

# PRINCIPAL PAPERS

## Liberating the Public Trust Doctrine from Its Historical Shackles

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At a superficial level, the shape of the public trust doctrine is easy enough to discern. It draws upon the Roman Law idea of common properties (*res communis*)<sup>1</sup> and on certain provisions of Magna Carta.<sup>2</sup> It deals with lands beneath navigable waters, with constraints on alienation by the sovereign and with an affirmative protective duty of government—a fiduciary obligation—in dealing with certain properties held publicly.<sup>3</sup> Yet to restate these commonplace observations is not to begin to penetrate the core of this unusual legal doctrine.

Taken at face value, the public trust appears simply to limit public alienation of certain properties. Yet when so narrowly interpreted, it generates some rather peculiar responses. One example is the California Supreme Court's solemn examination of the intentions of the California Legislature in 1870 to ascertain whether grants made more than a century ago were meant to be free of the public trust, a question that the legislature gave no evidence of having considered.<sup>4</sup> And only last year the Supreme

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<sup>1</sup> Justinian, *INSTITUTES*, 2.1.1-2.1.6.

<sup>2</sup> See Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 *YALE L.J.* 762, 765-68 (1970).

<sup>3</sup> For reference to traditional cases, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471 (1970).

<sup>4</sup> *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 101 S. Ct. 119 (1980).

Court of Oregon permitted an airport to be extended into Coos Bay on the theory that bridges are routinely built over navigable waters, and that the autos that go over the water on bridges are indistinguishable from airplanes that traverse navigable waters on runways.<sup>5</sup> One must ask whether the destiny of San Francisco Bay or the ocean shoreline should turn upon such historical or analytical oddities.

It is unreasonable to view the public trust as simply a problem of alienation of publicly owned property into private hands, since many—if not most—of the depredations of public resources are brought about by public authorities who have received the permission of the state to proceed with their schemes. On the other hand, it is inconceivable that the trust doctrine should be viewed as a rigid prohibition, preventing all dispositions of trust property or utterly freezing as of a given moment the uses to which those properties have traditionally been put. It can hardly be the basis for any sensible legal doctrine that change itself is illegitimate.

At its heart, 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. And neither Roman Law nor the English experience with lands underlying tidal waters is the place to search for the core of the trust idea.<sup>6</sup>

The essence of property law is respect for reasonable expecta-

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<sup>5</sup> *Morse v. Oregon Div. of State Lands*, 285 Or. 197, 590 P.2d 709 (1979).

<sup>6</sup> Roman Law most likely reflects an effort at rational classification. The Romans began by classifying as conventional private property those things which were amenable to ordinary purchase, sale or inheritance. Then the Romans classified everything that could not be so categorized, *i.e.*, temples, which were said to belong to the gods, public buildings, which belonged to the State, and a number of other things, called *res communis* or *res nullius*—like the seashore and wildlife—which could not be said to belong to anyone.

In all probability, categories like *res communis* were a response to what the Romans conceived to be the physical nature of certain properties—things that were abundant and not amenable to private possession, and therefore not the subject of purchase, sale, exclusion or possession. While some of these things can be physically and economically privatized, in fact they were not privately owned in Roman times, and probably were not subject to demands for private ownership. The Romans did, however, grant certain persons some exclusive rights to fishery in the sea. They also removed small farmers from their lands and instituted larger-scale, slave-operated farms which were owned by rich persons. See note 1 *supra*.

tions.<sup>7</sup> The idea of justice at the root of private property protection calls for identification of those expectations which the legal system ought to recognize. We all appreciate the importance of expectations as an idea of justice, but our concern for expectations has traditionally been confined to private owners. We have tied the *legal* concern with expectations to private proprietorship and to formal title; and while we recognize that mere title is not enough to sustain every claim of expectation that is made under it, it is hard to imagine legally enforceable expectations unconnected to formal title.<sup>8</sup> At the same time we know that, insofar as expectations underlie strong and deeply held legal-ethical ideals, they are not limited to title ownership.

In "*The New Property*," Professor Charles Reich<sup>9</sup> introduced the notion that many things lacking traditional status as formal property—things like television or liquor licenses—in fact generate expectations quite like those that attach to traditional forms of property.<sup>10</sup> Even interests that don't at all resemble ordinary property give rise to important values and expectations that cry for recognition, and sometimes get it. Much of the recent controversy over the federal highway program, and over urban renewal, was engendered by the prospect of the destruction of established communities.<sup>11</sup> Similar problems are arising today with the inundation of established western communities by energy development projects. The root values that inhere in the maintenance of an established community have much in common with the established expectations that underlie the recognition of private property rights.

To put the idea of expectations in a broader context, one

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<sup>7</sup> See, e.g., Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165 (1967).

<sup>8</sup> The courts are defining "property interests" more broadly than was traditional as a trigger for constitutionally protected *procedural* rights. E.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970). See *Bishop v. Wood*, 426 U.S. 341 (1976); *Mathews v. Eldridge*, 424 U.S. 319 (1976); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

<sup>9</sup> 73 YALE L.J. 733 (1964).

<sup>10</sup> See note 8 *supra*. For a recent case demonstrating the traditional view in full bloom, see *United States v. Fuller*, 409 U.S. 488 (1973) (condemnation of land adjacent to Taylor Grazing Act "permit" lands did not require compensation for any value added to lands by permits).

<sup>11</sup> E.g., A. LUPO, F. COLCORD & P. FOWLER, *RITES OF WAY: THE POLITICS OF TRANSPORTATION IN BOSTON AND THE U.S. CITY* (1971).

might say that stability, and the protection of stable relationships, is one of the most basic and persistent concerns of the legal system. Stability in ownership is what we protect with property rights; stability within a community is a major part of the business of the criminal law. Of course, stability does not mean the absence of change, nor does it mean political or legal reaction. It does mean a commitment to evolutionary rather than revolutionary change, for the rate of change and the capacity it provides for transition are precisely what separate continuity and adaptation from crisis and collapse.

Precisely the same point might be made from a biological perspective. The focus of environmental problems is *not*, as is sometimes suggested, the mere *fact* of change, which it is said environmental zealots cannot accommodate, but rather a rate of change so destabilizing as to provoke crises—social, biological and (as we see in the context of energy prices) economic. The disappearance of various species from the earth in the natural, evolutionary process is totally different from the disappearance of species over a short time. The key difference is not the *fact* of change, but the *rate* of change. The essence of the problem raised by public trust litigation is the imposition of destabilizing forces that prevent effective adaptation.

The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.<sup>12</sup> The function of the public trust as a legal doctrine is to protect such public expectations against destabilizing changes, just as we protect conventional private property from such changes.<sup>13</sup> So conceived, the trust

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<sup>12</sup> Land-use regulation, whether effectuated by private covenant or by public zoning, reflects a recognition of values common to the community. The regulation most often is a joint effort to protect values diffused among all property owners within the regulated area.

<sup>13</sup> I am persuaded that the *absence* of perceived destabilizing change is the underlying rationale for the recent decisions in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), and *Agins v. Tiburon*, 100 S. Ct. 2138 (1980). By the time those proposals were initiated, sensible land owners knew, or should have known, that historical protection and open-space preservation were important public values and that they were increasingly being protected to the detriment of landowners. While it is impossible to specify exactly when owners will be charged with such knowledge, there comes a point at which courts simply cease to be sympathetic to owners' claims that their reasonable expectations are being sharply disappointed. That is, at some point the imposition of such restraints is no longer seen as sharply destabilizing for the land-

doctrine would serve not only to embrace a much wider range of things than private ownership, but would also make clear that the legal system is pursuing a substantive goal identical to that for the management of natural resources. Concepts like renewability and sustained yield, so familiar to us in fisheries and forest management, are designed precisely to prevent the sort of sudden decline in stocks that is destabilizing and crisis-provoking. The legal system incorporates parallel concerns in protecting expectations, and it remains only to assure the legal principle's application more comprehensively.

I can put some flesh on these bare bones by referring to the historical experience that most clearly reveals the proper sources for the legal public trust doctrine today: the tradition of the commons in medieval Europe. A statement of regional French law in the 11th century declared that "the public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks . . . are not to be held by lords, . . . nor are they to be maintained . . . in any other way than that their people may always be able to use them."<sup>14</sup> The wild places abundant in early settlements were commonly resorted to by members of nearby communities to cut wood and catch fish, to hunt and graze animals, to obtain peat and rushes from marshes, and brush and broom from the heaths. It was only natural that these places should be commonly available, since their common use was necessary for the maintenance of the feudal economy.

Feudal law was, of course, customary law. As the common use of uncultivated areas became customary, it was natural for these customary uses to be described as legally compelled and required by justice, since ideas of custom, justice and law were inextricably intertwined in medieval thought. To be sure, custom was not unchanging. Lords frequently imposed new demands on their people and thus created new customs. Nor was it unknown for new rights to be asserted and then described (fictionally) as if they were customary.

But as resources became scarce, objections by the lords to common rights were heard and were often the source of agrarian

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development industry. One might say the same about the long line of wetland-protection cases. As such laws become more and more commonplace, wetlands owners will not be able to claim an expectational right to develop as they did in the past.

<sup>14</sup> M. BLOCH, *FRENCH RURAL HISTORY* 183 (1966).

revolts. The peasants responded to these incursions with indignation: "Let the knights then feel our strength," one writer said. "[W]e can go to the woods as we will—to cut the trees and take our pick—to catch the fish as they swim—to chase the deer through the forests—to do there what we please—in the clearings, waters and trees."<sup>15</sup> The claims did not ordinarily deny the legal or ethical possibility of private ownership. Rather, they asserted long-standing customary use and treated that assertion as a fact to be determined.<sup>16</sup>

It should be noted that not every attack on customary rights was deplored. Some traditional uses of the commons were condemned by agronomists as wasteful of good land which, with intelligent exploitation, might yield a richer harvest or support more livestock than it had in the past.<sup>17</sup> There was real merit to some of these claims, since traditional practices were often wasteful and sometimes highly destructive. The traditional customs were also an impediment to the aristocrats and entrepreneurs who stood ready to bring emergent capitalism to flower. They objected not only to inefficiency and waste, but also to

the fact that the existence of commons and grazing rights made it too easy for small holders and manual laborers to eke out a meagre living, encouraged them to live in "idleness" when they might have been hiring themselves out to work on the great estates. In the eyes of men with a keen appreciation of individual effort, such people were a disgrace to "property."<sup>18</sup>

The agrarian economy of the forest, with its common uses and customary rights, was a pre-capitalist phenomenon. It was inefficient from the perspective of rising economic rationalism, and irresistible forces of economic change were washing over it.

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<sup>15</sup> *Id.* at 182.

<sup>16</sup> In an English case of the 13th century, for example, men of the Archbishop of Canterbury of Maidstone complained that the Lord of Rochester stopped their ships going down the river and demanded a toll from them. It was argued that "they ought to give no toll . . . and ought to sail freely . . . and thus it was accustomed in the time of Archbishop Hubert Walter [in the past]." In response, it was said by Rochester, who sought to collect the toll, "that always from of old it has been used that, whether they were the ships of the archbishop [of Canterbury] or anyone else's, they were always accustomed and ought . . . to give tolls." Issue was thus joined, and the case was put to a jury for decision. *Curia Regis Rolls*, 15, No. 1079 (1234-1235).

<sup>17</sup> E. THOMPSON, *WHIGS AND HUNTERS* 109, 239-40 (1975); M. BLOCH, *supra* note 13, at 213-18.

<sup>18</sup> M. BLOCH, *supra* note 13, at 220.

Privatization of the bounty of nature was also a perfect symbol for emphasizing class distinctions.<sup>19</sup> Since nature's bounty obviously does not belong to anyone by common principles of justice—not being the product of anyone's labor, cultivation or discovery—to define it as the exclusive property of someone was to deem that person more important or more worthy than others. Nowhere was the point more tellingly made than in the rules about hunting. The events in early 18th-century England that led to the notorious Black Act—whereby deer poaching was made a capital offense—were perhaps the most extreme case. Terrible impositions were made on the traditional forest economy so that a newly rising class of London sportsmen could enjoy fashionable deer-hunting parties. The consumption of venison became a sign of status, “and the gift of game was one of the most delicate means by which the gentry expressed influence and solicited favor.”<sup>20</sup>

Privatization and class separation were not the only pressures felt by the commons. The commons were also very valuable resources. In times of economic stringency, they became a battleground for sustenance between lords and peasants, a fertile source of controversy because their legal status was so often buried in a shadowy history of competing claims of title and custom.

This history of the commons does not demonstrate any absolute restraint upon the alienation of things comprising nature's bounty, for such things were frequently alienated away from community use. At the same time, despite alienation and formal ownership, *mere* title was not always sufficient to settle the controversies. One might have been able to trace a grant back a long time, but if common uses incompatible with the grant had developed, those uses had to be reckoned with. The more necessary the uses, the stronger the claims of justice that attached to the custom. By the same token, even long-standing uses could be attacked—sometimes for good and sometimes for base reasons—by appeal to claims of ownership right.

What brought disputes over the commons to crisis was neither

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<sup>19</sup> “The absence of compact billages, and the dispersal of foresters, made social discipline impossible. . . . The gentry had decided . . . that enclosure was the best resource for agrarian class control.” E. THOMPSON, *supra* note 7, at 239-40.

<sup>20</sup> *Id.* See also T. LUND, *AMERICAN WILDLIFE LAW* 8 (1980).

title nor custom, taken alone, but the sharp disappointment of expectations, continuance of which was perceived as a necessity. A stable equilibrium was being disrupted by the rigorous application of laws and claims of title unjustified by any social or economic necessity.

The medieval customary law had the striking advantage of putting developed expectations, rather than formalities such as title ownership, at the center of attention. While such established uses were not determinative, the significance of the established uses to the sustenance of the community as a stable entity was, in one way or another, factored into the ultimate result. The powerful reaction which the English Black Act engendered—precisely because its enforcement *was* so destabilizing and the advantages from its enforcement so largely trivial—suggests how claims of custom versus title worked themselves out.

To put these considerations into modern guise, consider the recent case of *City of Berkeley v. Superior Court of Alameda County*.<sup>21</sup> Although the grantee's chain of title extended back more than 100 years, there was no claim of private use during that period. Thus the potential destabilizing effect of disappointing the grantee's expectations should carry less weight than traditional analysis would give it. At the same time, there was a long-standing public or common use. The court took actual use into account in fashioning a remedy, to be sure, but there is no established doctrinal basis for recognizing these values. The same notions may be influential in the Mono Lake controversy, where it is the recent destabilizing action of Los Angeles which is really critical, rather than the formalities of arrangements made decades ago.<sup>22</sup>

I do not mean to suggest that the medieval doctrine of custom should be revived in the late 20th century under the name of the public trust.<sup>23</sup> I do believe, however, that the public trust doctrine should be employed to help us reach the real is-

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<sup>21</sup> 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

<sup>22</sup> See *National Audubon Soc'y v. Department of Water & Power*, Civ. No. 566 (Alpine County Sup. Ct., Cal. filed 1979), *removed*, No. 80-127 (E.D. Cal. Feb. 20, 1980).

<sup>23</sup> The celebrated modern American custom case is *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969).



sues—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. The historical lesson of customary law is that the *fact* of expectations rather than some formality is central. Of course, title is not irrelevant where ownership is actually a surrogate for reliance and expectation and where non-recognition of title would in fact be destabilizing. Conversely, where title and expectations are not congruent, title should carry less weight. We do sometimes overtly recognize this point, as in the California cases of 1970 dealing with implied dedication of land permitting access to the sea.<sup>24</sup>

Our task is to identify the trustee's obligation with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destabilization and disruption. Less acute intrusions should be selected where feasible. In dealing with projects proposed for bottomlands, for example, the trustee should ask whether they need to be water-based. Where the alternatives include a solution which will sustain yields and support long-established human uses or biological communities, that approach should be required. Where traditional expectations must give way to new techniques or new needs, the transition should be as evolutionary—rather than revolutionary—as the new needs permit.

In our legal system there is always a question of separation of powers underlying substantive questions. In considering the rights of private property owners and their rightful expectations, we endow the courts with the final word. Since expectations so diffusely held are not explicitly recognized in the Constitution, courts have been less willing to take ultimate responsibility for public trust claims. Some courts have nonetheless found the trust responsibility to be a constitutional mandate to legislatures, based on the requirement that legislative acts be for a public purpose.<sup>25</sup> For these courts, a failure to recognize, or at least to consider and deal with, expectations in ways that minimize destabilization of expectations could represent a failure to act for a public purpose.

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<sup>24</sup> *Gion v. Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

<sup>25</sup> *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773 (1976). Cf. P. RIESENBERG, *INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT* (1956).

But however appealing such interpretations may be, sharp confrontations between courts and legislatures should be avoided wherever possible. The courts can do much to provoke a search for less disruptive alternatives below the constitutional level. They can assure that decisions made by mere administrative bodies are not allowed to impair trust interests in the absence of explicit, fully considered legislative judgments. Under the rubric of the legislative remand,<sup>26</sup> courts can also press a legislature to fortify its decisions with a full consideration of less disruptive solutions. Finally, the courts can reduce the pressures that claims of private ownership put on public trust resources by looking to the history of common rights. The courts should recognize that mere unutilized title, however ancient, does not generate the sort of expectations central to the justness of property claims, and that long-standing public uses have an important place in the analysis.

With such an approach fully in operation, we could integrate legal doctrine and fundamental principles of intelligent resource management, instead of treating basic social decisions as if they were merely the province of a title examiner. We could draw sustenance from history, rather than viewing it as a sterile, manipulative game.

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<sup>26</sup> See J. SAX, *DEFENDING THE ENVIRONMENT* 113-14 (1971).