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PHILLIPS PETROLEUM CO. V. MISSISSIPPI AND THE PUBLIC TRUST DOCTRINE: STRENGTHENING SOVEREIGN INTEREST IN TIDAL PROPERTY

The public trust doctrine, rooted in Roman law, holds that title to submerged land and tidelands is held in trust by the sovereign or state for the benefit of the people. As traditionally recognized, the trust doctrine provides that the public may use such property for commerce, navigation, and fishing. Since the environmental awakening of the early 1970's, however, the traditional triumvirate of uses¹ has expanded to embrace a wide range of perceived social, environmental, and economic needs. As a result of this expansion, courts have struggled to put the ancient public trust doctrine into proper perspective. Along the way, courts have attempted to balance the often competing values of private property interests and public rights. This tension has mirrored the larger debate within public resource law between common and private control of natural resources.² Changing perceptions of private and public needs have altered the scope of the public trust doctrine and have led to a measure of uncertainty as to its proper physical application.³

In *Phillips Petroleum Co. v. Mississippi*,⁴ the United States Supreme Court

1. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

2. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980). This tension has, perhaps, been more clearly evident in the emerging "takings" law of the current United States Supreme Court. See, e.g., *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (the imposition of a public access requirement in exchange for Coastal Commission approval to build constitutes a compensable taking); *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378 (1987) (requiring the payment of damages for the temporary denial of use of property); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987) (Pennsylvania subsurface mining regulation held not a taking); see also Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3 (1987); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter Michelman, *Property, Utility, and Fairness*]; Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448 (1988).

3. See Stevens, *supra* note 2, at 196.

4. 108 S. Ct. 791 (1988).

clarified the basis for state reliance on the public trust doctrine and significantly expanded the doctrine's geographical reach. The *Phillips* court held that upon becoming a state, Mississippi became fee simple owner of all lands under tidally influenced water.⁵ The extent to which the state could properly claim title was based on the rights and privileges of the original states, which were granted in like fashion to newly admitted states under the equal footing doctrine.⁶

Significantly, the Court rejected the navigability-in-fact standard as the *sine qua non*⁷ of lands subject to the public trust.⁸ Instead, the Court read English common law,⁹ early state law from the original thirteen states,¹⁰ and its own precedents¹¹ for the proposition that all lands subject to the ebb and flow of the tide, whether navigable in fact or not, are subject to the state's public trust interest.¹²

Phillips arose out of a dispute over legal title to forty-two acres of land underlying several small streams and a bayou in southwestern Mississippi.¹³ The waters over the property were neither navigable nor were they immediately adjacent to the sea.¹⁴ They were, nonetheless, affected by the ebb and flow of the tide through a tributary flowing into the Gulf of Mexico.¹⁵ Cinque Bambini Partnership and Phillips Petroleum Company brought suit¹⁶ to quiet title to this mineral-rich property as record title holders, claiming a chain of title dating back to pre-statehood Spanish land grants of 1813.¹⁷ The State of Mississippi, however, asserted title in fee simple as public trustee under the public trust doctrine.¹⁸ The Supreme Court of Mississippi held that the state owned the subject properties in fee simple.¹⁹ As a result,

5. *Id.* at 795.

6. *Id.*; see also *infra* text accompanying notes 53-73.

7. Brief for Petitioners at 31, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870) [hereinafter *Petitioners' Brief*].

8: *Phillips*, 108 S. Ct. at 797.

9. *Id.* at 796. Although the Court specifically reserved ruling on the state of the English law regarding the type of lands in question, the Court did accept its earlier pronouncements as binding. *Id.* (relying on *Shively v. Bowlby*, 152 U.S. 1 (1894)).

10. *Phillips*, 108 S. Ct. at 794-95.

11. *Id.* at 794-97; see *infra* notes 74-122.

12. *Phillips*, 108 S. Ct. at 795.

13. *Id.* at 793.

14. *Id.*

15. *Id.*

16. *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

17. *Id.* at 511.

18. *Id.* at 510.

19. *Id.* at 510-11.

the state was free to issue oil and gas leases to private parties for the properties at issue despite Cinque Bambini's record title.

The United States Supreme Court affirmed.²⁰ The Court held that tidal influence, and not navigability-in-fact, was the test for identifying lands²¹ subject to the public trust. Justice White, writing for the majority,²² determined that at the time of the American Revolution, the thirteen original states acquired fee simple title to all tidal land within their boundaries. Such tidal lands were held by the states as trustees for its citizens. New states, upon admission to the union, acquired a like trust over tidal lands within their boundaries on an equal footing with the original thirteen states.²³ As a result of this clarification of the ebb-and-flow test, millions of acres of non-navigable, tidal property are now squarely within the states' public trust.²⁴

The dissent²⁵ argued strongly that reasonable property expectations of landowners in Mississippi and in every coastal state would be severely disrupted²⁶ by extending the scope of the public trust doctrine beyond what it perceived as the doctrine's historical parameters.

This Note examines the development of the public trust doctrine in Roman law, English common law, and American Law. It then examines the continued application of the doctrine in the United States with examples of its varied interpretations by different states and in the large body of Supreme Court case law. The Note analyzes the *Phillips* decision in light of its consistent use of case law and as a balance between legitimate private interests and long-recognized public rights. The Note concludes by suggesting that a proper application of the public trust doctrine will serve as an important economic and environmental tool for state control over tidal property.

20. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988). The Court divided five to three. Justice Kennedy took no part in the discussion or decision of the case. At the time oral argument on the case was heard, Kennedy had not yet been appointed to the Court.

21. *Id.* at 795. The waters at issue in this case were non-navigable and tidal, as opposed to "inland" waters, which are non-tidal by definition. *Id.* at 793. A large body of public trust law has developed around this latter class of waters, the test for which has traditionally been navigability. For a fuller discussion of the implications of this distinction, see *infra* text accompanying notes 186-217.

22. Justice White was joined by Chief Justice Rehnquist and Justices Brennan, Blackmun and Marshall.

23. See *infra* notes 53-73 and accompanying text.

24. *Phillips*, 108 S. Ct. at 804 (O'Connor, J., dissenting) (citing S. SHAW & C. FREDINE, FISH AND WILDLIFE SERVICE, U. S. DEP'T OF THE INTERIOR, CIRCULAR 39, WETLANDS OF THE UNITED STATES at 15 (1956)).

25. Justice O'Connor was joined by Justices Stevens and Scalia.

26. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting).

I. THE EVOLUTION OF THE PUBLIC TRUST DOCTRINE

A. *Res Communes: Origins of the Public Trust in Roman Law*

Roman law developed out of a system in which the demands of commerce competed against burgeoning concentrations of urban life.²⁷ Most types of property were classified as belonging to individuals.²⁸ Some things,²⁹ however, were considered by operation of a "natural law" to be the property of no one.³⁰ Roman law recognized that the air, the sea, and the shore were public.³¹ This notion of *res communes* was an essential element of Roman law upon which the foundation of the common law was built.³²

B. *The Common Law Extension of the Trust and Its Application to the Several States*

As the Roman Empire declined, European commerce also declined.³³ The public trust reached its nadir at this point in the Dark Ages as control of public waterways began to slip away from the public and into private hands.³⁴ The English king's sovereign control over public waters came to be viewed as a personal fee.³⁵ As a result, the king freely privatized formerly common property at the expense of the public's long-recognized claims to

27. For an excellent historical treatment, see Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970); see also Stevens, *supra* note 2, at 195-97.

28. J. INST. 2.1.

Things become the private property of individuals in many ways; for the titles by which we acquire ownership in them are some of them titles of natural law, which, as we said, is called the law of nations, while some of them are titles of civil law. . . . [N]atural law is clearly the older, having been instituted by nature at the first origin of mankind, whereas civil laws first came into existence when states began to be founded, magistrates to be created, and laws to be written.

Id. at 2.1.11.

29. *Id.* at 2.1.7-.12. Sacred things such as "churches and votive offerings" as well as "[w]ild animals, birds, and fish" (before capture), were considered to be no one's property but the property of all. *Id.*

30. *Id.* at 2.1.7.

31. *Id.* at 2.1.1-.2.

Thus, the following things are . . . common to all-the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein.

Id.

32. Note, *supra* note 27, at 764.

33. *Id.*

34. *Id.* at 764-65.

35. *Id.*

commerce, navigation, and fisheries.³⁶

By the time of the Magna Carta, however, navigational commerce had begun to increase dramatically.³⁷ In order to aid the free flow of commerce, the Magna Carta prohibited obstructions to navigation, such as fishing weirs,³⁸ from rivers and channels.³⁹ As commerce continued to develop in England, the public trust doctrine reemerged along with it. The king came to be viewed as the *protector* of public rights and, although he had the right to grant title to land below the navigable waters, the right of the grantee remained subservient to the public rights of fishing and navigation.⁴⁰ Thus, while the lands subject to the public trust were in fact alienable, the trust itself was not.

Whereas *res communes* was not a particularly difficult concept for the Romans, the English common law system seemed to reject public ownership and instead required private ownership of property.⁴¹ The law thus created the fiction that the ownership of all soil below navigable waters was in the king.⁴² The king as protector became the king as sovereign trustee⁴³ for the public rights.⁴⁴

The title, therefore, or *jus privatum*, in the underlying lands of the sea and its arms, was in the king as owner. The dominion, though, or *jus publicum*, over those lands was in the king as trustee.⁴⁵ As Professor Sax⁴⁶ pointed

36. *Id.*

37. *Id.* at 765.

38. Weirs are enclosures set in waterways or other structures attached to underwater river beds. 7 C. DAVIS, H. COBLENTZ & O. TITELBAUM, *WATERS AND WATER RIGHTS* 324 (1976).

39. J. HOLT, *MAGNA CARTA* 49 (1965); see also Note, *supra* note 27, at 766.

40. J. ANGELL, *A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS* 33-34 (3d ed. 1826); see Note, *supra* note 27, at 768.

41. Stevens, *supra* note 2, at 197-98.

42. *Id.* at 198.

43. The recognized authority on the English law of the public trust, Lord Hale, put it thus:

The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the wast [sic] whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river.

Hale, *De Jure Maris*, in *A HISTORY OF THE FORESHORE* 376-77 (S. Moore ed. 1888).

44. *Id.* Lord Hale was quoted approvingly in *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

45. *Shively*, 152 U.S. at 11. In this sense, the king enjoyed a dual interest in the underlying lands: The private title to the property, expressed in terms of the *jus privatum*; and a sovereign interest in trust for the benefit of the people, expressed as the *jus publicum*. See *A HISTORY OF THE FORESHORE* 643-44 (S. Moore ed. 1888). The *jus privatum* is normally referred to in terms of private ownership of water beds which are still susceptible of private fee in limited circumstances. Although "the king hath prima facie this right in the arms and creeks of the sea," the *jus privatum* in a private citizen is possible by sovereign grant or by natural

out, whatever powers or restrictions the king may have possessed, it was nonetheless within Parliament's authority, acting under what would now be considered the "police power, to enlarge or diminish the public rights for some legitimate *public purpose*."⁴⁷ The dynamic established by the king as trustee, and Parliament as regulator, created confusion in American trust jurisprudence when the states adopted the common law.⁴⁸

The American system is a hybrid of the Roman and English conceptions of the public trust.⁴⁹ In the American system, the English common law rights passed to the colonies.⁵⁰ Similar rights passed under the royal charters in trust for the future communities.⁵¹ At the time of the Revolution, these rights became vested in the states.⁵²

C. The Equal Footing Doctrine

The plaintiffs in *Pollard v. Hagan*⁵³ claimed title to once-tidal-flowed property in Alabama through a congressional patent.⁵⁴ The Court held that Congress had no authority to grant public trust lands within the state's jurisdiction to private parties.⁵⁵ It stated that the shores of navigable waters, and the land under them, were not constitutionally granted to the United States, but were reserved to each of the states respectively.⁵⁶ Further, the Court held that the new states possessed the same rights, sovereignty, and jurisdic-

accretion. Hale, *supra* note 43, at 384-85. For further sources on natural and unnatural changes to the shore, see sources cited *infra* note 174.

46. Professor Joseph L. Sax, formerly of the University of Michigan, currently at the University of California, Berkeley, is widely recognized as this country's leading authority on the public trust doctrine. His notable articles include the seminal work, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, *supra* note 1, and Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980). See also J. SAX, DEFENDING THE ENVIRONMENT (1971).

47. Sax, *supra* note 1, at 476 (emphasis added).

48. *Id.*; see Note, *supra* note 27, at 774-75; *infra* notes 75-80 and accompanying text (American adaptation of common law applies disparate notions of navigability).

49. Note, *supra* note 27, at 774-75; see also *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842) (private claim to oyster bed in public river rejected as violative of public rights to navigation and fisheries).

50. See *infra* text accompanying notes 58-73.

51. *Id.*

52. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); see *Martin*, 41 U.S. at 410 ("For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use. . . .").

53. 44 U.S. (3 How.) 212 (1845).

54. *Id.* at 219-20.

55. *Id.* at 230.

56. *Id.*

tion over these properties as the original states.⁵⁷ This ruling remained undisturbed in the ninety-five years since the *Pollard* decision.⁵⁸

Revisiting the issue in the more recent case of *Utah Division of State Lands v. United States*,⁵⁹ the Court considered whether the equal footing doctrine permitted the state of Utah to claim that it acquired title to a navigable lake bed within its jurisdiction as against the federal government.⁶⁰ The Court noted that there existed a strong presumption against federal conveyance of a navigable bed attached to a private claim unless such intention was unambiguously declared by the United States.⁶¹ This case, however, involved Congress' selection of Utah Lake as a reservoir site under the Sundry Appropriation Act of 1888 prior to Utah's admission to the Union.⁶² On the facts of the case, the Court concluded that the act at issue did not contain sufficiently clear language to defeat Utah's claim.⁶³ The Court reemphasized its traditional equal footing position as a doctrine deeply rooted in the history of Roman and English common law.⁶⁴

The long line of equal footing cases has consistently maintained that the rights and privileges of the original thirteen states, with respect to navigable

57. *Id.*; accord *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Appleby v. City of New York*, 271 U.S. 364, 381 (1926); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892); see also *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477-78 (1850).

58. See, e.g., *Borax*, 296 U.S. at 15; *Appleby*, 271 U.S. at 381.

59. 107 S. Ct. 2318 (1987).

60. *Id.* at 2320.

61. *Id.* at 2321; see also *Sax*, *supra* note 1, at 486.

62. *Utah*, 107 S. Ct. at 2321-22; see *Montana v. United States*, 450 U.S. 544, 552-53 (1981); *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). See generally Note, *Title to the Soil Under Public Waters: A Question of Fact*, 2 MINN. L. REV. 313 (1918); Note, *Title to the Soil Under Public Waters: The Trust Theory*, 2 MINN. L. REV. 429 (1918).

63. *Utah*, 107 S. Ct. at 2324. The Court recognized Congress' historical policy of holding lands under navigable waters for the benefit of future states. *Id.* at 2323; see *Shively*, 152 U.S. at 49-50.

64. *Utah*, 107 S. Ct. at 2320 (citing *Shively*, 152 U.S. at 11-14; *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845)).

The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law, the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people.

Id.; see also Brief for Respondent, *State of Mississippi at 19*, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870) [hereinafter Respondent's Brief]. The rights to oil and gas leases for the submerged river bed were at issue in *Utah*. 107 S. Ct. at 2322; cf. *Phillips*, 108 S. Ct. at 793 (lucrative mineral leasing rights prompted Mississippi to assert its public trust interest).

waters, passed to the newly formed states upon admission to the Union. Those rights and privileges derived from the English common law but were expanded or limited by the individual states as public trustee.⁶⁵ The new states acquired an affirmative duty to control trust property for the benefit of their people, subject only to the limitations placed upon them by the United States Constitution.⁶⁶

In the seminal American public trust case, *Shively v. Bowlby*,⁶⁷ the Supreme Court reiterated its view that the original states acquired a public trust over soil below the high tide line. Similarly, property acquired by acts of the federal government was held in trust for the newly formed states.⁶⁸ Once the new states were formed, that trust transferred to the states on an equal footing with the original thirteen for appropriate public administration.⁶⁹ At issue in *Shively* was whether a congressional land grant to a private citizen in pre-statehood Oregon vested any property rights in land below the high tide as against a subsequent grant from the state.⁷⁰ The Court held that while Congress possessed the authority to grant public trust lands in its territories, it had never done so.⁷¹ Any grants made of land bordering tidelands did not impair the title and dominion of the newly created state.⁷² Under the equal footing doctrine, the states admitted into the Union after the adoption of the Constitution acquired the same rights as the original thirteen states in the lands under tide waters within their respective

65. Although a minority of the original 13 states have chosen to limit the common law doctrine (Massachusetts and Maine limited public ownership to land below *low* tide as opposed to *high* tide), most states have followed the common law. As a recognized extension of the public trust doctrine, for example, it is well established that any conveyance of trust lands to private parties must be made by the state legislature as public trustee. *Appleby v. City of New York*, 271 U.S. 364 (1926). Normally, a valid public purpose must exist for a legislative conveyance to pass judicial muster. *Id.*; see, e.g., *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892) (legislatively granted land beneath Lake Michigan held to be a revocable fee). But see Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); Roberts, *Beaches: The Efficiency of the Common Law and Other Fairy Tales*, 28 UCLA L. REV. 169 (1980); Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (criticizing the expansion of sovereign dominion over trust property as inefficient and historically unjustified).

66. *Illinois Cent. R.R.*, 146 U.S. at 435. The commerce clause states that, "Congress shall have the power . . . [t]o regulate Commerce . . . among the several [s]tates." U.S. CONST. art. 1, § 8, cl. 3. See *Kaiser Aetna v. United States*, 444 U.S. 164, 174-80 (1979) (discussing the scope of the federal navigational servitude).

67. 152 U.S. 1 (1894).

68. *Id.* at 26, 57.

69. *Id.* at 57-58.

70. *Id.*

71. *Id.*

72. *Id.*

jurisdictions.⁷³

II. THE STATES AND THE PUBLIC TRUST DOCTRINE

In order to determine the extent of the public trust property in which the newly formed states acquired an interest, it is necessary to examine the original states' perception of the common law and the modifications made to it by the thirteen new sovereigns.⁷⁴

A. *The Original States Define the Doctrine's Scope: Navigability*

Because of a geographic anomaly, the definition of navigable waters in England rested on tidal ebb and flow. All significant "arms of the sea" and navigable rivers used for purposes of commerce were physically subject to tidal influence.⁷⁵ As a result, non-navigable rivers, streams, and ponds which were not embraced by the public trust doctrine and the land below them became susceptible to private ownership. Furthermore, the king assumed no interest for the preservation of public fishing, navigation, or commerce. Thus, the terms "navigable waters" and "tidal waters" became interchangeable when speaking of the scope of the sovereign interest.⁷⁶

In colonial America, legislatures sought to define the adopted public trust in terms which were consistent with their geographical realities and with their commercial and recreational needs. In Massachusetts, the colonial legislature amended the common law definition of the high-tide line as the seaward boundary of private ownership.⁷⁷ The ordinance extended private ownership to the mean low-tide mark in order to facilitate and encourage the development of wharves and piers for commercial activity.⁷⁸ The ordinance

73. *Id.* at 57.

74. *See id.* at 11-26. "[T]here is no universal and uniform law upon the subject; but . . . each State has dealt with the lands under the tide waters . . . according to its own views of justice and policy. . . ." *Id.* at 26.

75. *See* Petitioners' Brief, *supra* note 7, at 19-23; Brief Amicus Curiae of the Thirteen Original States in Support of Respondents at 4-5, *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (No. 86-870) [hereinafter Amicus Brief of Original States]. *But see* Respondent's Brief, *supra* note 64, at 11-13.

76. *See* *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-55 (1851). It has been argued that the emphasis on "ebb and flow" in the English common law cases and their commentary was mere convenience, not intended to denote anything beyond the commercial navigability of a particular waterway. *Id.* at 455; *see also* Petitioners' Brief, *supra* note 7, at 17-18.

77. *Shively*, 152 U.S. 18-19 (citing Great Pond Ordinance of 1641 (current version at MASS. GEN. L., ch. 131, § 45 (1985))).

78. *See* *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (upholding state jurisdiction to regulate fisheries from a league within the "coast"); *Richardson v. Boston*, 60 U.S. (19 How.) 263, 269 (1857) (public right of navigation, between high and low tide, was defeasible at any time by the subsequent landowners).

specifically excluded public rights to fishing, fowling, and navigation from private ownership, thereby reserving a direct sovereign interest in the lands below high tide.⁷⁹ In so doing, the Commonwealth recognized its authority to regulate such public rights in non-navigable, tidal waters.⁸⁰

In Rhode Island, as with the majority of the original thirteen states, case law consistently recognized the rights of the public to tidelands below the mean high-water mark.⁸¹ Additionally, the Rhode Island Constitution specifically protected the public privileges of the shore which were available at common law and by prior use.⁸² Some states, such as New Hampshire, began to draw a distinction between salt and fresh waters. Case law has long recognized that *tide waters* are public waters,⁸³ whereas the appropriate test for sovereign interest in fresh waters is navigability-in-fact.⁸⁴ New York de-

79. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 82-88 (1853); see also *Amicus Brief of Original States*, *supra* note 75, at 6.

80. See *Commonwealth v. Vincent*, 108 Mass. 441, 447 (1871); see also *Amicus Brief of Original States*, *supra* note 75, at 7. But see *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 347 (1839) (limiting public trust interest to navigable waters which are navigable for some trade or agricultural purpose).

81. See R.I. CONST. art. I, § 17:

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 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

Id.; see also *Jackvony v. Powel*, 67 R.I. 218, 223, 21 A.2d 554, 556 (1941); *Gerhard v. Seekonk Bridge Comm'rs*, 15 R.I. 334, 335, 5 A. 199, 200-01 (1886); *Folsom v. Freeborn*, 13 R.I. 200, 204 (1881); *Bailey v. Burges*, 11 R.I. 330, 331 (1876); *Engs v. Peckham*, 11 R.I. 210 (1875).

82. See R.I. CONST. art. I, § 17; see also *Jackvony*, 67 R.I. at 225, 21 A.2d at 557. Connecticut adopted a tidal definition of navigability for public trust purposes and rejected navigability-in-fact. See *Prior v. Swartz*, 62 Conn. 132, 138-40, 25 A. 398, 399 (1892) (although state maintains rights in land below high water, upland owner may "wharf out" onto the tidelands); *Adams v. Pease*, 2 Conn. 481, 483-84 (1818).

83. See *Sibson v. State*, 110 N.H. 8, 10, 259 A.2d 397, 399 (1969); *Nudd v. Hobbs*, 17 N.H. 524, 526 (1845).

84. Georgia followed the New Hampshire distinction between fresh and salt waters, judging tidal waters against an ebb and flow standard and non-tidal waters by navigability-in-fact. See *Alabama v. Georgia*, 64 U.S. (23 How.) 505, 515 (1859); *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 411 (1851); *Oemler v. Green*, 134 Ga. 198, 67 S.E. 433 (1910); see also 1902 Ga. Laws 108; GA. CODE ANN. §§ 44-8-8 (1982); *Amicus Brief of Original States*, *supra* note 75, at 22.

New Jersey law has consistently held that the ebb and flow of the tide determines sovereign interest. But non-tidal waters are outside the scope of the public trust. New Jersey has chosen not to follow the New Hampshire navigability test for fresh waters. See *Stevens v. Paterson &*

fined its trust interest in shorelands by reference to tidality alone.⁸⁵ Legal navigability signified tidal influence, not navigability-in-fact.⁸⁶

The law of the original thirteen states, which serves as the "divining rod" of the public trust for purposes of the equal footing doctrine,⁸⁷ seemed to emphasize tidality over navigability.⁸⁸ The major commercial activity of the predominantly coastal thirteen states centered on tidal waters.⁸⁹ While Massachusetts and New Hampshire, most notably, recognized public trust rights

Newark R.R., 34 N.J.L. 532, 537 (1870); *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867); see also *Amicus Brief of Original States*, *supra* note 75, at 13-15.

85. See *Amicus Brief of Original States*, *supra* note 75, at 11-13.

86. Pennsylvania declared that tidal waters form part of the "common highway" which is vested in the state. *Ball v. Slack*, 2 Whart. 508, 539 (Pa. 1837); *Amicus Brief of Original States*, *supra* note 75, at 16-17; see also *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869); *Wainwright v. McCullough*, 63 Pa. 66, 74 (1869). Delaware recognized private ownership of the lands between the high and low water marks but maintained an inalienable interest in that property in trust for the public. This *intertidal* soil was considered to be subject to a trust servitude. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251 (1829); *Phillips v. State*, 449 A.2d 250, 255 (Del. 1982); *Bailey v. Philadelphia, Wilmington & Baltimore R.R.*, 4 Del. (1 Harr.) 389, 395 (Del. 1846) (all navigable rivers belong to the state); see also *Amicus Brief of Original States*, *supra* note 75, at 18.

Maryland also recognized private ownership in navigable water but such conveyances by the state were considered to be forever "subject to the public rights of navigation and fishery." See *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U.S. 672, 675 (1883) (soils below low water held by the state for public fishing); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 74 (1855); *Board of Pub. Works v. Larmar Corp.*, 262 Md. 24, 47, 277 A.2d 427, 438 (1971); see also *Amicus Brief of Original States*, *supra* note 75, at 19. Legal navigability in Maryland means where the tide ebbs and flows.

Virginia recognized the public trust in shorelands along the sea, bay, or any river or creek within the commonwealth. It also subjected adjacent lands to the public rights of fishing, fowling, and hunting. See *McCready v. Virginia*, 94 U.S. 391, 394-95 (1876) (state owns tide waters for benefit of its people subject only to commerce clause restrictions); *Garrison v. Hall*, 75 Va. 150, 160 (1881); *French v. Bankhead*, 52 Va. 65, 73, 11 Gratt. 136, 159 (1854) (upland owner has fee out to low water with wharfing-out privileges); see also *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982).

North Carolina defined legal navigability as land subject to the tide as far as the salt water flows. *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903); *State v. Glen*, 52 N.C. (7 Jones) 321 (1859); *Hatfield v. Grimsted*, 29 N.C. (7 Ired.) 139 (1846) (upland owner owns up to high water mark); *Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842); *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 59 (1831); see *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30 (1828); see also *Amicus Brief of Original States*, *supra* note 75, at 21.

South Carolina looked to the "daily ebb and flow of the tide." See *State v. Pinckney*, 22 S.C. 484, 508 (1884); *State v. Pacific Guano Co.*, 22 S.C. 50 (1884) (upland ownership extends only to high water); see also *Amicus Brief of Original States*, *supra* note 75, at 51.

87. See *Petitioners' Brief*, *supra* note 7, at 23.

88. See *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) ("The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British islands and that of the American continent.").

89. See *infra* note 119.

on non-tidal waters, the commercial insignificance of the fresh water bodies in early trust law resulted in unacceptably vague language for the newer states, many of which had lakes and rivers which were the functional equivalent of the oceans, bays, and harbors of the original thirteen states.

In *The Propeller Genesee Chief v. Fitzhugh*,⁹⁰ the Supreme Court considered for the first time⁹¹ whether it was constitutionally permissible for Congress to extend admiralty jurisdiction to non-tidal, navigable waters.⁹² The Court recognized that, although the common law spoke of tidal influence, there was nothing particularly unique in the ebb and flow of the tide that made waters suitable for admiralty jurisdiction.⁹³ The *Genesee* Court held that to limit such jurisdiction to tidal waters would be to ignore the vast commerce which took place on many of the great inland waterways.⁹⁴ More significantly, it would place the coastal states on an "unequal footing" with the inland states.⁹⁵ The inland states and their citizens would be denied the jurisdictional benefits which were constitutionally secured to the Atlantic states.⁹⁶

Subsequent Courts found the *Genesee* approach of extending admiralty jurisdiction to inland, navigable waters sufficient for designating such waters as "navigable" for purposes of the public trust. In *Barney v. Keokuk*,⁹⁷ the Supreme Court considered whether the City of Keokuk could properly fill

90. 53 U.S. (12 How.) 443 (1851). The Court went on to justify its emphasis on navigability:

In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river.

Id. at 454-55.

91. *Id.* at 453.

92. *Id.* at 443, 454; see Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (expanding District Court jurisdiction over non-tidal, navigable lakes and waterways). Lake Ontario was the waterway at issue in *Genesee*. The Court went on to identify the Great Lakes as "in truth inland seas . . . [with] [d]ifferent States border[ing] on them on one side, and a foreign nation on the other." *Genesee*, 53 U.S. (12 How.) at 453.

93. *Genesee*, 53 U.S. (12 How.) at 454.

94. *Id.*

95. *Id.*; see also Petitioners' Brief, *supra* note 7, at 34-35.

96. *Genesee*, 53 U.S. (12 How.) at 454; see also *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

97. 94 U.S. 324 (1876).

land on the Mississippi River for use as a public street.⁹⁸ Conceding that the common law definition of navigable waters and the application of that definition by the original states were limited to tidal property, the Court nonetheless recognized that title to land below nontidal, navigable waters belonged to the state by virtue of its sovereignty.⁹⁹ The Court held that the Keokuk authorities, as representatives of the public, had the right to fill in the disputed waterway in order to extend a public street.¹⁰⁰

The Supreme Court extended the *Genesee* rationale in *Illinois Central Railroad v. Illinois*.¹⁰¹ The Court considered whether an act of the Illinois legislature, conveying the soil below Lake Michigan on Chicago's waterfront to the railroad, effected an irrevocable grant of fee simple.¹⁰² The Court applied the *Genesee* reasoning for extending the public trust to navigable, inland waterways.¹⁰³ The question remained, however, whether the legislature could revoke the grant.¹⁰⁴ The Court answered that "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."¹⁰⁵

A similar grant of trust lands to a private party allowed the Supreme Court to refine the *Illinois Central* holding. *Appleby v. City of New York*¹⁰⁶ involved a city grant of tidelands with the state legislature's approval.¹⁰⁷ In approving the legislative authority to alienate lands within the public trust, the Court recognized that the *Illinois Central* decision would allow such a

98. *Id.* at 325.

99. *Id.* at 338.

100. *Id.* at 339.

101. 146 U.S. 387 (1892).

102. *Id.* at 451-52. "The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands . . . whether the . . . corporation can hold the lands . . . against any future exercises of power over them by the State." *Id.* at 452.

103. *Id.* at 435-37.

104. *Id.* at 452.

105. *Id.* at 453; see also Stevens, *supra* note 2, at 212. Stevens lays out a two-part test for evaluating the validity of legislative grants of trust lands:

(1) Does the disposition affirmatively aid or improve the public interest in navigation or other public use of the particular area of the waterway beneath the ordinary high watermark?

(2) If the legislative grant does not affirmatively aid or improve the public trust, does the disposition substantially impair the public interest in the remaining land and waters of the particular area of the waterway?

Id.; see also *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980).

106. 271 U.S. 364 (1926).

107. *Id.* at 366-67.

conveyance but only if the benefits of private ownership would substantially serve the public interest.¹⁰⁸

Additionally, the *Appleby* Court enunciated the model for judicial skepticism,¹⁰⁹ which was suggested in *Illinois Central*, as the test for scrutinizing the alienation of public trust lands. The approach is one of strict scrutiny for protecting the public interest against legislative sale of important public resources.¹¹⁰ The two decisions also illustrated the modern perception of the state as public trustee and its concomitant duties as protector of the public interest.¹¹¹ The Court found it proper for the state to convey public trust lands, but only to the extent to which such a conveyance was an express grant of the legislature, and to the extent that the legislative grant passed the *Illinois Central-Appleby* strict judicial scrutiny standard.¹¹² The lands once conveyed, however, remain impressed with an inalienable public trust. Should the public interest ever require inquiry into the propriety of the conveyance,¹¹³ revocation to restore the public interest may be available without the necessity of operating under the eminent domain power and the evolving "takings" analysis.¹¹⁴

The courts have attempted to define the sovereign interest in terms of both the nature and scope of the states' duty as well as its geographical limitations.¹¹⁵ The American version of the public trust doctrine thus shifted from the common law restriction of tidality to embrace the many rivers, lakes, and other waterways suitable for navigation. Navigability, it would appear, had become the *sine qua non* of trust lands, at least with respect to inland waters.¹¹⁶

108. *Id.* at 393-99; see also Connors & High, *Public Trust Doctrine and Private Rights*, 16 REAL EST. REV. 51, 53 (1987).

109. 271 U.S. at 384; Connors & High, *supra* note 108, at 53; Utah Div. of State Lands v. United States, 107 S. Ct. 2318, 2321 (1987); see United States v. Holt State Bank, 270 U.S. 49 (1926); see also Sax, *supra* note 1, at 490.

110. See Stevens, *supra* note 2, at 215 (suggesting that fear of legislative corruption may have had as much to do with the adoption of this model of judicial skepticism as the importance of the public resource itself).

111. See Connors & High, *supra* note 108, at 53.

112. See, e.g., City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980) (rejection of a 22,000-acre tideland conveyance in San Francisco Bay for lack of clear legislative intent); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) (legislative intent must be clearly expressed or necessarily implied); see also Stevens, *supra* note 2, at 219-20.

113. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453-54 (1892). But see *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970) (trust lands conveyed pursuant to legislative finding of unsuitability for trust purposes may be conveyed free of the public trust).

114. See *supra* note 2.

115. See *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R.*, 146 U.S. 387 (1892).

116. See Petitioners' Brief, *supra* note 7, at 18-23.

While the original states uniformly reserved tidelands for the benefit of the public, their approach to non-tidal waters was less consistent. These states, however, are all coastal states and their adoption and modification of the common law was in no small measure affected by their interests in commercial navigation and commercial fishing activities.¹¹⁷ It is not surprising then that the several states maintained their ports and access to them in "trust" not only for the interest of public access to the shore,¹¹⁸ but also for the important economic control of these resources which was so vital to the states' commercial survival.¹¹⁹

Equating navigability with tidality was a mere convenience for the coastal states.¹²⁰ For most of the remaining thirty-seven states, however, vast inland water resources fell outside the scope of the tidality limitation.¹²¹ The law of the original thirteen was inadequate to address these resources. For the new states, navigability became the essence of the public trust.¹²² The tension between the ebb-and-flow standard and the navigability-in-fact standard illustrated either the internal inconsistency of the doctrine itself or the retooling of an ancient concept to meet evolving public needs.

B. Trust Purposes

Traditionally, the public trust recognized the paramount sovereign interests of commerce, navigation, and fishing.¹²³ But, as the commercial and recreational demands of aquatic natural resources began to increase with a growth in population, the public trust purpose began to evolve to answer those changing demands.

117. See *supra* notes 89-104 and accompanying text.

118. See, e.g., Hale, *supra* note 43, at 833-89 (protection of public rights to the shore for bathing, digging sand and shells, and collecting seaweed); see also R.I. CONST. art. I, § 17 (protecting the recognized right to gather seaweed along the shore).

119. The great urban centers of the 13 original states developed around the seaports and harbors along the Atlantic coast. In order to maintain open access to these commercial resources, the states encouraged and enforced the availability of the tidelands for the construction of wharves and piers, albeit subject to paramount state rights to the tidelands. J. ANGELL, *supra* note 40, at 236-37; Richardson v. Boston, 60 U.S. (19 How.) 263, 269-70 (1856); Prior v. Swartz, 62 Conn. 132, 136-37, 25 A. 398, 399-400 (1892); Folsom v. Freeborn, 13 R.I. 200, 204-05 (1881).

120. It also served to broaden the scope of the sovereign fee, which, in many areas, would be outside the intertidal zone if strict navigability-in-fact were the standard. By employing the "convenient" ebb-and-flow approach, a state could greatly expand the acreage available for trust uses.

121. See *supra* note 92.

122. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

123. See J. INST., *supra* note 28, at 2.1.1-.6; see also Connors & High, *supra* note 108, at 51; Appleby v. City of New York, 271 U.S. 364, 382 (1925) (the rights of the people are to navigate, to fish, and to use the public waters as public highways).

The California Supreme Court introduced the modern approach to expanding trust uses. In *Marks v. Whitney*,¹²⁴ the court recognized that the public trust could not be limited to its traditional uses; the tidelands were too significant a resource for the court to ignore growing public needs.¹²⁵ Marks brought suit to quiet title to tideland property in order to fill and develop it.¹²⁶ Whitney opposed the assertion of title on the ground that it would infringe on his littoral rights as adjoining landowner and his rights as a member of the public.¹²⁷ Whitney sought a judicial declaration that the land in question was burdened with a public trust easement.¹²⁸ After setting aside the standing issue,¹²⁹ the court declared that the public trust properly included the rights to fish, hunt, bathe, swim, boat, and enjoy general recreation.¹³⁰

Additionally, the court noted that the public uses to which tidelands are subject were sufficiently flexible to encompass changing needs.¹³¹ As a result, the increasing demand for ecological preservation of tidelands adequately fit within the scope of public interest so that protection for that purpose remained consistent with the public trust.¹³² The court declined to define all the uses which might properly fall within the ambit of public purpose but indicated forcefully that the trust encumbrance embraced evolving social priorities.¹³³

The *Marks* decision prompted a lively debate among jurists, legislators, and resource managers as to the proper scope of public trust purposes. While *Marks* presented a vision of the doctrine as a flexible tool to fulfill a

124. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

125. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 801.

126. *Id.* at 256, 491 P.2d at 377, 98 Cal. Rptr. at 793.

127. *Id.*

128. *Id.*

129. *Id.* at 261, 491 P.2d at 381-82, 98 Cal. Rptr. at 798 (members of the public may bring an action to enforce public trust rights); see *Alameda Conservation Ass'n v. California*, 437 F.2d 1087, 1095-98 (9th Cir. 1971) (private action to restrain filling of bay and to declare public rights to waterways upheld); *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (private action to quiet title to private and public easements in a public beach).

130. *Marks*, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 766; see also *Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554 (1941).

131. *Marks*, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 766.

132. *Id.* The court pointed out that ecological control, open space preservation, and scenic preservation are all legitimate and important public purposes. *Id.*

133. *Id.*; see also M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 110-11 (1985); Wilson, *Private Property and the Public Trust: A Theory for Preserving the Coastal Zone*, 4 UCLA J. ENVTL. L. & POL'Y 57 (1984); Comment, *Sand Rights: Using California's Public Trust Doctrine to Protect Against Coastal Erosion*, 24 SAN DIEGO L. REV. 727 (1987). See generally Sax, *supra* note 1.

wide range of social needs,¹³⁴ some commentators have suggested that extending the doctrine beyond the traditional commercial function is a dangerous usurpation of private property rights by the state.¹³⁵

One area receiving a great deal of attention has been public access to the shore. As coastal development increased dramatically over the past fifteen years, the competing interests of public access and the "right to exclude,"¹³⁶ an essential stick in the bundle of property rights, have resulted in much litigation.¹³⁷ As states have attempted to regulate coastal property, the public trust doctrine has been invoked to justify intrusions on otherwise private property in order to preserve access to trust lands.¹³⁸ Although some states constitutionally mandate public access to the shore,¹³⁹ and despite congressional attempts to promote public access,¹⁴⁰ heightened judicial scrutiny of fifth amendment takings claims has worked to slow regulatory programs designed to ensure public access.¹⁴¹

The trust flexibility noted in *Marks* has led to other definitions of trust purposes. Where diversion of non-navigable tributaries negatively impacted upon the public trust uses of downstream lakes and rivers, the California Supreme Court found a violation of the public trust.¹⁴² Similarly, the Wis-

134. See Stevens, *supra* note 2, at 196 n.6; Andrews, *EPA Authority and Responsibility Under the Coastal Zone Management Act of 1972*, 10 NAT. RESOURCES LAW. 249 (1977); Hannig, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211 (1983); Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 UCLA L. REV. 1049 (1981); see also Federal Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 (1982); National Environmental Policy Act, 42 U.S.C. § 4331(b)(1) (1982).

135. See, e.g., Lazarus, *supra* note 65; Rose, *supra* note 65; Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138 (1982).

136. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). One commentator has suggested that this right in property allows its "commander 'to look any man in the eye and tell him to go to hell.'" BALL, *supra* note 133, at 108 (quoting W. LIPPMANN, *THE METHOD OF FREEDOM* 101-02 (1934)).

137. See *Mathews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A.2d 355 (1984) (in order for public to enjoy its public trust rights, it must have access to dry sand as well as shore), *cert. denied*, 469 U.S. 821 (1989); *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972) (public trust mandates that ocean waters be open to the public on equal terms).

138. See *supra* note 136. Most states define the locus of trust land as waterward of the high tide line. Only two states define the limit at low tide. See *supra* note 65; see also Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675 (1988) ("The public relies on the creation or continuation of social and legal relationships between property owners and non-owners which protect the rights of the public in continued access to those resources.").

139. See, e.g., R.I. CONST. art 1, § 17; CAL. CONST. art. X, § 4.

140. See Coastal Zone Management Act, 16 U.S.C. § 1452(2)(d) (1986).

141. See, e.g., *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (Commission's public easement demand effected a taking); see *supra* note 2.

142. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal.

consin Court of Appeals upheld an ordinance, against state challenge, which zoned a portion of a public lake exclusively for water ski exhibitions.¹⁴³ The court recognized the public benefits of the ordinance and also noted that the exclusive zoning effectively made private a portion of the lake, thereby eliminating certain trust uses.¹⁴⁴ It balanced the public harm and public benefit of conflicting uses, while recognizing that the trust must remain flexible.¹⁴⁵ In so doing, the court articulated what has become the current model of judicial review for expanding trust purposes.¹⁴⁶

Some commentators have expressed concern over this ad hoc judicial approach to expanding trust uses and have recommended instead, legislatively chartered state agencies to review and evaluate trust concerns.¹⁴⁷ Nonetheless, courts have consistently recognized that it is within the authority of the state to determine the direction of public trust lands in its jurisdiction to the extent that uses promote the public interest.¹⁴⁸

III. MISSISSIPPI ASSERTS DOMINION OVER TIDAL PROPERTY

In 1973, the Mississippi legislature enacted the Coastal Wetlands Protection Law,¹⁴⁹ which authorized the state's Marine Resources Council to produce aerial maps from which to determine the geographical boundaries of Mississippi's vast wetlands. The purpose of the legislation and the map making was to take stock of and evaluate the state's wetlands in order to plan for environmental protection.¹⁵⁰ Instead, the Mineral Leasing Commission used these maps to define the limits of the state's public trust interest so that it could lease mineral rights to third parties.¹⁵¹ Saga Petroleum entered into a lease with the Commission shortly thereafter on Cinque Bam-

Rptr. 346, *cert. denied*, 104 S. Ct. 413 (1983). *Audubon* involved a 35% reduction in the surface area of Mono Lake as a result of California water policy that allowed diversion of streams tributary to the lake. *Id.* at 421, 658 P.2d at 712, 189 Cal. Rptr. at 349. The effects were both aesthetically and ecologically devastating. *Id.*; see Young, *The Troubled Waters of Mono Lake*, NAT'L GEOGRAPHIC, Oct. 1981, at 504.

143. *State v. Village of Lake Delton*, 93 Wis. 2d 78, 286 N.W.2d 622 (Ct. App. 1979).

144. *Id.* at 74, 286 N.W.2d at 628.

145. *Id.* at 76, 286 N.W.2d at 630.

146. See, e.g., *Audubon*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983); *State v. Lyon*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (extending public trust control over four thousand miles of shorezone, swamp, and overflowed lands against private ownership), *cert. denied*, 454 U.S. 865 (1981).

147. See Connors & High, *supra* note 108, at 58.

148. See *supra* text accompanying notes 101-22; see also Singer, *supra* note 138, at 674-75.

149. MISS. CODE ANN. §§ 49-27-1 to 69 (Supp. 1985).

150. *Id.*

151. *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 511 (1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988).

bini's land.¹⁵² Cinque Bambini's title ran back 150 years.¹⁵³ During that period, all applicable property taxes had been paid in full.¹⁵⁴ No claim had ever been made against this property either by an arm of the state or by any individual, privately or on behalf of the public interest.¹⁵⁵ In 1813, prior to Mississippi statehood, the predecessors in title to the Cinque Bambini Partnership¹⁵⁶ had settled and claimed more than 2,400 acres of property bordering on what is now known as Bayou LaCroix, Bayou Enceinte, Long Gar Bayou, and the south branch of the Jourdan River in southwestern Mississippi, all tributary to the Gulf of Mexico.¹⁵⁷ In 1977, when record title was in Cinque Bambini, the Mississippi Mineral Lease Commission, purportedly acting pursuant to statutory authority,¹⁵⁸ issued oil and gas leases to Saga Petroleum U.S., Inc. for the lands in question. The partnership and other interested parties then brought suit to quiet title to the newly leased lands.¹⁵⁹ Despite what would appear to be settled property expectations, the state of Mississippi asserted fee to the tidelands at issue as public trustee, implicitly recognizing a public purpose to mineral leasing revenue.¹⁶⁰

*A. Mississippi Answers the Navigability Problem: Hoisting a Sail
Upon a Toothpick*¹⁶¹

The Mississippi Chancery Court ruled in *Cinque Bambini Partnership v. State*¹⁶² that the public trust doctrine vested title to 140 acres of the disputed

152. *Id.*

153. *Cinque Bambini Partnership v. State*, No. 14,178 (Ch. Miss. 1982) (*reprinted in* Petition for Writ of Certiorari to the Supreme Court of Mississippi at 41a, Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988) (No. 86-870) [hereinafter *Petition for Certiorari*]; see Petitioners' Brief, *supra* note 7, at 16.

154. Petitioners' Brief, *supra* note 7, at 37.

155. *Id.*

156. Other investors included the individual partners of Cinque Bambini Partnership, Spooner Petroleum Co., and Enserch Exploration, Inc. See *Petition for Certiorari*, *supra* note 153, at 294.

157. *Id.* at 29a, 30a-32a.

158. *Id.* at 31a.

159. *Id.* at 29a-31a.

160. See *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512, (Miss. 1986), *aff'd sub nom.* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988). Although the cases have never directly discussed pure economic benefit as a legitimate purpose, nothing in public trust jurisprudence would seem to contravene the assertion that economic control of tideland resources is properly within the scope of the sovereign interest. In fact, this emphasis on commercial control is an historical link to the traditional "commerce" purpose, which the common law and American courts protected by broadly applying the public trust doctrine. See also *Shively v. Bowlby*, 152 U.S. 1 (1894).

161. *Cinque Bambini*, 491 So. 2d at 515.

162. *Id.* at 510-11.

tidelands in the state by virtue of the equal footing doctrine.¹⁶³ The state supreme court reversed with respect to ninety-eight acres, holding that land brought artificially within the ebb and flow of the tide remained in the up-land land owner. The court affirmed state ownership to forty-two acres of tidally influenced wetland,¹⁶⁴ ruling that as a matter of state and federal law,¹⁶⁵ fee simple in all lands subject to tidal ebb and flow was in the state.

Rejecting petitioners' argument that, for purposes of the public trust, navigability-in-fact was the determinative test for measuring the inland reach of the state interest, the court declared that it could find no federal law addressing the applicability of the public trust to non-navigable, tidal water.¹⁶⁶ The court read the *Genesee* abandonment of the ebb-and-flow test as a logical extension of the equal footing doctrine to states with no tidally influenced water bodies.¹⁶⁷ It did not interpret that holding to indicate that ebb and flow ought to be rejected for tidal waters. Indeed, the court found abundant historical support for the proposition that, as for tidal waters, "navigability" meant subject to the ebb and flow of the tide, not navigability-in-fact.¹⁶⁸

In an attempt to come to terms with the navigability concept, the court adopted the "toothpick" standard for measuring the landward reach of the public trust.¹⁶⁹ For tidal and non-tidal waters alike,¹⁷⁰ it stated that the boundaries of the trust would not be the contours of the navigable channel¹⁷¹ but rather the point where the high water mark struck land.¹⁷² While non-navigable-in-fact waters might fall within those boundaries, as long as one could float a toothpick and navigate from point to point upon it, the land below those points was part of the trust corpus.¹⁷³ By adopting this standard, the court included within the public trust all lands below tidally-influenced waters, regardless of the current or historical navigability-in-fact

163. *Id.* at 511.

164. *Id.* at 510-11.

165. *Id.* at 516.

166. *Id.* at 514.

167. *Id.* at 513-14.

168. *Id.* at 514-15; see also *supra* text accompanying notes 34-52.

169. *Cinque Bambini*, 491 So. 2d at 515.

170. *Id.* (referring to waters which are navigable-in-fact for trust purposes, i.e., excluding fresh, non-navigable waters which are not subject to the public trust).

171. *Id.*

172. *Id.*

173. *Id.* The court articulated its "toothpick" metaphor:

[S]o long as by unbroken water course—when the level of the waters is at mean high water mark—one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries . . . granted [to] the State in trust.

Id.

of those waters. It held plainly that the lands over which the toothpick may naturally sail¹⁷⁴ are within the trust regardless of how far inland or remote from the sea.¹⁷⁵

B. Public Versus Private Interests

Although significant property claims were at issue in *Cinque Bambini*,¹⁷⁶ the Mississippi court refused to allow ostensibly settled property expectations to defeat the state-maintained public interest.¹⁷⁷ While recognizing the importance of stable property interests, the court correctly ruled that, in the absence of specific legislative grants of land below tidal water, title to such property would remain in the state.¹⁷⁸ The exercise of the trust pregnant in that title mandates a continued obligation to preserve the public interest. By acknowledging sovereign title and the right to issue mineral leases for the property, the court properly deferred trust management to the state for an arguably public objective.¹⁷⁹

IV. *PHILLIPS PETROLEUM CO. v. MISSISSIPPI*: THE SUPREME COURT INVIGORATES THE PUBLIC TRUST DOCTRINE

In upholding the judgment of the Mississippi Supreme Court, the United States Supreme Court determined that, as a matter of federal law, Mississippi took title to all land lying under tidally-influenced water, regardless of the water's navigability-in-fact.¹⁸⁰ In *Phillips Petroleum Co. v. Mississippi*,¹⁸¹ the Court took a modern look at the public trust doctrine, giving it a judicial stamp as a dynamic state tool. But in so doing, the Court chose to cast its analysis as little more than a "title suit."¹⁸²

174. *Id.* at 515-16. The "natural" sail limitation is designed to exclude from the public trust all waters which were brought within the tidal influence by unnatural means, such as dredging. *Id.* at 519-20. In this case, the court excluded 98 acres from the public trust for precisely this reason. *Id.*; see, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (excluding from the public trust and from the federal navigational servitude, a once private lagoon now connected to the sea through artificial dredging); see also *Shively v. Bowlby*, 152 U.S. 1 (1894); *Stuart, Avulsion and Accretion: Emphasis Oregon*, 3 WILLAMETTE L. REV. 345 (1965); *Waite, Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335.

175. *Cinque Bambini*, 491 So. 2d at 516-17.

176. *Id.* at 510.

177. *Id.* at 510-11.

178. *Id.* at 511.

179. See *supra* text accompanying notes 123-48.

180. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 793 (1988); see *Cinque Bambini*, 491 So. 2d at 512-13.

181. 108 S. Ct. 791 (1988).

182. *Id.* at 793. "Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit." *Id.* (quoting *Cinque Bambini*, 491 So. 2d at 510). By choosing to frame the issue in terms of a title suit, the major-

A. Majority Opinion

1. Equal Footing Doctrine Grants Title to States

The Court relied on its ruling in *Shively v. Bowlby* for the proposition that, upon the Revolution, the rights reserved to the king in and to the tidal waters passed to the original states.¹⁸³ Under the equal footing doctrine, those rights charged with the public trust passed to the subsequently admitted states.¹⁸⁴ The Court looked to the law of the original states and found no inconsistencies in the tidality limitation.¹⁸⁵ Rejecting petitioners' claim that the original states used navigability as the touchstone for the public trust,¹⁸⁶ the Court correctly accepted the state's argument that tidal influence was the essence of the trust at common law and in the original states.¹⁸⁷ Although there existed a good deal of confusion over the tidality and navigability standards for identification of public trust land, the Court has now, however modestly,¹⁸⁸ sifted through the seeming inconsistencies.

The Court correctly pointed out that petitioners' contention that the English common law limiting the public trust to actual navigability was an arguable misreading of the law, but in any event it was no longer applicable to the American evolution of the trust doctrine.¹⁸⁹ The *Genesee* decision perhaps gave credence to the notion that navigability was the touchstone for American law, but the Court pointed out that the *Genesee* line of cases merely extended admiralty jurisdiction to inland waterways. None of the cases relied on by the petitioner related to tidal, non-navigable waters like those at issue in *Phillips*.¹⁹⁰ The Court announced that while *Genesee* extended the trust to navigable fresh waters, it did not simultaneously withdraw from the trust the historically recognized tide waters.¹⁹¹ In identifying the reach of such property, the Court clearly articulated that, for tidal water, navigability-in-fact is irrelevant.

Upon admission to the Union, Mississippi acquired, at a minimum, the right to control tidelands within its borders. The Court accepted that Mis-

ity appears to limit the application of its decision to the facts, perhaps yielding to a general federalist fear of encroaching upon the property law of other states. The limitation appears to be unnecessary because the decision grants no new affirmative state duties, but only clarifies the geographical extent of the public trust for states that choose to go that far.

183. *Id.* at 794.

184. *See supra* notes 53-73 and accompanying text.

185. *Phillips*, 108 S. Ct. at 794; *see supra* notes 75-89.

186. *Phillips*, 108 S. Ct. at 794-95.

187. *Id.* at 795.

188. *See supra* note 182.

189. *Phillips*, 108 S. Ct. at 796.

190. *Id.*

191. *Id.* at 797. *See generally* Mann v. Tacoma Land Co., 153 U.S. 273 (1894).

issippi, once having acceded to those rights on an equal basis, could then steer the course of its public trust according to its views of public policy.¹⁹² However, such modification was limited by the paramount public interest in the trust corpus.¹⁹³ The Court, consistent with its long line of trust decisions beginning with *Shively*, recognized that the policy objectives of the state are exclusively matters of state law. *Phillips* federalizes only the issue of what lands were included within the states' respective trusts at the time of statehood. It does not purport to disturb state law which recognizes a stricter geographical limitation on trust property.¹⁹⁴ While conveyance of trust property was not at issue in *Phillips*, nothing in the decision would work to weaken the *Illinois Central* and *Appleby* standards for judicial review of abandonment of trust property to private parties. Presumably, although the Court chose to give great deference to state property law, there remains a basis for Supreme Court review of violations of the public trust by the state.

2. *The Court Acknowledges a Broad Application of Public Trust Purposes*

The Court pointed to various uses of trust lands to illustrate that limiting the trust definition to a navigability-in-fact standard would create an absurd result.¹⁹⁵ It reasoned that defining the trust in terms of navigation alone is historically inaccurate.¹⁹⁶ The Court alluded to extra-navigational interests in fishing and shell-fishing but neglected to include the long line of recent trust expansion cases which identified trust uses from recreation to environmental protection.¹⁹⁷ Nonetheless, by recognizing such "diverse uses" of the trust,¹⁹⁸ the Court declared that it would be logically inconsistent to limit its definition by navigability.¹⁹⁹ The Court has consistently recognized that the public uses which the states may choose to articulate are not the Court's to define.²⁰⁰

192. *Phillips*, 108 S. Ct. at 799; see *Hughes v. Washington*, 389 U.S. 290, 294 (1967) (Stewart, J., concurring).

193. *Phillips*, 180 S. Ct. at 794; see *Appleby v. City of New York*, 271 U.S. 364 (1926); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). The Court seems to give a broad federalist gloss to the issue of state control over public trust law while maintaining a federal capacity for direct judicial review. *Phillips*, 108 S. Ct. at 794-95, 799.

194. *Phillips*, 108 S. Ct. at 798.

195. *Id.* at 795.

196. *Id.* at 800 (O'Connor, J., dissenting).

197. See *supra* notes 123-48 and accompanying text.

198. *Phillips*, 108 S. Ct. at 795 (uses which have nothing to do with navigation per se).

199. *Id.*

200. *Id.*

B. Dissent

The dissent, authored by Justice O'Connor, argued passionately that such a determination disregarded precedent and would work incalculable injustice to the settled property expectations of thousands of land owners in all coastal states.²⁰¹ Thus, as a matter of law, and on equitable grounds, the dissent argued forcefully against the ebb-and-flow standard accepted by the majority.

1. *Navigability and the Widened Reach of the Public Trust: And the Toothpick Sails On*

The dissent countered that navigability was the historical test of the public trust doctrine.²⁰² It argued that the tidality standard adhered to by the majority spawned different tests for fresh and salt waters and, consequently, was inappropriate.²⁰³ Although it acknowledged that the *Genesee* decision merely extended admiralty jurisdiction to the inland waterways by virtue of the navigability test, the dissent argued that the decision was more than just an analogy to the supremacy of navigability for fresh waters.²⁰⁴ The dissent viewed the *Genesee* abandonment of tidality as the definitive statement on the American departure from the tidal rule.²⁰⁵ However, the case law and legislative uses of the trust belie this line of thinking.²⁰⁶

In addition, the dissent approached the application of the trust to discrete and completely non-navigable water as a matter of first impression for the Court, one which ought to be rejected as an illogical extension of the navigability language throughout trust jurisprudence.²⁰⁷ The dissent further refused to accept the suggestion that the public trust is an evolving doctrine capable of expanding to address changing applications of the public interest. Instead, it argued that the fundamental purpose of the trust is to preserve navigable water as commercial highways.²⁰⁸ For the dissent, to include non-navigable streams and swamps, although physically connected to the sea, would be an improper exercise of state control. Absent commercial navigation and notwithstanding the commercial interests of the state in lucrative mineral leasing, there would appear to be no role for the public trust doc-

201. *Id.* at 800 (O'Connor, J., dissenting).

202. *Id.*; see *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1971).

203. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting).

204. *Id.* at 802.

205. *Id.* at 801-02.

206. See *supra* notes 123-48 and accompanying text.

207. *Phillips*, 108 S. Ct. at 800 (O'Connor, J., dissenting).

208. *Id.* at 801 (quoting *Packer v. Bird*, 137 U.S. 661, 667 (1891)); see *supra* notes 134-48 and accompanying text.

trine. It would be necessary to read out of trust jurisprudence the expanding public uses explicitly and tacitly approved of by the Court in order to reach this conclusion.²⁰⁹

Although the Supreme Court never discussed the propriety of the lower court's illustrative toothpick metaphor, the Court did not rule inconsistently with it. By affirming Mississippi's ruling that the state's public trust interest extends to the innermost reaches of the tidal flow, the Court has implicitly adopted this toothpick test. As a result, the Court has now greatly increased the area subject to trust protection. As the dissent pointed out, nearly nine million acres of land may fall within the reach of the public trust.²¹⁰ The true figure is probably much higher.²¹¹

2. *Disruption of Reasonable Property Expectations?*

The dissent in *Phillips* argued that reasonable property interests would be destroyed by the tidality ruling, thereby depriving certain property owners of a reasonable return on their investments,²¹² and subjecting them to uncertainty which the principles of property law are purportedly designed to prevent.²¹³

The majority correctly countered that Mississippi law consistently held in favor of the public's rights in lands subject to the tide.²¹⁴ The reasonableness and consistency of long-established federal and Mississippi precedent mitigated any complaint of destruction of property expectations.²¹⁵ There can be no reasonable property expectation in lands which, since Roman law, have remained impressed with a public trust. Although the confusion brought on by the introduction of the inland waterways may have, for a time, vitiated the states' assertion of trust control, the mere suspicion of private interest in lands below water is not a sufficient basis for developing reasonable property expectations. As the Court pointed out, this confusion over navigability never reached tidal property.²¹⁶ The only difficulties that

209. See, e.g., *Hardin v. Jordan*, 140 U.S. 371, 371, 381-82 (1891) (recognizing reclamation of trust land for urban expansion); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) (fishing allowed).

210. See *supra* text accompanying note 24.

211. See, e.g., *California v. Superior Court*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981) (four thousand miles of shorelands included within the trust); see Porro & Teleky, *Marshland Tidal Dilemma: A Tidal Phenomenon*, 3 SETON HALL 323, 323 (1972) (244,000 acres of tidal marshland in New Jersey).

212. 108 S. Ct. at 804 (O'Connor, J., dissenting).

213. *Id.*; see also Stevens, *supra* note 2; Michelman, *Property, Utility, and Fairness*, *supra* note 2.

214. *Phillips*, 108 S. Ct. at 794.

215. *Id.* at 798-99.

216. *Id.* at 796-97.

arose were in connection with fresh water.²¹⁷ As *Phillips* made clear, there is no basis for property expectations in land below tidal water, regardless of the extent of the tidal influence.

V. EXTENDING THE SCOPE OF STATE INTEREST: PROPOSED EXERCISES OF THE PUBLIC DUTY

From the earliest extension of admiralty jurisdiction in *Genesee*, which protected commercial navigation, through the evolving trust purposes suggested by the state courts in cases such as *Marks* and *National Audubon*, and the language which developed therefrom, state courts and legislatures were not in a position to state categorically the extent to which they might assert the state's public trust interest. *Phillips* unequivocally declared that states such as Mississippi may assert fee simple in trust property.²¹⁸

The *Phillips* ruling strengthens state control of tidelands for those states wishing to extend the public trust to the extreme to which Mississippi was prepared to go. It is important to note that this ruling creates no affirmative duty on the states. It does, however, broaden the trust's operation both geographically and in terms of trust purposes.

From the public trust's commercial ground,²¹⁹ emerging public needs have extended the doctrine's traditional limitations.²²⁰ From bathing to recreation²²¹ to environmental protection²²² and now to revenue production, the public trust has fulfilled its purpose as a non-intrusive vehicle for public input into the disposition and use of important natural resources.

The state trust obligation need not operate as a restraint on alienation of trust property as some commentators have suggested.²²³ As far back as *Illinois Central*, the Supreme Court had sanctioned the sale of trust lands.²²⁴ Although the level of judicial scrutiny will rise with the importance of the conveyance, it is possible and prudent for states to grant fee simple or more restrictive interests in certain trust property. Any such grant must be made

217. *Id.*; see *Barney v. Keokuk*, 94 U.S. 324, 338 (1876); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 456 (1851); see also *supra* notes 90-99 and accompanying text.

218. The Court is silent on the necessity for a valid public objective in so claiming a fee interest.

219. See *supra* notes 27-36 and accompanying text; *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

220. See *supra* text accompanying notes 130-34.

221. See *State v. Village of Lake Delton*, 93 Wis. 2d 78, 286 N.W.2d 622 (1979).

222. See *supra* notes 132-34 and accompanying text; *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

223. See *Stevens, supra* note 2; see also *Rose, supra* note 65.

224. See 146 U.S. 387 (1892); see also *Appleby v. City of New York*, 271 U.S. 364 (1926).

by the legislature for a valid public purpose.²²⁵

When property is subject to the public trust, a state may restrict development to promote public access, scenic preservation, and environmental control without falling prey to the increasingly restrictive takings limitations. If the restrictions are reasonably related to the public interest inherent in the public trust property itself, state development exactions may escape the recently heightened standard of review for property regulation articulated in *Nollan v. California Coastal Commission*,²²⁶ the rationale being that no complete property expectations may be anticipated for lands subject to the public trust.

For coastal states rich with mineral deposits, the economic benefits associated with plenary state control over vast trust resources are obvious. Care must be taken, though, not to impair the long-term public interest in such property for short-term economic payoff.²²⁷

VI. CONCLUSION

The public trust doctrine, as originally articulated, protected the public interest in fishing, navigation, and commerce. The sovereign, king or state, became the guardian of these important public rights. Although transplanting the doctrine to American soil necessitated changes in its narrow, historical framework, it has evolved to meet changing public perceptions of our common natural resources. Where it once protected merely the traditional, commercial, water-dependent uses, it may now reach non-water-dependent commercial uses such as mineral leasing. It may now also provide a vehicle for improving public access to tidelands and their preservation.

The *Phillips* decision will fortify the operation of the trust as a state tool for economic and environmental control of significant resources, while partially fulfilling Professor Sax's perception of the doctrine as a "tool for citizens seeking a comprehensive legal approach to resource management problems."²²⁸ Although *Phillips* does not compel states to take action as comprehensive as that of Mississippi, it will give strength to those state legis-

225. *Appleby*, 271 U.S. 364, 384.

226. 107 S. Ct. 3141 (1987); see sources cited *supra* note 2.

227. See *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). "No single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis." *State v. Village of Lake Delton*, 93 Wis. 2d 78, 96, 286 N.W.2d 622, 632 (1979).

228. Sax, *supra* note 1, at 474.

latures and activists who choose to assert the public interest more forcefully in an age of ever-increasing property conflicts.

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