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ARTICLE

The Public Trust Doctrine and Private Property: The Accommodation Principle

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The public trust doctrine has been attacked by libertarian property rights advocates for being grounded on shaky history,[1] inefficient,[2] a threat to private property,[3] and inconsistent with

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1. *See* James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine,* 18 DUKE ENVTL. L & POL'Y F. 1 (2007) (alleging that the public trust doctrine's roots in Roman and English law are mythical, at least to the extent of preserving public rights; that American public trust law is grounded on a cases later overruled or misguided; and, that although the doctrine's evolution in the 19th century from tidal to navigable-in-fact waters was permissible, its 20th century evolution into a vehicle for resource preservation is a dangerous threat to both property rights and democracy). *See infra* note 13.

2. Jedidiah Brewer & Gary D. Libecap, *Property Rights and the Public Trust Doctrine in Environmental Protection and Natural Resource Conservation*, 53 AUSTL. J. AGRIC. & RESOURCE ECON. 1 (2009) (claiming that the public trust doctrine is less efficient than alternative allocation approaches like marketplace transactions or condemnation because it produces uncompensated redistribution, encourages litigation, and undermines settlements).

3. Randy T. Simmons, *Property and the Public Trust Doctrine, in* 39 PROP. & ENV'T. RES. CENTER POL'Y SERIES 1 (2007) (charging that the public trust doctrine equips judges and legislatures with the power to reduce property rights to the whims of changing public perceptions); George P. Smith & Michael Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL AFF. L. REV. 307, 333 (2006) (claiming that private property rights are compromised or eliminated if unprotected by constitutional compensation).

the rule of law.[4] Some libertarians see application of the public trust doctrine as an evisceration of private property rights.[5] In reality, such claims are hyperbolic. The doctrine actually functions to mediate between public and private rights, and thus is hardly the antithesis of private property; instead, it functions to transform, not eradicate, private property rights.

This mediating function was well described over a quarter-century ago by the California Supreme Court in its famous *Mono Lake* decision as an effort to accommodate both private property and public concerns through continuous state supervision of trust resources, regardless of whether they were in public or private ownership.[6] Courts applying the *Mono Lake* doctrine demand all feasible accommodations to preserve and protect trust assets,[7] but

4. James L. Huffman, *Background Principles and the Rule of Law*, 35 ECOLOGY L.Q. 1, 27 (2008) (maintaining that employing background property principles like the public trust doctrine as a defense to takings claims is inconsistent with the rule of law because it is a distortion of the common law process to suggest that state courts and legislatures can modify or abandon established common law principles in the name of present day notions of the public interest and public rights).

5. *See* Simmons, *supra* note 3, at 13 (charging that the effect of the public trust doctrine on private property eliminates the fundamental right to exclude, and without that right, property devolves back to the open-access commons from which it emerged, leading to inevitable overuse and environmental destruction).

6. Nat'l Audubon Soc'y v. Super. Ct. of Alpine County, 658 P.2d 709, 712, 723 (Cal. 1983) [hereinafter *Mono Lake*] (noting that "the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters." Previous case law demonstrates the continuing power of the state as administrator of the trust, a power which extends to revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.)

7. *See id.* at 712, 728 (affirming the authority of the state to grant non-vested usufructuary rights to appropriate water even if the diversions harm public trust uses but requiring courts and agencies approving such diversions to consider the effect of the diversions on trust uses and attempt, so far as feasible, to avoid or minimize any harm to those interests. "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses wherever feasible."); *see also* Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008) (recognizing that members of the public have the right to question agencies' decisions because they do not always strike an appropriate balance between protecting trust resources and accommodating other legitimate public interests); *In re* Water Use Permit Applications, 93 P.3d 643, 658 (Haw. 2004) [hereinafter *Waiahole Ditch II*] (vacating Water Commission's decision regarding allocation of water resources in part for failure to require the parties to justify the proposed water use in light of the trust purposes and weigh

they do not attempt to eliminate private property. In fact, virtually all applications of the public trust doctrine leave possession of private property unchanged.[8]

The doctrine does, however, often alter development rights, but those rights are only one stick in the property bundle.[9] Equating diminished development rights with a loss of all private property rights is a categorical mistake, one that perhaps serves the libertarian project of erecting the just compensation clause of the Fifth Amendment as a bulwark against continued efforts to modernize property law,[10] but it also overlooks the many dimensions of property rights and obligations.[11]

competing public and private water uses on a case-by-case basis); *In re* Water Use Permit Applications, 9 P.3d 409, 452, 454 (Haw. 2000) [hereinafter *Waiahole Ditch I*] (citing *Mono Lake* as instructive while positing that Hawaii's public trust doctrine may require even more protections than California's, but still indicating a preference for accommodating both instream and offstream uses where feasible); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005) (requiring upland private owner to provide public access to the water even though public use of the upland sands is subject to an accommodation of the interests of the owner).

8. *See infra* notes 35-73 and accompanying text.

9. *See* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773 (2002) (examining and finding wanting the traditional property bundle of sticks that is taught in law school and arguing for an expanded bundle that includes community obligations).

10. The leading commentary on the use of the Fifth Amendment as a limitation on land use and environmental regulation is RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

11. *See, e.g.,* Duncan, *Reconceiving the Bundle of Sticks, supra* note 9; ERIC T. FREYFOGEL, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 1-28, 84-104 (2007) (emphasizing that land ownership entails public responsibilities in an interconnected and ever-changing world) [hereinafter FREYFOGEL, ON PRIVATE PROPERTY]. *See also* ERIC T. FREYFOGEL, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 101-34 (2003) [hereinafter FREYFOGEL, THE LAND WE SHARE]. On the multi-dimensional nature of property, *see*, *e.g.,* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 870 (2009) (describing the need to strike the right balance between our obligations toward others and our inclination to favor our own interests when lawmakers make land use decisions); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. L. REV. 309, 314, 328-38 (2006) (arguing that the Supreme Court in Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528 (2005), returned to a citizenship model of property that presumes part of what it means to be a member of society is that owners have obligations as well as rights); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1108 (1996) (emphasizing that the pre-Lockean medieval world generally conceived property ownership as

The public trust doctrine has a special role to play in moderating development rights because it is, as suggested by Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Commission*, a background principle of property law.[12] Given the antiquity of the doctrine,[13] the public trust is well suited to its role as a background principle. A number of post-*Lucas* decisions have confirmed Justice Scalia's insight that the public trust serves to limit property owners' reasonable expectations to such an extent that loss of their development rights does not give rise to constitutional compensation.[14] In fact, the trust doctrine as a background principle has had a

limited by social obligations and that individual control was in the nature of a social trust); John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property,* 1986 U. ILL. L. REV. 1 (1986); Jeremy Waldron, *What Is Private Property?,* 5 OXFORD J. LEGAL STUD. 313 (1985); Joseph L. Sax, *Thoughts on the Decline of Private Property,* 58 WASH. L. REV. 481 (1983); Thomas C. Grey, *The Disintegration of Property, in* Nomos XXII 69 (J. Roland Pennock & John W. Chapman, eds., 1980); Francis S. Philbrick, *Changing Conceptions in Property Law,* 86 U. PA. L. REV. 691 (1938); P.J. PROUDHON, WHAT IS PROPERTY: AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT (Benj. R. Tucker trans., 1876).

12. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (suggesting that uncompensated regulations that prohibit all economically beneficial use of land must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership*; See also id.* at 1031 (stating that the state of South Carolina, "if it sought to restrain Lucas in a common-law action for public nuisance . . . must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.")

13. *See* Harrison C. Dunning, *The Antiquity of the Public Right*, *in* 2 WATERS AND WATER RIGHTS, ch. 29 (Robert E. Beck & Amy K. Kelley, eds., 3rd ed. 2009). Professor Huffman's claim that the public trust doctrine is historically illegitimate, James L, Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine,* 18 DUKE ENVTL. L & POL'Y F. 1 (2007), largely retraced ground trod in two secondary sources: Patrick Devaney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis,* 1 SEA GRANT L.J. 13 (1976); and Glen MacGrady, *The Navigability Concept in Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water,* 3 FLA. ST. U. L. REV. 511 (1975). No original historical research was evident in Huffman's article.

14. Palazzolo v. State, No. 88-0297, 2005 R.I. Super. LEXIS 108 at *55-56 (R.I. Super. Ct. July 5, 2005) (holding that the public trust doctrine can block a tidelands development without compensation); McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (S.C. 2003) (same, except that the tidelands were artificially created). *See* Erin Ryan, *Palazzolo, The Public Trust, and the Property Owner's Reasonable Expectations: Takings and the South Carolina Marsh Island Bridge Debate,* 15 SE. ENVTL. L.J. 121 (2006).

considerably larger effect on regulatory takings jurisprudence than the *Lucas* holding that regulations causing complete economic wipeouts are categorical takings.[15]

This result has been disturbing to some libertarian property advocates because they assume that the public trust doctrine is the antithesis of property rights, an assumption that dovetails with their fixation on the just compensation clause as the sine qua non of property. But property rights also include the rights of possession, use, and alienation[16] and are limited by the non-injury rule to neighbors and the community.[17] So, a loss of the right to constitutional compensation would hardly produce a complete loss of all property rights. Thus, even where it functions to deny landowner compensation claims, the operation of the public trust doctrine should not be viewed as the equivalent of a permanent physical occupation of property, which is a categorical taking.[18]

15. *See* Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 367 (2005) (maintaining that the categorical takings rule articulated in *Lucas* has turn[ed] out to be "much less significant than the categorical defenses the decision authorized.")

16. *See generally* A.M. Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112-24 (1961) (discussing incidents of land ownership, including rights to possession, use, management, income, capital, security, and alienation).

17. The classic statement about the limits on private property comes from Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court in 1851: "All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare." Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851). *See also id.* at 84-85.

> We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . ".

Id.

18. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (involving cable television wires and boxes, causing $1.00 in damage). Several recent decisions by the Court of Federal Claims and the Federal Circuit have considered federal restrictions on state water rights to protect endangered fish populations to amount to physical occupations, but in none of these cases did the courts consider the limitations the California public trust doctrine places on water rights in the state. *See* Tulare Lake Water Basin Storage Comm. v.

This article shows how the public trust doctrine functions alongside private property by examining representative case law in various states, which reveals a vibrant federalism in terms of how the background principle of the public trust doctrine affects private rights.[19] Part I begins with an examination of case law, beginning in 1821 with the seminal case of *Arnold v. Mundy,* in which the New Jersey Supreme Court began to establish a lineal definition of the public trust doctrine by delineating between public and private rights in submerged lands according to tidal influence. In the nineteenth century, this idea was quickly extended to all waterways that are navigable-in-fact. Part II moves beyond these lineal definition cases to those that adopt a more conceptual division between public and private rights through distinguishing between *jus public* and *jus privatum,* which allows trust duties to be imposed on private landowners without displacing their fee simple titles. Part III looks at another feature of the coexistence of public and private rights by examining those cases, beginning with the lodestar U.S. Supreme Court decision of *Illinois Central Railroad v. Illinois*, which establish exceptions allowing small privatization of public trust resources. Part IV turns to decisions that preserve trust resources by interpreting the application of the trust to transform a landowner's fee simple absolute into a defeasible fee. Finally, Part V explains those decisions, epitomized by beach access cases, which recognize the trust doctrine and the related doctrine of

United States, 49 Fed. Cl. 313 (2001) (deciding that federal restrictions on water diversions that reduced water deliveries to irrigators called for in federal contracts was a physical occupation, apparently overlooking *Mono Lake*'s disclaimer of any vested water rights under California law); Casitas Municipal Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (concluding that federal restrictions requiring a water district to channel water through a fish ladder could be a physical occupation taking, in part because the court thought, as a federal court, it could not interpret the effect of the state's public trust doctrine on the state water right); Stockton East Water Dist. v. United States, 583 F.3d 1344 (Fed. Cir. 2009) (allowing a takings claim to proceed concerning federal restrictions that reduced federal water deliveries as called for in federal contracts without considering the effect of the public trust doctrine).

19. One recent critique of the background principles concept managed to avoid almost any discussion of recent case law on background principles. *See* James L. Huffman, *Background Principles and the Rule of Law,* 35 ECOLOGY L.Q. 1 (2008) (alleging that the use of background principles as takings defenses distorts Justice Scalia's meaning in his *Lucas* decision and disregards the Fifth Amendment's takings clause).

customary rights to superimpose a public easement on private land titles. This examination of public trust case law shows that the public trust doctrine has had a transformative effect on private property rights, but it has not functioned, as is sometimes alleged, to eliminate private property.[20] Actually, the doctrine serves as a prime example of the common law's ability to evolve to meet the felt necessities of the times.[21]

I. THE TRUST DOCTRINE AS A LINEAL DIVISION BETWEEN PUBLIC AND PRIVATE RIGHTS

The American public trust doctrine, inherited from England, was first recognized by Chief Justice Andrew Kirkpatrick of the New Jersey Supreme Court in *Arnold v. Mundy,* a test case in which Arnold, a riparian landowner who had planted oysters in a tidal reach of the Raritan River, claimed that Mundy, who harvested the oysters, trespassed in doing so.[22] In a decision that the U.S. Supreme Court later described as "entitled to great

20. *See* Simmons, *supra* note 3, at 13, 17.

21. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Dover Publications 1991) (1881).

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id. Eric Freyfogle has traced some of the most significant shifts in the common law of property, noting especially the major shifts resulting from industrialization and westward expansion. FREYFOGEL, THE LAND WE SHARE, *supra* note 11, at 37-99. He also explained the massive shift that occurred in trespass during the antebellum era, when courts and legislatures curtailed the public's right to use unenclosed land. FREYFOGEL, ON PRIVATE PROPERTY, *supra* note 11, at 29-60. *See also* Eric T. Freyfogel, *Property and Liberty,* 34 HARV. ENVTL. L. REV. (forthcoming 2010) (arguing that lawmakers are morally obligated to revise property laws over time so that the law enforces only property rights that foster the common good, attacking the notion of a natural law of property which he claims is a product of majoritarian law).

22. Arnold v. Mundy, 6 N.J.L. 1, 8, 32 (1821). In 1821, Chief Justice Kirkpatrick was in his twenty-third year as a member of the New Jersey Supreme Court and his seventeenth year as Chief Justice.

weight" and the product of "great deliberation and research,"[23] the court ruled that Mundy had no title to the submerged land in question because the sovereign owned the beds of tidal waters in New Jersey, just as it did in England.[24]

Arnold v. Mundy began a lineal division of public and private submerged lands according to a waterbody's physical characteristics.[25] *Arnold* declared tidal submerged lands to be public, but well before the end of the Nineteenth Century, other state courts expanded public submerged lands to include waters that were navigable-in-fact.[26] The U.S. Supreme Court quickly ratified this result,[27] a considerable expansion in scope that brought the concept of state sovereign ownership to vast inland waterways.[28]

23. Martin v. Waddell's Lessee, 41 U.S. 367, 418 (1842) (approving the rationale of *Arnold* and suggesting that the rule that the states owned the beds of tidal waters applied to all original states as successors to the English Crown).

24. *Arnold*, 6 N.J.L. at 50.

25. In Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845), the Supreme Court expanded *Martin's* recognition of state ownership of submerged tidal lands beyond the original thirteen states as successors to the English Crown to all subsequent states, ruling that the federal government held tidal submerged lands in trust for future states prior to statehood.

26. *See, e.g,* Carson v. Blazer, 2 Binn. 475 (Pa. 1810) (concluding that it would be "highly unreasonable" to limit the scope of navigability to tidal waters); McManus v. Carmichael, 3 Iowa 1, 18, 30 (1856) (recognizing navigability-in-fact, not the presence of the tide, as the defining characteristic of public waters when determining landowner's title for riparian parcel to extend only to the high water mark); Home v. Richards, 8 Va. (4 Call) 441 (1798) (concluding that the beds of navigable rivers belong to the commonwealth and as such cannot be conveyed); Town of Ravenswood v. Flemings, 22 W.Va. 52 (1883) (acknowledging the navigable-in-fact test as controlling when limiting the title of riparian owners along the Ohio River to the high water mark and declaring the bed as vested in the state); Ingraham v. Wilkinson, 21 Mass (4 Pick.) 268, 284 (1826) (stating the common law to be that navigable waters "invariably and exclusively belong to the public" while not directly deciding the issue because no navigable river was in dispute).

27. The Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851) (upholding a congressional extension of admiralty jurisdiction to nontidal waters used for commerce); Barney v. City of Keokuk, 94 U.S. 324, 338 (1876) (rejecting the distinction between tidal and non tidal waters for the purposes of navigability and sovereign ownership, but leaving to the states the ultimate disposition of their submerged lands).

28. Phillips Petroleum Co. v. Mississippi, 484 U.S. 489, 484-85 (1988) (confirming that lands beneath both tidal and navigable-in-fact waters were state-owned public trust lands).

The upshot of *Arnold* and its progeny was a lineal division of public and private rights. The beds of waters influenced by the tides or that are navigable-in-fact were state-owned in trust for the public, while lands submerged beneath non tidal, non-navigable waters could be privately owned. Sovereign lands and private lands existed side-by-side, with the lands critically important for navigation and fishing in public hands.

Many states adhere to the lineal delineation of public versus private ownership described above.[29] However, judicial interpretation of navigability has proved malleable, as many courts now consider any waters suitable for recreation to meet the navigability test, regardless of whether they ever supported traditional commercial enterprises.[30] Moreover, in some states the definition of navigable waters is elastic in order to account for changes due to human interventions like dams and levees.[31] In some states, courts have extended the public trust doctrine beyond navigable and tidal waters to include non-navigable waters,[32] groundwater,[33] and parklands.[34] Thus, there is no

29. For states recognizing navigability as controlling, *see supra* note 26 and accompanying text; *see also* State v. Slotness, 185 N.W.2d 530, 532 (Minn. 1971) (noting that "the state owns the bed of navigable waters below the low-water mark in trust for the people.") For states adhering to the tidal test *see* Hooker v. Cummings, 20 Johns. 90 (N.Y. Sup. Ct. 1822) (recognizing non tidal rivers as private, even if still subject to public use); Brown v. Chadbourne, 31 Me. 9 (1849) (maintaining the common law doctrine that riparian owners along freshwater rivers own to the middle thread of the stream, and distinguishing freshwater bed ownership from tidal bed ownership, which remains in the state).

30. *See, e.g.,* Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984); State v. McIlroy, 595 S.W.2d 659 (Ark. 1980); Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004). *See generally* Dunning, *supra* note 13, § 32.03(a), at 32-8 (noting that at least ten states have adopted the "pleasure boat" test for navigability).

31. *See, e.g.,* Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738 (Ark. 2003) (ruling that the public gained recreational access rights when a dam permanently flooded riparian lands); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119-20 (S.C. 2003) (holding that the public trust doctrine extended to waters in man-made canals and their extension by erosion).

32. *See, e.g.*, *Mono Lake*, 658 P.2d at 712, 727-30 (Cal. 1983) (public trust extends to non-navigable waters that affect navigable waters); Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004) (all water in the state is owned by the public and managed by the state under the public trust doctrine).

33. *See Waiahole Ditch I*, 9 P.3d at 409 (groundwater); 10 VT. STAT. ANN. tit. 10, § 1390(5) (2010) (it is the policy of the state that the groundwater resources of the state are held in trust for the public); Great Lakes St Lawrence

uniform interpretation of this lineal, geographic division between public and private rights, and there seems to be an evolution toward a more expansive delineation on the public side of the divide.

II. THE TRUST DOCTRINE AS A CONCEPTIONAL DIVISION BETWEEN PUBLIC AND PRIVATE RIGHTS

The lineal definition of the scope of the public trust doctrine is in some jurisdictions complemented by a more abstract division: where the doctrine applies, it works a kind of conceptional severance into *jus publicum* and *jus privatum* estates.[35] A leading example is the California Supreme Court's 1971 decision in *Marks v. Whitney,* where the court rejected an attempt by a landowner to fill tidelands over the objection of a neighbor.[36] According to *Marks*, the effect of the public trust doctrine's application to wetlands was to divide the landowners property into two different estates,[37] similar to what occurs in the

River Basin Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008); *id.* § 1.2 (defining regulated basin water to include groundwater); *id.* § 1.3(1)(a) (declaring basin waters to be precious public resources shared and held in trust by the states; *id.* § 1.3(1)(f) (instructing compact states to protect, restore, improve, and manage to renewable but finite waters of the basin for the use, benefit, and enjoyment of all their citizens, including generations yet to come). *See also* Bridgett Donegan, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law,* 24 J. ENVTL. L & LITIG. 455 (2009).

34. *See, e.g.,* Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11, 15 (Ill. 1970); Friends of Van Cortland Park v. New York, 750 N.E.2d 1050, 1053 (N.Y. 2001).

35. *See* Dictionary.com, jus publicum, http://dictionary.reference.com /browse/jus+publicum (last visited Aug. 18, 2010) (according to one account, is a right of public ownership; specifically, the right of ownership of real property that is held in trust by the government for the public); *see also* Dictionary.com, jus privatum, http://dictionary.reference.com/browse/jus+privatum?qsrc=2446 (last visited Aug. 18, 2010) (a right of private ownership).

36. Marks v. Whitney, 491 P.2d 374, 380, 381 (Cal. 1971) (*Marks* was a notable public trust decision because it recognized public standing to enforce trust obligations, and described the public trust as a flexible doctrine able to evolve to accommodate changing public needs, such as preservation of wetlands in their natural state).

37. *See id.* (distinguishing the landowner's *jus privatum* from the *jus publicum* of the people).

case of financial trust.[38] The landowner's recognized *jus privatum* recognized rights such as possession and alienation, but that estate was burdened by the public's *jus publicum* rights, which restrained private development that was inconsistent with public rights.[39]

A number of state courts have employed *Marks v. Whitney*'s recognition that the public trust doctrine's effect is to sever property into two distinct estates. For example, the New York Supreme Court relied upon the *jus publicum/jus privatum* distinction to order a landowner to remove a fill he placed in Manhasset Bay.[40] The South Carolina Supreme Court used the same conceptual severance to deny a takings claim concerning a denial of a fill permit for artificially created submerged lands in Myrtle Beach.[41] And the Michigan Supreme Court invoked the *jus publicum/privatum* dichotomy in ruling that the public trust doctrine gave the public access rights on privately owned lands along the Great Lakes below the mean high water mark.[42]

38. When money or land is held in a traditional trust, the trustee has legal title to the property, while the beneficiaries have equitable title. *See generally* AMERICAN LAW INST., RESTATEMENT OF TRUSTS (THIRD) (1992). The property is thus conceptually severed into two estates, and the trustee has judicially enforceable obligations to the beneficiaries.

39. *See Marks,* 491 P.2d at 380-81.

> The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute . . . it is within the province of the trier of fact to determine whether any particular use made or asserted by Whitney in or over these tidelands would constitute an infringement either upon the *jus privatum* of Marks or upon the *jus publicum* of the people. It is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes an unlawful infringement upon the *jus publicum* therein.

Id.

40. Arnolds Inn, Inc. v. Morgan, 310 N.Y.S 2d 541, 547 (Sup. Ct. 1970).

41. McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003).

42. Glass v. Goeckel, 703 N.W.2d 58, 65 (Mich. 2005).

III. THE TRUST DOCTRINE'S EXCEPTIONS ALLOWING PRIVATIZATION OF SOME TRUST RESOURCES

The signature American public trust doctrine case is *Illinois Central Railroad v. Illinois*, an 1892 decision of the Supreme Court, in which Justice Stephen Field authored a majority opinion for the Court that held that the state could not privatize most of the Chicago harbor without violating the public trust doctrine.[43] This decision has probably energized the libertarians against the public trust doctrine because the Court used the doctrine to justify a preference for public ownership over private.[44] But Justice Field's decision also authorized privatization of trust resources when 1) the conveyance furthered public purposes, and 2) there was no substantial effect on remaining trust resources.[45] The effect of these exceptions was to

43. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452, 460, 465 (1892) (Shiras, J., dissenting). Although the Supreme Court split 4-3 on the case (with Chief Justice Fuller and Justice Blatchford recusing themselves), all seven justices believed that the public trust doctrine applied to the state's conveyance of the submerged lands to the railroad. But the three dissenters believed that the state possessed sufficient regulatory authority to ensure that the public's rights could be protected despite the conveyance. *See* Joseph D. Kearney & Thomas Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 709 (2004) (a thorough discussion of the background and outcome of the case, explaining that the railroad's motivations in lobbying for the statute granting the submerged lands was to fend off competitors, including one rival headed by Melvin Fuller before he became Chief Justice; that the state of Illinois had neither the financial resources nor expertise to develop the Chicago Harbor; that downstate legislators favored the grant to the railroad because a state 7% gross receipts tax would have generated money to fund downstate projects; and, that railroad probably engaged in bribery in securing passage of the legislation).

44. *Illinois Central*, 146 U.S. at 453.

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils underneath them, so as to leave them entirely under the use or control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id.

45. *Id.* (approving trust dispositions to private parties in the instance of parcels, for the improvement of navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains). *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475-76, 482-83 (1988) (It has never been entirely clear whether Justice Field's opinion was

authorize small privatizations of trust resources where the bulk of the trust resources remain public.[46]

Many cases have adopted the *Illinois Central* exceptions. For example, in *Boone v. Kingsbury,* the California Supreme Court upheld the state's issuance of oil drilling leases on trust lands, concluding that the oil derricks would not substantially interfere with the trust, especially in light of the state's ability to remove them upon a finding of substantial interference.[47] The Wisconsin Supreme Court upheld a conveyance of submerged Lake Michigan land to a private company in *City of Milwaukee v. State* because it was part and parcel of a larger scheme, entirely public in nature, designed to enable the city to construct its outer harbor in aid of navigation and commerce.[48] Additionally, the Arkansas Supreme Court, in *State v. Southern Sand and Material Co.,* upheld the legislature's authority to authorize the sale of sand and gravel from navigable streambeds because it cannot be claimed that the disposal or sale of sand and gravel is a relinquishment of the state's control over the common property, or that it impairs the right of common enjoyment, or that it interferes with navigation.[49]

The lesson of the *Illinois Central* exceptions seems to be that the public trust doctrine does not demand wholesale public ownership of trust resources. So long as the public purposes underlying the trust doctrine are maintained, small privatization is permissible.[50] In effect, the result is the public trust doctrine

grounded in state or federal law, although the Supreme Court has assumed it was a state law interpretation, even though Field did not expressly rely on state law). *See* Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View,* 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 113 (2010) (arguing that *Illinois Central* was based on federal common law).

46. In this way the public trust doctrine is similar to the riparian water rights doctrine, which allows small diversions so long as there is no substantial interference with the rights of neighbors or the flow of the stream. *See* Carol M. Rose*, Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 360-61 (1989).

47. Boone v. Kingsbury, 273 P. 797 (Cal. 1928).

48. City of Milwaukee v. Wisconsin, 214 N.W.2d 820, 830 (Wis. 1923).

49. Arkansas v. S. Sand and Material Co., 167 S.W. 854, 856 (Ark. 1914).

50. *See infra* Part IV, discussing cases in which private parties could retain ownership of trust lands if they maintained public water-related uses, as specified in their land grants.

prescribes a co-existence of public and private uses. The libertarian mind seems to have overlooked this reality.[51]

IV. THE TRUST DOCTRINE'S TRANSFORMATION OF FEE SIMPLES INTO DEFEASIBLE FEES

Where trust resources are privatized, trust obligations do not necessarily disappear, as evident in the discussion of *Marks v. Whitney* above.[52] In both Massachusetts and Vermont, the courts have interpreted the effect of the public trust on filled submerged lands to transform the fee simple absolute of landowners into defeasible fees. For example, in *Boston Waterfront Development Corp. v. Commonwealth*, the Massachusetts Supreme Judicial Court ruled that the public interest in such formerly submerged lands transcends the ordinary rules of property law.[53] Consequently, the court interpreted the nineteenth century statutes authorizing fills in Boston Harbor for wharfing to grant only fee simples subject to the condition subsequent that the lands be used for the public purpose of maritime commerce.[54] Thus, the lands were subject to forfeiture if converted to private condominiums.[55]

Similarly, in *Vermont v. Central Vermont Railway*, the Vermont Supreme Court ruled that the railroad's attempted conveyance of over a mile of Lake Champlain waterfront for real estate development was a violation of the public trust doctrine.[56] As in *Boston Harbor*, the filled railroad-owned lands remained burdened with the public trust, even though they were now privately owned.[57] Consequently, the court ruled that the state had the duty to continuously supervise these shorelands to

51. *See* sources cited *supra* note 3.

52. *See supra* notes 36-39 and accompanying text.

53. Boston Waterfront Dev. Corp. v. Massachusetts, 393 N.E.2d 356, 367 (Mass. 1979).

54. *Id.* at 367.

55. *Id.* at 366.

56. Vermont v. Cent. Vt. Ry., 571 A.2d 1128 (Vt. 1989).

57. *Id.* at 1133-34 (deciding that 19th century wharfing statutes did not contain a clear expression of an intent to abandon the public trust interest in the lands covered by the wharves); *see also* City of Berkeley v. Sup. Ct., 606 P.2d 362 (Cal. 1980) (ruling that tidelands granted to private parties under an 1870 statute remained subject to public trust obligations).

ensure that they were used for public purposes,[58] and that the railway owned the lands in fee simple subject to the condition subsequent that the lands be used for railroad, wharf, or storage purposes.[59] Thus, the state had the right to reclaim title to the lands if they were devoted to purposes inconsistent with the public trust doctrine.[60] These cases illustrate the transformative nature of the public trust doctrine. They show that the doctrine functions not to destroy private property but to modify it in order to ensure that private uses conform to trust purposes.

V. THE TRUST DOCTRINE AS A PUBLIC EASEMENT ON PRIVATE PROPERTY

More commonplace than transferring fee simples into defeasible fees are court decisions that interpret the public trust doctrine to impose a easement on fee simple estates. Perhaps the most vivid example is the New Jersey Supreme Court's recognition in *Matthews v. Bay Head* that the doctrine burdened private beaches with a public easement.[61] The scope of this easement was not merely access to the ocean but also included recreational rights to sunbathe on the beach.[62] But the New Jersey court did not apply the public trust to all private beaches, adopting an accommodation principle similar to that espoused by the California Supreme Court's *Mono Lake* decision that accounted for the location of the beach, the extent and availability of alternatives, the amount of public demand, and usage by the landowner.[63] Application of these Mathews factors[64] led the New

58. *Vermont*, 571 A.2d at 1132 (citing *Mono Lake,* 658 P.2d at 712, 721).

59. *Id.* at 1135.

60. *Id.* (noting that "[t]his means that the State has the right of re-entry in the event that the condition is breached by the railroad.")

61. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

62. *Id.* at 365 (finding that "[t]he bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge.")

63. *Id.*

64. Referred to as a reasonableness test by the court. Nat'l Home Ass'n Builders v. New Jersey Dep't. of Envtl Prot., 64 F.Supp.2d 354, 359 (D. N.J. 1999) (holding that no taking resulted from a requirement that developers of filled tidal lands provide a 30-foot walkway with public access, due to the application of the public trust doctrine).

Jersey Supreme Court to conclude in the 2005 case of *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club* that a private beach had to be opened to the public at a reasonable fee, the amount to be determined by the state.[65] The *Mathews* beach access factors provide a paradigmatic example of the accommodation principle by allowing the courts to balance public access with private rights to exclude.[66]

A public easement to use beaches has also been the result of the application of a doctrine closely related to the public trust: customary rights.[67] The pioneering case was the Oregon Supreme Court's 1969 decision in *Thorton v. Hay,* where the court ruled that the public's use of Oregon's beaches was ancient enough and prominent enough to establish a public easement quite similar to that later recognized by the New Jersey Supreme Court under the public trust doctrine.[68] Although the court later limited public rights to access Oregon beaches to those that were

65. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 124 (N.J. 2005).

66. As one commentator noted, the factors announced in *Mathews* demonstrate how a court can balance the public right of access with private property rights. *See* Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Above the High Water Mark*, 16 HASTINGS W.-NW J. ENVTL. L. & POL'Y 165, 179 n. 94 (2010). ("For example, where the upland beach is removed from the ocean, other public beaches are nearby, public demand for the upland beach is minimal, and the private landowner is making use of her upland beach, the private landowner should be able to exclude the public.")

67. The public trust and customary rights doctrines share a number of characteristics. First, they both reward old uses. Second, they protect established public uses. Third, they allow private uses that are consistent with public uses. But customary rights require more demonstrable and uniform historic public uses than the public trust doctrine requires. *See* Thorton v. Hay, 462 P.2d 671, 677 (Or. 1969) (recounting the Blackstonian elements of customary rights).

68. *Thorton*, 462 P.2d at 677 (paraphrasing Blackstone as to the factors relevant to a finding of customary rights, including the ancient nature of the use; continuous use without interruption; peaceable use free from dispute; reasonable use or use appropriate to the land and the community; visible boundaries to provide certainty concerning the extent of the public easement; obligatory, in the sense that the public use was not at landowners option; and consistent with other customs and laws). *See also* State *ex rel.* Hannon v. Fox, 594 P.2d 1093, 1101 (Idaho 1979) (recognizing customary rights where all seven of the Blackstonian elements were met).

adjacent to the ocean,[69] the doctrine of custom was resoundingly reaffirmed in *Stevens v. City of Cannon Beach.*[70] Several other state courts have adopted the customary rights doctrine as a vehicle for recognizing a public easement in ocean beaches.[71]

The states recognizing a public trust or customary rights easement for beach access have in effect moved the lineal delineation of public rights upland, away from the traditional boundary at the water's edge. They have been joined by other states which have applied the public trust doctrine to parklands.[72] The frontiers of the public trust doctrine no doubt lie in such upland resources with great public value. This amphibious evolution is only a continuation of the doctrine's historical advance from tidal to inland navigable waters.[73]

VI. CONCLUSION

The accommodation principle that the *Mono Lake* court and subsequent cases have implemented has become the chief

69. MacDonald v. Halverson, 780 P.2d 714, 724 (Or. 1989) (determining that a beach at a freshwater pool separated from the ocean, which the public did not historically use, was not subject to public customary rights).

70. Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Or. 1993) (concluding that the Oregon doctrine of customary rights was a background principle under the *Lucas* framework). Justice Scalia, joined by Justice O'Connor, dissented from the Supreme Court's denial of certiorari, acknowledging the difficulty in reviewing a takings claim without developed facts in the courts below but arguing that the Court should hear the petitioner's due process claim that the Oregon customary rights doctrine was pretextual or a historical), *cert. denied* 510 U.S. 1207, 1209 (1994).

71. *See, e.g.* Public Access Shoreline Hawaii by Rothstein v. Hawai'i County Planning Comm'n by Fujimoto, 903 P.2d 1246, 1263 (Haw. 1995); Matcha v. Mattox, 711 S.W.2d 95 (Tex. Civ. App. 1986); City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974). *See generally* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND §§ 5.26, 6.2, 6.3 (2001) (collecting articles on beach access). Texas beach access was strengthened in 2009, when the voters overwhelmingly approved Proposition 9, an amendment to the Texas Constitution which, *inter alia*, declared that "[t]he public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach. The right granted by this subsection is dedicated as a permanent easement in favor of the public." *See* Tx. H.R.J. Res. 102 (2009) (approved Nov. 3, 2009, amending TX CONST. Art. 1), *available at* http://ballotpedia.org/wiki /index.php/Texas_Proposition_9_(2009).

72. *See supra* note 34; Keith, *supra* note 66, at 179-87 (collecting cases).

73. *See* Scott Reed, *The Public Trust Doctrine: Is It Amphibious?,* 1 J. ENVTL. L. & LITIG. 107 (1986).

characteristic of the public trust doctrine's effect on private property. By imposing on the state a continuous supervisory duty to attempt to preserve trust assets[74] *Mono Lake* ruled that 1) there were no vested private rights that limited the trust,[75] 2) private grantees use rights were limited by the trust responsibility,[76] and 3) the state was not confined to erroneous past decisions.[77] All of these interpretations were means to implement the feasible accommodation for which the court called. This accommodation meant that there would be a balancing of public and private rights in fulfilling the trust responsibility,[78] which is hardly an evisceration of private property, unless private property means a kind of private sovereignty immune from state control. That sort of private property exists only in libertarian dreamworld.

This review of representative public trust case law reveals the doctrine to be not so much an anti-privatization concept as a vehicle for mediating between public and private rights in important natural resources. Courts have accomplished this accommodation of public and private rights sometimes through a geographical division, sometimes through a conceptional division, sometimes through allowing small privatizations of public resources, sometimes through a transformation of the definition of the private property interest, and sometimes through recognition of a public easement on private property. In none of

74. *See supra* note 6 and accompanying text.

75. *Mono Lake*, 658 P.2d at 712, 721, 727 (trust doctrine bars any claim of a vested right to harm trust resources).

76. *Id.* at 722-23 (citing People v. Cal. Fish Co., 138 P. 79 (Cal. 1913)); Berkeley v. Sup. Ct., 606 P.2d 362 (Cal. 1980). *See also Mono Lake*, 658 P.2d at 724 ("[n]o one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose.")

77. *Mono Lake,* 658 P.2d at 723, 728 (trust doctrine gives the state the continuing power to revok[e] previously granted rights and enforce "the trust against lands long thought free of the trust . . . the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.")

78. *Id.* This balancing was especially evident in the court's discussion of water rights, where the economy of the state was built in large part on water diverted from streams, it would be disingenuous to hold all such diversions were improper, that as a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses, but the state had to take the public trust into account to the extent feasible and preserve, so far as consistent with the public interest, the uses protected by the public trust.

these cases have the courts eliminated private property, but they have employed the public trust doctrine to recognize public rights in private property. Recognition of the nature of the accommodation between public and private rights that is accomplished by application of the public trust doctrine will no doubt not assuage its libertarian critics, but it might lead to more constructive conversations about the nature of public rights in privately owned land.[79]

79. *See, e.g.,* FREYFOGEL, ON PRIVATE PROPERTY, *supra* note 11, at 15-20 (correcting the "half-truth" that private property is primarily an individual right, the keystone of all other rights), 131-56 (discussing "the responsible landowner," including trust responsibilities, managing interconnected resources, the evolving nature of property rights, and supplying a suggested landowner's bill of rights); FREYFOGEL, THE LAND WE SHARE, *supra* note 11, at 101-34 (discussing various justifications for private property and showing how property rights and responsibilities have evolved over time). *See also* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (discussing the modern public trust doctrine, which is not only based on its traditional common law origins but also statutory and constitutional trust provisions).