The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right

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I. THE PUBLIC TRUST: CIVIL AND COMMON LAW ORIGINS

> As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes*—things common to all and property of none.[1]
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> The real title, of course, must be vested in some person.[2]

These two quotations illustrate the tension in the attitude of our legal system toward navigable waters. We are pulled in one direction toward common ownership by a tradition as old as the Roman Empire, and in another by precepts of common law and private enterprise requiring that virtually everything have an owner. This same tension is apparent in the recent challenges to the assertion of public rights to water held in the "public trust."[3]

For reasons largely historical, this public trust has commonly

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[1] United States v. Gerlach Live Stock Co., 339 U.S. 724, 744 (1950).

[2] Smith v. Andrews, [1891] 2 Ch. 678, 707.

[3] The term "public trust" has been widely used and misused in this country. It has been used to describe the nature of ownership of the public lands by the federal government. *E.g.*, United States v. Trinidad Coal Co., 137 U.S. 160 (1890); United States v. Ruby Co., 588 F.2d 697, 704-05 (9th Cir. 1978). It has been applied to the duties of the United States in holding lands for the future states. Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891); Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-23 (1844). It has also been used by candidates to describe the nature of the public office to which they aspire. For the purposes of this discussion, however, "public trust" is limited to the duties of sovereign states to hold navigable waters for their people and to protect certain uses for which these waters are needed.

been associated with the sovereign's ownership of the beds of navigable waters, and its purposes have been traditionally delineated as those of "commerce, navigation and fisheries."[4] Because of this association of ownership, the courts have had to struggle for more than a century with continual efforts of state legislatures and land offices to transfer away these historic rights under the rationale of public improvement or on the theory that navigable waters and tidelands were actually swamps susceptible of reclamation. This has led to judicial response in the form of declarations that the public trust is inalienable as an attribute of sovereignty no more capable of conveyance than the police power itself.

The law is "[t]he felt necessities of the times," said Justice Holmes.[5] Nowhere is this more readily demonstrated than in the field of public trust law. For as the country grew and its needs changed, the common law concepts developed on English soil were no longer appropriate. The opening of the Northwest Territory and the purchase of Louisiana presented us with vastly different waters than the seas and rivers of England. Unrestricted use of the inland waterways was a necessity for the development of the country. Since that time, changing needs have led to different definitions of public trust uses. Today, commerce is merely one of a number of public trust uses which were lower priorities—if recognized at all—in the 19th century.[6]

It appears that today we are in a roundabout way returning to the Roman concept of public rivers and lakes. Differing theories of navigability are being enunciated to meet public needs, to reconcile state and federal rules and to accommodate property concepts. And a new enumeration of public trust rights is emerging to meet the needs of the people, to whom, in the final analysis, these waters belong.

The Institutes of Justinian restated the Roman law: "By the law of nature these things are common to mankind—the air,

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[4] *E.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1960).

[5] O. W. HOLMES, THE COMMON LAW 1 (1881).

[6] For example, the courts have recognized that public trust uses include recreational boating and ecological preservation. *See* notes 123-25 and accompanying text *infra*. And public trust concepts have begun to merge with uses of the police power for the preservation of the marshlands and wetlands adjacent to the tidelands themselves—areas just as important to the health and integrity of a water environment.

running water, the sea and consequently the shores of the sea."[7] All rivers and ports were public, and the right of fishing was common to all men. Any person was at liberty to use the seashore to the highest tide, to build a cottage or retreat on it or to dry his nets on it, so long as he did not interfere with use of the sea or beach by others. Although the banks of a river were subject to private ownership, all persons had the right to bring vessels to the banks, to fasten to them by ropes and to place any part of their cargo there.[8]

Justinian's rules found their way into French law and thence to Louisiana, where they prevail to this day.[9] And in 13th-century Spain, Alfonso the Wise set forth in *Las Siete Partidas* the same principles that were to come to California as Spanish and Mexican law: "Every man has a right to use the rivers for commerce and fisheries, to tie up to the banks, and to land cargo and fish on them."[10] It has been suggested that these Hispanic rights, guaranteed by the Treaty of Guadalupe Hidalgo, serve as an independent basis for guaranteeing public rights to navigable waters.[11]

In England the same rules were known, but the doctrine took a different course. At the same time the *Siete Partidas* was being written, Bracton was quoting Justinian's rule:

> By natural law, these are common to all: running water, the air, the sea, and the shores of the sea. No one is forbidden access to the seashore. . . . [A]ll rivers and ports are public. Hence the right of fishing in a port or in rivers is common. By the laws of nations, the use of the banks also is as public as the rivers; therefore all persons are at equal liberty to land their vessels, unload them, and fasten their cable to the trees upon the banks, as to navigate the river itself.[12]

But the common law introduced into the public trust a concept less important in Roman times: ownership. The common

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[7] THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841).

[8] *Id.* 2.1.4; *see* R. TYLER, A TREATISE ON THE LAW OF BOUNDARIES AND FENCES 44 (1874).

[9] Gulf Oil Corp. v. State Mineral Bd., 317 So.2d 576, 681-82 (La. 1975); R. POUND, *supra* note 7, at 150, 151.

[10] Las Siete Partidas 3.28.6 (S. Scott trans. & ed. 1932).

[11] *See* Knight v. United States Land Ass'n, 142 U.S. 161, 183-87 (1891); San Francisco v. Le Roy, 138 U.S. 656, 670-72 (1891); Dyer, *California Beach Access: The Mexican Law and the Public Trust,* 2 ECOLOGY L. Q. 571 (1972).

[12] 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968).

law abhorred ownerless things. It was held, therefore, that the ownership of beds of navigable waters was in the King. How can divine right be reconciled with the public right to use the waters? Easily. "It is another rule of law," Bracton said, "that public rights, and such things as are materially related to them, are *inalienable*. . . . "[13] Consequently, he concluded that "all things which relate peculiarly to the public good cannot be given over or transferred . . . to another person, or separated from the Crown."[14]

As for American law, what is important is what was *perceived* to be the common law and what American courts chose to accept of it.[15] For our purposes, we must start with Pound's assertion that "[f]or most practical purposes, American judicial history begins after the Revolution."[16] As Pound points out, the courts of that day were made up in large part of untrained magistrates. One judge of Rhode Island's highest court in 1814 was a blacksmith, another a farmer. Of the three justices of New Hampshire's Supreme Court, one was a clergyman and one a physician. The distinguished jurist Justice James Kent put it this way in 1791: "There were no reports or state precedents. . . . We had no law of our own and nobody knew what [the law] was. . . . "[17] New Jersey, Pennsylvania and Kentucky in fact legislated against the citation of English decision. As Pound states, "[I]n the rude pioneer community the main point is to keep the peace. . . . There the refined scientific law that weighs and balances and deliberates and admits of argument is out of place. A few simple rules which everyone understands and a swift and decisive tribunal best serve such a community."[18] And as one New Hampshire judge reportedly said in 1880, "We decline to listen to musty, old, motheaten common law."[19]

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[13] *Id.* at 16-17 (emphasis added).

[14] *Id.* Although the rule of royal ownership has been attributed to the overreaching schemes of one Thomas Digges, circa 1660, *see* S. MOORE, HISTORY OF THE FORESHORE 180-84 (1888), it was well enough established by the time of the American Revolution to be assumed to be English common law.

[15] *See* State v. Corvallis Sand & Gravel Co., 283 Or. 147, 152 n.7, 582 P.2d 1352, 1356 n.7 (1978).

[16] R. POUND, THE SPIRIT OF THE COMMON LAW 113 (1921).

[17] *Id.*

[18] *Id.* at 117.

[19] Locke, *Right of Access to Great Ponds by the Colonial Ordinance*, 12 ME. L. REV. 148 (1918), *quoted in* Note, *Waters and Watercourses—Right to Pub-*

II. The Development of the Public Trust in the United States

> [P]roperty, like every other social institution, has a social function to fulfill.[20]

> It is far from meaning that patentees of a ranch on the San Pedro [in Arizona] are to have the same rights as owners of an estate on the Thames.[21]

The public interest in public waters has been recognized since the early days of the Massachusetts Bay Colony. Thus, the Massachusetts "great pond" ordinance of 1641 guaranteed the right to fish and fowl in ponds greater than ten acres in size, together with freedom of access through private property for that purpose. Similar protections were afforded freshwater lakes in Maine and New Hampshire.[22]

As early as 1821, in the leading case of *Arnold v. Mundy*,[23] an American court declared the law of public trust as we know it today. There it was stated that rights in the beds of navigable waters had been held by the Crown in trust for the common use of the people, that the states succeeded to this trust, and that a grant purporting to divest the citizens of these common rights was void. The people, it was held,

> may make such disposition of them, and such regulation concerning them, as they may think fit; that this power . . . must be exercised by them in their sovereign capacity; that the legislature may lawfully erect ports, harbours, basins, docks, and wharves; . . . that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places . . . . The 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.*[24]

This would be a grievance, said New Jersey's Chief Justice, "which never could be long borne by a free people."[25] Although

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lic Passage Along Great Lakes Beaches, 31 Mich. L. Rev. 1134, 1138 (1933).

[20] B. Cardozo, The Nature of the Judicial Process 87 (1921).

[21] Boquilas Cattle Co. v. Curtis, 213 U.S. 339, 345 (1909) (Holmes, J.).

[22] *See* Hardin v. Jordan, 140 U.S. 371, 393 (1891); Leighty, *Public Rights in Navigable State Waters*, 6 Land & Water L. Rev. 459, 471-72 (1971).

[23] 6 N.J.L. 1 (1821).

[24] *Id.* at 78 (emphasis added).

[25] *Id.*

the court's research has been criticized,[26] this doctrine has taken firm root in this country and is not likely to be dislodged.[27]

Our early perception of the common law was that the beds of the tidal, navigable waters were owned by the King in his sovereign capacity and, at least since the Magna Carta, held in trust for the people.[28] In its initial form, then, the public trust developed in this country as an adjunct of the ownership of the beds of navigable waters, an attribute of sovereignty inalienable in its nature. "When the Revolution took place," said Chief Justice Taney, "the people of each State became themselves sovereign; and in that character held 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."[29] Furthermore, newly admitted states were entitled, under the equal footing doctrine, to the lands beneath their navigable waters subject to the same trust,[30] irrespective of the ownership of the adjacent lands,[31] and Congress had no power to grant the beds of such waters after statehood.[32] But to determine rights within this context, it was necessary to find water navigable.

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[26] *E.g.*, MacGrady, *The Navigability Concept in the Civil and Common Law*, 3 FLA. ST. U. L. REV. 511, 513 (1975).

[27] *See, e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409-13 (1842); McManus v. Carmichael, 3 Iowa 1, 29 (1856).

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> [B]oth the title and the dominion of the sea, and the rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high watermark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title . . . in such lands . . . belongs to the King as the sovereign; and the dominion thereof . . . is vested in him as the representative of the nation and for the public benefits.

Shively v. Bowlby, 152 U.S. 1, 11 (1894).

[29] Martin v. Waddell, 41 U.S. (16 Pet.) 367, 367 (1842).

[30] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

[31] Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

[32] Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 477-78 (1850).

A. The Ebb and Flow of Navigability and the Overriding Concept of Public Right

This is where the wheels of the legal engine fell into a rut. This neat conjunction of navigability and the public trust at common law drew early courts into an oft-repeated and now discarded shibboleth that navigable waters were only those waters "in which the tide ebbed and flowed."[33] It was widely assumed, based on statements by Lord Hale and several English decisions,[34] that only *tidal* waters were subject to the King's ownership. This assumption, although it was initially adopted in a number of states, merits little consideration now for several reason. First, it is doubtful that it was even a statement of English law. Tidality may have been prima facie evidence of navigability, but it was not conclusive on that point.[35] Second, even under Lord Hale's theory, waters navigable in fact were characterized as common highways that could not be lawfully obstructed.[36] Third, this assumption was early rejected in states with large navigable freshwater rivers and lakes where it simply made no sense, especially as steamboats capable of passage upriver were developed.[37]

Massachusetts had claimed its "great ponds" for the public in 1641. Congress had made the common sense assumption that the great nontidal waters of the West were navigable when it en-

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[33] Lamprey v. State, 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893).

[34] M. HALE, DEJURE MARIS 3, *reprinted in* S. MOORE, *supra* note 13, at 378; The Case of the Royal Fishery of the River Banne, 1 Davies Rep. 149 (1762).

[35] Mayor of Lynn v. Turner, 1 Cowper Rep. 86 (1774); 2 H. BRACTON, *supra* note 12, at 40; H. WOOLRYCH, A TREATISE ON THE LAW OF WATERS 411 (1851).

[36] S. MOORE, *supra* note 13, at 374-75.

[37] *E.g.*, Carson v. Blazer, 2 Binn 475 (Pa. 1810) (Susquehanna River) (common law tidality test "was not deemed proper to this country, nor was it adopted up to the point of revolution"). It was noted in *Carson* that "the providential legislature appears to have derived from the earliest period, an ownership over all rivers and waters within the province, making them highways, or considering themselves as such." *Id.* at 492. "The wild claim of privilege to the middle of the river [an incident of ownership of non-navigable rivers] I never till this period heard seriously asserted." *Id. See generally* Shively v. Bowlby, 152 U.S. 1, 31-32 (1894); McManus v. Carmichael 3 Clarke (Iowa) 1 (1856); 2 H. BRACTON, *supra* note 12, at 49. *See also* Elwood v. City of New York, 450 F. Supp. 846, 861 (S.D.N.Y 1978); People v. Canal Appraisers, 33 N.Y. (6 Tiff.) 461 (1865); Wilson v. Forbes, 13 N.C. (2 Dev.) 30 (1828); Cates v. Waddington, 12 S.C.L. (1 McCord) 580 (1822).

acted the Northwest Ordinance of 1787,[38] requiring that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free. . . . "[39] And in the first federal public land statute, enacted in 1796, it was provided that "all navigable waters within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways. . . ."[40] Finally, the supposed common law definition of tidality was rejected by the United States Supreme Court in 1851 in *Gennessee Chief v. Fitzhugh*[41] and has found no use since except in those states that have chosen to employ it to define local property rights.[42] As the Supreme Court very sensibly put it in 1876, "The public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.[43]

Today there are three definitions of navigability affecting public rights. The test of navigability that determines the passage of title to the beds of navigable waters is different from other tests imposed to define federal jurisdiction under the commerce clause or to determine the public right to navigate a waterway. While the federal test of navigability for title purposes remains fairly rigid, the power of states to formulate other tests of navigability for purposes of public use has developed to meet the necessities of the times. We have, therefore, the paradoxical situation in which public trust uses—historically assured by the common law concept of ownership by the sovereign of the bed of a waterway—are being increasingly furthered by new and expanded definitions of public right having nothing to do with bed ownership.

1. Federal Law

For commerce clause purposes, *i.e.*, regulation of the waters of

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[38] Ch. 8, 1 Stat. 50 (1789).

[39] *Id. See also* acts of admission of Louisiana, ch. 31, § 3, 2 Stat. 641, 642 (1811); ch. 50, 2 Stat. 701, 703 (1812), and Mississippi. Ch. 23, § 4, 3 Stat. 348, 349 (1817).

[40] Act of May 18, 1796, ch. 29, § 9, 1 Stat. 464, 468, *cited in* Shively v. Bowlby, 152 U.S. 1, 32-33 (1894).

[41] 53 U.S. (12 How.) 443 (1851).

[42] *E.g.*, Barney v. Keokuk, 94 U.S. 324, 338 (1876).

[43] *Id.*

the state by Congress, those rivers have been held to be navigable in law which are "in fact, used or susceptible to being used in their natural condition 'or with reasonable improvements' for purposes of trade and commerce."[44] This is the basis for federal regulation of navigable waters—regulation now extending under the Rivers and Harbors Act[45] to environmental protection.

Where navigability is defined to determine the rights of the states to title of a stream bed, the test has been characterized as the basic commerce clause test with two conditions. First, it is applied to the stream in its natural condition; second, it is determined as of the time of admission of the state into the Union.[46]

When navigability is defined for all other purposes, *e.g.*, the public's right to navigate, it has been held that "the states are free to prescribe their own definitions of navigability," and that "the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the Federal sense or in any other sense."[47] Here the common law once again becomes relevant because, irrespective of title to the beds, a public right of passage existed at common law over the waterways that could accommodate the passage of boats.[48] Furthermore, it was generally understood that the public retained a right to fish and take shell fish on the privately owned shore between high and low tide.[49]

2. California Law

In California, as in many other states, the public rights arising from sovereign ownership of the bed have converged with those incident to the public right of passage.[50] The evolution began with Fly's Bay, a side channel of the Napa River. It is deep

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[44] United States v. Appalachian Power Co., 311 U.S. 377, 406-09 (1940).

[45] Ch. 425, 30 Stat. 1151 (1899) (codified in scattered sections of 33 U.S.C.).

[46] Shively v. Bowlby, 152 U.S. 1, 43 (1894).

[47] Hitchings v. Del Rio Woods Recreation & Parks Dist., 55 Cal. App. 3d 560, 567, 127 Cal. Rptr. 830, 834 (1st Dist. 1976) (*quoting in part* Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961)).

[48] 2 F. HILLARD, THE AMERICAN LAW OF REAL PROPERTY 88, 92 (3d ed. 1855); 3 J. KENT, COMMENTARIES 411 (4th ed. 1840).

[49] 3 J. KENT, *supra* note 48, at 410.

[50] *See generally* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1, 38-40 (1967); Note, *Water Recreation—Public Use of "Private Waters,"* 52 CALIF. L. REV. 171 (1964).

enough for navigation at mean tide and is entirely navigable by small boats at high tide, though at low tide the land is nearly bare. Although title to the underlying lands was claimed by virtue of a tideland grant, the California Supreme Court held that the title of the tidelands grantee was subject to pre-existing public rights to pass over in boats, hunt and fish.[51]

In contrast, it was apparently assumed that Frank's Tract was not navigable when it was patented as swamp and overflowed lands in 1873 and reclaimed for agricultural purposes. In 1938, however, a break in the levee resulted in flooding of the entire tract by the San Joaquin River. The general public then used it for fishing in rowboats and similar craft. When the land was leased to recreational developers in 1947, the court held that there was no right to exclude the public. The court said, "Plaintiffs, until the land is reclaimed, have no right to prevent the public from fishing on, or navigating these waters, provided the public can do so without trespassing on plaintiffs' land."[52]

In *People ex rel. Baker v. Mack*,[53] the shoe was on the other foot. In California, as in most states, obstruction of navigation is a public nuisance. In *Mack* the district attorney of Shasta County filed an action to abate a public nuisance against landowners on the Fall River who were attempting to prevent persons from boating, fishing and hunting on portions of the river adjacent to their lands. According to the court, the issue was whether or not the Fall River in the area involved was a navigable stream.[54] The court rejected defendant's efforts to apply the old commerce clause test and held the river to be navigable, at least for public easement purposes:

> With our ever increasing leisure time (witness the four and five day weekend), and the ever increasing need for recreational areas (witness the hundreds of camper vehicles carrying people to areas where boating, fishing, swimming and other water sports are available), it is extremely important that the public not be denied use of recreational water by applying the narrow and outmoded interpretation of "navigability."
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> It hardly needs citation of authority that the rule is that a navi-

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[51] Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912). *See also* notes 156-157 and accompanying text *supra*.

[52] Bohn v. Albertson, 107 Cal. App. 2d 738, 757, *hearing denied*, 238 P.2d 128, 141 (1st Dist. 1951).

[53] 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971).

[54] *Id.* at 1044, 97 Cal. Rptr. at 450.

gable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes.[55]

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[55] *Id.* at 1044, 97 Cal. Rptr. at 451. Indeed the constitution and statutes of California are replete with such declarations. *E.g.*, CAL. CONST. art X, § 4 (formerly CAL. CONST. art. XV, § 3). CAL. GOV'T CODE § 39933 (West 1968) states:

> All navigable waters situated within or adjacent to city shall remain open to the free and unobstructed navigation of the public. Such waters and water front of such waters shall remain open to free and unobstructed access by the people from the public streets and highways within the city. Public streets, highways, and other public rights of way shall remain open to the free and unobstructed use of the public streets and highways.

The legislative findings of the Nejedly-Hart State, Urban, and Coast Park Bond Act of 1976, ch. 259, 1976 Cal. Stats. 531 (codified at CAL. PUB. RES. CODE §§ 5096.111-.139 (West Cum. Supp. 1980)), provides in part:

> (a) It is the responsibility of this state to provide and to encourage the provision of recreational opportunities for the citizens of California.
>
> (b) It is the policy of the state to preserve, protect, and, where possible, to restore coastal resources which are of significant recreational or environmental importance for the enjoyment of present and future generations of persons of all income levels, all ages, and all social groups.
>
> (c) The demand for parks, beaches, recreation areas and recreational facilities, and historical resources preservation projects in California is far greater than what is presently available, with the number of people who cannot be accommodated at the area of their choice or any comparable area increasing rapidly. . . .
>
> (h) Cities, counties, and districts must exercise constant vigilance to see that the parks, beaches, recreation lands and recreational facilities, and historical resources they now have are not lost to other uses. . . .

Id. §§ 5096.112(a), .112(b), .113(a), .113(h) (West Cum. Supp 1980).

Similarly, the legislative findings of the Roberti-Z'berg Urban Open-Space and Recreation Program Act, ch. 160, 1976 Cal. Stats. 261 (codified at CAL. PUB. RES. CODE §§ 5620-5623 (West Cum. Supp. 1980)), provide in part:

> The Legislature hereby finds and declares:
>
> (a) The demand for recreation areas, facilities, and programs in California is far greater than the present supply, with the number of people who cannot be accommodated at the area of their choice or any comparable area increasing rapidly.
>
> (b) The demand for recreation areas, facilities, and programs in the urban areas of our state are even greater. . . .
>
> (f) Cities, counties and districts must exercise constant vigilance to see that the recreation lands and facilities they now have are not lost to other uses; they should acquire additional lands as such lands become available; they should take steps to improve the facilities they now have.

In holding the river to be navigable, the court approvingly cited a landmark decision from Minnesota, pointing out that

> [t]here are innumerable waters—lakes and streams—which will never be used for commerce, but which have been, or are capable of being used "for sailing, rowing, fishing, fowling, bathing, skating" and other public purposes, and that it would be a great wrong upon the public for all time to deprive the public of these uses merely because the waters are either not used or not adaptable for commercial purposes.[56]

The court made it clear that a number of contentions ordinarily advanced against navigability were not applicable to the public right of passage, as defined by state law:

a. It is not necessary that a stream or river be included in a statutory list of navigable streams such as that set forth in Harbors and Navigation Code section 131.[57] In fact, "all waters are deemed navigable which are really so."[58] Or, as one writer said, nature is competent to make a navigable river without the help of the legislature.[59]

b. A water may be navigable even though it is periodically bare or nearly bare.[60]

c. Boating for pleasure is a sufficient test of navigability.[61]

Id. § 5622.

See also, CAL. GOV'T CODE §§ 54090-54093 (West 1966 & Cum. Supp. 1980); *Id.* §§ 39933-39937; CAL. FISH & GAME CODE § 6511 (West Cum. Supp. 1980); CAL. PUB. RES. CODE §§ 6008, 6210.4, 6323 (West 1977).

[56] People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1046, 97 Cal. Rptr. 448, 451 (3d Dist. 1971) (*citing* Lamprey v. State, 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893)). Another decision cited approvingly by the court was Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914), in which the court held navigable—based on availability for rowboats—Rock River in Wisconsin, which varied seasonally from eight inches to two feet in depth, and which sometimes had no water in it.

The courts have had more of a problem in coping with bodies of water navigable by small boats but surrounded by privately held land. Although it would seem sufficient to hold that no right of access existed, Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907), occasionally inacessibility has been linked to navigability. *See, e.g.,* Nicholas v. McDaniel, 88 Mich. App. 120, 276 N.W.2d 538 (1979).

[57] CAL. HARB. & NAV. CODE §§ 101-106 (West 1978).

[58] Churchill Co. v. Kingsbury, 178 Cal. 554, 174 P. 329 (1918).

[59] J. GOULD, THE LAW OF WATERS § 54, at 118 (3d ed. 1900).

[60] Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912); *accord,* State v. McIlroy, 595 S.W.2d 659 (Ark. 1980).

[61] People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1976). *See also* Attorney Gen. v. Woods, 108 Mass. 436, 440 (1870); State

d. The court said that the question of title to the river bed was irrelevant. The fact that the county and state tax the bed of a river is of no significance for the question of navigability.[62] Thus, the court in *Mack* concluded:

> The modern determinations of the California courts, as well as those of several other states, as to the test of navigability, can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft.[63]

The next case, *Hitchings v. Del Rio Woods Recreation & Parks District,*[64] involved the efforts of a recreation and park district to close a river to canoeists ostensibly on the grounds of health and safety. The court reaffirmed the logic developed in *Forestier, Albertson* and *Mack,* holding that the Russian River was navigable.

The next confrontation between navigational rights and the police power was more difficult. In *People v. El Dorado County,*[65] a general-purpose government sought to close a river susceptible only of rafting to use by nonresident boaters because their use was allegedly causing pollution and fire hazards and endangering public health. The court held that less drastic means must be employed to meet any problems resulting from public use:

> While obviously effective to eliminate pollution and sanitation problems, the ordinance goes too far. . . . The public has a right to use the river; it has no right to pollute the river. Reasonable regulation is in order; use prohibition is not. The problems of pollution and sanitation in our increasingly crowded state are difficult and complex, calling for imagination and sophisticated solutions. But

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ex rel. Brown v. Newport Concrete Co., 336 N.E.2d 453, 457 (Ohio 1975); Kelley *ex rel.* McMullan v. Hallden, 51 Mich. App. 176, 214 N.W.2d 856 (1974); Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893); Luscher v. Reynolds, 153 Or. 625, P.2d 1158 (1936).

[62] People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454 (3d Dist. 1971). The lower court stated that "[t]he real question here is not of title but whether the public has the right of fishing and navigation." *Id.* at 1050, 97 Cal. Rptr. at 454; *accord,* State *ex rel.* Guste v. Two O'Clock Bayou Land Co., 365 So. 2d 1174, 1178 (La. Ct. App. 1978).

[63] People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1049, 97 Cal. Rptr. 440, 454 (3d Dist. 1971).

[64] 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1st Dist. 1976).

[65] 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1980).

> total prohibition of access is an impermissible solution. The ordinance is invalid because it denies the constitutional right of the public use of and access to a navigable stream.[66]

The *El Dorado* decision is particularly noteworthy because it recognizes the constitutional nature of the public right to navigate, based on the California Constitution, article X, section 4.[67]

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[66] *Id.* at 407. The Arkansas Supreme Court responded similarly in State v. McIlroy, 595 S.W.2d 659 (Ark. 1980):

> McIlroy and others testified that the reason they brought the lawsuit was because their privacy was being interrupted by the people who trespassed on their property, littered the stream and generally destroyed their property. We are equally disturbed with that small percentage of the public that abuses public privileges and has no respect for the property of others. Their conduct is a shame on us all. It is not disputed that riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach such a stream. The McIlroy's rights in this regard are not affected by our decision. While there are laws prohibiting such misconduct, every branch of Arkansas' government should be more aware of its duty to keep Arkansas, which is a beautiful state, a good place to live. No doubt the state cannot alone solve such a problem, it requires some individual effort of the people. Nonetheless, we can no more close a public waterway because some of those who use it annoy nearby property owners, than we could close a public highway for similar reasons.
>
> In any event, the state sought a decision that would protect its right to this stream. With that right, which we now recognize, goes a responsibility to keep it as God made it.

Id. at 665.

For an example of regulation held to be reasonable (or at least not arbitrary), see Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979). *See also* People v. El Dorado County, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1980); Nelson v. De Long, 213 Minn. 425, 7 N.W.2d 342 (1942) (exclusive swimming area); Menzer v. Elkhort Lake, 51 Wis. 2d 70, 186 N.W.2d 290 (1971) (ordiance prohibiting use of motor boats each summer Sunday); CAL. HARB. & NAV. CODE § 660 (West 1978) (authorizing time-of-day restrictions, speed zones, special use areas and sanitation and pollution control measures), *construed in* 45 Op. Cal. Att'y Gen. 122 (1965).

[67] CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 2) provides:

> No individual, partnership, or corporation, claiming or in possession of the frontage or title lands of a harbor, bay, inlet, estuary or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or destruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always obtainable for the

Thus, the public right of passage over waters capable of accommodating small boats has become well established irrespective of ownership of the bed. But this right is a limited and sometimes fragile one. The United States Supreme Court recently rejected an effort by the federal government, exercising the navigational servitude, to guarantee public access to a hitherto private fish pond dredged into a marina by private developers without compensation.[68] It appears that the water was not considered navigable for public access under applicable state

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people thereof.

In addition, CAL. CONST. art. I, § 25 provides:

> The people shall have the right to fish upon and from the public lands of the state and in the waters thereof, excepting upon lands set aside for fish and hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State. . . .

In 1897, the California Supreme Court stated: "To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters. . . ." People v. Truckee Lumber Co., 116 Cal. 397, 401, 48 P. 374, 375 (1897).

A similar result was reached in Wyoming on the basis of a state constitutional provision declaring that all waters within the state's boundaries belonged to the state. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). But the Colorado Supreme Court rejected a similar argument and affirmed a trespass conviction, apparently based on the ancient concept of *cujus est solum, ejus est usquee ad coelum*. People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979). For a position contrary to the *Emmert* case based on navigability in fact and the qualified nature of a riparian's rights, see People v. Waite, 103 Misc. 2d 204, 425 N.Y.S.2d 462 (St. Lawrence County Ct. 1979).

[68] Kaiser Aetna v. United States, 444 U.S. 164 (1979). This case may mark the beginning of judicially imposed limitations on the federal navigational servitude, an almost impregnable doctrine under the shelter of the commerce clause. *See, e.g.*, Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); United States v. Chandler Dunbar Co., 229 U.S. 53 (1913). A state's control of its navigable waters has been characterized as an integral part of state sovereignty. It may be considered to be that kind of "integral operation" in an area of "traditional governmental functions" which the tenth amendment protects from excessive federal interference. *Cf.* National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (federal minimum wage and maximum hours requirements for state and municipal employees held unconstitutional because setting of those requirements is an integral operation in an area of traditional governmental functions covered by the tenth amendment.)

law.[69]

B. The State as Trustee, or Quis Custodiet Custodes?

With the advent of the 19th century, tensions increased between the ancient concept of public rights to the beds and banks of waters and the newer laissez faire concept that all property should be put to use and developed.[70] In the so-called "gilded age" of the late 1800's, a policy of open-handed disposition of public lands often extended indiscriminately to the beds of sovereign waters. More and more pressure developed to convey the publicly owned navigable waterways into private hands.[71] The courts have relied on a number of doctrinal mechanisms to protect public interests against such efforts, including application of the doctrines of implied dedication,[72] custom[73] and extension of the common law prohibitions against obstructions of navigability.[74] But the approach most compatible with the concept of ownership has been that of an inalienable public trust attached to the beds of navigable waters.

We have already seen that the concept of the public trust in navigable waters was adopted early in the country and accepted without hesitation by the United States Supreme Court.[75] Happily, it was available when needed to protect the public's rights in navigable waters against their supposed legislative protectors.

One of the most outrageous schemes involved the Illinois Leg-

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[69] Kaiser Aetna v. United States, 444 U.S. 164, 167 (1979). *See also* Vaughn v. Vermilion Corp., 444 U.S. 206, 208 (1979).

[70] *See, e.g.*, Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 769-70 (1970).

[71] *See* Dunham, *Some Crucial Years of the General Land Office, 1875-1880, reprinted in* THE PUBLIC LANDS (V. Carstensen ed. 1978).

[72] *E.g.*, Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). Although application of the implied dedication doctrine in *Gion* met with loud outcries of confiscation, it would appear that neither the rule of law nor its construction should have taken anyone by surprise. *See* County of Los Angeles v. Berk, 26 Cal. 3d 201, 213, 605 P.2d 381, 389, 161 Cal. Rptr. 742, 750 (1980), and authorities cited therein.

[73] United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D. Virgin Is. 1976); Hay v. Bruno, 344 F. Supp. 286 (D. Or. 1969); Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

[74] *E.g.*, Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 868 (1970).

[75] Martin V. Waddell, 41 U.S. (16 Pet.) 367 (1842); Arnold v. Mundy, 6 N.J.L. 1 (1821); *see* notes 20-30 and accompanying text *supra*.

islature's attempted conveyance of lands constituting the bed of Lake Michigan along the entire Chicago waterfront. When the legislature had a later change of heart, it sought to revoke the grant. The United States Supreme Court upheld the revocation in *Illinois Central Railroad Co. v. Illinois*,[76] concluding that the public trust was inalienable. In what the California Supreme Court has described as the "seminal" case and the "primary authority" in the field,[77] Justice Field set forth rules that have since been adopted and elaborated on by the courts of California and other states:

> 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. 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 lands 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. *But that is 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 sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such water for the use of the public.* The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *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. . . .* [78]

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[76] 146 U.S. 387 (1892).

[77] City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330, *cert. denied*, 101 S. Ct. 119 (1980).

[78] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452-53 (1892) (emphasis added). *See also* Appleby v. New York, 271 U.S. 364 (1925), in which the Court said:

> The title which the State holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some

The *Illinois Central* decision laid down a two-part test for determining the validity of a legislative grant of navigable waters beneath the ordinary high watermark:

> (1) Does the disposition affirmatively aid or improve the public interest in navigation or other public use of the particular area of the waterway beneath the ordinary high watermark?
>
> (2) If the legislative grant does not affirmatively aid or improve the public trust, does the disposition substantially impair the public interest in the remaining land and waters of the particular area of the waterway?[79]

The Court held that the title of the state cannot be surrendered or delegated except for *public* purposes:

> A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties* 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, *then it can abdicate its police powers in the administration of government and the preservation of peace.* In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more comformable to its wishes. *So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the State.*[80]

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reasonable use which can fairly be said to be for the public benefit. *Id.* at 365.

[79] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452-53 (1892). This language, refined and transmogrified by the California courts, has given rise to the "relatively small parcel" requirement. *See* notes 106-12 and accompanying text *infra*.

[80] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453-54 (1892) (emphasis added).

In a recent refinement of these criteria, the California Court of Appeal invalidated a proposed exchange of tidelands for privately owned uplands which would have resulted in relinquishment of two-thirds of the shoreline of upper Newport Bay, thus violating the requirement that the sovereign lands to be conveyed must be a "relatively small parcel." County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973).

Prophetically, that court foresaw the California Supreme Court's decision in

Of like effect is *Priewe v. Wisconsin State Land & Improvement Co.*,[81] in which the Wisconsin Supreme Court reviewed a statute authorizing the draining of Muskego Lake, a navigable body of water, for the purpose of converting the lakebed from public to private ownership. The court held that "the State is powerless to divest itself of its trusteeship as to the submerged lands under navigable waters in this state,"[82] even under the guise of a public purpose.[83]

In general, the inalienability of the public trust has been based conceptually on its importance as an attribute of sover-

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City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980), which seven years later overruled Knudson v. Kearney, 171 Cal. 250, 152 P.2d 541 (1915), and held that the many acres of tidelands and submerged lands in San Francisco Bay remained subject to the trust.

See also Morse v. Oregon Div. of State Lands, 34 Or. App. 853, 581 P.2d 520 (1978), *aff'd*, 285 Or. 197, 590 P.2d 709 (1979) (permit to fill 32 acres of estuary for airport runway found inconsistent with the public trust):

> Because the trust is for the public benefit, the State's trustee obligation is commonly described as the protection of specified public usages, *e.g.*, navigation, fishery and, in more recent cases, recreation. The severe restriction upon the power of the State as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.

Id. at 860, 581 P.2d at 524; *accord*, Northern Pac. Ry. v. Hirzel, 2 Idaho 438, 161 P. 854 (1946) (state cannot alienate submerged lands); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773 (1976); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947) (state patents invalidated to preserve the public trust).

[81] 93 Wis. 534, 67 N.W. 918 (1896), *aff'd on rehearing*, 103 Wis. 537, 79 N.W. 780 (1899).

[82] *Id.* at 550, 79 N.W. at 781.

[83] The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it. *Id.* at 547, 79 N.W. at 781.

eignty, as the *Illinois Central* and *Priewe* decisions indicate. Dominion and control over navigable waters is such an essential attribute of sovereignty that it must, of necessity, pass to a newly admitted state as a constitutional right.[84] By the same token, a legislature cannot divest the state of its sovereignty so as to impair its jurisdiction over such waters.[85]

C. The "Naked Fee" of the Tidelands Grantee

The legal tides of California have ebbed and flowed over the extent to which the lands beneath navigable waters may be granted free of the public trust for public purposes. Since the earliest days of the state, it was accepted that the navigable waters were held in trust for the public purposes of navigation and fishery.[86] At the same time, however, the explosive pressures of a growing state led to the enactment of a series of statutes authorizing the development of the San Francisco waterfront[87] and the transfer into private hands of the swamp and overflowed lands.[88] Such statutes often used the all-embracing phrase "swamp and overflowed, marsh and tidelands." Controversies ensued immediately as to whether or not the statutes authorized the conveyance of tidelands and if, assuming they did, the legislature had power to do so. The prospect of giveaways on a scale similar to that of the Chicago waterfront in *Illinois Central* led the legislature to exclude land within five to ten miles of the major harbors of San Francisco, San Diego, Oakland and Sacramento, and within one mile or more of other cities or towns.[89] At the same

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[84] *E.g.*, Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-30 (1845).

[85] *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). It is interesting that one of the principal critics of the theory that navigable waters were vested in the Crown attacked that concept in part on the ground that the King would only sell such lands to reduce the national debt. S. MOORE, *supra* note 13, at xlviii.

[86] *E.g.*, Ward v. Mulford, 32 Cal. 365, 372-73 (1867); Gunter v. Geary, 1 Cal. 462, 468-69 (1851).

[87] Ch. 543, 1867-68 Cal. Stats. 716 (1868); ch. 41, 1851 Cal. Stats. 307.

[88] Swamp and overflowed lands were those "[m]ade swampy by the overflow and seepage of freshwater streams." People v. California Fish Co., 166 Cal. 576, 591, 138 P. 79, 85 (1913).

[89] *E.g.*, CAL. POL. CODE § 3488 (current version at CAL. WATER CODE §§ 50101-50111, 50401 (West 1966)); ch. 573, 1869-1870 Cal. Stats. (1870); ch. 388, 1869-1870 Cal. Stats. 541 (1870); ch. 915, 1867-1868 Cal. Stats. 507 (1868); ch.

time, the courts scrutinized the scope of such laws closely and excluded by statutory interpretation attempted grants of extensive areas of coastal tidelands.[90] In the 18th century, indignation over widespread abuses in the public land offices led to the enactment of constitutional protections against the alienation of sensitive tidelands[91] after a debate in which it was stated, "If there is any one abuse greater than another that I think the people of the State of California have suffered at the hands of their lawmaking power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State. . . ."[92]

The sale of tidelands and submerged lands had nevertheless reached epidemic proportions.[93] Where the relevant statutes could be construed as prohibiting such grants, it was easy for the courts to find the corresponding patent void. But where the legislature had clearly authorized a grant of tidelands, it was necessary to fall back on the doctrine that what had passed was a "naked fee" subject to all of the public rights incident to sovereign lands. Thus the grantee received bare title, with the public trust lingering over the land like the smile of a juridical Cheshire cat.[94]

If there is a lodestone in California law for such a proposition, it is *People v. California Fish Co.*[95] In that case the supreme court held that a patent for tidelands, which was issued in 1887 to Merick Reynolds and subsequently developed by the construction of valuable docks, passed "at most, only the title to the soil subject to the public right of navigation."[96] The court reached this conclusion on two bases. First, the California Constitution provides:

397, 1863 Cal. Stats. 591; ch. 235, 1858 Cal. Stats. 198; ch. 151, 1855 Cal. Stats. 189.

[90] Kimball v. McPherson, 46 Cal. 103 (1873); Taylor v. Underhill, 40 Cal. 471 (1871); People v. Morrill, 26 Cal. 336 (1864).

[91] *E.g.*, CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 3).

[92] City of Long Beach v. Mansell, 3 Cal. 3d 462, 505 app. B, 476 P.2d 423, 455, app. B., 91 Cal. Rptr. 6, 55, app. B (1970) (*quoting* EXCERPTS FROM DEBATES & PROCEEDINGS, CAL. CONST. CONVENTION 1878-1879).

[93] Nash, *The California State Land Office, 1858-1898*, 27 HUNTINGTON LIB. Q. 347 (1963-64).

[94] *See, e.g.*, Forestier v. Johnson, 164 Cal. 24, 30, 127 P. 156, 158-59 (1912); Taylor, *Patented Tidelands: A Naked Fee?*, 47 CAL. ST. B.J. 420 (1972).

[95] 166 Cal. 576, 138 P. 79 (1913).

[96] *Id.* at 588, 138 P. at 84.

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.[97]

These provisions, the court held,

> are binding upon every department of the state government, legislative, executive, and judicial. . . . All previous laws inconsistent therewith ceased to be effective upon the adoption thereof. The effect of the section above quoted is that, no matter what effect a subsequent sale of tidelands may have to pass title to the soil of the tidal lands of a navigable bay such as that of San Pedro or Wilmington, it cannot be effective to give the patentee a right to destroy, obstruct, or injuriously affect the public right of navigation in the waters thereof.[98]

Since the purchasers of the land in question had no vested rights at the time the constitution took effect, the court held that their grants carried merely a naked fee subject to the right of the state to enter and make changes necessary to adapt the premises for navigation and provide access for that purpose.[99]

The same conclusion could also be reached without the help of the state constitution, the court said, because the statutes authorizing sale did not contemplate destruction of the public trust:

> It is not to be assumed that the State, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abdicated the trust as to all land not within the very limited areas of the reservations, and should have directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement, which it was its duty to protect, and for the protection and regulation of which it received its title to such lands.[100]

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[97] CAL. CONST. art. X, § 4 (formerly CAL. CONST. art XV, § 2).

[98] People v. California Fish Co., 166 Cal. 576, 587-88, 139 P. 79, 84 (1913).

[99] *Id.* at 588, 138 P. at 84.

[100] *Id.* at 591, 138 P. at 85. Of course, for common law trust purposes, navigable nontidal waters stand on the same basis as tidal ones. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Packer v. Bird, 137 U.S. 661 (1890); Barney v. Keokuk, 94 U.S. 324, 336 (1876).

Thus, the state could, as Justice Field had pointed out in *Illinois Central,* authorize improvements to further navigation and commerce and, in the process, terminate the trust in limited sections of a waterfront. In that event, the court said, the state's determination is conclusive upon the courts,

> [b]ut statutes purporting to authorize an abandonment of such use will be carefully scrutinized and scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. And, if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.[101]

It appears, therefore, that courts will not be bound by patently inaccurate declarations of public purposes for legislation having as its goal the destruction of public waters for private profit.[102] This principle has been consistently followed in Cali-

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[101] People v. California Fish Co., 168 Cal. 576, 597, 138 P. 79, 88 (1913). The same court on another occasion had this comment on the oft-cited policy of deference to legislative grants:

> This is a beautiful theory [that legislative grants are presumed to be in the public interest] but it scarcely accords with the well-known fact that the Legislature has put little time to deliberate upon the mass of bills brought before it, and that it is very often imposed upon, and that is oftener still mistaken as to matters vitally connected with the subjects of legislation. It would seem that all the reasons for protecting the King of England against his own improvidence in granting Crown lands would apply with double force to grants by a modern legislature . . . (Civil Code section 1069).

City of Oakland v. Oakland Waterfront Co., 118 Cal. 160, 175-75 (1897).

[102] In Priewe v. Wisconsin State Land & Improvement Co., 103 Wis. 537, 79 N.W. 780 (1899), the court confronted a statute purporting to convey to one John Reynolds title to the lands underlying Lake Muskego and Wind Lake and authorizing him to drain them for the purpose of preserving the public health and well-being of nearby communities. On the first hearing, the court held that it was not bound by the legislature's declaration of purpose. When plaintiff prevailed on remand, a second appeal was taken. The court required the grantee-defendant to restore the lakes to their former condition, stating:

> Leaving out of view the pretense that the draining of the lake was for the purpose of promoting the public health, not a shadow of legal authority exists to justify the acts complained of. The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than

fornia. In *City of Long Beach v. Mansell*,[103] for example, the California Supreme Court considered an attempted absolute alienation of tide and submerged lands free of the public trust (1) with respect to the common law trust, and (2) under the California Constitution, which prohibited the alienation to private persons by the state of "tidelands within two miles of any incorporated city . . . and fronting on the water of any harbor, estuary, bay or inlet used for the purpose of navigation."[104] The court concluded that

> tidelands subject to the trust may not be alienated into absolute private ownership; *attempted alienation of such tidelands passes only bare legal title, the lands remaining subject to the public easement.* However, the state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust—and if they are not subject to the constitutional prohibition forbidding alienation—they may be irrevocably conveyed into absolute private ownership.[105]

With a few carefully defined exceptions, then, the trust remains attached to sovereign lands conveyed to private individu-

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> it has to donate the school fund or the state capitol to a private purpose.

Id. at 549-50, 79 N.W. at 781.

For an interesting comment on how a California court might or might not accept a legislative finding or the absence of the same, see Besig v. Friend, 463 F. Supp. 1053, 1060, 1063 (N.D. Cal. 1979).

[103] 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

[104] CAL. CONST. art. X, § 3 (formerly CAL. CONST. art. XV, § 3).

[105] City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970) (emphasis added). For an ingenious and more restrictive reading of *California Fish*, see Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RESOURCES LAW. 279 (1977). But the writer, while characterizing the opinion of Justice Shaw in that case as not only erroneous but as a minority expression, admits that it was accepted in several significant decisions following, *e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 60 P.2d 825 (1936); Littman, *supra* this note, at 288-89. The cases also require that only a "relatively limited area" may be thus freed of the public servitude. *See* City of Long Beach v. Mansell, 3 Cal. 3d 462, 484, 476 P.2d 423, 439, 91 Cal. Rptr. 23, 39 (1970); Atwood v. Hammond, 4 Cal. 2d 31, 43, 48 P.2d 20, 26 (1935); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973).

als. This conclusion was fortified recently in *City of Berkeley v. Superior Court of Alameda County*,[106] in which the court dealt with tideland grants covering some 22,229 acres of San Francisco Bay. These grants included the entire two-and-one-half-mile Berkeley waterfront without any provision for public access.[107] Several previous decisions had assumed that they met the requirements of *Illinois Central*,[108] but the California Supreme Court disagreed. First, applying the principles of *California Fish*, the court said that statutes purporting to abandon the public trust were to be "strictly construed" and that "the intent to abandon must be clearly expressed or necessarily implied."[109] The court held that the grant statute at issue failed to show the requisite clear intent to further navigation or some other trust use.[110] Second, even if the statute had shown the requisite intent, the court said that a state may not, under the *Illinois Central* rule, grant to private persons tidelands of as vast an area as the 1870 Act purportedly authorized.[111] Third, the court suggested that "a grant of tidelands, even if made for improvement of navigation, does not vest absolute title in a private party until the improvements are actually made."[112]

What of tidelands improved in reliance upon these grants? The court could have fallen back on *California Fish*, which had held that the public trust remained applicable to an area potentially including "the entire sea beach from the Oregon line to Mexico and the shores of every bay, inlet, estuary, and navigable stream as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water

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[106] 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 372, *cert. denied*, 101 S. Ct. 119 (1980).

[107] *Id.* at 519, 606 P.2d at 366, 162 Cal. Rptr. at 331.

[108] Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915); Alameda Conservation Ass'n v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 254 (1st Dist. 1968).

[109] City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 528-29, 606 P.2d 362, 369-70, 162 Cal. Rptr. 327, 334-35, *cert. denied*, 101 S. Ct. 119 (1980).

[110] *Id.*

[111] "Such action amounts to an improper abdication by the state of its role as trustee on behalf of the people." *Id.* at 531, 606 P.2d at 371, 162 Cal. Rptr. at 336.

[112] *Id.* at 532, 606 P.2d at 372, 162 Cal. Rptr. at 337. *See also* State v. Superior Court (Lyon), 29 Cal. 3d 210, 127 Cal. Rptr. 696 (1981).

streams."[113] Alternatively, the decision could have been made prospective only, though that would have rendered the court's holding "an academic exercise, because the grants were made more than a century ago."[114] Instead the court chose

> to balance the interests of the public in tidelands conveyed . . . as against those of the landowners who hold property under these conveyances by holding that submerged lands and lands subject to tidal action remained subject to the public trust, while properties that had been filled, whether or not substantially improved, were freed of the trust to the extent the areas were not subject to tidal action. Tidelands that have been neither filled nor improved are not only the most suitable for the continued exercise of trust uses, but because there is only a remote likelihood that these parcels may be filled [citations], the economic loss to the grantees of such lots is speculative at best and is clearly outweighed by the interest of the public.[115]

In sum, the public trust rights of navigation can be alienated only with respect to relatively small parcels and only when authorized by law pursuant to a general scheme which improves navigation. California law is thus rooted in common law, under which the English courts—in the heyday of laissez faire—did not hesitate to protect public navigation against obstruction, even when it was argued that the impediments resulted in a benefit to general navigation.[116]

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[113] People v. California Fish Co., 166 Cal. 576, 591, 138 P. 79, 85 (1913).

[114] City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338, *cert. denied,* 101 S. Ct. 119 (1980).

[115] *Id.* at 534-35, 605 P.2d at 373-74, 162 Cal. Rptr. at 338. There is nothing new or unusual about those holdings. It has long been held that the sovereignty of a state cannot be alienated:

> Public rights, and such things as are materially related to them, are inalienable, and this important doctrine was established by the early lawyers. The rule laid down by Bracton is that things which relate peculiarly to the public good cannot be given, sold, or transferred by the King to another person, or separated from the Crown. . . .

H. SCHULTES, AQUATIC RIGHTS 10 (1811). Although in England it was sometimes assumed that the trust could be extinguished by Act of Parliament, H. WOOLRYCH, *supra* note 35, at 272, Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), clearly does not give this prerogative to American legislatures. *See* notes 76-80 and accompanying text *supra.*

[116] *E.g.,* Respublica v. Caldwell, 1 U.S. (1 Dallas) 150 (1785); Regina v. Randall, 174 Eng. Rep. 606 (1842); King v. Ward, 111 Eng. Rep. 832 (1836); Rex v. Lord Grosvenor, 171 Eng. Rep. 720 (1819); Parmeter v. A.-G., 147 Eng. Rep.

D. The Evolution of Trust Uses: From Commerce to Water Skiing

But what of trust uses going *beyond* the mere passage over water by boat? While a "public water" in England may have belonged to the lord of the manor, it was still subject to the right of passage by the public. Nevertheless, fishing rights could be privately owned, and the right of passage in England did not include anything so frivolous as bathing.[117]

In this country, concepts of public right developed to embrace other uses. The oft-cited Great Pond statutes contemplated fishing and fowling.[118] In 1853 a Michigan court said, "The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use. . . ."[119] Similarly, a Minnesota court stated:

> Many, if not the most, of the meandered lakes of this stae, are not adapted to . . . commercial navigation; but they are used . . . by the people for sailing, rowing, fishing, fowling, bathing, skating, . . . and other public purposes. . . . To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.[120]

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356 (1813). *See also* King v. Clark, 88 Eng. Rep. 1558 (1701).

[117] S. MOORE, *supra* note 13, at 1.

[118] MASS. GEN. LAWS ANN. chs. 91, 131 (Supp. 1980); *id.* ch. 140, §§ 194-196 (1974).

[119] Moore v. Sanborne, 2 Mich. 519, 525 (1853).

[120] Lamprey v. State, 52 Minn. 181, 199-200, 53 N.W. 1139, 1143 (1893). *See also* Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1911) (hunting ducks from boat over privately owned land periodically inundated by shallow waters no trespass):

> Navigable waters are public waters, and as such they should enure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit. Riparian owners, therefore, took title to lands under navigable waters with notice of such trust, and subject to the burdens created by it. It was intended that navigable waters should be public navigable waters, and only by giving members of the public equal rights thereon so far as navigation and its incidents are concerned can they be said to be truly public.

And the California court in *People v. Mack*[121] justified the more liberal state test of navigability for easement purposes by "the ever increasing need for recreational areas."[122]

It was inevitable that in *Marks v. Whitney*[123] the California Supreme Court would expressly recognize that the public trust encompassed such recreational purposes as bathing, swimming, fishing, hunting, boating and general recreation, as well as use of the bottom of the navigable waters for anchoring, standing or other purposes. The tidelands were also to be preserved for ecological study.[124] Further, the court said:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. . . . [T]he state is not burdened with an outmoded classification favoring one mode of utilization over another . . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is preservation of these lands in their natural state, so that they may serve as ecological units for scientific study, for open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[125]

> Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high water mark. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. . . .

Id. at 271-72, 145 N.W. at 820; *accord,* Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974); Whitcher v. State, 87 N.H. 145, 181 A. 549 (1935); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954).

This policy is by no means a new-fangled one. A provision in Vermont's constitution traceable to 1777 gives the people the right "in seasonable times," to hunt and fowl on unenclosed lands and to fish on "all boatable and other waters [not private property] . . . ." VT. CONST. ch. II, § 63; *see* Hazen v. Perkins, 92 Vt. 414, 105 A. 249 (1912).

[121] 19 Cal. App. 3d 1040, 97 Cal. Rptr. 48 (3d Dist. 1971).

[122] *Id.* at 1045, 97 Cal. Rptr. at 451.

[123] 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

[124] *Id.*

[125] *Id.*; *accord,* Inhabitants of West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158 (1863) (construing the right of fishing and fowling in great ponds to include the right to cut ice); Van Ness v. Borough of Deal, 139 N.J. Super. 83, 352 A.2d 599 (Ch. Div. 1975), *rev'd on other grounds,* 145 N.J. Super. 368, 367 A.2d 1191 (App. Div. 1976) (adding surfing to the list of trust uses); Wisconsin Environmental Decade, Inc. v. Department of Natural Resources, 85 Wis. 2d 518, 271 N.W.2d 69 (1978); Muench v. Public Service Comm'n, 261 Wis. 492, 55 N.W.2d 40 (1952).

Thus, the enumeration of public trust uses has expanded and contracted to meet modern necessities. From its nadir in the 18th and 19th centuries, when only navigation was protected,[126] the public trust has perhaps come full circle so as to coincide with the principles of old Roman law.

E. The Prioritization of Public Trust Rights

Another branch in the development of public trust uses is the enumeration of permitted purposes for which tidelands have been granted in trust to local governments. Of course, the development of oil and other mineral resources emerged early as a public trust use in response to felt necessities of the 20th century.[127] In recent grants, the legislature has authorized the development of trust lands for convention centers, hotels, motels and apartment buildings, subject to an overriding requirement of compliance with the trust.[128]

There is no rigid prioritization of public trust uses. When trust uses conflict, a balancing process has been undertaken. For example, in the 1821 English decision of *Blundell v. Catterall,*[129] the court rationalized the exclusion of swimming and related access to the shore on the basis that it could conflict with navigation, fishing and private property rights. The discovery of oil under the California tidelands brought different considerations into view, and the possible losses to other public trust uses caused by oil drilling have been held to be outweighed by the public benefit that would accrue from the development of mineral wealth beneath the submerged lands.[130] And in *Martin v.*

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[126] Even the right to tow from the banks had been extinguished. *See* 79 Yale L.J., *supra* note 70, at 781.

[127] Boone v. Kingsbury, 206 Cal. 148, 181, 183, 273 P. 797, 811-12, 814 (1928), *appeal dismissed and cert. denied,* 280 U.S. 517 (1929).

[128] *E.g.*, ch. 1763, 1961 Cal. Stats. 3767; *see* People v. City of Long Beach, 51 Cal. 2d 875, 880, 338 P.2d 177, 179 (1959) (YMCA consistent with trust purposes: benefit to sailors and merchant seamen); People v. City of Long Beach, 200 Cal. App. 2d 609, 614, 19 Cal. Rptr. 585, 588 (1962).

[129] 106 Eng. Rep. 1190 (Ex. 1821).

[130] Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928). The court said:

> In fact, the development of the mineral resources, of which oil and gas are among the most important, is the settled policy of state and nation, and the courts should not hamper this manifest policy except upon the existence of the most practical and substantial grounds.

Smith,[131] the court of appeal construed a city's lease of tidelands for construction of a restaurant, bar, motel, swimming pool, shopping complex and parking area as "consistent with the trust upon which said lands were conveyed to the city and with the requirements of commerce and navigation of [the] harbor."[132]

So the public trust permits—indeed requires—the balancing of competing uses. Merchant marine navigation may not be compatible with bathing and sunning. Navigation by small boats may in some cases have to yield to the development of yacht harbors and marinas. And the unrestricted right to use "common highways" must defer to improvements such as wharves and piers, dams, log booms and bridges when they are properly authorized and serve a public purpose.[133]

Although public trust uses are generally not mutually exclusive so that multiple uses can be accommodated, in some cases they cannot. Substantial controversy still exists over the reconciliation (or lack thereof) of appropriations of water for admittedly beneficial domestic uses with demands for that same water for the maintenance of lake levels necessary for the maintenance of wildlife and certain shoreline uses.[134] Balancing is required, since the trust doctrine cannot be expected to maintain the status quo forever. In the words of the Wisconsin Supreme Court:

> Certainly the trust doctrine would prevent the state from making any substantial grant of a lake bed for a purely private purpose. . . . Even for a public purpose, the state could not change an entire lake into dry land nor alter it so as to destroy its character

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Id. at 182, 273 P. at 812.

[131] 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1st Dist. 1960).

[132] *Id.* at 578, 7 Cal. Rptr. at 728.

[133] Cardwell v. American Bridge Co., 113 U.S. 205 (1885); State v. Village of Lake Delton, 93 Wis. 2d 78, 98, 286 N.W.2d 622, 632-33 (Ct. App. 1979).

[134] The North Dakota Supreme Court has interpreted the public trust doctrine (in tandem with constitutional provisions declaring all flowing streams and natural water courses to be the property of the state subject to appropriation for beneficial use) to require the application of public trust principles to the allocation of water permits. A comprehensive plan for the state's natural resources is thus required before water permits for coal-related power and energy-related production facilities will issue. United Plainsmen v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976). *See also* National Audubon Soc'y v. Department of Water & Power, No. 6429 (Mono County Super. Ct., Cal. May 2, 1979), *removed*, No. 80-127 (E.D. Cal. Feb. 20, 1980), in which it is contended that the public trust doctrine prohibits withdrawals having the effect of severely lowering a lake's level and increasing its salinity.

> as a lake. . . . But the trust doctrine does not prevent minor alterations of the natural boundaries between water and land.
>
> It is not the law, as we view it, that the state, represented by its Legislature, must forever be quiescent in the administration of the trust doctrine to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin.[135]

The court upheld a comprehensive scheme for park development, notwithstanding that it required partial fill of a lake bed. The court said:

> We are of the opinion that the use of filled lake bed . . . for park improvement, including a parking area and appurtenant highways, as well as alterations which will aid navigation and other enjoyment of the water, does not violate the obligations of the trust subject to which the state owns the lake bed.
>
> In reaching that conclusion, we attach importance to these facts: 1. Public bodies will control the use of the area. 2. The area will be devoted to public purposes and open to the public. 3. The diminution of lake area will be very small when compared with the whole of Lake Wingra. 4. No one of the uses of the lake as a lake will be destroyed or greatly impaired. 5. The disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.[136]

Thus, when impairment of a public trust use occurs, the impairment is balanced against other public trust uses. Included in the balancing are two additional factors—the traditional deference to legislative judgment counterbalanced by a presumption that the legislature did not intend to violate public trust principles.[137] The courts have analogized exercises of the police power to the public trust, relying on the special nature of waterways to justify special legislative protection.[138]

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[135] State v. Public Serv. Comm'n, 275 Wis. 112, 120, 81 N.W.2d 71, 74 (1957).

[136] *Id.* at 118, 81 N.W.2d at 73; *accord,* City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957). And the court of appeal of that state had little difficulty upholding an exclusive license for water ski exhibitions in a portion of a navigable, artificial lake as a legitimate public purpose, consistent with trust and "common highways" provisions of the Wisconsin Constitution. State v. Village of Lake Delton, 93 Wis. 2d 78, 286 N.W.2d 622 (Ct. App. 1979).

[137] People v. California Fish Co., 166 Cal. 576, 597, 138 P. 79, 88 (1913).

[138] *E.g.,* Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909).

F. Constitutional and Statutory Declarations: Another Source of Public Right

We have seen already the extent to which constitutional and legislative declarations are relied on as support for decisions safeguarding public trust purposes.[139] But no discussion of public rights in navigable waters is complete without mention of the Northwest Ordinance,[140] language from which has been incorporated into the constitutions or acts of admission of most of the western states and in many modern judicial expressions. The Ordinance states, in part:

> [T]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy without any tax, impost or duty therefor. . . .[141]

Aside from the post-1970 statutory declarations of public trust in all natural resources, state efforts to protect the dry sand area have been limited to two directions: the declaration of custom made by the Oregon court in Thornton v. Hay, 254 Or. 584, 598 n.6, 462 P.2d 671, 678 n.6 (1969), long accepted public use making them available, and exercise of the police power, implemented by statute. Thus Connecticut, recognizing the importance of tidal wetlands, enacted a statutory mechanism for its protection and the prevention of excess fill. CONN. GEN. STAT. ANN. §§ 22a-28 to -45 (West Cum. Supp. 1979), *upheld in* Bracciaroli v. Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975). California's statutory protections for the coastline and San Francisco Bay have become justly famous for their breadth and scope. They, too, are dependent on the public trust for much of their effect. *E.g.*, Town of Emeryville v. San Francisco Bay Conservation & Dev. Comm'n, 69 Cal. 2d 533, 549, 446 P.2d 798, 800, 72 Cal. Rptr. 790, 800 (1968).

Perhaps a landmark is the holding of the Wisconsin court in Just v. Marinette County, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768-69 (1972), upholding wetlands regulation in part on public trust grounds.

[139] *See* notes 81-90 and accompanying text *supra*.

[140] Ch. 8, 1 Stat. 50 (1789).

[141] *Id.* at 52. The language of the Northwest Ordinance did not spring from the brows of the members of the Continental Congress. The words echo Grotius' description of navigable waters as "highways of the world." *See* Note, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706, 725 (1922). And in enunciating the common law, Lord Hale said that waterways "are in the nature of common highways, in which all the King's people have a liberty of passage." M. HALE, FIRST TREATISE, *reprinted in* S. MOORE, *supra* note 13, at 339.

Further, in all of the states of the Northwest Territory and most of the western states, admission was hinged on the requirement that their navigable wa-

This language should not be dismissed as mere verbiage. Note, for example, the use made of it by the Missouri Supreme Court in *Elder v. Delcour*[142] to hold that a member of the public was no trespasser even where he had (1) pressed down the riparian owner's fence across a nonnavigable stream, (2) taken his canoe across the fence, (3) floated in the canoe across the riparian's land, (4) carried the canoe on the bank around a log jam and then (5) waded down the bed of the stream to fish before reembarking in the canoe and leaving the riparian's land. An important basis of the opinion was the declaration in the Ordinance[143] and the Missouri Constitution[144] that "[t]he Mississippi and Missouri rivers, and the navigable waters flowing into them and the carrying places between the same, shall be common highways and forever free to the people of the said territory and to the citizens of the United States without any tax, duty or impost therefor."[145] And in *Diana Shooting Club v. Husting*,[146] the incorporation of this language in Wisconsin's Acts of Admission and constitution led the court to conclude that

> [e]ver since the organization of the Northwest Territory in 1787 to the time of the adoption of our Constitution the right to the free use of the navigable waters of the state has been jealously reserved not only for citizens of the territory and state but to all citizens of the United States alike. . . .[147]

State constitutional and statutory expressions of the public trust remained, for some time, as disjointed and unfocused as

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ters be "common highways and forever free." Ch. 8, 1 Stat. 52 (1789); *see* compilation in Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 415-18 (1970).

[142] 364 Mo. 835, 269 S.W.2d 17 (1954).

[143] Ch. 93, § 15, 2 Stat. 743, 747 (1812).

[144] Mo. CONST. of 1875 art. I.

[145] *But see* Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900).

[146] 156 Wis. 261, 145 N.W. 816 (1914).

[147] *Id.* at 267-68, 145 N.W. at 818. *See also* State v. Jackman, 60 Wis. 2d 700, 709 n.6, 211 N.W.2d 480, 486 n.6 (1973), construing *Diana* and similar cases as introducing recreational uses into the public trust doctrine. It appears, however, that the "common highways" clause cannot prevent a state from authorizing dams, bridges and like improvements under its power over navigable waters conferred by the equal footing doctrine. Cardwell v. American Bridge Co., 113 U.S. 205 (1885).

In Moore v. Sanborne, 2 Mich. 520 (1853), the Michigan court held that the Ordinance extended a public navigable right "over all streams which were capable of being used for any purpose of public utility," and superseded the English common law requirement of public use for nontidal waters. *Id.* at 525.

the common law. During the 1800's, acts of admission in state constitutions and statutes continued to echo the mandate of the Northwest Ordinance that the navigable waters be "common highways, and forever free." An interesting variant appeared in Tennessee, where the constitution provides "[t]hat an equal participation in the free navigation of the Mississippi, is one of the inherent rights of the citizen of this State; it cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever."[148]

Following the seminal article by Professor Sax in 1970,[149] many state legislatures passed environmental statutes expressing the public trust with respect to all natural resources. Michigan's Environmental Protection Act, declaring the availability of relief "for the protection of the air, water and other natural resources and the public trust therein, from pollution, impairment or destruction,"[150] is foremost. But a number of other states have also passed declarations of more or less positive effect declaring the preservation of the environment to be state policy.[151]

In Wyoming a constitutional provision declaring water to be the property of the state was construed to create a public right to navigate.[152] Similarly, the Pennsylvania Constitution states that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."[153] This provision was held to state a public trust in *Payne v. Kassab*,[154] in which the court said:

> We must recognize . . . that decision makers will be faced with the constant and difficult task of weighing conflicting environmen-

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[148] TENN. CONST. art. I, § 29.

[149] Sax, *supra* note 85.

[150] MICH. STAT. ANN. § 14.528 (202) (1980).

[151] *E.g.*, 42 U.S.C. § 4331(c) (1976); CONN. GEN. STAT. ANN. § 22 a-15 (West 1958); MINN. STAT. ANN. ch. 116B (West 1977); MONT. CONST. art 9, § 1; N.Y. CONST. art 14, §§ 1, 4; VA. CONST. art. 11, §§ 1, 3 (the latter declaring a public trust in oyster beds).

[152] Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). *See also* Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1975); ILL. CONST. art 11, §§ 1-2; LA. CONST. art 9, §§ 1, 3 (declaring policy of protection of natural resources and prohibiting alienation of beds of navigable waters).

[153] Art. 1, § 27.

[154] 11 Pa. Commw. Ct. 14, 312 A.2d 86 (1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976).

> tal and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, aesthetic, and historical resources.[155]

California's first constitutional expression of public rights came in 1879 in response to what was characterized in the debates as gross excesses in the disposition of public lands. What is now article 10, section 4 instructs the legislature to assure that frontage and tidal lands of all navigable waters within the state remain open and accessible to California residents.[155.1] This provision was construed by the supreme court in *Forestier v. Johnson*[156] as depriving the legislature of power to dispose of tidelands in such a way as to terminate the public trust over them.[157] It was held in *People v. Russ*[158] to prohibit dams on private waters if the dams would obstruct navigable waters.[159] In *People v. El Dorado County*,[160] the provision added a constitutional dimension to the right to navigate, and in *Lane v. City of Redondo Beach*[161] it was held to give a right against the destruction of public access to tidelands of navigable waters by the vacating of a city street.[162]

Similarly, article 10, section 3 has been characterized as establishing a constitutional trust existing concurrently with the common law one but having the more far-reaching effect of making

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[155] *Id.* at 29, 312 A.2d at 94. *See also* Newburyport Redevelopment Authority v. Comm., 401 N.E.2d 118, 137-38 (Mass. App. 1980) (right of people to "natural scenic, historic and esthetic qualities of their environment," land and easements acquired for such purposes not to be disposed of without 2/5 vote of general court); MASS. CONST. amend. art. 49, *as amended by* art. 97 (1972); R.I. CONST. art. 37, § 1 (constitutional right of fishery and use and enjoyment of natural resources; duty of general assembly to protect natural environment); TEX. CONST. art. 16, § 59a (conservation and development of all natural resources, including waters and navigation, declared public rights and duties). Other state constitutional provisions merely declare that public lands, however acquired, are to be held in public trust for the people of the state. *E.g.*, UTAH CONST. art 20, § 1.

[155.1] CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 2), set out in text accompanying note 97 *supra*.

[156] 164 Cal. 24, 127 P. 156 (1912).

[157] *Id.* at 34, 127 P. at 160.

[158] 132 Cal. 102, 64 P. 111 (1901).

[159] *Id.* at 105, 64 P. at 112.

[160] 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1979).

[161] 49 Cal. App. 3d 251, 122 Cal. Rptr. 189 (2d Dist. 1975).

[162] *Id.* at 256-57, 122 Cal. Rptr. at 193-94.

attempted conveyances within its scope totally void.[163] That provision, of course, prohibits the grant or sale of tidelands within two miles of any incorporated city or town. It was supplemented by a 1909 statute prohibiting the sale of tidelands and submerged lands entirely.[164] In *Dietz v. King*,[165] the California Supreme Court, noting the "strong policy expressed in the constitution and statutes of this state of encouraging public use of shoreline recreational areas,"[166] said that these provisions "clearly indicate we should encourage public use of shoreline areas whenever that can be done consistently with the federal constitution."[167]

F. The Foreshore: Unqualifiedly Private or Subject to Public Rights?

Public rights in and over the beds of navigable waters and tidelands are firmly established. Not so those on the dry sand above the tide. Do public trust rights extend to the area above high tide—the dry sand area, as it is sometimes described—an area of considerable significance, one covered at least to some extent under Roman law but deprived of the *jus publicum* under the common law theories of Thomas Digges?[168]

The right to pass over the foreshore, to draw boats upon it and to dry nets on it largely passed into the common law.[169] Nevertheless, the issues surrounding the use of dry sand areas above ordinary high water has been a perplexing one. Uses incident to navigation have customarily been upheld.[170] But the Supreme Court of Massachusetts gave an advisory opinion to the effect that the right of passage over dry lands at periods of low

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[163] City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1971); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973).

[164] CAL. PUB. RES. CODE § 7991 (West 1977).

[165] 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

[166] *Id.* at 42, 465 P.2d at 58, 84 Cal. Rptr. at 170.

[167] *Id.* at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.

[168] *See* note 14 *supra*.

[169] As one commentator said, the right of public fishery in tidal waters includes as an incident "the right of fishing over the foreshore, . . . of laying lines, drawing nets . . . and presumably of drawing nets on the beach above ordinary high watermark in the fact of fishing." MOORE & MOORE, FISHERIES 96 (1903).

[170] Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954).

tide cannot be reasonably included as one of the traditional rights of navigation, and therefore a statute purporting to create such a right of passage would constitute a taking.[171]

It appears that the law is well past reliance on *cujus est salum ejus est ad coelum.*[172] The better course would be to restore the Roman concept of public right and include within navigational rights walking, wading and pushing or pulling craft across shallows, riffles, rapids and other obstructions.[173]

CONCLUSION

We are a continental nation, and public needs for water and its incidents rise daily. Thus it is that we grow closer and closer to the civil law in defining public rights to our waters. We long ago rejected the common law test equating navigability with tidality and adopted the civil law on that question: those rivers which are navigable in fact are navigable in law.[174]

The public trust as we recognize it today is an expression of concern for the navigable waters that are part of the heritage of mankind. The shallow waters and uplands that they periodically cover gave birth to life. Through the primordial muck of the tidelands, our forebears crawled out of the sea onto dry land. Where would we be now, one might ask, if that hospitable shorezone had been subject to private ownership, control and development? Would our finned, crawling forebears have been able to pass over tidelands if they had been filled and fenced and "improved"?

The California Supreme Court has observed that "the right of navigation in all . . . navigable waters is the paramount right of every citizen."[175] The fundamental nature of public navigational rights was underscored by the Pennsylvania Supreme Court

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[171] Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974); *cf.* Note, *Waters and Watercourses—Right of Public Passage Along Great Lakes Beaches,* 31 MICH. L. REV. 1134, 1138-42 (1933) (American courts have consistently held that there is a public right of passage over the foreshore and have even permitted hunting and camping). *But see* Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907) (no right to cross private property to navigable water).

[172] *See* People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979).

[173] *See* Bohn v. Albertson, 107 Cal. App. 2d 738, 749, 238 P.2d 135-36 (1st Dist. 1951); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

[174] R. TYLER, *supra* note 8, at 43.

[175] Wright v. Seymour, 69 Cal. 122, 127, 10 P. 323, 326 (1886).

when it said, "There is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits."[176]

Because water is such a central fact to our existence, it is no wonder that the public trust doctrine has been so closely associated with it. In the myths of our creation, water came first. And kings and emperors alike—even in the most despotic realms, however great their power over land—have recognized the inviolability of the rights of navigation and access to water that are so important to civilized society.

[176] Flanagan v. City of Philadelphia, 42 Pa. 219, 228 (1862), *quoted in* Yoffee v. Pennsylvania Power & Light Co., 385 Pa. 520, 534, 123 A.2d 636, 644 (1956).