Private Property and the Public Trust: A Theory for Preserving the Coastal Zone

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I. INTRODUCTION

In the National Environmental Policy Act of 1969, Congress declared "that it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony."[1] By virtue of this Act, Congress recognized the right of every person to enjoy a healthful environ-

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1. 42 U.S.C. § 4331(a) (1982).

ment and imposed upon every person the responsibility of contributing to the preservation of the environment.[2] Yet environmental regulations designed to further these ends frequently have been criticized as violative of the fifth amendment.

In furtherance of the goals set forth in the National Environmental Policy Act, Congress passed the Coastal Zone Management Act of 1972.[3] Alterations of land in the coastal zone have far-reaching effects because of the close relationship between the shorelands and natural resources adjacent to them.[4] Therefore it was important for the government to step in to ensure that "[i]mportant ecological, cultural, historic, and aesthetic values in the coastal zone which are essential to well-being of all citizens [will not be] irretrievably damaged or lost."[5] Governmental action under this Act, such as attempts to limit the size or to change the location of a proposed development, also may be challenged by investors raising the specter of compensation.

The clash between public needs and private rights has made clear the need to reevaluate traditional notions of private property. The Supreme Court has been grappling with this problem ever since Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*,[6] struck down a regulation enacted to protect the public because it interfered with private property rights. This paper will look at the important cases and three theories the Court uses in evaluating "takings" of property.

The long recognized interest of the public in navigable waters is important in the coastal zone management context. By virtue of the "navigational servitude", Congress may regulate navigable waters without having to pay compensation. However, the tradition of protecting navigable waters from private acquisition was examined and altered by the Supreme Court in *Kaiser-Aetna v. United States*.[7] This paper will examine the majority opinion and dissenting opinions and the implications for public rights.

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2. *Id.* at § 4331(c).
3. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982).
4. The term "coastal zone" means the coastal waters . . . and the adjacent shorelands . . . strongly influenced by each other . . . and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches . . . . The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters . . . .

Id. at § 1453.
5. *Id.* at § 1451(e).
6. 260 U.S. 393 (1922).
7. 444 U.S. 164 (1979).

The public trust doctrine, another device which stems from the historic public rights in navigable waters, holds greater potential for sustaining environmental regulations. This doctrine imposes an affirmative duty on the states to preserve shorelands and other natural resources for certain public uses. It has received a great deal of attention in the last decade, reflecting the public's growing concern over the environment. This concern has prompted many states to codify the doctrine or to add it to their constitutions.[8] Issues arising from the application of the public trust doctrine generally concern the type of resources that should be held in trust for the public and the uses for which the resources should be held. This paper will look at how the doctrine has been used in four states.

The public trust concept provides an innovative basis for the assertion of public rights. Private owners cannot acquire a property right in resources reserved by society. Thus they have no basis for demanding compensation when uses of their property which affect those resources are restricted. This paper will explore the use of the public trust doctrine to uphold environmental regulation. It will argue not only that additional restrictions on the use of private property—especially in the coastal zone—are justified, but also that we as a society must change our entire way of thinking if we are to continue to enjoy the resources now available.[9]

II. "NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION"[10]

A. Protecting Public Interest and the Legacy of *Pennsylvania Coal*

1. The Physical Invasion and Harm/Benefit Theories

When there is a transfer of title or a physical invasion of property, the Court has had no problem finding that a taking has occurred and that compensation is required. If the state merely restricts the owner's use of property, though, the question of whether a taking has occurred is more difficult to answer. In *Pennsylvania Coal Co. v. Mahon*[11] the Court rejected the position that a

8. *See infra* notes 171-222 and accompanying text.

9. "Where would we be now, one might ask, if that hospitable shorezone had been subject to private ownership, control and development? Would our finned, crawling forebears have been able to pass over tidelands if they had been filled and fenced and 'improved' "? Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195, 231 (1980).

10. U.S. CONST. amend. V.

11. 260 U.S. 393 (1922).

reasonable exercise of the police power can never be a taking.[12] However, the Court has not articulated a satisfactory test for determining when a regulation constitutes a taking.

Several tests have been identified by the commentators. The physical invasion test is exemplified by *United States v. Causby*,[13] where the air space directly above plaintiff's chicken farm was used as a flight path for planes taking off from an adjacent government airport. Given the low altitude and the frequency of the flights, the Court found that this amounted to a servitude on plaintiff's property. It was "an intrustion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."[14] The Court declared that " 'it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.' "[15] Classifying this case as a physical invasion, the Court compared it to such physical invasions of the surface of property as installation of water lines and construction of sidewalks on private property.[16]

The harm/benefit theory was enunciated by Justice Harlan in *Mugler v. Kansas*,[17] which involved a statute that outlawed beer manufacturing. Although plaintiff had invested money in a plant on the basis of a license from the government, and its building could not be profitably put to any other use, the Court held that this did not constitute a taking.[18] The statute merely prohibited using the property for a purpose injurious to the public welfare; it did not appropriate the property for some public benefit:

> Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.[19]

Thus arose the distinction between abating a nuisance and taking property for public benefit. The former is an exercise of the police power; the latter requires institution of eminent domain proceedings.[20]

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12. *Id.* at 395.
13. 328 U.S. 256 (1946).
14. *Id.* at 265.
15. *Id.* at 266 (quoting United States v. Cress, 243 U.S. 316, 328 (1916)).
16. *Id.* at 265.
17. 123 U.S. 623 (1887).
18. *Id.* at 675.
19. *Id.* at 669.
20. *Id.*

Implicit in Harlan's analysis is the idea that a property owner has no right to use his property in a way that will cause harm to the public. Since no one can acquire a vested property right to harm the public,[21] the state does not have to pay to "take" it. The harm/benefit theory draws support from the common law maxim *sic utere tuo ut alienum non laedas*, 'use your own proprety so as not to harm the property of another.' It would seem that this maxim, on which nuisance law is based, is flexible enough to justify government attempts to regulate less traditional injuries to the public as the population increases and property becomes more interdependent.

There are problems with the harm/benefit theory.[22] The distinction between preventing a harm and creating a benefit is often not readily apparent. Is the landowner who will not allow his land to be used for a wildlife preserve or who insists on putting billboards on his land along a highway causing harm to the public? Determining what a nuisance is involves a value judgment. Some uses clearly threaten the public health or safety, but others are less obviously offensive. Another problem is that a use which was once innocuous may become harmful over time. Whether property owners should be subject to the risk that land which they may have owned for many years will be deemed a nuisance due to changed conditions or demographic shifts raises equitable concerns.

In *Hadacheck v. Sebastian*,[23] the City of Los Angeles passed an ordinance forbidding the operation of brickyards within the city limits. Plaintiff had bought land rich in clay and established a brick manufacturing business before the city boundaries were extended to encompass his property. Though the ordinance reduced the value of the land from $800,000 to $60,000, the Court held that this was not a taking: "There must be progress, and if in its march private interests are in the way they must yield to the good of the community."[24] Similarly, in *Goldblatt v. Town of Hempstead*,[25] the city changed the zoning ordinance, forcing the plaintiff to close down his mining business. The Court held that the police power was lim-

21. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39 (1964).

22. *See id.* at 48-50; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-1201 (1968).

23. 239 U.S. 394 (1915).

24. *Id.* at 410. Since plaintiff's property was still in a sparsely settled area, there was a question whether it was a nuisance. This should not be determinative, however; the city should be able to regulate in anticipation of further growth. In fact, the ordinance would prevent this problem from arising in the future.

25. 369 U.S. 590 (1962).

ited only by the requirement that it be exercised for a public purpose and that the means used be reasonable: "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."[26]

These cases seem unfair because the landowners using the land for industry were there first. One conceptual difference between preventing a harm and creating a benefit is that an anti-nuisance law forbids some uses but leaves the property owner with a range of choice, whereas a public benefit measure imposes a designated use, leaving no room for the owner to decide what to do with the property.[27] In many cases, although the property may not be usable in the way the owner intended, the total value of the land may not be substantially reduced. He can often recover his loss merely by holding on to the property. If the property owner is reluctant to invest for fear that the government will pass yet another ordinance, this may impose demoralization costs on society.[28] Whether such a fear should lead to compensation is debatable.

2. The Diminution of Value/Reasonable Investment-Backed Expectations Theory

The diminution of value test was created by Justice Holmes in *Pennsylvania Coal*. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking."[29] Holmes was concerned that an exercise of the police power could place an unfair burden on the individual.[30] This concern is reflected in the recent cases, beginning with *Armstrong v. United States*:[31] "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to

26. *Id.* at 592.

27. Michelman, *supra* note 22, at 1201, 1201 n.77.

28. *See generally id.* Michelman has proposed a utility test to determine when compensation should be offered. Compensation, he reasons, should be paid when it is a means of maximizing overall social utility, which he measures in terms of economic value based on three factors: 1. Net efficiency gains: the excess of economic benefits over losses resulting from regulation; 2. Demoralization costs: the present value of lost future production caused by demoralization of people who think they may be subject to similar treatment someday; and 3. Settlement costs: the cost of paying off people damaged in an amount sufficient to avoid demoralization costs. Demoralization cost are, generally speaking, the losses that society incurs as the result of discouraging the economically productive use of property.

29. 260 U.S. at 415.

30. Sax, *supra* note 21, at 40-41.

31. 364 U.S. 40 (1960).

bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[32] However, the Court has yet to formulate when, "in all fairness and justice," the burden of programs for the common good should be spread among the taxpayers and when a property owner may be adversely affected without compensation.

In *Pennsylvania Coal* the plaintiffs sought to enjoin the defendant coal company from removing coal located beneath the plaintiff's property even though the defendant had reserved the right to mine the coal by the deed by which the defendant had conveyed the surface to the plaintiffs predecessors in interest. Plaintiffs relied on a state statute that prohibited removal of coal in such a way as to cause the subsidence of public buildings.[33] Justice Holmes viewed the difference between regulation and taking as one of degree, not of kind,[34] thereby requiring resolution on a case-by-case basis. He apparently had no trouble deciding that the police power provided for in the statute was excessive, and consequently struck down the statute. Since the "property" consisted solely of the right to mine the coal, application of the statute destroyed defendant's property. Thus the statute was being used to "destroy previously existing rights of property and contract."[35] If the statute were permitted to stand, the landowner would receive a windfall.[36]

Justice Holmes failed to mention that these "previously existing rights of property and contract" grew out of a deed executed in 1878 by the coal company, conveying to the plaintiff's predecessor in interest. At that time coal companies owned substantially all of the land in the region. Purchasers had no choice but to accept the terms offered. Thus, the Mahon's predecessors in interest waived all claims for personal injury or property damage due to possible

32. *Id.* at 49.

33. The Act applied to the mining of anthracite coal within the limits of a city which would cause " 'subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.' " 260 U.S. at 417 (Brandeis, J., dissenting) (quoting the Pennsylvania statute).

34. *See* F. BOSSELMAN, D. CALLIES, J. BANTA, THE TAKING ISSUE 134 (Study for the Council on Environmental Quality, Executive Office of the President, 1973).

35. 260 U.S. at 413.

36. Justice Holmes compared the statute unfavorably to another Pennsylvania land use law considered by the Court in Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914). There the legislature had required coal companies to leave pillars of coal in place along the boundaries of adjacent mines, so as to prevent cave-ins onto miners. This restriction was deemed to validly secure "an average reciprocity of advantage." 260 U.S. at 415. However, this was Justice Holmes' gloss, not the reasoning of the Court in *Plymouth Coal.*

mine subsidence.[37] The language of the deed indicated that at the time the property was sold, the coal company knew that its operations caused surface subsidence.

The Supreme Court of Pennsylvania had recognized the history of these contracts and upheld the state statute, finding that these types of contracts were harmful to the community as a whole and, consequently, came within the ambit of the police power. "[T]he power to enforce the public policy of the state, declared in this legislature, cannot be defeated because they who move the court . . . are parties to such a contract."[38] It was, after all, the contracts themselves that were causing the problems the state had attempted to solve.

In dissent, Justice Brandeis, echoing Justice Harlan in *Mugler v. Kansas*, argued that a restriction imposed to protect the welfare of the public is not a taking. "[T]he right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance."[39] The mineral rights remained in the coal company's possession. The state merely prevented the coal company from "making a use which interferes with paramount rights to the public."[40] Brandeis provided a pointed illustration: "If by mining anthracite coal the owner would necessarily unloose poisonous gasses, I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields."[41]

Justice Brandeis analyzed the case on the reasonableness of the statute and suggested that the Court defer to the determination of the Pennsylvania legislature.[42] A contract between parties should not prevail when the public safety is involved. In addition, where the police power is exercised to protect the public from danger, there is no need to consider reciprocity of advantage between the property owner and the rest of the community. However, he noted that prohibiting an owner from certain uses leads to "the advantage of living and doing business in a civilized community . . . given by the act to the coal operators."[43]

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37. F. Bosselman, *supra* note 34, at 130.

38. *Id.* at 133, *quoting* Record at 74, *Pennsylvania Coal.*

39. 260 U.S. at 417 (Brandeis, J., dissenting).

40. *Id.* (Brandeis, J., dissenting).

41. *Id.* at 418 (Brandeis, J., dissenting).

42. *Id.* at 420.

43. *Id.* at 422. Justice Holmes' arguments sound suspiciously like those used to strike down state regulation of business on substantive due process grounds. This case, interestingly enough, was decided well before the Court refuted that doctrine in Nebbia v. New York, 291 U.S. 502 (1934). Justice Brandeis' forward-looking approach of not

That the diminution of value test is still applied is illustrated by *Penn Central Transportation Co. v. New York City*.[44] Although a taking was not found, the Court reached its conclusion only after determining that the value of Penn Central's property was not significantly diminished. The City of New York had undertaken to preserve some of its historic buildings by requiring the owners of those buildings to follow certain procedures before commencing any construction.[45] The Court noted that enhancing the quality of life by preserving aesthetic features is a permissible state goal and that building restrictions are an appropriate means.[46] Plaintiffs were denied permission to build an office tower on top of Grand Central Terminal. They had contracted with a building company for construction and claimed that the denial of the ability to exploit this property interest constituted a taking.

The Court examined two factors: the economic impact of the regulation—and, particularly, the extent to which it interfered with "distinct investment-backed expectations"—and the character of the governmental action.[47] The majority's decision turned on the first factor, which is a modernized version of the diminution of value test; the dissent based its arguments on the second factor.

Writing for the Court, Justice Brennan observed that governmental action adversely affects recognized economic values in a wide variety of contexts: taxes, programs involving riparian owners on navigable waters and land use regulations that may prohibit the

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replacing a statute rationally related to a legitimate state objective with the point of view of the Court was not applied to the field of land use regulation until four years later, in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). That case upheld zoning as a reasonable exercise of the police power. In *Euclid*, the plaintiff attacked the ordinance on its face. The Court said that, because industrial uses can be a nuisance, zoning is a legitimate end of the police power. *Id.* at 388-89. Further, excluding buildings devoted to business from residential neighborhoods bears a rational relationship to the health and safety of the community. *Id.* at 391. The case established that zoning would be presumed constitutional; the scope of judicial review would be narrow. In Nectow v. City of Cambridge, 277 U.S. 183 (1928), decided two years later, the Court struck down an ordinance as applied because there was no clear public purpose in zoning plaintiff's land residential. Since adjacent land was zoned industrial, the general welfare of that part of the city would not be promoted. *Id.* at 187. Thus, this was not a reasonable exercise of the police power. (Both *Euclid* and *Cambridge* were due process rather than taking challenges.)

44. 438 U.S. 104 (1978).

45. New York's Landmarks Preservation Law imposed a duty upon the owner to keep the exterior features of the building "in good repair" and required prior approval from the Landmarks Preservation Commission for any proposal to alter the exterior of the landmark. *Id.* at 111-12.

46. *Id.* at 129.

47. *Id.* at 124.

most beneficial use of the property.[48] In a seeming departure from *Pennsylvania Coal*, the Court looked to the interference with Penn Central's right in the parcel as a whole. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[49] The Court said that Penn Central's "primary expectation concerning the use of the parcel," continuing to use it as a railroad terminal, had not been infringed[50] and noted that transferable development rights were available to mitigate the impact of the law.[51]

In dissent, Justice Rehnquist quoted the language of *United States v. Cress* that had been dispositive in *United States v. Causby*:[52] " '[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.' "[53] He contended that the Landmarks Preservation Law is different from a zoning regulation where the burdens are shared by all property owners in a designated area. The restrictions placed on those property owners accrue to their common benefit (e.g., the value of their property may increase as a result of the restrictions), as well as to the municipality as a whole. The landmark law, Justice Rehnquist argued, is more like a discriminatory zoning ordinance;[54] it imposed a servitude on plaintiff's property that was not imposed on neighboring property.[55]

Thus, in the words of Justice Holmes, there is no "average reciprocity of advantage": the City of New York, and especially those whose property around Grand Central Terminal will not be overshadowed by a skyscraper, win; Penn Central loses. Justice Brandeis, dissenting in *Pennsylvania Coal*, said that reciprocity of advantage is an important consideration where the governmental action is for the purpose of conferring benefits.[56] Applying that test, Justice Rehnquist observed that Penn Central's plan was not unlawful and yet its property was subjected to restrictions greater

48. *Id.* at 124-25.
49. *Id.* at 130.
50. *Id.* at 136.
51. *Id.* at 137. Because the Court found no taking, it did not address the question of whether TDR's would constitute just compensation.
52. *See supra* note 16 and accompanying text.
53. *Id.* at 149-50 (Rehnquist, J., dissenting) (quoting United States v. Cress, 243 U.S. 316, 328 (1917)).
54. *Id.* at 139 n.2 (Rehnquist, J., dissenting).
55. *Id.*
56. 260 U.S. at 422.

than those imposed by the city's zoning requirements.[57]

The majority reasoned that the Landmarks Preservation Law was a form of zoning even though it does not apply to neighborhoods because it applies to all "similarly situated" property. The only danger is that it might be arbitrarily applied, and the appellants did not contend that it had been arbitrarily applied as to them.[58] The dissent argued that the only cases found not to involve takings of property were those involving regulations to prevent a noxious use.[59] The majority countered that these cases were "better understood" as not resting on restriction of noxious use "but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit . . . ."[60] The brickyard in *Hadacheck v. Sebastian* and the mine in *Goldblatt* were lawful businesses that were operating before the cities grew up around them. The majority added that destruction of a landmark could not be asserted not to be harmful.[61]

3. Some Thoughts

The disagreement between the majority and the dissent in *Penn Central* illustrates the difficulties of the harm/benefit theory. New York's Landmarks Preservation Law is similar to environmental regulations: both are preventive measures designed to halt certain practices *before* they cause harm. Certainly this is just as valid as attempting to rectify an existing harm. To say that preventive measures require payment of compensation means that landowners have a right to use their property in any way they choose—even if the legislature has determined, for example, that destroying sand dunes will erode beaches. The state should not have to wait until there is nothing left to protect (or to exploit).

One problem with the diminution of value/reasonable investment-backed expectations theory, is whether the Court measures the diminution of value in absolute terms or relative to the total value of property regulated. Whether the owner benefited from laws that gave his property favorable treatment or pushed some of his costs onto society so that the value of the property was partially created by the public are also considerations. If Penn Central had sold Grand Central Terminal and retained "development rights" in

57. 438 U.S. at 139-40 (Rehnquist, J., dissenting).
58. *Id.* at 132.
59. *Id.* at 145 n.8 (Rehnquist, J., dissenting).
60. 438 U.S. at 133-34 n.30.
61. *Id.*

the space above, Penn Central would have lost everything, as did the coal company in *Pennsylvania Coal.* Would the Court say that Penn Central acted at its own risk when it sold the property?

According to Professor Sax, the compensation clause was intended to protect against governmental action that is arbitrary.[62] The courts, then, should be concerned only with whether a regulation is a valid and reasonable exercise of the police power. This, of course, is the jurisprudence for which Justice Brandeis argued in dissent in *Pennsylvania Coal.* Professor Sax's approach would have the legislature determine what uses are harmful to the public and what means to use to prevent the harm.[63] The courts would not interfere unless "the legislature has subordinated a judgment about maximization of social benefits to advancement of private gain."[64]

There have always been limitations on property rights, such as nuisance law and attachment for debt.[65] In addition, there have been changes in the common law that effect reallocation of resources, such as the creation of product liability doctrine.[66] Society's outlook is changing. Congress and state legislatures have made findings and enacted environmental regulations. Although the developers often disagree with the changes in policy, they certainly have enough influence to have been vocal participants in the political process. The government then allocates resources to reflect competing social values.[67] Recent legislation was brought about by growing public concern, and developers in the coastal zone cannot claim ignorance of that concern. However, environmental regulations generally do not prohibit development completely; rather, they require that it be carried out on a regulated scale.

When *Penn Central* was before the New York Court of Appeals,[68] Judge Breitel came up with an intriguing analysis. Under New York law, an unreasonable exercise of the police power could not be a "taking," but could nevertheless be unconstitutional if it destroyed all but a residue of value.[69] The court asked only whether

62. Sax, *supra* note 21, at 57.

63. *See* Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149, 175 (1971).

64. *Id.* at 176.

65. Oakes, *Property Rights in Constitutional Analysis Today,* 56 WASH. L. REV. 583, 589 (1981).

66. Sax, *supra* note 21, at 51.

67. *Id.* at 62-63.

68. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

69. *See* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 593-94,

the restrictions placed on Penn Central amounted to a denial of due process: had the government deprived Penn Central of all reasonable return on its property?[70] The "reasonable return" due the property owner is limited to the value created through the property owner's efforts or investment and does not include society's contribution in providing opportunities for exploitation.[71] In this case, Grand Central Terminal would never have become a major transportation center without people. It is this status that makes it a desirable site for an office building. Moreover, the government has favored it as a public utility, provided assistance in its financial troubles, and increased its value by concentrating subway and bus routes nearby.[72] "It is exceedingly difficult but imperative, nevertheless, to sort out the merged ingredients and to assess the rights and responsibilities of owner and society."[73] The transferable development rights provided the return to satisfy due process.[74] Judge Breitel felt that this was not a normal zoning case.[75] The dissenting justices on appeal made the same judgment, but reasoned that the regulation was discriminatory zoning,[76] a conclusion rejected by the New York court.[77] To the New York Court of Appeals, singling out the properties affected by the landmark law was justified by the cultural, architectural, historical, or social significance attached to the landmark.[78]

B. The Navigational Servitude and *Kaiser Aetna*

1. Background

In *United States v. Chandler-Dunbar Water Power Co.*,[79] the Supreme Court established that the property rights of riparian own-

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597, 350 N.E.2d 381, 384-85, 387, 385 N.E.2d 5, 8-9, 11, *app. dismissed and cert. denied sub nom.* Ramsgate Properties, Inc. v. City of New York, 429 U.S. 990 (1976).

70. *Penn Central*, 42 N.Y.2d at 332-33, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.

71. *Id.* at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916. The court here suggested, also, that society's contributions to the value of the property entitled society to some return. This is similar to Henry George's idea that since society's increasing demand for land—rather than the efforts of the landowner—is what gives it value, society—not the landowner—should reap the benefits. Hapgood, *Progress and Poverty Continued*, THE NEW REPUBLIC, May 12, 1979, at 21.

72. *Penn Central*, 42 N.Y.2d at 332, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 918-19.

73. *Id.* at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.

74. *Id.* at 335-36, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

75. *Id.* at 329-30, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.

76. *Penn Central*, 438 U.S. at 139-40 (Rehnquist, J., dissenting).

77. *Penn Central*, 42 N.Y.2d at 330-31, 366 N.E.2d at 1274-75, 397 N.Y.S.2d at 918.

78. *Id.* at 330-31, 366 N.E.2d at 1274-75, 397 N.Y.S.2d at 918.

79. 229 U.S. 53 (1913).

ers[80] on navigable waters are qualified by the interest of the public in "maintain[ing] them as 'common highways, . . . forever free.' "[81] Title to submerged land granted by state law is subordinate to the power of Congress under the commerce clause to regulate and improve navigation.[82] This "servitude in respect of navigation" means that compensation is unnecessary when the government "takes" property pursuant to its control of navigation.[83] In *Chandler-Dunbar*, the plaintiff claimed an interest in the flow of the stream and demanded compensation for the government's reduction of water power. The Court rejected this claim, holding that navigable waters are public property and not subject to private ownership. Although states may grant certain rights to riparian owners, such as the right to construct wharves, these individuals cannot claim an interest superior to that of the public in cases where there is a conflict.[84] This case established the principle that no compensation is required when the water involved is navigable.

In England, waters subject to the ebb and flow of the tide were considered navigable. The Supreme Court established quite early that the test used in England was not applicable in this country, where the great rivers and lakes, although not affected by the tide, support a great deal of commercial activity.[85] The more appropriate test was whether the waters are navigable in fact.[86] They are navigable in fact when they are used or are capable of being used as "highways for commerce."[87] A water may be navigable in fact even if natural barriers have to be removed in order to accommodate larger vessels.[88]

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80. The term "riparian" will be used throughout this Article; it should be understood as including "littoral" where applicable.

81. Kaiser Aetna v. United States, 444 U.S. 164, 186 (1979) (ellipsis by the Court). The quotation is from the Northwest Ordinance: "[T]he navigable Waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the Inhabitants of the said territory, as to the Citizens of the United States, . . . without any tax, impost or duty therefor." Act of July 13, 1787, art. 4, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 341 (as amended by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50).

82. *Chandler-Dunbar*, 229 U.S. at 63 (citing Gibson v. United States, 166 U.S. 269, 271-72 (1897)).

83. *Id.* at 64 (citing Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

84. *Id.* at 70.

85. *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454-58 (1851).

86. *Id.* at 454.

87. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).

88. *See* The Montello, 87 U.S. (20 Wall.) 430 (1874).

> It would be a narrow rule to hold that . . . unless a river was capable of being navigated by [large vessels], it could not be treated as a public highway. The capability of

2. The Facts of the Case and Analysis

In *Kaiser Aetna v. United States*,[89] the Court was faced with the question of whether compensation is required for a public right of access to a body of water made navigable by a property owner.[90] The Court held that a taking was involved and that compensation was due. Although the facts of the case may limit its precedential value, the Court's approach indicates a willingness to protect private rights at the expense of the public.

Kaiser Aetna owned property on the island of Oahu, Hawaii, bordering the Pacific Ocean. Included in its acreage was a fishpond, a shallow body of water along the shore that was once separated from the bay by a sandbar and stone walls. Openings in this barrier allow the pond to be affected by tidal action. Such ponds were used by the ancient Hawaiians to raise fish and were a part of the feudal system. Rights in the fishponds were recognized to the same extent as rights in other real property. After Hawaii became an American possession, fishponds continued to be treated the same as land and under state law were considered private property.[91]

Kaiser Aetna converted the pond into a marina. The U.S. Army Corps of Engineers was informed of the plans and told Kaiser Aetna that permits were not required for the development. Kaiser Aetna later proposed to dredge a channel connecting the marina to the bay, and the Corps acquiesced. The development included waterfront lots and boat slips for which nonresidents paid usage fees.[92] The lawsuit arose when the Corps of Engineers sought to require Kaiser Aetna to allow free public access to the marina since it was a "navigable water of the United States."[93] The Court found that even though the marina was navigable, Kaiser Aetna could reserve it for the use of its members.

The thrust of the opinion was that the navigational servitude is not coextensive with Congress' power to regulate navigation. Thus

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use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it is capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact .

Id. at 441.

89. 444 U.S. 164 (1979).

90. *Id.* at 169. This is how the majority framed the issue; the dissent viewed the body of water as having been navigable naturally, on the basis of an "ebb and flow" test that the dissenters thought still applicable to coastal land. *Id.* at 181-84 (Blackmun, J., dissenting).

91. *Id.* at 166-67.

92. *Id.* at 167-68.

93. *Id.* at 168.

the waterway's navigability was not dispositive of the public access issue. While Congress might "prescribe the rule of the road, require the removal of obstructions to navigation," and otherwise regulate to promote navigation,[94] such an exercise of authority did not create a "blanket exception" to the takings clause.[95] The Court pointed out that the concept of navigability may be used to establish federal jurisdiction, to define the scope of Congress' regulatory authority under the commerce clause or to determine the authority of the Corps of Engineers. However, a body of water's navigability alone does not determine how far the navigational servitude extends.[96]

The Court took a narrow view of the navigational servitude, finding that it gave rise to governmental authority to assure that navigable waters "retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce."[97] The Court implied that since the servitude existed "by virtue of the Commerce Clause,"[98] it was limited to the promotion of navigation. However, "[h]ere, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal* . . . ."[99]

Does the navigational servitude merely express the public interest in keeping navigable waters navigable? Does it only apply to ports and arteries of commerce? Must the public right asserted relate directly to navigation? The Court in *Kaiser Aetna* appears to answer these question in the affirmative.[100] The implication is that the public interest in navigable waters comprises no more than the regulation of interstate and foreign commerce.[101] Since the marina had little, if any, commercial significance, the public interest was minimal. Whereas prior cases had viewed navigable waters as public property and the servitude as protecting public rights therein, the *Kaiser Aetna* court did not, and instead recognized the private owner's claim as superior to the public's.

It was significant to the Court that the pond was private property under state law. The pond was navigable only because of Kaiser

94. *Id.* at 174.
95. *Id.* at 172.
96. *Id.* at 171-72.
97. *Id.* at 177.
98. *Id.*
99. *Id.* at 178.
100. *See id.* at 178-79; 10 ENVTL. L. REV. 654, 663-64 (1980).
101. 10 ENVTL. L. REV. at 658.

Aetna's improvements. Without those improvements, it had not been usable as a "highway for commerce." Thus, it was not the sort of "great navigable stream" considered incapable of private ownership.[102] The developer invested "substantial amounts of money" but, as a result, was asked to give up "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."[103] The majority was also concerned by the fact that the Corps of Engineers consented to the dredging that made the pond navigable. This, according to the Court, led to certain expectations on the part of Kaiser Aetna, one of which was that the government must pay if it demands a right of public access.[104] The Court felt that this would result in a substantial devaluation of the property.[105] Essentially, the Court treated the government's effort to provide access as an action to acquire an easement across private property for which compensation was due.[106]

The opinion alludes to all three theories used by the Court in takings jurisprudence. First, opening up the marina to the public would be a physical invasion.[107] Second, that invasion would cause a diminution in value, because one of Kaiser-Aetna's investment-backed expectations was that the public would have to pay to use the marina.[108] Third, free access was not ordered to abate a nuisance, but to create a benefit, tantamount to creating a public park.[109] The characterization could be disputed by arguing that preventing the public from using navigable waters was "harmful", or that public access to a marina designed for 22,000 would not turn it into a public park. It is unclear that the property would be worth

102. 444 U.S. at 175 (citing *Chandler-Dunbar*, 229 U.S. at 69).

103. *Id.* at 176.

The bundle of rights concept of property has appeared in all of the recent cases. It fits neatly with the reasonable investment-backed expectations analysis: a developer can divide his property into separate interests and argue that a regulation destroys one of them, contrary to his expectations. Justice Brennan met such an argument in much the same way as he dealt with the claim in *Penn Central*: "[t]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51, 65-6 (1979). However, Justice Brennan does not recognize that some strands may be fundamental, others not.

104. 444 U.S. at 179.

105. *Id.* at 180.

106. *Id.* (citing *Causby*, 328 U.S. at 265).

107. *Id.*

108. *Id.*

109. *Id.*

less if free public access was available. Perhaps the Court was afraid that people would not lease space if they could enter for free. However, public access did not include the right to have a lot or to keep a boat at the marina. Arguably, governmental permission to improve the marina should not negate the traditional concept of navigable waters as areas open to the public.

In *Pruneyard Shopping Center v. Robins*,[110] decided six months later, Justice Rehnquist, again writing for the majority, agreed that it was appropriate to qualify the "fundamental" right to exclude others. Plaintiffs attempted to distribute literature from a booth in a large enclosed shopping center and claimed that the shopping center's rule prohibiting distribution was an infringement of their right of free speech under both the state and federal constitutions. The California Supreme Court held that the state constitution protects " 'speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.' "[111] The United States Supreme Court deferred to the California Supreme Court's interpretation of the state constitution, recognizing that states have the authority to adopt more expansive rights than those conferred by the federal constitution.[112] Perhaps if the state rather than the federal government had granted the right of access in *Kaiser Aetna*, that regulation would have withstood a takings challenge.

A crucial factor in *Pruneyard* seemed to be the necessity of the right to exclude others from the enjoyment of the use or from the economic value of the property. The Court distinguished *Kaiser Aetna*, on which the shopping center relied, saying that the regulation in that case so interfered with Kaiser Aetna's " 'reasonable investment backed expectations' " that it amounted to a taking.[113] Thus, *Pruneyard* makes clear that the basis for the decision in *Kaiser Aetna* was the diminution of value caused by the imposition of a public right of access. The Court quickly disposed of the property owner's due process claim, quoting *Nebbia v. New York*: " '[N]either property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest. . . .' "[114]

110. 447 U.S. 74 (1980).

111. *Id.* at 78 (quoting Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979)).

112. *Id.* at 81.

113. *Id.* at 84 (quoting *Kaiser Aetna*, 444 U.S. at 178; however the Court in *Kaiser Aetna* had discussed "reasonable investment backed expectations" only in reference to *Penn Central*, 438 U.S. at 124, see *Kaiser Aetna*, 444 U.S. at 175).

114. *Id.* at 84-5 (quoting *Nebbia v. New York*, 291 U.S. 502, 523 (1934)).

The dissenters in *Kaiser Aetna* criticized the majority for assuming that the marina became subject to the navigational servitude as a result of the developer's improvements. Justice Blackmun, joined by Justices Brennan and Marshall, argued that the pond was a navigable body of water before Kaiser Aetna appeared on the scene, based on the ebb and flow of the tide test of navigability.[115] When the Court adopted the test of navigability in fact, it was expanding the reach of federal authority over navigable waters to include rivers and lakes, not discarding the traditional approach.[116] According to the dissenters, case law supported this argument[117] and mandated application of the ebb and flow of the tide test to coastal workers. "The ebb and flow of the tide define the geographical, chemical, and environmental limits of the three oceans and the Gulf that wash our shores. Since those bodies of water in the main are navigable, they should be treated as navigable to the inner reach of their natural limts."[118] Thus, the body of water at issue was navigable before Kaiser Aetna invested labor and capital in the project.

The dissenters also differed with the majority on the question of whether the navigational servitude was coextensive with navigability. The dissent regarded the servitude as the formula by which the government carries out its responsibility as "guardian of a public right of access to navigable waters of the United States."[119] To preserve the dominant federal interest in navigation, the government has been given the power "not only to regulate interstate commerce by water, but also to control the waters themselves, and to maintain them as 'common highways, . . . forever free.' "[120] The

115. *Kaiser Aetna*, 444 U.S. at 181-84 (Blackmun, J., dissenting).

116. 444 U.S. at 183 (Blackmun, J., dissenting).

117. The issue in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852), was the jurisdiction of the federal courts to hear a negligence claim involving the collision of two vessels on Lake Ontario. The Court reasoned that the ebb and flow of the tide test of admiralty jurisdiction was adopted in England because it was an easy way to determine navigability and because there was no navigable stream not subject to the tide. *Id.* at 454-55. The traditional definition of admiralty jurisdiction, however, was narrower than that which the Constitution contemplated; commerce on inland navigable waters was therefore within the Constitutional admiralty jurisdiction. *Id.* at 451-52. It is the public and navigable nature of a body of water that should determine the scope of admiralty jurisdiction. *Id.* at 455. The issue in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871), was whether a river on which a commercial ship was traveling was navigable; if so, the ship was subject to "such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States." *Id.* at 564.

118. *Kaiser Aetna*, 444 U.S. at 183 (Blackmun, J., dissenting).

119. *Id.* at 186 (Blackmun, J., dissenting).

120. *Id.* (quoting the Northwest Ordinance, Act of July 13, 1787, art. 4, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 341 (as amended by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50)) (Blackmun, J., dissenting).

dissent pointed out that navigable waters are sometimes referred to as "public" waters.[121] If a body of water is navigable, its form and the manner in which it was created are not important.[122]

The dissent then considered whether the government's exercise of the navigational servitude required compensation. It concluded that in making use of the pond, Kaiser Aetna acted at its own risk.[123] Kaiser Aetna had only a share of the common interest in navigable waters, and even when the riparian owner has invested substantial amounts, it has merely increased or improved its access to the right held by all members of the public. Therefore the loss cannot be compensable.[124] Underlying this principle is the idea that navigable water cannot be private property. The majority's treatment of the marina as fast land was inappropriate, because its value and the motive for its development lay in its navigability.[125] The dissenters also argued that the significance attached by the majority to the fact that the pond was private property under Hawaiian law was inappropriate. It reasoned that local law determines rights between citizens and between citizen and state but does not override the assertion of the navigational servitude by the federal government.[126]

The dissenting justices weighed the private interest against the public interest to reach their conclusion.[127] They do not go so far as to say that since there is no private property, there cannot be a taking. However, to the extent that investments were built upon public water, the diminution in the value of the property caused by the public exercising its right to that water should not be taken into account.[128] According to the dissenters, Kaiser Aetna's expectation that it could make a navigable body of water private was not backed by the law and was unreasonable. Furthermore, the marina's value, to a large extent, was due to its location on the bay, and therefore also should have been excluded in computing the diminution of value. Thus the plaintiff's interest in enjoying exclusive use of the marina was weak.

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121. *Id.* at 185 (citing *The Genesee Chief*, 53 U.S. (12 How.) at 457; The Daniel Ball, 77 U.S. (10 Wall.) at 563) (Blackmun, J., dissenting).

122. *Id.* at 187 (Blackmun, J., dissenting).

123. *Id.* at 190 (Blackmun, J., dissenting).

124. *Id.* at 189-90 (Blackmun, J., dissenting).

125. *Id.* at 190 (Blackmun, J., dissenting).

126. *Id.* at 191-92.

127. *Kaiser Aetna*, 444 U.S. at 188 (Blackmun, J., dissenting).

128. *Id.* (Blackmun, J., dissenting). This is similar to Judge Breitel's analysis in *Penn Central*. *See supra* notes 62-69 and accompanying text.

The public interest lay in the commercial significance of navigable waters arising from the freedom of commerce. The dissent argued that if developers are permitted to appropriate navigable waters for private use, there will be little left of the "freedom of commerce that the navigational servitude is intended to safeguard."[129] Thus, the government should be viewed as protecting the public from injury rather than creating a benefit for the public.[130] The dissent therefore feared that "[a]fter today's decision it is open to any developer to claim that private improvements to a waterway navigable in interestate commerce have transformed 'navigable water of the United States' into private property, at least to the extent that he may charge for access to the portion improved."[131]

The unusual confluence of facts in *Kaiser Aetna* would make it seem less than significant if its theme of limiting public rights were not affirmed in *Vaughn v. Vermilion Corp.*,[132] the companion case. There the owner of property along the Gulf of Mexico constructed a system of canals to be used for hunting and fishing. The canals were subject to the ebb and flow of the tide and were navigable in fact. The property owner sought an injunction to keep non-lessees from using the canals. The Court identified two issues for resolution. The first issue was "[w]hether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are similarly open to use by all citizens of the United States."[133] The Court found this question was answered by *Kaiser Aetna*: the federal authority over navigation did not give rise to a right of public access.

The Court did not decide the second issue: if a private owner built artificial navigable channels, but did so, in part, by destroying pre-existing naturally navigable channels, did the artificial waterways become part of the "navigable waterways of the United States?"[134] Since this question had not been decided below, the case was remanded. In contrast, the dissenting justices contended that the property owner "voluntarily undertook to transform land into navigable water" and thereby surrendered the right to control access to the canals, even though the canals were entirely artificial.[135]

129. 444 U.S. at 191 (Blackmun, J., dissenting).
130. *Id.* (Blackmun, J., dissenting).
131. *Id.* at 191.
132. 444 U.S. 206 (1979).
133. *Id.* at 208.
134. *Id.*
135. *Id.* at 210 (Blackmun, J., dissenting).

III. THE PUBLIC TRUST DOCTRINE

A. Introduction

The public trust doctrine evolved from the English common law concept that the sovereign owned all tidal waters and the lands lying beneath them.[136] This doctrine is different from the police power, which enables the government to act in the name of public health, safety, and welfare. The American public trust doctrine now imposes upon the government an affirmative duty to hold in trust certain lands, including shorelands and navigable lakes and streams.[137] The government's role is analogous to that of a trustee.[138] In general, property subject to the trust must be open to the public, maintained for certain public uses, and may not be turned over to private parties. There is restraint on the state's power to act and the courts will look closely at derogations from trust lands.[139] Thus, the public trust doctrine is to the states what the National Environmental Policy Act and the close scrutiny doctrine are to federal agencies.[140]

The doctrine can be used in a variety of ways, from preventing a use of property, either by the government or by private parties, to justifying a governmental regulation. Professor Sax observes that three judicial concepts support the doctrine.[141] First, in *Martin v. Lessee of Waddell* the Supreme Court recognized that the Crown's public trust in colonial fishing waters continued in the trust of the State of New Jersey: "[M]en . . . could not have been expected to encounter the many hardships that unavoidably attended their emigrating to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property."[142] Professor Sax has characterized this approach as holding that "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than

136. Stevens, *supra* note 8, at 201.

137. *See* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 435, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356, *cert. denied sub nom.* City of Los Angeles Dep't of Water and Power v. Nat'l Audubon Soc'y, 104 S. Ct. 413 (1983).

138. Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388, 388 & n.5 (1970).

139. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 485-547 (1970).

140. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 170-71 (1977).

141. Sax, *supra* note 139, at 484-85.

142. 41 U.S. (16 Pet.) 367, 414 (1842).

of serfs."[143] To protect these interests, care should be taken that individuals not acquire the power to control them. The federal navigational servitude reflects this sentiment.[144]

The second principle supporting the doctrine is that certain interests are gifts of nature which no one should be permitted to claim as his own.[145] This idea lay behind the setting aside of national forest and park lands.[146] It is not clear, however, that even under these circumstances the sovereign must always preserve these lands unchanged.[147]

The last concept in support of the public trust doctrine is practical: certain resources are "peculiarly public" in nature and should be controlled by the government for the benefit of the community as a whole.[148] Different calls upon the resource can thus be regulated and accommodated. Professor Sax's paradigm is water, both as used and as traveled upon.[149]

Several issues will be explored in this section: 1. the extent to which the state may grant public trust lands to private owners; 2. the extent to which the state may change the use to which the land is put; 3. how far beyond its traditional application to shorelands the doctrine extends; and 4. the uses for which the property must be maintained. It should be noted that many states have extended the scope of the public trust doctrine by statute or by constitutional amendment, thereby providing the public with a valuable tool for protecting its rights.[150] Though the doctrine is flexible, it

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143. Sax, *supra* note 139, at 484.

144. *Id.*

145. *Id.*

146. *Id.* at 484-85;

> The resources which have required ages for their accumulation to the intrinsic value and quality of which human agency has not contributed, which there are no known substitutes [sic], must serve as the welfare of the nation. In the highest sense, therefore, they should be regarded as property held in trust for the use of the race rather than for a single generation and for the use of the nation, rather than for the benefit of a few individuals who may hold them by right of discovery or by purchase.

NATIONAL CONSERVATION COMMISSION REPORT, S. Doc. No. 676, 60th Cong., 2d Sess. 109 (1909), *quoted in* Cohen, *supra* note 125, at 388 n.4.

147. It is not the law, as we view it, that the state, represented by its Legislature, must forever be quiescent in the administration of the trust doctrine to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin.

State v. Public Serv. Comm'n, 275 Wis. 112, 120, 81 N.W.2d 71, 74 (1957), *cited in* Stevens, *supra* note 8, at 225.

148. Sax, *supra* note 139, at 485.

149. *Id.*

150. W. RODGERS, *supra* note 140, at 182.

has wide variations from state to state.

B. The Early Cases

In *Shively v. Bowlby*[151] the Supreme Court had occasion fully to explain the late-nineteenth century understanding of the history of the public trust doctrine as interepreted in England and adopted in this country. One party claimed title to land below the high water mark of the Columbia River based on a grant from the United States; the other claimed title based on a grant from the State of Oregon. The Court held that the state grant prevailed over the grant from the federal government.

In England, "the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all lands below high water mark" were vested in the Crown.[152] This land was unsuitable for buildings or farming. Its natural uses were public—for navigation and fishing. "[T]he title, *jus privatum*, in such lands belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit."[153] The King could grant the land to another owner or it could be acquired by usage, but it remained imbued with a public interest—" 'that *jus privatum* is clothed . . . with a *jus publicum*.' "[154] In other words, an individual may acquire the fee with respect to the jus privatum, but inalienable rights remain in the public.

In the United States after the American Revolution, all rights of the Crown vested in the states, subject to the rights surrendered to the federal government by the Constitution,[155] such as the right to control navigation. In *Martin v. Lessee of Waddell*,[156] the Court had held that the states became the sovereign with respect to submerged lands.[157] The proprietors of the King had been holding the lands in trust for the public, and consequently, an individual taking from a proprietor could not assert title possessing rights greater than those of the royal proprietor.[158] The Court there had pointed out that the settlers would not have endured the hardships had they

151. 152 U.S. 1 (1894).
152. *Id.* at 11.
153. *Id.*
154. *Id.* at 12 (quoting M. HALE, DE PORTIBUS MARIS, in F. HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, 84 (Dublin 1787)).
155. *Id.* at 14-15.
156. 41 U.S. (16 Pet.) 367 (1842).
157. *See supra* notes 142-143 and accompanying text.
158. 41 U.S. (16 Pet.) at 415-16.

known that land under the rivers and oceans "at their very doors" could be appropriated as private property, and that "the settler upon the fast land [could be] . . . excluded from its enjoyment, and unable to take a shellfish from its bottom, or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another."[159] Though the dispute in *Shively v. Bowlby* arose in Oregon, the Court noted that western states are treated the same as the original states. The Court noted that when territory was acquired from Mexico, the United States acquired title to the submerged lands and held it in trust for future states. Upon admission to the Union, title passed to the states.[160] This doctrine and this

159. *Id.* at 414.

160. *Id.* at 30.

Last term, in a unanimous opinion, the United States Supreme Court reversed a decision of the California Supreme Court that followed this reasoning. Summa Corp. v. Cal. State Lands Comm'n, 104 S. Ct. 1751 (1984) rev'g City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), arose when the City of Los Angeles sought to make improvements to a privately owned lagoon without exercising its power of eminent domain, contending that the public owned an easement therein by virtue of the public trust doctrine. Title to the land held by Summa Corporation was originally acquired from Mexico and patented by the United States following the Treaty of Guadalupe Hidalgo. The patent issued to Summa Corporation's predecessors in interest did not mention the public trust easement. *Id.* at 1753-4.

The California Supreme Court had looked at whether the title acquired from Mexico was subject to the public interest in the tidelands. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 298, 644 P.2d 792, 797, 182 Cal. Rptr. 599, 604 (1982). The court found in the law of Mexico, as expressed in Las Siete Partidas, a doctrine similar to the common law public trust:

> The things which belong in common to the creatures of this world are the following, namely, the . . . sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage . . . . Rivers, harbors, and public highways belong to all persons in common . . . .

Id. at 298 n.8.

The court held that the federal government's silence when it patented the title did not lead to a loss of the public right. *Id.* at 300. Holding the other way would result in a "dual system of rights"; southern Californians would enjoy title free of the public trust while northern Californians, whose title did not originate with Mexico, would hold their property subject to the trust. *Id.* at 298.

The United States Supreme Court did not reach the question of whether Mexican law imposed a public right on the tidelands. 104 S. Ct. 1751 at 1753. The Court focused on the obligation of the United States under the Treaty of Guadalupe Hidalgo to protect the property rights of Mexican landowners and on the importance of a final settlement of claims. The Court held that even if the property had been subject to the public interest under Mexican law, that interest was forfeited when the state of California failed to assert it in federal patent proceedings. *Id.* at 1758.

The impact of this decision on the public trust doctrine remains to be seen. It will probably be limited by its facts: the Court viewed the patent proceeding provided for by

policy was generally applicable outside the original states.[161]

The Supreme Court's opinion in *Illinois Central Railroad Co. v. Illinois*[162] is the "lodestar" of American public trust law.[163] In 1869, the State of Illinois had granted virtually the entire harbor of the City of Chicago to the Illinois Central Railroad. The grant was conditioned upon noninterference with the public's right of navigation. The Court pointed out that this condition merely restated the pre-existing restriction on private action.[164] The railroad intended to fill a part of the harbor to construct rail tracks, wharves, and buildings. Realizing that an immensely valuable piece of property had been lost, the Illinois legislature in 1873 repealed the grant.

Because the state could not abandon its trust in lands under navigable waters in the first place, the Court held that the legislature's repeal of the grant was legitimate.[165] The state's title to these lands was "different in character" from that to lands that the state may sell. It was "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 the liberty of fishing therein freed from the obstruction or interference of private parties."[166] Because the state had a duty to "hold and manage" submerged lands for the use of the public, the original grant was comparable to surrendering the police power in the "administration of government and preservation of the peace" to a private party.[167]

Several principles can be derived from *Illinois Central*. First, the state may not delegate its authority over public trust land to private parties. It may vest control temporarily in a municipality or other body, but retains the right to revoke.[168] Second, the state may grant parcels in order to promote the interests of the public when the public interest in the remainder is not thereby harmed.[169] The sorts of improvements which would promote the interests of the public include the building of port facilities.[170] However, the modern Court

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Congress in the statute implementing the treaty to be of overriding importance. *Id.* at 1756. It is interesting to note, however, that a present-day property owner may have greater title than the original Mexican grantee.

161. *Id.* at 28.
162. 146 U.S. 387 (1892).
163. Sax, *supra* note 139, at 489.
164. 146 U.S. at 451.
165. *Id.* at 453.
166. *Id.* at 452.
167. *Id.* at 453.
168. *Id.* at 453-54.
169. *Id.* at 453.
170. *Id.* at 452.

has given no hint of what additional private uses might be of a public value sufficient to justify such limited derogations from the public trust.

C. Some State Responses and Recent Cases

Massachusetts has interpreted the *Illinois Central* case as requiring that the legislature unambiguously makes its intentions clear when it appears to be altering the use of public trust lands.[171] Since the interest is a public one, the courts should ensure that the legislature and administrative agencies consider the public in all decisions that affect trust lands.[172] The Massachusetts court therefore created a presumption that the state legislature favored the continuation of a public park use even though it had granted significant rights to a private venture. Consequently, the legislature or the agency has the burden of showing that invasion of the trust is intended.[173] In this way, the courts assure that the whole of the public interest has been taken into account without creating policy by fiat.[174] The need arises whenever the legislature takes land out of the trust, such as by selling it to a private party,[175] or changes the use of public trust land, by taking land from a park to build a highway.[176]

As to administrative agencies, decisions that have been made after private interests have lobbied for them must be justified by legislative declarations. When decision-making is visible, all interested parties have a chance to participate.[177] In *Robbins v. Department of Public Works*,[178] the Supreme Judicial Court of Massachusetts said that the legislature must indicate its awareness of the existing public use whenever purporting to confer authority to divert parklands to a new and inconsistent use. "In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use."[179]

The Wisconsin Supreme Court has likewise made public trust law

171. *See* Sax, *supra* note 139, at 491-502.
172. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 419-21, 215 N.E.2d 114, 121-23 (1966).
173. *Id.* at 421, 215 N.E.2d at 123.
174. *See* Sax, *supra* note 139, at 502.
175. *See* Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).
176. *See* Robbins v. Department of Pub. Works, 355 Mass. 328, 244 N.E.2d 577 (1969).
177. *See* Sax, *supra* note 139, at 498.
178. 355 Mass. 328, 244 N.E.2d 577 (1969).
179. *Id.* at 331, 244 N.E.2d at 580.

a technique by which to "mend perceived imperfections in the legislative and administrative process."[180] When the state authorizes a project that subordinates public rights in trust lands to any private interests, it must explain why it is doing so.[181] The courts examine the impact of a project with particular attention to whether the land retains its public character of use[182] and to whether the new use is compatible with the land's natural character.[183] The Wisconsin court has established guidelines to ensure the public interest is considered in agency decisions. For example, agencies should consider the following questions: Will public bodies control the use of the area? Will the development be devoted to public purposes and open to the public? Will the project destroy existing public uses without replacing them?[184] Given the interdependency of resources, the courts have also created a rule that the legislature may not delegate authority over trust land to a municipality; the needs of the region as a whole must be taken into account.[185]

In *Just v. Marinette County*,[186] the Wisconsin Supreme Court invoked the public trust doctrine to sustain a regulation against a takings challenge. The county had enacted an ordinance pursuant to a state water protection program.[187] The ordinance was intended to protect navigable waters from deterioration caused by uncontrolled development of shorelands.[188] In certain districts designated for conservation, a permit was required for dredging or filling of wetlands. The plaintiffs owned property along a lake in a conservancy

180. Sax, *supra* note 139, at 509.

181. *Id.* at 514.

182. City of Milwaukee v. State, 193 Wis. 423, 449, 214 N.W. 820, 830 (1927).

183. City of Madison v. State, 1 Wis. 2d 252, 259, 83 N.W.2d 674, 678 (1957).

184. State v. Public Serv. Comm'n, 275 Wis. 112, 118, 81 N.W.2d 71, 73 (1957).

185. *See* City of Madison v. Tolzmann, 7 Wis. 2d 570, 97 N.W.2d 485 (1958); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952) (noted in Sax, *supra* note 139, at 522-23).

186. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

187. *Id.* at 10, 201 N.W.2d at 765. The Wisconsin's navigable waters protection law states in relevant part:

> To aid in the fulfillment of the state's role as trustee of its navigable waters . . . it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

Id. at 10-11 n.1, 201 N.W.2d at 765 n.1 (quoting WIS. STAT. ANN. § 144, 26(1) (1974)).

188. *Id.* at 11, 201 N.W.2d at 765.

district which they had purchased before passage of the ordinance partially for their own use and partially for resale. After the ordinance became effective, they filled some wetlands on their property without obtaining a permit. They then sought a declaration that the ordinance was unconstitutional.[189]

The court framed the issue as "a conflict between the public interest in stopping the despoliation of natural resources . . . and an owner's asserted right to use his property as he wishes."[190] In analyzing the plaintiffs' claim, the court created a unique version of the harm/benefit theory. The court held that the restriction on the plaintiffs' use of their property was intended to prevent the harm that otherwise would result from a change in its natural character. One of the state's public trust duties was to stop pollution in navigable waters, which, in their natural condition, were unpolluted.[191] The state, in its role as trustee, was bound to preserve those waters for fishing, recreation, and scenic beauty, as well as to promote navigation.[192] The court noted that land "adjacent to or near navigable waters" is subject to the public trust doctrine[193] and acknowledged the importance of wetlands in the ecosystem: "What makes this case different from most . . . zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty."[194] Thus, the court indicated that public rights in navigable waters extend, by virtue of the close relationship between these natural resources and the shoreland, to protection of that shoreland.

Furthermore, the court stated that a landowner "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[195] The state's exercise of its police power merely restricted landowners to uses which did not upset the environment and thereby interfere with public rights,[196] rights which the state in its role as trustee has a duty to protect. The court distinguished *Pennsylvania Coal*, saying that the law at issue in that case attempted to secure for the public a

189. *Id.* at 11-14, 201 N.W.2d at 765-67.
190. *Id.* at 14-15, 201 N.W.2d at 767.
191. *Id.* at 17-18, 201 N.W.2d at 768.
192. *Id.* at 17-18, 201 N.W.2d at 768.
193. *Id.* at 18, 201 N.W.2d at 769.
194. *Id.* at 16-17, 201 N.W.2d at 768.
195. *Id.* at 17, 201 N.W.2d at 768.
196. *Id.* at 17-18, 201 N.W.2d at 768.

benefit "not presently enjoyed."[197] Here, the public has a present right to the shoreland and to natural resources as they were created. The court rejected the plaintiffs' diminution of value argument, that is, a claim of loss of value based on what the land would be worth if its original character were changed. Because this change would be a public harm, the loss in value was not "an essential factor."[198]

In *Graham v. Estuary Properties, Inc.*[199] the Florida Supreme Court met a similar takings challenge with an analysis of the legal significance of far-reaching environmental changes modeled on that of *Just.* Estuary Properties was denied an application for a development which would have destroyed about 1,800 acres of black mangrove forest, thereby causing degradation of adjoining bays and adversely affecting the fishing industry.[200] Estuary Properties petitioned for review of the state government denial of its approval, and won below on the ground that denial was a taking.[201] The state petitioned for review.

The Florida Supreme Court found that denial of the application had been a valid exercise of the police power because the proposed development would result in pollution of the surrounding bays.[202] There could still be a taking, though, if the regulation caused a sufficient diminution in the value of the property. The court distinguished the cases relied on by the plaintiff. In those cases, the landowners had bought submerged lands from the state. Denial of a permit to fill those lands deprived the owners of the only beneficial use of the property.[203] That was not true in this case.[204] Moreover, there was no finding that filling the land would adversely affect the public interest.[205]

In this case, the property was not entirely submerged and was purchased "from a private party with full knowledge that part of it was totally unsuitable for development."[206] The court gave short shrift to the plaintiff's "subjective expectation that the land could be developed in the manner it now proposes."[207] The court agreed

197. *Id.* at 23, 201 N.W.2d at 771.
198. *Id.* at 23, 201 N.W.2d at 771. The court did not say it should not be considered at all, only that it was not controlling.
199. 399 So. 2d 1374 (Fla. 1981).
200. *Id.* at 1376-77.
201. Estuary Properties, Inc. v. Askaw, 381 So. 2d 1126 (Fla. Dist. Ct. App. 1979).
202. 399 So. 2d at 1381.
203. *Id.* at 1381-82.
204. *Id.*
205. *Id.* at 1379.
206. *Id.* at 1381-82.
207. *Id.* at 1383.

with the Wisconsin court that a landowner has no right to use his land for a purpose for which it was unsuited in its natural state and that injures the rights of others.[208] Thus, by implication, such uses need not be taken into account in assessing diminution of value. The court also agreed with the observation in *Just* that the interrelationship of wetlands and the adjacent environment to the purity of the water and other natural resources gave rise to the need for protection of these lands in the public interest.[209] The court did not employ a public trust analysis, though it noted that the *Just* court had done so.[210] Instead, it reasoned that prevention of a harm, not the creation of a benefit, was involved, but did not go so far as to find that there was a public right to have its environment preserved.[211]

In *Marks v. Whitney*,[212] the California Supreme Court expanded the uses to which trust lands are subject, stating that they should be flexible enough to encompass changing public needs:

> There is a growing recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[213]

The court acknowledged the importance of the matter, "particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property."[214] The right of the owner of tidelands is subject to the right of the state to " 'enter upon and possess' " those lands for the preservation and advancement of the public uses.[215] This case demonstrates the continuing applicability of two longstanding principles of California public trust law—that the legislature's intent to take land out of the public trust must be clear if it is to be honored, and that a statute will be interpreted, if possible, to preserve the public use.[216]

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208. *Id.* at 1382.
209. *Id.*
210. *Id.*
211. *Id.*
212. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
213. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.
214. *Id.* at 257, 491 P.2d at 378, 98 Cal. Rptr. at 794.
215. *Id.* at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797 (quoting People ex rel. Webb v. California Fish Co., 166 Cal. 576, 599, 138 P. 79, 88 (1913)).
216. Stevens, *supra* note 9, at 217, citing *California Fish Co.*, 166 Cal. at 597, 138 P. at 88.

The California Supreme Court has demonstrated a willingness to expand the public trust doctrine beyond navigable waters.[217] The court has held that the public trust doctrine protects even flowing navigable lakes from harm caused by diversion of their tributaries.[218] The diversions, which fed into the Los Angeles aqueduct as part of the city's water supply, threatened Mono Lake's scenic beauty and ecological values, two uses protected by the trust.[219] Rather than declare that the environmental interests should prevail over Los Angeles' need for water, the court held that the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.[220] However, the court also recognized that the city had relied on the right to divert the water as granted by the state's water resources board and that discontinuing the diversions would be costly.[221] The dilemma this court has begun to face is how to give the public trust doctrine weight equal to that which state law grants to appropriative water rights.[222]

IV. ONE LAST LOOK

The supreme courts of Wisconsin and Florida found support in the public trust doctrine for their decisions that the states' exercises of police power to prevent use of property was reasonable and that compensation was not required. The Wisconsin court found that the property owners did not have a vested right to harm the public, and therefore had no basis for demanding compensation. Included within the state's duties was the preservation of the trust lands in an unpolluted state. Thus, if dredging and filling, even on lands not traditionally subject to the trust, would make the trust lands unsuitable for the public's use, the law requires the state to stop the harmful activity. Lastly, the Wisconsin Court has expanded the uses for which trust lands must be preserved in recognition of the sensitive nature of the coastal zone and the importance of leaving it alone.

In contrast, the Florida court concentrated on the diminution of value/reasonable investment-backed expectations theory. The court held that the landowner's expectations could not have in-

217. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

218. *Id.* at 447-48, 658 P.2d at 728-29, 189 Cal. Rptr. at 365-66.

219. *Id.* at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356.

220. *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364-65.

221. *Id.* at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

222. *Id.* at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

cluded altering his property in such a way as to destroy public rights. Thus any loss in value due to such expectations may not be taken into account in assessing whether the regulation deprives the owner to such an extent as to amount to a taking.[223]

If *Kaiser Aetna* was analyzed with the public trust doctrine in mind, the result likely would be different. As the dissent argued, public rights existed in the tidal pond that could not be appropriated by a private owner. Because the public already had rights in the property, the government did not take anything away by requiring free public access. Since trust lands are controlled by the states rather than by the federal government, the Court would be more inclined to recognize the rights of the public. In addition, Congress' regulatory authority would not be confused with the navigational servitude. The public trust doctrine as it has developed provides greater governmental control than does the navigational servitude since the public's interests go beyond using trust land for commerce. Moreover the issue of whether the pond was navigable before the developer invested would be moot, because trust lands include more than merely lands under navigable waters. Therefore under the public trust doctrine, the developer would act at its own risk.

Professor Sax views the public trust doctrine as a "medium for democratization."[224] By requiring legislatures and administrative agencies to take the public interest into consideration, trust lands will not be destroyed at the insistence of "tightly organized groups with clear and immediate goals," such as developers. This requirement is similar to the close scrutiny doctrine invoked by the courts to protect minority rights, except under the public trust doctrine, the rights of a diffuse majority are threatened. The courts should therefore ensure that the legislature considers all viewpoints when dealing with questions affecting the public trust, such as what land should be protected and the way in which it should be protected.[225]

Professor Sax's approach to the takings problem is based on a recognition of the "interconnectedness between various uses of seemingly unrelated pieces of property."[226] Current taking law assumes that when the government regulates the use of private prop-

223. Professor Sax would agree that these expectations should not be recognized. *See* Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980).

224. Sax, *supra* note 139, at 509.

225. *Cf. id.* at 502.

226. Sax, *supra* note 63, at 150.

erty, the public has acquired something to which it did not previously have a right. However, where the use of property has "spillover effects," the owner has no greater claim to compensation than those who are affected when the government fails to prevent the use.[227] Environmental regulations merely seek to restrain activities that have spillover effects or to ensure that the costs are borne by those who benefit from the harmful activities.[228]

The growing appreciation of the importance of wetlands to our overall quality of life makes the case for protecting them a relatively easy one. Considering the spillover effects that exist outside the coastal zone, a case may be made for extending the public trust concept to all resources for which there is a public need. Congress's recognition of the right of the public to clean air and water provides a basis for the extension of the doctrine. In light of the rapid depletion of resources in which the public has an "intrinsic" interest, we run the danger of becoming a "society of serfs" to those who own these resources.

"[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."[229] Justice Jackson's famous words are from a case involving the federal navigational servitude. Similarly, public trust lands are "imbued with a public interest." Although a private owner may hold title, paramount rights remain in the public. Since the state has an affirmative duty to protect these rights, it does not need to resort to the police power, let alone its power of eminent domain, to prevent a private owner from interfering with them. Thus, a law passed to protect land held in the public trust does not run the risk of "going so far" that it becomes a taking. The owner cannot reasonably expect to infringe upon public rights. This does not mean he cannot exploit his property; it only means that he must pay for that exploitation. Of course, society may set limits upon such exploitation at a point where it would inevitably bear the costs, such as when beaches are endangered. After all, an owner's location on the water gives him an advantage most of society does not have and

227. *Id.* at 159. Spillovers include: physically restricting a neighbor; burdening a common; imposing on the community the burden of providing public services; and adversely affecting others' health or well-being. *Id.*

228. *See generally* Huffman, *Individual Liberty and Environmental Regulation: Can We Protect People While Preserving the Environment?*, 7 ENVTL. L. REV. 431 (1977).

229. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

that he did not create himself. Where the public trust doctrine is utilized, there is no need for the courts to resort to any of the theories customarily relied upon in taking jurisprudence.