

# The Public Trust Doctrine: A Brief (and True) History

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In an era of fake news and personal truths, history is in the eye of the beholder. One needs only declare it so, and so it is. Context no longer matters. People and perceptions of the past are discounted, even condemned, in service to modern sensibilities and ambitions. Present-day values and objectives require the retelling of history—confirmed not by careful research and respect for the words and deeds of those whose history we recount, but by repetition of our truths about the past. The ends justify the means.

There are thus two histories of the public trust doctrine. One founded in Anglo-American custom and case law. Another founded in the imaginations of now two generations of advocates in search of a fail-safe guardian of the environment. While I am sympathetic to the cause of environmental protection, I am even more sympathetic to the cause of human freedom. Because the latter requires an unwavering commitment to the rule of law, and because the rule of law requires respect for legal precedent, I believe it is essential that we get the history right.

Many years ago, my colleague, Mike Blumm, described me as the Darth Vader of the public trust doctrine. I would prefer to be thought of as the Luke Skywalker of the rule of law, though having written numerous articles on this theme that are generally referenced as “but see,” if not totally ignored, probably qualifies me to be called Don Quixote. But I continue to tilt at this windmill because I find in the work of those I criticize a deeply ingrained acceptance that legal argument is finally about precedent rather than policy. Why else would they routinely appeal to history in their arguments for judicial reinvention of the public trust doctrine?

For example, a Westlaw search on any given day may reveal upward of 500 articles that reference Justinian in the context of the public trust doctrine. Almost always, particular language from Justinian’s Institutes is quoted as an ancient source of the public trust doctrine.<sup>1</sup> I confess I have not read all 500 articles, but by way of illustration, I will note only

some of the Justinian references made by participants in this conference.<sup>2</sup> Prof. Nicholas Robinson: “The Roman ‘public trust doctrine’ derives from Justinian’s Institutes . . . .”<sup>3</sup> Prof. Erin Ryan: “The public trust doctrine is among the oldest doctrines of the common law, with roots in the Justinian Code of ancient Rome, where it was called the *jus publicum*.”<sup>4</sup> Prof. Mary Christina Wood: “The essential public rights that infuse the trust were expressed in Roman times in the Institutes of Justinian . . . .”<sup>5</sup> Prof. Bradford Mank: “The public trust doctrine has its roots in ancient Roman law and perhaps even earlier. The Institutes of Justinian, which codified Roman civil law, recognized that certain types of property were communal property for the benefit of the general public . . . .”<sup>6</sup> Prof. Melissa Scanlan: “One part of the Corpus, the *Institutes of Justinian*, contained the origins of the public trust doctrine.”<sup>7</sup> Prof. Alexandra Klass: “In Justinian’s compendium of Roman law, he declared as part of natural law that there were communal rights in the air, running water, the sea and the shores of the sea.”<sup>8</sup> And finally, Professor Blumm, as a coauthor with Professor Wood: “First surfacing in Roman law through the Justinian Code, [the public trust] . . . became entrenched in American law in the 19th century through the process of statehood.”<sup>9</sup> More recently, writ-

2. This is in reference to the 2018 J.B. & Maurice C. Shapiro Environmental Law Symposium, “The Public Trust Doctrine in the 21st Century” hosted at The George Washington University Law School on March 15, 2018.
3. Nicholas A. Robinson, *IUCN as Catalyst for a Law of the Biosphere: Acting Globally and Locally*, 35 ENVTL. L. 249, 280 (2005).
4. Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 ENVTL. L. 561, 567 (2015).
5. Mary Christina Wood & Charles W. Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL’Y 634, 649 (2016).
6. Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 83 (2009).
7. Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 213 n.4 (2000).
8. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 702–03 n.9 (2006).
9. MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* xxxv (2d ed. 2015).

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1. See discussion *infra*.

ing with Aurora Paulsen Moses, Professor Blumm asserted that the public trust doctrine originated in Roman law as an antimonopoly notion: “As the Roman Emperor Justinian explained in a 6th century legal treatise, there are ‘things which are naturally everybody’s . . .’ including ‘air, flowing water, the sea, and the sea-shore.’ English law adopted this Roman law concept in the Magna Carta of 1215, which included a provision promising public uses of navigable and tidal waters for navigation, commerce, and fishing purposes while restricting private monopolies that would interfere with those uses.”<sup>10</sup>

References to Magna Carta, like Blumm’s in his antimonopoly account of the public trust doctrine, are only slightly less common than the aforementioned references to Justinian as part of the claimed historical provenance for an expansive interpretation of the public trust doctrine. As is often the case in the telling of history, the person telling the story has more often relied on the story told by others than on those whose story it is. In the case of scholarly accounts of the history of the public trust doctrine, earlier articles by scholars Joe Sax and Charles Wilkinson are often cited as authority.<sup>11</sup> Sax is rightly credited with resurrecting the doctrine from obscurity in a 1970 article in which he, unlike his many acolytes, recognized the limits of Roman law as precedent for the judicial intervention he was proposing.<sup>12</sup> A year later, he wavered on that conclusion, writing that “[l]ong 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.”<sup>13</sup> After nine more years, Sax reiterated his original position that “neither Roman Law nor the English experience with lands underlying tidal waters is the place to search for the core of the trust idea.”<sup>14</sup> Wilkinson also discounted the significance of Roman law as precedent for the modern doctrine, rather contending, with classic Wilkinsonian elegance, that

[t]he real headwaters of the public trust doctrine . . . arise in rivulets from all reaches of the basin that holds the societies of the world. These things were articulated in different ways in different times by different peoples. In some cases, the

waters ran deep, in other places the waters ran shallow. But the idea of a high public value in water seems to have existed in most places in some fashion.<sup>15</sup>

Yet, both Sax and Wilkinson are frequently relied upon in the telling of the mythological history of the public trust doctrine.

In a nutshell, the generally accepted history is that from Justinian’s Institutes through Magna Carta, Bracton, Hale, 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.<sup>16</sup>

As this account of history has gained credence through repetition, the ambitions for the public trust doctrine have grown. Not only is the doctrine said to constrain the public and private use of resources, but also that it empowers the courts to mandate actions by the executive and legislative branches of government, even when those branches have chosen not to act. Emperor Justinian, King John, Henry de Bracton, Chief Justice Matthew Hale, William Blackstone, Chancellor James Kent, Chief Justice Roger Taney (author of *Martin v. Waddell’s Lessee*) and Justice Stephen Field (author of *Illinois Central Railroad v. Illinois*) would all be in disbelief.

But not so for our late 20th and early 21st century judiciary. In a landmark modern public trust case, the Supreme Court of California, quoting the Institutes of Justinian, wrote that “[f]rom this origin in Roman law, the English common law evolved the concept of the public trust.”<sup>17</sup> The New Jersey Supreme Court cited Justinian in stating that “[t]he genesis of this principle [public trust] is found in Roman jurisprudence. . . .”<sup>18</sup> The Montana Supreme Court has declared that “[t]he public trust doctrine is of ancient origin. Its roots trace to Roman civil law . . . .”<sup>19</sup> The Rhode Island Supreme Court credited the Greek philosopher Gaius, but also Justinian for passing the doctrine on four centuries later.<sup>20</sup> The Michigan Supreme Court concluded that “[t]his obligation [the public trust doctrine] traces back to the Roman Emperor Justinian . . . .”<sup>21</sup> The Vermont Supreme Court found that “[t]he public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law.”<sup>22</sup> The Washington Supreme Court concluded that “[t]he principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, promulgated in

10. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. L. REV. 1, 6–7 (2017).

11. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509–46 (1969); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

12. [W]hile it was understood that in certain common properties—such as the seashore, highways and running water—perpetual use was dedicated to the public, it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.

Sax, *supra* note 11, at 475.

13. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 163–64 (1971).

14. Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186 (1980).

15. Wilkinson, *supra* note 11, at 431.

16. James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 1 (2007).

17. *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 718, 13 ELR 20272 (Cal. 1983).

18. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 360 (N.J. 1984).

19. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012).

20. *Champlin’s Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1166 (R.I. 2003).

21. *Glass v. Goeckel*, 703 N.W.2d 58, 63–64 (Mich. 2005).

22. *State v. Cent. Vt. Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989).

Rome in the 5th century A.D.”<sup>23</sup> A slightly less confident Iowa Supreme Court wrote that “[t]he public trust doctrine is said to be traceable to the work of Emperor Justinian.”<sup>24</sup> And a very confident United States District Court in Oregon recently concluded that “[a]pplication of the public trust doctrine to natural resources predates the United States of America. Its roots are in the Institutes of Justinian . . . .”<sup>25</sup>

Embracing the myth of Justinian, Magna Carta, and more discussed below as today’s truth does serve our purposes better than the truth of the past. But how does one reconcile such mythmaking with a lawyer’s and citizen’s commitment to the rule of law? The rule of law requires adherence to the law as it is, not as we wish it were. Of course, we can change the law in accordance with legal process, and the common law has evolved over time, but we cannot change the law by rewriting history. That even those who would find a vast sea of public rights in the public trust doctrine feel themselves constrained by the rule of law is confirmed by their need to rewrite the history of the doctrine. Why else the routine genuflection to Justinian?

My assignment for this article is to explain the history of the public trust doctrine. But given the pervasive acceptance of the foregoing account, my challenge is as much to correct the record as it is to recount the actual history of the doctrine. Because I have examined both the myth and the history of the public trust doctrine at length elsewhere,<sup>26</sup> I will offer only a truncated account prefaced by a brief explanation of two different claims made in the name of the doctrine.

One claim is that there are certain resources that by their nature require public ownership. When legal title to these resources is held by the state (in the generic sense) the claim is that they cannot be alienated nor used by the state in ways not consistent with the claimed public rights. When title to these resources is in private hands, the claim is either that their acquisition was contrary to law or that their private use is restricted by superior public rights. The other claim is that public trust resources, whether in public or private ownership, are, by public right, available for particular public uses. In the history that follows, I will demonstrate that neither Roman nor English law support the first claim. I will also demonstrate that although the second claim finds support in both Roman and English law, it supports only clearly defined and limited uses—namely navigation and fishing of specific resources of navigable waters and their associated submerged lands.

## I. Roman Law

One repeatedly quoted phrase from Justinian’s Institutes serves as the key evidence of a Roman public trust doctrine: “[t]hings common to mankind by the law of nature, are the air, running water, the sea, and, consequently, the shores of the sea; no man therefore is prohibited from approaching any

part of the seashore . . . .”<sup>27</sup> As the ellipses indicate, there is more to the sentence, though I personally have never seen it quoted by those claiming the authority of ancient law. What follows immediately after “seashore” is “whilst he abstains from damaging farms, monuments, [and buildings], which are not in common as the sea is.” So, members of the Roman public had a right to approach the seashore, but only so long as they did not interfere with private property on that seashore. And how, we might ask, did portions of the public seashore become private property? Either by private appropriation or alienation by public authorities. Both were allowed under Roman law.

Description of “the air, running water, [and] the sea” as “things common to mankind” reflected two realities of 3d century Rome: these things were generally abundant relative to demand and were, in their physical nature (“by the law of nature”), difficult to possess, as compared to land. They were *res nullius*, meaning things not owned, or *res communes*, which under Roman law meant essentially the same thing.<sup>28</sup> Thus, they were things that could be appropriated for private use,<sup>29</sup> or claimed by governments that could, in turn, grant them to private users. Although Roman philosophers and even the Emperor Justinian might have aspired to the idea of a public right of access to and passage over the seas, the reality of life in the Roman Empire was that “all of the marine and coastal area resources that it was possible for the technology of the Romans to exploit were either in private ownership or were leased to monopolies . . . .”<sup>30</sup> In other words, the fact of free public access to the sea (and air and running water) reflected not a recognized public right under Roman law, but rather a failure on the part of those who would exercise their right to appropriate unowned resources (*res nullius* or *res communes*) to develop means to effectively enforce any such claims.

Roman law precluded neither the private appropriation of running waters, the sea, or the seashore, nor state alienation of those resources to private parties. This does not mean that the public had no recourse when their use of those resources for navigation and fishing was obstructed by the state or private owners—at least in theory. Roman citizens could seek injunctive relief against obstructions to

23. *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987).

24. *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989).

25. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1253, 46 ELR 20072 (D. Or. 2016).

26. Huffman, *supra* note 16, at 14.

27. JUSTINIAN, *THE INSTITUTES OF JUSTINIAN* 67 (Thomas Cooper ed. & trans., 1841).

28. Modern advocates of an expansive public trust doctrine will understand *res communes* to mean things belonging to the public in a proprietary sense, but that was not the understanding under Roman law. “[A]ll [of the Roman sources] except Celsus use language in the nature of *res communes* and *res nullius*—terms which . . . represent a distinction without a real difference.” Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don’t Hold Water*, 3 FLA. ST. U.L. REV. 511, 533 (1975).

29. “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.” James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENVTL. L. 337, 344 (2015). “If one builds in the sea or on the seashore, although not on his own land, yet nevertheless he by the *jus gentium* makes it his.” MacGrady, *supra* note 28, at 533 (quoting E. WARE, *ROMAN WATER LAW* (1905) (translating the *Digest*, a 50-volume codification of legal writings by Roman jurists)).

30. Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 33 (1976).

navigation, docking, and shoreline footpaths; blocking or diversion of waters whether or not navigation was affected; and interferences with watering cattle at the shore and could seek restitution for injuries suffered from the building of a pier or breakwater.<sup>31</sup> Although there is reason to question whether these remedies were meaningfully available to the general public,<sup>32</sup> these examples from the Digests do have parallels in the common law. It is possible that the common-law rules emerged with knowledge of Roman law.<sup>33</sup> But it is far more likely, given the role of custom in early English law, that they arose from the same practicalities that created the Roman rules—similar to the practicalities that led English and American courts to adopt a rule of capture for acquisition of title to fish and wild animals.

What is not in doubt, however, is that Roman law allowed for private appropriation of the sea, running waters, and the seashore, and for alienation of those resources by the state where it had previously claimed title. While private title to such resources could be difficult to define and enforce because of their physical characteristics, neither those characteristics nor the perceived public importance of the resources dictated public title. Under Roman law, “things common to all” were those things available for taking and conversion to private property, not things that could only be held in common. Thus, there is no precedent in Roman law for the modern claim that the public trust doctrine precludes alienation of natural resources owned by the state. Perhaps the most convincing evidence of this legal reality is the fact that Roman law recognized and protected private property in the sea and seashore, whether acquired by appropriation or grant from the state. If anything, Roman law may have served as precedent for the longstanding English and American recognition of private title in those same so-called public trust resources.

Another difficulty for those who rely on Roman law as precedent for modern public trust claims is that Roman law made no distinction, until near the end of the Empire, between a public and a personal status of the emperor.<sup>34</sup> That is, the emperor did not exercise sovereignty over some things on behalf of the public (*jus publicum*) and control of other things in a proprietary capacity (*jus privatum*).<sup>35</sup> The private interests of the ruler were, by definition, the public

interest—or vice versa.<sup>36</sup> Applied to the modern state, such a doctrine of unlimited sovereign authority in the ruler would mean either that the state can alienate nothing or alienate everything. The fact that virtually every private property in the western United States was acquired directly or indirectly from the national government confirms that the former is not the case. And certainly, the latter is not the rule aspired to by advocates for an expansive public trust.

English law would eventually provide better precedent for those who would distinguish between the private and public roles of the ruler, but there is a difficulty in relying on *jus publicum* constraints on a crown that derives its authority from God as precedent for similar limits on governments that derive their authority from the people. In a government founded on popular sovereignty, the *jus publicum* is defined by the people and cannot, therefore, be a limit on the exercise of their sovereign powers. Not to mention the irony of appealing to the laws of states in which the Emperor or King could do no wrong.

## II. English Law

If not Roman law, then surely English law can supply a distinguished and ancient pedigree to an expansive 21st century public trust doctrine. English law was the law of the English colonies in North America and it was retained by the various states after independence.<sup>37</sup>

As with many assertions of right under modern American law, the public rights of the public trust doctrine are often said to derive from the Magna Carta, notwithstanding that it was largely an agreement by the King to respect the rights of his barons.<sup>38</sup> Two chapters serve as precedent for the public trust doctrine. Chapter 16 provides: “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.”<sup>39</sup> According to Matthew Hale, this provision was a reaction to the King 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 [sic] the King had taken his pleasure or advantage of the writ or precept de defensione ripariae . . . .”<sup>40</sup> Not until the 19th century would this provision be understood as a limit on the King’s authority to grant exclusive fisheries.<sup>41</sup> Rather, the objection to the writ

31. See Huffman, *supra* note 16, at 15.

32. According to Patrick Deveney, “[t]he actual effect of these injunctions was negligible. . . . They were granted ex parte and without investigation into the actual situation; consequently, the interdicts were phrased hypothetically and amounted to no more than a mere statement of the rule the praetor recognized. . . .” Deveney, *supra* note 30, at 24.

33. Bracton is generally credited with introducing aspects of Roman law to the English common law in his 13th century *De Legibus et Consuetudinibus Angliae*. With regard to Roman law influences on English law as a consequence of Bracton’s many references to Roman law, Sir William Holdsworth observed: “No doubt there is a body of thoroughly English rules; and Bracton differs at very many points from the Roman texts. But it is clear that he has used Roman terms, Roman maxims, and Roman doctrines to construct upon native foundations a reasonable system out of comparatively meager authorities.” WILLIAM S. HOLDSWORTH, 2 A HISTORY OF ENGLISH LAW 286 (3d ed. 1923) (emphasis added).

34. See Deveney, *supra* note 30, at 17.

35. *Id.*

36. *Id.*

37. See generally William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968).

38. For an account of how Magna Carta “was reinvented as a potent symbol of liberty and justice,” see Alex Lock, *Radicalism and Suffrage*, BRIT. LIBR. (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/radicalism-and-suffrage> [<https://perma.cc/8EDL-ZCGL>].

39. 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.” MAGNA CARTA Chapter 16, art. 20 (Eng. 1225).

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

41. See generally Gann v. Free Fishers (1865) 11 HL 1305 (Eng.), Malcomson v. O’Dea (1863) 11 HL 1155 at 1155–56 (Eng.). Prior to that, Magna Carta

*de defensione ripariae* at the time of Magna Carta was that it required the riparian owner to repair, at his own expense, roads and bridges in preparation for the King's fishing expeditions.<sup>42</sup> Chapter 16 protected the landed barons from liability for expenditures in support of the King's pleasures, but not a public right to fish or navigate on the streams and rivers of the realm.

Chapter 23 provides: "All kydells [*fish weirs*] for the future, shall be quite removed out of the Thames and the Medway, and through all England, excepting upon the sea coast."<sup>43</sup> The provision has been relied upon by later writers and some courts as precedent for prohibitions on obstructions to navigation, but its purpose at the time was to prevent the King from blocking fish passage to the private fisheries of upstream barons. While Chapter 23 is sometimes referenced as a foundational precedent for a public right of navigation, it was actually relied upon by Lord Hale as proof that private ownership of submerged lands was allowed.<sup>44</sup>

The conflicts sought to be resolved by Magna Carta reflected preexisting understandings of rights in the resources at issue. It was generally accepted that from the Norman Conquest, the Crown held title to all lands and waters. It was also understood that private parties could acquire title by crown grant. In dispute were which lands and waters had been granted and what rights were reserved in the Crown. In fact, many private holdings had been acquired by appropriation of unoccupied lands, so there was no small dose of fiction in the notion that all private rights were by grant from the Crown.<sup>45</sup> But it was the case 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."<sup>46</sup> Magna Carta acknowledged these private claims, but none resembling a general public right of access. Indeed, recognizing the claims of the barons confirmed that the Crown could neither exclude them from their private lands and waters nor mandate that they provide for the King's access to his private domain, and also that they (the barons) could exclude the public from their private lands and fisheries.

Although 13th century jurist Bracton introduced the Roman idea of public rights in navigable waters to English

law, five centuries would pass before an English court would rule that the Crown could not grant exclusive fisheries to private parties.<sup>47</sup> By then, however, most of the valuable fisheries had already been granted. In an unreported case decided in 1632, an English court held that submerged and tidal lands were presumed to remain with the King unless expressly granted.<sup>48</sup> Although not cited by another English court for 163 years,<sup>49</sup> nor relied upon by a jury for another nearly a century after that,<sup>50</sup> this so-called *prima facie* rule is often referenced today as precedent for presumptive state title to submerged and tidal lands with the suggestion that the rule is founded on a public right in those lands. While presumptive state title to submerged and tidal lands is understood today as recognition of the importance of such lands to the public, the English rule is hardly convincing precedent since it was invented to support the King's claim to lands long in private use and possession, but without proof of Crown grant. And whatever its nefarious English roots, the *prima facie* rule recognizes the validity of express government grants of submerged lands.<sup>51</sup>

### III. Early American Law

On most questions of English law, 19th century American courts and commentators looked first to William Blackstone's Commentaries on the Laws of England. But on the law of the sea, their primary source was Lord Chief Justice Matthew Hale's treatise *De Jure Maris*.<sup>52</sup> Consistent with 19th century English law, Hale accepted the *prima facie* rule but was clear that title to submerged lands could be, and in large part had been, acquired for private use.<sup>53</sup> In his discussion of the law relating to the use of navigable waters, Hale identified three categories of coastal property: *jus privatum*, the proprietary title in individuals or the Crown; *jus regium*, the royal right or what we would call police power; and *jus publicum*.<sup>54</sup> With respect to the latter Hale wrote:

[T]he people have a publick [sic] interest, a *jus publicum*, of passage and repassage [sic] with their goods by water, and must not be obstructed by nuisances or impeached by exactions . . . . [F]or the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of an highway is,

was not seen as an obstacle to the granting of exclusive fisheries, *Carter v. Murcot* (1768) 98 Eng. Rep. 2162, although the private claimant had the burden of proving the grant, *Lord Fitzwalter's Case* (1762) 86 Eng. Rep. 766 (K.B. 1762).

42. Deveney, *supra* note 30, at 40.

43. MAGNA CARTA Chapter 23 (Eng. 1225), <http://www.bsswebsite.me.uk/History/MagnaCarta/magnacarta-1225.html>. The same language appears in Chapter 33 of the 1215 version, available at <http://www.bsswebsite.me.uk/History/MagnaCarta/magnacarta-1215.html>.

44.

The exception of weares upon the sea-coast[s] . . . make 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.

HALE, *supra* note 40, at 389.

45. Huffman, *supra* note 16, at 22–23.

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

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

48. See *Attorney General v. Philpott* (1632), reported only in STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 895–907 (1888). The case was decided by a corrupt court at the King's urging and may never have been acted upon.

49. See *Attorney General v. Richards* (1795) 145 Eng. Rep. 980 at 981. MOORE, *supra* note 48, at 263.

50. MOORE, *supra* note 48, at 616.

51. Huffman, *supra* note 16, at 23–34.

52.

The treatise of Sir Matthew Hale, *De Jure Maris*, has been so often recognized in this country, and in England, that it has become the text book, from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water.

Ex parte Jennings, 6 Cow. 518 (N.Y. Sup. Ct. 1826).

53. HALE, *supra* note 40, at 327.

54. *Id.* at 372–74.

which though in point of property it may be a private man's freehold, yet it is charged with a publick [sic] interest of the people, which may not be prejudiced or damnified.<sup>55</sup>

Thus, under English law as understood by 19th century American courts and commentators, there were three aspects to coastal property: the land (possessed by individuals, the Crown, or the state), the right of navigation over and past the land (possessed by the public in the form of an easement), and the power of the state to enforce the public right (the royal right or police power). The pervasive fisheries grants in England confirmed that there was no public right to fish unless granted by the landowner.<sup>56</sup> The pervasive private ownership of submerged and riparian lands confirmed that there was no prohibition on crown or state alienation of the land, although the public right to navigate would be unaffected. Neither Hale nor Blackstone mention a public trust doctrine, but by the time of American independence, English law (and thus the law of the American colonies) recognized a public right to navigate on navigable (defined as tidal) waters and a public right to fish in waters where no exclusive fishery had been retained by the crown or granted to individuals.

With American independence, sovereignty shifted from the Crown to the state governments. Several questions relevant to the public trust doctrine had to be resolved as a consequence of there being a new sovereign: First, what laws apply? Second, who owns what, and particularly, who has title to submerged and riparian lands? Lastly, what rights does the public, the true sovereign, possess?

With respect to the laws under which government is organized, the change was revolutionary. The states each enacted constitutions to replace the unwritten constitution under which the Crown and parliament exercised sovereignty. With respect to the powers of the sovereign, there was little change in terms of the scope of powers, but revolutionary change in the inclusion of written bills of rights constraining the exercise of those powers.<sup>57</sup> By way of confirming that the common law of England would remain the law, the new states enacted laws confirming the "reception" of English common law, subject, of course, to changes made by the newly sovereign state legislatures.

Among the received English law principles was that everything is owned, either by government or privately.<sup>58</sup> With

55. *Id.* at 404–05.

56.

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 [sic] 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.

57. Many in the founding generation would have said that their bills of rights were not revolutionary, but rather the expression of the already existing rights of Englishmen that had been abridged in the colonies. Not every state enacted a bill of rights along with their first constitution.

58.

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

respect to the ownership of lands, the states, as the new sovereigns, succeeded to the Crown's titles including those held in the name of the former colonies. Because grants previously made by the crown or by the colonial authorities were generally respected, significant portions of the states remained as private property. As one of the compromises leading to the Constitution of 1787, the extensive western land claims of several states were ceded to the new federal government, making the United States a large landowner a dozen years after the Revolution. With the exception of lands required for government facilities and functions, the expectation with respect to both state and federal lands was that they would, in due course, be conveyed or transferred to private owners. Conforming with the retained English common law, submerged lands on non-navigable waters were owned by the riparian owner to the thread of the stream or river,<sup>59</sup> and submerged lands on navigable waters were owned by the state unless previously granted to a private party.<sup>60</sup> Lord Hale summarized the English rule as follows:

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.<sup>61</sup>

Thus, where ownership of submerged lands beneath navigable waters was in doubt, retained English law invoked the prima facie rule—absent evidence of prior grant or user, the state is the presumptive owner. But American courts came to view the prima facie rule not as one of evidence, as it was in England, but as a rule of title. This seemingly subtle shift from the English precedents contributed to modern confusion about the relationship between state ownership of submerged lands and the public trust doctrine. Under English law, the evidentiary presumption of state ownership reflected that original title was understood to be in the Crown, meaning that any private claims would require proof of subsequent legal acquisition. As a rule of title, the presumption of state ownership was easily understood to derive from the public's navigation and fishing rights, notwithstanding that the exercise of those rights was in no way dependent on state ownership as confirmed by Lord Hale<sup>62</sup> and as evidenced by the many 19th and 20th century grants of submerged lands for

capable of ownership, leaving as little as may be in common, to be the source of contention and strife."

Huffman, *supra* note 16, at 28 (quoting *Browne v. Kennedy*, 5 H. & J. 195, 208 (Md. 1821) (Earle, J., dissenting)).

59. "[B]y 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." *Palmer v. Mulligan*, 3 Cai. R. 307, 318 (N.Y. Sup. Ct. 1805) (Kent, C.J., concurring).

60. *Ex parte Jennings*, 6 Cow. 518 (N.Y. Sup. Ct. 1826).

61. *Arnold v. Mundy*, 6 N.J.L. 1, 60 (N.J. Sup. Ct. 1821) (Rossell, J.).

62.

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

private use. Thus, an evidentiary rule invented by the Crown for the purpose of expropriating title from private owners unable to prove title beyond long-term use was transformed into the notion that public rights of navigation and fishing in navigable waters precludes private ownership of submerged lands beneath those waters (and to assert public title to submerged lands long understood to be private property).<sup>63</sup>

The prima facie rule as a rule of title was applied by Chief Justice Andrew Kirkpatrick in *Arnold v. Mundy*,<sup>64</sup> often cited as the foundational case of the American public trust doctrine. The plaintiff claimed the defendant trespassed (and appropriated oysters) on his private oyster beds in the tidal mud flats of the Rariton River at Perth Amboy in New Jersey. The claim of title was based on a survey made under New Jersey law, the plaintiffs having planted and tended the oysters, and a chain of title dating from the twenty-four proprietors of East New Jersey and the King of England. The defendant claimed he had a right shared in common with fellow citizens to take oysters in the navigable waters of the state. The issue, wrote Kirkpatrick (who had already ruled on the case at trial), was “[a]s to the right of the proprietors to convey.”<sup>65</sup> Distinguishing between public and common property, Kirkpatrick found that under English law 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.”<sup>66</sup> Thus, the King’s grant to the twenty-four proprietors via their predecessors in title did not allow for any private rights to the oyster beds in question. The fact that such private grants were pervasive in England and New Jersey alike only indicated the extent of the “usurpation of . . . ancient common rights.”<sup>67</sup>

The original grants on which the *Arnold* plaintiff based his claim were made under the full force of English law. But, of course, the case was being heard under New Jersey law, which, only a year before Kirkpatrick wrote, was supplemented by the New Jersey Legislature with an act authorizing individuals owning lands adjacent to waters “wherein oysters do or will grow” to plant and have the exclusive right of harvesting oysters.<sup>68</sup> Not only did Kirkpatrick ignore the legislative act, but he proclaimed a theory of public rights that explains why the case remains a favorite of those advocating an expansive public trust doctrine:

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public right in the nature of an easement whether the land is owned by the king, by a private party, or by no one.

Huffman, *supra* note 16, at 30.

63. See *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012) (in which the state of Montana claimed title to lands on which PPL and its predecessors had long paid property taxes as private owners). For an in-depth analysis of the Supreme Court’s opinion, see James L. Huffman, *PPL Montana v. Montana: A Unanimous Smackdown of a State Land Grab*, 2011–2012 *CATO SUP. CT. REV.* 167 (2012).
64. 6 N.J.L. 1, 9 (N.J. Sup. Ct. 1821) (Kirkpatrick, C.J.).
65. *Id.* at 69 (Kirkpatrick, C.J.).
66. *Id.* at 72–73 (Kirkpatrick, C.J.).
67. *Id.* at 73 (Kirkpatrick, C.J.).
68. Act for the Preservation of Clams and Oysters, 1820 N.J. Laws 162 § 9.

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 . . . .<sup>69</sup>

Kirkpatrick acknowledged that the legislature, empowered by the people,

may lawfully bank off the water of those rivers, ports, and bays, and reclaim the land upon the shores; they may build dams, locks, and bridges for the improvement of the navigation and the ease of passage; they may clear out and improve fishing places to increase the product of the fishery; they may create, improve, and enlarge oyster beds, by planting oysters thereon, in order to procure a more ample supply; they may do all this themselves at the public expense, or they may authorize others to do it by their own labour, and at their own cost, giving them reasonable tolls, rents, profits, or exclusive enjoyments.<sup>70</sup>

But he dismissed these powers as “nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen.”<sup>71</sup> “[D]ivesting all the citizens of their common right . . . would be a grievance which never could be long borne by a free people.”<sup>72</sup> Kirkpatrick did not address how the powers of a democratic sovereign might be different from those of a King, or how the rights of a free people (public rights as distinct from private rights) can be violated by an act of a legislature elected by those same people.

That question was addressed twenty-one years later in *Martin v. Waddell’s Lessee*,<sup>73</sup> albeit by the dissent. On its facts, *Martin* looked very much like *Arnold* with one critical difference. Where the defendant in *Arnold* asserted a public right to take oysters in tidal mudflats, the defendant in *Martin* claimed a private right under grant from the state of New Jersey.<sup>74</sup> Although the dispute in *Martin* was between two private claimants, Chief Justice Taney, writing for the majority, relied on *Arnold* to support a ruling for the defendant. With reference to the plaintiff’s claim, Taney cited two Eng-

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69. *Arnold*, 6 N.J.L. at 76–77 (Kirkpatrick, C.J.).

70. *Id.* at 13.

71. *Id.* at 78.

72. *Id.* at 13 (alterations in original).

73. 41 U.S. 367, 420 (1842).

74. *Id.* Defendant’s grant was made pursuant to the Act of November 25, 1824. 1824 N.J. Laws 28 §§ 3–6 (encouraging and regulating the planting of oysters in the township of Perth Amboy).

lish cases 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.”<sup>75</sup> It was left to Justice Smith Thompson in dissent to observe that “if the king held such lands as trustee, for the common benefit of all his subjects, and inalienable as private property, I am unable to discover, on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals.”<sup>76</sup> Thompson’s conclusion was that the King, like the state (his successor in title), did have power to alienate the lands in question, making the dispute over which party held the better title to an exclusive right in the oyster beds. Ten years later, in a similar dispute in *Den v. Ass’n of New Jersey*, Taney would cite *Martin* in finding for the state’s grantee, but without any mention of the Crown grant being an infringement on public rights.<sup>77</sup>

It may seem puzzling that *Martin* is frequently cited as early American precedent for the public trust doctrine given that in both *Martin* and *Den* the court upheld private claims of right in tidal lands. It is true that in *Martin*, for the first time in a U.S. Supreme Court opinion, the concept of a public trust was raised in the context of navigable waters jurisprudence. “The country mentioned in the letters-patent,” wrote Taney, “was held by the king in his public and regal character, as the representative of the nation, and in trust for them.”<sup>78</sup> But this use of the term trust could have either of two meanings. It could mean, as advocates of an expansive public trust doctrine would have it, that the lands in question could not be alienated, or at least were subject to the whatever public easements the trust might guarantee. But “the country mentioned in the letters-patent” would come to constitute the eastern half of the state of New Jersey, most of which was long since alienated and in the exclusive control (subject to the state’s police power) of private owners. So, Taney’s use of the term trust can only mean that a free people (the sovereign people of New Jersey) have a right to have their government rule in service of the public good, including in the disposition and regulation of navigable waters and submerged lands. The grant of letters of patent conveyed to the twenty-four proprietors was first and foremost a delegation of political authority over the entirety of East New Jersey and by default a grant of title to crown lands within that territory.

Thus, *Martin* provides little support for modern claims of expansive public rights relating to natural resources and the environment. Taney was wrong in concluding that the original grant from the King was either proprietary or sovereign, but not both. As Thompson noted in dissent (citing Hale), 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.”<sup>79</sup> The letters of patent conveyed both. Taney was also wrong to conclude that the law governing the letters of patent precluded alienation of the oyster fishery. The applicable law, noted Thompson, “is, that prima 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.”<sup>80</sup> The state of New Jersey was presumed to have title to submerged lands under navigable waters but, like the King, could grant exclusive rights in those lands where, in the judgment of the sovereign people as represented in their legislature, it would serve the public. Furthermore, Taney’s argument with respect to a public trust was pure dicta given that both parties to the lawsuit asserted an exclusive private right.

It is also noteworthy that eight years after *Martin*, *Arnold v. Mundy* was effectively (though not expressly) reversed by the New Jersey Supreme Court in *Gough v. Bell*.<sup>81</sup> The *Gough* court observed that the *Arnold* ruling was in conflict with several legislative acts which authorized the erection of dams, bridges, piers and docks and the appropriation of oyster beds. For the majority, Chief Justice Henry Green cited Massachusetts Chief Justice Lemuel Shaw, who stated “a navigable stream may cease to be such, by the appropriation of the soil, under legislative authority, to other purposes . . .”<sup>82</sup>; and Chief Justice John Marshall, who wrote “[the placing of a dam in a navigable waterway] is an affair between the government of Delaware and its citizens . . .”<sup>83</sup> Green concluded that

If, by this proposition [no alienation of public trust resources], 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.<sup>84</sup>

New Jersey Chief Justice Green’s reasoning in *Gough* was supported four decades later by the Supreme Court in *Illinois Central Railroad v. Illinois (Illinois Central)*. Although the *Illinois Central* case is routinely cited as the holy grail of expanded American public trust doctrine, the Supreme Court did not rule that the state of Illinois could not alienate submerged lands, nor did it extend the public trust doctrine beyond navigable waters or to public uses other than navigation and fishing.<sup>85</sup> Five times in his opinion for the majority in *Illinois Central*, Justice Field reiterated that the state could alienate submerged and riparian lands unless doing so

75. *Martin*, 41 U.S. at 410. Neither of the two cases cited by Taney (*Blundell v. Catterall*, 106 Eng. Rep. 1190, 1197, 1199–1200, 1203, 1205 (K.B. 1821), and *Duke of Somerset v. Fogwell*, 108 Eng. Rep. 325, 328–29 (1829)) support his conclusion. In *Blundell*, the defendant acknowledged the plaintiff’s title to shore lands and adjacent fisheries, claiming only a right of access and to bathe. In applying the prima facie rule, the Somerset court acknowledge the King’s authority to grant exclusive fisheries. See Huffman, *supra* note 16, at 46–48.

76. Huffman, *supra* note 16, at 44–45.

77. 56 U.S. 426, 432–33 (1853).

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

79. *Id.* at 422 (Thompson, J., dissenting).

80. *Id.* at 424 (Thompson, J., dissenting).

81. 22 N.J.L. 441 (N.J. 1850).

82. *Charlestown v. Cty. Comm’rs of Middlesex*, 44 Mass. 202, 203 (Mass. 1841).

83. *Willson v. Back Bird Creek Marsh Co.*, 27 U.S. 245, 251 (1829).

84. *Gough*, 22 N.J.L. at 459.

85. Nor is *Illinois Central* a confirmation of a public-spirited action by the Illinois Legislature in revoking its original grant to the railroad. The history of the case from beginning to end is one of political self-dealing. See Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).



obstructed the public's rights to navigate and fish in navigable waters.<sup>86</sup> Indeed, he observed that "[t]he 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 . . ." <sup>87</sup> Justice Field also stated that the lands in question were "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."<sup>88</sup> Navigation and fishing—nothing more.

*Illinois Central* did confirm one apparent difference between the American and English public trust doctrines. In both jurisdictions, the doctrine limited the use of lands beneath navigable waters. Due to England having few navigable waters not affected by the tides, the test for navigability was generally determined by the reach of the tides. American courts were quick to recognize that on a continent with numerous navigable rivers and lakes, the public's interest in free navigation would not be adequately served if limited to waters affected by the tides. That is, the purpose of the common-law rule would not be served unless navigable waters were understood to include navigable-in-fact waters, whether or not affected by the tides.

While this application of the public trust doctrine to navigable-in-fact waters served the purposes of the doctrine, it had the effect, given the American understanding of the *prima facie* rule as one of title, of also establishing state title to lands beneath those waters. This explains the state of Illinois' ownership of the submerged lands off the Chicago waterfront. But the public's right to navigate and fish in those

waters was not dependent on the state holding title. Those rights existed without regard to ownership of the submerged lands and served as a limitation on the use of those lands.

With respect to the nature and extent of public rights in navigable waters, there was nothing new or revolutionary in the *Illinois Central* decision. It supplies no precedent for an expansion of the land or resources to which the doctrine applies or of the public rights of use of public trust resources. But the decision did contribute to a confusion between the police power and the public trust that has bedeviled public trust law over the ensuing 125 years. Citing *Arnold*, Justice Field wrote 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."<sup>89</sup> In dissent, Justice George Shiras objected that a grant of state property to *Illinois Central* in no way compromised the sovereign powers of the state.<sup>90</sup> As Shiras explained, the sovereign power of the state is not the same thing as the public trust. The former are the powers inherent in all governments, though subject to any constitutional limits.<sup>91</sup> The latter are the rights held in common by all citizens in the nature of an easement on both private and public properties.<sup>92</sup> Justice Field further confused the matter by stating that the state's title to the submerged lands under Lake Michigan "necessarily carries with it control over the waters above them, whenever the lands are subjected to use."<sup>93</sup> But the state's responsibility to secure the public's right to navigate and fish in the lake existed whether or not the state held title to the lakebed.

#### IV. 20th Century American Law

Since its decision in *Illinois Central*, the Supreme Court has cited that case in a total of thirty other opinions, twenty-three of which were rendered in the three decades following *Illinois Central*. In almost all of those opinions, the reference to *Illinois Central* related not to the public trust doctrine, but rather to disputes over title to submerged lands. Whereas state title to lands under both tidal and navigable fresh waters was often attributed to the public's rights to navigate and fish in the overlying waters, the court consistently recognized "the consequent right [of the state] to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such water, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce."<sup>94</sup> Under American law, the *prima facie* rule had thus come to function as a rule of title, but not a prohibition

86. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). The five instances where Justice Field made clear the state could alienate submerged and riparian lands are as follows:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states . . . with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . .

*Id.* at 435;

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

*Id.* at 452;

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

*Id.* at 453;

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

*Id.*; "The trust with which they are held . . . cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." *Id.* at 455–56.

87. *Id.* at 452.

88. *Id.*

89. *Id.* at 456.

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

91. The *jus regium* in Hale or the police power in modern parlance.

92. For Hale, the public rights are the *jus publicum* and the private rights, whether held by individuals or by the state, are the *jus publicum*.

93. *Ill. Cent. R.R.*, 146 U.S. at 452.

94. *See, e.g., id.* at 435; *Morris v. United States*, 174 U.S. 196, 236 (1899); *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452, 481–82 (1903); *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 451–52 (1908); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 333, 4 ELR 20094 (1973), *over-*

on public conveyance of submerged lands. Private ownership could derive from pre-Independence grants by the Crown or other sovereigns,<sup>95</sup> from post-independence grants of territorial lands by the United States,<sup>96</sup> from post-independence grants by the states, or from future grants by the states.<sup>97</sup>

With a single exception, the handful of post-*Illinois Central* Supreme Court decisions that address the public trust doctrine offer little to those seeking to liberate the doctrine from its historical shackles. In *Appleby v. City of New York*, the Court made clear that *Illinois Central* did not preclude state alienation of submerged lands and that the public trust doctrine is one of state, not federal, law. Chief Justice William Taft quoted the following from a New York Court of Errors opinion:

[T]here can be no doubt of the right of Parliament in England, or the Legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual. Hence 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.<sup>98</sup>

Writing for a unanimous court, Taft would explain that a grant of the entire waterfront of Chicago is different from the grant of submerged lands for the construction of a wharf and other commercial facilities, but his brief quotation from the New York court encapsulated the essence of the public

trust doctrine. There is a public right to navigate and fish in navigable waters, and thus a restriction on uses of those waters and their underlying submerged lands that interfere with the public right. Because public rights belong to the people at large and are distinct from the vested rights of individuals, the legislature, as representatives of the public, may alienate submerged lands and authorize the obstruction of navigable waters in whatever manner deemed beneficial to the public—so long as they do not violate vested individual rights. *Illinois Central* was different (and unusual) in that a grant of the entire harbor could not pass muster as consistent with the public right.

Since *Appleby*, the Supreme Court has addressed the public trust doctrine in only four cases, all involving issues of title to submerged lands. In *Summa Corp. v. California ex rel. State Lands Commissions*, the court acknowledged in a footnote (citing *Illinois Central*) that “alienation of the beds of navigable waters will not be lightly inferred,” but recognized that “property underlying navigable waters can be conveyed in recognition of ‘international duty.’”<sup>99</sup> In *Phillips Petroleum v. Mississippi*, the court ruled that notwithstanding Phillips Petroleum’s recorded titles, years of property tax payments and a chain of title dating back over 150 years to Spanish land grants, the state of Mississippi had title to disputed tide lands pursuant to the equal footing doctrine.<sup>100</sup> In *Idaho v. Coeur d’Alene Tribe of Idaho*, the court ruled that the Coeur d’Alene Tribe of Idaho was prevented by the Eleventh Amendment from asserting its claim to title to submerged lands under Lake Coeur d’Alene in federal court.<sup>101</sup> Justice Anthony Kennedy’s opinion announcing the 5–4 ruling of the court included an extensive discourse on the public rights in navigable waters.<sup>102</sup> Finally, in *PPL Montana v. Montana*, the Supreme Court ruled that Montana did not have title to submerged lands under certain non-navigable stretches of the Missouri River, while again opining on the public trust doctrine.<sup>103</sup>

Although all four cases relate to title to submerged lands and therefore are not properly understood as public trust doctrine cases, the last three contribute, in dicta, to the ever-expanding distortions of the history of the doctrine. In *Phillips Petroleum*, Justice Byron White first ties state title to the public trust and then abandons navigability as the test for the extent of lands affected with a public trust.<sup>104</sup> Because “the states have interests in lands beneath tidal waters which have nothing to do with navigation,” Justice

ruled on an unrelated holding by Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 7 ELR 20137 (1977).

95. *Summa Corp. v. Cal. ex rel. State Lands Comm’n*, 466 U.S. 198, 209, 14 ELR 20464 (1984).

96. In *Shively v. Bowlby*, the court asserted that “[t]he congress of the United States . . . has constantly acted upon the theory . . . that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide . . . shall not be granted away during the period of territorial government.” *Shively v. Bowlby*, 152 U.S. 1, 49 (1894). But three decades later, the court affirmed that Congress did not always adhere to the theory:

[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

*United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

97.

As the king, by his charter, put the colonial government in his place, they held the right in and over the arms of the sea, navigable rivers, and the land in the colony, for the benefit of the people of the colony, as a public trust, not as a private estate; the people of the colony had the right of fishing, navigating and passing freely in and over the public waters, subject to such grants of franchise or property as might have been made, or which should be made in future.

*Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 650 (1837).

98. *Appleby v. City of New York*, 271 U.S. 364, 382 (1926) (quoting *Lansing v. Smith*, 4 Wend. 9 (N.Y. 1829)).

99. *Summa Corp.*, 466 U.S. at 207 (citing *Montana v. United States*, 450 U.S. 544, 552 (1981)).

100. See *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 484, 18 ELR 20483 (1988). “There can be no distinction between those states which acquired their independence by force of arms and those which acquired it by the peaceful consent of older states. The Constitution says, the latter must be admitted into the union on an equal footing with the rest.” *Pollard v. Hagan*, 44 U.S. 212, 216 (1845).

101. See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 27 ELR 21227 (1997). Subsequently, the United States sued the state of Idaho in its guardian capacity asserting the tribe’s claim to title. In another 5–4 decision, the Supreme Court ruled that the lands in question had been reserved by the United States for the benefit of the tribe and did not pass to the state of Idaho when it became a state. See *Idaho v. United States*, 533 U.S. 262, 281 (2001).

102. *Coeur d’Alene Tribe of Idaho*, 521 U.S. at 286.

103. See *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012).

104. *Phillips Petroleum*, 484 U.S. at 476, 479–80.

White concludes that the state of Mississippi has title to the tidelands in question.<sup>105</sup> But the existence of state interests in particular lands, even in navigation over those lands, does not establish state title to those lands. Both private and public lands can be affected by, or subject to, the public trust. Because American law treated the English *prima facie* rule as a rule of original state title in submerged lands under navigable waters, it should be expected that the extent of the public trust would parallel the extent of state title. But that does not mean that state title necessarily extends to all lands subject to the public trust, or that all lands to which the state holds title are subject to the trust. As Justice Sandra Day O'Connor observed in dissent, the seemingly "belated and opportunistic"<sup>106</sup> claims of the state of Mississippi "could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs."<sup>107</sup>

Justice O'Connor's dissent, joined by Justices John Paul Stevens and Antonin Scalia, in *Phillips Petroleum*, underscores a key reason for environmentalists' pursuit of an expanded public trust doctrine. By definition, the public rights guaranteed by the public trust are senior and therefore superior to any conflicting claims of private right. For example, the private owner of submerged lands has the right to construct a wharf in a navigable waterway, but not one that obstructs navigation. This is so without regard for the date or terms of the private right because the public right is understood to have existed from time immemorial. No statute, regulation, deed, or other evidence of the creation of the public right is required. Thus, an expansion of either the geographic extent of the public right or the uses guaranteed by that right will, as Justice O'Connor makes clear, unavoidably dispossess private rights holders of property they "reasonably believed was lawfully theirs."<sup>108</sup> Reasonable beliefs with respect to property rights, or any rights for that matter, are founded on established laws and judicial precedents, not on the ambitions, however estimable, of those who would change the law. That those who advocate for an expanded public trust doctrine acknowledge this commitment to the rule of law is underscored by their undying efforts to rewrite the history, and the precedent, of the doctrine. When they succeed, as the state of Mississippi did in *Phillips Petroleum*, private property is taken for a public use without just compensation. In rewriting the history of the public trust doctrine, the *Phillips Petroleum* majority ignored Justice Oliver Wendell Holmes' caution that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>109</sup>

In *Idaho v. Coeur d'Alene Tribe of Idaho*, Justice Kennedy describes the state's title to the submerged lands in dispute as

"an essential attribute of sovereignty."<sup>110</sup> He cites *Martin v. Waddell's Lessee* and *Pollard v. Hagan*, the latter for the proposition "that States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.'"<sup>111</sup> "The principle which underlies the equal footing doctrine and the strong presumption of state ownership," writes Kennedy "is that navigable waters uniquely implicate sovereign interests."<sup>112</sup> He goes on to reference Justinian, Bracton, Magna Carta, Hale, *Arnold v. Mundy* and *Illinois Central* in support.<sup>113</sup> But if submerged lands "uniquely implicate sovereign interests" and state ownership of those lands is "an essential attribute of sovereignty," Justice Kennedy fails to explain why the United States could dispose of those lands during the territorial period when "the intention was definitely declared or otherwise made very plain."<sup>114</sup> In support of his assertion that ownership of submerged lands is an essential attribute of sovereignty Justice Kennedy notes that "[i]n 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," but he fails to explain why the King's sovereignty was not compromised when "an individual or a corporation . . . acquired rights in it by express grant, or by prescription or usage."<sup>115</sup> Justice Kennedy did seek to distance the sovereign states from the crown by asserting that "American law, moreover, did not recognize the sovereign's rights of private property (*jus privatum*) that existed in England, apart from the public's rights to this land (*jus publicum*)."<sup>116</sup> But this is simply wrong. The reality is that states and the United States have disposed of submerged lands while retaining sovereign jurisdiction over those lands. This makes clear that under American law, like English law, the state has distinct proprietary and sovereign interests in land. While states do have proprietary title to submerged lands under navigable waters, claiming that state ownership of those lands is essential to state sovereignty is like the assertion in *Geer v. Connecticut* that the states own wildlife.<sup>117</sup> In the words of Justice Marshall writing for the majority in *Douglas v. Seacoast Products, Inc.*, it is "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.'"<sup>118</sup> There is much fiction in Justice Kennedy's historical discourse in *Idaho v. Coeur d'Alene Tribe of Idaho*.

Most recently, in *PPL Montana v. Montana*, Justice Kennedy writing for a unanimous court again genuflected to the "ancient origin[s]" of the public trust doctrine. But that

105. *Id.* at 476.

106. *Id.* at 492. The state of Mississippi did not seek to protect the lands at issue from environmental degradation. To the contrary, the state sought to benefit from the royalties generated from petroleum development of those lands.

107. *Id.* at 493.

108. *Id.*

109. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

110. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283, 27 ELR 21227 (1997) (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)).

111. *Id.*; *Pollard*, 44 U.S. at 222.

112. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 284.

113. *Id.* at 284–85.

114. *Id.* (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

115. *Id.* at 284 (quoting *Shively v. Bowlby*, 152 U.S. 1, 13 (1894)).

116. *Id.* at 286.

117. 161 U.S. 519 (1896).

118. 431 U.S. 265, 284, 7 ELR 20442 (1977) (quoting *Toomer v. Witsell*, 334 U.S. 385, 402 (1948)).

doctrine, whatever its origins, said Justice Kennedy, was not relevant to resolving the title dispute between PPL Montana and the state of Montana:

Unlike the equal-footing doctrine . . . which is the constitutional foundation for the navigability rule of riverbed title . . . the public trust doctrine remains a matter of state law . . . While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public . . . the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.<sup>119</sup>

Despite Justice Kennedy's recounting of the modern myths of public trust doctrine history in *Couer d'Alene Tribe of Idaho* and *PPL Montana*, the court's unanimous ruling in the latter case makes clear that much of what is relied upon as Supreme Court public trust precedent is largely dicta. Every "public trust" opinion of the Supreme Court is really about title to submerged lands, not the public trust doctrine. The court's repeated reminder that submerged lands are held subject to public rights of navigation and fishing is historically correct. But the existence of those public rights is neither contingent on public title to the underlying lands nor the basis of public title to those lands. The only historical link between the law of title to submerged lands and the public trust doctrine is that a presumption of the former and the rationale of the latter is a strong public interest in navigation and fishing on navigable waters.

At this point in the American part of the story, one might reasonably ask why, with a few exceptions, the focus has been on Supreme Court cases. If the public trust doctrine is one of state law, as Justice Kennedy asserts in *PPL Montana*, shouldn't we be looking at state court decisions? And if the public trust doctrine is neither the foundation for state title to submerged lands nor confined in its application to submerged lands owned by the state, why have most of the cases discussed involved title disputes rather than claims of public right? It is true that in all the cases discussed, the courts have had reference to public trust rights, but from *Arnold to PPL Montana* the matter in dispute has been title.

## V. Meanwhile, in the State Courts

Only six state court decisions from a total of four states have been mentioned in the foregoing discussion of American public trust law.<sup>120</sup> There are, of course, many more, and what would be clear from reading all of them is that, in the words of Professor Sax, "[public trust law] coverage includes, with some variation among states, that aspect of the public domain below the low-water mark on the margin of

the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence."<sup>121</sup> In terms of the narrow geographic scope of the doctrine as propounded by state courts before and up to the time of his 1969 article, Sax's summary is accurate, although 19th and early 20th century state courts generally described the affected rivers and streams as navigable-in-fact rather than as "of consequence."<sup>122</sup> Sax's summary also fails to state that the public rights of use in those narrowly defined waters were (as of 1969) similarly narrow—navigation and fishing (with a few cases including bathing).<sup>123</sup>

But like some of the courts whose decisions he reports, Sax conflates the public trust doctrine with the law relating to title to submerged lands. Indeed, consistent with his ambitions for the doctrine as a tool of judicially enforced "democratization" of natural resource policy-making, Sax asserts that the public trust doctrine also covers parklands "especially if they have been donated to the public for specific purposes."<sup>124</sup> Here, again like some of the courts he cites,<sup>125</sup> Sax confuses the state's responsibility as a trustee under the law of trusts with the public trust doctrine's limits on state management and disposition of state-owned submerged lands. The public's interest in and the states' authorities and responsibilities for the management and disposition of the public domain, including those arising from trust arrangements, are distinct from, though not unrelated to, the public's rights and the states' responsibilities under the public trust doctrine. The two state cases cited by Sax as foundational do not make this mistake. In *Commonwealth v. Alger*, the Massachusetts court did not question the defendant's title to tidelands while ruling that the owner is not therefore entitled to obstruct navigation.<sup>126</sup> In *State v. Cleveland and Pittsburgh Railway*, the Ohio court accepted that while a riparian owner was entitled to build on state owned submerged lands, he could not therefore obstruct navigation.<sup>127</sup> Both courts recognized that the public rights of navigation and fishing on navigable waters, guaranteed by the public trust doctrine, exist without regard for ownership of the submerged lands.

121. Sax, *supra* note 11, at 556.

122. After using this language Sax goes on to say the "[s]ometimes the coverage of the trust depends on a judicial definition of navigability, but that is a rather vague concept which may be so broad as to include all waters which are suitable for public recreation." *Id.*

123. *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 21 (1922).

124. *Id.*

125. Illustrative are Pennsylvania and New York cases in which the state's trust responsibilities in relation to public parks are said to derive from the public trust doctrine. In re Estate of Ryerss, 987 A.2d 1231, 1236 n.8 (Pa. Commw. Ct. 2009) ("[W]hen land has been dedicated and accepted for public use, a political subdivision is estopped from interfering with or revoking the grant at least so long as the land continues to be used, in good faith, for the purpose for which it was originally dedicated."); *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053 (N.Y. 2001) (reaffirming "the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes"). Both opinions relied on early decisions correctly relying on the law of trusts and not the public trust doctrine. *Bd. of Trs. of Phila. Museums v. Trs. of the Univ. of Pa.*, 96 A. 123, 123–25 (Pa. 1915); *Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234, 243 (N.Y. 1871).

126. Sax, *supra* note 11, at 487 (citing *Commonwealth v. Alger*, 61 Mass. 53, 74–75 (Mass. 1851)).

127. *Id.* at 487–88 (citing *State v. Cleveland & Pittsburgh R.R.*, 94 Ohio St. 61, 79 (Ohio 1916)).

119. *PPL Mont., LLC*, 565 U.S. at 603–04.

120. *Browne v. Kennedy*, 5 H. & J. 195, 208 (Md. 1821); *Charlestown v. Cty. Comm'rs of Middlesex*, 44 Mass. 202, 203 (Mass. 1841); *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821); *Gough v. Bell*, 22 N.J.L. 441 (N.J. 1850); *Ex parte Jennings*, 6 Cow. 518 (N.Y. 1826); *Palmer v. Mulligan*, 3 Cal. 307 (N.Y. Sup. Ct. 1805).

All of the California and Wisconsin cases Sax offers to illustrate the “contemporary doctrine of the public trust” involve disputes relating to lands beneath navigable water,<sup>128</sup> some over the validity of private claims of title to submerged lands.<sup>129</sup> While many courts have stated in dicta that public trust lands cannot be alienated,<sup>130</sup> Sax correctly concluded that, “there is no general prohibition against disposition of trust properties, even on a large scale.”<sup>131</sup> *Illinois Central* is “one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of the state legislature.”<sup>132</sup> Other cited cases do not assess the validity of private grants but rather involve claims that private uses of submerged lands violate public rights.<sup>133</sup> Where the courts find that public rights guaranteed by the public trust doctrine have been infringed, the offending uses are almost invariably ones that obstruct navigation or fishing in navigable waters.<sup>134</sup>

Although Sax accepted that, with few exceptions, state courts limited their application of the public trust doctrine to circumstances involving threats to public rights of navigation and fishing in tidelands and navigable waters, he began his discussion of the contemporary doctrine with a Massachusetts case, unrelated to waters of any kind. Sax claimed that *Gould v. Greylock Reservation Commission*<sup>135</sup> was “the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest.”<sup>136</sup> *Gould* was notable for requiring explicit legislative direction to alter public land use, but it had nothing to do with the public trust doctrine. At issue was a proposal to develop a ski area and associated commercial facilities within a legislatively established, 9,000-acre Greylock Reserve on Mount Greylock.<sup>137</sup> The Massachusetts Supreme Court ruled that the lease and management agreement under which the ski area was to be developed exceeded the Tramway Authority’s legislative grant of authority.<sup>138</sup> Though seemingly a simple case of stat-

utory interpretation, Sax characterized its significance more broadly. He wrote, “[i]t is . . . a judicial response to a situation in which public powers were being used to achieve a most peculiar purpose.”<sup>139</sup> The determinative “peculiar purpose” identified by Sax and the *Gould* court was the creation of “a commercial venture for private profit” for which the court could “find no express grant . . . of power to permit use of public lands.”<sup>140</sup>

Such rent seeking is too commonplace to be aptly described as peculiar; more peculiar is Sax’s description of *Gould* as a public trust doctrine case. The court’s opinion never mentions the ‘public trust doctrine’ or uses the term ‘public trust.’ Indeed, the word ‘trust’ appears only in reference to “any trust agreement issued for the protection of bondholders” in the financing scheme for the proposed development.<sup>141</sup> Even distinguished scholar Joe Sax cannot turn a statutory interpretation case into a public trust case simply by describing it as “an important case in the development of the public trust doctrine.”<sup>142</sup> If trust has anything to do with the *Gould* case, it is the trust that citizens in a democratic republic place in those they elect to represent them. The *Gould* court was surely correct to demand clear evidence that the people’s interests as declared in the legislature were served by the Tramway Authority, but such oversight of the democratic process has nothing to do with the common-law public trust doctrine.

Sax described the *Gould* opinion as involving “a simple but ingenious flick of the doctrinal wrist,”<sup>143</sup> but it is really Sax who flicks the doctrinal wrist in an effort to create a new future for the public trust doctrine. Although he acknowledged “a continued reluctance [by state courts] to recognize the public trust,”<sup>144</sup> he saw in it “a considerable opportunity for fruitful judicial intervention . . . .”<sup>145</sup> “Perhaps the most striking impression produced by a review of public trust cases in various jurisdictions,” concluded Sax, “is a striking sense of openness which the law provides; there is generally support for whatever decision a court might wish to adopt.”<sup>146</sup> A decade later, Sax would recognize that, notwithstanding the openness he perceived in the case law, courts were not taking up the invitation to fruitful intervention.<sup>147</sup> The courts, for the most part, were sticking with the common law as it is, rather than as Sax and a growing army of environmental advocates wished it to be.

## VI. The Public Trust Doctrine After Sax

The foregoing is as much about what the history of the public trust doctrine was not about, than what it was. What the history of the doctrine actually was could be recounted in a

128. *Id.* at 509–46.

129. *See, e.g.*, *Priewe v. Wis. State Land & Improvement Co.*, 67 N.W. 918, 920 (Wis. 1896) (holding invalid the grant of lake bottom for purpose of draining and conversion to cropland as not for a public purpose); *see also* *Kimball v. MacPherson*, 46 Cal. 103, 108 (Cal. 1873) (requiring “very explicit provision” for grants of shore land between high and low water mark).

130. *See, e.g.*, *State v. Cleveland & Pittsburgh R.R.*, 94 Ohio St. 61, 80 (Ohio 1916) (“An individual may abandon his private property, but a public trustee cannot abandon public property.”); *see also* *Brickell v. Trammell*, 77 Fla. 544, 559 (Fla. 1919) (“The trust in which the title to the lands under navigable waters is held is governmental in its nature and cannot be wholly alienated by the States.”).

131. Sax, *supra* note 11, at 486.

132. *Id.* at 489.

133. *See* *In re Trempealeau Drainage Dist. v. Houghton*, 131 N.W. 838, 841 (Wis. 1911) (finding that drainage of granted lands did not violate public rights to hunt and fish); *Forestier v. Johnson*, 164 Cal. 24 (Cal. 1912) (barring a private grantee of tidelands from excluding the public’s exercise of its public trust rights).

134. *See, e.g.*, *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927) (In approving a challenged private use of submerged lands, the court distinguished earlier holdings in which “consummation of the scheme would have materially affected the rights of the public to the navigable waters of the lakes . . . .”); *see also* *People v. Cal. Fish Co.*, 138 P. 79, 83 (Cal. 1913) (holding that the grantee of tidelands takes “the title to the soil . . . subject to the public right of navigation”).

135. 350 Mass. 410 (Mass. 1966).

136. Sax, *supra* note 11, at 492.

137. *Gould*, 350 Mass. at 415–16.

138. *Id.* at 426.

139. Sax, *supra* note 11 at 494.

140. *Id.* (quoting *Gould v. Greylock Reservation Comm’n*, 350 Mass. 410, 426 (1966)).

141. *Gould*, 350 Mass. at 417.

142. Sax, *supra* note 11 at 556.

143. *Id.* at 498.

144. *Id.* at 551.

145. *Id.* at 544.

146. *Id.* at 553.

147. Sax, *supra* note 14, at 185–86.

much shorter article. But because the history of the doctrine has been so often romanticized, if not purposely distorted, and because repetition seems to turn fiction into truth, this article attempts, once again, to set the record straight.

It might be objected that the history discussed is incomplete—that nearly half a century has passed since the last state case mentioned here was decided, which may be a fair concern. What is the history of the public trust doctrine since Professor Sax invited fruitful judicial intervention and the breaking of historical shackles? Despite the best efforts of Sax's most imaginative acolytes, the geographic scope of the public trust doctrine remains, with rare exceptions, confined to tidelands and lands riparian to and beneath navigable waters. The public's rights have remained tied, again with rare exceptions, to navigation, fishing and bathing.

Just about the time Sax published his 1969 article, three state courts decided cases that would join the pantheon of progressive public trust decisions. In 1969, the Oregon Supreme Court ruled in *State of Oregon ex rel. Thornton v. Hay* that, notwithstanding long-vested private title to the dry sand beaches on the Oregon coast, there is a public right of access to those beaches under the common-law doctrine of custom.<sup>148</sup> Although not a public trust case by its own terms, it was very much in the spirit of Sax's call for judicial creativity given that the Oregon court cited only a single American case as precedent, and that was a very old case from another jurisdiction.<sup>149</sup> Two years later, the California Supreme Court ruled similarly with respect to the dry sand beaches of its state. In *Marks v. Whitney*, the California court relied on the public trust doctrine to describe the public's right of access as

[p]ublic trust easements . . . traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.<sup>150</sup>

The following year, the Wisconsin Supreme Court ruled in *Just v. Marinette County* that the public's rights in the use of submerged lands extended to privately owned wetlands tributary to navigable waters and imposed "a duty [on the state] to eradicate the present pollution and to prevent further pollution in its navigable waters."<sup>151</sup> While the three cases expand both the geographic reach of the historic public trust doctrine (to dry sand beaches and non-navigable, but tributary wetlands) and the public rights guaranteed by the doctrine (to general recreation and pollution prevention), the doctrine remained firmly immersed in water.

Over the ensuing decades, other state courts embraced the limited geographic and public use expansions reflected in these cases. In 1983, the California Supreme Court ruled,

as the Wisconsin court had in *Just*, that the public trust doctrine applied to non-navigable tributaries of navigable waters where the public rights in those navigable waters were obstructed.<sup>152</sup> The next year, the Montana Supreme Court extended the doctrine's geographic reach by redefining the test for navigability as all waters that can be used for recreation.<sup>153</sup> This synergetic link between the expansion of the geographic reach of the doctrine and the public uses protected had been underscored several years earlier by the Ohio Court of Appeals, which observed "that the modern utilization of our waters by our citizens requires that our courts, in their judicial interpretation of the navigability of such waters, consider their recreational use as well as the more traditional criteria of commercial use."<sup>154</sup>

Some state courts have followed the lead of those mentioned above while others have declined to do so. That is the way of a federal system. But among those state courts that have embraced the New Jersey Supreme Court's view that "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit," none have broken the historical shackles of the doctrine in the ways that Professor Sax envisioned. The doctrine remains firmly linked to water and limited to commercial and recreational use of those waters.

State court decisions extending the public trust doctrine with respect to either geography or public rights are few and far between. The *Just* court's conclusion that the public trust doctrine imposes affirmative duties on the state to regulate water pollution derives from a not uncommon confusion of the state's responsibilities under the public trust doctrine with its authority under the police power. Indeed the Wisconsin Supreme Court would later correct that error, while also restoring the traditional definition of navigable waters, ruling in *Rock-Koshkonong Lake District v. State Department of Natural Resources* that because the public trust doctrine applies only to navigable waters, the regulation of pollution on uplands had to have been founded on the police power.<sup>155</sup>

In a case widely cited by commentators, the California Court of Appeals stated "that it has long been recognized that wildlife are protected by the public trust doctrine."<sup>156</sup> In support of this claim, the court quoted from an article of mine, in which I wrote: "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."<sup>157</sup> Contrary to the California court's conclusion, this did not mean that wildlife are subject to the public trust, but rather that wildlife are *res nullius* and therefore subject to ownership by capture. Although the English Crown, like many monarchs, often

152. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719, 732–33 (Cal. 1983) (stating the public trust encompasses all navigable lakes and streams).

153. *Mont. Coal. for Stream Access v. Curran*, 210 Mont. 38, 56 (Mont. 1984).

154. *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 127 (Ohio Ct. App. 1975).

155. 350 Wis. 2d 45, 80–81 (Wis. 2013).

156. *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 166 Cal. App. 4th 1349, 1361 (Cal. Ct. App. 2008) (as modified on denial of reh'g (Oct. 9, 2008)).

157. *Id.* at 1361–62 (quoting Huffman, *supra* note 16, at 86.).

148. 254 Or. 584, 587 (Or. 1969) (finding that the public had acquired an easement to go onto this land for recreational purposes); *id.* at 598–99 (affirming the trial court in upholding state custom as a source of law).

149. *Id.* at 597 (citing *Perley v. Langley*, 7 N.H. 233 (N.H. 1834)).

150. 6 Cal. 3d 251, 259, 2 ELR 20049 (Cal. 1971).

151. 56 Wis. 2d 7, 16, 3 ELR 20167 (Wis. 1972).

claimed ownership for themselves, the state's authority with respect to wildlife in American law has included the regulation of capture and the protection of habitat pursuant to the states' police powers. It is those police power authorities that the California court in *Center for Biological Diversity v. FPL* says the state has a duty to perform. Despite the expansive public trust language, the court looks to statutes for definition of the state's responsibilities and acknowledges the separation of powers obstacles to actually ordering state agencies to take particular actions beyond complying with established process.<sup>158</sup> In a subsequent case, the California Court of Appeals cited *Center for Biological Diversity v. Florida Power and Light* for the proposition that the Department of Fish and Wildlife must "take its public trust responsibilities into account in providing its review and comment,"<sup>159</sup> leading to the conclusion in yet another court of appeals case that there is "no distinction between compliance with the act and the public trust doctrine."<sup>160</sup> But this reduces the public trust doctrine as applied to wildlife to nothing more than a sort of special appeal for exercise of the police power in pursuit of favored ends.

Because reliance on trust-like language in statutes has the effect of merging the public trust doctrine with the police power, advocates of an expanded public trust doctrine have also looked to environmental rights amendments in a few state constitutions when raising separation of powers obstacles for the courts.<sup>161</sup> In a recent decision, the Pennsylvania Supreme Court ruled, however, "that Pennsylvania has no established public trust principles applicable to Section 27 [the environmental rights amendment to the Pennsylvania Constitution]."<sup>162</sup> Rather, the court looked to the law of trusts in finding that royalties from state oil and gas leases of "public natural resources," of which the state is declared a "trustee" by Section 27,<sup>163</sup> must be "used for conservation and maintenance purposes" and not deposited in the state's general fund. In dissent, Justice Max Baer acknowledged that "[u]ntil the late 1960s, the . . . [public trust doctrine] applied primarily to navigable waterways,"<sup>164</sup> but he urged that "the terminology used by the drafters of Section 27

evokes the public trust doctrine."<sup>165</sup> The objective of those who drafted Section 27, he suggested, was for Pennsylvania to join "a movement . . . to expand the previously limited doctrine to encompass natural resources generally."<sup>166</sup> As of last year, Pennsylvania had not done so.

Other states with constitutional guarantees of environmental rights include Hawaii, Illinois, Massachusetts, Montana, and Rhode Island. Although it has been urged that these provisions, like Pennsylvania's Article I, Section 27, constitutionalize the public trust doctrine, the states' courts have not agreed. Article XI of the Illinois Constitution provides that "the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations" and empowers private citizens to "enforce this right against any party, governmental or private."<sup>167</sup> The Illinois Supreme Court, making no mention of the public trust doctrine, has ruled that Article XI "does not create any new causes of action, but rather, does away with the 'special injury' requirement typically employed in environmental nuisance cases."<sup>168</sup> Article II, Section 3 of the Montana Constitution enumerates "certain inalienable rights . . . [including] 'the right to a clean and healthful environment . . .'"<sup>169</sup> After stating that "[t]he public trust doctrine in Montana's Constitution grants public ownership in water," the Montana Supreme Court found unconstitutional provisions of a stream access law that violated the property rights of riparian landowners, rights also enumerated as inalienable in Article II, Section 3.<sup>170</sup> As Justice Jean Turnage remarked in concurrence, "it is not . . . necessary to resort to the theory of Public Trust Doctrine to find a right to the use of surface waters in this State . . ." That right, stated Turnage, is recognized "in the express language of Article IX, Section 3(3) of the Montana Constitution, which provides: 'All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law.'" Justice Turnage's point was that, like the controlling statute in the California case above, the public trust doctrine adds nothing to public and private rights and responsibilities that derive from other laws.

When asked to find that Article 97<sup>172</sup> of the Massachusetts Constitution imposes public trust duties preventing a

158.

Intervention by the courts [through a separate lawsuit under the public trust doctrine], other than by exercising oversight over the administrative process and ensuring that proper standards are applied, not only would threaten duplication of effort and inconsistency of results, but would require courts to perform an ongoing regulatory role as technology evolves and conditions change.

*Ctr. for Biological Diversity*, 166 Cal. App. 4th at 1371.

159. *Ctr. for Biological Diversity v. Cal. Dep't of Forestry & Fire Prot.*, 232 Cal. App. 4th 931, 953 (Cal. Ct. App. 2014).160. *Citizens for E. Shore Parks v. Cal. State Lands Comm'n*, 202 Cal. App. 4th 549, 577 (Cal. Ct. App. 2011) (as modified on denial of reh'g (Jan. 27, 2012)).161. *See, e.g.*, Montana, Rhode Island, Pennsylvania.162. *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 933 n.26, 47 ELR 20081 (Pa. 2017).

163. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. art. I, § 27.

164. *See Pa. Envtl. Def. Found.*, 161 A.3d at 943.165. *See id.* at 942.166. *See id.* at 943.

167. ILL. CONST., art. XI.

168. *See City of Elgin v. Cty. of Cook*, 169 Ill. 2d 53, 85 (Ill. 1995); *see also Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 967 (Ill. 2012).

169. MONT. CONST., art. II, § 3.

170. *See Galt v. State*, 731 P.2d 912, 915, 916 (Mont. 1987).171. *See id.* at 916.

172.

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose . . . Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

local government from conveying property acquired by the town as a tax forfeiture, the Massachusetts Land Court relied on the Supreme Judicial Court's earlier ruling that Article 97 only limited alienation of public property "specifically designated for conservation."<sup>173</sup> "The public trust doctrine," said the Land Court, "[is] expressed as the government's obligation to protect the public's interest in . . . the Commonwealth's waterways [sic]. Under the public trust doctrine, the Commonwealth holds tidelands [sic] in trust for traditional public uses of fishing, fowling, and navigation."<sup>174</sup> In other words, the Massachusetts public trust doctrine conforms to the historic common law, unaffected by Article 97. The same can be said of Article I, Section 17, of the Rhode Island Constitution.<sup>175</sup> "Under the public trust doctrine," wrote the Rhode Island Supreme Court in 1999, "the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public."<sup>176</sup> "The state's authority over that land," wrote the court, is limited by Article 1, Section 17, of the Rhode Island Constitution, which provides that the people shall continue to enjoy "the privileges of the shore," including the right to fish, to swim, and to pass along the shore." Thus, by its own terms, "rights . . . to which they [the people] have been heretofore entitled" and as interpreted by the Rhode Island Supreme Court, Article I, Section 17, only confirms public rights in the use of state waters always held by the people.

That leaves the Hawaii Constitution as the best hope of those who would rely upon state constitutions for an expanded public trust doctrine. Article XI, Section 9 of the Hawaii Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private,

Mass CONST. art. XCVII; see also *Nabhan v. Town of Salisbury*, No. 10 MISC 442909(AHS), 2014 WL 1569480, at \*4 (Mass. Land Ct. Apr. 17, 2014).

173. See *Nabhan v. Town of Salisbury*, No. 10 MISC 442909(AHS), 2014 WL 1569480, at \*4 (Mass. Land Ct. Apr. 17, 2014) (citing *Hanson v. Lindsey*, 444 Mass. 502 (Mass. 2005)).

174. *Id.* at 6.

175.

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation for the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

R.I. CONST., art. 1, § 17.

176. *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259–60 (R.I. 1999) (citing *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995); *Nugent ex rel. Collins v. Vallone*, 91 R.I. 145, 152, 161 (R.I. 1960); *Bailey v. Burges*, 11 R.I. 330, 331 (R.I. 1876)).

through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

While the Hawaii Supreme Court has held that this provision is self-executing and therefore a basis for private actions to enforce laws intended to protect the environment,<sup>177</sup> it has effectively precluded linking it to the public trust doctrine's rights of use in trust resources by allowing that any substantive rights are to be determined by the legislature.<sup>178</sup> The court has also limited private rights of actions to those in which the plaintiff has a "personal stake" as distinct from "general constitutional and statutory rights . . . [held] in common with the general public."<sup>179</sup>

The court has, however, found that sections 1 and 7 of Article XI import the public trust doctrine into Hawaiian Constitution law. Section 1 provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

Section 7 provides:

The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people. The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

In *In re Water Use Permit Applications*, the Hawaii Supreme Court held "that Article XI, Section 1 and Article XI, Section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii."<sup>180</sup> Given the facts in the case then before the court, the significance of this holding in terms of the scope of the public trust doctrine in Hawaii is unclear. Under existing Hawaii law, Sections 1 and 7 were not essential to the court's ruling. The public trust doctrine was long recognized<sup>181</sup> and its application to trib-

177. *Cty. of Haw. v. Ala Loop Homeowners*, 235 P.3d 1103, 1129 (Haw. 2010).

178. "[Section 9] has both a substantive and a procedural component. First, it recognizes a substantive right 'to a clean and healthful environment,' with the content of that right to be established not by judicial decisions but rather 'as defined by laws relating to environmental quality.' Second, it provides for the enforcement of that right by 'any person' against 'any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.'" *Id.* at 409.

179. *Bremner v. City & Cty. of Honolulu*, 96 Haw. 134, 142 (Haw. Ct. App. 2001).

180. 9 P.3d 409, 443–44 (Haw. 2000).

181. *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 725 (Haw. 1899).



utary groundwaters was consistent with an earlier supreme court ruling, “that where surface water and groundwater can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights, whether the diversion involves surface water or groundwater.”<sup>182</sup> Groundwater diversions that impacted public rights in surface waters would be as much a violation of the public trust as diversion of surface waters with the same effect. In addition to thus expanding the geographic (hydrologic) reach of the public trust doctrine, the Hawaii court expanded the uses to which the public has a right in public trust waters to include “maintenance of waters in their natural state.”<sup>183</sup>

Notwithstanding that the court’s ruling in *In re Water Use Permit Application* did not stray from the water-bound roots of the public trust doctrine, the court stated as a holding “that article XI, Section 1 and Article XI, Section 730 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii.”<sup>184</sup> While Section 7 speaks only to water resources, Section 1 addresses Hawaiian governments’ responsibilities with respect to “natural beauty and all natural resources, including land, water, air, minerals and energy sources.” If the Hawaii public trust doctrine applies to all of that, the liberation of the doctrine from its historical shackles will exceed Professor Sax’s wildest dreams. But both Sections 1 and 7 complicate the matter by recognizing the legitimacy of resource use and development. Section 1 requires Hawaii’s governments to “promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” Section 7 mandates the creation of a water resources agency to “set overall water conservation, quality and use policies.” “The state water resources trust,” noted the court, “thus embodies a dual mandate of (1) protection and (2) maximum reasonable and beneficial.”<sup>185</sup> In a lengthy discourse the court makes a valiant effort to establish, in the absence of any supporting language in either sections, that mandate 1 (addressing protection) trumps mandate 2 (addressing use).

That is where reading the public trust doctrine into Sections 1 and 7 comes in handy. The court acknowledges that making water policy in compliance with Section 7 requires government to “weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law.”<sup>186</sup> This sounds like the sort of balancing governments must do all the time in making policy, but because this task is constitutionally mandated, governmental compliance is subject to judicial review. How will a court determine whether a government’s policy decisions comply with Sections 1 and 7? By “reading the constitution to establish a ‘rule of reasonableness’ requiring the balancing of environmental costs and benefits against economic, social,

and other factors.”<sup>187</sup> Taking into account “the constitutional requirements of ‘protection’ and ‘conservation’” but not the constitutional requirements of “beneficial and reasonable” use, “the historical and continuing understanding of the trust as a guarantee of public rights,” and “the ‘zero-sum’ game between competing water uses demands,” governments (and presumably the courts in reviewing what governmental actions), should “bring a presumption in favor of public use, access, and enjoyment.”<sup>188</sup> In terms more familiar to judicial review, the public trust content of Section 7, and presumably Section 1, “prescribes a ‘higher level of scrutiny’ for private commercial uses . . . .”<sup>189</sup> Just to make completely clear that the balancing inherent in natural resource policy-making will rest finally with the courts, the Court notes that because “[t]he public trust . . . is a state constitutional doctrine . . . , [a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawaii rests with the courts of this state.”<sup>190</sup>

## VII. Why Getting the History Right Matters

Over the half century since Professor Sax first urged that the public trust doctrine could be a tool for “effective judicial intervention,” the doctrine has evolved in directions Sax would praise. But it has not been transformed into the mighty instrument of environmental reform he envisaged. Perhaps, that is yet to come. Certainly, there is no shortage of advocates for the realization of Sax’s vision. That the courts have only occasionally been persuaded to expand the doctrine’s historic reach is testimony to the generally strong commitment of most judges to the rule of law and the separation of powers.

Proponents of an expanded public trust doctrine and those courts that have endorsed expansions over the past several decades appear to agree that history matters to the rule of law. They seem to find it necessary, after all, to reference Justinian, Magna Carta, *Illinois Central*, and other precedents. Presumably, they recognize that unless one is prepared to forswear the rule of law and embrace judicial governance, there is really no choice but to rely on historical rules and principles. But if the reason for referencing history is to establish that judicial decisions are based on preexisting law and not policy or personal preferences of advocates and judges, it is essential that we review the history accurately. Otherwise, we are only pretending to adhere to the rule of law.

As noted above,<sup>191</sup> Professor Sax acknowledged in his 1980 article that the historical shackles of the doctrine were constraining the achievement of his vision for the public trust doctrine as an all-purpose tool in environmental litigation. But he knew that would be a problem from the beginning. In his 1970 article, he wrote, “only the most manipulative of historical readers could extract much binding precedent

182. *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 555 (Haw. 1982).

183. *In re Water Use Permit Applications*, 9 P.3d at 448.

184. *Id.* at 132.

185. *Id.* at 139.

186. *Id.* at 142.

187. *Id.*; see also *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 14 ELR 20790 (La. 1984).

188. *Id.* at 142.

189. *Id.*

190. *Id.* at 143.

191. See discussion *supra* The Public Trust Doctrine After Sax.

from what happened a few centuries ago in England.”<sup>192</sup> Sax wrote for a second time on the public trust doctrine because the courts had not taken up his invitation to “effective judicial intervention” expressed in his 1980 article. Like Professor Wood’s present-day call for judicial intervention in the name of an imagined “atmospheric trust doctrine,”<sup>193</sup> Sax was urging the courts to intervene not because the law required it, but because the other two branches of government had failed to take what he perceived to be necessary actions.

Both the rule of law and the constitutional separation of powers dictate against such judicial law making. Defenders of judicial expansion of the historic public trust doctrine contend that common-law courts have always had authority to adapt the law to changed circumstances.<sup>194</sup> For example, as noted above, American courts changed the definition of navigable waters from waters affected by the tides to waters that are navigable-in-fact.<sup>195</sup> But that adaptation allowed for the public trust doctrine to serve the same ends on the expansive North American continent as it served in Great Britain. The adapted rule would more likely conform to, rather than conflict with, the reasonable expectations of both owners of submerged lands those engaged in commerce and fishing. This is a far cry from what, for example, the Montana Court did in redefining navigable waters to include those susceptible to recreation. By granting access to thousands of miles of waterways from which the public previously could be excluded at the discretion of property owners, the Montana Court upset the reasonable expectations of those property owners while granting welcome, but unexpected, public access. A greater leap would be a judicial ruling that a public right to be free from climate change is merely an adaptation of the public trust right to fish and navigate in navigable waters.

It may be true that climate change is the most pressing issue of our time. It is certainly true that the public has a strong interest in the conservation and wise use of the planet’s finite resources. But as Justice Holmes wrote nearly a century ago in *Pennsylvania Coal v. Mahon*, we cannot forget “that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way . . . .”<sup>196</sup> The constitutional way, under both the federal and state constitutions, is for the legislature to make the law, the executive to implement the law, and the courts to adjudicate disputes and enforce the law. All of this is to be done in conformance with due process, at the heart of which is allegiance to the rule of law. Neither imagined nor real necessity amends the Constitution or justifies the rule of judges.

Judge Ann Aiken concludes her opinion in *Juliana v. United States* with the oft-repeated declaration by Chief Justice John Marshall in *Marbury v. Madison* that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>197</sup> But no serious student of American constitutional law would understand Chief Justice Marshall’s statement to mean judges have the power to say what the law will be. Rather, Chief Justice Marshall’s point, and the basis for the Supreme Court’s willingness to rule on *Marbury*’s claim, was that when faced with an alleged conflict between legislative action and the Constitution, it is the responsibility of the courts to determine whether or not the challenged action violates the Constitution—ergo, to say what the law is. Courts are necessarily confined to examination of authoritative legal sources in determining what the law is—namely constitutions, statutes, legal regulations, and precedent, or in other words, history.

The best argument proponents of an expanded public trust doctrine have is that we face serious environmental challenges, those challenges have not been adequately addressed by the legislative or executive branches of government, and the courts must therefore intervene. Professor Sax made this argument in his foundational 1969 article, as has Professor Wood in making the case for her atmospheric trust theory.<sup>198</sup> In an article about *Juliana*, Professor Wood called climate change a threat of “mind-blowing urgency” requiring judicial intervention because “[t]he international treaty process will probably fail, the legislature will not act, and the president will do too little too late.”<sup>199</sup> However, in a rule of law system with constitutional separation of powers, that argument is not good enough. The history of the public trust doctrine confirms that the public has the right to fish and navigate in navigable waters without regard for ownership of the submerged lands. It is not the province and duty of the judicial department to rewrite history in the name of establishing new public rights.

It is the case, as evidenced in the California, Montana, Oregon, and Wisconsin judicial rulings cited above, that judicial modifications of the traditional common-law public trust doctrine become precedent and law on which future courts can and will rely. Indeed, *Juliana* is part of a nationwide barrage of lawsuits in search of judges willing to make new law in the name of urgency or necessity. If after the appeals are exhausted, new, judicially created, public rights become the law of the land, they will have arisen not from the wisdom of Justinian, but from the imaginations of activist judges. The history of the doctrine will not support such blatant law making, and the rule of law will have suffered.

192. See Sax, *supra* note 11, at 485.

193. See, e.g., Wood & Woodward, *supra* note 5, at 636.

194. “The public trust doctrine, like all common law principles,” opined the New Jersey Supreme Court, “should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 2 ELR 20519 (N.J. 1972).

195. See discussion *supra* Early American Law.

196. 260 U.S. 393, 416 (1922).

197. 217 F. Supp. 3d 1224, 1263, 46 ELR 20175 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

198. See Sax, *supra* note 11.

199. Mary Democker, *Natural Law*, U. OF OR.: OR. Q. (Aug. 1, 2014, 12:00 AM), <https://around.uoregon.edu/oq/natural-law> [https://perma.cc/6AXE-A852].