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Speaking of inconvenient truths -- a history of the public trust doctrine

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

The only problem for these ambitions for the public trust doctrine is that they rely on a mythological history of the doctrine. There was nothing resembling the modern idea of public trust in Roman law and the claimed restraint on alienation of state owned waters and lands is belied by a history of pervasive private ownership in both Rome and England. Magna Charta had little or nothing to do with such public rights, nor is there significant support in Bracton, Hale or Blackstone for the imagined doctrine. The one concept of English law on which the modern public trust doctrine relies – the prima facie rule pursuant to which title to submerged lands is presumed to be in the Crown absent a showing to the contrary – was a 16th century fabrication that did not take hold in England until late in the 19th century, well after American law had developed on its own. Ironically, the invented prima facie rule served to feather the nest of the Crown, not to protect the rights of the public. American law would serve the same government self-dealing many centuries later in Phillips Petroleum v. Mississippi, though in the name of the public good.

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

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

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

Ambitions for an expanded public trust doctrine are numerous. Many writers have followed up on Professor Sax’s article with concrete proposals for application of the public trust doctrine to natural resources conservation and environmental protection. A few examples are only illustrative. With the financial support of the federal government and under contract to the state of Connecticut, David Slade and several coauthors wrote an entire book on how the public trust doctrine might be applied to the management of the “lands, waters and living resources” of coastal states.3 Gary Meyers has argued that the public trust doctrine can be the vehicle for a more holistic approach to the management of wildlife and wildlife habitat.4 Robert Fishman, noting that the public trust doctrine “has long held attraction for advocates of federal public land conservation,” suggests the legislative “mandate to make affirmative contributions toward the [National Wildlife Refuge] System mission provides a statutory basis for application of the

2 He later wrote an article suggesting how some of these historic limitations might be circumvented. See infra note 18.
public trust doctrine.” Samantha Bohrman argues that coalbed methane development “exacerbates an inequity between gas giants and farmers, ranchers, and common citizens, . . . [leaves] counties struggling to fund and maintain programs and infrastructure they can no longer afford, . . . [and] compromises the environment, . . . [all of which] presents a classic violation of the public trust doctrine.”6 Kristen Carpenter suggests that the public trust doctrine “may support the right of citizens (including American Indian citizens) to use public lands for religious and cultural purposes.”7 Alison Rieser makes the case for ecological preservation as a public property right under the public trust doctrine.8 A bibliography of papers suggesting innovative uses of the public trust doctrine in natural resources and environmental law would go on for many pages, and it would be even longer if it included proposals for applying the doctrine in other areas of the law. Noting that “[t]he public-trust doctrine has proved useful in the past to correct government misallocations,” Patrick Ryan suggests that “it can also do so with the regulation of the electromagnetic spectrum.”9 Keith Aoki suggests that the public trust doctrine provides a useful analogy for asserting public rights in intellectual property.10 The possibilities, it seems, are only limited by the imagination.

While some commentators have been proposing concrete applications of the public trust doctrine, they and others have been considering the theoretical justifications for judicial intervention in the name of public, as opposed to individual, rights. In a rule of law system committed to democratic government, this is not a simple problem since judicial intervention will often be in contravention of the actions of elected legislatures and executives. In his 1970 article Sax asserted, counterintuitively, that the public trust doctrine is rooted in the requirements of democracy,11 a theory later elaborated on by Michael Blumm.12 Charles Wilkinson and Richard Epstein have made very different arguments for the doctrine having roots in the United States Constitution.13 William Araiza suggests that the doctrine has roots in state constitutional

7 Carpenter, A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners, 52 UCLA L. REV. 1061, 1120 (2005).
11 Sax, supra note 1.
provisions to the extent that they guarantee appropriate consideration of environmental values in government decision making. Based on perceived convergences in ecology and economic theories, Alison Rieser suggests that the public trust doctrine might have its roots in the police powers of the states. Carol Rose has looked beyond public trust law to public prescription and custom to find a unifying theme rooted in the idea of “inherently public property” held and managed by the “unorganized public.” In a paper written many years ago, I examined several possible theoretical foundations for the public trust doctrine and concluded that it is best understood as an aspect of property law.

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

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15 Rieser, supra note 8.
18 However, the doctrine has been employed expansively by some states within the context of water and submerged lands. The most publicized case is National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709 (Cal.,1983). Other state cases dramatically expanding the reach of the doctrine include, e.g.: Montana Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (Mont.,1984); Matthews v. Bay Head Imp. Ass’n, 95 N.J. 306, 471 A.2d 355 (N.J.,1984); Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (Wis. 1972).
19 Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U. C. Davis L. Rev. 185 (1980).
20 For example the Illinois case of Paepcke v. Public Building Co., 46 Ill. 2d 330 (1970) has been cited often as an example of the application of the public trust doctrine to park lands unrelated to any navigable waters. While the court does speak of public parks as subject to a public trust, it upholds a challenged change of use on the basis of a clear legislative authorization of the change. As recently as 2003, the Illinois court reaffirmed that holding in Friends of Parks v. Chicago Park District, 203 Ill. 2d. 312, 328 (2003). In Complaint of Steuart Transportation Co., 495 F. Supp 38, 40 (1980), a federal district court stated that “[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and
Most courts responding favorably to Professor Sax’s urging that the historic shackles of the doctrine be removed have done so in two different ways while keeping the doctrine tied to water. One approach has been to expand public trust uses beyond navigation, commerce, fishing and bathing. In the most celebrated modern public trust case of National Audobon Society v. Superior Court,21 the California Supreme Court held that public trust doctrine protects ecological and recreational uses as well as navigation, commerce and fishing. The other approach has been to extend the geographic reach of the doctrine by applying it to waters that are neither tidal nor navigable in fact. The National Audobon case extended the doctrine in this way, as did the Montana Supreme Court decision in Montana Coalition of Stream Access v. Curran.22 The geographic impact has also been expanded to uplands in some states. For example, the New Jersey Supreme Court has held that the public trust doctrine guarantees a public right of beach access across private, non-tidal uplands.23

Few cases or commentaries on the public trust doctrine fail to mention the Roman roots of the doctrine. Specifically, they have reference to Justinian and quote this language: “[A]ll of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea.”24 Upon these few words from antiquity, environmental advocates, and at least a few American courts, have sought to build the foundation of what they hope will become a grand edifice of public rights in natural resources and environmental protection. But Justinian is not the hero in this struggle against the forces of development and environmental destruction – he was merely summarizing the laws of his time for the benefit of young law students. The hero is Professor Joe Sax whose 1970 article called for “effective judicial intervention” in natural resource management through resort to the public trust doctrine.25

Much ink has been spilled over the past four decades on the public trust doctrine and its historic foundations, both in academic articles and judicial decisions. This is as it should be in a rule of law, precedent based, legal system. What can one more study of the subject add to what we already know? A fair amount, it turns out, because what we think we know about the history of the public trust doctrine is often a distortion and sometimes just plain wrong. Even a cursory review of the literature and case law reveals a lot of wishful thinking and not very much sound historical research. In a sense, the widespread misrepresentation of the history of the public trust doctrine is apt because the lawmakers themselves often have been party to the distortions. Bracton, often cited for the notion that the English common law had embraced the Roman law as preserve the public’s interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.”

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21 Supra note 18 at 435.
22 Supra note 18 at 53. In National Audubon the California court included tributaries of navigable waters in the geographic reach of the public trust doctrine. In Curran the Montana Court held that the doctrine applied to all waters in the state capable of recreational use.
23 Supra note 18. The New Jersey court reaffirmed the Matthews holding in Raleigh Avenue Beach Association v. Atlantis Beach Club, 185 N.J. 40, 42 (2005), but said that the private beach club could impose a reasonable fee.
24 The Institutes of Justinian 2.1.1 (T. Cooper trans. & ed. 1841).
25 Supra, note 1.
described by Justinian, either misunderstood or misrepresented the law of Rome,\textsuperscript{26} and, most probably, was himself stating an aspiration for the common law rather than reporting on the actual laws of his time.\textsuperscript{27} Hale endorsed a rule of presumptive Crown ownership of submerged, tidal lands that had been fabricated from whole cloth by a title hunter in service to himself and the Crown.\textsuperscript{28} Chancellor Kent, with reference to English law, announced an American law of title to submerged lands that reflected neither the law nor the fact of English practice.\textsuperscript{29} And so it is with most modern advocates of the expansive public trust doctrine proposed by Professor Sax almost four decades ago. They are making it up as they go, but in the tradition of some of the common law’s greatest lawyers.

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

What follows is straightforward. The first section recounts the myth that is the generally accepted version of public trust history. The second section examines relevant Roman law precedent. English common law origins of the doctrine are examined in the third section. The fourth part of the paper is a review of 19th and early 20th century public trust law in the United States, including Supreme Court case law to the present. Because American law has generally linked the public trust doctrine to state ownership of resources, the fifth section discusses the law of state ownership, first with respect to submerged lands and then with respect to wildlife. The sixth and concluding section argues that expansions of the public trust doctrine cannot be rooted

\textsuperscript{26} “Bracton omits, for example, the passage from the \textit{Institutes} which said that the property of the seashore was in no one, probably because he was well aware that some of the foreshore was held by private individuals.” Deveney, \textit{Title, Jus Publicum, and the Public Trust: An Historical Analysis}, 1 SEA GRANT L. J. 13, 37 (1970).

\textsuperscript{27} “[W]here Bracton relies on Roman law, and specifically where he lays down the rule that the sea and seashore were common to all and asserts that the general public had the right to use river banks for towing and mooring and the foreshore for cottages and the drying of nets, he is most probably describing a rule of law he thought desirable, relying on the codified wisdom of the Roman law as a model for the common law, and not stating a rule that actually obtained in England at the time.” \textit{Id.} at 36.

\textsuperscript{28} \textit{Infra}, note 102.

\textsuperscript{29} \textit{Infra}, text accompanying notes 118-121.
in history, and therefore must be founded upon a sound theory of judicial intervention in the
decisions of democratic government, if a suitable such theory can be devised.

II. The Mythological History of the Public Trust Doctrine

In a nutshell, the generally accepted storyline goes like this. Roman law, as
communicated to us across the centuries by Justinian, recognized and protected public rights in
specially important natural resources. These public rights constituted the *jus publicum*. We
suspect that the Romans inherited the idea from earlier civilizations (of the Golden Age during
which resources belonged to no one and everyone was well provided for, but that is a different
story), but we place the provenance of this public trust at least as early as the Romans because
Justinian recorded – to paraphrase – that air, flowing water, the sea and the shores of the sea are
by natural law common to all. Here is Professor Sax’s summary of this part of the story:

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

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

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

Our story continues across the Atlantic. “British settlers brought the concept of the
public trust to America when they claimed ownership by the right of discovery.” Actually, it
was the English Crown that claimed by right of discovery. Most settlers claimed ownership
pursuant to a grant from the Crown, grants one might expect to be important to subsequent

30 J. SAX, DEFENDING THE ENVIRONMENT 163-64 (1971).
31 Id.
32 Deveney, supra note 26 at 39.
33 Kehoe, The Next Wave in Public Beach Access: Removal of States as Trustees of Public
34 Id. at 1924.
resource allocation disputes. Lord Chief Justice Matthew Hale’s treatise *De Jure Maris et Brachiorum ejusdem* is most often cited as the authority relied upon by American courts, although “[t]here is no suggestion whatsoever of a public trust in Lord Hale’s writings. . . .”35 The New Jersey Supreme Court decision in *Arnold v. Mundy* is generally cited as the first case to apply the doctrine on American soil.36 But it is always best to have a United States Supreme Court opinion to rely upon, even when we are talking about state law, so the story of the history of the public trust doctrine concludes with *Illinois Central Railroad v. Illinois*.37 Never mind that *Illinois Central* was actually a contract clause case, and the Court was ambivalent as to whether the contract was invalid because the state violated the trust or because the revocation of the grant was not an impairment of contract in light of the trust.

Upon the foundation of this widely accepted history of the public trust doctrine, advocates for resource conservation and environmental protection have sought to erect the grand edifice of judicial intervention proposed by Professor Sax in his 1970 article. Supporters of the Sax project have had some successes, but many courts have declined invitations to expand the doctrine and at least a few fellow-travelers have expressed concerns about the wisdom and viability of the public trust doctrine as the silver bullet of environmental protection.38

Of course there is another century of public trust doctrine history, but most of that is the story of what has happened since Professor Sax wrote his seminal 1970 article. I will comment on that history later in this paper, but my central purpose is to explain the errors and deficiencies of the generally accepted story recounted above. I recognize that I may be tilting at windmills in trying to set the story straight, but in that case I will not be the first.39 As we have learned in so many contexts, including many cases of false forecasts of environmental hazard, truth often struggles in the face of repetitious assertions of myth.

III. Roman Law and the Public Trust Doctrine

An enthusiastic Yale law student, writing at the same time as Sax, urged “proponents of the public trust . . . [to] hold the original Roman law up as a useful model of doctrinal purity to which we should return.”40 “If Roman citizens had these rights,” asks the student rhetorically,

35 Deveney, *supra* note 26 at 48.
36 6 N.J.L. 1 (Sup. Ct. 1821).
37 146 U.S. 387 (1892).
39 I have relied heavily on the work of two individuals, Patrick Deveney, *supra* note 26, and Glenn MacGrady, *infra* note 44, whose historical research and analysis have been generally ignored. See *infra* note 45. Before them, Stuart Moore’s comprehensive treatise, *infra* note 45, was similarly ignored.
“why shouldn’t we?” Indeed, why shouldn’t we? As we shall see, it turns out Roman citizens had no such rights, but, of course, that is no reason we should not have them. But it is a reason we should not base our claim on the precedent of Roman law, as public trust advocates have done consistently over four decades.

What we know about Roman law is relatively little compared to what we know about our own law or even the law of medieval England. We are limited to a relatively few sources that have survived, many of which are seen through the gloss of much later translations and edits. More significantly we are limited by our own frame of reference. The challenge to understanding historic laws in their own time is great, even within our own legal system over a mere century or two. The challenge is twofold: first, words do not have constant meaning over time, even assuming nothing has been lost in translation from one language to another; and second, our moral judgments can easily influence our understanding and assessment of past laws. This latter challenge of what some have called “presentism” can lead us to misunderstand or misrepresent the motivations of historic lawmakers both because our own morality condemns what we take to be the intended results of historic laws or because, out of its historic context, the law’s purpose appears consistent with that to which we aspire – as in the case of the public trust doctrine.

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

41 Id. at 787 n. 113.
42 Variously defined as the application of current standards to historical figures and events. See Hunt, Against Presentism, American Historical Association Perspectives (May 2002), http://www.historians.org/Perspectives/issues/2002/0205/0205pre1.cfm.
43 Supra note 26.
45 Since 1990 there have been over 1700 articles that make reference to the public trust doctrine. Of these, over 420 mention Roman history. Deveney’s article is cited in only 36 and MacGrady’s in only 31. Among the few articles citing both Deveney and MacGrady (17 of the 420) is Carol Rose’s The Comedy of the Commons, supra note 16. Rose acknowledges that the historical foundations of the public trust doctrine are shaky at best. She looks largely to 19th century American case law in an effort to explain the persistence of the idea of public rights (in the context of public trust, prescription and custom) in the face of a generally pervasive acceptance of private property as the better way to allocate scarce resources. For a discussion of Rose’s conclusions see infra, text accompanying notes 135-151. Deveney and MacGrady were not the first to be ignored. As MacGrady notes, Stuart Moore, author of A HISTORY OF THE
with a brief reference to the Roman law. One suspects that Deveney and MacGrady have been
gnored not because their work is questioned, but because their conclusions are inconvenient for
the judicial intervention project launched by Professor Sax. Indeed, I have found no work that
challenges either author’s conclusions about Roman or English law.

The gemstone of modern public trust law, widely quoted in the literature and caselaw, is
Justinian’s declaration that “these things are by natural law common to all: air, flowing water,
the sea and, consequently, the shores of the sea. No one, therefore, is forbidden access to the
shore . . . .” The first clue that something might not be as it seems in this oft quoted language is
the ellipse appearing at the end of the quotation, at least when properly quoted. What follows
immediately in the same sentence after “shore” is “if he abstains from injury to the villas,
monuments and buildings there, because these [the villas, etc.] are not governed by the law of
nations as is the sea.” But wait, is not the point that Roman law protected the sea and seashore
from private use to assure free access for all the public? What are these villas, monuments and
buildings that the public must not harm doing on the seashore? Here is what Deveney has to say
on the subject:

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

FORESHORE (3rd ed. 1888), wrote at length on the Roman and English laws of submerged lands
yet “remains relatively unknown.” Id. at 552.

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

JUSTINIAN, supra note 24.

48 Id.
this aspect of Roman law to the exclusion of its complements – state grants of exclusive rights and individual acquisition of ownership by occupation – is to misunderstand the Roman law and to ignore the economic realities of the time.\(^{50}\)

That the Roman law did not really guarantee an inalienable public right to use and access the sea and seashore does not mean that the public had no rights at all. Roman law provided for several forms of injunctive and restitutionary relief (interdicta), including popular injunctions that granted standing to all citizens to protect the public’s rights.\(^{51}\) One popular injunction allowed citizens to challenge obstructions to navigation or docking and to shoreline footpaths with restoration of the status quo ante as the remedy (though only damages could be sought for obstructions to navigation and fishing on the sea). Another cause enforced a prohibition on changing stream flows by blocking or diverting waters, whether or not it affected navigation. Individual citizen’s could seek an injunction against interferences with navigation or with anyone bringing cattle to drink at the shore. Anyone actually injured by the building of a pier or breakwater was entitled to injunctive relief and presumably damages.\(^{52}\) But, says Deveney, “[t]he actual effect of these injunctions was negligible, . . . They were granted ex parte and without investigation into the actual situation; consequently, the interdicts were phrased hypothetically and amounted to no more that a mere statement of the rule the praetor recognized.”\(^{53}\)

Legal remedies aside, references to Roman law have suggested a strong philosophical commitment to the notion of common or public rights. Justinian wrote “[a]ll rivers and harbors . . . are public, and therefore there is a right of fishing, common to all, therein.”\(^{54}\) While acknowledging that Justinian may not have been stating the law as it was in fact, commentators Smith and Sweeney recently have written that “[u]nder a remarkable philosophy of natural resource preservation, the Romans implemented a concept of ‘common property’ and extended public protection to the air, rivers, sea, and seashores, which were unsuited to private ownership and dedicated to the use of the general public.” They go on to suggest that “this public trust concept resonated throughout medieval Europe . . . .”\(^{55}\) But what did the Romans really mean by “common to all,” and is it really plausible that a continent of warring kings and barons embraced a philosophy of sharing?

\(^{50}\) Deveney, \textit{supra} note 26 at 21-22. MacGrady notes that the Digests explicitly recognize the private right to appropriate shore lands by building on them. “If one builds in the sea or on the seashore, although not on his own land, yet nevertheless he by the \textit{jus gentium} makes it his.” \textit{Supra} not 44 at 533 (quoting from Ulpian Digest 39.1.1.18).

\(^{51}\) See MacGrady, \textit{supra} note 44 at 521 for a discussion of the enforcement of rights on public rivers by interdict and for a discussion of the difference in Roman law between private and public rivers.

\(^{52}\) \textit{Id.} at 25.

\(^{53}\) \textit{Id.}

\(^{54}\) JUSTINIAN, \textit{supra} note 24.

Deveney concludes that the concept of “things common to all” originated with the third-century jurist Marcian who adopted the idea of a Golden Age from the classical poets and philosophers. In this Golden Age of antiquity, writes Deveney, “until greed gave birth to private property, all things were held in common and the earth naturally produced its fruits for the benefit of all.”

But then there was trouble. There arose “the age of hard iron . . . . [T]he land which had previously been common to all, like the sunlight and the breezes, was now divided up far and wide by boundaries, set by cautious surveyors.” Marcian’s list of things common to all included air, flowing water, the sea and the seashore. Dry land was not included, suggests Deveney, probably “because it had long been ‘divided up far and wide by boundaries, set by cautious surveyors.’” And it was already divided up because of the economic realities of 3rd century Rome. This myth of a Golden Age of antiquity, in which there was no private property and all shared equally the bounty of the earth, is very similar to the modern day myths about the relationship between aboriginal Americans and the earth and water they depended upon for survival.

In both cases, “things common to all” were so in part because of the physical nature of the particular resources and the limits of technology, but mostly because supply was abundant and demand slight. “In actuality, says Deveney, the sea and the seashore were ‘common to all’ only insofar as they were not yet appropriated to the use of anyone or allocated by the state.” The law of private acquisition was set forth clearly in the Digest:

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

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

That “things common to all” are those things free for the taking and conversion to private property turns on its head the modern reliance on Roman law as the foundation for the public trust doctrine. Worse yet for the modern public trust doctrine, which most often is offered as a limit on the states’ ability to dispose of state owned lands and waters, is “that there were no

56 Deveney, supra note 26 at 26.
57 Id. at 27, quoting from Ovid, Metamorphoses 1, 96-136, translated by M. Innes, The Metamorphoses of Ovid 31-32 (1966).
58 Id.
60 Supra note 26 at 29 (emphasis in original).
61 Id. at 30.
62 Digest 41.1.30.4.
63 Id. at 41.1.14.
restraints whatever imposed by law on the power of the sovereign to convey public land, including the sea and seashore. All such restraints were in fact made impossible by the basic premise of Roman Law: “That which pleases the Emperor has the force of law.” 64 While most advocates of the public trust doctrine will have few sympathies for the Roman emperors, they may have sympathies for democratic government, a theoretical problem for the modern public trust doctrine to which I will return. 65

Another problem for those who rely on Roman law as precedent for the modern public trust doctrine is that Roman law made no distinction, until very late in the Empire, between the public and the personal status of the ruler. 66 Without this distinction, the concept of the jus publicum (as distinguished from jus privatum), upon which the public trust doctrine depends, makes no sense. Unless all properties held by the ruler are in the nature of jus publicum, which was clearly not the case in the Roman Empire, there must be some basis for distinguishing those resources the ruler can alienate or in which he can grant private rights of use from those he cannot. It is one thing to hold that “things held in common” are open for all to use “unless and until a private person or the state required exclusive control of the resource,” 67 as Roman law did. It is quite a different thing to hold that the state cannot alienate or grant exclusive rights of use to common resources because the sovereign’s title is held subject to a restraint in the nature of an easement held by the public independent from the sovereign, as modern public trust advocates would have it. As a theoretical matter, the latter rule is plausible where the sovereign is independent of the people, although it was not the case in Rome. But where the sovereign is the people, as in the United States, advocates of the latter approach have some theoretical scrambling to do. As we will see later in this paper, the distinction between the public and personal status of the King came late to the English common law as well, but that is a problem for reliance on common law precedent to which we will turn imminently.

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

Roman law was innocent of the idea of trusts, had no idea at all of a “public” (in the sense we use the term) as the beneficiary of such a trust, allowed no legal remedies whatever against state allotment of land, exploited by private monopolies everything (including the sea and the seashore) that was worth exploiting, and had a general idea of public rights that is quite alien to our own. 68

Thus, Roman law seems to offer little to those seeking the comfort or reassurance of well pedigreed legal precedence. The reality of life in the Roman Empire was that “all of the marine and coastal area resources that it was possible for the technology of the Romans to exploit were

64 Deveney, supra note 26 at 32-33. Of course this is the same principle that gave the English Parliament unlimited authority to dispose of any and all public lands of Britain. See discussion infra following note 97.
65 See infra text accompanying notes 217-218.
66 Deveney, supra note 26 at 17.
67 Id. at 21.
68 Id.
either in private ownership or were leased to monopolies. . . .” 69 The Stoics and other philosophers of classical Greece provided both Romans and modern Americans with lovely visions of a plentiful earth without boundaries. But this Golden Age existed only in legend and myth. “The [Roman] rule that ‘the sea and seashore are by nature common to all’ reflected a philosophic commitment to the freedom of elemental things for all men, even though its legal effect was to make the sea and shore available for private appropriation.” 70

IV. Common Law and the Public Trust Doctrine

Roman law with respect to navigable waters was formally introduced to the common law by Bracton who included parts of Justinian’s commentary on the sea and seashore in his 13th century work. 71 Although Bracton purported to be restating the law of England at the time he wrote, “he is most probably describing a rule of law he thought desirable, relying on the codified wisdom of the Roman law as a model for the common law, and not stating a rule that actually obtained in England at the time.” 72 Thus, modern public trust advocates have not only the precedent of Roman law as they wish to understand it, but the precedent of Bracton’s summation of English law as he wished to understand it. But before Bracton wrote, there was the Magna Carta which contained two chapters of possible relevance.

Chapter 16 states:

No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time. 73

This provision was a reaction to the kings having placed “as well fresh as salt rivers in defense for [the kings’ recreation]; that is, to bar fishing and fowling in a river till the King had taken his pleasure or advantage of the writ de defensione ripariae.” 74 Although this limitation on the Crown would eventually resemble the kind of public right imagined for the modern public trust doctrine, at the time it appears that the writ de defensione ripariae was objected to because it required the riparian owner to repair, at his own expense, roads and bridges in preparation for the

69 Id. at 33. MacGrady agrees with this conclusion. “. . . Roman law evidently tolerated appropriations of the seashore in the nature of private ownership.” Supra note 44 at 533.
70 Id. at 34.
72 Deveney, supra note 26 at 36. MacGrady suggests the Bracton was not distorting Roman law, rather that he was borrowing from the language of the Institutes to the extent that it conformed to his understanding of English law at the time. Supra note 44 at 556.
73 The quoted language is from the 1225 version of Magna Carta. It was derived from Chapter 47 of the 1215 version that provided: “All forests that have been made such in our time shall forthwith be disafforsted; and a similar course shall be followed with regard to river banks that have been placed ‘in defense’ by us in our time.”
king’s fishing expeditions.” Eventually Chapter 16 would be understood as a prohibition on the King’s granting of exclusive fisheries, but not until the 19th century. As late as 1768 the courts still acknowledged the King’s authority to grant exclusive fisheries, although the burden of proof was on the party claiming the exclusive grant. Thus, the Roman rule that the coastal area resources were open for common use until occupied or granted by the ruler remained the law of England for several centuries after Magna Carta with the not unimportant later modification that the right was prima facie in the Crown, placing the burden on anyone claiming an exclusive right. But this prima facie rule did not become fully accepted until late in the 19th century and the law with respect to fisheries was not the same as the law with respect to submerged lands.

Chapter 23 of Magna Carta provides that: “All weirs for the future shall be utterly put down on the Thames and Medway and throughout all England, except on the seashore.” “This simple provision of the Magna Charta would not even bear mentioning,” says MacGrady, “were it not for the fact that some writers and jurists have expanded it ‘almost unrecognizably’ over the years.” Although the provision was relied upon by later writers and courts to support a prohibition on obstructions to navigation, its immediate purpose was to prevent the king from blocking fish passage upstream to the exclusive fisheries of the baron’s who, after all, were the other party of interest in the negotiation of Magna Carta. Chapter 23 “had nothing to do with the question of title to land under waters.” In fact the provision was relied upon by Lord Hale to demonstrate that private ownership of such lands was possible:

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

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79 Infra note 110.
80 Infra note 121.
81 The quoted language is from the 1225 version of Magna Carta. It was derived from the Chapter 33 of the 1215 version that provided: “All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore.”
82 MacGrady, supra not 44 at 554, quoting from _____ Note, supra note 40 at 767.
83 See Deveney, supra note 26 at 39.
84 Id.
85 Hale, supra note 74 at 389.
Thus, Magna Carta Chapters 16 and 23 are very thin reeds upon which to rest an expansive public trust doctrine. The modern doctrine as applied to navigable waters relies heavily upon the state’s having title to the submerged lands. But at the time of Magna Carta, and for many centuries later, there was no concept in England of lands owned by the King (who, according modern public trust theory, was the predecessor in title to the states) as trustee for the general public.

Then again, no line is drawn, at least no marked line, between those proprietary rights which the king has as king and those which he has in his private capacity. The nation, the state, is not personified; there are no lands which belong to the nation or to the state. The king’s lands are the king’s lands; the king’s treasure is the king’s treasure: there is no more to be said. Then again, no line is drawn, at least no marked line, between those proprietary rights which the king has as king and those which he has in his private capacity. The nation, the state, is not personified; there are no lands which belong to the nation or to the state. The king’s lands are the king’s lands; the king’s treasure is the king’s treasure: there is no more to be said.86

Magna Carta reflects clearly that the king had special standing in relation to the barons, but “if the medieval king’s property differed in any way from that of his barons, it was only to the extent that he held more of it.”87

Every legal system that recognizes private property requires an explanation for how any particular claimant came into title to particular land or resources. The Roman theory, at least with respect to submerged lands and those subject to the ebb and flow of the tides, was that the land was held in common which, as we have seen, means that owners came into title by appropriation or occupation. Modern advocates have interpreted the Roman res communes to suggest resources belonging to the public in the sense we might understand it today, but in reality there was little to distinguish res communes from res nullius in Roman law.88 That is, no one owned the land until someone occupied it.89 This theory was consistent with the myth of the Golden Age, and was the theory in English law at least until the 17th century when John Selden posited the mare clausum (the closed sea) as the property of the English Crown.90 While the King did not object to this break with antiquity, Selden, and Blackstone after him, turned to the Bible to justify this claim of private title on behalf of the Crown.

In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to men “dominion over all the earth; and over the fish of the sea, and

87 Deveney, supra note 26 at 38.
88 “[A]ll [of the Roman sources] except Celsus use language in the nature of res communes and res nullius – term which . . . represent a distinction without a real difference.” MacGrady, supra note 44 at 533.
89 This concept of land held in common forms the basis for the famous “tragedy of the commons” commentary inspired by Garrett Hardin. Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968). It might be argued that Hardin’s starting point was common ownership as opposed to non-ownership, but it comes to the same thing since the private uses that lead to the tragedy of the commons are, for practical purposes, the equivalent of private title, albeit nonexclusive private title.
90 J. Selden, Mare Clausum: The Right and Dominion of the Sea 127-35 (1663).
over the fowl of the air, and over every living thing that moveth on the earth.”

This is the only true and solid foundation of man’s dominion over external things, whatever metaphysical notions may have been started by fanciful writers upon this subject.91

The Bible justified private ownership, including by the king, but in English theory the act by which the king acquired title was the Norman Conquest. This meant that all property held by anyone other than the king, including title to submerged and riparian lands, came by grant from the king. Of course this was mostly theory, without evidence of actual grants, that served to explain and justify the status quo, but the king did in fact make many grants so that “[b]y the reign of King John almost all of the foreshore and the rivers of the kingdom either were still held by the Crown as private property or had been granted in fee to individual holders.”92 Of particular importance to modern public trust theory that seeks precedent in the Magna Carta and English law is that the foreshore and rivers to which the Crown still had title could be and often was granted to other private owners.93 “There was no concept of a public trust in the early common law – that is, of the idea that the title of certain lands was held inalienably by the Crown for the common use.”94

Nonetheless, it is certainly true that Magna Carta has been variously relied upon in modern times for claims of broad public rights notwithstanding its origins in the struggle between the king and his barons. “[T]hrough the process of creative judicial misunderstanding in favor of the public’s rights,”95 and with some help from Blackstone,96 the English courts did eventually embrace the rule that the Crown could not grant exclusive fisheries in tidal waters.97 But this late recognition of public rights in English law was more symbolic than real since many exclusive fisheries had been granted in the past and the prohibition had nothing to do with ownership of submerged and riparian or tidal lands. That past grants of private right were to be respected was evident from Magna Carta which in Chapter 16 expressly excepted defenses

91 BLACKSTONE’S COMMENTARIES II-3 (1776).
92 Deveney, supra note 26 at 39.
93 “Bracton clearly states what the Romans left in doubt: the soil of the shore can be privately owned, at least by building on it.” The clearest evidence of this, concludes MacGrady is Bracton’s statement that “the soil cedes to the building.” MacGrady, supra note 44 at 556.
94 Deveney, supra note 26 at 38. MacGrady concludes that there was still no concept of a public trust in English law by the time of the American revolution. “At the time the public trust doctrine was supposedly vesting the Crown title to submerged beds and the foreshore in the newly sovereign American states, there was virtually no legal support for such a doctrine in English common law.” Supra note 44 at 590.
95 Deveney, supra note 26 at 39.
96 “A free fishery, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed: though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by king John’s great charter, and the rivers that were fenced in his time were directed to be laid open . . . .” BLACKSTONE, supra note 91 at 39.
97 Supra note 77.
(exclusive Crown fisheries) established in the time of King Henry and in Chapter 23 prohibited all wiers “for the future.” That future conveyances and grants of land could be still made by the King was inherent in his private property rights, so long as the lands were his in his personal capacity, or in the sovereignty of the King and Parliament, to the extent the property was held in the King’s public role.

What changed to the benefit of public rights, at least in the long run, was the prima facie rule for ownership of submerged and tidal lands, pursuant to which the lands were presumed to remain with the King unless expressly granted. The new rule was first stated in the case of Attorney-General v. Philpott,98 but that case was decided by a corrupt court doing the king’s bidding and was not cited as authority by an English court for another 164 years,99 after which at least another century passed without a single English jury deciding in favor of the Crown “against evidence of user on the part of the subject.”100 The Philpott decision was a factor leading to the beheading of Charles I for, among other things, “taking away of men’s rights under color of the King’s title to land between high and low-water mark.”101 Note that the objection was not to the King’s taking public rights, but to taking the private rights of those claiming title to the lands in question. Indeed, the Crown’s objective in pressing the prima facie rule was not to protect the lands for the public, but rather “to expropriate lands long in private hands in order to resell them to replenish their coffers.”102 Although the prima facie theory was invented from whole cloth in the 16th century to facilitate the Crown’s taking of long vested private rights and did not become the fully accepted law of England for three centuries, we will see that its pedigree would gain luster at the hands of American commentators and judges. But even then, “[u]nder the prima facie theory the power of the Crown to make grants of the foreshore and land under water was never in question. None of the parties involved [in the 16th and 17th centuries] was interested in expanding the interests of the general public in the coastal area.”103 Notwithstanding its sordid past, however, the prima facie rule did serve the eventual

98 The case is unreported and may never have been acted upon. It appears in MOORE supra note 45 at 896-907.
99 Attorney General v. Richards, 145 ENG. REP. 980 (Ex. 1795).
100 MOORE, supra note 45 at 616.
101 Article 26 of the Grand Remonstrance presented to Charles I on December 1, 1641, in MOORE, id. at 310.
102 Deveney, supra note 26 at 42. MacGrady, provides a vivid account of the title hunting and title hunters who relied on the prima facie rule to identify submerged properties on which private title would be difficult to prove. With adequate payments to the Crown, these lands would then be expressly granted to the title hunters. Among the title hunters was a certain Thomas Digges who is credited with inventing the prima facie rule in his 1568 treatise Proofs of the Queen’s Interest in Lands Left by the Sea and the Salt Shores Thereof. Supra note 44 at 559-563. See also James Rasband, The Disregarded Common Law Parentage of the Equal Footing and Public Trust Doctrines, 32 LAND & WATER L. REV. 1, 11-12 (1997). As noted below, infra at text accompanying note 273, there is an interesting similarity between the Crown’s motives in pressing for the prima facie rule and the motives of the state of Mississippi in Phillips Petroleum v. Mississipi, 484 U.S. 469 (1988), the United States Supreme Court’s most recent public trust decision.
103 Deveney, supra note 26 at 43.
claims of public right under the public trust theory. With resources of such value as submerged and tidal lands, it was not to be presumed that title passed with the conveyance of the uplands. But, of course, the prima facie rule did not preclude express grants of such lands.

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

The most influential source on the English law of the sea among 19th century American courts and commentators was Lord Chief Justice Matthew Hale’s treatise *De Jure Maris.* Although he endorsed the prima facie theory, he acknowledged that title to submerged and tidal land could be and most often was privately owned and that it could be acquired by usage, custom, prescription, or conveyance from the Crown. “There was no question in Hale’s mind that the king could convey title to land below the sea, several fisheries, and even property in a delimited part of the sea itself or in navigable rivers.”

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

[T]he people have a publick interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached

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104 BRACTON, supra note 71.
105 *Supra* note 74.

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

106 Deveney, *supra* note 26 at 45.
by exactions. . . . [F]or the *jus privatum* of the owner or proprietor is charged with
and subject to that *jus publicum* which belongs to the king’s subjects; as the soil
of an highway is, which though in point of property it may be a private man’s
freehold, yet it is charged with a publick interest of the people, which may not be
prejudiced or damnified.107

Taken together these three categories of coastal property fit neatly together, although not
precisely as modern public trust advocates would like. There is private (including crown or
state) ownership of coastal land. There is a public right of navigation over and past those lands,
meaning that obstructions to navigation (nuisances) are forbidden. And there is the power in the
king or state to enjoin or remove such obstructions. But, there is no public right to fish in
navigable waters, though they may be granted the liberty to do so.108 And there is no constraint
on private ownership of submerged or tidal lands or on the power of the king to convey those
lands,109 though private owners may not create nuisances that obstruct navigation. In sum,
“[t]here is no suggestion whatsoever of a public trust in Lord Hale’s writings, and he recognizes
no limitations on the power of the Crown to convey title to the coastal area.”110

V. EARLY AMERICAN PUBLIC TRUST LAW

The American revolution created some interesting theoretical problems for those required
to design the new governments and create legal systems that could carry on where the English
government and law left off. The law part was relatively easy, particularly since the American
revolutionaries, for the most part, only sought to guarantee for themselves the rights of
Englishmen.111 The common law would be received as the law of the individual states subject

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107 Hale, *supra* note 74 at 336.

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

109 “Neither the changes following the beheading of Charles I nor the revolution of 1688
reduced in any way the power of the sovereign to alienate the coastal area resources of the
kingdom.” Deveney, *supra* note 26 at 49.

110 *Id.* at 48. Of the eventual acceptance of the prima facie rule and Hale’s considerable
influence on that lengthy process, MacGrady, *supra* note 44 at 567, writes: “The adoption of the
prima facie rule is thus an example of lawmaking by personal reputation and treatise writing.”
He goes on to say the “American law concerning the foreshore ownership was shaped by a
similar lawmaking process,” and so too, as we shall see, has been modern American public trust
law.

111 See F. McDonald, *Novus Ordo Secloorum: The Intellectual Origins of the
to whatever modifications would be made subsequently. But a more challenging theoretical question was the explanation and justification for the transition from a sovereign King to a sovereign democratic republic. The legitimacy of the revolution rested in the self evident truth that “Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, . . .” The revolution was an assertion that the King’s government, at least in America, was not just, yet the sovereign powers the newly independent states would exercise would be exactly those the King had exercised. Like the individual rights asserted in the Declaration of Independence, the powers of government were self evident. So the states simply succeeded to the powers of the Crown (and Parliament), at least until some of those powers were delegated to a national government.

By this same theory, the states succeeded to the ownership of lands previously held by the king. Of course the king in England had no deed or other document evidencing the crown’s title, but no one challenged the legal fiction that the king owned everything in the beginning and continued to own that which had not been granted by the king or otherwise privately acquired. The principle of universal title in the crown, combined with the king’s power to grant title and the concepts of customary use and prescription, made it possible “to assign a particular proprietor to every thing capable of ownership, leaving as little as may be in common, to be the source of contention and strife.” While the modern public trust doctrine stands in opposition, Justice Earle of the Maryland Court of Appeals thought it to be “a principle based on soundest policy.” For the new American states that succeeded to the king’s ownership, this legal fiction was critical to their economic and political success. State title to unoccupied and unused lands (waste lands they were often called) made it possible for the states to embrace the English common law of property and to establish formal systems for the disposal of these lands. Without state title and formal systems for conveyance to private owners, there surely would have been much “contention and strife.”

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

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115 In the oft cited case of Arnold v. Mundy, supra note 36, Chief Justice Kirkpatrick reported that notwithstanding the claimed exclusive right at issue in the case, “the people had always disputed that right, had entered upon it, and taken oysters from it, when they pleased, and if opposed by Coddington [predecessor in title to plaintiff], that the strongest usually prevailed.”
to be large landowners over the long haul. This was, after all, a revolution against a king who among other offenses had significant land holdings from which most ordinary citizens were excluded. It was anticipated that state and federal properties would be limited to those necessary to a functioning and effective government – courthouses and other government buildings, military facilities and public roads.\textsuperscript{118}

These presumptions about government land ownership would change over time. Nearly a century after the adoption of the Constitution, significant federal lands began to be reserved from private acquisition with the expectation that they would remain in federal ownership indefinitely.\textsuperscript{119} As new states were created, other federal lands were granted for the support of schools and other public services,\textsuperscript{120} with the initial expectation that most of these lands sooner or later would be sold to private purchasers. None of this was very controversial, although the original states with large western land claims would rather have retained those lands, but had they succeeded in retaining their western lands, the expectation still was that they would be conveyed into private ownership.

In sorting out these land ownership issues the founding generation paid little attention to submerged and tidal lands, not because they were in fact invisible but because the law on the subject was thought to be well settled. Citing the case of \textit{The Royal Fishery, in the river Banne},\textsuperscript{121} Chancellor Kent stated that “by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil.”\textsuperscript{122} Pursuant to the prima facie rule, all other submerged lands (those under navigable waters – understood to include all waters affected by the tide) were presumed to be owned by the state unless a private claimant could demonstrate otherwise.\textsuperscript{123} It was and is widely accepted among American courts that this alleged English equation of navigability with tidal waters was gradually abandoned by many state courts in recognition of the topography of the North American continent with its great inland waterways. But there is good evidence that Chancellor Kent and the most influential treatise writer on the subject, Joseph Angell, got the English law wrong on this point. If indeed navigable-in-fact, non tidal, waters were considered navigable under English law, as MacGrady contends,\textsuperscript{124} it is just one more

\begin{itemize}
\item \textsuperscript{118} \textit{Benjamin J. Hibbard}, \textit{A History of Public Land Policies} 529-37 (1924).
\item \textsuperscript{119} \textit{Supra} note 117 at 250.
\item \textsuperscript{120} \textit{Id.} at 249.
\item \textsuperscript{121} \textit{Royal Fishery of the River Banne}, 80 Eng. Rep. 540 (1611). This case was widely cited in American cases on ownership of submerged lands, but on its facts it was concerned with ownership of the fishery and not with title to submerged lands. The same is true of the oft cited \textit{Carter v. Murcot, supra} note 77.
\item \textsuperscript{123} \textit{Ex parte} Jennings, 6 Cow. 518 (N.Y. Ct. Of Errors 1826).
\item \textsuperscript{124} “Whether the current American doctrine is ultimately a good one or a bad one is not the issue here. The point is that Angell and Kent, and the multitude of courts that have announced the American rule, have relied on an erroneous historical view of English fact and English law.” MacGrady, \textit{supra} note 44 at 549
\end{itemize}
historical error contributing to the eventual linkage in American law of the public trust doctrine to state ownership of submerged lands.

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

In Sir Matthew Hale’s excellent treatise . . . he lays down the law generally that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil, but he admits that fresh rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, &c. and in that sense may be regarded as common highways by water. . . . They are called public rivers, not in reference to the property of the river, but to the public use. 125

American law would gradually lose sight of this point and would create a tie between public ownership of submerged lands and public rights in the use of overlying waters. However, Lord Hale’s tripartite division of rights in the coastal area in no way linked the jus publicum to the king (or the state) having title to the submerged or riparian lands. As Hale defined it, the jus publicum is a public right in the nature of an easement whether the land is owned by the king, by a private party or by no one. The prima facie theory endorsed by Hale was an evidentiary presumption, not a rule of title. 126 But as the following discussion of the American public trust doctrine will evidence, American law came to understand the prima facie rule as a rule of title with the result that the jus publicum, which had been the basis for the evidentiary presumption under English law, 127 became dependent on state ownership of the submerged land. That link is one of the “shackles” to which Professor Sax had reference. 128 By linking the jus publicum to state ownership, it would be difficult to extend the public rights theory to perceived public interests in the management and use of privately owned resources. However, expansive public trust theories as applied to water resources did benefit from this misunderstanding of Hale’s prima facie theory in the following way. Under English law, the jus publicum extended to all navigable waters independent of ownership. Under American law, because the jus publicum was an attribute of state ownership, the states were presumed to own the beds and banks of all navigable

125 Palmer v. Mulligan, supra note 122.
126 MacGrady, supra note 44 at 550.
127 The prima facie theory in England was rooted in the “recognition that the foreshore was a distinct and valuable type of property not to be passed by implication.” Deveney, supra note 26 at 43.
128 With the historical shackles loosened or removed, “the public trust doctrine is not just a set of rules about tidelands, a restraint on alienation by the government, or an historical inquiry into the circumstances of long-forgotten grants.” Sax, supra note 19 at 186. “[T]he public trust doctrine should be employed to help us reach the real issues – expectations and destabilization – whether the expectations are those of private property ownership, of a diffuse public benefit from ecosystem protection or of a community’s water supply.” Id. at 192-93.
streams. Thus, although the states as sovereigns were theoretically successors in title to the King, they got more than the King actually had when it came to submerged lands.

The original states also succeeded to title in uplands held by the Crown and new states were generally granted some lands by the United States Government. No one suggested, until recently, that these and other uplands might be affected by the public trust doctrine. But a concern for public access to privately held resources was not limited to navigable waters and submerged lands. Just as the *jus publicum* had application to navigable waters in service of commerce, so were there claims of public rights in roadways over which commerce also traveled. Roads were sometimes dedicated at the time lands were granted and sometimes later, either by willing property owners or by eminent domain. But roads were also established by common use and, via one of the many fictions by which the common law courts kept their house in order, some of these roads were found to have been granted through custom or prescription. Under English, and in some cases America law, other public easements on private property were similarly acquired for grazing, public squares, annual festivals, horse racing and other sporting events.

Although most commentators on the public trust doctrine have paid scant attention to these dryland public uses and their underlying legal doctrines, Professor Carol Rose has done us the favor of considering how public trust, prescription and custom might be interrelated in 19th century American law. Rose suggests that all three doctrines protect the interests of what she calls the “unorganized public” as distinct from the organized public that is represented by the state and other governmental entities. The unorganized public, says Rose, is vested with “inherently public property” that is “collectively ‘owned’ and ‘managed’ by society at large, with claims independent of and indeed superior to the claims of any purported governmental manager” of property vested in the state. The fact that “the prescriptive doctrines generated no real tests for the character of the use that could establish public acquisition of a road . . . suggests the extraordinary strength of the view that roads should be public property.” “Despite frailties in its original authority,” says Rose, “[i]t is equally striking that ‘public trust’ doctrines in waterways, like the doctrines easing public acquisition of roadways, flourished

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129 “A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed.” BLACKSTONE, supra note 91 at II-265.

130 See e.g. Kerwhaker v. Cleveland, C. & C.R. Co., 3 Ohio St. 172, 1854 WL 2 (1854) (“it was the common custom of the country to allow domestic animals to run at large upon the uninclosed grounds of the neighborhood” at 185).

131 See e.g. Le Clercq v. Trustees of Town of Gallipolis, 7 Ohio 217, PT. I, 1835 WL 36 (1835) (“The original survey of the town left the ground for this purpose, in conformity to our habits—in greater conformity to the habits and customs of the people composing the colony.” at 220)


135 Rose, supra note 16 at 720-721.

136 *Id.* at 727.
alongside the popularization of classical economic theory – a theory that generally rejected the
notion that the general public could own and manage property.”[137] The persistence of the idea
of “inherently public property” in the face of otherwise widespread agreement, at least until the
late 19th century, that public property should be privatized wherever possible, leads Rose to ask
what led some 19th century American courts to conclude that some resource uses are inherently
public.[138]

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

[Custom suggests that there may be a middle ground between regimes in which
the resource is so plentiful or so difficult to privatize that it is not worth the effort,
and regimes in which conflicting uses are managed by formal ownership. This
middle ground is the regime of the managed commons, where usage as a
commons is not tragic but rather capable of self-management by orderly and
civilized people.][139]

The challenge Rose faces is to explain what distinguishes these “inherently public” resource uses
from those that are either private or public in the formal sense. She acknowledges the usual
argument made in justification of eminent domain that rent seeking by holdouts can result in
diminished net social welfare where foregone public benefits far outweigh any increased benefits
to the holdout. “But even if the holdout danger was necessary for a presumption of
‘publicness,’” says Rose, “that danger cannot have been sufficient. . . . Unlike eminent domain,
public prescription and public trust doctrines require no payment to the owner . . . . How, then,
can we know whether such property will be more valuable in public hands?”[140]

Finding traditional holdout explanations for public trust, public prescription and custom
incomplete, Rose turns to another idea of classical economics – “returns to scale or
‘interactiveness’ of use.”[141] Noting that American law has generally reflected the view that more
commerce is better, not just in terms of economic prosperity but also in terms of building strong
communities, Rose suggests that public trust, public prescription and custom are connected by an

137 Id. at 730.
138 The idea of “inherently public property” could be understood to mean that some
resources are by their nature public. This is the sense in which many 19th and 20th century
American courts have understood the public trust. But Rose seems to take the view that what is
inherently public may change with circumstances, and FARNHAM in his 1904 treatise on THE
LAW OF WATERS AND WATER RIGHTS, relying on the generally ignored Stuart Moore, (see note 45 supra) demonstrates that whatever consensus exists today on the inherently public nature of
tidal lands was not shared by the pre-19th century English. “There was no public sentiment or
rule of law to prevent [the King’s] . . . granting land covered by the water.” At 172.
139 Rose, supra note 16 at 749.
140 Id. at 761.
141 Id. at 769.
understanding of the importance of the unorganized public to community. In economic terms, 
she contends, there are significant rents realized by this unorganized public through commerce 
and other community activities dependent on public access to particular resources. When the 
public is excluded, these rents are foregone.

The public right to 'its' rent could assume several guises. An organized public 
could use eminent domain powers, paying for the underlying land at fair market 
value but appropriating to itself any additional rent granted by the 
nonexclusiveness and expandability of the public use. The 'unorganized' public, 
on the other hand, fell back on doctrines of inherently public property – public 
trust and public prescription. These doctrines allocated to the public only an 
easement for access; but the easement again released to the public its rent. Thus 
eminent domain and inherently public property were only variant assertions of the 
same public entitlement to the rents that publicness had created.142

While Rose’s argument elegantly bridges categories of common law taxonomy and offers 
a more than plausible economic rationale to support that bridge, it is doubtful that many courts 
were thinking in the terms she suggests. Of course we can never know what judges were really 
thinking, but based on what they wrote in their opinions it appears few had in mind the 
unorganized public’s entitlement to the rents created by community interaction. Rose 
acknowledges that many 19th century American courts rejected the claim that the unorganized 
public has rights that constrain the democratically elected legislature,143 but she turns to 
Blackstone and American courts relying on Blackstone for the idea that custom exists in parallel 
with laws enacted by Parliament or local legislatures.

Blackstone does speak extensively of custom, but largely as a source of the common law 
rather than as a limitation on Parliament or the common law courts. Blackstone’s examples of 
customary law relate almost entirely to private interests and to governmental processes and 
powers, not to notions of public right to which both Parliament and the courts must defer.144 For

142 Id. at 771.
143 Id. at 736. See discussion re democracy and the public trust doctrine, infra at text 
accompanying notes 247-251.
144 As examples of general custom Blackstone cites “the course in which lands descend by 
inheritance; the manner and form of acquiring and transferring property; the solemnities and 
obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the 
respective remedies of civil injuries, the several species of temporal offences, with the manner 
and degree of punishment; and an infinite number of minuter particulars, which diffuse 
themselves as extensively as the ordinary distribution of common justice requires.” Supra note 
91 at II-68. As examples of local custom Blackstone cites “in Kent . . . that not the eldest son 
only of the father shall succeed to his inheritance . . .; and that, though the ancestor be attainted 
and hanged, yet the heir shall succeed to his estate, without any escheat to the lord . . . [and] in 
divers antient boroughs . . . that the youngest son shall inherit the estate, in preference to his 
elder brothers, . . . [and] in other boroughs that a widow shall be intitled, for her dower, to all her 
husband’s lands, . . . [and] lastly, are many particular customs within the city of London, with 
regard to trade, apprentices, widows, orphans, and a variety of other matters.” Id. at 74-75.
Blackstone custom was a legitimating source for laws to be formalized mostly by courts and to some extent by Parliament, not an independent category of laws that could bind the courts and Parliament. Indeed, Blackstone states explicitly that “no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist.”

Rose’s suggestion that a concept of “inherently public” property underlies the public trust doctrine, even if the English origins of that doctrine are not quite what advocates have claimed, is not well supported by the history of the prima facie rule on which the modern trust doctrine relies. As demonstrated above, the Crown’s claim of title to submerged lands had nothing to do with protecting the public’s interest in navigating and fishing the overlying waters. Among the grievances leading to the execution of King Charles I in 1649 was the Crown’s taking, pursuant to the prima facie theory, lands that had been held in private hands for generations. It took three centuries for English law finally to embrace the Crown’s claim, though always made in the name of the public interest – hardly what one would call “inherently public” property.

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

Rose argues that “indefiniteness of the number and identity of users” is essential to these rights of the unorganized public, but much of the case law on public prescription relies on analogy to the law of private prescription which is centrally concerned with protecting the settled expectations of particular individuals. In answering her own query as to “[w]hy allow

145 Id., at I-76-77.
146 On the other hand, the prima facie theory may make more sense as an evidentiary presumption, if not a rule of title, in the United States. “The presumption of prima facie ownership by the state was more appropriate in the new American situation because rather than presuming ownership in the crown for purposes of augmenting the royal purse, the prima facie theory in American presumed ownership on behalf of the people.” Rasband, supra note 102 at 18.
147 Supra text accompanying note 95-103.
148 Rose, supra note 16 at 744.
149 “The rule thus being that the adverse user conclusively establishes the presumption of dedication to the public, – as, in the case of the individual, the prescriptive right establishes the presumption of a grant.” Schwerdtle v. Placer County, 108 Cal. 589, 596, 41 P. 448 (Cal. 1895); “The use of a way by the public for twenty years gives a prescriptive right of a public as well as a similar user does of a private way.” EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 199 (4th ed. 1885).
unorganized individuals to bind their governments to ‘accept’ roadways?” Rose suggests that “[t]he chief idea seems to have been to protect injured parties’ expectations.”\textsuperscript{150} It is certainly true that public rights acquired by prescription, or existing pursuant to public trust or custom, may be asserted by individuals unknown in advance of any legal action, but the context for judicial consideration of any claim will involve identifiable individuals whose expectations will be very much like those of individuals claiming a private prescriptive right. Certainly there were 19\textsuperscript{th} century American courts that employed the language of public rights, and perhaps a few of them even thought about the gains from community and interconnectedness such public rights would yield, but the adversarial approach of Anglo-American law allows judicial consideration of such lofty matters only in the context of particularized claims. One must have a self-interest to get a court’s attention, and to prevail one must have something in the nature of a private right, even if that right is held in common with others.\textsuperscript{151} Indeed, that is precisely the context of Arnold v. Mundy and every public trust case that followed.

\textit{Arnold v. Mundy}

Arnold v. Mundy is generally cited as the foundational case of public trust law in the United States.\textsuperscript{152} The case involved just one of many disputes over the right to take oysters in the tidal mud flats of the Rariton River at Perth Amboy in New Jersey. The plaintiff claimed that defendant had trespassed on his private oyster bed and taken away his oysters. Plaintiff’s claim of exclusive right in the oyster bed was founded upon a survey conducted pursuant to New Jersey law, his having planted and tended oysters in the bed, and a chain of title dating back to the 24 proprietors of East New Jersey who acquired title from the Duke of York who, in turn, acquired title in 1664 and 1674 from his brother Charles II, the King of England.\textsuperscript{153} The defendant claimed that plaintiff’s title extended only to the high water mark and that he had taken oysters pursuant to a right held in common with his fellow citizens to harvest oysters from the navigable waters of the state of New Jersey.

Writing for the New Jersey Supreme Court was Chief Justice Kirkpatrick, who had also ruled on the case at trial. “The great question in the cause,” said Kirkpatrick, is “[a]s to the right of the proprietors to convey.”\textsuperscript{154} Here he had reference to the 24 proprietors of East New Jersey who had been granted title in common to a significant part of New Jersey by the Duke of York,  

\begin{itemize}
\item \textsuperscript{150} Rose, supra note 16 at 734
\item \textsuperscript{151} An important distinction between prescription and custom in English law, said Blackstone, was “that custom is properly a \textit{local} usage, and not annexed to any \textit{person}.” Supra note 91 at II-263. But those who could claim a right of use in private property pursuant to custom were nonetheless a definite and limited number of individuals at any point in time. Even claims pursuant to constitutional rights held by all citizens must demonstrate personal interests, although sometimes those personal interests can be very attenuated. See, e.g., United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).
\item \textsuperscript{152} Supra note 36.
\item \textsuperscript{153} The history of land conveyances from the Crown through the 24 Proprietors to individual grants is recounted as determined by the jury in the Supreme Court’s decision in Martin v. Waddell, 41 U.S. 367, 370-80 (1842).
\item \textsuperscript{154} Supra note 36 at 48.
\end{itemize}
for the purpose of overseeing and encouraging the development of that portion of the colony. After confessing that he had not had sufficient time to consider the issue fully,\textsuperscript{155} Kirkpatrick concluded that the plaintiff did not have a private right in the oyster beds because the proprietors did not hold an alienable interest in those beds that they could have conveyed to plaintiff’s predecessors in title. Because all of the grants in the plaintiff’s claimed chain of title appeared on their face to convey the oyster beds,\textsuperscript{156} Kirkpatrick had to find that the original grant by Charles II to the Duke of York was invalid to the extent it purported to convey a proprietary interest in tidal lands.

Kirkpatrick found that the grant to the Duke of York was not of a private estate, but rather of all the powers of government and the crown, save the reserved power to hear appeals. Pursuant to those granted powers, the Duke could convey properties to individuals, but only under the same circumstances as could the King. The King’s powers in this regard were limited, and so therefore were the Duke’s powers. “Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth,” said Kirkpatrick. “But the nation does not possess all those things in the same manner.”\textsuperscript{157} He goes on to identify three kinds of property: private property that has been granted to individuals; public property (the crown or public domain) which has not been, but can be, granted to individuals; and common property which is for all to share. He cites Blackstone and Vattel in stating that common property includes “the air, the running water, the sea, the fish, and the wild beasts.”\textsuperscript{158} Because these are all resources “in which a sort of transient usufructuary possession, only, can be had,” and because they cannot “well be vested in all the people,” this common property is therefore in the sovereign power “to be held, protected, and regulated for the common use and benefit.”\textsuperscript{159} Kirkpatrick cites Hale and Bracton, as well as several English, cases in support of this description of common property. Following on Hale, he states that “[i]n navigable rivers, the fishery is common, it is prima facie in the king, but is public and for the common use.”\textsuperscript{160} Consistent with the widespread American misunderstanding of the English

\begin{itemize}
\item \textsuperscript{155} Though we have taken time since last term to look into it, yet I must confess, for myself, that I have not done so in so full and satisfactory a manner as could have been wished; and my apology must be, that during a very great part of the vacation, I have been necessarily abroad, attending to other official duties, and during the time I had assigned to myself for this purpose, I have been so much indisposed as not to be able very satisfactorily to attend to business of any kind. \textit{Id.}
\item \textsuperscript{156} The grant by Charles II to the Duke of York conveyed “all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, hunttings and fowlings, and all other royalties, profits, commodities and hereditaments to said islands, lands and premises . . . .” Quoted in Martin \textit{supra} note 153 at 370. The grant by the Duke of York to the 24 proprietors of East New Jersey conveyed “every part and parcel thereof, together with all islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises whatsoever . . . .” \textit{Id.} at 377.
\item \textsuperscript{157} \textit{Supra} note 36 at 49.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 50.
\end{itemize}
prima facie rule, Kirkpatrick takes it to be a rule of title rather than an evidentiary presumption. Understood as an evidentiary presumption placing the burden of proof on a claimant, the prima facie rule would necessarily imply that alienation is possible, and that would contradict Kirkpatrick’s holding in the case.

Kirkpatrick illustrates the difference between the public domain and common property by suggesting that a citizen cannot go into the king’s forests and harvest trees even though it is public property. The king’s forests, like all of the crown domain, exist for the personal use of the king and as a source of revenue for governmental purposes. Common property, on the other hand, is for the use of everyone. The king may not “appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.”

Having taken the absolutist position that the common property rights in navigable waters below the high water mark are inalienable by the king or any of his assignees, Kirkpatrick must explain the reality of many private claims to submerged lands in tidal waters, particularly in England. His explanation is two fold. First, grants dating from Henry II or earlier are legally valid, although for Kirkpatrick not morally legitimate. Exclusive fishing rights claimed as royal franchises pursuant to the royal prerogative were “considered by the people to be a usurpation of their ancient common rights.” This violation of public rights was “broken down and prohibited in [the] future,” by Magna Carta which was “nothing more than a restoration of the ancient common law.” The fact that counsel for the plaintiff provided evidence that “not only navigable rivers, but also arms of the sea, ports, harbours, and certain portions of the main sea itself upon the coasts, and all the fisheries appertaining to them [are] in the hands of individuals . . . [could not] be controverted,” was, for Kirkpatrick, only evidence of the continuing usurpation of the public’s rights, whether the claim of private right was based on royal grant or prescription. In looking to Magna Carta as the legal recognition of these public rights under English law, he relied upon Blackstone. However, the law was not so clear cut for Blackstone who felt compelled to explain the inconsistencies in the case law. “But the considering such right as originally a flower of the prerogative, till restrained by magna carta, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, may remove some difficulties in respect to this matter, with which our books are embarrassed.” Of Hale, who wrote three and a half centuries after Magna Carta that “the king may grant fishing within a creek of the sea . . . and may also grant a navigable river that is an arm of the sea, with
the water and soil thereof,” 167 Kirkpatrick insisted that “he must be understood as speaking of
the common law before it was confined and restrained by Magna Carta.” 168 But, suggested
Kirkpatrick, if Hale were understood to suggest that the king retained the power to alienate tidal
lands, waters and fisheries, it should be remembered that he, like Davies the reporter of the River
Banne case, were “disciples of Seldon, and converts to his doctrine of mare clausum,” 169 a
doctrine reflective of the positive law but not favorable to the public rights theory.

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

Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of
nature, which is the only true foundation of all the social rights; that by the civil
law, which formerly governed almost the whole civilized world, and which is still
the foundation of the polity of almost every nation in Europe; that by the common
law of England, of which our ancestors boasted, and to which it were well if we
ourselves paid a more sacred regard; I say I am of opinion, that by all these, the
navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of
the sea, including both the water and the land under the water, for the purpose of
passing and repassing, navigation, fishing, fowling, sustenance, and all the other
uses of the water and its products (a few things excepted) are common to all the
citizens, and that each has a right to use them according to his necessities, subject
only to the laws which regulate that use . . . . 170

There is little wonder the case has stood, with Illinois Central, as a beacon of modern
public trust theory. The rhetoric is grand and sweeping. But Kirkpatrick did play fast and loose
with English precedent and history. 171 In support of his understanding of the prima facie rule he
cites both the River Banne case and Carter v. Murcot, but neither case supports his view that the
rule simply establishes title in the crown as a sort of guardian (Kirkpatrick never uses the word
trust) for inalienable public rights. As the English Court said, five years after Arnold v. Mundy,
in Duke of Somerset v. Fogwell, the River Banne stood for the principle that because “general
words in a grant by the King would not pass such a special royalty, which belonged to the Crown
by prerogative. . . . [T]he grant of the King passes nothing by implication.” 172 This

167 HALE, supra note 74 at 384.
168 Supra note 36 at 51. Rasband, supra note 102 at 24 concludes: “Kirkpatrick’s
conclusion that after Magna Charta the crown lacked all power to grant land under navigable
water was inaccurate. The inaccuracy, however, did serve the useful purpose of clearing New
Jersey’s title to the foreshore.”
169 Supra note 36 at 51
170 Id. at 52.
171 “Arnold v. Mundy is an impressive display of judicial dexterity; [but] as history it is
nonsense.” Deveney supra note 26 at 56. “Kirkpatrick’s conclusion that after Magna Charta the
crown lacked all power to grant land under navigable water was inaccurate. . . [and] Arnold was
an exceptional departure from the prima facie theory recognized by other early courts and state
legislatures. . . .” Rasband, supra note 102 at 24-25.
172 The Duke of Somerset v. Fogwell, 5 B. & C. 875, 885 (1826).
understanding of the prima facie rule had been earlier recognized by Lord Mansfield in *Carter* where he stated “in navigable rivers, . . . the fishery is common: it is primâ facie in the King, and is public. If anyone claims it exclusively, he must shew a right. If he can shew a right by prescription, he may then exercise an exclusive right.”173 *Carter* was even quoted by Justice Rossell in *Arnold* to this effect: “[O]ne might prescribe for a several fishery, parcel of a manor, where the sea flows and reflows, but he must prove a right by prescription.”174 Rossell also quotes Hale on the same point:

In case of private rivers, the lords having the soil is good evidence to prove he hath the right of fishing, and it puts the proof on them who claim liberam piscariam. But in case of a river that flows and reflows prima facie it is common to all. If any claim it to himself, the proof lieth on his side; and it is a good justification to say, the locus in quo is a branch of the sea, and that the subjects of the king are entitled to a free fishery.175

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

It is more than a little ironic that when Kirkpatrick and Rossell were writing their opinions, the New Jersey legislature had already recognized that individuals could establish exclusive rights in certain oysters beds in state owned waters. An Act of June 9, 1820, authorized individuals owning lands adjacent to waters “wherein oysters do or will grow” (meaning tidal waters) to plant and have the exclusive right of harvesting oysters.176 Consistent with the English understanding of the *jus publicum*, the Act excepted waters leading to “any public landing” and prohibited obstruction to free navigation. Anyone violating these exclusive rights was subject to a fifty dollar penalty, half of which was to be paid to the person whose exclusive right was infringed. And the Act indicated that such exclusive, appropriative rights in oyster beds had been lawful at least since November 7, 1817.177 It is clear that the defendant in *Arnold* did not claim such an exclusive right, although he could make application for such a right under New Jersey law and he was the beneficiary of an exclusive right held by the community of Woodbridge in which he resided.178 Indeed it is not clear whether the defendant was claiming a

173  *Supra* note 77 at 2164.
174  *Supra* note 36 at 59.
175  *Id.*
177  A subsequent statute made it clear that owners of coastal lands in Newark Bay could license the right to exclusive oyster beds to third parties and that such exclusive claims were to be staked out in a particular manner. A Supplement to the act, entitled “An act for the preservation of Claims and Oysters,” passed on the ninth day of June, eighteen hundred and twenty, December 8, 1823, *ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY* 55 (1823).
178  See B. McCAY, *OYSTER WARS AND THE PUBLIC TRUST* 46-49 (1998). As we will see, the defendant in *Martin v. Waddell, supra* note 153, did make such a claim pursuant to legislation adopted three years after the *Arnold* decision. See discussion *infra* at note 181.
right shared with all citizens of New Jersey or a right exclusive to the residents of Woodbridge. In any event, it is clear that the idea of exclusive rights in tidal lands and fisheries was widely accepted in the state of New Jersey in the early 19th century, notwithstanding the rhetoric of Chief Justice Kirkpatrick’s opinion.

Finally, Kirkpatrick made the all important connection between the powers and responsibilities of the English crown and those of its successor sovereign, the people of the state of New Jersey. The people have “the legal title and the usufruct [and] may make such disposition of them, and such regulation concerning them, as they may think fit... [thru] the legislature [which] is their rightful representative in this respect.” The legislature may provide for all manner of public improvements for navigation and commerce, including fishing and oystering, “at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments.”179 But these considerable powers are

nothing more than what is called the jus regium, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.180

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

**Martin v. Waddell**

*Martin v. Waddell* is very similar to *Arnold* on its facts, with one major difference. In *Martin* the plaintiff claims an exclusive right under the same royal grants as did the plaintiff in *Arnold*, but the defendant also claimed an exclusive right under license from the state of New Jersey pursuant to an 1824 statute authorizing the state to grant exclusive rights in oyster beds in return for rents to the state.181 In writing for the majority of the United States Supreme Court, Chief Justice Taney took no notice of this fundamental difference between the two cases. A dissenting Justice Thompson did take note of the nature of the defendant’s claim, stating: “[I]f the king held such lands as trustee, for the common benefit of all his subjects, and inalienable as

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179 Id. at 53.
180 Id.
181 The statute and the defendant’s interest under that statute were before the Court in the verdict of the jury. *Supra* note 150 at 379-380. An act to encourage and regulate the planting of oysters in the township of Perth Amboy, November 25, 1824, *Acts of the Forty-Ninth General Assembly of the State of New Jersey* 28 (1824).
private property, I am unable to discover, on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals. 182 Justice Thompson’s conclusion was that Charles II must, therefore, have had the power to alienate a proprietary interest in the oyster beds in question, a conclusion with considerable support in the law, although not one that necessarily follows from the power of alienation existing in the New Jersey legislature. 183 A decade later in the case of Den v. Jersey Co. Chief Justice Taney relied on his Martin opinion in upholding a claim to reclaimed tidal lands based upon a grant from the New Jersey Legislature as against another private claim based on a grant from the Proprietors of east New Jersey. 184 There was no mention of common or public rights, although the case was indistinguishable from Martin v. Waddell. 185

While acknowledging that in England the crown was the appropriate organ of government to hold and dispose of the public domain, Chief Justice Taney introduced the trust concept to the Supreme Court’s navigable waters jurisprudence in his statement that “[t]he country mentioned in the letters-patent was held by the king in his public and regal character, as the representative of the nation, and in trust for them.” 186 But Taney did not have reference only to navigable waters and their submerged lands. His assertion was that all of the lands granted in the letters-patent by Charles II to the Duke of York, lands he describes as public domain, were held in trust for the nation. So his use of the term trust is very different from its modern usage in the context of what Hale defined as common property. Taney’s application of the term to all of the lands that would become the state of New Jersey means he could only have been speaking of the trust which all free peoples must have in their governments, not of a trust in the sense the term is used in modern public trust doctrine.

With respect to the particular oyster beds claimed by the plaintiff in the case, Taney cites Blundell v. Catterall 187 and Duke of Somerset v. Fogwell 188 in asserting that “the question must be regarded as settled in England, against the right of the king, since Magna Carta, to make such a grant.” 189 Neither case really supports Taney’s conclusion about English law.

In Blundell, the defendant sought to defend against an action in trespass by asserting a public right to bathe in the sea and to have access for that purpose across the foreshore. It is a puzzle why Chief Justice Taney cited the case as supportive of the conclusion that the king has no right to convey private interests in navigable waters and tidal lands. None of the four opinions in

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182 Supra note 153 at 432.
183 See discussion infra accompanying notes 217-221.
185 In Martin the legislature had created a licensing scheme under which the defendant acquired an exclusive right to plant and harvest oysters in tidal waters. In Den the legislature had chartered the defendant corporation for the purpose of granting it tidal lands to be reclaimed by filling.
186 Supra note 153 at 409.
188 Supra note 172.
189 Supra note 1503 at 410.
the case question that the plaintiff had exclusive rights to the shore and to the associated fishery. Nor did the defendant challenge those private rights. The defendant claimed only the right to bathe on the shore and to have access to the shore across the plaintiff’s property. Whether or not the plaintiff’s property interest had been granted before or after Magna Carta was not an issue, even for the one dissenting judge, Justice Best, who was prepared to embrace a common law right to bathe even if the only justification was public policy. Best did fairly state the concept of common property as defined by Hale in stating that the seashore “was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil.” This may have been the source of Chief Justice Taney’s use of the public trust terminology, but as Justice Bayley stated in response to Justice Best, while there is no doubt a jus publicum, “the question in this case is, what the jus publicum is.” Neither Bayley nor his other two colleagues could find any support for the jus publicum including the right to bathe claimed by the defendant. What is important about Blundell for modern public trust analysis is Justice Bayley’s recognition that the scope of the jus publicum was not defined by Hale in his oft cited treatise and that Justice Best’s willingly expanded the common law definition on the basis of his assessment of good public policy. Taney, following the lead of the New Jersey court in Arnold, was apparently willing to embrace the Best approach.

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

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

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190 “[U]nless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance.” Supra note 187 at 287.

191 Id.

192 Id. at 308.

193 Supra note 121 at 877.

194 Id. at 875.

195 Id.
For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual, in trust for the whole.  

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

To determine the validity of the jus publicum claim, Taney asked “[w]hether the [king’s] dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred on the duke?” And if so, “[w]hether, in his hands, they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit?” The latter question is not, said Taney, to be answered as if we are interpreting a mere deed or other document of conveyance. “It was an increment upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.” As the questions were posed by Taney, there could be only one answer. No one doubted that public rights in navigable waters existed as the jus publicum. If what the Duke of York received from Charles II was either a proprietary interest in those waters and submerged lands or a responsibility to preserve the public’s right of use, the public right would prevail and no grants of exclusive rights could be permitted. For Taney, either the Duke received a proprietary interest or he held the waters and lands “as one of the royalties incident to the powers of government.” But those alternatives did not reflect the laws of England at the time. Justice Taney could claim not to be interested in the laws of England, but the reality was (and remains) in a rule of law system bridging the sovereignty of two nations that the laws of the earlier sovereign continue to matter. Hence the persistent return to English law in modern discussions of the public trust doctrine in American jurisdictions.

Justice Thompson, in dissent, ably explains how Taney has misunderstood or distorted the laws of England and of New Jersey as evidenced by the dependence of the state on private

196 Supra note 153 at 410-11.
197 Id. at 411.
198 Id.
199 Id. at 412.
200 Id. at 413.
enterprise pursued on submerged lands that have been granted by the Duke and his successors in title. "A majority of the court seem to have adopted the doctrine of Arnold v. Mundy," says Thompson, which was based on the "broad proposition, that the title to land under the water did not, and could not, pass to the Duke of York, as private property. . . . It is worthy of observation," he suggests, "that the course of New Jersey in relation to this claim is hardly consistent with her pretensions." Amidst those pretensions, he points out, is the very law upon which the defendant rests his claim. "The enacting clause [of that legislation] authorizes the setting apart the oystery to exclusive private use, when, by the proviso, no obstruction is to be made to the fisheries."

Where Taney got the law of navigable waters and fisheries wrong, the New Jersey Legislature got it right in that simple enacting clause. It is not a choice between public and private rights. Rather private rights can and do exist, subject to the jus publicum, and when grants of submerged lands and fisheries are made by the king or his assignee they must be explicit and will not be implied. Thompson has reference to Hale in stating that the "king of England hath a double right in the sea, viz. A right of jurisdiction, which he ordinarily exercises by his admiral, and a right of propriety or ownership." By the letters of patent of 1664 and 1674 the Duke of York received both and there was no necessity, as Taney suggested, to convert the "jura regalia . . . into private property." "The true rule on the subject is," said Thompson, "that primâ facie a fishery in a navigable river is common, and he who sets up an exclusive right, must show title, either by grant or prescription." Thompson further suggested that it was not clear from the majority opinion what was different about drylands. If the Duke of York received only the jura regalia from Charles II, how was it possible for most of the drylands in the state to have come into private ownership? Of course Taney had no thought that the Duke lacked sufficient proprietary interest to convey the dryland, but his argument that wetlands could not be privately owned because of their special public values made it difficult to explain why drylands, many of which had equal or greater public value, could be granted and privately owned.

Arnold Overruled

Although Taney’s majority opinion in Martin v. Waddell relied heavily on the New Jersey court’s opinion in Arnold v. Mundy, the New Jersey court overturned its decision only eight years later in Gough v. Bell. Not surprisingly, Gough is seldom cited in the public trust literature. Of 128 articles published since 1982 that cite Arnold, only 11 cite Gough and two of those mistate

201 Id. at 419.
202 Id.
203 Id. at 420-21.
204 Id. at 422.
205 Id. at 413.
206 Id. at 424.
207 Id.
208 22 N.J.L. 441 (SUP. CT. 1850).
the holding in the case. But notwithstanding the extensive modern reliance on Arnold, the fact of the matter is that it was not good law in New Jersey after 1850. Indeed every indication in the three decades separating the two opinions was that it was never good law. In overruling Arnold, Chief Justice Green noted that:

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

Quoting his predecessor’s holding in Arnold that “the sovereign power itself cannot . . . make a direct and absolute grant of the waters of the state,” Chief Justice Green stated:

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

Among the authorities cited by Green were Chief Justice Shaw of the Massachusetts Supreme Court who held in Charlestown v. Middlesex “that a navigable stream may cease to be such, by the appropriation of the soil under legislative authority to other purposes,” and Chief Justice John Marshall who stated in Willson v. Black Bird Creek Marsh Co. that “unless it comes in conflict with the constitution or a law of the United States [which he found it did not],” the placing of a dam in a navigable waterway “is an affair between the government of Delaware and


210 It may be suggested that the holding in Arnold was restored in 1972 in the case of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972) in which the New Jersey court quoted extensively from Chief Justice Kirkpatrick’s opinion. But the Neptune City case did not involve the alienability of tidal lands and in any event the Court agreed in dicta that such lands could be alienated if “promoting the interests of the public” or if there is no “substantial impairment of the public interest in the lands and waters remaining.” at 308.

211 Supra note 208 at 13.
212 Id.
213 44 MASS. 202, 203 (1841).
its citizens."  

Marshall concluded his very short opinion in *Willson* with a footnote that included the entirety of Justice Baldwin’s opinion on behalf of the Circuit Court for the Eastern District of Pennsylvania in *Atkinson v. Philadelphia and Trenton Railroad Co.* in which Baldwin stated that “[t]his common right [of public access to a navigable waterway] is as much under the protection of the law, as a right of property in a citizen, . . . but it is a right derived from legislation, which may be abridged or modified . . . as may be thought most conducive to the public welfare, by authorizing the erection of bridges or dams, which may subject the navigation to partial interruption, or wholly destroy it.”

It should be noted that Chief Justice Green’s statement of the law on state alienation of submerged lands is very similar to Justice Field’s explanation of the law in *Illinois Central*, notwithstanding the heavy modern reliance on *Illinois Central* for a near total limit on alienation.

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

The court elaborated on its understanding of the legislative power:

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

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214 27 U.S. 245, 251 (1829).
215 2 FED. CAS. 105, 107-08 (1834).
216 See discussion *infra* accompanying notes 230-235.
217 *Supra* note 208 at 12.
name and in their stead. The act of the legislature is the act of the people, not that of a mere trustee holding the legal title for the public good.\textsuperscript{218}

The same point was made by the Virginia Supreme Court of Appeals in \textit{James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.}\textsuperscript{219} At issue was title to lands underlying a navigable river, the James. Title was claimed pursuant to grants made by the state to predecessors in title. The Virginia court had many years earlier stated in \textit{Home v. Richards} that the bed of a navigable river could not be granted.\textsuperscript{220} The reality in \textit{Home} was that the prevailing party was permitted to construct a dam across a portion of the Rappahannock River, whether or not he had title to the bed, which depended upon whether or not the river was navigable. Thus, the Court’s declaration that the bed of a navigable river could not be granted did not mean that individuals might not possess usufructuary rights in the water and bed as an attribute of ownership of riparian land of under license from the state. Notwithstanding this caveat relative to the \textit{Home} decision, there was an important difference between that case and \textit{James River}. In \textit{Home} the grant in question had been made by the crown. In \textit{James River} the grants were made by the Virginia legislature. The \textit{James River} court held that the state could grant private title to lands beneath a navigable waterway and stated that:

Undoubtedly there are certain public uses of navigable waters which the state does hold in trust for all the public, and of which the state cannot deprive them, such as the right of navigation, but, subject to these public rights, there is no reason why the beds of navigable streams may not be granted, unless restrained by the Constitution. The Legislature is the representative of the people in such matters, and may exercise full power over the property of the state, except so far as that right has been ceded to the federal government, or is restrained by the state Constitution.\textsuperscript{221}

\textit{Illinois Central Railroad v. Illinois}\textsuperscript{222} is the “lodestar”\textsuperscript{223} of modern public trust doctrine for much the same reason that Justinian provides the Roman law foundation and Bracton and Hale the English common law foundation. The case has been badly misunderstood and its holding distorted. We know that the case has been misunderstood thanks to the meticulous historical work done by Professors Kearney and Merrill.\textsuperscript{224} We know that its holding has been distorted by reading Justice Field’s opinion carefully. More than a century later, the misunderstandings and distortions matter little to modern public trust law, but there are nonetheless lessons to be learned from getting the facts and the law straight.

\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.}, 138 Va. 461 (1924).
\textsuperscript{220} \textit{Home v. Richards}, 8 Va. 441 (1798).
\textsuperscript{221} \textit{Supra} note 219 at 469.
\textsuperscript{223} Sax, \textit{supra} note 1 at 489.
The usual story goes like this. Like many other railroads in the United States, the Illinois Central was granted a right-of-way by the United States government along with significant land grants to subsidize the costs of construction. The State of Illinois issued a charter to the railroad permitting it to operate within the state. The City of Chicago came to agreement with the railroad, not without controversy, that the tracks would run along the lakeshore. Subsequently, so the story goes, the Illinois Central stole the entire lakeshore and harbor of the city by getting friends in the Illinois legislature to grant the company 1000 acres of submerged lands along the city’s existing harbor and lakeshore. Only a few years later, the Legislature recognized the error of its ways and revoked the land grant. The Illinois Central challenged the revocation as a violation of their federal constitutional rights under the contracts and 14th Amendment due process clauses. When the case finally reached the United States Supreme Court, Justice Field recognized the scandal of the Illinois Legislature’s giveaway to big business of the public’s rights and held that the Legislature was not competent to grant the lands to Illinois Central because the public trust doctrine prohibited alienation. Absent Justice Field’s recognition of the ancient public trust doctrine, the growth and development of a great American city would have been subject to the whims and desires of a powerful, private monopoly.

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

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225 Kearney & Merrill suggest that this “standard narrative” had its roots in Professor Sax’s telling of the story in his 1970 article. They also suggest that the standard narrative has been embraced both by proponents and opponents of the modern doctrine.

Sax's account of the facts underlying Illinois Central has remained influential among commentators, especially those who place more faith in collective than in market-based solutions to problems of environmental degradation. But to a remarkable degree, an identical narrative also underlies the accounts of the public trust doctrine advanced by scholars sympathetic to private property and market ordering and hence generally skeptical about the doctrine. Id. at 808.

226 Id. at 931.
227 Id. at 927.
228 Id.
229 Id. at 925.
stymie the development and growth of Chicago, including the development of the submerged lands for commercial advantage, they would have worked out a solution without the aid of the Supreme Court. Nor did Justice Field have preservation of the lakefront in mind.

The story Kearney and Merrill tell of Illinois Central does not "suggest that the public trust doctrine is necessarily a bad idea or a good one. But it does suggest that the doctrine should be assessed using arguments more probing than a retelling of the standard narrative of the Illinois Central case. That story is a fable, and can justify the doctrine only if we already believe in it for reasons independent of the lesson the case supposedly teaches." Many modern advocates of the expanded public trust doctrine are such believers because they see the doctrine as their best hope to stop development in its tracks. For them, the fable of big business versus the common rights of ordinary people is a far better foundation for the doctrine than is the reality of power politics that Kearney and Merrill recount.

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

230 Justice Field did suggest that pursuant to the land grant Illinois Central had the power “to delay indefinitely the improvement of the harbor,” but no one had realistic fears that the company would do so. Supra note 222 at 451.
231 “A widespread consensus existed in the second half of the nineteenth century about the need for a new depot and a new outer harbor. The main point of controversy was over what form the development would take and who would control it, not whether there should be any development of the lakefront at all.” Supra note 224 at 925.
232 His public trust doctrine was designed to preserve access to the lake for commercial vessels at competitive prices, not to preserve Lake Park or the shoreline from further economic development. Moreover, Justice Field was not alone in these preferences among the federal judges who ruled on aspects of the controversy. When the dust finally settled, all of the Illinois Central’s massive landfills and improvements had been ratified by the federal courts as being consistent with the nebulous trust identified in Illinois Central. Thus, the public trust doctrine, as invoked in the Illinois Central litigation, was scarcely an anti-development doctrine. Id.
233 Id. at 930.
234 It is the settled law of this country that the ownership of an dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states . . . with the consequent right to use or dispose of any portion thereof, when that can be done
without substantial impairment of the interest of the public in the waters . . . supra note 222 at 435.

It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the land and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. *Id.* at 452.

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *Id.* at 453.

The state can no more abdicate its trust over property . . . like navigable waters and soils under them, . . . except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers . . . *Id.*

The trust with which they are held . . . cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. *Id.* at 454-55.

235 “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.” *Id.* at 452.
That the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.236

Field later explains that these lands are “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”237 So the import of Illinois Central when it was decided was that the state had considerable discretion in meeting its trust responsibilities with respect to navigable waters and submerged lands. It could alienate lands for purposes related to the promotion of navigation and commerce. It could alienate land for any private purpose so long as it did not interfere with the public interests in navigation, commerce and fishing. However, the alienation of most of the then present and future harbor of the City of Chicago could not be done consistent with these trust responsibilities. The permitted alienations, wrote Justice Field, reflect “a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake.”238 This narrow limitation on the state’s power to alienate submerged lands is precisely the same limitation articulated a half century earlier by New Jersey Chief Justice Green in Gough v. Bell.239

In reaching his decision, Justice Field relied upon Hale’s explanation of English law and the English court’s application of that law in Blundell v. Catterall as recounted in the New York case of People v. Ferry Co. The New York court stated, correctly, that “[t]he king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge.”240 He also cited Martin v. Waddell, noting that Chief Justice Taney there relied heavily on Arnold v. Mundy as a case “in which the decision was made ‘with great deliberation and research,’”241 notwithstanding that Chief Justice Kirkpatrick had apologized for failing to devote adequate consideration to the case.242 From Arnold Justice Field drew the conclusion that “[t]he sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.”243

In quoting this statement, Field opened the door to a confusion that has persisted to the present day, although Justice Shiras’s dissent made clear that the grant to the Illinois Central did

236 Id. at 437.
237 Id. at 452.
238 Id. at 452-53.
239 Supra, note 208.
240 Supra note 222 at 458, quoting from People v. Ferry Col, 68 N.Y. 71, 76 (1877).
241 Id. at 456.
242 Supra note 155.
243 Supra note 222 at 456.
not in any way affect the sovereign powers of the state. The sovereign power of the state, what Hale called the *jus regium* and we call the police power, is not the same thing as the public trust, or *jus publicum* in Hale’s terms. The former are the powers inherent in all governments, subject to any self-imposed, usually constitutional, constraints. The latter are rights held in common by all citizens in the nature of an easement upon the *jus privatum* whether held by the state or by individuals. Field had earlier hinted at this confusion when he wrote that “[t]he state can no more abdicate its trust over property . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.” Although he was correct that, under English law, neither could be abdicated, the statement seemed to suggest that the state’s responsibilities with respect to the *jus publicum* were of the same nature as its responsibilities under the *jus regium*. The confusion was further amplified by the implication from Arnold that alienation of state property in submerged lands (*jus privatum* with title in the state) was itself a breach of the state’s trust responsibilities under the *jus publicum*. But the *jus publicum*, properly understood, existed as an easement in properties in navigable waters and submerged lands whether held by the state or by private individuals. By the time of *Illinois Central*, this misunderstanding of the *jus publicum* had already become ingrained due to the conclusion that control of navigable waters arose from ownership of the underlying lands. Title to the submerged lands under Lake Michigan, wrote Field, “necessarily carries with it control over the waters above them, whenever the lands are subjected to use.” But the original understanding of the *jus publicum* denied the truth of this assertion by holding that without regard to ownership of submerged lands, the public had certain rights in the use (and therefore control to that extent) of the overlying waters.

Nowhere in Field’s opinion is there a suggestion that the law might be different in the democratic states of the United States than it was in the English monarchy. The assumption seemed to be that the democratic legislature of Illinois was subject to the same constraints on alienation of state property as was the king of England. This made sense, it was thought, because “‘prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest.’” Given this understanding of the nature

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244 “[I]t is not pretended, in this view of the case, that the state can part, or has parted, by contract, with her sovereign powers. The railroad company takes and holds these lands subject at all times to the same sovereign powers in the state as obtain in the case of other owners of property.” *Id.* at 474. This fundamental distinction between the state’s proprietary interests and its sovereign powers was well understood by 19th century American courts. In the 1877 case of *People v. New York and Staten Island Ferry Co.*, the New York Court of Appeals stated that “[t]he grantee [of submerged tidal lands] acquires the title to the soil and the State cannot annul the grant, and the grantee, by virtue of his proprietary interest, can exclude any other person from the permanent occupation of the land granted . . . But the State does not . . . divest itself of the right to regulate the use of the granted premises in the interest of the public and for the protection of commerce and navigation.” 68 N.Y. 71, 79 (1877).

245 *Id.* at 452.

246 *Id.* at 457. Here, Field was quoting from Justice Bradley in *Stockton v. Baltimore and N.Y. Railroad Co.*, 32 Fed. Rep. 9 (C.C.N.J. 1887). Bradley’s statement that the king acquired title by right of conquest is different from Chief Justice Taney’s insistence in *Martin* that title was acquired by right of discovery. *Supra* note 153 at 409.
of the state’s interest in navigable waters and submerged lands, it is probably not surprising that
Illinois Central represented a preference for the judiciary, rather than the legislature, having the
last say on the alienation of lands affected with the public trust. “What happened in Illinois
Central, according to the standard narrative, tells us that elected officials cannot be trusted with the
power to dispose of certain kinds of resources. If we are to protect the public interest in these
resources effectively, we must resort to some kind of judicially enforced inalienability rule.” 247
Justice Field confirmed this distrust of the legislature in stating that even if the legislature was
competent to make the grant of submerged lands, it was “necessarily revocable.” 248 Otherwise,
“every harbor in the country [would be] at the mercy of a majority of the legislature of the state in
which the harbor is situated.” 249 But this view totally ignores both the core idea of the American
Revolution and the reality of Parliament’s powers in the monarchical republic from which the
United States achieved its independence. As a dissenting Justice Shiras stated in Illinois Central:
“It would seem to be plain that, if the state of Illinois has the power, by her legislature, to grant
private rights and interests in parcels of soil under her navigable waters, the extent of such a grant,
and its effect upon the public interests in the lands and waters remaining, are matters of legislative
discretion.” 250

Perhaps the most puzzling aspect of the 19th, and even 20th, century caselaw and
commentary on the public trust doctrine is its almost universal failure to distinguish between the
powers and responsibilities of the crown and those of the state and federal governments formed
after the Revolution. It is a failure that has infected other areas of American law including,
notably, the law of sovereign immunity. Why should we assume that abuses by the crown will be
abuses by the elected legislature? Is not the theory of popular sovereignty that individuals have
both rights and responsibilities in a civic community, and that democratic governance is the best
available means for assuring that actions taken in the name of the public will most likely serve the
public interest while respecting individual rights and fairly distributing the responsibilities of civic
life? Yet the theory of the public trust doctrine, as we have come to understand it from our reading
of Illinois Central, seems to be that we must rely upon the courts (including the unelected federal
courts) to assure that the legislature does not violate the common (not individual) rights of the
citizenry. Unless the common rights represented by the jus publicum are understood to be
individual rights held in common by all citizens and enforceable by each citizen acting on his
personal behalf (like a tenancy in common), the jus publicum must be understood to be the rights
of the public as an entity. 251 It is one thing to conclude that the king cannot be trusted to respect
those rights. It is quite another thing to suggest that the legislature, which has been elected by the
public to act on behalf of the public, cannot be trusted to respect the public’s rights. English law,
on which modern public trust advocates rely, clearly understood this fundamental distinction.

247 Kearney & Merrill, supra note 224 at 803.
248 Supra note 222 at 455. Field’s discussion of the revocability of the grant suggests some
uneasiness with his earlier conclusion that the legislature was not competent to make the grant in
the first place. But the idea that a grant intended to facilitate private development of the harbor
was revocable without constitutional consequence defied logic. No private enterprise would
invest in such project without greater security than that.
249 Id.
250 Id. at 467.
251 See discussion infra accompanying note 2564.
“What the king alone might not be able to do after 1701 [date of an act by Parliament declaring all prospective royal grants invalid] has never been beyond the power of the king and Parliament together to do, or beyond the power of Parliament alone.”

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

**From *Illinois Central* to Phillips Petroleum**

Although *Illinois Central* is today the lodestar of the public trust doctrine, its impact on the law in the decades following the decision was limited. The case was extensively cited in state court opinions for the general notion of a public right to navigation, commerce and fishing in navigable waters, but it had little effect on state law with respect to the alienation of submerged lands under those waters. Most conveyances of submerged lands would have passed muster under *Illinois Central* had they been challenged in federal court, but the reality was that disputes over title to submerged lands were generally agreed to be matters of state law for resolution by state

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252 Deveney, *supra* note 26 at 50. In the case of King v. Montague, 107 Eng Rep 1183 (K.B. 1825) Justice Bayley wrote:

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

253 *Supra* note 222 at 475.

254 *Id.* at 474.

255 *Id.*
courts. Indeed the nature and extent of the public trust in navigable waters were understood by everyone, including the United States Supreme Court, to be questions of state law.

That it was a question of state law was made clear in *Appleby v. City of New York,*256 the next case in which the Supreme Court addressed the public trust doctrine. The 1926 case is seldom cited today, either in the case law or in the public trust literature, but it remains important for two reasons. First, in deciding for the private claimant of submerged land granted by the city pursuant to state authorization, *Appleby* underscored that *Illinois Central* was not a prohibition on alienation of such lands. Second, Chief Justice Taft’s opinion is filled with citations to New York law. Justice Field’s opinion in *Illinois Central* cites only two Illinois cases, neither for the purpose of evidencing the law of Illinois on title to submerged land under navigable waters or any public trust responsibilities of the state with respect to such lands.257 Because Justice Field paid no heed to Illinois law in *Illinois Central* and because that case is the focal point of modern public trust analysis, there has been much recent discussion of the sources of the public trust doctrine and it has been suggested by a few modern commentators that the public trust doctrine is rooted in federal law, if not in the federal constitution.258 If we looked to *Appleby* rather than *Illinois Central,* we would understand that whatever the public trust doctrine is, it is a question of state law.

*Appleby* is also of interest in any historical analysis of *Illinois Central* because it involved a private claim of title to submerged lands in an important public harbor and because the claim, like *Illinois Central’s,* was based on the contract clause of the United States Constitution. Chief Justice Taft began his opinion in *Appleby* with the statement that “the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself . . . is a state question, and we must determine it from the law of the state. . . .”259 Taft’s sincerity on this point might be questioned since he went on to reverse the decision of the state’s highest court on this question of state law, but he had a sound justification for considering New York law anew in the Supreme Court. The

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

257 The cases were cited in the context of the City of Chicago’s claims to the soil under platted streets, alleys, ways, etc.. Ironically, one of the cited cases did involve submerged lands on an apparently navigable river and the Court stated that the riparian landowner owned submerged lands to the center of the river, contrary to Justice Field’s assertion that the state had title to all submerged lands under navigable waterways. Trustees v. Havens, 11 ILL. 554, 556 (1850). The other case had nothing to do with submerged lands but did state with respect to the city’s trust responsibilities in relation to public streets that the legislature had discretion to determine how best to meet those responsibilities. Chicago v. Rumsey, 87 ILL. 348, 354 (1877).

258 See, e.g. Wilkinson, *supra* note 19 at 460, fn 144. Wilkinson notes that “[t]he *Appleby* ruling contains an involved and comprehensive analysis of New York state law and state court decisions, in contrast to the very limited treatment of Illinois authority in *Illinois Central.*”

259 *Supra* note 256 at 409.
Court had long made an exception to its normal rule of deferring to state court interpretation of state law in contract disputes where the state is a contracting party.\textsuperscript{260}

In 1852 and 1853 the City of New York conveyed to Appleby fee simple title to a significant area of submerged lands for the purpose of Appleby’s undertaking to fill those lands for commercial, residential and public purposes. It was “an excellent example of nineteenth century legislative attempts to achieve desired social goals, in the absence of an adequate tax structure, by utilizing private capital.”\textsuperscript{261} Out of concern for unobstructed navigation on the Hudson River, the state subsequently established a line beyond which fill would not be permitted. The effect was to reduce by roughly half the land available to Appleby for filling. The City then undertook a policy to condemn and take by eminent domain all of the privately owned wharf property and water lots within its boundaries and to construct wharves at public expense, including two wharves adjacent to Appleby’s lands which had not been condemned. When the City curtailed its condemnation program in 1914, Appleby sued for trespass and sought an injunction to stop the dredging of his submerged lands adjacent to the public wharves. Appleby prevailed in the trial court but that opinion was reversed in the New York Court of Appeals. He then filed his contract clause claim in the United States Supreme Court.

Although Taft’s opinion for the unanimous court was, for the most part, a careful analysis of New York law, he did comment briefly on the broader issues addressed in \textit{Illinois Central}. He confirmed that “[u]pon the American Revolution, all the proprietary rights of the crown and Parliament in and all their dominion over lands under tidewater vested in the several states, subject to the powers surrendered to the national government. . . .”\textsuperscript{262} On the question of the state’s power to alienate those lands he relied on \textit{Lansing v. Smith} for the principle of New York law that:

> [T]here can be no doubt of the right of the right of Parliament in England, or the Legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual.\textsuperscript{263}

\textsuperscript{260} Taft cited several cases is support of this exception including Jefferson Bank v. Skelly, 66 U.S. 436 (1861) in which the court stated:

We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions have been conclusive upon this court, \textit{with a single exception}, and that is when it has been called upon to interpret the contracts of States, ‘though they have been made in the forms of law,’ or by the instrumentality of a State’s authorized functionaries, in conformity with State legislation. at 443.

\textsuperscript{261} Deveney, \textit{supra} note 26 at 71-72.

\textsuperscript{262} \textit{Supra} note 256 at 381.

\textsuperscript{263} \textit{Id.} at 382, quoting from 4 Wend. (N.Y.) 9 (1829).
The last sentence of the statement from *Lansing* has particular significance to the New York court’s understanding of the nature of the *jus publicum*. It is a common right, perhaps in the nature of a joint tenancy, but certainly not in the nature of a tenancy in common. Indeed, the *Lansing* court went on to state that “the Legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large: Provided they do not interfere with vested rights which have been granted to individuals.”

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

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

Under New York law, concluded Taft, the legislature may alienate fee simple title to submerged tidal land including “exclud[ing] itself from its exercise as sovereign of the *jus publicum* (that is, the power to preserve and regulate navigation),” but that such alienation of public rights will be found only “upon clear evidence of its intention and of the public interest in promotion of which it acted.”

Relying on another New York case which held that, having granted both the submerged land on which to construct a wharf and the easement of wharfage (navigation) adjacent to that wharf, the City could only restrict that easement of wharfage by condemnation, Taft said “it follows necessarily that it [the legislature] may by an absolute deed of land under water, with the right of the grantee to fill it, part with its own power to regulate the navigation of water over this land. . . .”

Taft finally did get to a discussion of *Illinois Central*, and found it to be a case unlike any of those he had discussed under New York law. He summarized Field’s holding in these terms: “It was held that it was not conceivable that a Legislature could divest the state of this absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power. . . .” He noted that it “was necessarily a statement of Illinois law,” notwithstanding that Field had no resort to Illinois law, and acknowledged that it had been widely cited with approval including by the New York courts. Taft mentioned two New York cases that relied upon *Illinois Central* in invalidating grants of submerged lands to private parties. Both involved most of the land in a particular region and both confirmed that the legislature nevertheless had the power to make such grants if it “can fairly be said to be for the public benefit.” But none of that altered the Court’s unanimous holding

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264 *Id.*
265 *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 77-78 (1877).
266 *Supra* note 256 at 384.
267 *Id.* at 388-89.
268 *Id.* at 393.
269 *Id.* at 395.
270 The same language appeared in both cases. *Coxe v. State*, 144 N.Y. 396, 406 (1895) in which the state had granted to a private company the right “to reclaim and drain all or any
that Appleby’s contract with the state of New York had been impaired in contravention of the contract clause of the United States Constitution. There can be little doubt, based on both Appleby and Illinois Central, that had the Illinois Legislature’s grant to Illinois Central Railroad been for particular parcels in the Chicago harbor for the purpose of facilitating the development of the railroad or of associated commercial activity it would have been upheld. Illinois Central was an exceptional case yielding an exceptional result.

Since Appleby, the Supreme Court has cited Illinois Central in less than a handful of cases, only one of which addresses the constraints imposed on states by the public trust doctrine. That case, Phillips Petroleum v. Mississippi, has been of assistance to those seeking to release the doctrine from its “historic shackles,” although with concrete results contradictory of the broad environmental protection objectives generally thought to benefit from an expansive application of the doctrine. Phillips Petroleum involved a dispute over the ownership of land lying under non navigable waters affected by the tides. Mississippi claimed title to the lands on the basis of the equal footing doctrine pursuant to which “new states admitted to the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.” Phillips Petroleum claimed title to the same lands based upon recorded titles, property tax payments over many years and a demonstrated chain of title dating back over 150 years to Spanish land grants predating the United States’ acquisition of territory that would become the state of Mississippi. The supreme irony of the case is that the State of Mississippi did not assert its claim of ownership on the basis of its desire to protect the traditional public uses of navigable waters, nor on the basis of a concern for the ecological integrity of those waters as the modern advocates of the public trust doctrine would have it. The State’s “belated and opportunistic” interest in the lands was based on its desire to derive revenue from the lease of those lands for petroleum development. Like the 17th century English Crown’s reliance on Thomas Digges’ prima facie rule, Mississippi relied on a legal doctrine with no basis in English law and contrary to the settled expectations of generations of property claimants. Adding to the irony is the fact that the Mississippi Mineral Lease Commission identified the lands at issue from a survey conducted pursuant to the Mississippi Coastal Wetlands Protection Law.

portion of the wet or overflowed lands and tidewater marshes on or adjacent to Staten Island and Long Island.” Long Sault Development Co. v. Kennedy, 212 N.Y. 1, 8 (1914) in which “the Legislature of New York attempted to give complete control of the navigation of the St. Lawrence river in the region of Long Sault Rapids, to a private corporation. . . .” Supra note 256 at 396.


Supra note 99 at 474, quoting from Shively v. Bowlby, 152 U.S. 1, 57 (1894). For more on Shively, see discussion infra accompanying notes 275-293.

Id. at 492 (O’Connor dissenting).

See supra at note 102.

Supra note 102 at 492.
But these facts did not prevent environmental advocates from supporting Mississippi’s claim or from celebrating the majority holding in the case.\textsuperscript{276} While some amount of tidal lands would be subjected to the impacts of oil and gas development,\textsuperscript{277} governments everywhere have a new Supreme Court opinion to support uncompensated environmental regulations on lands understood for generations to be private property. For advocates of an expanded public trust doctrine, the bad news of oil and gas development on some tidal lands in Mississippi was well offset by the good news that, in the words of dissenting Justice O’Connor, “[t]he Court’s decision today could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs.”\textsuperscript{278} While high-minded statements of public interest generally undergird public trust claims by both government and those advocating constraints on development, the prospect of circumventing the constitutional requirement of compensation for takings of private property is often what motivates the claim. In a lapse of rare candor in another of the Supreme Court’s few public trust cases, the City of Los Angeles “indicated that it wanted to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner’s property.”\textsuperscript{279} Therein lies the nub of the debate over the public trust doctrine and the reason that it has often been framed as a debate over title to land and resources rather than an inquiry into the nature and scope of public rights and the state’s responsibilities with respect to those rights as it was under Roman and English law.

VI. State Ownership and the Public Trust

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

State Ownership of Submerged Lands

Given the Court’s holding in \textit{Phillips Petroleum}, it is probably not surprising that Justice White embraced the oil company’s assertion that “the ’seminal case in American public trust
jurisprudence is *Shively v. Bowlby.*"\(^{280}\) Justice White does cite *Illinois Central,* but only for having restated the equal footing doctrine from *Shively\(^{281}\) and in support of the assertions that tidewater and navigability were “synonyms at common law”\(^{282}\) and that “lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union.”\(^{283}\) *Shively,* indeed, was more relevant to *Phillips Petroleum* than was *Illinois Central* because, like *Phillips Petroleum,* *Shively* was concerned with a title dispute as opposed to an inquiry into the limits on state power to alienate submerged lands. In *Shively* it is not questioned that the state of Oregon has the power to grant exclusive title to submerged lands. Rather the issue is whether or not the United States government had the authority to grant submerged lands in the Oregon Territory prior to the creation of the state of Oregon.

At issue in *Shively* was title to submerged lands in the Columbia River adjacent to the town of Astoria, Oregon. *Shively* claimed title on the basis of his predecessors in title having recorded a claim in 1854 under the Oregon Donation Act of 1850 and that claim having been patented by the United States in 1865. *Bowlby* and co-plaintiff *Parker* claimed on the basis of a deed issued by the Board of School Land Commissioners of the State of Oregon pursuant to an Oregon statute enacted in 1874. The Oregon Supreme Court concluded that the United States had no authority to grant lands below the high water mark and found for *Bowlby* and *Parker.* The United States Supreme Court agreed in a unanimous opinion by Justice *Gray.*

Noting “diversity of view as to the scope and effect of the [Supreme Court’s] previous decisions . . . upon the subject of public and private rights in lands below high-water mark of navigable waters,” Justice *Gray* finds it “a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject.”\(^{284}\) He discusses the English common law and concludes, consistent with *Hale* whom he quotes at length, that:

> In England, from the time of Lord *Hale,* it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage, . . . and that this title is held subject to the public right, jus publicum, of navigation and fishing.\(^{285}\)

He then goes on to state, consistent with *Hale’s* prima facie rule, that “[i]t is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.”\(^{286}\) Noting that the common law became the law of the United States to the extent not modified, he then has recourse to *Martin v. Waddell* as “[t]he leading case in this court, as to the title and dominion of tide waters and of the lands under

\(^{280}\) Supra note 102 at 473, quoting from petitioner’s reply brief.  
\(^{281}\) Id. at 474.  
\(^{282}\) Id. at 477.  
\(^{283}\) Id. at 479.  
\(^{284}\) Supra note 272 at 10-11.  
\(^{285}\) Id. at 13.  
\(^{286}\) Id.
them," and confirms that grants by the crown of uplands did not, without express language to that effect, convey lands below the high water mark. In other words, a unanimous Court speaking through Justice Gray was of the view that Hale’s prima facie rule applied in colonial America as it had in England. But when sovereignty passed from the king to the state governments after the Revolution, each sovereign state was free to modify or maintain the common law rule as it chose. Justice Gray provides a comprehensive survey of the laws of the thirteen original states by way of confirming that state, not federal, law is controlling on the question of title and that in every jurisdiction the state has authority to alienate whatever submerged land it owns, subject to the public right of navigation and fishing and the federal constitutional power to regulate interstate and foreign commerce.

Justice Gray then turns to the more immediate question of the law in the states admitted since the adoption of the Constitution, of which Oregon is one. Based upon the Virginia cession of its western land claims in 1783, the Northwest Ordinance of 1787, and the Supreme Court’s decisions in Pollard’s Lessee v. Hagan, United States v. Pacheco and Knight v. Association, Gray, quoting from Knight, states that:

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

In the language of the Northwest Ordinance, this is the equal footing doctrine. It is a doctrine that limits the authority of the United States government with respect to submerged lands, but in no

287 Id. at 15.
288 Id. at 18-26.
289 The Virginia cession provided that the ceded lands would be formed into new states “having the same rights of sovereignty, freedom, and independence as the other states.” Quoted id. at 26.
290 The Northwest Ordinance of July 13, 1787, provided that new states would be admitted “on an equal footing, with the original states in all respects whatever,” and that ‘all the lands within’ the territory so ceded to the United States, and not reserved or appropriated for other purposes, should be considered as a common fund for the use and benefit of the United States.” Id. The equal footing language originally appeared in the Northwest Ordinance of 1784: “That whosoever any of the said states shall have, of free inhabitants as many as then shall be in any one the least numerous of the thirteen original States, such State shall be admitted by its Delegates into the Congress of the United States, on an equal footing with the said original States. . . .” 26 Journals of the Continental Congress 119 (March, 1784) (Gaillard Hunt ed. 1928).
291 44 U.S. 212 (1845).
292 69 U.S. 587 (1864).
293 142 U.S. 161 (1891).
294 Supra note 272 at 30.
295 Supra note 290.
way limits the powers of the states with respect to those lands. To the extent that Justice McKinley’s opinion for the Court in Pollard’s Lessee “implied that the title in the land below high-water mark could not have been granted away by the United States after the deed of cession of the territory [from Georgia], and before the admission of the state into the Union,” Justice Gray concluded that it was dicta and not controlling. In fact it was clear, said Gray, that the United States could grant submerged lands under navigable waters “whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce . . . , or to carry out other public purposes appropriate to the objects for which the United States hold the territory.”

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

\[296\] Supra note 272 at 28.
\[297\] “Notwithstanding the dicta contained in some of the opinions of this court, . . . to the effect that congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.” Id. at 47.
\[298\] Id. at 48.
\[300\] Supra note 287 at 221.
\[301\] See City of Mobile v. Eslava, 41 U.S. 234, 248 (1842) and City of Mobile v. Hallett, 41 U.S. 261, 263 (1842). Catron had also dissented in Pollard’s Heirs and wrote the majority opinion in Pollard’s Lessee v. Files, supra note 295.
\[302\] Supra note 291 at 221.
\[303\] Id. at 234.
which must exist in some government, could only exist in Congress;\(^{304}\) and that the invalidation of
titles based on United States and Spanish land grants would disrupt the entire established economy
of the Gulf Coast states.\(^{305}\) Catron further argued that “if the United States cannot grant these
lands, neither can Alabama; and no individual title to them can ever exist.”\(^{306}\) Of course that was
a result no one could have contemplated at the time, although it has strong appeal with some
environmentalists today. From the perspective of the parties in \textit{Pollard’s Lessee}, the case was
about private claims of right. But as Justice Catron observed in his dissent, “the question before us
is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of
property is a mere incident.”\(^{307}\)

By the time of \textit{Shively}, a half century later, the political boundaries had been sorted out and
the Court was focused on the competing claims of private title. Although it was not necessary to
his decision in that case, Gray confirmed, as part of his comprehensive review of the law, that the
submerged lands in question are not necessarily just those affected by the tides as under the
English rule (as it was understood by American courts). Citing \textit{Carson v. Blazer}\(^ {308}\) as the seminal
case and \textit{The Genesee Chief}\(^ {309}\) as the leading federal case (although it was concerned with
admiralty and maritime jurisdiction rather than title to submerged lands), Gray states that
navigable waters, for the purpose of establishing title to submerged lands, are, in most states, those
waters that are navigable in fact.\(^ {310}\) He even takes the liberty of suggesting that states adhering to
the English rule are “at variance with sound principles of public policy.” But by way of making
clear that “it is for the states themselves to determine” title to submerged land, whether under tidal
of non-tidal but navigable waters, Gray laments that “[i]f they [states] choose to resign to the
riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for
others to raise objections.”\(^ {311}\) This state autonomy on the question of title to submerged lands had
earlier been recognized in \textit{Packer v. Bird} where the Court stated that “the right of the riparian
owner, where the waters are above the influence of the tide, will be limited according to the law of
the state either to low or high water mark, or will extend to the middle of the stream.”\(^ {312}\) It was
clear beyond argument, concluded Justice Gray, “that the title and rights of riparian or littoral
proprietors in the soil below high-water mark of navigable waters are governed by the local laws
of the several states, subject, of course, to the rights granted to the United States by the
constitution.”\(^ {313}\) This conclusion was consistent with a proper understanding of the equal footing
doctrine. “Equal footing was a principle considered crucial to the development and expansion of
the Union. Each new state would be endowed with equal sovereignty and would participate as an

\(^{304}\) \textit{Id}\.
\(^{305}\) \textit{Id.} at 232.
\(^{306}\) \textit{Id.} at 234.
\(^{307}\) \textit{Id.} at 232.
\(^{308}\) 2 Binn. 475 (Pa. 1810).
\(^{309}\) 53 U.S. 443 (1851).
\(^{310}\) \textit{Supra} note 272 at 31-40.
\(^{311}\) \textit{Id.} at 43.
\(^{312}\) 137 U.S. 661, 670 (1891).
\(^{313}\) \textit{Supra} note 272 at 40.
equal member of the Union.”

Professor Rasband has demonstrated how the doctrine was transformed into a basis for establishing title to submerged lands.

If the Supreme Court majority in Phillips Petroleum had in mind to expand the reach of the public trust doctrine in the way advocated by environmentalists, Shively is an odd case to have identified as seminal. When Justice Gray states “that the navigable waters and the soils under them, . . . shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, . . . shall not be granted away [by the United States] during the period of territorial government,” he is describing the historic practices of Congress and not a legal prohibition. Indeed, as indicated above, the Shively Court found no doubt that Congress could make grants of submerged lands in territories of the United States. There were limitations intended to keep new states on an equal footing, but the point was that new states came in on an equal footing in the sense that they had title to all submerged lands that remained the property of the United States at the time of admission to the Union. The prohibition critical to the result in Shively was on the United States making grants within the boundaries of any existing state. Also critical to the outcome of the case was the Court’s conclusion that “unless . . . [tidal and submerged lands] have been . . . built upon with its permission, [the states have] the right to sell and convey them to any one, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public.” That the Shively Court had no thought of a significant constraint on the states’ power to dispose of submerged lands is evidenced by the principle that Justice Gray draws from Illinois Central.

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314 Rasband, supra note 102 at 34.
315 Rasband demonstrates the incoherence of Pollard and Shively which together hold “(1) that ownership of land under navigable water is an essential aspect of sovereignty; (2) that each state must enter the Union on an equal sovereign footing . . .; but (3) that Congress nevertheless has the power . . . to grant land under navigable water.” Equal footing, says Rasband, must be understood to mean “that Congress has the power to convey submerged lands, that each state is entitled to equal sovereign footing, but that ownership of submerged lands is not essential to state sovereignty.” Id. at 47.
316 Id. at 49.
317 Supra at note 297. Justice Gray concluded that it could be no other way. “By the constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon then, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition.” Supra note 272 at 48.
318 In Manchester v. Massachusetts, 139 U.S. 240, 260 (1891), the Court quoted with approval Justice Curtis’s statement in Smith v. Maryland, 59 U.S. 71, 74 (1855), that “[w]hatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state or the sovereign power which governed its territory before the declaration of independence.” In support of that statement, Justice Curtis in turn cited Pollard’s Lessee v. Hagan.
319 Supra note 272 at 52.
Illinois Central recognized as the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation, so far as may be necessary for the regulation of commerce.320

Although Gray had concurred along with Justice Brown in Justice Shiras’ dissent in Illinois Central, it does not appear that he misrepresented the thinking of that decision’s four person majority since three of them remained on the Court and agreed to the unanimous holding in Shively.321

Many other 19th century cases in the state and federal courts dealt with title disputes in submerged lands. While there were still differences of opinion, by the end of the century the law and its origins were reasonably clear and settled. The rule in England was that the king held title to lands under navigable waters. At least since Chief Justice Taney’s decision in Genesse Chief, it was generally accepted by American courts and commentators that navigable waters were defined in England as those affected by the tides.322 While exclusive grants of those lands could be made by the king and rights could be acquired by prescription, the prima facie assumption was that the king retained title, placing the burden on a private claimant to prove a grant by the king or prescriptive title. The king held these lands subject to a common right of use for navigation and fishing, although the king could make exclusive grants of both land and fisheries for the purpose of promoting navigation and commerce or to the extent that such grants did not unnecessarily

320 Id. at 47.
321 The Illinois Central majority consisted of Justices Field, Harlan, Brewer and Lamar. Justices Shiras, Gray and Brown dissented. Chief Justice Fuller did not participate, having been counsel in the court below, nor did Justice Blatchford who held stock in the Illinois Central Railroad. Both Lamar and Blatchford died before Shively was decided. Justice Jackson replaced Lamar and participated in the Shively decision. Justice White replaced Blatchford, but a week after Shively was decided. Thus the unanimous court in Shively consisted of eight justices, three of whom had been in the four member majority in Illinois Central.
322 As indicated above, see discussion supra at text accompanying notes 124, the accepted American understanding of English law on the relationship between navigability and tidal waters was incorrect, at least until English law changed in the second half of the 19th century. Noting the confusion among English authorities through the 18th century, MacGrady asks “how could Kent... have concluded that navigable rivers and tidal rivers were coextensive in England, and that the Crown held title to the beds of all tidal rivers,...” Supra note 44 at 584. MacGrady goes on to observe that “Kent... not only settled the American understanding of English law, but 63 years later, settled the English understanding of English law.” Id. At 585. What happened 63 years later was the decision in Murphy v. Ryan, 2 Ir. R.C.L. 143 (1868) in which an English court for the first time held that navigable waters were coextensive with tidal waters. For an illustration of the earlier English navigable-in-fact rule see Miles v. Rose, 128 Eng. Rep. 868 (C.P. 1814).
interfere with those public purposes. The English rule as stated by Kent applied in the American colonies except where modified to meet local needs and circumstances.

After the American Revolution, sovereignty over, and title to, submerged lands passed to the state governments subject to the common rights of navigation and fishing and any powers delegated to the United States by the Constitution. As independent sovereigns, each state was free to enact its own laws with respect to ownership of the beds and banks of navigable and non-navigable waters, subject to valid existing rights, common rights in navigation and fishing and the delegated powers of the United States. New states entered the union on an equal footing with the original states, meaning they had title to submerged lands not previously granted and the same police powers with respect to those lands as the original states, but this did not mean that state title was the same in every state. Among the original thirteen states, seven held that presumptive state title extended to the high water mark while six held that state title extended only to the low water mark.323 Under English law title to the beds and banks of fresh waters, even if navigable in fact, was held by riparian landowners. Most of the original states adhered to the English rule, but most of the new states applied a navigable in fact test to determine the scope of presumptive state ownership of submerged lands. In every state it was accepted that the state could alienate its submerged lands for the purpose of promoting navigation and commerce or for other purposes so long as the private uses did not interfere with navigation, and subject to the delegated powers of the United States. In disputes over title to submerged lands under navigable waters, the burden was on the private claimant to prove title, consistent with the English prima facie rule. The opposite presumption applied with respect to submerged lands under non-navigable waters. The prima facie rule was also understood to apply to conveyances of submerged land by the United States.

The notion of an externally imposed limit on the state’s exercise of its proprietary and sovereign rights with respect to submerged land was seldom even suggested beyond the boiler-plate reference to the common rights of navigation and fishing in navigable waters. In the vast sea of cases dealing with private claims of title to submerged lands – in every one of which the private claim had its origin in a grant from the English crown, a foreign government, the United States or a state government325 – there was no suggestion that the claim might be invalid because it infringed a public right. Where private activities in navigable waters interfered with navigation, the standard remedy was an action in nuisance, not a claim that the interfering individual lacked title to the submerged land. Arnold v. Mundy, Martin v. Waddell and Illinois Central Railroad v. Illinois were exceptions to the norm, but even then, exceptions more in rhetoric than in their holdings. The defendant in Arnold may have claimed pursuant to an exclusive community right, and in any event could have made application for an exclusive license from the state. But if the claim was

323 According to Justice Gray’s survey in Shively, Rhode Island, Connecticut, New York, New Jersey, Delaware, South Carolina and North Carolina fixed the high water mark as the boundary of state title while Massachusetts, New Hampshire, Pennsylvania, Maryland, Virginia and Georgia limited state title to the low water mark. Supra note 272 at 18-25.

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

325 This was true of prescriptive claims as well, since prescription operated against another with legal title.
truly on behalf of what Professor Rose calls the “unorganized public,” it was unusual if not unique among 19th century cases. In any event it is clear that under New Jersey law at the time Arnold was decided, an individual taking oysters on the basis of a claim of common right could well have been violating the private rights of another individual with exclusive license from the state. Martin was nothing more than a title dispute, the defendant claiming on the basis of an exclusive license from the state. So we are left with Illinois Central as the only clear case in which a claim of private title to submerged lands was rejected on the basis of a claim of common right. But recall that Justice Field was careful to point out the exceptional nature of the grant to the Illinois Central Railroad, while recognizing the state’s general power to alienate submerged lands.

**State Ownership of Wildlife**

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

Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering.326

As the Romans conceived of the matter, wild animals are, in the nature of things and therefore by the law of nations, owned by no one in their natural state. They are part of the *res nullius*. The rule of Roman rule of capture set forth by Justinian was said to be itself natural, but it was also practical. Like water, and unlike land, wild animals are transient, they move about without regard to fixed boundaries. One could know who owned land and fixtures or things growing on land by their location, but one could not know who owned wildlife until it was confined. The complexity of Roman law on this subject demonstrates that the rule of capture was more practical than philosophical. There were special rules for bees, pigeons, peacocks, geese and other fowl that might leave their owners land but would return of their own accord.327 Wild creatures were owned by no one, not because they were thought to be owned by everyone, but because establishing private ownership required special rules adapted to their wild nature. If there was a right held in common it was the right to acquire private ownership of wild animals by capturing them.

Early English law was much the same. “Things are said to be *res nullius* in several different ways:” wrote Bracton, “by nature or the *jus naturale*, as wild beasts, birds and fish.”328

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326 INSTITUTES, supra note 24 at 2.1.12.
327 Id. at 2.1.14-16.
328 BRACTON, supra note 71 at 41.
By the *jus gentium* or natural law the dominion of things is acquired in many ways. First by taking possession of things that are owned by no one, [and do (not)now belong to the king by the civil law, no longer being common as before,] as wild beasts, birds and fish, that is, all the creatures born on the earth, in the sea or in the heavens, that is, in the air, no matter where they may be taken. When they are captured they begin to be mine, because they are forcibly kept in my custody, and by the same token, if they escape from it and recover their natural liberty they cease to be mine and are again made the property of the taker.\(^{329}\)

Blackstone, writing five centuries later, recorded that under English law “a man may be invested with a qualified, but not absolute, property in all creatures that are *ferae naturae*, either *per industrium*, *propter impotentiam*, or *propter privilegium*.\(^{330}\) Acquisition of property in a wild animal *per industrium* is the rule of capture, accomplished “by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty.”\(^{331}\) It is a qualified ownership defeasible “if they resume their antient wildness, and are found at large.”\(^{332}\) Property in *ferae naturae, propter impotentiam*, existed in the offspring of birds or wild animals that, by their immobility, were confined to nests or burrows on ones property, “till such time as they can fly, or run away, and then my property expires;”\(^{333}\) The very practical nature of the law is certainly reflected in this rule, which would seem to have encouraged landowners to provide habitat for breeding and nesting. Finally, property in *ferae naturae, propter privilegium*, was “the privilege of hunting, taking, and killing them, in exclusion of other persons.”\(^{334}\) This qualified ownership existed within the boundaries of ones private land (as under Roman law), but also within the boundaries of other “liberties” including those that may have been granted by the crown for the sole purpose of taking game.

The crown was in a position to grant exclusive rights to hunt and fish for the same reason it was able to grant exclusive rights in tidelands and navigable waters – it was the proprietor of all of those things. Blackstone observed that “notwithstanding the general introduction and continuance of property, [there are some things that] must still unavoidably remain in common,” and therefore only be subject to usufructuary ownership, including light, air, water and “those animals which are said to be *ferae naturae*, or of a wild and untamable disposition.”\(^{335}\) But “that species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game,” were vested in the crown as a means of preempting the “disturbances and quarrels [that] would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy. . . .” Thus Blackstone made the case for the king having title to all wild game, as well as to the navigable waters, of the kingdom. It was all part of the “legislature of England[s] . . . wise and orderly maxim, of assigning to everything

\(^{329}\) *Id.* at 42.
\(^{330}\) BLACKSTONE, *supra* note 91 at II-391.
\(^{331}\) *Id.*
\(^{332}\) *Id.* at 393.
\(^{333}\) *Id.* at 394.
\(^{334}\) *Id.* at 394-95.
\(^{335}\) *Id.* at 14.
capable of ownership a legal and determinate owner.”

As with navigable waters and submerged lands, the rules also served well the interests of the king and his favorites.

Of course the English laws with respect to wildlife were applied in the American colonies, and after the Revolution the states succeeded to the sovereign powers and rights relating to wildlife just as they had with respect to navigable waters and tidelands. Indeed, many of the early wildlife cases were one and the same with submerged lands cases. *Arnold v. Mundy* and *Martin v. Waddell* were both wildlife cases in the sense that what was really at issue was the right to harvest oysters.

The common property that Justice Kirkpatrick says cannot be alienated in *Arnold* includes not just the submerged lands from which oysters are harvested but the oysters themselves.

“The people of New Jersey,” said Chief Justice Taney in *Martin*, “have exercised and enjoyed the rights of fishery for shell-fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors.”

The New Jersey laws regulating the taking of oysters, in effect at the time of *Arnold* and directly at issue in *Martin*, were challenged by non-citizens of the state in the federal case of *Corfield v. Coryell* on the grounds that they violated Article I, Section 8 (the commerce clause) and Article IV, Section 2 (the privileges and immunities clause) of the United States Constitution.

The challenged laws prohibited non-citizens from taking oysters within the state of New Jersey as well as authorized the granting of exclusive license to New Jersey citizens to plant and harvest oysters. Counsel for the plaintiffs in *Corfield* cited *Arnold* in support of their claim that the common right to take oysters cannot be restrained, even as against non-citizens.

In pressing their claim, plaintiffs insisted that there could be no exclusive right in fish or game until it was captured, but Justice Washington, sitting as a circuit justice, disagreed. Washington stated that the citizens of New Jersey “may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.”

To agree with plaintiffs that the harvesting of New Jersey’s oysters was among the privileges and immunities of all citizens of the United States, said Washington, would “amount . . . to a grant of a cotenancy in the common property of the state, to the citizens of all the other states.”

336 Id. at 15.

337 Common property, says Kirkpatrick, includes “the air, the running water, the sea, the fish, and the wild beasts.” Supra note 36 at 49.

338 Supra note 153 at 417.


340 Id. at 548.

341 Id. at 552.

342 Id. Justice Washington’s rejection of the privileges and immunities claim with respect to the taking of wildlife is particularly important because his opinion in *Corfield* is often cited as one of the earliest articulations of the natural rights basis for understanding the privileges and immunities clause. See TRIBE, I AMERICAN CONSTITUTIONAL LAW 1251 (3rd ed. 2000). Not only was there no natural rights basis for limiting the state’s power to regulate and permit the taking of oysters, but the natural rights Washington identified implied that the state would be precluded from forbidding all private acquisition of exclusive rights in game, if only the exclusive right to acquire title by capture. Among the fundamental rights protected by the privileges and immunities clause, said Washington, was “the right of a citizen . . . to take, hold
Justice Washington also found in *Corfield*, relying on *Gibbons v. Ogden*\(^{343}\) that the New Jersey exclusion of non-citizens from taking oysters within the state was not an unconstitutional regulation of interstate commerce. Well over a century later it would be found that Justice Washington was probably wrong in this conclusion,\(^{344}\) but his statements on the nature of New Jersey citizens’ common right in oysters remain relevant to our modern understanding of the concept of public or common rights. Washington’s description of New Jersey citizens as “tenants in common,” with respect to the fisheries of the state made clear that individual New Jersey citizens had a right of access to the fishery so long as it remained common, but no right to object to a total prohibition on the taking of oysters or to the granting of exclusive licenses to take oysters.

A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use.\(^ {345}\)

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

Most of the caselaw that followed after *Corfield*, like the case law relating to ownership of submerged lands, turned on the relative powers of the state and federal governments or constitutional limits on those powers. In the submerged lands cases, the dispute was most often between one party claiming under a grant from the United States and the other party claiming title from the state. In the wildlife cases the controversy generally related to the nature and extent of the regulatory powers of the state and federal governments. The United States Supreme Court’s first serious consideration of the issue in the context of wildlife came in *McCready v. Virginia*, yet another oyster case raising the question whether a state could prohibit citizens of another state from planting oysters in its waters. Relying on *Martin v. Waddell*, Chief Justice Waite, writing for a unanimous court, stated “the States own the tide-waters themselves, and the fish in them, so far

\(^{343}\) *Gibbons v. Ogden*, 22 U.S. 1 (1824). In *Gibbons* Chief Justice John Marshall drew a distinction between regulations of commerce, clearly within federal power, and “[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens.” at 208.

\(^{344}\) *Hughes v. Oklahoma*, 441 U.S. 322 (1879).

\(^{345}\) *Supra* note 339 at 552.
as they are capable of ownership while running. For this purpose the State represents the people, and the ownership is that of the people in their united sovereignty.” This common interest is “held . . . subject to the paramount right of navigation, the regulation of which . . . has been granted to the United States. . . . [but] [t]here has been . . . no such grant of power over the fisheries.”

Waite followed *Corfield* in rejecting a privileges and immunities challenge to Virginia’s law. “Such an appropriation,” said Waite, “is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.”

But the fact that the citizens of Virginia had a shared property right in the submerged lands and fisheries within the state did not mean that the state could not regulate access by those citizens or grant exclusive rights to particular citizens. “[A]ll concede that a State may grant to one of its citizens the exclusive use of a part of the common property, [so] the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.”

The concept of state ownership of wildlife became firmly rooted in American law with the Supreme Court’s decision in *Geer v. Connecticut*. Although that case has since been overruled, it is important to understand what was said in that and several subsequent Supreme Court decisions on the subject of a common right to wildlife that might form the basis for an expanded application of the public trust doctrine. The defendant in *Geer*, was convicted of violating a Connecticut statute prohibiting the possession of game birds for the purpose of transporting them beyond the state, the birds having been legally killed within the state. Among other defenses, the defendant argued that the Connecticut statute was invalid under the commerce clause of Article I, Section 8, of the United States Constitution. In the course of his opinion for the five justice majority, Justice White discussed the history of wildlife law from Athens to 19th century America. From the beginning, he reported, “the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power.” Of course this statement presumed the validity of the rule of capture that was well settled in American law. At issue in the case was the nature and extent of the state’s power to regulate the taking of wildlife, not the right of individuals to acquire a property interest in wildlife by killing it or otherwise reducing it to possession.

The history Justice White recounts in *Geer* is pretty much the history summarized above. Because wildlife are generally transient and not easily confined, through the centuries and across societies they have been held to belong to no one and therefore to belong to everyone in common. But it is also true that the sovereign has always asserted particular interests in wildlife and has acted to limit and even prohibit the taking of wildlife by ordinary people. In Athens, “‘Solon, seeing that the Athenians gave up to the chase, to the neglect of the mechanical arts, forbade the

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347 *Id.*
348 *Id.* at 396.
350 See discussion *infra* at note 378.
351 *Supra* note 349 at 522.
killing of game.”352 In Rome, according to Justice White, “[n]o restriction . . . was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession,” although it appears that access to wildlife and other coastal resources was in fact greatly limited.353 White notes that in Europe, despite some claims that the natural law prohibits the sovereign from limiting public access to game, “[t]he sovereigns have reserved to themselves, and to those to whom they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons.”354 The Napoleonic Code, says White, provides “‘[t]here are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed.’”355 And “[t]he common of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.”356

It is notable in Justice White’s explanation of the roots of the common or state ownership doctrine in American law that the consequence of these asserted public rights is not any limits on state power with respect to wildlife. To the contrary, it is the source of unlimited power in the states to protect, regulate and dispose of wildlife. In the state courts at the time, this was precisely the understanding of state power with respect to wildlife. In Royal Phelps v. Racey, the Court of Appeals of New York held that “[t]he protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion.”357 In Magner v. People of the State of Illinois, the Illinois Supreme Court stated: “The ownership [of wildlife] being in the people of the State – the repository of the sovereign authority – . . . it necessarily results, that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare.”358 The California Supreme Court stated in Ex parte Maier “[t]he wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.”359 All of these cases and many others spoke the language of state and

352 Id., quoting from MERLIN, 4 REPERTOIRE DE JURISPRUDENCE 128 (1807).
353 See discussion supra at note 69.
354 Supra note 349 at 524, quoting from POTHIER, TRAITÉ DU CROIT DE PROPRIÉTÉ, Nos. 27-28.
355 Id. at 526 quoting from Articles 714 & 715.
356 Id.
357 Royal Phelps v. Racey, 60 N.Y. 10, 14 (1875), (upholding conviction of an individual found in possession in New York of game birds killed and transported from another state in violation of a New York law prohibiting such possession on the particular date in question).
358 Magner v. People of the State of Illinois, 97 Ill. 320, 333-34 (1881), (upholding conviction of an individual for selling quail killed in and imported from Kansas in violation of Illinois prohibition on sale of such game.)
359 Ex parte Maier, 37 P. 402, 404 (1894), (upholding the conviction an individual for the sale in California of wild meat killed in and transported from Texas in violation of a prohibition on the sale of wild meat in the state).
common ownership while recognizing full discretion in the legislature to regulate the use and
disposal of wild game.

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

While the fundamental principles upon which the common property in game rest
have undergone no change, the development of free institutions had led to the
recognition of the fact that the power or control lodged in the state, resulting from
this common ownership, is to be exercised, like all other powers of government, as
a trust for the benefit of the people, and not as a prerogative for the advantage of the
governer as distinct from the people, or for the benefit of private individuals as
distinguished from the public good.\(^{360}\)

Later in the opinion White writes:

> It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust
> for all the people of the state, and hence, by implication, it is the duty of the
> legislature to enact such laws as will best preserve the subject of the trust, and
> secure its beneficial use in the future to the people of the state. But, in any view,
> the question of individual enjoyment is one of 'public policy, and not of private
> right.'\(^{361}\)

But a careful reading of both statements reveals that what White is really talking about is the police
power of the state, not a public trust based limit on the police power. In the first quotation he says
the states’ authority with respect to game is “like all other powers of government.” In the second
quotation he says that legislative enactments on game are a matter of “public policy.” And near
the conclusion of his opinion, Justice White states that “[t]he right to preserve game flows from the
undoubted existence in the state of a police power to that end. . . .”\(^{362}\)

Following on *Geer*, the Supreme Court made frequent reference to the state ownership
theory in wildlife cases. In *Missouri v. Holland*, where federal regulations of migratory waterfowl
pursuant to a treaty with Great Britain were challenged as a violation of state authority over
wildlife, Justice Holmes acknowledged that earlier federal regulation of migratory birds, not
undertaken pursuant to treaty obligations, had been invalidated in the face of state claims of
ownership in the wildlife. Absent the treaty, said Holmes, the state of Missouri “would be free to
regulate this subject,” but he also suggested that “[t]o put the claim of the State upon title is to lean
upon a slender reed. Wild birds are not in the possession of anyone; and possession is the
beginning of ownership.”\(^{363}\) In *Lacoste v. State of Louisiana* the Court upheld a severance tax on
the hides, skins and furs of wild animals against a takings claims under the 14th amendment due
process clause, noting that “[t]he wild animals within its borders are, so far as capable of

\(^{360}\) Supra note 349 at 529.

\(^{361}\) Id. at 534.

\(^{362}\) Id.

ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein."\textsuperscript{364} In \textit{Foster-Fountain Packing Co. v. Haydel} the Court invalidated a Louisiana law requiring the removal of heads and hulls of all shrimp prior to export. The Court acknowledged that “the state owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people,”\textsuperscript{365} but found that conservation was “a feigned and not the real purpose” of the statute.\textsuperscript{366}

In \textit{Toomer v. Witsell} Chief Justice Vinson, writing for a unanimous court, picked up on Justice Holmes’ clear skepticism in his \textit{Holland} opinion about the state ownership theory.\textsuperscript{367} The court found that a South Carolina law imposing a tax on non-resident shrimpers that was 100 times as much as the tax on resident shrimpers violated the privileges and immunities clause of Article IV, Section 2\textsuperscript{368} and a law requiring shrimping boats to dock at a South Carolina port and unload, pack and stamp their catch with a tax stamp before transporting it to another state violated the commerce clause of Article I, Section 8.\textsuperscript{369} In its defense the State of South Carolina had urged that state ownership of the shrimp justified its discrimination against non-residents because they did not share in ownership of the fish. Vinson pointed out that only in \textit{McCready} had the Court ever upheld such blatant discrimination against non-resident fishing and hunting. Based on two factual distinctions,\textsuperscript{370} he concluded that \textit{McCready} was an exception to the general rule that such discrimination was unconstitutional. “The whole ownership theory, . . .” said Vinson, “is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” In a concurring opinion, Justice Frankfurter objected that \textit{McCready} should not “be looked at askance.” Not only had the doctrine of that case been widely relied upon in state courts, said Frankfurter, but in \textit{Truax v. Raich} the Supreme Court itself “formulated the amplitude of the . . . doctrine by referring to “the regulation or the distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.”\textsuperscript{371}

Thirty years later the Supreme Court returned to consideration of the state ownership theory in three successive terms with seemingly contradictory results. In 1977 the Court invalidated a Virginia law prohibiting federally licensed vessels owned by nonresidents of Virginia.

\textsuperscript{364} Lacoste v. State of Louisiana, 263 U.S. 545, 549 (1924).
\textsuperscript{365} Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 11 (1928).
\textsuperscript{366} \textit{Id.} at 10.
\textsuperscript{367} Toomer v. Witsell, 334 U.S. 385, 401 (1948).
\textsuperscript{368} \textit{Id.} at 402.
\textsuperscript{369} \textit{Id.} at 406.
\textsuperscript{370} \textit{McCready} involved stationary oysters rather than transient fish and regulations of inland rather than coastal waters.
\textsuperscript{371} \textit{Supra} note 367 at 408-09, quoting from \textit{Truax v. Raich}, 239 U.S. 33, 39 (1915). In \textit{Truax} the Court invalidated an Arizona law, enacted by initiative, requiring that 80% of the employees of employers with five or more workers be qualified electors or native-born citizens. The Court mentions \textit{McCready} by way of distinguishing it from the issue in \textit{Truax}. 

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from fishing in Chesapeake Bay and prohibiting ships owned by non citizens to catch fish anywhere in the state. Pursuant to holding that the Virginia law was preempted by federal legislation, Justice Marshall stated:

The “ownership” language . . . must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." [citations omitted] Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.372

The next year the Court upheld, in Baldwin v. Fish and Game Commission of Montana, a state hunting license scheme that required non-residents to pay seven and one-half times as much as residents for a license to hunt elk in the state. The law was challenged as violating the privileges and immunities clause of Article IV, Section 2, and the equal protection clause of the 14th amendment. Citing Corfield, McCready and Geer, Justice Blackmun stated that “[i]t appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people.”373 Blackmun acknowledged that “the states’ interest in regulating and controlling those things they claim to ‘own,’ including wildlife, is by no means absolute,”374 but insisted “that that language nevertheless expressed ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”375 In concurrence, Chief Justice Burger admitted that the state ownership doctrine “is . . . a legal anachronism of sorts,” but insisted that it nonetheless “manifests the State’s special interest in regulating and preserving wildlife for the benefit of its citizens.”376 Justice Brennan, joined by Justices White and Marshall, said in dissent that “[t]he lingering death of the McCready doctrine as applied to a State’s wildlife, begun with the thrust of Mr. Justice Holmes’ blade in Missouri v. Holland . . . finally became reality in Douglas v. Seacoast.”377 As it turned out, Justice Brennan was right about the demise of the state ownership theory, but just a year premature. Although the state ownership theory got a little CPR in Baldwin, it was finished off the next term in Hughes v. Oklahoma378. In Hughes the Court held “that time has revealed the error of the early resolution reached in [Geer] . . . and accordingly . . . [it] is today overruled.”379 Justice Brennan noted that efforts to extend the state ownership justification for favoring residents in the use of other

374 Id. at 385.
375 Id. at 386 quoting from Douglas, supra note 372 at 284, quoting in turn from Toomer, supra note 367 at 402.
376 Id. at 392.
377 Id. at 405.
378 Supra note 344.
379 Id. at 326.
resources had been repeatedly rejected and concluded that there was no justification for treating wildlife any differently. “Under modern analysis,” wrote Brennan, “the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.”

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

It is not coincidental that the interstate commerce and the privileges and immunities clauses have been the context for the wildlife cases in the Supreme Court. The cases have reflected the efforts of states to gain advantage for their own residents in relation to non-residents, much more than they have reflected sincere concern for wildlife conservation. To the extent that state laws do not have differential impacts on non-residents, do not conflict with legitimate federal laws and do not violate the federal constitutional rights of the state’s own citizens, state legislatures can do what they like, subject only to any limits imposed by their own state constitution and courts. It is such limits that advocates for extension of the public trust doctrine to wildlife seek to establish. Although they have relied on the state ownership rhetoric of Supreme Court cases and on the Roman and English references to common property in wildlife, their objective is to justify court

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381 Id. at 334.

382 For example, a state law that burdens interstate commerce might be upheld under the Pike v. Bruce Church test (cited in Hughes v. Oklahoma, 441 U.S. at 331) on the ground that “the burden imposed on such commerce is clearly [not] excessive in relation to the putative local benefits,” 397 U.S. 137, 142 (1970), with the Court relying on its repeated statements that the ownership theory should be understood to indicate a “special” interest in wildlife on the part of state governments. But even then, it seems unlikely that the Supreme Court would find wildlife protection more special than schools or police or any number of other things the state does pursuant to the police power. The wildlife cases seem to recognize that these public policy priority questions are for state legislatures to resolve.
imposed limits on the legislative power or to justify legislative actions that might limit the property rights claims of state citizens. Rather than accept that wildlife conservation and management is one among a multitude of competing interests in the give and take of the state legislatures, they seek a trump in the political game. State ownership theory has been the hoped for trump card.

VII. THE PAST AND FUTURE OF THE PUBLIC TRUST DOCTRINE

As the foregoing demonstrates, the generally accepted history of the public trust doctrine is more myth than reality. The real story, to summarize very briefly, goes like this. Roman law distinguished three interests in tidal waters and submerged lands. The \textit{jus publicum} was the common right of unobstructed navigation, commerce and fishing (and perhaps bathing) in navigable waters. The emperor was assumed to own all navigable waters, submerged lands and other unappropriated resources and had the power to grant exclusive interests in them. The \textit{jus privatum} encompassed all private interests in these waters and lands including the proprietary interests of the emperor. Such private interests were acquired either by grant or prescription. The \textit{jus regium} encompassed the emperors powers to regulate these waters and lands on behalf of the public. Early English law made similar distinctions. After Magna Carta, the crown was precluded from granting exclusive title to navigable waters and tidal lands, in law if not in fact, but there was no such limit on grants made by the king and Parliament or by Parliament alone. From the 19th century, title to all submerged and tidal lands was presumed to be in the crown, putting the burden of proof on any private claimants to demonstrate the legitimacy of their claims. Grants were made subject to the public right of navigation, commerce and fishing and any obstructions to or interference with those uses were subject to abatement or removal pursuant to an action in nuisance. These principles of English law, with various distortions, applied in the American colonies, and after the Revolution the individual states succeeded to the crown’s and Parliament’s rights and responsibilities. The prima facie rule of presumptive state title was converted a rule of sovereign title and was applied to navigable waters and submerged lands. Grants of those state interests to private parties could be made subject to the public rights of navigation, commerce and fishing. These public uses could be regulated and licensed or granted by the state legislatures as successors to the powers of Parliament and without the limitations imposed by Magna Carta on the king. The only important change from the English doctrine, at least according to Chancellor Kent and all subsequent American law, was its application in most American states to all waters navigable in fact.

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

Of course the law cannot be frozen in time. It must adapt to changing circumstances and
the evolving values of our society. One of the great strengths of the common law has been its
adaptability over many centuries in the hands of judges with the wisdom to preserve the rule of law
by adapting the law, not to the interests in the case at hand, but to the realities of a changing
society. This has been accomplished, for the most part, through adherence to basic concepts and
adaptation through evolving conceptions. This difference, between concept and conception, is
well illustrated by the American adaptation of the English definition of navigable waters. At least
according to Chancellor Kent, in 18th century English law navigable waters were those affected by
the tides, not because all such waters are in fact navigable, but because most navigable waters in
Britain are tidal and the extent of the tides is a relatively easy boundary to identify. The concept
was of waters on which navigation should be protected against obstruction. The conception, good
enough in light of the need to readily identify affected waters, was those affected by the tides. In
North America, many navigable waters are not tidal, so the conception of tidal waters as navigable
was seen by the courts as too limiting. In fact reliance on the English conception of tidal waters in
North America would do harm to the concept of unobstructed navigation since the law that
protected navigation would not apply on the vast inland river and lake system (given the linking of
the common right to state ownership). The topography and hydrology of North America required
a different conception. The courts settled on navigable in fact even though it was less clear as a
definition of boundaries. Increased enforcement costs would be offset many times by the benefits
of free navigation on America’s inland waterways.

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

The foregoing history of the public trust doctrine in the United States confirms that the vast
majority of American judges have been good stewards of the rule of law. The broad and sweeping
language of Justinian that has echoed through two millenia of case law and commentary has been
narrowly applied, as it was in England, to navigable waters for the purposes of navigation,
commerce, fishing and sometimes bathing. With the exception of the revised definition of
navigability in North America, an exception made to avoid an exceptional departure from the

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concept of navigability in the common law, American case law remained reasonably true to its
common law roots at least through the middle of the 20th century. The glaring exception was
Arnold v. Mundy, but there the departure was more rhetorical than actual and it had only to do with
alienability of state lands, not the extent and nature of the public trust. On the question of
alienability the case was overruled to conform with historic and continuing practices in New Jersey
and to return the state to the common law norm prevalent in the other states. Even the “lodestar”

case of Illinois Central was not a departure from the common law focus on navigation, commerce
and fishing in navigable waters. While ruling against the railroad, the Supreme Court confirmed
that the state could alienate submerged lands, but not if doing so was likely to result in total
obstruction of the public’s right of navigation and commerce. The decision really turned on the
factual conclusion that the grant to the railroad would have that consequence. From a rule of law
perspective, this understanding of Illinois Central is far better than the Court’s alternative
suggestion that the legislature may have had the power to make the grant, but they also had the
power to revoke it without compensation to the railroad.

Over the course of the 19th century, American public trust law did depart from its English
roots in establishing a firm linkage of the public trust to state ownership. The original concept was
that the jus publicum operated as an easement in relation to the jus privatum, whether the state or
individuals were the proprietors of submerged and tidal lands. The linkage to state ownership
arose in part because of the expansion of the definition of the navigable waters to include
navigable-in-fact, non tidal waters. This expansion was important to commerce and navigation on
America’s inland waterways, the traditional concern of the public trust, but not because the state
owned the beds of those waterways. The traditional doctrine applied to navigable waters whether
or not the beds were owned by the sovereign. The expansion of the navigability definition was
also important to the extent of riparian land ownership in the rapidly developing continent. Under
the English prima facie rule, the presumption was that the state owned the beds and banks of
navigable waterways. Submerged lands could be privately held, but the burden was on the private
claimant to prove title either by grant from the state or prescription. There was, however, no
necessary connection between reliance on navigability to define the geographic scope of the
common rights of navigation and commerce and navigability as establishing the prima facie case
for state ownership of submerged lands. This merging of two distinct doctrines did not result in
unrestrained private obstructions to navigation, because the traditional remedy of an action in
nuisance remained in cases of private obstruction.

The American cases also have tended to confuse the jus publicum and the jus regium. As
explained by Bracton, the jus publicum is the common right of navigation, commerce and fishing
in navigable waters. The jus regium is the power of the sovereign to act in the public interest
including the power to enforce the jus publicum. This power to enforce the jus publicum, an aspect
of what we would today call the police power, is the same as the power to enforce the jus
privatum. The confusion in some American cases results from thinking of the jus publicum as the
public interest rather than as common rights in the nature of an easement. The common right in
navigation, commerce and fishing in navigable waters is enforced in the state courts in a nuisance
case or some analogous action against the offending individual. Under English law the obstruction was referred to as a purpresture. Injunctive relief
would be granted in an action in nuisance.
via its police powers to promote and protect the public interest. An order by the state enforcing the
jus publicum requires no compensation to the offending party because that party had no right to
obstruct navigation in the first place, or to state it in the affirmative, the common right was a
preexisting easement. But it does not follow that everything the state does pursuant to its police
power can be done without compensation to affected property owners. By confusing the jus
publicum and the jus regium – the common right to navigation and fishing with the general public
interest – American case law has opened a potentially giant loophole in the constitutional
protections of property rights. A property owner whose dam on his own property obstructs
navigation and thus violates the jus publicum has no complaint when he is required to remove the
dam without compensation. His property right did not permit such a dam to be built. But if the
jus publicum is just a Latin term for the public interest, the scope of the public trust is limitless
and the constitutional protections of property rights are a nullity.

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

385 In such a case, the jus publicum is part of what Justice Scalia called “background
386 This confusion has not been limited to the courts. Noting that the Florida Constitution
(Article 10, Section 11) provides that unalienated tidelands are held in trust for the people and
may only be sold or leased when in the public interest, Donna Christie argues that the use of the
term “the public interest” rather than “public trust uses” “is an indication that Florida intends the
document to be dynamic and reflect the public’s contemporary interests. . . .” Marine Resources,
the Public Trust Doctrine and Intergenerational Equity, 19 J. LAND USE & ENVT. L. 427, 433
(2004). But there is nothing on the face of the provision suggesting it means anything other than
state lands may be sold when the legislature determines it to be in the public interest. It is the
legislature, not the public trust doctrine, that is meant to be dynamic.
387 A parallel to this development in public trust law exists in other areas of public interest
regulation. The term “stakeholder” has become common parlance to describe individuals or
The wildlife cases can be helpful to a clear understanding of the historic public trust doctrine. As we have come to understand in the last several decades, the concept of public ownership of wildlife was a useful legal fiction expressing that wildlife are thought to be important to the general public interest. But the concept of public ownership also had much deeper roots in Roman and English law in the sense that all things not owned, either because they have not been appropriated or because they are not conducive to ownership, are owned by the emperor or king, or by their American successors to sovereignty, the states. And so it was with navigable waters and submerged lands as well as with unclaimed or "waste" uplands. The idea of a common or public right to navigation, commerce and fishing in these navigable waters, with resulting limitations on the use of those waters and their submerged lands, did not mean that the waters and lands could not be granted to private individuals. Nor did it mean that the *jus publicum* could not be granted in the form of several fisheries, exclusive wharfing rights or licenses to engage in commerce. So long as the *jus publicum* had not been granted, the remedy for its violation was an action in nuisance. But there is little doubt that the state could eliminate the action in nuisance and replace it with a regulatory regime, or replace it with nothing which would be the equivalent of granting the right to whomever appropriated it first. In other words, the legislature speaks for the public. It is the only legitimate voice for the public interest. If its decisions, whether with respect to navigable waters or any other matter or means not precluded from its jurisdiction and powers by the state or federal constitutions, are invalidated by the courts, the courts are acting beyond their legitimate powers.

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

It may be argued that the foregoing review of the history of the public trust doctrine has taken too narrow a view of the relevant history. Customs and practices beyond the formal institutions of the law may be found to confirm a much broader understanding of the public's rights. Although a broader perspective may evidence long standing public uses not reflected in the statutory or common law, as the Oregon Supreme Court concluded in *Thornton v. Hay* in which it found a public right of access to the dry sand beaches of the state, such a sociological approach is

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388 State ex rel. Thornton v. Hay, 254 Or. 584 (1969). Relying on a history of extensive public use of Oregon's beaches, Blackstone and an 1834 New Hampshire case (Perley v. Langley, 7 N.H. 233), the court found a public right of access to the dry sand beaches of the state pursuant to the doctrine of custom.
almost certain to confirm a generally narrow understanding of the public trust doctrine.\(^{389}\) As we have seen from Magna Carta through Arnold v. Mundy, sociological realities have generally reflected extensive grants of exclusive private rights, even in those rare cases where statements of the formal law asserted a broad public right. The king continued to grant lands and fisheries to private individuals, often with the approval of Parliament, notwithstanding the prohibitions of Magna Carta. At the very moment Chief Justice Kirkpatrick was writing his opinion in Arnold v. Mundy the New Jersey legislature was passing laws providing for the granting of exclusive rights to plant and harvest oysters in New Jersey waters. The sociological history of resource use is largely a history of economic forces at work. Professor Cohen suggests that history will demonstrate that the common rights generally said to be the core of the public trust doctrine originally existed to promote commercial interests through the efficiencies of private rights, including a private right of access to the channels of commerce.\(^{390}\) Professor Rose recognizes that 19th century American courts rarely ventured beyond commerce as the foundation of public trust and public prescription, and that custom as a basis for noncommercial public rights was more often rejected than accepted.\(^{391}\) She suggests, nonetheless, a theory of a commons managed by the unorganized public that might extend these common law doctrines beyond commerce to speech and recreation, though probably not environmental protection.\(^{392}\) But the evidence for such a theory in the case law is thin and the evidence that such informal management of scarce resources works on a scale relevant to the 21st century is even thinner. Nearly forty years ago, Patrick Deveney observed that the history of the doctrine being told by some modern courts was "very much ad hoc" and "often substituted for or obscured an analysis of the real interests competing for the coastal area." Five years after Deveney, Glenn MacGrady concluded that "the public trust doctrine was . . . [n]onexistent at English common law, . . . was created by an obscure and unprepared state court judge, adopted by the inventive Roger Taney, and repeated forever after in

\(^{389}\) Even in Thornton the court provided no evidence, sociological or otherwise, that the dry sand beaches of Oregon had been customarily used by the public. The claim of customary use had not been raised in the trial court so there was no evidence on the record to support the Supreme Court's conclusion. The court's opinion suggested that the customary common right had existed on the entire Oregon coast, notwithstanding that only a single property owner was party to the litigation. The Oregon Supreme Court later held that the doctrine did not apply to every dry sand beach in the state, absent a showing of actual public use sufficient to satisfy the doctrine of custom, McDonald v. Halvorson, 308 Ore. 340 (1989). But four years later the Court seemed to affirm its original statement in Thornton recognizing general public rights, at least to a particular section of the coast. Stevens v. City of Cannon Beach, 317 Or. 131 (1993). The United States Supreme Court declined to grant certiorari over a vigorous dissent by Justice Scalia in which he wrote: "To say that this case raises a serious Fifth Amendment takings issue is an understatement." Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1334 (1994).


\(^{391}\) Supra note 16 at 723.

\(^{392}\) In a contribution to a symposium on Professor Sax's public trust writings, Rose concludes that "the public trust doctrine only indirectly relates to environmental resources, . . ." The better theory for environmentalists, she suggests, is one drawn from the law of riparianism. Rose, Joseph Sax and the Idea of the Public Trust, 25 ECOLOGY L. Q. 351, 360-361 (1998).
hundreds of American decision, . . .” And, he might have added, it was repeated by scores of legal commentators. The ad hoc and ill-informed telling of that history has continued unabated since Deveney and MacGrady wrote, but it does not provide justification to secure for the public, in the name of newly conceived notions of common rights and without compensation, resources heretofore privately owned.

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

393 Supra note 44 at 591.