to guarantee for themselves the rights of Englishmen.¹⁴² The common law would be received as the law of the individual states subject to whatever modifications would be made subsequently.¹⁴³ But a more challenging theoretical issue was the explanation and justification for the transition from a sovereign king to a sovereign democratic republic. The legitimacy of the Revolution rested in the self evident truth that "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, . . ." ¹⁴⁴ The Revolution was an assertion that the king's government, at least in America, was not just, yet the sovereign powers the newly independent states would exercise would be exactly those the king had exercised. Like the individual rights asserted in the Declaration of Independence, the powers of government were self evident. So, the states simply succeeded to the powers of the Crown (and Parliament), at least until some of those powers were delegated to a national government.¹⁴⁵

By this same theory, the states succeeded to the ownership of lands previously held by the king. Of course the king in England had no deed or other document evidencing the Crown's title, but no one challenged the legal fiction that the king owned everything in the beginning and continued to own that which had not been granted by

141. *Id.* at 48. Of the eventual acceptance of the prima facie rule and Hale's considerable influence on that lengthy process, MacGrady, *supra* note 58, at 567, writes: "The adoption of the prima facie rule is thus an example of lawmaking by personal reputation and treatise writing." He goes on to say the "American law concerning foreshore ownership was shaped by a similar lawmaking process," and so too, as we shall see, has been modern American public trust law.

142. See F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 9-55 (1985).

143. See *THE OXFORD COMPANION TO AMERICAN LAW* 127-30 (Kermit L. Hall et al. eds., 2002).

144. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

145. See, e.g., *Browne v. Kennedy*, 5 H. & J. 195, 195 (Md. 1821).

the king or otherwise privately acquired. The principle of universal title in the Crown, combined with the king's power to grant title and the concepts of customary use and prescription, made it possible "to assign a particular proprietor to every thing capable of ownership, leaving as little as may be in common, to be the source of contention and strife."¹⁴⁶ While the modern public trust doctrine stands in opposition, Justice Earle of the Maryland Court of Appeals thought this common law rule was "a principle based on soundest policy."¹⁴⁷ For the new American states that succeeded to the king's ownership, this legal fiction was critical to their economic and political success. State title to unoccupied and unused lands (waste lands they were often called) made it possible for the states to embrace the English common law of property and to establish formal systems for the disposal of these lands.¹⁴⁸ Without state title and formal systems for conveyance to private owners, there surely would have been much "contention and strife."¹⁴⁹

But in America, the lands owned by the Crown were vastly greater in volume and a much larger portion of the whole than in England.¹⁵⁰ In the case of a few states with large western land claims, lands would be ceded to the national government in the interest of gaining agreement to unite as one nation and in anticipation of the formation of future states,¹⁵¹ but most of these now state lands (including those ceded to the national government) were expected to become private property in due course.¹⁵² Neither state governments nor the federal government were expected to be large landowners over the long haul.¹⁵³ This was, after all, a revolution against a king

146. *Id.* at 208 (Earle, J., dissenting).

147. *Id.*

148. *See id.*

149. *Id.* In the oft cited case of *Arnold v. Mundy*, 6 N.J.L. 1, 45 (N.J. 1821), Chief Justice Kirkpatrick reported that notwithstanding the claimed exclusive right at issue in the case, "the people had always disputed that right, had entered upon it, and taken oysters from it, when they pleased, and if opposed by Coddington [predecessor in title to plaintiff], that the strongest usually prevailed."

150. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478-79 (1988) (noting that "the different topography of America – in particular, our 'thousands of miles of public navigable water[s] . . . in which there is no tide'" distinguished the extent of the public trust doctrine in America from England (quoting *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1852)).

151. *See* FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790*, 11 (1965).

152. *See* James Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 245 (1994).

153. *Id.* at 247-48.

who, among other offenses, had significant land holdings from which most ordinary citizens were excluded.¹⁵⁴ From after the Revolution until well past the middle of the nineteenth century, “government did not choose to manage its land as a capital asset, but to get rid of it in an orderly, fruitful way.”¹⁵⁵

These presumptions about government land ownership would change over time. Nearly a century after the adoption of the Constitution, significant federal lands began to be reserved from private acquisition with the expectation that they would remain in federal ownership indefinitely.¹⁵⁶ As new states were created, other federal lands were granted for the support of schools and other public services,¹⁵⁷ with the initial expectation that most of these lands sooner or later would be sold to private purchasers.¹⁵⁸ None of this was very controversial, and although the original states with large western land claims would rather have retained those lands, had they succeeded in retaining their western lands, the expectation still would have been that the lands would be conveyed into private ownership.¹⁵⁹

In sorting out these land ownership issues, the founding generation paid little attention to submerged and tidal lands, not because they were in fact invisible, but because the law on the subject was thought to be well settled. Citing the case of *The Royal Fishery of the River Banne*,¹⁶⁰ Chancellor Kent stated that “by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil.”¹⁶¹ Pursuant to the prima facie rule, all other submerged lands (those under navigable waters – understood to include all waters affected by the tide) were presumed to be owned by the state unless a private claimant could demonstrate otherwise.¹⁶² It was and is widely accepted among American courts that this alleged English equation of navigability with tidal waters was gradually

154. *See id.* at 248.

155. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 203 (1973).

156. Huffman, *supra* note 152, at 250.

157. *Id.* at 249.

158. *Id.* at 247.

159. *See id.* at 246-47.

160. (1611) 80 Eng. Rep. 540. This case was widely cited in American cases on ownership of submerged lands, but on its facts it was concerned with ownership of the fishery and not with title to submerged lands. The same is true of the oft cited *Carter v. Murcot*, (1768) 98 Eng. Rep. 2162.

161. *Palmer v. Mulligan*, 3 Cai. 307 (N.Y. Sup. Ct. 1805).

162. *Ex parte Jennings*, 6 Cow. 518 (N.Y. 1826).

abandoned by many state courts in recognition of the topography of the North American continent with its great inland waterways.¹⁶³ But there is good evidence that Chancellor Kent and the most influential treatise writer on the subject, Joseph Angell, got the English law wrong on this point.¹⁶⁴ If indeed navigable in fact, non-tidal waters were considered navigable under English law, as MacGrady contends,¹⁶⁵ it is just one more historical error contributing to the eventual linkage in American law of the public trust doctrine to state ownership of submerged lands.

It is also reasonable to assume that the founding generation was less concerned about ownership of submerged lands than we might be today because ownership of those lands generally was not a factor in what was then the most important use of those waters – navigation. Chancellor Kent stated the matter succinctly:

In Sir *Mathew Hale's* excellent treatise . . . he lays down the law generally that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil, but he admits that fresh rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, &c., and in that sense may be regarded as common *highways by water*. . . . They are called public rivers, not in reference to the property of the river, but to the public use.¹⁶⁶

American law would gradually lose sight of this point and would create a tie between public ownership of submerged lands and public rights in the use of overlying waters. However, Lord Hale's tripartite division of rights in the coastal area in no way linked the *jus publicum* to the king (or the state) having title to the submerged or riparian lands. As Hale defined it, the *jus publicum* is a public right in the nature of an easement whether the land is owned by the king, by a private party, or by no one.¹⁶⁷ The *prima facie* theory endorsed by

163. See, e.g., *Diana Shooting Club v. Hasting*, 145 N.W. 816, 819 (Wis. 1914) (“In England, however, only waters on which the tide ebb and flowed were held navigable. Such limitation upon navigable waters has never obtained in the United States. Navigability in fact for products of the forest, field, or commerce for regularly recurrent annual periods has, in our state, been held sufficient to constitute a stream navigable.”).

164. See *infra* at pp. 38-41.

165. MacGrady, *supra* note 58, at 567 (“Whether the current American doctrine is ultimately a good one or a bad one is not the issue here. The point is that Angell and Kent, and the multitude of courts that have announced the American rule, have relied on an erroneous historical view of English fact and English law.”).

166. *Palmer*, 3 Cai. at 317.

167. See *HALE*, *supra* note 32, at 336.

Hale was an evidentiary presumption, not a rule of title.¹⁶⁸ But as the following discussion of the American public trust doctrine will evidence, American law came to understand the *prima facie* rule as a rule of title with the result that the *jus publicum*, which had been the basis for the evidentiary presumption under English law,¹⁶⁹ became dependent on state ownership of the submerged land. That link is one of the “shackles” to which Professor Sax made reference.¹⁷⁰ By linking the *jus publicum* to state ownership, it would be difficult to extend the public rights theory to perceived public interests in the management and use of privately owned resources. However, expansive public trust theories as applied to water resources did benefit from this misunderstanding of Hale’s *prima facie* theory in the following way. Under English law, the *jus publicum* extended to all navigable waters independent of ownership. Under American law, because the *jus publicum* was an attribute of state ownership, the states were presumed to own the beds and banks of all navigable streams. Thus, although the states as sovereigns were theoretically successors in title to the king, they got more than the king actually had when it came to submerged lands.

The original states also succeeded to title in uplands held by the Crown and new states generally were granted some lands by the United States Government.¹⁷¹ No one suggested, until recently, that these and other uplands might be affected by the public trust doctrine. But a concern for public access to privately held resources was not limited to navigable waters and submerged lands. Just as the *jus publicum* had application to navigable waters in service of commerce,¹⁷² so were there claims of public rights in roadways over which commerce traveled. Roads were sometimes dedicated at the time lands were granted and sometimes later, either by willing

168. MacGrady, *supra* note 58, at 550.

169. Deveney, *supra* note 30, at 43 (discussing the *prima facie* theory in England’s roots in the “recognition that the foreshore was a distinct and valuable type of property not to be passed by implication”).

170. SAX, *supra* note 38, at 186 (With the historical shackles loosened or removed, “the public trust doctrine is not just a set of rules about tidelands, a restraint on alienation by the government, or an historical inquiry into the circumstances of long-forgotten grants. . . . [T]he public trust doctrine should be employed to help us reach the real issues – expectations and destabilization – whether the expectations are those of private property ownership, of a diffuse public benefit from ecosystem protection or of a community’s water supply.”).

171. *See, e.g.*, Deveney, *supra* note 30, at 58.

172. *Id.* at 46.

property owners or by eminent domain.¹⁷³ But roads were also established by common use and, via one of the many fictions by which the common law courts kept their house in order, some of these roads were found to have been granted through custom or prescription.¹⁷⁴ Under English law, and in some cases American law, other public easements on private property were similarly acquired for grazing,¹⁷⁵ public squares,¹⁷⁶ annual festivals,¹⁷⁷ horse racing¹⁷⁸ and other sporting events.¹⁷⁹

Although most commentators on the public trust doctrine have paid scant attention to these dryland public uses and their underlying legal doctrines, Professor Carol Rose has done us the favor of considering how public trust, prescription and custom might be interrelated in nineteenth century American law.¹⁸⁰ Rose suggests that all three doctrines protect the interests of what she calls the “unorganized public” as distinct from the organized public that is represented by the state and other governmental entities.¹⁸¹ The unorganized public, says Rose, is vested with “inherently public property” that is “collectively ‘owned’ and ‘managed’ by society at large, with claims independent of and indeed superior to the claims of any purported governmental manager” of property vested in the state.¹⁸² The fact that “the prescriptive doctrines generated no real tests for the character of the use that could establish public acquisition of a road . . . suggests the extraordinary strength of the view that roads should be public property.”¹⁸³ “[D]espite frailties in its original authority,” says Rose, “[i]t is equally striking that ‘public trust’ doctrines in waterways, like the doctrines easing public

173. BLACKSTONE, *supra* note 114, at *35 n.19.

174. *Id.* at *265 (“A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed.”).

175. *See e.g.*, *Kerwhaker v. Cleveland, Columbus & Cincinnati R.R. Co.*, 3 Ohio St. 172, 185 (1854) (“it was the common custom of the country to allow domestic animals to run at large upon the uninclosed grounds of the neighborhood”).

176. *See e.g.*, *Le Clercq v. Trustees of Town of Gallipolis*, 7 Ohio 218, 220 (1835) (“The original survey of the town left the ground for this purpose, in conformity to our habits-in greater conformity to the habits and customs of the people composing the colony.”).

177. *Hall v. Nottingham*, (1876) 33 L.T.R. 697 (Exch. Div.).

178. *Mounsey v. Ismay*, (1863) 158 Eng. Rep. 1077 (Q.B.).

179. *Abbot v. Weekly*, (1665) 83 Eng. Rep. 357 (K.B.).

180. Rose, *supra* note 18, at 714.

181. *Id.* at 721.

182. *Id.* at 720-21.

183. *Id.* at 727.

acquisition of roadways, flourished alongside the popularization of classical economic theory – a theory that generally rejected the notion that the general public could own and manage property.”¹⁸⁴ The persistence of the idea of “inherently public property” in the face of otherwise widespread agreement, at least until the late nineteenth century, that public property should be privatized wherever possible, leads Rose to ask what led some nineteenth century American courts to conclude that some resource uses are inherently public.¹⁸⁵

One explanation might be that some resources simply cannot be privatized due to their physical nature. Presumably such resources also could not be owned by the state in a proprietary sense for the same reasons. But Rose rejects this simple explanation, noting that many public rights rooted in public trust, prescription, and custom could easily be converted to exclusive proprietary interests and suggesting a different form of control:¹⁸⁶

[C]ustom suggests that there may be a middle ground between regimes in which the resource is so plentiful or so difficult to privatize that it is not worth the effort, and regimes in which conflicting uses are managed by formal ownership. This middle ground is the regime of the managed commons, where usage as a commons is not tragic but rather capable of self-management by orderly and civilized people.¹⁸⁷

The challenge Rose faces is to explain what distinguishes these “inherently public” resource uses from those that are either private or public in the formal sense. She acknowledges the usual argument made in justification of eminent domain that rent seeking by holdouts can result in diminished net social welfare where foregone public benefits far outweigh any increased benefits to the holdout.¹⁸⁸ “But even if the holdout danger was *necessary* for a presumption of ‘publicness,’” says Rose, “that danger cannot have been *sufficient*. . . .

184. *Id.* at 730.

185. *Id.* The idea of “inherently public property” could be understood to mean that some resources are by their nature public. This is the sense in which many nineteenth and twentieth century American courts have understood the public trust. But Rose seems to take the view that what is inherently public may change with circumstances, and Farnham on page 171 of his 1904 treatise *THE LAW OF WATERS AND WATER RIGHTS*, relying on the generally ignored Stuart Moore (*see supra* note 32, at 172), demonstrates that whatever consensus exists today on the inherently public nature of tidal lands was not shared by the pre-nineteenth century English: “There was no public sentiment or rule of law to prevent [the King’s] . . . granting land covered by the water.”

186. Rose, *supra* note 18, at 781.

187. *Id.* at 749.

188. *Id.* at 760-61.

Unlike eminent domain, public prescription and public trust doctrines require no payment to the owner; How, then, can we know whether such property will be more valuable in public hands?”¹⁸⁹

Finding traditional holdout explanations for public trust, public prescription, and custom incomplete, Rose turns to another idea of classical economics – “returns to scale or ‘interactiveness’ of use.”¹⁹⁰ Noting that American law has generally reflected the view that more commerce is better, not just in terms of economic prosperity but also in terms of building strong communities, Rose suggests that public trust, public prescription, and custom are connected by an understanding of the importance of the unorganized public to community.¹⁹¹ In economic terms, she contends, there are significant rents realized by this unorganized public through commerce and other community activities dependent on public access to particular resources, and when the public is excluded, these rents are foregone.¹⁹² Thus, public trust, public prescription, and custom can preserve the unorganized public’s entitlement to these rents:

The public right to “its” rent could assume several guises. An organized public could use eminent domain powers, paying for the underlying land at fair market value but appropriating to itself any additional rent created by the nonexclusiveness and expandability of the public use. The “unorganized” public, on the other hand, fell back on doctrines of inherently public property – public trust and public prescription. These doctrines allocated to the public only an easement for access; but the easement again rendered to the public its rent. Thus eminent domain and inherently public property were only variant assertions of the same public entitlement to the rents that publicness had created.¹⁹³

While Rose’s argument elegantly bridges categories of common law taxonomy and offers a more than plausible economic rationale to support that bridge, it is doubtful that many courts were thinking in the terms she suggests. Of course we can never know what judges were really thinking, but based on what they wrote in their opinions, it appears few had in mind the unorganized public’s entitlement to the rents created by community interaction. Rose acknowledges that many nineteenth century American courts rejected the claim that the unorganized public has rights that constrain the democratically

189. *Id.* at 761.

190. *Id.* at 769.

191. *Id.* at 776.

192. *See id.* at 776-80.

193. *Id.* at 771.

elected legislature,¹⁹⁴ but she turns to Blackstone and American courts relying on Blackstone for the idea that custom exists in parallel with laws enacted by Parliament or local legislatures.¹⁹⁵

Blackstone does speak extensively of custom, but largely as a source of the common law rather than as a limitation on Parliament or the common law courts. Blackstone's examples of customary law relate almost entirely to private interests and to governmental processes and powers, not to notions of public right to which both Parliament and the courts must defer.¹⁹⁶ For Blackstone, custom was a legitimating source for laws to be formalized mostly by courts and to some extent by Parliament, not an independent category of laws that could bind the courts and Parliament. Indeed, Blackstone states explicitly that "no custom can prevail against an express act of Parliament; since the statute itself is a proof of a time when such a custom did not exist."¹⁹⁷

Rose's suggestion that a concept of "inherently public" property underlies the public trust doctrine, even if the English origins of that doctrine are not quite what advocates have claimed, is not well supported by the history of the prima facie rule on which the modern trust doctrine relies.¹⁹⁸ As demonstrated above, the Crown's claim of title to submerged lands had nothing to do with protecting the public's interest in navigating and fishing the overlying waters.¹⁹⁹

194. *See id.* at 736.

195. *See id.* at 740-42.

196. As examples of general custom Blackstone cites "the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries, the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires." WILLIAM BLACKSTONE, 1 COMMENTARIES *68. As examples of local custom Blackstone cites "in Kent . . . that not the eldest son only of the father shall succeed to his inheritance . . . and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord . . . [and] in divers antient boroughs . . . that the youngest son shall inherit the estate, in preference to his elder brothers, . . . [and] in other boroughs that a widow shall be intitled, for her dower, to all her husband's lands, . . . [and] lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters." *Id.* at *74-*75.

197. *Id.* at *76-*77.

198. Rasband, *supra* note 127, at 18. On the other hand, the prima facie theory may make more sense as an evidentiary presumption, if not a rule of title, in the United States. "The presumption of prima facie ownership by the state was more appropriate in the new American situation because rather than presuming ownership in the crown for purposes of augmenting the royal purse, the prima facie theory in America presumed ownership on behalf of the people."

199. *Supra* text accompanying notes 120-28.

Among the grievances leading to the execution of King Charles I in 1649 was the Crown's taking, pursuant to the *prima facie* theory, lands that had been held in private hands for generations.²⁰⁰ It took three centuries for English law finally to embrace the Crown's claim, though always made in the name of the public interest – hardly what one would call “inherently public” property.

Rose offers as “an example closer to home, . . . the western United States . . . settlers [who] treated land, water, and other resources as a commons, and managed them through their own customs.”²⁰¹ But like the customs upon which much English law was founded (and in Rose's own words), these “customs were formalized into law” with “the arrival of increasing numbers of claimants with conflicting claims.”²⁰² This fairly quick formalization occurred, one suspects, because America had become very much a nation of written laws (in judicial opinions as well as constitutions, statutes, and ordinances) and because resource management by custom proved effective only on a small scale.

Rose argues that “indefiniteness of the number and identity of users” is essential to these rights of the unorganized public,²⁰³ but much of the case law on public prescription relies on analogy to the law of private prescription which is centrally concerned with protecting the settled expectations of particular individuals.²⁰⁴ In answering her own query as to “[w]hy allow unorganized individuals to bind their governments to ‘accept’ roadways?” Rose suggests that “[t]he chief idea seems to have been to protect injured parties' expectations.”²⁰⁵ It is certainly true that public rights acquired by prescription, or existing pursuant to public trust or custom, may be asserted by individuals unknown in advance of any legal action, but the context for judicial consideration of any claim will involve identifiable individuals whose expectations will be very much like

200. See Rasband, *supra* note 127, at 12-13 n.35.

201. Rose, *supra* note 18, at 744.

202. *Id.*

203. *Id.* at 764-66.

204. See, e.g., *Schwerdtle v. Placer County*, 41 P. 448, 449 (Cal. 1895) (noting that “[t]he rule thus being that the adverse user conclusively establishes the presumption of dedication to the public—as in the case of the individual the prescriptive right establishes the presumption of a grant.”); EMORY WASHBURN, *A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES* 199 (4th ed. 1885) (“The use of a way by the public for twenty years gives a prescriptive right of a public as well as a similar user does of a private way.”).

205. Rose, *supra* note 18, at 734.

those of individuals claiming a private prescriptive right.²⁰⁶ Certainly there were nineteenth century American courts that employed the language of public rights, and perhaps a few of them even thought about the gains from community and interconnectedness such public rights would yield, but the adversarial approach of Anglo-American law allows judicial consideration of such lofty matters only in the context of particularized claims. One must have a self-interest to get a court's attention, and to prevail one must have something in the nature of a private right, even if that right is held in common with others.²⁰⁷ Indeed, that is precisely the context of *Arnold v. Mundy* and every public trust case that followed.

A. *Arnold v. Mundy*

*Arnold v. Mundy*²⁰⁸ is generally cited as the foundational case of public trust law in the United States.²⁰⁹ The case involved just one of many disputes over the right to take oysters in the tidal mud flats of the Rariton River at Perth Amboy in New Jersey.²¹⁰ The plaintiff claimed that defendant had trespassed on his private oyster bed and taken away his oysters.²¹¹ Plaintiff's claim of exclusive right in the oyster bed was founded upon a survey conducted pursuant to New Jersey law, his having planted and tended oysters in the bed, and a chain of title dating back to the 24 proprietors of East New Jersey who acquired title from the Duke of York who, in turn, acquired title in 1664 and 1674 from his brother Charles II, the King of England.²¹² The defendant claimed that plaintiff's title extended only to the high water mark and that he had taken oysters pursuant to a right held in

206. An important distinction between prescription and custom in English law, said Blackstone, was "that custom is properly a *local* usage, and not annexed to any *person*." BLACKSTONE, *supra* note 114, at *263 (emphasis in original). But those who could claim a right of use in private property pursuant to custom were nonetheless a definite and limited number of individuals at any point in time. Even claims pursuant to constitutional rights held by all citizens must demonstrate personal interests, although sometimes those personal interests can be very attenuated. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973).

207. *Students Challenging*, 412 U.S. at 686-687.

208. *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821).

209. See, e.g., Blumm, *supra* note 14, at 580.

210. *Arnold*, 6 N.J.L. at 1-3.

211. *Id.* at 1.

212. *Id.* at 4 (noting that the history of land conveyances from the Crown through the twenty-four proprietors to individual grants is recounted as determined by the jury in the Supreme Court's decision in *Martin v. Waddell*, 41 U.S. 367, 370-80 (1842)).

common with his fellow citizens to harvest oysters from the navigable waters of the state of New Jersey.²¹³

Writing for the New Jersey Supreme Court was Chief Justice Kirkpatrick, who also had ruled on the case at trial.²¹⁴ “[T]he great question in the cause,” said Kirkpatrick, is “[a]s to the right of the proprietors to convey.”²¹⁵ Here he was referring to the 24 proprietors of East New Jersey who had been granted title in common to a significant part of New Jersey by the Duke of York, for the purpose of overseeing and encouraging the development of that portion of the colony.²¹⁶ After confessing that he had not had sufficient time to consider the issue fully,²¹⁷ Kirkpatrick concluded that the plaintiff did not have a private right in the oyster beds because the proprietors did not hold an alienable interest in those beds that they could have conveyed to plaintiff’s predecessors in title.²¹⁸ Because all of the grants in the plaintiff’s claimed chain of title appeared on their face to convey the oyster beds,²¹⁹ Kirkpatrick had to find that the original grant by Charles II to the Duke of York was invalid to the extent it purported to convey a proprietary interest in tidal lands.²²⁰

Kirkpatrick found that the grant to the Duke of York was not of a private estate, but rather of all the powers of government and the crown, save the reserved power to hear appeals.²²¹ Pursuant to those granted powers, the Duke could convey properties to individuals, but

213. *Id.* at 2.

214. *See id.* at 76 (“Upon the whole, therefore, I am of opinion, as I was at the trial . . .”).

215. *Id.* at 69-70.

216. *See id.* at 60 (discussing the history of how East New Jersey came to be owned by twenty-four proprietors). *See also id.* at 28.

217. *Id.* at 70 (Noting that “though we have taken time since last term to look into it, yet I must confess, for myself, that I have not done so in so full and satisfactory a manner as could have been wished; and my apology must be, that during a very great part of the vacation, I have been necessarily abroad, attending to other official duties, and during the time I had assigned to myself for this purpose, I have been so much indisposed as not to be able very satisfactorily to attend to business of any kind.”).

218. *Arnold*, 6 N.J.L. at 78.

219. The grant by Charles II to the Duke of York conveyed “all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, profits, commodities and hereditaments to said islands, lands and premises . . .” Quoted in *Martin*, 41 U.S. at 370. The grant by the Duke of York to the twenty-four proprietors of East New Jersey conveyed “every part and parcel thereof, together with all islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises whatsoever . . .” *Id.* at 377.

220. *Arnold*, 6 N.J.L. at 78.

221. *Id.* at 70-71.

only under the same circumstances as could the king.²²² The king's powers in this regard were limited, and therefore, so were the Duke's powers.²²³ "Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth," said Kirkpatrick, "but the nation does not possess all those things in the same manner."²²⁴ He goes on to identify three kinds of property: private property that has been granted to individuals; public property (the crown or public domain) which has not been, but can be, granted to individuals; and common property which is for all to share.²²⁵ He cites Blackstone and Vattel in stating that common property includes "the air, the running water, the sea, the fish, and the wild beasts."²²⁶ Because these are all resources "in which a sort of transient usufructuary possession, only, can be had," and because they cannot "well. . . be vested in all the people," this common property is therefore in the sovereign power "to be held, protected, and regulated for the common use and benefit."²²⁷ Kirkpatrick cites Hale and Bracton, as well as several English cases, in support of this description of common property.²²⁸ Following on Hale, he states that "[i]n navigable rivers, the fishery is common, it is prima facie in the king, but is public and for the common use."²²⁹ Consistent with the widespread American misunderstanding of the English prima facie rule, Kirkpatrick takes it to be a rule of title rather than an evidentiary presumption. Understood as an evidentiary presumption placing the burden of proof on a claimant, the prima facie rule would necessarily imply that alienation is possible, and that would contradict Kirkpatrick's holding in the case.

Kirkpatrick illustrates the difference between the public domain and common property by suggesting that a citizen cannot go into the king's forests and harvest trees even though it is public property.²³⁰ The king's forests, like all of the crown's domain, exist for the personal use of the king and as a source of revenue for governmental

222. *Id.*

223. *Id.* at 71.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 71-72.

229. *Id.* at 72.

230. *Id.* at 72-73.

purposes.²³¹ Common property, on the other hand, is for the use of everyone.²³² The king may not “appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.”²³³

Having taken the absolutist position that the common property rights in navigable waters below the high water mark are inalienable by the king or any of his assignees, Kirkpatrick must explain the reality of many private claims to submerged lands in tidal waters, particularly in England. His explanation is two fold. First, grants dating from Henry II or earlier are legally valid, although for Kirkpatrick not morally legitimate.²³⁴ Exclusive fishing rights claimed as royal franchises pursuant to the royal prerogative were “considered by the people to be a usurpation of their ancient common rights.”²³⁵ This violation of public rights was “broken down and prohibited in [the] future,” by Magna Carta which was “nothing more than a restoration of the ancient common law.”²³⁶ The fact that counsel for the plaintiff provided evidence that “[could not] be controverted” that “not only navigable rivers, but also arms of the sea, ports, harbours, and certain portions of the main sea itself upon the coasts, and all the fisheries appertaining to them [are] in the hands of individuals,”²³⁷ was, for Kirkpatrick, only evidence of the continuing usurpation of the public’s rights,²³⁸ whether the claim of private right was based on royal grant or prescription. In looking to Magna Carta as the legal recognition of these public rights under English law, he relied upon Blackstone.²³⁹ However, the law was not so clear cut for Blackstone who felt compelled to explain the inconsistencies in the case law: “But the considering such right as originally a flower of the prerogative, till restrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I.) to

231. *Id.*

232. *Id.* at 71.

233. *Id.* at 72-73.

234. *Id.* at 73.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* (claiming that “[s]o far as it depends upon royal grant [claims of private title to fisheries or submerged lands] . . . it seems pretty clear that it has always been considered as an encroachment upon the common rights of the people”).

239. *Id.* at 74.

such as now claim it by prescription, may remove some difficulties in respect to this matter, with which our books are embarrassed.”²⁴⁰ Of Hale, who wrote three and a half centuries after Magna Carta that “[t]he king may grant fishing within a creek of the sea . . . [and] may also grant that very interest itself, viz. a navigable river that is an arm of the sea, [with] the water and soil thereof,”²⁴¹ Kirkpatrick insisted that “he must be understood as speaking of the common law before it was confined and restrained by Magna Carta.”²⁴² But, suggested Kirkpatrick, if Hale were understood to suggest that the king retained the power to alienate tidal lands, waters and fisheries, it should be remembered that he, like Davies, the reporter of the *River Banne* case, were “disciples of Seldon, and converts to his doctrine of mare clausum,”²⁴³ a doctrine reflective of the positive law but not favorable to the public rights theory.

Justice Kirkpatrick summed up his position in language a modern advocate of public rights could scarce improve upon:

Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use²⁴⁴

There is little wonder the case has stood, with *Illinois Central*, as a beacon of modern public trust theory. The rhetoric is grand and sweeping. But Kirkpatrick did play fast and loose with English

240. BLACKSTONE, *supra* note 114, at *40.

241. HALE, *supra* note 32, at 384.

242. *Arnold*, 6 N.J.L. at 75; Rasband, *supra* note 127, at 24 (concluding “Kirkpatrick’s conclusion that after Magna Carta the crown lacked all power to grant land under navigable water was inaccurate. The inaccuracy, however, did serve the useful purpose of clearing New Jersey’s title to the foreshore.”).

243. *Arnold*, 6 N.J.L. at 74.

244. *Id.* at 76-77.

precedent and history.²⁴⁵ In support of his understanding of the prima facie rule he cites both the *River Banne* case and *Carter v. Murcot*, but neither case supports his view that the rule simply establishes title in the crown as a sort of guardian (Kirkpatrick never uses the word trust) for inalienable public rights. As the English Court said, five years after *Arnold v. Mundy*, in *Duke of Somerset v. Fogwell*, the *River Banne* case stood for the principle that because “general words in a grant by the King would not pass such a special royalty, which belonged to the Crown by prerogative. . . . [T]he grant of the King passes nothing by implication.”²⁴⁶ This understanding of the prima facie rule had been earlier recognized by Lord Mansfield in *Carter* where he stated: “[I]n navigable rivers, . . . the fishery is common: it is primâ facie in the King, and is public. If anyone claims it exclusively, he must shew a right. If he can shew a right by prescription, he may then exercise an exclusive right.”²⁴⁷ In *Arnold*, Justice Rossell even cites *Carter* as holding that “one might prescribe for a several fishery, parcel of a manor, where the sea flows and reflows, but he must prove a right by prescription”²⁴⁸ Rossell also quotes Hale on the same point:

In case of private rivers, the lords having the soil is good evidence to prove he hath the right of fishing, and it puts the proof on them who claim liberam piscariam. But in case of a river that flows and reflows prima facie it is common to all. If any claim it to himself, the proof lieth on his side; and it is a good justification to say, the locus in quo is a branch of the sea, and that the subjects of the king are entitled to a free fishery.²⁴⁹

Yet both Kirkpatrick and Rossell conclude that the king was without power to grant private rights to tidal lands or to an oystery or fishery in navigable waters.

It is more than a little ironic that when Kirkpatrick and Rossell were writing their opinions, the New Jersey Legislature had already recognized that individuals could establish exclusive rights in certain oyster beds in state owned waters. An Act of June 9, 1820,

245. Deveney, *supra* note 30, at 56 (“*Arnold v. Mundy* is an impressive display of judicial dexterity; [but] as history it is nonsense.”); *see also* Rasband, *supra* note 127, at 24-25 (“Kirkpatrick’s conclusion that after Magna Carta the crown lacked all power to grant land under navigable water was inaccurate . . . [and] *Arnold* was an exceptional departure from the prima facie theory recognized by other early courts and state legislatures”).

246. *Duke of Somerset v. Fogwell*, (1829) 108 Eng. Rep. 325, 329.

247. *Carter v. Murcot*, (1768) 98 Eng. Rep. 127, 129.

248. *Arnold*, 6 N.J.L. at 88 (Rossel, J.) (summarizing *Carter*, 98 Eng. Rep. 127).

249. *Id.*

authorized individuals owning lands adjacent to waters “wherein oysters do or will grow” (meaning tidal waters) to plant and have the exclusive right of harvesting oysters.²⁵⁰ Consistent with the English understanding of the *jus publicum*, the Act excepted waters leading to “any public landing” and prohibited obstruction to free navigation.²⁵¹ Anyone violating these exclusive rights was subject to a fifty dollar penalty, half of which was to be paid to the person whose exclusive right was infringed.²⁵² And the Act indicated that such exclusive, appropriative rights in oyster beds had been lawful at least since November 7, 1817.²⁵³ It is clear that the defendant in *Arnold* did not claim such an exclusive right, although he could make application for such a right under New Jersey law, and, additionally, he was the beneficiary of an exclusive right held by the community of Woodbridge in which he resided.²⁵⁴ Indeed it is not clear whether the defendant was claiming a right shared with all citizens of New Jersey or a right exclusive to the residents of Woodbridge. In any event, it is clear that the idea of exclusive rights in tidal lands and fisheries was widely accepted in the state of New Jersey in the early nineteenth century, notwithstanding the rhetoric of Chief Justice Kirkpatrick’s opinion.

Finally, Kirkpatrick made the all important connection between the powers and responsibilities of the English crown and those of its successor sovereign, the people of the state of New Jersey. The people have “the legal estate and the usufruct [and] may make such disposition of them, and such regulation concerning them as they may think fit . . . [thru] the legislative body, who are the representatives of the people for this purpose.”²⁵⁵ The legislature may provide for all manner of public improvements for navigation and commerce, including fishing and oystering, “at the public expense, or they may

250. Act of June 9, 1820, 1820 N.J. Laws 162 § 9 (providing for the preservation of clams and oysters).

251. See Deveney, *supra* note 30, at 54.

252. 1820 N.J. Laws 162 § 10.

253. A subsequent statute made it clear that owners of coastal lands in Newark Bay could license the right to exclusive oyster beds to third parties and that such exclusive claims were to be staked out in a particular manner. Act of Dec. 8, 1823, 1823 N.J. Laws 55 § 1 (supplementing the Act for the preservation of clams and oysters).

254. See BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST 46-49 (1998). As we will see, the defendant in *Martin v. Waddell*, 41 U.S. 367, 378-79 (1842), did make such a claim pursuant to legislation adopted three years after the *Arnold* decision. See *infra* discussion accompanying note 258.

255. *Arnold v. Mundy*, 6 N.J.L. 1, 13 (N.J. 1821).

authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments.”²⁵⁶ But these considerable powers are

nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.²⁵⁷

Beyond asserting that the people of New Jersey succeeded to the crown’s sovereign powers and limitations, neither justice addressed the difficult question of how the powers of a democratic sovereign might be different from those of a king. That question would be addressed in a subsequent United States Supreme Court decision, *Martin v. Waddell*, but only in dissent. The majority opinion in *Martin* would embrace *Arnold v. Mundy* without reservation.

B. *Martin v. Waddell*

*Martin v. Waddell*²⁵⁸ is very similar to *Arnold* on its facts, with one major difference. In *Martin* the plaintiff claimed an exclusive right under the same royal grants as did the plaintiff in *Arnold*, but the defendant also claimed an exclusive right under license from the state of New Jersey pursuant to an 1824 statute authorizing the state to grant exclusive rights in oyster beds in return for rents to the state.²⁵⁹ In writing for the majority of the United States Supreme Court, Chief Justice Taney took no notice of this fundamental difference between the two cases. A dissenting Justice Thompson did take note of the nature of the defendant’s claim, stating: “[I]f the king held such lands as trustee for the common benefit of all his subjects, and inalienable as private property, I am unable to discover on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use

256. *Id.*

257. *Id.* at 78.

258. *Martin*, 41 U.S. at 367.

259. See *Rose*, *supra* note 18, at 727-30, 737 (discussing the Court’s consideration of the state’s interest and the defendant’s interest under the statute); Act of November 25, 1824, 1824 N.J. Laws 28 §§ 3-6 (encouraging and regulating the planting of oysters in the township of Perth Amboy).

of individuals.”²⁶⁰ Justice Thompson’s conclusion was that Charles II must, therefore, have had the power to alienate a proprietary interest in the oyster beds in question, a conclusion with considerable support in the law, although not one that necessarily follows from the power of alienation existing in the New Jersey Legislature.²⁶¹ A decade later in the case of *Den v. Jersey Co.* Chief Justice Taney relied on his *Martin* opinion in upholding a claim to reclaimed tidal lands based upon a grant from the New Jersey Legislature as against another private claim based on a grant from the proprietors of East New Jersey.²⁶² There was no mention of common or public rights, although the case was indistinguishable from *Martin v. Waddell*.²⁶³ The fact that Taney relied on *Martin* to uphold a private claim of entitlement in *Den* on very similar facts makes it puzzling why *Martin* has persisted as authority for a modern public trust doctrine understood to constrain the state’s power to alienate submerged lands. In both *Martin* and *Den*, Taney confirmed private title to submerged lands granted by the state.

While acknowledging that in England the crown was the appropriate organ of government to hold and dispose of the public domain, Chief Justice Taney introduced the trust concept to the Supreme Court’s navigable waters jurisprudence in his statement that “[t]he country mentioned in the letters-patent was held by the king in his public and regal character, as the representative of the nation, and in trust for them.”²⁶⁴ But Taney was not speaking only of navigable waters and their submerged lands. His assertion was that all of the lands granted in the letters-patent by Charles II to the Duke of York, lands he describes as public domain, were held in trust for the nation.²⁶⁵ So his use of the term trust is very different from its modern usage in the context of what Hale defined as common property. Taney’s application of the term to all of the lands that would become the state of New Jersey means he could only have been speaking of the trust which all free peoples must have in their governments, not of a trust in the sense the term is used in modern public trust doctrine.

260. *Martin*, 41 U.S. at 432.

261. See *infra* text accompanying notes 307-315.

262. *Den v. Ass’n of the Jersey Co.*, 56 U.S. 426, 432-33 (1853).

263. *Martin*, 41 U.S. at 432 (discussing legislation that created a licensing scheme under which the defendant acquired an exclusive right to plant and harvest oysters in tidal waters). See also *Den*, 56 U.S. at 431-32 (noting that the legislature had chartered the defendant corporation for the purpose of granting it tidal lands to be reclaimed by filling).

264. *Martin*, 41 U.S. at 409.

265. *Id.* at 367.

With respect to the particular oyster beds claimed by the plaintiff in the case, Taney cites *Blundell v. Catterall*²⁶⁶ and *Duke of Somerset v. Fogwell*²⁶⁷ in asserting that “the question must be regarded as settled in England, against the right of the king, since Magna Carta, to make such a grant.”²⁶⁸ Neither case really supports Taney’s conclusion about English law.

In *Blundell*, the defendant sought to defend against an action in trespass by asserting a public right to bathe in the sea and to have access for that purpose across the foreshore.²⁶⁹ It is a puzzle why Chief Justice Taney cited the case as supportive of the conclusion that the king has no right to convey private interests in navigable waters and tidal lands. None of the four opinions in the case question that the plaintiff had exclusive rights to the shore and to the associated fishery. Nor did the defendant challenge those private rights, claiming only the right to bathe on the shore and to have access to the shore across the plaintiff’s property. Whether or not the plaintiff’s property interest had been granted before or after Magna Carta was not an issue, even for the one dissenting judge, Justice Best, who was prepared to embrace a common law right to bathe even if the only justification was public policy.²⁷⁰ Best did fairly state the concept of common property as defined by Hale in stating that the seashore “was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil.”²⁷¹ This may have been the source of Chief Justice Taney’s use of the public trust terminology, but as Justice Bayley stated in response to Justice Best, while there is no doubt a *jus publicum*, “the question in this case is, what the *jus publicum* is.”²⁷² Neither Bayley nor his other two colleagues could find any support for the *jus publicum* including the right to bathe claimed by the defendant. What is important about *Blundell* for modern public trust analysis is Justice Bayley’s recognition that the

266. *Blundell v. Catterall*, (1821) 106 Eng. Rep. 1190, 1197, 1199-1200, 1203, 1205 (K.B.).

267. *Duke of Somerset v. Fogwell*, (1829) 108 Eng. Rep. 325, 328-29.

268. *Martin*, 41 U.S. at 410.

269. *Blundell*, 106 Eng. Rep. at 1190-91.

270. *Id.* at 1197 (Best, J.) (“But unless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance.”).

271. *Id.*

272. *Id.* at 1204 (Bayley, J.).

scope of the *jus publicum* was not defined by Hale in his oft cited treatise,²⁷³ and Justice Best's willing expansion of the common law definition on the basis of his assessment of good public policy.²⁷⁴ Taney, following the lead of the New Jersey court in *Arnold*, apparently was willing to embrace the Best approach.

Although there is much language in the reporter's preface to the court's opinion in *Fogwell* that might be read to support Taney's conclusion, the court did not seriously question the king's power to grant a private fishery. At issue was the proper form for the instant action.²⁷⁵ In resolving that technical question, the Court cited the *River Banne* case in support of the prima facie rule on crown grants pursuant to deciding whether or not the soil was a part of the grant,²⁷⁶ but otherwise the Court assumed the grant upon which the plaintiff based his claim was valid.²⁷⁷ The reporter stated that "[t]he learned [trial] Judge was of opinion, that there was evidence for the jury to presume that there had been before the reign of Henry the Third, a grant of the exclusive right of fishing in the river Dart,"²⁷⁸ and stated in the headnote to the case that the ruling in the case applied "[w]here a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before Magna Charta."²⁷⁹ Given that it is also reported that the grant to the Duke of Somerset issued from Elizabeth I more than three centuries after Magna Carta,²⁸⁰ one might conclude that indeed it "must be presumed" that the grant was before Magna Carta.

Having addressed the question of English law, Taney then went on to say that it was of little relevance "because it has ceased to be a matter of much interest in the United States."²⁸¹

For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried

273. *Id.* at 1204-05.

274. *See id.* at 1196-97 (Best, J.).

275. *Duke of Somerset v. Fogwell*, (1826) 5 B. & C. 875, 878 (reporter headnotes).

276. *Id.* at 885 (Bayley, J.).

277. *Id.* at 886.

278. *Id.* at 877 (reporter headnotes).

279. *Id.* at 875.

280. *Id.*

281. *Martin v. Waddell*, 41 U.S. 367, 410 (1842).

and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual, in trust for the whole nation.²⁸²

But even as late as 1842, the English law would not be so easily dismissed. Both the plaintiff and the defendant asserted rights based in English law. The plaintiff's claim of title led back to a grant from the king of England,²⁸³ and Taney acknowledged the prima facie rule that Hale had described nearly three centuries earlier. "The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, . . . [any] grant to an individual . . . is so much taken from the common fund [Such grants] are, therefore, construed strictly; and it will not be presumed, that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it."²⁸⁴ The defendant's claim was founded in the *jus publicum*, a concept with deep roots in English jurisprudence.²⁸⁵

To determine the validity of the *jus publicum* claim, Taney asked "[w]hether the [king's] dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred on the duke?"²⁸⁶ And if so, "[w]hether, in his hands, they were intended to be a trust for the common use of the new community about to be established; or private property to be parceled out and sold to individuals, for his own benefit?"²⁸⁷ The latter question is not, said Taney, to be answered as if we are interpreting a mere deed or other document of conveyance, rather "it was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed."²⁸⁸ As the questions were posed by Taney, there could be only one answer. No one doubted that public rights in navigable waters existed as the *jus publicum*. If what the Duke of York received from Charles II was either a proprietary interest in those waters and submerged lands or a responsibility to preserve the public's right of use, the public right would prevail and no grants of exclusive rights could be permitted.

282. *Id.* at 410-11.

283. *Id.* at 367.

284. *Id.* at 411.

285. *See id.* at 425-26.

286. *Id.* at 411.

287. *Id.*

288. *Id.* at 412.

For Taney, either the Duke received a proprietary interest or he held the waters and lands “as one of the royalties incident to the powers of government.”²⁸⁹ But those alternatives did not reflect the laws of England at the time. Justice Taney could claim not to be interested in the laws of England, but the reality was (and remains) in a rule of law system bridging the sovereignty of two nations that the laws of the earlier sovereign continue to matter. Hence the persistent return to English law in modern discussions of the public trust doctrine in American jurisdictions.

Justice Thompson, in dissent, ably explains how Taney misunderstood or distorted the laws of England and of New Jersey, as evidenced by the dependence of the state on private enterprise pursued on submerged lands that had been granted by the Duke and his successors in title. “A majority of the court seem to have adopted the doctrine of *Arnold v. Mundy*,”²⁹⁰ says Thompson, which was based on the “broad proposition, that the title to land under the water did not, and could not, pass to the Duke of York, as private property. . . . It is worthy of observation,” he suggests, “that the course of New Jersey in relation to this claim is hardly consistent with her pretensions.”²⁹¹ Amidst those pretensions, he points out, is the very law upon which the defendant rests his claim. “The enacting clause [of that legislation] authorizes the setting apart the oystery to exclusive private use, when, by the proviso, no obstruction is to be made to the fisheries.”²⁹²

Where Taney got the law of navigable waters and fisheries wrong, the New Jersey Legislature got it right in that simple enacting clause. It is not a choice between public and private rights. Rather private rights can and do exist, subject to the *jus publicum*, and when grants of submerged lands and fisheries are made by the king or his assignee they must be explicit and will not be implied. Thompson makes reference to Hale in stating that the “king of England hath a double right in the sea, viz., a right of jurisdiction, which he ordinarily exercises by his admiral, and a right of propriety or ownership.”²⁹³ By the letters of patent of 1664 and 1674 the Duke of York received both and there was no necessity, as Taney suggested, to convert the “*jura*

289. *Id.* at 413.

290. *Id.* at 419.

291. *Id.*

292. *Id.* at 420-21.

293. *Id.* at 422.

regalia . . . into private property.”²⁹⁴ “The true rule on the subject,” said Thompson, “is that *primâ facie* a fishery in a navigable river is common, and he who sets up an exclusive right, must show title, either by grant or prescription.”²⁹⁵ Thompson further suggested that it was not clear from the majority opinion what was different about drylands.²⁹⁶ If the Duke of York received only the *jura regalia* from Charles II, how was it possible for most of the drylands in the state to have come into private ownership? Of course Taney did not think that the Duke lacked sufficient proprietary interest to convey the dryland, but his argument that wetlands could not be privately owned because of their special public values made it difficult to explain why drylands, many of which had equal or greater public value, could be granted and privately owned.

C. Arnold Overruled

Although Taney’s majority opinion in *Martin v. Waddell* relied heavily on the New Jersey court’s opinion in *Arnold v. Mundy*, the New Jersey court overturned its decision only eight years after *Martin* in *Gough v. Bell*.²⁹⁷ Not surprisingly, *Gough* is seldom cited in the public trust literature. Of 128 articles published since 1982 that cite *Arnold*, only 11 cite *Gough* and two of those misstate the holding in the case.²⁹⁸ But notwithstanding the extensive modern reliance on *Arnold*, the fact of the matter is that it was not good law in New Jersey after 1850.²⁹⁹ Indeed every indication in the three decades

294. *Id.* at 413.

295. *Id.* at 424.

296. *Id.*

297. *Gough v. Bell*, 22 N.J.L. 441 (N.J. 1850).

298. Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVL. L. 477, 482 n.31 (2001) (stating that *Gough* holds “that state sovereignty precludes New Jersey proprietors from granting lands below high-water . . .”). See also Donna A. Golem, Note, *The Public Trust Doctrine Unprecedentedly Gains New Ground in Phillips Petroleum Co. v. Mississippi*, 22 LOY. L. A. L. REV. 1319, 1353 (1989) (stating that *Gough* “applied the public trust doctrine to tidelands at the shore of navigable waters”).

299. It may be suggested that the holding in *Arnold* was restored in 1972 in the case of *Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 52 (1972), in which the New Jersey court quoted extensively from Chief Justice Kirkpatrick’s opinion. But *Neptune City* did not involve the alienability of tidal lands and in any event the Court agreed in dicta that such lands could be alienated if “promoting the interests of the public” or if there is no “substantial impairment of the public interest in the lands and waters remaining.” *Id.* at 54 (quoting *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)).

separating the two opinions was that it was never good law. In overruling *Arnold*, Chief Justice Green noted:

The view, moreover, expressed by the Chief Justice, in *Arnold v. Mundy*, is incompatible with very numerous acts passed by the legislature of this state. The acts which authorize the erection of dams or bridges across navigable streams, which are found upon the statute book from a very early period, the laws authorizing the erection of piers and docks, and the laws authorizing the exclusive appropriation of oyster beds to private use, are all grants or appropriations of the waters of the state destructive to some extent of common rights.³⁰⁰

Quoting his predecessor's holding in *Arnold* that "[t]he sovereign power itself cannot . . . make a direct and absolute grant of the waters of the state,"³⁰¹ Chief Justice Green stated:

If, by this proposition, it is meant only to assert that a grant of all the waters of the state, to the utter destruction of the rights of navigation and fishery, would be an insufferable grievance, it is undoubtedly true. . . . But if it be intended to deny the power of the legislature, by grant, to limit common rights or to appropriate lands covered by water to individual enjoyment, to the exclusion of the public common rights of navigation or fishery, the position is too broadly stated. The contrary doctrine is supported by numerous authorities.³⁰²

Among the authorities cited by Green were Chief Justice Shaw of the Massachusetts Supreme Court, who held in *Charlestown v. Middlesex* "that a navigable stream may cease to be such, by the appropriation of the soil, under legislative authority, to other purposes . . .,"³⁰³ and Chief Justice John Marshall, who stated in *Willson v. Black Bird Creek Marsh Co.* that "unless it comes in conflict with the Constitution or a law of the United States [which he found it did not]," the placing of a dam in a navigable waterway "is an affair between the government of Delaware and its citizens . . ."³⁰⁴ Marshall concluded his very short opinion in *Willson* with a footnote that included the entirety of Justice Baldwin's opinion on behalf of the Circuit Court for the Eastern District of Pennsylvania in *Atkinson v. Philadelphia and Trenton Railroad Co.* in which Baldwin stated that "[t]his common right [of public access to a navigable waterway] is as much under the protection of the law, as a right of property in a

300. *Gough*, 22 N.J.L. at 456.

301. *Id.* at 458-59 (quoting *Arnold v. Mundy*, 6 N.J.L. 1, 53 (N.J. 1821)).

302. *Id.* at 459.

303. 44 Mass. 202, 203 (1841).

304. 27 U.S. 245, 251 (1829).

citizen, . . . but it is a right derived from legislation, which may be abridged or modified . . . as may be thought most conducive to the public welfare, by authorizing the erection of bridges or dams, which may subject the navigation to partial interruption, or wholly destroy it.”³⁰⁵ It should be noted that Chief Justice Green’s statement of the law on state alienation of submerged lands is very similar to Justice Field’s explanation of the law in *Illinois Central*,³⁰⁶ notwithstanding the heavy modern reliance on *Illinois Central* for a near total limit on alienation.

The *Gough* court might have overruled *Arnold* simply because its prohibition on state alienation of submerged lands did not comport with the reality everywhere in New Jersey and in every other state in the Union. But the opinion warrants more attention than it has received because of its recognition that even if there existed a common law prohibition on alienation by the king (although the facts did not support the existence of that rule either), it did not follow that there would be a similar prohibition on the people and legislatures of the new American states.³⁰⁷ The court stated that “[w]hatever doubts may exist in regard to the power of the king to dispose of common rights, there exists none in regard to the power of parliament. Parliament not only may, but does exercise the power of aliening the public domain, of disposing of common rights, and of converting arms of the sea, where the tide ebbs and flows, into arable land, to the utter destruction of the common rights of navigation and fishing.”³⁰⁸ The court elaborated on its understanding of the legislative power:

This power is attributed to the omnipotence of parliament, and it is said that no such omnipotence is vested in the legislature. The legislature, it is true, is not omnipotent in the sense in which parliament is so. It is restrained by constitutional provisions. Its powers are abridged by fundamental laws. But it would seem clear, upon principle, that in every political existence, in every organized government, whatever may be its form, there must be vested somewhere ultimate dominion, the absolute power of disposing of the property of every citizen. In this consists eminent domain, which is an inseparable attribute of sovereignty If the legislature may dispose of the property of each individual citizen for the public good, it would seem to be no greater exercise of power to dispose of public property or the common rights of all the people for the same end. The objection to an alienation of the

305. 2 F. Cas. 105, 107-08 (1834).

306. See *infra* text accompanying notes 338-350.

307. See *Gough v. Bell*, 22 N.J.L. 441, 457 (N.J. 1850).

308. *Id.*

public domain by the king is that he is but a trustee for the community. But the legislature are not mere trustees of common rights for the people. These rights are vested in the people themselves; the legislature, in disposing of them, act as their representatives, in their name and in their stead. The act of the legislature is the act of the people, not that of a mere trustee holding the legal title for the public good.³⁰⁹

The same point was made by the Virginia Supreme Court of Appeals in *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*³¹⁰ At issue was title to lands underlying a navigable river, the James. Title was claimed pursuant to grants made by the state to predecessors in title.³¹¹ The Virginia court had many years earlier stated in *Home v. Richards* that the bed of a navigable river could not be granted.³¹² The reality in *Home* was that the prevailing party was permitted to construct a dam across a portion of the Rappahannock River, whether or not he had title to the bed, which depended upon whether or not the river was navigable.³¹³ Thus, the court's declaration that the bed of a navigable river could not be granted did not mean that individuals might not possess usufructuary rights in the water and bed as an attribute of ownership of riparian land or under license from the state. Notwithstanding this caveat relative to the *Home* decision, there was an important difference between that case and *James River*. In *Home* the grant in question had been made by the crown.³¹⁴ In *James River* the grants were made by the Virginia Legislature.³¹⁵ The *James River* court held that the state could grant private title to lands beneath a navigable waterway and stated:

Undoubtedly there are certain public uses of navigable waters which the state does hold in trust for all the public, and of which the state cannot deprive them, such as the right of navigation, but, subject to these public rights, there is no reason why the beds of navigable streams may not be granted, unless restrained by the Constitution. The Legislature is the representative of the people in such matters, and may exercise full power over the property of the

309. *Id.*

310. *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 469-70 (1924).

311. *Id.* at 471.

312. *Home v. Richards*, 8 Va. 441, 466 (1798).

313. *Id.* at 446-47.

314. *See id.* at 441-45.

315. *James River*, 138 Va. at 471.

state, except so far as that right has been ceded to the federal government, or is restrained by the state Constitution.³¹⁶

D. Illinois Central Railroad v. Illinois

*Illinois Central Railroad v. Illinois*³¹⁷ is the “lodestar”³¹⁸ of modern public trust doctrine for much the same reason that Justinian provides the Roman law foundation and Bracton and Hale the English common law foundation. The case has been badly misunderstood and its holding distorted. We know that the case has been misunderstood thanks to the meticulous historical work done by Professors Kearney and Merrill.³¹⁹ We know that its holding has been distorted by reading Justice Field’s opinion carefully. More than a century later, the misunderstandings and distortions matter little to modern public trust law, but there are nonetheless lessons to be learned from getting the facts and the law straight.

The usual story goes like this.³²⁰ Like many other railroads in the United States, the Illinois Central was granted a right-of-way by the United States government along with significant land grants to subsidize the costs of construction.³²¹ The State of Illinois issued a charter to the railroad permitting it to operate within the state.³²² The City of Chicago came to agreement with the railroad, not without controversy, that the tracks would run along the lakeshore.³²³ Subsequently, so the story goes, the Illinois Central stole the entire lakeshore and harbor of the city by getting friends in the Illinois Legislature to grant the company 1000 acres of submerged lands along the city’s existing harbor and lakeshore.³²⁴ Only a few years

316. *Id.* at 469.

317. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

318. Sax, *supra* note 1, at 489.

319. See generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).

320. Kearney & Merrill suggest that this “standard narrative” had its roots in Professor Sax’s telling of the story in his 1970 article. *Id.* at 808. They also suggest that the standard narrative has been embraced both by proponents and opponents of the modern doctrine. Sax’s account of the facts underlying *Illinois Central* has remained influential among commentators, especially those who place more faith in collective than in market-based solutions to problems of environmental degradation. But to a remarkable degree, an identical narrative also underlies the accounts of the public trust doctrine advanced by scholars sympathetic to private property and market ordering and hence generally skeptical about the doctrine. *Id.*

321. *Id.* at 818.

322. *Id.*

323. *Id.* at 836-37, 847.

324. *Id.* at 800-01, 838-39.

later, the Legislature recognized the error of its ways and revoked the land grant.³²⁵ The Illinois Central challenged the revocation as a violation of their federal constitutional rights under the contracts and 14th Amendment due process clauses.³²⁶ When the case finally reached the United States Supreme Court, Justice Field recognized the scandal of the Illinois Legislature's giveaway to big business of the public's rights and held that the Legislature was not competent to grant the lands to Illinois Central because the public trust doctrine prohibited alienation.³²⁷ Absent Justice Field's recognition of the ancient public trust doctrine, the growth and development of a great American city would have been subject to the whims and desires of a powerful, private monopoly.³²⁸

As Kearney and Merrill demonstrate in their history of the case, "the reality is more complex than the standard story even begins to intimate."³²⁹ They tell a story not of big business against the public interest, but rather of nearly four decades of political battles among the City of Chicago, the State of Illinois, the United States Government and the Illinois Central and other private interests. At the end of the day everyone got some of what they wanted, and no one had perfectly clean hands. Kearney and Merrill conclude that the Illinois Central may well have employed corrupt means to influence the Legislature,³³⁰ but they also contend that legislators could have reasonably believed that the grant was in the best interest of the City and State.³³¹ A wide array of political and economic interests were competing for control of the Chicago waterfront, and it is safe to say that none of them had in mind the preservation of the natural beauty of the lakeshore, except for a few wealthy residents concerned with preserving their unobstructed views.³³² Indeed, had any of the competing interests thought that the outcome would stymie the development and growth of Chicago,³³³ including the development of the submerged lands for commercial advantage, they would have

325. *Id.* at 801.

326. *Id.* at 801, 916-17.

327. *See id.* at 924-25.

328. *Id.* at 806, 881.

329. *Id.* at 930-31.

330. *Id.* at 927.

331. *Id.* at 927-28.

332. *Id.* at 925.

333. Justice Field did suggest that pursuant to the land grant Illinois Central had the power "to delay indefinitely the improvement of the harbor," but no one had realistic fears that the company would do so. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 451 (1892).

worked out a solution without the aid of the Supreme Court.³³⁴ Nor did Justice Field have preservation of the lakefront in mind.³³⁵

Kearney and Merrill conclude the following about their story of *Illinois Central* and its ramifications for the public trust doctrine:

None of this is to suggest that the public trust doctrine is necessarily a bad idea or a good one. But it does suggest that the doctrine should be assessed using arguments more probing than a retelling of the standard narrative of the *Illinois Central* case. That story is a fable, and can justify the doctrine only if we already believe in it for reasons independent of the lesson the case supposedly teaches.³³⁶

Many modern advocates of the expanded public trust doctrine are such believers because they see the doctrine as their best hope to stop development in its tracks. For them, the fable of big business versus the common rights of ordinary people is a far better foundation for the doctrine than is the reality of power politics that Kearney and Merrill recount.

The fable of *Illinois Central's* history is matched with something of a fable about what the case actually held. Most modern applications of the public trust doctrine involve proposals for development on isolated public and private parcels said to be affected with a public trust.³³⁷ In such cases, *Illinois Central* is offered as precedent for the principle that public property affected with a public trust cannot be alienated. But that is not what the Supreme Court held in *Illinois Central*. No less than five times in the opinion, Justice Field expressly states that submerged and coastal lands affected with a public trust can be alienated.³³⁸ Indeed, he notes that it is often in

334. Kearney & Merrill, *supra* note 319, at 925 (“A widespread consensus existed in the second half of the nineteenth century about the need for a new depot and a new outer harbor. The main point of controversy was over what form the development would take and who would control it, not whether there should be any development of the lakefront at all.”).

335. *Id.* (“His public trust doctrine was designed to preserve access to the lake for commercial vessels at competitive prices, not to preserve Lake Park or the shoreline from further economic development. Moreover, Justice Field was not alone in these preferences among the federal judges who ruled on aspects of the controversy. When the dust finally settled, all of *Illinois Central's* massive landfills and improvements had been ratified by the federal courts as being consistent with the nebulous trust identified in *Illinois Central*. Thus, the public trust doctrine, as invoked in the *Illinois Central* litigation, was scarcely an anti-development doctrine.”).

336. *Id.* at 931.

337. *See, e.g.,* Appleby v. City of New York, 271 U.S. 364 (1926); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

338. *Ill. Cent. R.R. Co.*, 146 U.S. at 435 (1892) (“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states . . . with the consequent right to use or

the public interest for the state to do so.³³⁹ What the *Illinois Central* majority of four justices did hold was:

[T]he same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.³⁴⁰

Field later explains that these lands are “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”³⁴¹ So the import of *Illinois Central* when it was decided was that the state had considerable discretion in meeting its trust responsibilities with respect to navigable waters and submerged lands. It could alienate lands for purposes related to the promotion of navigation and commerce.³⁴² It could alienate land for any private purpose so long as it did not interfere with the public interests in navigation, commerce, and fishing.³⁴³ However, the alienation of most of the then present and future harbor of the City of Chicago could not be done consistent

dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters” *Id.* at 435; “It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the land and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.” *Id.* at 452; “The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” *Id.* at 453; “The state can no more abdicate its trust over property . . . like navigable waters and soils under them, . . . except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers” *Id.*; “The trust with which they are held . . . cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.” *Id.* at 455-56.

339. *Id.* at 452 (“The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.”).

340. *Id.* at 437.

341. *Id.* at 452.

342. *See id.*

343. *See id.* at 435.

with these trust responsibilities. The permitted alienations, wrote Justice Field, reflect “a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake.”³⁴⁴ This narrow limitation on the state’s power to alienate submerged lands is precisely the same limitation articulated a half century earlier by New Jersey Chief Justice Green in *Gough v. Bell*.³⁴⁵

In reaching his decision, Justice Field relied upon Hale’s explanation of English law and the English court’s application of that law in *Blundell v. Catterall* as recounted in the New York case of *People v. New York & Staten Island Ferry Co.*³⁴⁶ The New York court stated, correctly, that “[t]he king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge.”³⁴⁷ He also cited *Martin v. Waddell*, noting that Chief Justice Taney there relied heavily on *Arnold v. Mundy* as a case “in which the decision was made ‘with great deliberation and research,’”³⁴⁸ notwithstanding that Chief Justice Kirkpatrick had apologized for failing to devote adequate consideration to the case.³⁴⁹ From *Arnold* Justice Field drew the conclusion that “[t]he sovereign power, itself . . . cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.”³⁵⁰

In quoting this statement, Field opened the door to a confusion that has persisted to the present day, although Justice Shiras’s dissent made clear that the grant to the Illinois Central did not in any way affect the sovereign powers of the state.³⁵¹ The sovereign power of

344. *Id.* at 452-53.

345. 22 N.J.L. 441, 456-57 (N.J. 1850).

346. *Ill. Cent. R.R. Co.*, 146 U.S. at 458 (relying on the discussion of Hale in *People v. N. Y. & Staten Island Ferry Co.*, 68 N.Y. 71, 76 (N.Y. 1877)).

347. *Id.* (quoting *N. Y. & Staten Island Ferry Co.*, 68 N.Y. at 76).

348. *Ill. Cent. R.R. Co.*, 146 U.S. at 456.

349. *Arnold v. Mundy*, 6 N.J.L. 1, 9 (N.J. 1821).

350. *Ill. Cent. R.R. Co.*, 146 U.S. at 456.

351. *Id.* at 474. (“[I]t is not pretended, in this view of the case, that the state can part, or has parted, by contract, with her sovereign powers. The railroad company takes and holds these lands subject at all times to the same sovereign powers in the state as obtain in the case of other owners of property.”) This fundamental distinction between the state’s proprietary interests and its sovereign powers was well understood by nineteenth century American courts. In the

the state, what Hale called the *jus regium* and we call the police power, is not the same thing as the public trust, or *jus publicum* in Hale's terms. The former are the powers inherent in all governments, subject to any self-imposed, usually constitutional, constraints.³⁵² The latter are rights held in common by all citizens in the nature of an easement upon the *jus privatum* whether held by the state or by individuals.³⁵³ Field had earlier hinted at this confusion when he wrote that "[t]he state can no more abdicate its trust over property . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."³⁵⁴ Although he was correct that, under English law, neither could be abdicated,³⁵⁵ the statement seemed to suggest that the state's responsibilities with respect to the *jus publicum* were of the same nature as its responsibilities under the *jus regium*. The confusion was further amplified by the implication from *Arnold* that alienation of state property in submerged lands (*jus privatum* with title in the state) was itself a breach of the state's trust responsibilities under the *jus publicum*.³⁵⁶ But the *jus publicum*, properly understood, existed as an easement in properties in navigable waters and submerged lands whether held by the state or by private individuals.³⁵⁷ By the time of *Illinois Central*, this misunderstanding of the *jus publicum* had already become ingrained due to the conclusion that control of navigable waters arose from ownership of the underlying lands. Title to the submerged lands under Lake Michigan, wrote Field, "necessarily carries with it control over the waters above them, whenever the lands are subjected to use."³⁵⁸ But the original understanding of the *jus publicum* denied the truth of this assertion by holding that without regard to ownership of submerged lands, the public had certain rights

1877 case of *People v. New York and Staten Island Ferry Co.* the New York Court of Appeals stated that "[t]he grantee [of submerged tidal lands] acquires the title to the soil and the State cannot annul the grant, and the grantee, by virtue of his proprietary interest, can exclude any other person from the permanent occupation of the land granted But the State does not . . . divest itself of the right to regulate the use of the granted premises in the interest of the public and for the protection of commerce and navigation." 68 N.Y. 71, 79 (N.Y. 1877).

352. See Karl P. Baker & Dwight H. Merriam, *The Law and Planning of Public Open Spaces: Boston's Big Dig and Beyond: Indelible Public Interests in Property: The Public Trust and the Public Forum*, 32 B.C. ENVTL. AFF. L. REV. 275, 279 (2005).

353. *Id.*

354. *Ill. Cent. R.R. Co.*, 146 U.S. at 453.

355. *Id.*

356. *Id.* at 456.

357. HALE, *supra* note 32, at 336.

358. *Ill. Cent. R.R. Co.*, 146 U.S. at 452.

in the use (and therefore control to that extent) of the overlying waters.³⁵⁹

Nowhere in Field's opinion is there a suggestion that the law might be different in the democratic states of the United States than it was in the English monarchy. The assumption seemed to be that the democratic legislature of Illinois was subject to the same constraints on alienation of state property as was the king of England. This made sense, it was thought, because "prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the state by right of conquest."³⁶⁰ Given this understanding of the nature of the state's interest in navigable waters and submerged lands, it is probably not surprising that *Illinois Central* represented a preference for the judiciary, rather than the legislature, having the last say on the alienation of lands affected with the public trust. "What happened in *Illinois Central*, according to the standard narrative, tells us that elected officials cannot be trusted with the power to dispose of certain kinds of resources. If we are to protect the public interest in these resources effectively, we must resort to some kind of judicially enforced inalienability rule."³⁶¹ Justice Field confirmed this distrust of the legislature in stating that even if the legislature was competent to make the grant of submerged lands, it was "necessarily revocable."³⁶² Otherwise, "every harbor in the country [would be] at the mercy of a majority of the legislature of the state in which the harbor is situated."³⁶³ But this view totally ignores both the core idea of the American Revolution and the reality of Parliament's powers in the monarchical republic from which the United States achieved its independence. As a dissenting Justice Shiras stated in *Illinois Central*:

359. HALE, *supra* note 32, at 336.

360. *Id.* at 457. Here, Field was quoting from Justice Bradley in *Stockton v. Baltimore and N.Y. R.R. Co.*, 32 F. 9, 19 (N.J. 1887). Bradley's statement that the king acquired title by right of conquest is different from Chief Justice Taney's insistence in *Martin* that title was acquired by right of discovery. *Martin v. Waddell*, 41 U.S. 367, 409 (1842).

361. Kearney & Merrill, *supra* note 319, at 803.

362. *Ill. Cent. R.R. Co.*, 146 U.S. at 455. Field's discussion of the revocability of the grant suggests some uneasiness with his earlier conclusion that the legislature was not competent to make the grant in the first place. But the idea that a grant intended to facilitate private development of the harbor was revocable without constitutional consequence defied logic. No private enterprise would invest in such project without greater security than that.

363. *Id.*

It would seem to be plain that, if the state of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant and its effect upon the public interests in the lands and waters remaining are matters of legislative discretion.³⁶⁴

Perhaps the most puzzling aspect of the nineteenth, and even twentieth, century caselaw and commentary on the public trust doctrine is its almost universal failure to distinguish between the powers and responsibilities of the crown and those of the state and federal governments formed after the Revolution. It is a failure that has infected other areas of American law including, notably, the law of sovereign immunity. Why should we assume that abuses by the crown will be abuses by the elected legislature? Is not the theory of popular sovereignty that individuals have both rights and responsibilities in a civic community, and that democratic governance is the best available means for assuring that actions taken in the name of the public will most likely serve the public interest while respecting individual rights and fairly distributing the responsibilities of civic life? Yet the theory of the public trust doctrine, as we have come to understand it from our reading of *Illinois Central*, seems to be that we must rely upon the courts (including the unelected federal courts) to assure that the legislature does not violate the common (not individual) rights of the citizenry. Unless the common rights represented by the *jus publicum* are understood to be individual rights held in common by all citizens and enforceable by each citizen acting on his personal behalf (like a tenancy in common), the *jus publicum* must be understood to be the rights of the public as an entity.³⁶⁵ It is one thing to conclude that the king cannot be trusted to respect those rights. It is quite another thing to suggest that the legislature, which has been elected by the public to act on behalf of the public, cannot be trusted to respect the public's rights. English law, on which modern public trust advocates rely, clearly understood this fundamental distinction. "What the king alone might not be able to do after 1701 [date of an act by Parliament declaring all prospective royal grants invalid] has never been beyond the power of the king and Parliament together to do, or beyond the power of Parliament alone."³⁶⁶

364. *Id.* at 467 (Shiras, J., dissenting).

365. *See infra* discussion accompanying note 373.

366. Deveney, *supra* note 30, at 50. In the case of *R v. Montague*, (1825) 107 Eng. Rep. 1183, 1184 (K.B.), Justice Bayley wrote:

Yet the legislature can be trusted, without judicial intervention, at least in this case, with the rights of its individual citizens. The contract and due process claims asserted by Illinois Central were both constitutional. Neither was given a moment's notice by the majority. The Court thus turned the notion of limited government on its head by ignoring claims of right under the contract and due process clauses while intervening in the name of the public to invalidate the actions of the people's representatives in the legislature. Justice Field sought to avoid the contract clause claim by concluding that the legislature was not competent to make the grant in the first place,³⁶⁷ but then he goes on to suggest that, in any event, the grant was revoked.³⁶⁸ But such revocation, as Justice Shiras pointed out, "is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."³⁶⁹ Shiras did not disagree with Field's description of the public rights in navigable waters and submerged lands, but there was no claim that those rights had been violated by Illinois Central, and there would "be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company [should] attempt to disregard them."³⁷⁰ And if the Illinois Legislature later were to conclude that the public interest no longer was served by the grant to Illinois Central, as it apparently did in 1873, it could "take the rights and property of the railroad company in these lands by a constitutional condemnation of them."³⁷¹

E. From Illinois Central to Phillips Petroleum

Although *Illinois Central* is today the lodestar of the public trust doctrine, its impact on the law in the decades following the decision was limited. The case was extensively cited in state court opinions for the general notion of a public right to navigation, commerce, and fishing in navigable waters, but it had little effect on state law with

[E]ven supposing this to have been at some time a public navigation . . . it ought to be presumed that the rights of the public have been lawfully determined. . . . If they arose from natural causes, why should not natural causes also put an end to them? But they might also be put an end to by Act of Parliament, or by writ of ad quod damnum, and, perhaps, by commissioners of sewers, if there were any appointed for the district, and they found that it would be for the benefit of the whole level.

367. *Ill. Cent. R.R. Co.*, 146 U.S. at 460.

368. *Id.* at 461-62.

369. *Id.* at 475 (Shiras, J., dissenting).

370. *Id.* at 474 (Shiras, J., dissenting).

371. *Id.*

respect to the alienation of submerged lands under those waters. Most conveyances of submerged lands would have passed muster under *Illinois Central* had they been challenged in federal court, but the reality was that disputes over title to submerged lands generally were agreed to be matters of state law for resolution by state courts.³⁷² Indeed, the nature and extent of the public trust in navigable waters were understood by everyone, including the United States Supreme Court, to be questions of state law.

That it was a question of state law was made clear in *Appleby v. City of New York*,³⁷³ the next case in which the Supreme Court addressed the public trust doctrine. The 1926 case is seldom cited today, either in the case law or in the public trust literature, but it remains important for two reasons. First, in deciding for the private claimant of submerged land granted by the city pursuant to state authorization,³⁷⁴ *Appleby* underscored that *Illinois Central* was not a prohibition on alienation of such lands. Second, Chief Justice Taft's opinion is filled with citations to New York law. Justice Field's opinion in *Illinois Central* cites only two Illinois cases, neither for the purpose of evidencing the law of Illinois on title to submerged land under navigable waters or any public trust responsibilities of the state with respect to such lands.³⁷⁵ Because Justice Field paid no heed to Illinois law in *Illinois Central* and because that case is the focal point of modern public trust analysis, there has been much recent discussion of the sources of the public trust doctrine and it has been suggested by a few modern commentators that the public trust doctrine is rooted in federal law, if not in the federal constitution.³⁷⁶ If we looked to *Appleby* rather than *Illinois Central*, we would

372. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988).

373. 271 U.S. 364 (1926). A companion case, *Appleby v. Delaney*, 271 U.S. 403 (1926), was decided at the same time. A unanimous Supreme Court found for the plaintiff in both cases on an impairment of contract theory.

374. *Id.* at 399.

375. The cases were cited in the context of the City of Chicago's claims to the soil under platted streets, alleys, ways, etc.. Ironically, one of the cited cases did involve submerged lands on an apparently navigable river and the Court stated that the riparian landowner owned submerged lands to the center of the river, contrary to Justice Field's assertion that the state had title to all submerged lands under navigable waterways. *Trustees v. Havens*, 11 Ill. 554, 557 (1850). The other case had nothing to do with submerged lands but did state with respect to the city's trust responsibilities in relation to public streets that the legislature had discretion to determine how best to meet those responsibilities. *Chicago v. Rumsey*, 87 Ill. 348, 354 (1877).

376. See, e.g., Wilkinson, *supra* note 15, at 460 n.144. Wilkinson notes that "[t]he *Appleby* ruling contains an involved and comprehensive analysis of New York state law and state court decisions, in contrast to the very limited treatment of Illinois authority in *Illinois Central*." *Id.*

understand that whatever the public trust doctrine is, it is a question of state law.

Appleby is also of interest in any historical analysis of *Illinois Central* because it involved a private claim of title to submerged lands in an important public harbor and because the claim, like *Illinois Central*'s, was based on the contract clause of the United States Constitution.³⁷⁷ Chief Justice Taft began his opinion in *Appleby* with the statement that "the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself . . . is a state question, and we must determine it from the law of the state"³⁷⁸ Taft's sincerity on this point might be questioned since he went on to reverse the decision of the state's highest court on this question of state law, but he had a sound justification for considering New York law anew in the Supreme Court. The Court had long made an exception to its normal rule of deferring to state court interpretation of state law in contract disputes where the state is a contracting party.³⁷⁹

In 1852 and 1853, the City of New York conveyed to Appleby fee simple title to a significant area of submerged lands for the purpose of Appleby's undertaking to fill those lands for commercial, residential, and public purposes.³⁸⁰ It was "an excellent example of nineteenth century legislative attempts to achieve desired social goals, in the absence of an adequate tax structure, by utilizing private capital."³⁸¹ Out of concern for unobstructed navigation on the Hudson River, the state subsequently established a line beyond which fill would not be permitted.³⁸² The effect was to reduce by roughly half the land available to Appleby for filling.³⁸³ The City then undertook a policy

377. *Appleby v. City of New York*, 271 U.S. at 380.

378. *Id.*

379. Taft cited several cases in support of this exception including *Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 443 (1861), in which the court stated:

We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation.

380. *Appleby*, 271 U.S. at 381.

381. Deveney, *supra* note 30, at 71-72.

382. *Appleby*, 271 U.S. at 383.

383. *Id.*

to condemn and take by eminent domain all of the privately owned wharf property and water lots within its boundaries and to construct wharves at public expense, including two wharves adjacent to Appleby's lands which had not been condemned.³⁸⁴ When the City curtailed its condemnation program in 1914, Appleby sued for trespass and sought an injunction to stop the dredging of his submerged lands adjacent to the public wharves.³⁸⁵ Appleby prevailed in the trial court, but that opinion was reversed in the New York Court of Appeals.³⁸⁶ He then filed his contract clause claim in the United States Supreme Court.

Although Taft's opinion for the unanimous court was, for the most part, a careful analysis of New York law, he did comment briefly on the broader issues addressed in *Illinois Central*. He began by confirming that "[u]pon the American Revolution, all the proprietary rights of the crown and Parliament in, and all their dominion over, lands under tidewater vested in the several states, subject to the powers surrendered to the national government . . ."³⁸⁷ On the question of the state's power to alienate those lands, he relied on *Lansing v. Smith* for the applicable principle of New York law:

[T]here can be no doubt of the right of parliament in England, or the legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all *public* rights belonging to the people at large. They are not the *private* unalienable rights of each individual.³⁸⁸

The last sentence of the statement from *Lansing* has particular significance to the New York court's understanding of the nature of the *jus publicum*. It is a common right, perhaps in the nature of a joint tenancy, but certainly not in the nature of a tenancy in common. Indeed, the *Lansing* court went on to state that "the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals."³⁸⁹ Chief Justice Taft then

384. *Id.* at 400.

385. *Id.*

386. *Id.*

387. *Appleby*, 271 U.S. at 381.

388. *Id.* at 382 (quoting 4 Wend. 9, 21 (N.Y. Sup. Ct. 1829)).

389. *Id.*

cited the New York case of *People v. New York & Staten Island Ferry Co.* for what is essentially Hale's prima facie rule:

It will not be presumed that the legislature intended to destroy or abridge the public right for private benefit, and words of doubtful or equivocal import will not work this consequence. . . . The state, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide-waters, or authorize a use inconsistent with the public right³⁹⁰

Under New York law, concluded Taft, the legislature may alienate fee simple title to submerged tidal land including "exclud[ing] itself from its exercise as sovereign of the *jus publicum*, (that is[,] the power to preserve and regulate navigation)," but such alienation of public rights will be found only "upon clear evidence of its intention and of the public interest in promotion of which it acted."³⁹¹ Relying on another New York case, *Langdon v. Mayor*,³⁹² which held that, having granted both the submerged land on which to construct a wharf and the easement of wharfage (navigation) adjacent to that wharf, the City could restrict that easement of wharfage only by condemnation,³⁹³ Taft said "it follows necessarily that [the legislature] may by an absolute deed of land under water, with the right of the grantee to fill it, part with its own power to regulate the navigation of water over this land"³⁹⁴

Taft finally got to a discussion of *Illinois Central*, and found it to be a case unlike any of those he had discussed under New York law. He summarized Field's holding in these terms: "It was held that it was not conceivable that a Legislature could divest the state of [more than 1,000 acres in the harbor of Chicago and the adjoining submerged lands] absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power"³⁹⁵ He noted that it "was necessarily a statement of Illinois law,"³⁹⁶ notwithstanding that Field had no resort to Illinois law, and acknowledged that it had been widely cited with approval including

390. *People v. N. Y. & Staten Island Ferry Co.*, 68 N.Y. 71, 77-78 (1877).

391. *Appleby*, 271 U.S. at 384.

392. 93 N.Y. 129 (1883).

393. *Id.* at 161.

394. *Id.* at 388-89.

395. *Id.* at 393.

396. *Id.* at 395.

by the New York courts.³⁹⁷ Taft mentioned two New York cases that relied upon *Illinois Central* in invalidating grants of submerged lands to private parties, but he pointed out that both cases involved most of the land in a particular region and both confirmed that the legislature nevertheless had the power to make such grants if it “can fairly be said to be for the public benefit.”³⁹⁸ Ultimately, nothing in this discussion altered the Court’s unanimous holding that Appleby’s contract with the state of New York had been impaired in contravention of the contract clause of the United States Constitution.³⁹⁹ There can be little doubt, based on both *Appleby* and *Illinois Central*, that had the Illinois Legislature’s grant to Illinois Central Railroad been for particular parcels in the Chicago harbor for the purpose of facilitating the development of the railroad or of associated commercial activity it would have been upheld. *Illinois Central* was an exceptional case yielding an exceptional result.

Since *Appleby*, the Supreme Court has cited *Illinois Central* in less than a handful of cases,⁴⁰⁰ only one of which addresses the constraints imposed on states by the public trust doctrine. That case, *Phillips Petroleum v. Mississippi*,⁴⁰¹ has been of assistance to those seeking to release the doctrine from its “historic shackles,” although with concrete results contradictory of the broad environmental protection objectives generally thought to benefit from an expansive application of the doctrine. *Phillips Petroleum* involved a dispute over the ownership of land lying under non-navigable waters affected by the tides. Mississippi claimed title to the lands on the basis of the equal footing doctrine, pursuant to which “new states admitted into the Union since the adoption of the Constitution have the same rights as the original States [sic] in the tide waters, and in the lands under

397. *Id.*

398. *Id.* at 395-96 (quoting *Coxe v. State*, 39 N.E. 400, 402 (1895), in which the state had granted to a private company the right “to re-claim and drain . . . all or any portion of the wet or overflowed lands and tidewater marshes on or adjacent to Staten Island and Long Island”). The court also referred to *Long Sault Development Co. v. Kennedy*, 105 N.E. 849, 851 (1914), in which case “the Legislature of New York attempted to give complete control of the navigation of the St. Lawrence River in the region of Long Sault Rapids, to a private corporation . . .” 271 U.S. at 396.

399. *Id.* at 402-03.

400. *See, e.g.*, *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 332 n.1 (1973) (Stewart, J., dissenting); *Summa Corp. v. California*, 466 U.S. 198, 206 n.4 (1984); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474 n.2, 477, 488 (1988); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 285 (1997).

401. 484 U.S. 469 (1988).

them, within their respective jurisdictions.”⁴⁰² Phillips Petroleum claimed title to the same lands based upon recorded titles, property tax payments over many years and a demonstrated chain of title dating back over 150 years to Spanish land grants predating the United States’ acquisition of territory that would become the state of Mississippi.⁴⁰³ The supreme irony of the case is that the State of Mississippi did not assert its claim of ownership on the basis of its desire to protect the traditional public uses of navigable waters, nor on the basis of a concern for the ecological integrity of those waters as the modern advocates of the public trust doctrine would have it. The State’s “belated and opportunistic”⁴⁰⁴ interest in the lands was based on its desire to derive revenue from the lease of those lands for petroleum development.⁴⁰⁵ Like the seventeenth century English Crown’s reliance on Thomas Digges’ prima facie rule,⁴⁰⁶ Mississippi relied on a legal doctrine with no basis in English law and contrary to the settled expectations of generations of property claimants. Adding to the irony is the fact that the Mississippi Mineral Lease Commission identified the lands at issue from a survey conducted pursuant to the Mississippi Coastal Wetlands Protection Law.⁴⁰⁷

But these facts did not prevent environmental advocates from supporting Mississippi’s claim or from celebrating the majority holding in the case.⁴⁰⁸ While some amount of tidal lands would be subjected to the impacts of oil and gas development,⁴⁰⁹ governments everywhere now had a new Supreme Court opinion to support uncompensated environmental regulations on lands understood for generations to be private property. For advocates of an expanded public trust doctrine, the bad news of oil and gas development on some tidal lands in Mississippi was well offset by the good news that,

402. *Phillips Petroleum*, 484 U.S. at 474 (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)). For more on *Shively*, see discussion *infra* accompanying notes 408-435.

403. Golem, Note, *The Public Trust Doctrine Unprecedentedly Gains New Ground in Phillips Petroleum Co. v. Mississippi*, 22 LOY. L.A. L. REV. 1319, 1335 (1989).

404. *Phillips Petroleum*, 484 U.S. at 492 (O’Connor, J., dissenting).

405. *Id.* at 492

406. See MacGrady, *supra* note 58, at 559-63.

407. *Phillips Petroleum*, 484 U.S. at 492 (O’Connor, J., dissenting).

408. An exception to the widespread praise of *Phillips Petroleum* among environmentalists is Brent R. Austin, *The Public Trust Misapplied: Phillips Petroleum v. Mississippi and the Need to Rethink an Ancient Doctrine*, 16 ECOLOGY L.Q. 967 (1989), where it is argued that the link of the doctrine to state ownership of tidal land will constrain its future use in the protection of non-tidal environmental values.

409. Impacts that have made a cause celebre of opposition to recurrent proposals to drill for petroleum in the Arctic National Wildlife Refuge.

in the words of dissenting Justice O'Connor, "[t]he Court's decision today could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs."⁴¹⁰ While high-minded statements of public interest generally undergird public trust claims by both government and those advocating constraints on development, the prospect of circumventing the constitutional requirement of compensation for takings of private property is often what motivates the claim. In a lapse of rare candor in another of the Supreme Court's few public trust cases, the City of Los Angeles "indicated that it wanted to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner's property."⁴¹¹ Therein lies the nub of the debate over the public trust doctrine and the reason that it has often been framed as a debate over title to land and resources, rather than an inquiry into the nature and scope of public rights and the state's responsibilities with respect to those rights, as it was under Roman and English law.

VI. STATE OWNERSHIP AND THE PUBLIC TRUST

Two lines of Supreme Court cases have contributed to the modern tie between state ownership of submerged lands and the public trust doctrine. It is already evident that legal doctrine defining state ownership of submerged lands has played a critical role in the American understanding of the public trust doctrine. This linkage, though it has distorted the historic concept of the public trust, is not surprising given that one doctrine related to uses of navigable waters and the other to ownership and use of their underlying lands. The other line of cases, those relating to the ownership of wildlife, has suggested a possibly fruitful direction for expansion of the public trust doctrine, although it might better suggest how the doctrine has already strayed from its original meaning.

A. *State Ownership of Submerged Lands*

Given the Court's holding in *Phillips Petroleum*, it is probably not surprising that Justice White embraced the oil company's assertion that "the 'seminal case in American public trust

410. *Phillips Petroleum*, 484 U.S. at 493 (O'Connor, J., dissenting).

411. *Summa Corp. v. California*, 466 U.S. 198, 200 (1984).

jurisprudence is *Shively v. Bowlby*.⁴¹² Justice White does cite *Illinois Central*, but only for having restated the equal footing doctrine from *Shively*⁴¹³ and in support of the assertions that tidewater and navigability were “synonyms at common law”⁴¹⁴ and that “lands under navigable freshwater lakes and rivers were within the public trust given the new States [sic] upon their entry into the Union”⁴¹⁵ *Shively*, indeed, was more relevant to *Phillips Petroleum* than was *Illinois Central* because, like *Phillips Petroleum*, *Shively* was concerned with a title dispute as opposed to an inquiry into the limits on state power to alienate submerged lands. In *Shively*, it was not questioned that the state of Oregon had the power to grant exclusive title to submerged lands.⁴¹⁶ Rather, the issue was whether or not the United States government had the authority to grant submerged lands in the Oregon Territory prior to the creation of the state of Oregon.⁴¹⁷

At issue in *Shively* was title to submerged lands in the Columbia River adjacent to the town of Astoria, Oregon. *Shively* claimed title on the basis of his predecessors in title having recorded a claim in 1854 under the Oregon Donation Act of 1850 and that claim having been patented by the United States in 1865.⁴¹⁸ *Bowlby* and co-plaintiff *Parker* claimed title on the basis of a deed issued by the Board of School Land Commissioners of the State of Oregon pursuant to an Oregon statute enacted in 1874.⁴¹⁹ The Oregon Supreme Court concluded that the United States had no authority to grant lands below the high water mark and found for *Bowlby* and *Parker*.⁴²⁰ The United States Supreme Court agreed in a unanimous opinion by Justice Gray.⁴²¹

Noting “diversity of view as to the scope and effect of the [Supreme Court’s] previous decisions . . . upon the subject of public and private rights in lands below high water mark of navigable waters,” Justice Gray finds it “a fit occasion for a full review of those

412. *Phillips Petroleum*, 484 U.S. at 473 (quoting from petitioner’s reply brief).

413. *Id.* at 474.

414. *Id.* at 477.

415. *Id.* at 479.

416. *Id.* at 474 (construing *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)).

417. *Id.*

418. *Shively v. Bowlby*, 152 U.S. 1, 2 (1894).

419. *Id.* at 3-6.

420. *Id.* at 8.

421. *Id.* at 58.

decisions and a consideration of other authorities upon the subject.”⁴²² He discusses the English common law and, consistent with Hale, whom he quotes at length, he concludes:

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage[,] . . . and that this title . . . is held subject to the public right, *jus publicum*, of navigation and fishing.⁴²³

He then goes on to state, consistent with Hale’s prima facie rule, that “[i]t is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.”⁴²⁴ Noting that the common law became the law of the United States to the extent not modified, he then makes reference to *Martin v. Waddell* as “[t]he leading case in this court, as to the title and dominion of tide waters and of the lands under them,”⁴²⁵ and confirms that grants of uplands by the crown did not, without express language to that effect, convey lands below the high water mark.⁴²⁶ In other words, a unanimous Court speaking through Justice Gray was of the view that Hale’s prima facie rule applied in colonial America as it had in England.⁴²⁷ But when sovereignty passed from the king to the state governments after the Revolution, each sovereign state was free to modify or maintain the common law rule as it chose.⁴²⁸ Justice Gray provides a comprehensive survey of the laws of the thirteen original states by way of confirming that state, not federal, law is controlling on the question of title and that in every jurisdiction the state has authority to alienate whatever submerged land it owns, subject to the public right of navigation and fishing and the federal constitutional power to regulate interstate and foreign commerce.⁴²⁹

Justice Gray then turns to the more immediate question of the law in the states admitted since the adoption of the Constitution, of

422. *Id.* at 10-11.

423. *Id.* at 13.

424. *Id.*

425. *Id.* at 15.

426. *Id.* at 16-17.

427. *Id.* at 14.

428. *Id.*

429. *Id.* at 18-26.

which Oregon is one. Based upon the Virginia cession of its western land claims in 1783,⁴³⁰ the Northwest Ordinance of 1787,⁴³¹ and the Supreme Court's decisions in *Pollard v. Hagan*,⁴³² *United States v. Pacheco*⁴³³ and *Knight v. United States Land Association*,⁴³⁴ Gray, quoting from *Knight*, states:

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several states; and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original states possess within their respective borders.⁴³⁵

In the language of the Northwest Ordinance, this is the equal footing doctrine.⁴³⁶ It is a doctrine that limits the authority of the United States government with respect to submerged lands, but in no way limits the powers of the states with respect to those lands. To the extent that Justice McKinley's opinion for the Court in *Pollard's Lessee* "implied that the title in the land below high-water mark could not have been granted away by the United States after the deed of cession of the territory [from Georgia], and before the admission of the state into the Union,"⁴³⁷ Justice Gray concluded that it was dicta and not controlling.⁴³⁸ In fact it was clear, said Gray, that the United States could grant submerged lands under navigable waters "whenever it becomes necessary to do so in order to perform

430. The Virginia cession provided that the ceded lands would be formed into new states "having the same rights of sovereignty, freedom, and independence as the other states." *Id.* at 26.

431. The Northwest Ordinance of July 13, 1787, provided that new states would be admitted "on an equal footing, with the original states in all respects whatever," and that "all the lands within" the territory so ceded to the United States, and not reserved or appropriated for other purposes, should be considered as a common fund for the use and benefit of the United States." *Id.* The equal footing language originally appeared in the Northwest Ordinance of 1784: "That whensoever any of the said states shall have, of free inhabitants as many as then shall be in any one the least numerous of the thirteen original states, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original states . . ." 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 119 (Gaillard Hunt ed., 1928).

432. 44 U.S. 212 (1845).

433. 69 U.S. 587 (1864).

434. 142 U.S. 161 (1891).

435. *Shively*, 152 U.S. at 30 (quoting *Knight*, 142 U.S. at 183).

436. *See supra* note 432.

437. *Shively*, 152 U.S. at 28.

438. *Id.* at 47 ("Notwithstanding the dicta contained in some of the opinions of this court . . . to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.").

international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce . . . , or to carry out other public purposes appropriate to the objects for which the United States hold the territory.”⁴³⁹

Justice Gray was correct in describing as dicta the assertion in *Pollard's Lessee* that the United States could not alienate submerged territorial lands under its jurisdiction. *Pollard's Lessee* was one of a long line of Supreme Court rulings on title to submerged lands in Mobile, Alabama, including two prior rulings on title to the specific land in question.⁴⁴⁰ As in *Shively* a half century later, *Pollard's Lessee* and the many other cases involving land claims in Mobile and elsewhere on the Gulf Coast had nothing to do with assertions of public or common rights. They were disputes about title between private claimants. In *Pollard's Lessee* and the other Mobile cases, one private claim was based on Spanish grants that had been confirmed by Congress and patented by the United States after Alabama was admitted and the competing private claim was based on grants from the city or state governments.⁴⁴¹ However the disputes were resolved, there was no suggestion that the national or state governments lacked the power to alienate the lands in question. At the heart of Justice McKinley's dicta in *Pollard's Lessee* (stating that the United States had no authority to make or confirm any grants of submerged land even prior to the admission of a new state) was his assertion “that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed”⁴⁴² Without municipal sovereignty, argued McKinley, the United States had no power to dispose of the land it held in trust for the new states. Justice Catron, in one of what must be among the most persistent series of dissents in the Court's history,⁴⁴³ objected: that the majority decision was inconsistent with earlier decisions on the same facts;⁴⁴⁴ that if the United States lacked the municipal sovereignty necessary to grant submerged lands it must lack the authority to grant uplands

439. *Id.* at 48.

440. *See, e.g.,* *Pollard's Heirs v. Kibbe*, 39 U.S. 353 (1840); *Pollard's Lessee v. Files*, 43 U.S. 591 (1844).

441. *Pollard's Lessee*, 43 U.S. at 591-92.

442. *Pollard's Heirs v. Hagan*, 44 U.S. 212, 221 (1845).

443. *See, e.g.,* *City of Mobile v. Eslava*, 41 U.S. 234, 247-60 (1842); *City of Mobile v. Hallett*, 41 U.S. 261, 263-68 (1842). Catron had also dissented in *Pollard's Heirs v. Kibbe*, 39 U.S. 353 (1840), and wrote the majority opinion in *Pollard's Lessee*, 43 U.S. at 591.

444. *Hagan*, 44 U.S. at 230.

as well (which was clearly not the case);⁴⁴⁵ that municipal authority in territories of the United States, which must exist in some government, could only exist in Congress;⁴⁴⁶ and that the invalidation of titles based on United States and Spanish land grants would disrupt the entire established economy of the Gulf Coast states.⁴⁴⁷ Catron further argued that “if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist.”⁴⁴⁸ Of course that was a result no one could have contemplated at the time, although it has strong appeal with some environmentalists today. From the perspective of the parties in *Pollard’s Lessee*, the case was about private claims of right. But as Justice Catron observed in his dissent, “the question before us is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of property is a mere incident.”⁴⁴⁹

By the time of *Shively*, a half century later, the political boundaries had been sorted out and the Court was focused on the competing claims of private title. Although it was not necessary to his decision in that case, Gray confirmed, as part of his comprehensive review of the law, that the submerged lands in question are not necessarily just those affected by the tides as under the English rule (as it was understood by American courts). Citing *Carson v. Blazer*⁴⁵⁰ as the seminal case and *The Genesee Chief*⁴⁵¹ as the leading federal case (although it was concerned with admiralty and maritime jurisdiction rather than title to submerged lands), Gray states that navigable waters, for the purpose of establishing title to submerged lands, are, in most states, those waters that are navigable in fact.⁴⁵² He even takes the liberty of suggesting that states adhering to the English rule are “at variance with sound principles of public policy.”⁴⁵³ But by way of making clear that “it is for the states themselves to determine” title to submerged land, whether under tidal or non-tidal but navigable waters, Gray laments that “[i]f they [states] choose to resign to the riparian proprietor rights which

445. *Id.* at 234.

446. *Id.*

447. *Id.* at 233-34.

448. *Id.* at 234.

449. *Id.* at 232.

450. 2 Binn. 475 (Pa. 1810).

451. 53 U.S. 443 (1851).

452. *Shively v. Bowlby*, 152 U.S. 1, 31-40 (1894).

453. *Id.* at 43.

properly belong to them in their sovereign capacity, it is not for others to raise objections.”⁴⁵⁴ This state autonomy on the question of title to submerged lands had earlier been recognized in *Packer v. Bird* where the Court stated that “the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state either to low or high water mark, or will extend to the middle of the stream.”⁴⁵⁵ It was clear beyond argument, concluded Justice Gray, “that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the Constitution.”⁴⁵⁶ This conclusion was consistent with a proper understanding of the equal footing doctrine. “Equal footing was a principle considered crucial to the development and expansion of the Union. Each new state would be endowed with equal sovereignty and would participate as an equal member of the Union.”⁴⁵⁷ Professor Rasband has demonstrated how the doctrine was transformed into a basis for establishing title to submerged lands.⁴⁵⁸

If the Supreme Court majority in *Phillips Petroleum* had in mind to expand the reach of the public trust doctrine in the way advocated by environmentalists, *Shively* is an odd case to have identified as seminal. When Justice Gray states “that the navigable waters and the soils under them, . . . shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, . . . shall not be granted away [by the United States] during the period of territorial government,”⁴⁵⁹ he is describing the historic practices of Congress and not a legal prohibition. Indeed, as indicated above, the *Shively* Court found no doubt that Congress could make grants of submerged lands in territories of the United

454. *Id.*

455. 137 U.S. 661, 669-70 (1891).

456. *Shively*, 152 U.S. at 40.

457. Rasband, *supra* note 127, at 34.

458. Rasband demonstrates the incoherence of *Pollard* and *Shively* which together hold “(1) that ownership of land under navigable water is an essential aspect of sovereignty; (2) that each state must enter the Union on an equal sovereign footing . . .; but (3) that Congress nevertheless has the power . . . to grant land under navigable water.” Equal footing, says Rasband, must be understood to mean “that Congress has the power to convey submerged lands, that each state is entitled to equal sovereign footing, but that ownership of submerged lands is not essential to state sovereignty.” *Id.* at 47.

459. *Shively*, 152 U.S. at 49.

States.⁴⁶⁰ There were limitations intended to keep new states on an equal footing, but the point was that new states came in on an equal footing in the sense that they had title to all submerged lands that remained the property of the United States at the time of admission to the Union.⁴⁶¹ The prohibition critical to the result in *Shively* was on the United States making grants within the boundaries of any existing state. Also critical to the outcome of the case was the Court's conclusion that "unless . . . [tidal and submerged lands] have been . . . built upon with its permission, [the states have] the right to sell and convey them to any one, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public."⁴⁶² That the *Shively* Court had no thought of a significant constraint on the states' power to dispose of submerged lands is evidenced by the principle that Justice Gray draws from *Illinois Central*:

[*Illinois Central*] recognized as the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation, so far as may be necessary for the regulation of commerce.⁴⁶³

Although Gray had concurred along with Justice Brown in Justice Shiras' dissent in *Illinois Central*, it does not appear that he misrepresented the thinking of that decision's four person majority

460. *Id.* at 48. Justice Gray concluded that it could be no other way. "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition." *Id.*

461. In *Manchester v. Massachusetts*, 139 U.S. 240, 260 (1891), the Court quoted with approval Justice Curtis's statement in *Smith v. Maryland*, 59 U.S. 71, 74 (1855), that "[w]hatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the state or the sovereign power which governed its territory before the declaration of independence." In support of that statement, Justice Curtis in turn cited *Pollard's Heirs v. Hagan*, 44 U.S. 212 (1845).

462. *Shively*, 152 U.S. at 52.

463. *Id.* at 47.

since three of them remained on the Court and agreed to the unanimous holding in *Shively*.⁴⁶⁴

Many other nineteenth century cases in the state and federal courts dealt with title disputes in submerged lands. While there were still differences of opinion, by the end of the century the law and its origins were reasonably clear and settled. The rule in England was that the king held title to lands under navigable waters.⁴⁶⁵ At least since Chief Justice Taney's decision in *Genesee Chief*, it was generally accepted by American courts and commentators that navigable waters were defined in England as those affected by the tides.⁴⁶⁶ While exclusive grants of those lands could be made by the king and rights could be acquired by prescription, the prima facie assumption was that the king retained title, placing the burden on a private claimant to prove a grant by the king or prescriptive title.⁴⁶⁷ The king held these lands subject to a common right of use for navigation and fishing, although the king could make exclusive grants of both land and fisheries for the purpose of promoting navigation and commerce or to the extent that such grants did not unnecessarily interfere with those public purposes.⁴⁶⁸ The English rule as stated by Kent applied in the American colonies except where modified to meet local needs and circumstances.⁴⁶⁹

464. The *Illinois Central* majority consisted of Justices Field, Harlan, Brewer and Lamar. Justices Shiras, Gray and Brown dissented. Chief Justice Fuller did not participate, having been counsel in the court below, nor did Justice Blatchford who held stock in the Illinois Central Railroad. Both Lamar and Blatchford died before *Shively* was decided. Justice Jackson replaced Lamar and participated in the *Shively* decision. Justice White replaced Blatchford, but a week after *Shively* was decided. Thus the unanimous court in *Shively* consisted of eight justices, three of whom had been in the four member majority in *Illinois Central*.

465. *Martin v. Waddell*, 41 U.S. 367, 413-14 (1842).

466. As indicated above, see discussion *supra* at text accompanying note 124, the accepted American understanding of English law on the relationship between navigability and tidal waters was incorrect, at least until English law changed in the second half of the nineteenth century. Noting the confusion among English authorities through the eighteenth century, MacGrady asks "how could Kent . . . have concluded that navigable rivers and tidal rivers were legally coextensive in England, and that the Crown held title to the beds of all tidal rivers" MacGrady, *supra* note 58, at 584. MacGrady goes on to observe that Kent "not only settled the American understanding of English law, but sixty-three years later, settled the English understanding of English law." *Id.* at 585. What happened sixty-three years later was the decision in *Murphy v. Ryan*, (1868) 2 Ir. R.C.L. 143, in which an English court for the first time held that navigable waters were coextensive with tidal waters. For an illustration of the earlier English navigable in fact rule see *Miles v. Rose*, (1814) 128 Eng. Rep. 868 (C.P.).

467. HALE, *supra* note 32, at 392.

468. *Shively*, 152 U.S. at 13.

469. *Id.* at 14.

After the American Revolution, sovereignty over, and title to, submerged lands passed to the state governments subject to the common rights of navigation and fishing and any powers delegated to the United States by the Constitution.⁴⁷⁰ As independent sovereigns, each state was free to enact its own laws with respect to ownership of the beds and banks of navigable and non-navigable waters, subject to valid existing rights, common rights in navigation and fishing and the delegated powers of the United States.⁴⁷¹ New states entered the union on an equal footing with the original states, meaning they had title to submerged lands not previously granted and the same police powers with respect to those lands as the original states, but this did not mean that state title was the same in every state.⁴⁷² Among the original thirteen states, seven held that presumptive state title extended to the high water mark while six held that state title extended only to the low water mark.⁴⁷³ Under English law title to the beds and banks of fresh waters, even if navigable in fact, was held by riparian landowners. Most of the original states adhered to the English rule,⁴⁷⁴ but most of the new states applied a navigable in fact test to determine the scope of presumptive state ownership of submerged lands.⁴⁷⁵ In every state it was accepted that the state could alienate its submerged lands for the purpose of promoting navigation and commerce or for other purposes so long as the private uses did not interfere with navigation, and subject to the delegated powers of the United States.⁴⁷⁶ In disputes over title to submerged lands under navigable waters, the burden was on the private claimant to prove title, consistent with the English *prima facie* rule.⁴⁷⁷ The opposite presumption applied with respect to submerged lands under non-

470. *Id.*

471. *Id.* at 14-26.

472. *Id.* at 26.

473. According to Justice Gray's survey in *Shively*, Rhode Island, Connecticut, New York, New Jersey, Delaware, South Carolina and North Carolina fixed the high water mark as the boundary of state title while Massachusetts, New Hampshire, Pennsylvania, Maryland, Virginia and Georgia limited state title to the low water mark. *Id.* at 18-25.

474. The exceptions, again according to Justice Gray in *Shively*, were Pennsylvania, Virginia, North Carolina and New York, the latter only with respect to the Hudson, Mohawk and St. Lawrence Rivers. *Id.* at 31.

475. *Id.* at 26-48.

476. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

477. *Arnold v. Mundy*, 6 N.J.L. 1, 5 (N.J. 1821).

navigable waters.⁴⁷⁸ The prima facie rule was also understood to apply to conveyances of submerged land by the United States.⁴⁷⁹

The notion of an externally imposed limit on the state's exercise of its proprietary and sovereign rights with respect to submerged land was seldom even suggested beyond the boiler-plate reference to the common rights of navigation and fishing in navigable waters.⁴⁸⁰ In the vast sea of cases dealing with private claims of title to submerged lands – in every one of which the private claim had its origin in a grant from the English crown, a foreign government, the United States or a state government⁴⁸¹ – there was no suggestion that the claim might be invalid because it infringed a public right. Where private activities in navigable waters interfered with navigation, the standard remedy was an action in nuisance, not a claim that the interfering individual lacked title to the submerged land. *Arnold v. Mundy*, *Martin v. Waddell* and *Illinois Central Railroad v. Illinois* were exceptions to the norm, but even then, exceptions more in rhetoric than in their holdings.⁴⁸² The defendant in *Arnold* may have claimed pursuant to an exclusive community right, and in any event could have made application for an exclusive license from the state. But if the claim was truly on behalf of what Professor Rose calls the “unorganized public,” it was unusual if not unique among nineteenth century cases.⁴⁸³ In any event it is clear that under New Jersey law at the time *Arnold* was decided, an individual taking oysters on the basis of a claim of common right could well have been violating the private rights of another individual with exclusive license from the state.⁴⁸⁴ *Martin* was nothing more than a title dispute, the defendant claiming on the basis of an exclusive license from the state.⁴⁸⁵ So we are left with *Illinois Central* as the only clear case in which a claim of private title to submerged lands was rejected on the basis of a claim of common right. But recall that Justice Field was careful to point out the exceptional nature of the grant to the Illinois Central Railroad,

478. *Id.*

479. *Id.* at 7-8.

480. *See, e.g., Ill. Cent. R.R. Co.*, 146 U.S. at 452.

481. This was true of prescriptive claims as well, since prescription operated against another with legal title.

482. *See Ill. Cent. R.R. Co.*, 146 U.S. at 387; *Martin v. Waddell*, 41 U.S. 367 (1842); *Arnold*, 6 N.J.L. at 1.

483. *See Rose, supra* note 18, at 721.

484. *Arnold*, 6 N.J.L. at 33.

485. *Martin*, 41 U.S. at 407-08.

while recognizing the state's general power to alienate submerged lands.⁴⁸⁶

B. State Ownership of Wildlife

One other line of cases, those relating to ownership of wildlife, is of historical interest in relation to present day ambitions for the public trust doctrine. Of all the theories for extension of the public trust doctrine to resources existing beyond navigable waters, those relating to wildlife have the most surface plausibility. In most discussions of the subject, the starting point is the same as in discussions of navigable waters – Justinian's *Institutes*:

Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering.⁴⁸⁷

As the Romans conceived of the matter, wild animals are, in the nature of things and therefore by the law of nations, owned by no one in their natural state.⁴⁸⁸ They are part of the *res nullius*. The Roman rule of capture set forth by Justinian was said to be itself natural, but it was also practical. Like water, and unlike land, wild animals are transient, they move about without regard to fixed boundaries. One could know who owned land and fixtures or things growing on land by their location, but one could not know who owned wildlife until it was confined. The complexity of Roman law on this subject demonstrates that the rule of capture was more practical than philosophical. There were special rules for bees, pigeons, peacocks, geese and other fowl that might leave their owners land but would return of their own accord.⁴⁸⁹ Wild creatures were owned by no one, not because they were thought to be owned by everyone, but because establishing private ownership required special rules adapted to their wild nature. If there was a right held in common it was the right to acquire private ownership of wild animals by capturing them.

486. *Ill. Cent. R.R. Co.*, 146 U.S. at 450-51.

487. JUSTINIAN, *supra* note 27, at 2.1.12.

488. Raymond J. Starr, *Silvia's Deer (Vergil, Aeneid 7.479-502): Game Parks and Roman Law*, 113 AM. J. PHILOLOGY 435, 438 (1992).

489. JUSTINIAN, *supra* note 27, at 2.1.14-16.

Early English law was much the same. “Things are said to be *res nullius* in several different ways:” wrote Bracton, “by nature or the *jus naturale*, as wild beasts, birds and fish”⁴⁹⁰

By the *jus gentium* or natural law the dominion of things is acquired in many ways. First by taking possession of things that are owned by no one, [and do (not) now belong to the king by the civil law, no longer being common as before,] as wild beasts, birds and fish, that is, all the creatures born on the earth, in the sea or in the heavens, that is, in the air, no matter where they may be taken. When they are captured they begin to be mine, because they are forcibly kept in my custody, and by the same token, if they escape from it and recover their natural liberty they cease to be mine and are again made the property of the taker.⁴⁹¹

Blackstone, writing five centuries later, recorded that under English law “a man may be invested with a qualified, but not absolute, property in all creatures that are *ferae naturae*, either *per industriam*, *propter impotentiam*, or *propter privilegium*.”⁴⁹² Acquisition of property in a wild animal *per industriam* is the rule of capture, accomplished “by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty.”⁴⁹³ It is a qualified ownership defeasible “if they resume their ancient wildness, and are found at large.”⁴⁹⁴ Property in *ferae naturae*, *propter impotentiam*, existed in the offspring of birds or wild animals that, by their immobility, were confined to nests or burrows on one’s property, “till such time as they can fly, or run away, and then my property expires.”⁴⁹⁵ The very practical nature of the law is certainly reflected in this rule, which would seem to have encouraged landowners to provide habitat for breeding and nesting. Finally, property in *ferae naturae*, *propter privilegium*, was “the privilege of hunting, taking, and killing them, in exclusion of other persons.”⁴⁹⁶ This qualified ownership existed within the boundaries of one’s private land (as under Roman law), but also within the boundaries of other “liberties” including those

490. BRACTON, *supra* note 93, at 41.

491. *Id.* at 42.

492. BLACKSTONE, *supra* note 114, at *392.

493. *Id.*

494. *Id.* at *394.

495. *Id.* at *395.

496. *Id.* at *394-95.

that may have been granted by the crown for the sole purpose of taking game.⁴⁹⁷

The crown was in a position to grant exclusive rights to hunt and fish for the same reason it was able to grant exclusive rights in tidelands and navigable waters – it was the proprietor of all of those things. Blackstone observed that “notwithstanding the general introduction and continuance of property, [there are some things that] must still unavoidably remain in common,” and therefore only be subject to usufructuary ownership, including light, air, water and “those animals which are said to be *ferae naturae*, or of a wild and untamable disposition.”⁴⁹⁸ But “that species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game,” were vested in the crown as a means of preempting the “disturbances and quarrels [that] would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy”⁴⁹⁹ Thus Blackstone made the case for the king having title to all wild game, as well as to the navigable waters, of the kingdom. It was all part of the “legislature of England[’s] . . . wise and orderly maxim, of assigning to everything capable of ownership a legal and determinate owner.”⁵⁰⁰ As with navigable waters and submerged lands, the rules also served well the interests of the king and his favorites.

Of course the English laws with respect to wildlife were applied in the American colonies, and after the Revolution the states succeeded to the sovereign powers and rights relating to wildlife just as they had with respect to navigable waters and tidelands. Indeed, many of the early wildlife cases were one and the same with submerged lands cases. *Arnold v. Mundy* and *Martin v. Waddell* were both wildlife cases in the sense that what was really at issue was the right to harvest oysters.⁵⁰¹ The common property that Justice Kirkpatrick says cannot be alienated in *Arnold* includes not just the submerged lands from which oysters are harvested but the oysters themselves.⁵⁰² “The people of New Jersey,” said Chief Justice Taney in *Martin*, “have exercised and enjoyed the rights of fishery for shell-

497. *Id.* at *414-20.

498. *Id.* at *14.

499. *Id.* at *725.

500. *Id.* at *15.

501. *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821); *Martin v. Waddell*, 41 U.S. 367 (1842).

502. *Arnold*, 6 N.J.L. at 49. Common property, says Justice Kirkpatrick, includes “the air, the running water, the sea, the fish, and the wild beasts.”

fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors.”⁵⁰³ The New Jersey laws regulating the taking of oysters, in effect at the time of *Arnold* and directly at issue in *Martin*, were challenged by non-citizens of the state in the federal case of *Corfield v. Coryell* on the grounds that they violated Article I, Section 8 (the commerce clause) and Article IV, Section 2 (the privileges and immunities clause) of the United States Constitution.⁵⁰⁴ The challenged laws prohibited non-citizens from taking oysters within the state of New Jersey as well as authorized the granting of exclusive license to New Jersey citizens to plant and harvest oysters.⁵⁰⁵ Counsel for the plaintiffs in *Corfield* cited *Arnold* in support of their claim that the common right to take oysters cannot be restrained, even as against non-citizens.⁵⁰⁶ In pressing their claim, plaintiffs insisted that there could be no exclusive right in fish or game until it was captured, but Justice Washington, sitting as a circuit justice, disagreed.⁵⁰⁷ Washington stated that the citizens of New Jersey “may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.”⁵⁰⁸ To agree with plaintiffs that the harvesting of New Jersey’s oysters was among the privileges and immunities of all citizens of the United States, said Washington, would “amount . . . to a grant of a cotenancy in the common property of the state, to the citizens of all the other states.”⁵⁰⁹

503. *Martin*, 41 U.S. at 417.

504. *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823).

505. *Id.* at 549-50.

506. *Id.* at 548.

507. *Id.* at 552.

508. *Id.*

509. *Id.* Justice Washington’s rejection of the privileges and immunities claim with respect to the taking of wildlife is particularly important because his opinion in *Corfield* is often cited as one of the earliest articulations of the natural rights basis for understanding the privileges and immunities clause. See LAURENCE H. TRIBE, I AMERICAN CONSTITUTIONAL LAW 1251 (3d ed. 2000). Not only was there no natural rights basis for limiting the state’s power to regulate and permit the taking of oysters, but the natural rights Washington identified implied that the state would be precluded from forbidding all private acquisition of exclusive rights in game, if only the exclusive right to acquire title by capture. Among the fundamental rights protected by the privileges and immunities clause, said Washington, was “the right of a citizen . . . to take, hold and dispose of property.” *Corfield*, 6 F. Cas. at 552. But if that is so, one might ask how the state of New Jersey could prohibit non-citizens from taking oysters in New Jersey. As we have seen, Washington’s answer was that the wildlife of New Jersey had already been appropriated

Justice Washington also found in *Corfield*, relying on *Gibbons v. Ogden*,⁵¹⁰ that the New Jersey exclusion of non-citizens from taking oysters within the state was not an unconstitutional regulation of interstate commerce.⁵¹¹ Well over a century later it would be found that Justice Washington was probably wrong in this conclusion,⁵¹² but his statements on the nature of New Jersey citizens' common right in oysters remain relevant to our modern understanding of the concept of public or common rights. Washington's description of New Jersey citizens as "tenants in common," with respect to the fisheries of the state made clear that individual New Jersey citizens had a right of access to the fishery so long as it remained common, but no right to object to a total prohibition on the taking of oysters or to the granting of exclusive licenses to take oysters:

A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use.⁵¹³

Just as granting exclusive rights to submerged lands, including those from which the oysters might be harvested, did not violate the rights of the individual or collective citizens of New Jersey, the granting of such exclusive right to harvest oysters was within the power of the state legislature.

Most of the caselaw that followed after *Corfield*, like the case law relating to ownership of submerged lands, turned on the relative powers of the state and federal governments or constitutional limits on those powers.⁵¹⁴ In the submerged lands cases, the dispute was most often between one party claiming under a grant from the United

by the citizens of New Jersey as tenants in common. The fundamental right to take property did not include the property of others.

510. *Gibbons v. Ogden*, 22 U.S. 1 (1824). In *Gibbons* Chief Justice John Marshall drew a distinction between regulations of commerce, clearly within federal power, and "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." *Id.* at 208.

511. *Corfield*, 6 F. Cas. at 552.

512. See *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1879).

513. *Corfield*, 6 F. Cas. at 552.

514. See, e.g., *McCready v. Virginia*, 94 U.S. 391, 395-97 (1876).

States and the other party claiming title from the state.⁵¹⁵ In the wildlife cases the controversy generally related to the nature and extent of the regulatory powers of the state and federal governments. The United States Supreme Court's first serious consideration of the issue in the context of wildlife came in *McCready v. Virginia*, yet another oyster case raising the question of whether a state could prohibit citizens of another state from planting oysters in its waters.⁵¹⁶ Relying on *Martin v. Waddell*, Chief Justice Waite, writing for a unanimous court, stated "the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty." This common interest is "held . . . subject to the paramount right of navigation, the regulation of which . . . has been granted to the United States, . . . [but] [t]here has been . . . no such grant of power over the fisheries."⁵¹⁷ Waite followed *Corfield* in rejecting a privileges and immunities challenge to Virginia's law. "Such an appropriation," said Waite, "is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."⁵¹⁸ But the fact that the citizens of Virginia had a shared property right in the submerged lands and fisheries within the state did not mean that the state could not regulate access by those citizens or grant exclusive rights to particular citizens. "[A]ll concede that a State may grant to one of its citizens the exclusive use of a part of the common property, [so] the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."⁵¹⁹

The concept of state ownership of wildlife became firmly rooted in American law with the Supreme Court's decision in *Geer v. Connecticut*.⁵²⁰ Although that case has since been overruled,⁵²¹ it is important to understand what was said in that and several subsequent Supreme Court decisions on the subject of a common right to wildlife

515. *Id.* at 394.

516. *Id.*

517. *Id.* at 395.

518. *Id.*

519. *Id.* at 396.

520. *Geer v. Connecticut*, 161 U.S. 519 (1896).

521. *See infra* discussion at note 564.

that might form the basis for an expanded application of the public trust doctrine. The defendant in *Geer* was convicted of violating a Connecticut statute prohibiting the possession of game birds for the purpose of transporting them beyond the state, the birds having been legally killed within the state.⁵²² Among other defenses, the defendant argued that the Connecticut statute was invalid under the commerce clause of Article I, Section 8, of the United States Constitution.⁵²³ In the course of his opinion for the five justice majority, Justice White discussed the history of wildlife law from Athens to nineteenth century America. From the beginning, he reported, “the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power.”⁵²⁴ Of course this statement presumed the validity of the rule of capture that was well settled in American law. At issue in the case was the nature and extent of the state’s power to regulate the taking of wildlife, not the right of individuals to acquire a property interest in wildlife by killing it or otherwise reducing it to possession.⁵²⁵

The history Justice White recounts in *Geer* is pretty much the history summarized above. Because wildlife are generally transient and not easily confined, through the centuries and across societies they have been held to belong to no one and therefore to belong to everyone in common. But it is also true that the sovereign has always asserted particular interests in wildlife and has acted to limit and even prohibit the taking of wildlife by ordinary people. In Athens, “Solon, seeing that the Athenians gave up to the chase, to the neglect of the mechanical arts, forbade the killing of game.”⁵²⁶ In Rome, according to Justice White, “[n]o restriction . . . was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession,” although it appears that access to wildlife and other coastal resources was in fact greatly limited.⁵²⁷ White notes that in Europe, despite some claims that the natural law prohibits the sovereign from limiting public access to game, “[t]he sovereigns have reserved to themselves, and to those to whom they judge proper to transmit it, the right to hunt all

522. *Geer*, 161 U.S. at 521-22.

523. *Id.* at 522.

524. *Id.*

525. *See id.* at 527-29.

526. *Id.* (quoting from PHILLIPE ANTOINE MERLIN, 4 REPERTOIRE DE JURISPRUDENCE 128 (1807)).

527. *See supra* discussion at note 91.

game, and have forbidden hunting to other persons.”⁵²⁸ The Napoleonic Code, says White, provides “[t]here are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed.”⁵²⁹ And “[t]he common of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.”⁵³⁰

It is notable in Justice White’s explanation of the roots of the common or state ownership doctrine in American law that the consequence of these asserted public rights is not any limit on state power with respect to wildlife. To the contrary, it is the source of unlimited power in the states to protect, regulate and dispose of wildlife. In the state courts at the time, this was precisely the understanding of state power with respect to wildlife. In *Royal Phelps v. Racey*, the Court of Appeals of New York held that “[t]he protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion.”⁵³¹ In *Magner v. People of the State of Illinois*, the Illinois Supreme Court stated: “The ownership [of wildlife] being in the people of the State – the repository of the sovereign authority – . . . it necessarily results, that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare.”⁵³² The California Supreme Court stated in *Ex parte Maier* “[t]he wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed

528. *Geer*, 161 U.S. at 524 (quoting from POTHIER, *TRAITÉ DU CROIT DE PROPRIÉTÉ*, Nos. 27-28).

529. *Id.* at 526 (quoting from C. CIV. arts. 714 & 715 (Fr.)).

530. *Id.*

531. *Royal Phelps v. Racey*, 60 N.Y. 10, 14 (1875) (upholding conviction of an individual found in possession in New York of game birds killed and transported from another state in violation of a New York law prohibiting such possession on the particular date in question).

532. *Magner v. Illinois*, 97 Ill. 320, 333-34 (1881) (upholding conviction of an individual for selling quail killed in and imported from Kansas in violation of Illinois prohibition on sale of such game).

necessary for its protection or preservation, or the public good.”⁵³³ All of these cases and many others spoke the language of state and common ownership while recognizing full discretion in the legislature to regulate the use and disposal of wild game.

Justice White did use language in *Geer* that invited the conclusion that limits on legislative discretion may nonetheless exist:

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.⁵³⁴

Later in the opinion White writes:

It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state. But in any view, the question of individual enjoyment is one of ‘public policy, and not of private right.’⁵³⁵

But a careful reading of both statements reveals that what White is really talking about is the police power of the state, not a public trust based limit on the police power. In the first quotation he says the states’ authority with respect to game is “like all other powers of government.”⁵³⁶ In the second quotation he says that legislative enactments on game are a matter of “public policy.”⁵³⁷ And near the conclusion of his opinion, Justice White states that “[t]he right to preserve game flows from the undoubted existence in the State of a police power to that end”⁵³⁸

533. *Ex parte Maier*, 37 P. 402, 404 (1894) (upholding the conviction of an individual for the sale in California of wild meat killed in and transported from Texas in violation of a prohibition on the sale of wild meat in the state).

534. *Geer*, 161 U.S. at 529.

535. *Id.* at 534.

536. *Id.* at 529.

537. *Id.* at 534.

538. *Id.*

Following on *Geer*, the Supreme Court made frequent reference to the state ownership theory in wildlife cases.⁵³⁹ In *Missouri v. Holland*, where federal regulations of migratory waterfowl pursuant to a treaty with Great Britain were challenged as a violation of state authority over wildlife, Justice Holmes acknowledged that earlier federal regulation of migratory birds, not undertaken pursuant to treaty obligations, had been invalidated in the face of state claims of ownership in the wildlife.⁵⁴⁰ Absent the treaty, said Holmes, the state of Missouri “would be free to regulate this subject,” but he also suggested that “[t]o put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.”⁵⁴¹ In *Lacoste v. State of Louisiana* the Court upheld a severance tax on the hides, skins and furs of wild animals against a takings claims under the 14th Amendment due process clause, noting that “[t]he wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.”⁵⁴² In *Foster-Fountain Packing Co. v. Haydel* the Court invalidated a Louisiana law requiring the removal of heads and hulls of all shrimp prior to export.⁵⁴³ The Court acknowledged that “the state owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people,”⁵⁴⁴ but found that conservation was “a feigned and not the real purpose” of the statute.⁵⁴⁵

In *Toomer v. Witsell* Chief Justice Vinson, writing for a unanimous court, picked up on Justice Holmes’ clear skepticism in his *Holland* opinion about the state ownership theory.⁵⁴⁶ The court found that a South Carolina law imposing a tax on non-resident shrimpers

539. See, e.g., *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 3 (1928); *Lacoste v. Louisiana*, 263 U.S. 545, 547 (1924); *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

540. *Holland*, 252 U.S. at 432.

541. *Id.* at 434.

542. *Lacoste*, 263 U.S. at 549.

543. *Foster-Fountain Packing Co.*, 278 U.S. at 12-14.

544. *Id.* at 11.

545. *Id.* at 10.

546. *Toomer v. Witsell*, 334 U.S. 385, 401 (1948).

that was 100 times as much as the tax on resident shrimpers violated the privileges and immunities clause of Article IV, Section 2⁵⁴⁷ and a law requiring shrimping boats to dock at a South Carolina port and unload, pack and stamp their catch with a tax stamp before transporting it to another state violated the commerce clause of Article I, Section 8.⁵⁴⁸ In its defense the State of South Carolina had urged that state ownership of the shrimp justified its discrimination against non-residents because they did not share in ownership of the fish.⁵⁴⁹ Vinson pointed out that only in *McCready* had the Court ever upheld such blatant discrimination against non-resident fishing and hunting.⁵⁵⁰ Based on two factual distinctions,⁵⁵¹ he concluded that *McCready* was an exception to the general rule that such discrimination was unconstitutional. “The whole ownership theory, . . .” said Vinson, “is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”⁵⁵² In a concurring opinion, Justice Frankfurter objected that *McCready* should not “be looked at askance.”⁵⁵³ Not only had the doctrine of that case been widely relied upon in state courts, said Frankfurter, but in *Truax v. Raich* the Supreme Court itself “formulated the amplitude of the . . . doctrine by referring to ‘the regulation or the distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.’”⁵⁵⁴

Thirty years later the Supreme Court returned to consideration of the state ownership theory in three successive terms with seemingly contradictory results. In 1977, the Court invalidated a Virginia law prohibiting federally licensed vessels owned by non-residents of Virginia from fishing in Chesapeake Bay and prohibiting ships owned

547. *Id.* at 402-03.

548. *Id.* at 406.

549. *Id.* at 399-400.

550. *Id.* at 400-01.

551. *Id.* at 401. *McCready* involved stationary oysters rather than transient fish and regulations of inland rather than coastal waters.

552. *Id.* at 402.

553. *Id.* at 408.

554. *Id.* at 408-09, quoting from *Truax v. Raich*, 239 U.S. 33, 39 (1915). In *Truax* the Court invalidated an Arizona law, enacted by initiative, requiring that eighty percent of the employees of employers with five or more workers be qualified electors or native-born citizens. The Court mentions *McCready* by way of distinguishing it from the issue in *Truax*.

by non-citizens to catch fish anywhere in the state. Pursuant to holding that the Virginia law was preempted by federal legislation, Justice Marshall stated:

The “ownership” language . . . must be understood as no more than a 19th-century legal fiction expressing “the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” [citations omitted] Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.⁵⁵⁵

The next year the Court upheld, in *Baldwin v. Fish and Game Commission of Montana*, a state hunting license scheme that required non-residents to pay seven and one-half times as much as residents for a license to hunt elk in the state.⁵⁵⁶ The law was challenged as violating the privileges and immunities clause of Article IV, Section 2, and the equal protection clause of the 14th Amendment.⁵⁵⁷ Citing *Corfield*, *McCready* and *Geer*, Justice Blackmun stated that “[i]t appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people.”⁵⁵⁸ Blackmun acknowledged that “the States’ interest in regulating and controlling those things they claim to ‘own,’ including wildlife, is by no means absolute,”⁵⁵⁹ but insisted “that that language nevertheless expressed ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”⁵⁶⁰ In concurrence, Chief Justice Burger admitted that the state ownership doctrine “is . . . a legal anachronism of sorts,” but insisted that it nonetheless “manifests the State’s special interest in regulating and preserving wildlife for the benefit of its citizens.”⁵⁶¹ Justice Brennan, joined by Justices White and Marshall, said in dissent that “[t]he lingering death of the *McCready* doctrine as applied to a State’s wildlife, begun with the thrust of Mr. Justice Holmes’ blade in *Missouri v. Holland* . . . finally became reality in

555. *Douglas v. Seacoast Prod’s, Inc.*, 431 U.S. 265, 284-85 (1977) (quoting from *Toomer v. Witsell*, 334 U.S. 385, 402 (1948)).

556. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 392 (1978).

557. *Id.* at 372.

558. *Id.* at 384.

559. *Id.* at 385.

560. *Id.* at 386 (quoting *Douglas*, 431 U.S. at 284, and *Toomer*, 334 U.S. at 402).

561. *Id.* at 392.

Douglas v. Seacoast.”⁵⁶² As it turned out, Justice Brennan was right about the demise of the state ownership theory, but just a year premature. Although the state ownership theory got a little CPR in *Baldwin*, it was finished off the next term in *Hughes v. Oklahoma*.⁵⁶³ In *Hughes* the Court held “that time has revealed the error of the early resolution reached in [*Geer*] . . . and accordingly . . . [it] is today overruled.”⁵⁶⁴ Justice Brennan noted that efforts to extend the state ownership justification for favoring residents in the use of other resources had been repeatedly rejected⁵⁶⁵ and concluded that there was no justification for treating wildlife any differently. “Under modern analysis,” wrote Brennan, “the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.”⁵⁶⁶

Because most objections to state wildlife laws rooted in the ownership theory have taken the form of claimed violations of the United States Constitution, the Supreme Court jurisprudence on the subject is important. But there is nothing in the Supreme Court’s rejection of the state ownership theory that precludes a state legislature from continuing to assert ownership of wildlife and holding that such ownership constrains the state’s discretion with respect to wildlife use, disposal and management.⁵⁶⁷ A state legislature could ban, as some have, the taking of certain animals on the ground of state or public ownership, but the state can do that pursuant to its police power without the ownership claim. In other words, or in the repetitious words of the Supreme Court, a state legislature can choose to place a higher priority on wildlife conservation than on competing policy objectives, whether or not it claims to own the wildlife. What states cannot do is enact wildlife protection laws that conflict with either the individual rights protections or the governmental power assignments of the United States Constitution. The only way in which the state ownership argument can make a difference in such federal cases is in the event the Supreme Court relies upon a balancing test and takes it upon

562. *Id.* at 405.

563. 441 U.S. 322 (1879).

564. *Id.* at 326.

565. *See, e.g.*, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (natural gas); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas) and *Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (milk).

566. *Douglas v. Seacoast Prod’s, Inc.*, 431 U.S. 265, 284 (1977).

567. *Id.*

itself to decide in favor of a state law on the basis that the claim of state ownership evidences that the state's interest in a challenged law is sufficiently weighty to overcome a burden on a protected right or a delegated federal power.⁵⁶⁸

It is not coincidental that the interstate commerce and the privileges and immunities clauses have been the context for the wildlife cases in the Supreme Court. The cases have reflected the efforts of states to gain advantage for their own residents in relation to non-residents, much more than they have reflected sincere concern for wildlife conservation. To the extent that state laws do not have differential impacts on non-residents, do not conflict with legitimate federal laws and do not violate the federal constitutional rights of the state's own citizens, state legislatures can do what they like, subject only to any limits imposed by their own state constitution and courts. It is such limits that advocates for extension of the public trust doctrine to wildlife seek to establish. Although they have relied on the state ownership rhetoric of Supreme Court cases and on the Roman and English references to common property in wildlife, their objective is to justify court imposed limits on the legislative power or to justify legislative actions that might limit the property rights claims of state citizens. Rather than accept that wildlife conservation and management is one among a multitude of competing interests in the give and take of the state legislatures, they seek a trump in the political game. State ownership theory has been the hoped for trump card.

VII. THE PAST AND FUTURE OF THE PUBLIC TRUST DOCTRINE

As the foregoing demonstrates, the generally accepted history of the public trust doctrine is more myth than reality. The real story, to summarize very briefly, goes like this. Roman law distinguished three interests in tidal waters and submerged lands.⁵⁶⁹ The *jus publicum*

568. For example, a state law that burdens interstate commerce might be upheld under the *Pike v. Bruce Church* test (cited in *Hughes*, 441 U.S. at 331) on the ground that "the burden imposed on such commerce is clearly [not] excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), with the Court relying on its repeated statements that the ownership theory should be understood to indicate a "special" interest in wildlife on the part of state governments. But even then, it seems unlikely that the Supreme Court would find wildlife protection more special than schools or police or any number of other things the state does pursuant to the police power. The wildlife cases seem to recognize that these public policy priority questions are for state legislatures to resolve.

569. Carl Shadi Paganelli, *Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan*, 58 HASTINGS L.J. 1095, 1096-1103 (2007).

was the common right of unobstructed navigation, commerce and fishing (and perhaps bathing) in navigable waters.⁵⁷⁰ The emperor was assumed to own all navigable waters, submerged lands and other unappropriated resources and had the power to grant exclusive interests in them.⁵⁷¹ The *jus privatum* encompassed all private interests in these waters and lands including the proprietary interests of the emperor.⁵⁷² Such private interests were acquired either by grant or prescription. The *jus regium* encompassed the emperor's powers to regulate these waters and lands on behalf of the public. Early English law made similar distinctions. After Magna Carta, the crown was precluded from granting exclusive title to navigable waters and tidal lands, in law if not in fact, but there was no such limit on grants made by the king and Parliament or by Parliament alone.⁵⁷³ From the nineteenth century, title to all submerged and tidal lands was presumed to be in the Crown, putting the burden of proof on any private claimants to demonstrate the legitimacy of their claims.⁵⁷⁴ Grants were made subject to the public right of navigation, commerce and fishing⁵⁷⁵ and any obstructions to or interference with those uses were subject to abatement or removal pursuant to an action in nuisance.⁵⁷⁶ These principles of English law, with various distortions, applied in the American colonies, and after the Revolution the individual states succeeded to the crown's and Parliament's rights and responsibilities.⁵⁷⁷ The prima facie rule of presumptive state title was converted to a rule of sovereign title and was applied to navigable waters and submerged lands. Grants of those state interests to private parties could be made subject to the public rights of navigation, commerce and fishing. These public uses could be regulated and licensed or granted by the state legislatures as successors to the powers of Parliament and without the limitations imposed by Magna Carta on the king. The only important change from the English doctrine, at least according to Chancellor Kent and

570. *Id.* at 1098.

571. *See id.* at 1097-98.

572. *Id.* at 1098.

573. *See supra* text accompanying note 308; *see also* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

574. Deveney, *supra* note 30, at 53.

575. *Id.* at 54.

576. *See generally* text accompanying *supra* notes 137-39.

577. Deveney, *supra* note 30, at 55-66.

all subsequent American law, was its application in most American states to all waters navigable in fact.⁵⁷⁸

Courts and commentators have consistently referenced the history of the public trust doctrine because they embrace the common law's precedential method of assuring that judges and other governmental officials respect the rule of law. The persistent citations to Justinian, Bracton, Hale, Blackstone, Kent, *Arnold*, *Martin* and *Illinois Central* are not mere expressions of antiquarian interest. They reflect a deeply rooted belief among Anglo-American lawyers that the judge and the legal advocate must demonstrate that the law they propound was indeed the law before the passions and self-interest of the particular case intervened. It would not do in *Arnold* for Chief Justice Kirkpatrick to reject a private claim of right on the basis of his conclusion that the public interest would be better served by leaving oyster beds open to all. Rather he had to demonstrate, based on pre-existing law, that the private claim derived from an illegal grant. The Supreme Court in *Illinois Central* could not invalidate the grant to the railroad on the ground that it was bad public policy. Rather, the Court required reliance on a pre-existing legal rule that either forbade the legislature from making the grant or authorized its repeal without compensation to the railroad. Without reference to pre-existing law and an indication that such law is somehow binding on the decision at hand, the judge becomes the law maker and the rule of law is abandoned to the rule of men and women.

Of course the law cannot be frozen in time. It must adapt to changing circumstances and the evolving values of our society. One of the great strengths of the common law has been its adaptability over many centuries in the hands of judges with the wisdom to preserve the rule of law by adapting the law, not to the interests in the case at hand, but to the realities of a changing society. This has been accomplished, for the most part, through adherence to basic concepts and adaptation through evolving conceptions.⁵⁷⁹ This difference, between concept and conception, is well illustrated by the American adaptation of the English definition of navigable waters. At least according to Chancellor Kent, in eighteenth century English law navigable waters were those affected by the tides, not because all such

578. *See id.* at 66.

579. Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1949-50).

waters are in fact navigable, but because most navigable waters in Britain are tidal and the extent of the tides is a relatively easy boundary to identify.⁵⁸⁰ The concept was of waters on which navigation should be protected against obstruction. The conception, good enough in light of the need to readily identify affected waters, was those affected by the tides. In North America, many navigable waters are not tidal, so the conception of tidal waters as navigable was seen by the courts as too limiting. In fact, reliance on the English conception of tidal waters in North America would do harm to the concept of unobstructed navigation since the law that protected navigation would not apply on the vast inland river and lake system (given the linking of the common right to state ownership). The topography and hydrology of North America required a different conception. The courts settled on navigable in fact even though it was less clear as a definition of boundaries. Increased enforcement costs would be offset many times by the benefits of free navigation on America's inland waterways.

The revolution in public trust law urged by Professor Sax and so many others might be said to call for nothing more than new conceptions of public trust uses and resources in light of changed circumstances.⁵⁸¹ But implicit in this argument is a whole different foundational concept. The concept to which the rule of law is tethered would no longer be the public right in navigation, commerce and fishing in navigable waters. It would be the public interest as broadly conceived as anyone might imagine which is indistinguishable from the scope of the police power. The concept of a public right to navigation, commerce and fishing in navigable waters is bounded sufficiently to limit the discretion of a judge or other public official. To be sure there are gray areas where judgment must be exercised – does fishing include oystering or do navigable waters include those navigable in fact? But if a public right to fish implies a public right to camp and a navigable waterway implies a prairie pothole, or if the concept of a public right in navigation, commerce and fishing implies a public right in all things the public might be thought to value at any point in time, then there can be no rule of law because there is no bounded concept to constrain the judge.

The foregoing history of the public trust doctrine in the United States confirms that the vast majority of American judges have been

580. *Palmer v. Mulligan*, 3 Cai. 307, 318 (N.Y. 1805).

581. *See Sax, supra* note 1.

good stewards of the rule of law. The broad and sweeping language of Justinian that has echoed through two millennia of case law and commentary has been narrowly applied, as it was in England, to navigable waters for the purposes of navigation, commerce, fishing and sometimes bathing. With the exception of the revised definition of navigability in North America, an exception made to avoid an exceptional departure from the concept of navigability in the common law, American case law remained reasonably true to its common law roots, at least through the middle of the twentieth century. The glaring exception was *Arnold v. Mundy*, but there the departure was more rhetorical than actual and it had only to do with alienability of state lands, not the extent and nature of the public trust.⁵⁸² On the question of alienability, the case was overruled to conform with historic and continuing practices in New Jersey and to return the state to the common law norm prevalent in the other states. Even the “lodestar” case of *Illinois Central* was not a departure from the common law focus on navigation, commerce and fishing in navigable waters.⁵⁸³ While ruling against the railroad, the Supreme Court confirmed that the state could alienate submerged lands, but not if doing so was likely to result in total obstruction of the public’s right of navigation and commerce. The decision really turned on the factual conclusion that the grant to the railroad would have that consequence. From a rule of law perspective, this understanding of *Illinois Central* is far better than the Court’s alternative suggestion that the legislature may have had the power to make the grant, but they also had the power to revoke it without compensation to the railroad.⁵⁸⁴

Over the course of the nineteenth century, American public trust law did depart from its English roots in establishing a firm linkage of the public trust to state ownership. The original concept was that the *jus publicum* operated as an easement in relation to the *jus privatum*, whether the state or individuals were the proprietors of submerged and tidal lands. The linkage to state ownership arose in part because of the expansion of the definition of the navigable waters to include navigable in fact, non-tidal waters. This expansion was important to commerce and navigation on America’s inland waterways, the traditional concern of the public trust, but not because the state

582. See *Arnold v. Mundy*, 6 N.J.L. 1, 45 (N.J. 1821).

583. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

584. *Id.* at 456.

owned the beds of those waterways. The traditional doctrine applied to navigable waters whether or not the beds were owned by the sovereign. The expansion of the navigability definition was also important to the extent of riparian land ownership in the rapidly developing continent. Under the English *prima facie* rule, the presumption was that the state owned the beds and banks of navigable waterways. Submerged lands could be privately held, but the burden was on the private claimant to prove title either by grant from the state or prescription. There was, however, no necessary connection between reliance on navigability to define the geographic scope of the common rights of navigation and commerce and navigability as establishing the *prima facie* case for state ownership of submerged lands. This merging of two distinct doctrines did not result in unrestrained private obstructions to navigation, because the traditional remedy of an action in nuisance remained in cases of private obstruction.

The American cases also have tended to confuse the *jus publicum* and the *jus regium*. As explained by Bracton, the *jus publicum* is the common right of navigation, commerce and fishing in navigable waters. The *jus regium* is the power of the sovereign to act in the public interest including the power to enforce the *jus publicum*. This power to enforce the *jus publicum*, an aspect of what we would today call the police power, is the same as the power to enforce the *jus privatum*. The confusion in some American cases results from thinking of the *jus publicum* as the public interest rather than as common rights in the nature of an easement. The common right in navigation, commerce and fishing in navigable waters is enforced in the state courts in a nuisance case or some analogous action against the offending individual.⁵⁸⁵ It is in the public interest for the state to provide for such remedies, but that is only a very small part of what the state might do via its police powers to promote and protect the public interest. An order by the state enforcing the *jus publicum* requires no compensation to the offending party because that party had no right to obstruct navigation in the first place, or to state it in the affirmative, the common right was a preexisting easement. But it does not follow that everything the state does pursuant to its police power can be done without compensation to affected property owners. By confusing the *jus publicum* and the *jus regium* – the

585. Under English law the obstruction was referred to as a *purpresture*. Injunctive relief would be granted in an action in nuisance.

common right to navigation and fishing with the general public interest – American case law has opened a potentially giant loophole in the constitutional protections of property rights. A property owner whose dam on his own property obstructs navigation and thus violates the *jus publicum* has no complaint when he is required to remove the dam without compensation.⁵⁸⁶ His property right did not permit such a dam to be built. But if the *jus publicum* is just a Latin term for the public interest,⁵⁸⁷ the scope of the public trust is limitless and the constitutional protections of property rights are a nullity.

The prospect of such a free pass to the exercise of the police power has animated the modern interest in an expanded public trust doctrine. It is implicit in Professor Sax's 1970 article and explicit in many articles written in the intervening years.⁵⁸⁸ Many of the advocates of an expanded doctrine are of the view that the interests they seek to protect are of special importance and not interests that should be negatively impacted by the actions of private property owners on the one hand, or of state and local government on the other hand. By expanding the scope of the *jus publicum*, they can claim there is no infringement of property rights because those rights have always been subject to the public rights of the *jus publicum*. And to the extent the *jus publicum* is viewed as a limit on the legislature, at least with respect to management and use of state owned resources, they can exercise a trump in the political process. The effort to extend the doctrine to wildlife is illustrative of its potential power and of the importance to that potential of the American conflation of the *jus publicum*, *jus privatum* and *jus regium*. By linking the public trust to state ownership of submerged lands, it is a seemingly small step to expand its application to all state owned resources. The overruling of *Geer* has not been helpful to that possibility.⁵⁸⁹ But by equating the *jus publicum* to the public interest,

586. In such a case, the *jus publicum* is part of what Justice Scalia called "background principles" in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

587. This confusion has not been limited to the courts. Noting that the Florida Constitution (Article X, Section 11) provides that unalienated tidelands are held in trust for the people and may only be sold or leased when in the public interest, Donna Christie argues that the use of the term "the public interest" rather than "public trust uses" "is an indication that Florida intends the doctrine to be dynamic and reflect the public's contemporary interests . . ." *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427, 433 (2004). But there is nothing on the face of the provision suggesting it means anything other than state lands may be sold when the legislature determines it to be in the public interest. It is the legislature, not the public trust doctrine, that is meant to be dynamic.

588. See Sax, *supra* note 1.

589. See generally *Hughes v. Oklahoma*, 441 U.S. 322 (1879).

or at least to special public interests, the American interpretation has encouraged reliance on the view that state ownership of wildlife was meant to convey a special public interest in that particular resource. In modern public trust law a special interest can be converted to a public right by the stroke of a sympathetic judge's pen. That right will then serve to preempt the claims of private property owners and to trump the political process.⁵⁹⁰

The wildlife cases can be helpful to a clear understanding of the historic public trust doctrine. As we have come to understand in the last several decades, the concept of public ownership of wildlife was a useful legal fiction expressing that wildlife are thought to be important to the general public interest. But the concept of public ownership also had much deeper roots in Roman and English law in the sense that all things not owned, either because they have not been appropriated or because they are not conducive to ownership, are owned by the emperor or king, or by their American successors to sovereignty, the states. And so it was with navigable waters and submerged lands as well as with unclaimed or "waste" uplands. The idea of a common or public right to navigation, commerce and fishing in these navigable waters, with resulting limitations on the use of those waters and their submerged lands, did not mean that the waters and lands could not be granted to private individuals. Nor did it mean that the *jus publicum* could not be granted in the form of several fisheries, exclusive wharfing rights or licenses to engage in commerce. So long as the *jus publicum* had not been granted, the remedy for its violation was an action in nuisance. But there is little doubt that the state could eliminate the action in nuisance and replace it with a regulatory regime, or replace it with nothing, which would be the equivalent of granting the right to whomever appropriated it first. In other words, the legislature speaks for the public. It is the only legitimate voice for the public interest. If its decisions, whether with respect to navigable waters or any other matter or means not precluded from its jurisdiction and powers by the state or federal constitutions, are invalidated by the courts, the courts are acting beyond their legitimate powers.

590. A parallel to this development in public trust law exists in other areas of public interest regulation. The term "stakeholder" has become common parlance to describe individuals or groups with a personal interest in just about any private or public project. But the term "stakeholder" carries meaning different from old fashioned terms like "voter" or "special interest group." The term speaks of rights more than interests, casting a very different shadow over both the judicial and legislative processes.

Yet that is precisely what proponents of an expanded public trust doctrine advocate. In Professor Sax's words, they seek judicial intervention to limit the legislative and executive branches of government or to force those branches of government to impose limits on private individuals in the name of the public trust doctrine.⁵⁹¹ To encourage and bolster such judicial intervention they have created a mythological history of the doctrine. Perhaps this is an acknowledgment of the rule of law and our precedential legal system, or at least a sense that our courts, for the most part, remain committed to the rule of law tradition, but it shows little respect for the rule of law or for history.

It may be argued that the foregoing review of the history of the public trust doctrine has taken too narrow a view of the relevant history. Customs and practices beyond the formal institutions of the law may be found to confirm a much broader understanding of the public's rights. Although a broader perspective may evidence long standing public uses not reflected in the statutory or common law, as the Oregon Supreme Court concluded in *Thornton v. Hay*, in which it found a public right of access to the entire coast of the state,⁵⁹² such a sociological approach is almost certain to confirm a generally narrow understanding of the public trust doctrine.⁵⁹³ As we have seen from Magna Carta through *Arnold v. Mundy*, sociological realities have generally reflected extensive grants of exclusive private rights, even in those rare cases where statements of the formal law asserted a broad public right. The king continued to grant lands and fisheries to private individuals, often with the approval of Parliament,

591. See Sax, *supra* note 1, at 473.

592. State *ex rel.* *Thornton v. Hay*, 254 Or. 584 (1969). Relying on a history of extensive public use of Oregon's beaches, Blackstone and an 1834 New Hampshire case *Perley v. Langley*, 7 N.H. 233 (1834), the court found a public right of access to the dry sand beaches of the state pursuant to the doctrine of custom.

593. Even in *Thornton* the court provided no evidence, sociological or otherwise, that the dry sand beaches of Oregon had been customarily used by the public. The claim of customary use had not been raised in the trial court so there was no evidence on the record to support the Supreme Court's conclusion. The court's opinion suggested that the customary common right had existed on the entire Oregon coast, notwithstanding that only a single property owner was party to the litigation. The Oregon Supreme Court later held that the doctrine did not apply to every dry sand beach in the state, absent a showing of actual public use sufficient to satisfy the doctrine of custom, in *McDonald v. Halvorson*, 308 Or. 340 (1989). But four years later the Court seemed to affirm its original statement in *Thornton* recognizing general public rights, at least to a particular section of the coast. *Stevens v. City of Cannon Beach*, 317 Or. 131 (1993). The United States Supreme Court declined to grant certiorari over a vigorous dissent by Justice Scalia in which he wrote: "To say that this case raises a serious Fifth Amendment takings issue is an understatement." *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994).

notwithstanding the prohibitions of Magna Carta. At the very moment Chief Justice Kirkpatrick was writing his opinion in *Arnold v. Mundy*, the New Jersey Legislature was passing laws providing for the granting of exclusive rights to plant and harvest oysters in New Jersey waters.⁵⁹⁴ The sociological history of resource use is largely a history of economic forces at work. Professor Cohen suggests that history will demonstrate that the common rights generally said to be the core of the public trust doctrine originally existed to promote commercial interests through the efficiencies of private rights, including a private right of access to the channels of commerce.⁵⁹⁵ Professor Rose recognizes that nineteenth century American courts rarely ventured beyond commerce as the foundation of public trust and public prescription, and that custom as a basis for noncommercial public rights was more often rejected than accepted.⁵⁹⁶ She suggests, nonetheless, a theory of a commons managed by the unorganized public that might extend these common law doctrines beyond commerce to speech and recreation, though probably not environmental protection.⁵⁹⁷ But the evidence for such a theory in the case law is thin and the evidence that such informal management of scarce resources works on a scale relevant to the twenty-first century is even thinner. Nearly forty years ago, Patrick Deveney observed that the history of the doctrine being told by some modern courts was “very much ad hoc” and “often substituted for or obscured an analysis of the real interests competing for the coastal area.”⁵⁹⁸ Five years after Deveney, Glenn MacGrady concluded that “the public trust doctrine was . . . [n]onexistent at English common law, . . . was created by an obscure and unprepared state court judge, adopted by the inventive Roger Taney, and repeated forever after in hundreds of American decisions, . . .”⁵⁹⁹ And, he might have added, it was repeated by scores of legal commentators. The ad hoc and ill-informed telling of that history has continued unabated since

594. See James Kent, COMMENTARIES ON AMERICAN LAW 417 (Oliver Wendell Holmes ed., 12th ed. 1873).

595. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 254 (1992).

596. Rose, *supra* note 18, at 722-23.

597. In a contribution to a symposium on Professor Sax's public trust writings, Rose concludes that “the public trust doctrine only indirectly relates to environmental resources” The better theory for environmentalists, she suggests, is one drawn from the law of riparianism. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L. Q. 351, 360-61 (1998).

598. Deveney, *supra* note 30, at 37.

599. MacGrady, *supra* note 58, at 591.

Deveney and MacGrady wrote, but it does not provide justification to secure for the public, in the name of newly conceived notions of common rights and without compensation, resources heretofore privately owned.

Of course in the adversary system of the common law, the lawyer is expected to make the most of the facts and law at hand. But a careful review of the history – the precedent – does not make the case for expanded application of the public trust doctrine. That leaves its advocates to search for constitutional sources for the doctrine, or to make the case for judicial law making beyond the traditional judicial role of legal interpretation. At the end of the day, courts will embrace whatever theories they choose and extend or limit the public trust doctrine as they see fit. But if they are committed to the rule of law, democratic government, and the traditional interpretive role of the judiciary, they will not loosen the public trust doctrine's historic shackles.