UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 51 | Number 2 Article 10

12-1-1972

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trated by the facts of the *Barker* case, itself, in which a man accused of a brutal murder was free on bail for over four years. Society's interest is given greater emphasis in amended rule 50(b) of the Federal Rules of Criminal Procedure.[52]

In assessing the possible remedies which could be imposed where the right to speedy trial has been violated, the Court found dismissal to be the only possible alternative and called it "indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried."[53] The Court considered dismissal to be more drastic action than the exclusion of illegal evidence under the fourth amendment.[54] However, this conclusion does not seem to consider the fact that many cases reversed under the exclusionary rule are never retried because the prosecutor realizes that he cannot secure a conviction without the excluded evidence. In those cases where the defendant is not retried, the charges have, in effect, been dismissed.

The development of the right to a speedy trial continues to lag behind other constitutional protections afforded to the criminal defendant. The Supreme Court in *Barker* has taken a step toward full protection of this right, but until explicit time limits are established, a substantial risk of violation of this important right will remain in our system of criminal justice.

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Environmental Law—Expanding the Definition of Public Trust Uses

Public concern for protecting the environment has recently been manifested in efforts to preserve the coastal wetlands.[1] Public pressure has resulted in the passage of comprehensive coastal zone management acts in three states[2] and a variety of less comprehensive measures in a

[52]FED. R. CRIM. P. 50(b), *reported,* 11 CRIM. L. REP. 3014-15, provides in part: "The district plan shall include special provisions for the prompt disposition of any case in which it appears to the court that there is reason to believe that the pretrial liberty of a particular defendant who is in custody or released pursuant to Rule 46, poses a danger to himself, to any other person, or to the community."

[53]92 S. Ct. at 2188, *see* ABA, *supra* note 28, § 4.1.

[54]92 S. Ct. at 2188.

[1]See E. BRADLEY & J. ARMSTRONG, A DESCRIPTION AND ANALYSIS OF COASTAL ZONE AND SHORELAND MANAGEMENT PROGRAMS IN THE UNITED STATES (Univ. of Michigan Sea Grant Technical Report No. 20, 1972).

[2]FLA. STAT. ANN. §§ 161.011-.45 (Supp. 1972); R.I. GEN. LAWS ANN. §§ 46-23-1 to -12

large number of other states.[3] One problem faced by legislatures when attempting to rationalize, coordinate, and control use of coastal wetlands is that by attempting too much regulation they may encroach upon property owners' rights protected by the fifth amendment's[4] prohibition against taking property without just compensation.[5] The recent California decision, *Marks v. Whitney*,[6] provides California (and any other state in which a public trust in coastal, tideland, or navigable waters is recognized) with a useful and creative means of avoiding the "takings" problems when legislating for wetlands management.

Marks owned property on Tomales Bay, a bay affected by the tides. A remote predecessor in title had received the property by grant from the state. A long strip of his property consisted of land covered by the ordinary ebb and flow of tides—that is, tideland. Whitney's property was landward of Marks' and was so situated that Marks' tidelands separated almost all of Whitney's beachfront from the waters of the bay. Marks proposed to cut off or substantially diminish Whitney's free access to the waters by constructing a boating marina along the entire length of his tideland property.

Perhaps for the purpose of obtaining financing for his project, Marks instituted an action to quiet title in which he asserted "complete ownership of the tidelands and the right to fill and develop them."[7] Whitney counterclaimed alleging a right to free access to the waters upon which his land fronted. He based his claim on rights accruing to himself as a littoral owner and as a member of the public. His public claim was based on California law, which holds tidelands to be public trust lands burdened with public-trust easements.[8]

(Supp. 1970); WASH. REV. CODE ANN. § 90.286x (Supp. 1971). In about half of the remaining coastal states major studies of coastal wetlands have been undertaken. *See* E. BRADLEY & J. ARMSTRONG, *supra* note 1, at 58.

[3]*Id.* at 9-18.

[4]U.S. CONST. amend. V. In Chicago, B.&Q.R.R. v. Chicago, 166 U.S. 226, 235-41 (1897), the Supreme Court held that taking of private property for public purpose without compensation is a denial of due process forbidden by the fourteenth amendment.

[5]Schoenbaum, *The Coastal Zone, Public Rights and Coastal Zone Management*, 51 N.C.L. Rev. 1 (1972).

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

[7]*Id.* at 256, 491 P.2d at 377, 98 Cal. Rptr. at 793.

[8]The landmark cases are People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), and Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912). California public trust law holds that, with certain exceptions based on statutory interpretations of legislative acts of the late nineteenth century, the tidelands of the state are held by the state in trust for the people. Any conveyance of the tidelands by the state to a private individual reserves by implication a public-trust easement to the state unless the legislature affirmatively extinguishes the trust with regard to the land conveyed.

The trial court denied that Whitney had standing to raise the public trust issue. It disposed of Whitney's claim to access based on his rights as a littoral owner by granting him a seven-foot-wide easement across Marks' property. The California Court of Appeal affirmed the trial court's decision.[9] Whitney appealed to the California Supreme Court.

The supreme court addressed itself to four questions:[10] the first considered whether Marks' tidelands were burdened with a public servitude; the second dealt with Whitney's standing to raise the public trust issue; the third discussed Whitney's rights as a littoral owner; the fourth involved the problem of how to fix the seaward boundary of Marks' property. Only the language used by the Court in answering the first question is pertinent to the constitutional problem of "takings" inherent in most comprehensive land-use regulatory schemes.

Not surprisingly, the supreme court found that Marks' tidelands were burdened with a public trust easement. This finding was consistent with many previous cases in which the courts had found the state's tidelands to be burdened with a public servitude.[11] The court did not stop, however, with declaring the existence of the burden; it went on to address itself to the problem of defining the scope of the servitude. Public trust easements in coastal waters and tidelands, the court explained, had been traditionally defined in terms of navigation, commerce, and fisheries.[12] This categorization was not, however, exclusive. Other uses, particularly recreational uses, had been recognized as falling within the public trust servitude.[13] The court noted that tradition should not be mistaken for law and that certain uses should not be favored merely because they had been favored in the past.

> In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and

[9] 11 Cal. App. 3d 1089, 90 Cal. Rptr. 220, *petition for rehearing denied*, 12 Cal. App. 3d 796, 91 Cal. Rptr. 128 (1970).

[10] 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790.

[11] People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); Forestier v. Johnson, 164 Cal. 24, 127 P. 15 (1912).

[12] 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

[13] *Id.*

marine life, and which favorably affect the scenery and climate of the area.[14]

The notion that public rights exist in navigable and tidal waters is ancient in Anglo-American law;[15] indeed, its origins have been traced to Roman law.[16] The reasons for the development of a body of law dealing with public rights in waters are the subject of historical debate,[17] but they probably include the importance of water as a resource, the competition for this resource, and the waxings and wanings of monarchical power in England.[18] By the late eighteen century the state of the public trust law in England was essentially this: navigable waters,[19] whether owned by the sovereign or by private persons, were impressed with a servitude in favor of the public. Regardless of who held legal title to the land under the water, the public had certain rights to the use of the water which the sovereign was supposed to enforce[20] for the benefit of the public. The most ancient and frequently enunciated of these rights was the right of navigation. Two other easements mentioned almost as frequently were the right of commerce and the right of fishery.[21]

When the American states gained independence from England, trusteeship passed from the British sovereign to each of the states. An early United States Supreme Court decision, *Martin v. Waddell*,[22] held that a state could, if it wished, assert its trusteeship to navigable waters, that is, the question was a matter of state law. This holding plus several other nineteenth century decisions[23] seemed to imply that a state legislature might ignore the state's trusteeship and systematically alienate the navigable waters of the state to private parties free from the public

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[14]*Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

[15]A.W. Stone, *Public Rights and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS § 35.2 (R. Clark ed. 1967).

[16]*See Note—State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571, 576 (1971) [hereinafter cited as *Greatwater Resource*]; Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763 (1970) [hereinafter cited as Comment].

[17]*Greatwater Resource* 577 & n.28.

[18]For a good short survey of the development of public trust law in England *see id.* at 576-99.

[19]The definition of "navigable" has caused considerable confusion in American case law. *See* Schoenbaum, *supra* note 5.

[20]Roman law favored the theory that the sovereign could not alienate title to the beds under navigable waters at all. English common law, however, permitted alienation of title but found an implied easement in favor or public rights in the waters regardless of who held title to the subsoil. Comment 768-71.

[21]*Id.* at 781, 783.

[22]41 U.S. (16 Pet.) 367 (1842).

[23]Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Barney v. City of Keokuk, 94 U.S. 324 (1876).

servitude. But to confuse matters, at the close of the nineteenth century in the great public trust case, *Illinois Central Railroad Co. v. Illinois*,[24] the United States Supreme Court seemed to reverse itself and indicate that a state could not completely abdicate its responsibilities as trustee for the public of navigable waters within its domain.

The legacy of confusion from the nineteenth century concerning the existence and nature of the public servitude to which the nation's waters are subject has resulted, in this century, in much litigation. One of the most interesting and important questions litigated is the one raised by *Marks v. Whitney*: What is a public trust use?

As already noted, the court was correct in stating that the legitimate and protected public trust uses of tidelands have most frequently been defined in terms of navigation, commerce, and fisheries.[26] This was certainly true in California. An early California case, *Eldridge v. Cowell*,[27] perhaps limited public trust rights to navigation. Several years later the right of fishery was mentioned as a protected public trust use.[28] Following the landmark public trust decision by the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*,[29] in which navigation, fishery, and commerce were all mentioned as being legitimate public trust uses, the California Supreme Court as a routine matter began to incorporate the trio of uses into its enunciation of protected public trust usage.[30]

A few years ago, however, a new note crept into the California court's discussion of the nature of public trust usage:

> The nature and extent of the trust under which the state holds its navigable waterways has *never been defined with precision*, but it has been stated generally that . . . [uses] . . . are within trust purposes when they are done "for the purposes of commerce, navigation, and fisheries for the benefit of all the people of the state."[31]

In *City of Long Beach v. Mansell*[32] the trio of uses were described as

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[24]146 U.S. 387 (1892).

[25]Stone, *supra* note 15, at 200.

[26]*See* note 20 *supra*.

[27]4 Cal. 87 (1854).

[28]Ward v. Mulford, 32 Cal. 353 (1867).

[29]146 U.S. 387 (1892).

[30]*See, e.g.*, People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912).

[31]Colberg, Inc. v. State, 67 Cal. 2d 408, 417, 432 P.2d 3, 9, 62 Cal. Rptr. 401, 407 (1967) (emphasis added).

[32]3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

the "traditional" delineation of public trust purpose. The court was beginning to consider the possibility that navigation, fisheries, and commerce were not the only usages to come within the aegis of public trust. In *Marks v. Whitney* the court has finally stopped hinting that the trio is not sacred and actually has suggested a few new uses that fall within the scope of the public trust easement and deserve the status of public trust use. In recent years only two other state courts have spoken with such expansiveness of the scope of the public trust easement.[33] In *Menzer v. Elkhart Lake*,[34] the Wisconsin Supreme Court quoted with approval an earlier Wisconsin decision in which that court had said:

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.[35]

The Wisconsin court has led the nation in developing a comprehensive body of law based on the public trust.[36]

Recently, the New Jersey Supreme Court joined California and Wisconsin in announcing new vistas for the doctrine. In *Borough of Neptune City v. Borough of Avon-by-the Sea*,[37] the court decided that the public trust doctrine prohibited municipalities from charging higher rates to non-residents than to residents attempting to use the city's beaches. Plaintiffs had not argued the public trust as a theory of recovery; the court supplied the rationale on its own.[38] Like California, the New Jersey court observed that the traditional delineations of public trust usage, navigation, fishing, and commerce, were no longer adequate to meet the current needs.

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[33]One other court, the Massachusetts Supreme Court, declared more than fifty years ago that the scope of the public trust doctrine went beyond navigation: "it includes all necessary and proper uses, in the interest of the public." Home for Aged Women v. Commonwealth, 202 Mass. 422, 435, 89 N.E. 124, 129 (1909). However, this expansive language has not been further developed by the Massachusetts court, although with regard to other issues concerning the public trust (alienability, for example) Massachusetts has developed a comprehensive body of law. *See* Sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 491 (1970).

[34]51 Wis. 2d 70, 82, 186 N.W.2d 290, 296 (1971).

[35]Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816, 820 (1914).

[36]Sax, *supra* note 33, at 509.

[37]61 N.J. 296, 294 A.2d 47 (1972).

[38]*Id.* at ____, 294 A.2d at 51.

> We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.[39]

Of what benefit is this broadened concept of public trust use enunciated in *Marks v. Whitney* to persons concerned with rationalizing and coordinating the resource use of the coastal wetlands? The answer depends on the influence of the California Supreme Court with the various state courts and legislatures of the nation. The court has issued a clear invitation to the California legislature to use the public trust doctrine aggressively. The legislature can do this by incorporating into legislation the finding by the court that uses of coastal wetlands for ecological conservation, open-space, and scientific study come under the umbrella of the public trust servitude with which the wetlands are burdened.

Public trust law is not a sophisticated or well-coordinated branch of the substantive law.[40] The use of wetlands for navigation, fishery, or commerce may conflict with one of the other public trust uses. For example, dredging a harbor may be beneficial for commerce and navigation but disastrous to fisheries. In 1967 the California Supreme Court found drilling for oil and gas in the tidelands to be consistent with the public trust because the activity was so obviously related to commerce.[42] The confusion in public trust law derives partly from state legislatures' leaving to the courts the role of defining public trust use and of establishing a hierarchy of preferred uses.[43] The courts, left to fashion the law from a hodgepodge of fact situations, have understandably been unable to formulate a comprehensive body of law.

If the California legislature is not interested in breaking the unblemished record of legislative abstinence from public trust law, the language in *Marks v. Whitney* may simply be interpreted as adding

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[39]*Id.* at ____, 294 A.2d at 54.

[40]Comment 774.

[41]Some writers claim that in a showdown navigation always wins. *See id.* at 774; *Greatwater Resource* 649.

[42]Colberg, Inc. v. State, 67 Cal. 2d 408, 418, 432 P.2d 3, 9, 62 Cal. Rptr. 401, 407 (1967).

[43]For a general discussion of what some jurisdictions have done toward developing comprehensive public trust doctrine in the absence of statutes pertaining to the subject *see* Sax, *supra* note 33.

another few "uses" to the general potpourri. The trio becomes a quintet or something more; "ecological preservation" and "scientific study" join navigation, commerce, and fishery. Public and private plaintiffs simply have another peg on which to hang an environmental law suit.[44] Courts will be obliged to continue the haphazard balancing of competing public trust uses according to their relative importance, except that five or six uses will have to be juggled now instead of three.

This discussion is not intended to disparage the utility to environmental plaintiffs of the addition of some new uses to those already deserving of protection. However, legislation which is responsive to the broad language in *Marks v. Whitney* would provide a far more powerful aid to efforts to preserve coastal wetlands. The legislature, in its role as trustee for the public of public trust easements in the wetlands, should simply declare that the use of the wetlands, most beneficial to the public is the preservation of the wetlands as ecological units of study, as open-space, and as a natural environment for birds and marine life. Any proposed uses, including other public trust uses, which are inconsistent with these should be declared permissible only upon a showing that such other uses will not substantially impair or harm the uses now given priority. Any present use of public trust areas inconsistent with the priority uses should be declared permissible only upon a finding by an administrative agency that such uses are necessary to and for the benefit of the public as a whole or do not substantially impair the uses of the wetlands now deemed to hold priority.

Obviously such legislation is very broad in scope. An act by the California legislature along the lines suggested above should not be the legislature's final effort with regard to coastal zone management. More comprehensive measures, such as those passed in Florida and Washington,[45] are clearly preferable for dealing with resource utilization of wetlands. As a stop-gap measure, however, such legislation would at least prevent heedless and unnecessary destruction of the coastal wetlands.

How does the holding in *Marks v. Whitney* enable the legislature to avoid the constitutional problem of takings? First, a brief explanation of what this problem involves: The United States Constitution[46] and most state constitutions[47] provide that no property shall be taken for

[44]Professor Joseph Sax sees great possibilities for protection of the environment via citizen law suits brought to defend the public trust. *See* J. SAX, DEFENDING THE ENVIRONMENT 158-74 (1971).

[45]*See* note 2 *supra*.

[46]U.S. CONST. amend. V; *see* note 4 *supra*.

[47]*E.g.*, CAL. CONST. art. 1 § 14; N.Y. CONST. art. 1 § 7.

public purpose without just compensation. Occasionally land-use planning schemes involve limiting the use to which a private owner may put his property to such an extent that the owner is deprived of all reasonable beneficial enjoyment. When this happens, the plan or scheme is said to be unconstitutional as to that particular owner since to hold otherwise would, in effect, permit state action to "take" a person's property without compensation.[48] A coastal management scheme that contemplates conserving vast areas of the wetlands could encounter difficulties from riparian owners whose lands were rendered useless or nearly so by the restrictions placed on their property. These owners could argue that either the plan was unconstitutional as to them or that conformity with the plan required the state to compensate them for the loss of enjoyment of their property.[49] Success of the former argument would effectively gut the plan; success of the latter could be prohibitively expensive for the state. *Marks v. Whitney* reveals one kind of activity, however, in which the government can engage, even to the extent of severely restricting the use to which riparian owners may put the waters abutting their property, that does not require compensation to those owners. The government, as sovereign and as trustee of the public easement in navigable and tidal waters, may engage in activity for the protection of whatever uses are deemed to fall within the definition of public trust. In doing so the government is not "taking" anything; it is using what it already owns.[50] As mentioned above,[51] the most traditional use has been navigation, and most of the cases that deal with this issue speak of the government activity in terms of navigation or of commerce.[52] But, using the reasoning of *Marks v. Whitney*, the easement is viewed as a functional one based on current findings of beneficial public use rather than an historical classification of certain immutable uses. Therefore, as the government finds certain uses to be more pressing and others less so, the use

[48]In Zabel v. Pinellas County Water & Navig. Control Authority, 171 So. 2d 376 (Fla. 1965), the Florida Supreme Court held that absent a showing of adverse effect to the public interest, defendant's denial of a dredge and fill permit to plaintiff, which prevented plaintiff from fulfilling his dream of constructing a trailer park on Boca Ciega Bay, amounted to taking plaintiff's property without compensation.

[49]*Id.*

[50]*See* Sage v. Mayor, Aldermen & Commonality, 154 N.Y. 61, 79-80, 47 N.E. 1096, 1101-02 (1897), for explanation for finding a retention of an easement for the public in any conveyance of public trust lands by the sovereign, on the basis of the principle of implied reservation.

[51]*See* text accompanying note 21 supra.

[52]*See, e.g.*, Scranton v. Wheeler, 179 U.S. 141, 171 (1900); United States v. 422,978 Square Feet of Land, 445 F.2d 1180, 1184, (1971); *In re* Jamaica Bay, 286 N.Y. 382, 176 N.E. 539, 542 (1931).

to which the government may put its easement may change accordingly. If what the government wishes to do with its easement is to restrict use of public trust property altogether, that is, to preserve the property in its natural state, riparian owners cannot complain that something has been taken from them. Whatever rights they had, whatever the nature of their ownership in the soil under the water, they took their property subject to the public easement.[53]

There is room for much abuse if the government carries the public trust rationale too far. On one hand, there must be limits to the type of use the government wishes to make of its easement. If the legislature were to find, for example, that the most pressing public need with respect to tidal waters was to derive revenue from their sale, other aspects of public trust law must intervene to prohibit the destruction of the trust.[54] On the other hand, the legal theory of public trust easement whereby the government can prohibit development of wetlands areas by owners in fee of the subsoil will leave many persons who have made substantial investments in coastal property with very little to show for their expenditure and probably very little in the way of remedy. For these reasons, fairness dictates that the avenue opened by *Marks v. Whitney* be taken as merely a stopgap approach to the prevention of wetlands destruction.

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Estate Tax and the Closely Held Corporation—A Nearly Fatal Blow to Section 2036

Many a tax consultant who has a client with a majority interest in a closely held corporation has been looking for a way for his client to avoid estate taxes on such stock without having to give up control of his corporation in the process. In *United States v. Byrum*[1] the Supreme Court has provided such an opportunity. According to the Court's interpretation of section 2036 of the Internal Revenue Code,[2] the majority

[53]In Zabel v. Pinellas County Water & Navig. Control Authority, 171 So. 2d 376, 388 (Fla. 1965), the dissenting opinion found "the retained inalienable trust doctrine" to be sufficient grounds to deny compensation to an owner of the tidelands denied a permit to dredge and fill.

[54]Professor Sax devotes much of his article, *supra* note 33, to the problem of preserving the public-trust servitude in spite of legislative indifference and hostility.

[1]92 S. Ct. 2382 (1972).

[2]INT. REV. CODE OF 1954, § 2036 provides: