

1971

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Leighty, Leighton L. (1971) "Public Rights in Navigable State Waters - Some Statutory Approaches," *Land & Water Law Review*: Vol. 6 : Iss. 2 , pp. 459 - 490.

Available at: https://scholarship.law.uwyo.edu/land_water/vol6/iss2/1

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LAND AND WATER LAW REVIEW

VOLUME VI

1971

NUMBER 2

This article begins with the premise that, for the most part, the scope of public and private rights in navigable waters within the various states is determined under applicable state law. The scope of these rights is indeed a large subject; this article is but one segment of a larger, comprehensive study of public and private rights in navigable waters. The first part of the study was published earlier in this journal, and there it was indicated that this second part would cover the "scope" of rights in navigable waters. However, for mechanical reasons unrelated to the interdependent character of the subject matter of the larger study, the full "scope" of these rights cannot be presented in this issue of the journal. Instead, the focus here will be on statutory approaches which create dimensions for legal rights as they exist in navigable waters. The third and final portion of the larger study will be published in a subsequent issue of this journal and will explore the scope of public and private rights as developed in case decisions.

PUBLIC RIGHTS IN NAVIGABLE STATE WATERS--SOME STATUTORY APPROACHES

*Leighton L. Leighty**

As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes*—things common to all and property of none.**

I. INTRODUCTION

HAVING developed the *source* of public and private rights in navigable waters in the context of federal limitations, this article will continue the discussion of the *scope* of these rights under state statutory controls. Each state as a sovereign political unit has the requisite *imperium* to exercise nearly plenary control over the water and other natural resources

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** *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950).

within its territorial jurisdiction. As indicated in the first part of this study, each state acquired its sovereignty under applicable principles of international law or under the constitutional doctrine of "equal footing." For purposes of creating a federal union, the states relinquished certain aspects of their otherwise unlimited territorial sovereignty to the federal government. These are enumerated in the federal constitution and were discussed in part one. Therefore, under our constitutional form of government, state sovereignty implies that (except as limited by the federal constitution and respectively by the pertinent state constitution) each state has absolute, plenary authority to regulate and control its internal natural resources.¹

"Sovereignty" in this context is a collective concept with the residual source of power being in the *people* of the state.² As their representative, the legislature may regulate and control natural resources under the "police power," one of the overt manifestations or prongs of the concept of state sovereignty. As a general rule, the state legislature has the exclusive authority to exercise this power.³ Moreover, control of

1. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Manigault v. Springs*, 199 U.S. 473 (1905); *Geer v. Connecticut*, 161 U.S. 519 (1896); *Shively v. Bowlby*, 152 U.S. 1 (1894); *accord*, *United States v. Texas*, 339 U.S. 707 (1950); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); see *Skiriotes v. Florida*, 313 U.S. 69 (1941). See also *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). In *Tennessee Copper* the Court indicates that each state, in its sovereign capacity, "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power." *Georgia v. Tennessee Copper Co.*, *supra* at 237. Even without compensation, the state legislature may decide to destroy one privately held natural resource to preserve another. *Miller v. Schoene*, 276 U.S. 272 (1928). See also COOLEY, CONSTITUTIONAL LIMITATIONS 1-2 (5th ed. 1883) (definition of "sovereignty").

2. See generally *Chisolm v. Georgia*, 1 U.S. 16, 2 Dall. 419, 469 (1793). For a discussion of several of the early theoretical bases for "sovereignty" see BLISS, OF SOVEREIGNTY (1885). See also BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 98-160 (1966); O'CONNELL, INTERNATIONAL LAW 319 (1965); DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 34-54 (1908); WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 37 (1878).

In this context the state's governmental structures merely represent political legitimacy for purposes of expressing this power. See *Chisholm v. Georgia*, *supra* at 472. See also *Geer v. Connecticut*, *supra* note 1; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. LAW REV. 471 (1970).

3. *Compare City of El Paso v. Simmons*, 379 U.S. 497 (1965); *Berman v. Parker*, 348 U.S. 26 (1954); *Hunter v. Pittsburgh*, 207 U.S. 161 (1907); *Muench v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 514, *on rehearing* 55 N.W.2d 40, 43-45 (1952).

navigable waters is an inherent attribute of state sovereignty; the United States Supreme Court has said, "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged"⁴

Assuming that the analysis in the first part of this study was correct, the federal test for navigability is mandatory only with respect to the narrow issue of bed title.⁵ The federal test as described in *The Daniel Ball* will be applied as of the date on which a state was admitted to the union to determine which submerged lands beneath inland lakes and streams passed into state ownership and which lands remained available for private acquisition.⁶ Of course, if a state elects to limit its exercises of sovereign power over navigable water to those areas for which it possesses bed title,⁷ it may do so. On the other hand, however, a state is not required to constrict its controls in this manner, and as will be discussed, a state has the theoretical legal basis for broad controls over internal water resources. The controlled waters need not be limited to *any* test of "navigability." Waters within a state may simply be declared a "public resource."⁸

The United States Supreme Court has not yet definitively established the outer limits beyond which state legislatures may not go in their extensions of public rights to recreational use and enjoyment of waters within a state. The most ambiguous areas are small, nonnavigable feeder streams where bed title is in private ownership and nonnavigable lakes having neither inlet nor outlet and being entirely surrounded by private riparian (littoral) ownership. At some point the question of how far public rights may be expanded without the exercise of the police power being denominated an uncon-

4. United States v. Oregon, 295 U.S. 1, 14 (1935).

5. See generally Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NATURAL RESOURCES J. 1 (1967); Note, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171 (1964).

6. See, e.g., Utah v. United States, 39 U.S.L. WEEK 4717 (U.S. June 7, 1971); United States v. Utah, 283 U.S. 64, 75-76 (1931).

7. Compare N.D. CODE ANN. § 61-15-02 (1960) with S.D.C.L.A. §§ 43-17-1, 43-17-2 (1969); UTAH CODE ANN. § 65-1-14 (1968).

8. See VT. STAT. ANN. tit. 10, § 1101 (1958) (Supp. 1970).

stitutional "taking," must be answered.⁹ A related question (or perhaps another statement of the same question) is whether, given the usufructuary character of recreational uses of lakes and streams, "property" and "property rights" (in a constitutional sense) exist in such waters.¹⁰ The basic distinctions have been settled for a considerable length of time. Chief Justice Shaw announced the classic statement:

9. See *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 89 N.E. 760 (1909); *McCord v. High*, 24 Iowa 336 (1868); *Murray v. Preston*, 106 Ky. 561, 50 S.W. 1095 (1899); *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336 (1875). See generally, COOLEY, *supra* note 1 at 729; Lauer, *The Riparian Right as Property*, WATER RESOURCES AND THE LAW 131, 133-268 (University of Michigan Law School) (1958); HINES, A DECADE OF EXPERIENCE UNDER THE IOWA WATER PERMIT SYSTEM 73-84 (Univ. of Iowa Agricultural Law Center Monograph No. 9, 1966); O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 581-609 (1962); Sax, *Taking and the Police Power*, 74 YALE L. J. 36 (1964); Waite, *Public Rights in Indiana Waters*, 37 IND. L. J. 467, 480-83 (1962); Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 WIS. L. REV. 864, 872; Note, *Fishing and Recreation Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322 (1968).

"The right which the owner of lands has to a water-course flowing over them . . . cannot be taken from him constitutionally for public use without just compensation." *McCord v. High*, *supra* at 342. "The state cannot do it nor authorize anyone else to do it." *Petraborg v. Zontelli*, 217 Minn. 536, 545, 15 N.W.2d 174, 179 (1944). Justice Cooley, *supra*, summarizes the point:

All navigable waters are for the use of all the citizens; and there cannot lawfully be any exclusive private appropriation of any portion of them. The question what is a navigable stream would seem to be a mixed question of law and fact; and though it is said that the legislature of the State may determine whether a stream shall be considered a public highway or not, yet if in fact it is not one, the legislature cannot make it so by simple declaration, since, if it is private property, the legislature cannot appropriate it to a public use without providing for compensation.

10. Most of the authors cited in note 9, *supra*, raise this issue. See also Note, *The State v. The Riparian: A Problem of Water Use and Control*, 1961 WASH. U.L.Q. 257.

One court has stated that "neither sovereign nor subject can acquire anything more than a mere usufructuary right" in the *corpus* of a flowing stream. *Sweet v. City of Syracuse*, 129 N.Y. 316, 335, 27 N.E. 1081, 1084, *rehearing*, 129 N.Y. 643, 29 N.E. 289 (1891). This approach might negate the concept of a state navigational servitude as the basis for regulation without compensation. On the other hand, if this is the fundamental character of riparian rights *vis a vis* the rights of other riparians and of the public to surface recreational uses—then one might easily conclude that indeed there is no "property" in the constitutional sense and that all state legislative controls which expand or limit these uses are merely regulations concerning human conduct. No cases have taken this approach, but broad controls in favor of community use of natural resources have been sustained. See *State v. McKinnon*, 153 Me. 15, 133 A.2d 885 (1957). See generally Lauer, *supra* note 9 at 169-75; Note, *Water Recreation—Public Use of "Private" Waters*, *supra* note 5. An area of study in which more research is needed and in which useful comparisons might be produced is the contrasting of judicial attitudes toward land use controls with those toward navigable and other "public" waters. A fruitful exploration, beyond the scope of this article, might begin with the following cases: *State v. Johnson*, — Me. —, 265 A.2d 711 (Me. 1970); *State v. McKinnon*, *supra*; *Opinion of the Justices*, 118 Me. 503, 106 865 (1919); *State v. Brace*, 76 N.D. 314, 36 N.W.2d 330 (1949); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466 268 A.2d 765 (1970); *State v. Dexter*, 32 Wash.2d 551, 202 P.2d 906 (1949).

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise.

* * * *

the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.¹¹

11. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-86 (1851). See generally Sax, *supra* note 9.

However, these general rules do not explain the significance of legislative declarations that certain waters are "public."¹² Similarly, merely to state in a statute that vested rights are to be given a fully protected status does little toward an explanation of the nature of the respective interests of the public and of private riparian landowners—both glibly referred to as "rights."

On the other hand, the high Court has manifested some indications of support for nearly plenary state control over water resources. For example, in *Manigault v. Springs*¹³ riparian owners in South Carolina entered into a contract for the removal of an existing dam and to keep the creek free for navigation purposes. Subsequently, the South Carolina General Assembly passed an act, reciting the necessity of draining low-lands to enhance their tax value, under which some of the riparian parties to the contract were authorized to construct a dam across the creek (subject to a proviso for paying damages to landowners injured by the dam's construction or maintenance.) The South Carolina Constitution provides:

All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed . . . for the use of the shores or any wharf erected . . . in or over the waters of any navigable stream unless the same be authorized by the General Assembly.¹⁴

The Court found that this state constitutional provision did not interfere with the state's common law powers over navigable waters. The Court held:

While, as already observed, there is a general allegation in the bill that Kinloch creek was a navigable stream, and was capable of navigation by vessels in the Santee river and thence into the ocean, there is no allegation that it was ever used for that purpose, and the opinion of the court was that it certainly was not a navigable water of the United States,

12. Judicial vacillation is common. See, e.g., *State v. Brace*, *supra* note 10. See generally Lauer, *supra* note 9.

13. 199 U.S. 473 (1905).

14. SO. CAR. CONST. art. 1 § 28. This section was asserted in the context of section 29 which indicates that state constitutional provisions in South Carolina, when applicable, are mandatory and not merely permissive.

or a public highway under the laws of South Carolina. But, however this may be, we are of [the] opinion that the state had full power, in the absence of legislation by Congress, to authorize the construction of this dam for the avowed purposes of this act.¹⁵

In subsequent use of the *Manigault* case the Supreme Court has stated:

The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In *Manigault v. Springs . . . The Court sustained the statute upon the ground that the private interests were subservient to the public right.*¹⁶ [Emphasis Added.]

* * * *

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity.

* * * *

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time.¹⁷

In like manner, a New Jersey statute made it unlawful to transport the waters of any fresh water lake or stream into any other state, and state enforcement of the statute was upheld by the Supreme Court:

. . . .But we prefer to put the authority, which cannot be denied to the state, upon a broader ground than that which was emphasized below, since, in our

15. *Manigault v. Springs*, 199 U.S. 473, 483 (1905).

16. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934).

17. *Id.* at 442.

opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.

* * * *

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.

* * * *

[I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from

statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows.¹⁸

In short, the precise question of the permissible range of state legislative controls over recreational surface uses may be ripe for determination. It appears that, even in the narrow context of ownership of bed title, the Court's *dicta* supports broad legislative controls:

It is not for a state by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

* * * *

Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on nonnavigability of the stream in fact. In such a case, navigability *vel non* is not a local question.¹⁹

Moreover, state cases have frequently upheld broad exercises of the police power over natural resources to promote public considerations despite claims of detriment by private interests.²⁰

18. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355-56 (1908).

19. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922).

20. See, e.g., *State v. McKinnon*, 153 Me. 15, 133 A.2d 885 (1957); *State v. Dexter*, 32 Wash.2d 551, 202 P.2d 906 (1949). *But see* *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1905); *State v. Johnson*, ___ Me. ___ 265 A.2d 711 (1970); *State v. Brace*, 76 N.D. 314, 36 N.W.2d 330 (1949). See also *American Coal Mining Co. v. Special Coal & Food Comm'n*, 268 F. 563 (D. Ind. 1920).

Most of the decided cases focus upon a "conservation" issue rather than on problems of resource development. For example, the *Dexter* court stated: "That the protection and conservation of the natural resources of the state is in the general welfare and serve a public purpose, and so constitute a reasonable exercise of the police power, is now so well settled

II. STATE LEGISLATIVE DEVELOPMENTS

The areas of state legislative control over navigable waters have included the problems of conservation and preservation, surface use, fills and other alterations, and access. Navigation itself, of course, is the fundamental basis for sovereign controls over these resource problem areas, but striking a meaningful, pragmatic definition of "navigability" has eluded both courts and legislatures. "Navigation" under the traditional concepts of commerce has not created significant problems.²¹ Here navigability is usually obvious.²² On the other hand, recreational surface uses were not always included in "navigation" and were treated on a different basis at early common law.²³ Where these uses were the only feasible ones, given the character and carrying capacity of a particular water resource, recreational uses had to be made part of "commerce," accepted under a different standard,²⁴ or rejected entirely.

A. Balancing of Interests

The resolution of the problem areas listed above will, of necessity, require a balancing of public and private interests. Emphasis in this article is placed on public interests for two reasons—procedurally, the larger study adopted this organi-

that no further citation of authority is necessary." *State v. Dexter*, *supra* at 557, 202 P.2d at 909. However, a notable exception, with rather unusual "developmental" and environmental implications, is *State v. Johnson*, *supra*. *Dexter* involved a statute requiring private landowners to participate in reforestation programs, while *Johnson* dealt with statutory regulations requiring permits for alteration of coastal wetlands.

21. Without providing a definition of "navigability," statutes prohibiting obstructions to navigation have been abundant. See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-601 (1956) (obstructions declared public nuisances); S.D.C.L. § 46-26-1 (1969); TENN. CODE ANN. § 39-2901 (1955); *But see* S.C. CODE ANN. § 70-1 (1962).
22. The historical development of the concept of "indelible navigability" was discussed in part one of this study. See Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 427-28 (1970). [Hereinafter cited as Leighty.]
23. See *Collins v. Gerhardt*, 237 Mich. 38, 45, 211 N.W. 115, 117 (1926); 1 WATERS AND WATER RIGHTS § 35.2 (Clark ed. 1967); 2 FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 1364-65 (1904).
24. *Ne-Bo-Shone Ass'n v. Hogarth*, 81 F.2d 70 (6th Cir. 1936); *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17 (1954); *Muench v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 514 (1952). Public recreational water uses may be treated as one of the "incidents" to the public navigational easement. See, *e.g.*, *Bohn v. Albertson*, 107 Cal. App.2d 738, 238 P.2d 128 (Dist. Ct. App. 1951); *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 163 N.E.2d 373 (1959); *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944).

zation²⁵ and, substantively, the criteria for designating certain waters as "public" have remained ambiguous in the face of increased community requirements for public outdoor recreation.²⁶ However, this emphasis does not diminish the importance of private rights in navigable waters. What is needed is an effective standard for the demarcation of the scope of private controls over the usufructs in lakes and streams. The absence of such a standard means that resource development and private investments must proceed with some degree of uncertainty. This may not have a significant negative impact for some commercial operations, but for the individual investor in riparian lands for the private recreational use of his family and licensees the impact may be substantial. The value of solitude, presumably reflected in purchase prices, is of considerable importance to a highly urbanized society. Land developments related to recreational water uses emphasize the right of privacy and the values of open space. Limitations on public enjoyment of these water uses is a primary basis for investment. These expectations should not be dismissed without sound bases, intensive economic impact studies and a mechanism for *gradual* market adjustments. The introduction above clearly indicates that there is authorization for legislative shrinking of private interests in lakes and streams and that broad regulations may fall short of a "taking." Moreover, expanded approaches to the public trust doctrine seem to provide a basis for satisfying increased *public* demands on these limited resources.²⁷ On the other hand, if no legitimate basis remains for exclusive (or at least limited) use and enjoyment of recreational waters by private investment interests, then this position should be forthrightly declared by state legislatures. Broad declarations in favor of public rights are not sufficient. To "regulate" under the no-compensation rubric of the police power, to destroy even mere usufructs because they were judicially created at some remote period of time, requires at least a minimal amount of *actual balancing* of the respective interests of private riparians and the public in concrete contexts.

25. Leighty at 394-97.

26. See generally Note, *Water Recreation—Public Use of "Private" Waters*, *supra* note 5; Note, *Fishing and Recreation Rights in Iowa Lakes and Streams*, *supra* note 9.

27. See Sax, *supra* note 2. *But cf.* Kerpelman v. Board of Public Works, 276 A.2d 56 (Md. 1971).

The editorial comments made in the last paragraph do not necessarily reflect the current status of applicable legal principles. They were made at this point rather than in their usual, more appropriate location in the "analysis" section, in order to provide a preface for the statutory materials which follow.

Moreover, basic weighing and balancing of interests is required in the problem areas of conservation, preservation, lake and stream modifications, and access. "Conservation" balancing of interests has been adequately discussed in the *Hudson County Water Co. v. McCarter*²⁸ and the *Geer v. Connecticut*²⁹ lines of cases and will receive no additional comment. The remaining list of problems will be discussed in relation to specific state statutes, but a brief reflection on the problem of access at this point seems justified.

A complete discussion of the access problem involves questions related to early colonial ordinances,³⁰ prescriptive rights, dedications, and the condemnation of public access sites;³¹ therefore full treatment of the problem is beyond the scope of this presentation.³² Access is a distinct and separate issue from that of the *existence* of public rights in a given lake or stream; it is quite possible for these rights to exist in the absence of lawful access.³³ On the other hand, when "public rights" are considered in this study, the assumption is made that access is available. Seldom does an exercise of a public right in recreational waters authorize a trespass on riparian uplands,³⁴ but access from publicly-owned property limits the significance of this restriction. In sum, access is treated in this article as part of the scope of the public's rights because access is either available or can be made available through

28. 209 U.S. 349 (1908).

29. 161 U.S. 519 (1896).

30. The Northwest Ordinance of 1787 was discussed in part one. See Leighty at 415-18. The Great Pond Ordinance is discussed below.

31. *E.g.*, Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

32. See generally I WATERS AND WATER RIGHTS § 38 (Clark ed. 1967); Note, *Water Recreation—Public Use of "Private" Waters*, *supra* note 5.

33. See, *e.g.*, Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W.2d 105 (1961). *But see* State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954).

34. See, *e.g.*, Attorney General *ex rel.* Hoffmaster v. Taggart, 306 Mich. 432, 11 N.W.2d 193 (1943); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). *But see* Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); LA. CIV. CODE ANN. art. 455 (West 1952).

condemnation procedures.³⁵ The question of access will be discussed with respect to some statutes which do not expressly provide for access to waters declared "public" and with respect to some which expressly disclaim the creation of any new rights of access, but the basic assumption that access is either available or implied in the legislative declaration will otherwise remain firm.

B. Great Ponds

The Massachusetts Bay Colony Ordinance of 1641-7 provides:

Sec. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the said town, or the general court, have otherwise appropriated them:

* * * *

Sec. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any men to fish or fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.³⁶

The ordinance defines a great pond as an area "containing more than ten acres of land"³⁷ and creates public rights in the

35. See authorities cited note 32 *supra*. Compare *State v. Kuluvar*, 266 Minn. 408, 123 N.W.2d 699 (1963), with *State v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278 (1954).

36. See generally *Slater v. Gunn*, 170 Mass. 509, 49 N.E. 1017 (1898); Locke, *Right of Access to Great Ponds by the Colonial Ordinance*, 12 MAINE L. REV. 148 (1919); Smith, *The Great Pond Ordinance—Collectivism in Northern New England*, 30 B.U.L. REV. 178 (1950); Waite, *Public Rights in Maine Waters*, 17 MAINE L. REV. 161 (1965); Annot. 57 A.L.R.2d 569, 583 (1958). See also Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335.

37. The water surface area has been modified by subsequent legislative action. MASS. ANN. LAWS ch. 131, §§ 1, 36 (1965) (*natural* ponds of 20 acres or more); N.H. REV. STAT. ANN. § 271.20 (1966). New Hampshire requires the lake to be *in excess* of ten acres. *Id.* at § 271.21; see *Concord Mfg. Co. v. Robertson*, 66 N.H. 1, 25 Atl. 718 (1889). The ten acre minimum apparently is still part of the common law of Maine. *Conant v. Jordan*, 107 Me. 227, 77 Atl. 938 (1910). But there is no statute in point. See generally Waite, *Public Rights in Maine Waters*, 17 MAINE L. REV. 161 (1965). The purpose of the codification may vary the size of the surface acreage. Compare MASS. ANN. LAWS ch. 131, § 1 (1965) (20 acres or more under Fish & Game Code) with MASS. ANN. LAWS ch. 91, § 35 (1967) (10 acres or more under Waterways Code).

waters for surface use and consumptive purposes.³⁸ The ordinance itself provides for access;³⁹ court interpretation treats the waters as if the state owned them in a proprietary capacity (*dominium*), rather than merely regulating them in a sovereign capacity (*imperium*).⁴⁰ In any event, public uses have been extended under this early enactment beyond fishing and fowling to include most of the fields of recreation.⁴¹ However, there has been a tendency to protect private landowners by restricting public access points to lands which are vacant and unenclosed.⁴² Fresh-water lakes⁴³ in Maine, Massachusetts, and New Hampshire come within the scope of these rules relating to great ponds through common law developments.⁴⁴

C. Statutory and Constitutional Definitions of Navigability

The need for effective legislative activity seems clear.⁴⁵ As indicated in the first part of this study,⁴⁶ judicial attempts at a definition of "navigability" have not produced any significant degree of certainty with respect to the scope of pub-

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38. *Gratto v. Palangi*, 154 Me. 308, 147 A.2d 455 (1958); *City of Auburn v. Union Water Power Co.*, 90 Me. 576, 38 Atl. 561 (1897); *West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158 (1863); *Slater v. Gunn*, 170 Mass. 509, 49 N.E. 1017 (1898); *Whitcher v. State*, 87 N.H. 405, 181 Atl. 549 (1935).
 39. Separate legislation provides the mechanism for public access. MASS. ANN. LAWS ch. 131, §§ 1, 34; ch. 91 § 18A (1967). For example, procedures for obtaining public access may be set in motion by a petition from ten citizens. *Id.* See also Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 Wis. L. Rev. 335.
 40. See, e.g., *City of Auburn v. Union Water Power Co.*, 90 Me. 576, 587, 38 Atl. 561, 566 (1897).
 41. *Gratto v. Palangi*, *supra* note 38; *Barrows v. McDermott*, 73 Me. 441 (1882); *Slater v. Gunn*, *supra* note 38, *Whitcher v. State*, *supra* note 38.
 42. See *Slater v. Gunn*, *supra* note 38; cf. *Concord Mfg. Co. v. Robertson*, *supra* note 37 (access statute challenged).
 43. Some of the states subject to great pond regulations have adopted other rules for streams. Massachusetts, for example, has the following rule for streams *subject to tidal action*: ". . . no tidal stream shall be considered navigable above the point where, on the average throughout the year, it has a channel less than forty feet wide and four feet deep during the three hours nearest the hour of high tide." MASS. ANN. LAWS ch. 131, § 114 (1965). There was no statute discovered which dealt with nontidal streams in Massachusetts. New Hampshire, by contrast, appears to have a statutory definition for navigable, nontidal streams which is similar to the federal commercial navigability test (expressly rejecting the "log-float" test). N.H. REV. STAT. ANN. § 271:9 (1966).
 44. Massachusetts and New Hampshire have specific "great pond" statutes, but all three states have given meaning to the original colonial ordinance through case interpretation. See, e.g., *Conant v. Jordan*, 107 Me. 227, 77 Atl. 938 (1910).
 45. See generally Bartke, *Navigability in Michigan in Retrospect and Prospect*, 16 WAYNE L. REV. 409 (1970).
 46. See Leighty at 392, 432.

lic rights in lakes and streams. The particular facts and circumstances related to the water resource, as described in each case, become significant in judicial determinations of "navigability"—*e.g.*, inlet and outlet sources, past history of public use, type of use, location of the water resource, practical necessities and local customs, changes in the utility and social value attributable to the use in question, public trust considerations, the regularity of flow, volume and velocity of flow. However, in the context of actual on-site observations of bodies of water declared by judicial fiat to be navigable or nonnavigable, predictability becomes the servant of flexibility.⁴⁷

1. *Definitions of Navigability*

On the other hand, few significant patterns have developed in legislative definitions of "navigability." (The avoidance of the latter term in favor of a declaration of certain waters being "public" is discussed in the next section.) The following legislatures seem to have made no attempt to create a definition of "navigability" or "public waters:" Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Maine, Maryland, Nebraska, Nevada, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia.⁴⁸ Among the states which have attempted a definition, several have merely drafted a circular statement—declaring navigable waters to be public, or defining public waters as those which are navi-

47. See *Petition of County Board of Supervisors*, 381 Mich. 180, 160 N.W.2d 909 (1968); *Attorney General ex rel. Hoffmaster v. Taggart*, 306 Mich. 432, 11 N.W.2d 193 (1943); *Lamprey v. Metcalf*, 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893). The determination approaches the complexity of defining a "nuisance" or "obscene" literature. See PROSSER, *THE LAW OF TORTS* 592 (3d ed. 1964).

48. This does not imply a lack of concern for these waters. See ARIZ. REV. STAT. ANN. §§ 13-601, 45-101A (1956); FLA. STAT. ANN. §§ 271.02-10 (1962) (limits placed on private riparian uses); *Id.* at § 370.03 (1) (1960) (beds of navigable waters are property of the state); HAWAII REV. LAWS § 19-20 (1955) (water resources of paramount importance); NEV. REV. STAT. §§ 537.010 - .030 (1967) (certain named waters declared navigable for purposes of fixing bed title); *Id.* at § 537.020 (Virgin River); *Id.* at § 537-030 (Winnemucca Lake); PENN. STAT. ANN. tit. 32, § 591 (1967) ("navigable waters of the United States" defined); TENN. CODE ANN. § 39-2901 (1955) (obstruction of navigable water); W.VA. CODE § 61-3-47 (1966). See also MALONEY, PLAGER & BALDWIN, *WATER LAW AND ADMINISTRATION—THE FLORIDA EXPERIENCE* 346-405 (1968).

gable.⁴⁹ In either situation the courts, as more fully described in part three of this study, must provide the ultimate determination.

State constitutional provisions establish the basis for public access and recreational uses in some states. For example, the Alaska Constitution provides: "Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of this state . . ." ⁵⁰ (Emphasis added.) The Alaska legislative body has not yet accepted this invitation. Court decisions in Missouri,⁵¹ New Mexico,⁵² Wisconsin,⁵³ and Wyoming⁵⁴ have placed varying degrees of emphasis on state constitutional declarations when establishing a broad foundation for recreational surface uses. New Mexico and Wyoming appear to have taken the strongest position on this point. The New Mexico Constitution states: "The unappropriated water of every natural stream . . . is hereby declared to belong to the public . . ." ⁵⁵ The New Mexico Supreme Court, in *State v. Red River Valley Co.*,⁵⁶ took the position that since riparian rights do not exist in that state, lakes and streams are available

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49. Alabama is a typical example: "All navigable waters in this state are public thoroughfares." ALA. CODE ANN. tit. 38, § 104 (1959). No substantive dimension is provided (*by statute*) for the Alabama concept of "navigable waters." Louisiana, under its civil law approach, has declared navigable water to be "public things." LA. CIV. CODE art. 453 (West, 1952). Therefore, the state *owns* navigable waters not in private control on August 12, 1910. LA. CIV. CODE ANN. § 9.1101 (1965). The limitations on riparians have been described earlier in this study. LA. CIV. CODE ANN. art. 455 (West 1952); Leighty at 398 n. 27. However, case interpretation may limit the extension of this public *ownership* as a basis for public *recreation*. See Delta Duck Club v. Barrios, 135 La. 357, 65 So. 489 (1914). See also OHIO REV. CODE ANN. § 1507.01 (1964) (circular statement in Shore Erosion Control Code). ORE. REV. STAT. § 780.030 (1969) (navigable waters open to steamboats and other craft); PENN. STAT. ANN. tit. 32, § 591 (1967); W. VA. CODE § 61-3-47 (1966).
50. ALASKA CONST. art 8, § 14. See also ALASKA STAT. ANN. § 44.03.010 (1967) (state sovereignty over submerged lands in the marginal sea described).
51. *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17 (1954). The support of the state constitution was probably only employed as a make-weight.
52. *State v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945).
53. Wisconsin has given some attention to its state constitutional version of the Northwest Ordinance of 1787. However, it appears that greater emphasis is placed on the Ordinance itself than on the state constitution. See Lundberg v. University of Notre Dame, 231 Wis. 187, 282 N.W. 70, 73 (1938) [explanatory memorandum at 285 N.W. 839 (1939)]. See generally Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335. State use of this ordinance was discussed earlier in this study. Leighty at 414-18.
54. *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961).
55. N.M. CONST. art. 16, § 2. See also N. M. STAT. ANN. § 75-1-1 (1968).
56. 51 N.M. 207, 182 P.2d 421 (1945).

for recreational uses.⁵⁷ Wyoming has a similar constitutional provision.⁵⁸ Colorado, on the other hand, has taken the opposite position and has indicated that these sweeping statements concerning public ownership of waters in western states should be applied only in the context of water allocation and consumptive uses.⁵⁹

Arkansas statutes have largely been concerned with private riparian rights. In one statute mineral rights in lands under *artificially* created navigable waters were declared to remain in private ownership, subject to public navigational and recreational pursuits.⁶⁰ Similarly, the Cache River was specifically declared nonnavigable, even though it once floated logs.⁶¹

California and Illinois represent the legislative patterns in which navigable waters are defined in a commercial context, essentially limited to valuable transportation uses, and the patterns in which certain waters are declared "navigable" merely by the operation of public power exercised.⁶² California law provides that "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation."⁶³ "Navigable waters" are then defined as those that come within the jurisdiction of the United States Corps of Engineers plus any others in the state "with the exception of those privately owned."⁶⁴ In like manner, the Illinois statute points in the direction of the federal test for navigability, particularly the expanded test stated in *United States*

57. Public access across private property is provided by statute. N.M. STAT. ANN. §§ 75-1-4, 75-1-5 (1968). See also N.M. STAT. ANN. § 62-1-6 (1960) (authority to float logs).

58. WYO. CONST. art. 8, § 1. *Public ownership* of the waters apparently means that private property in Wyoming is subject to an easement to allow these waters to pass. Upon the waters the public may travel. They may even step upon the stream beds if necessary to facilitate the recreational travel easement, but they are prohibited from general wading unrelated to navigation. *Day v. Armstrong*, 362 P.2d 137, 145-46 (Wyo. 1961).

59. See *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1905). For a list of these statutory and constitutional passages declaring waters in western states to be "public" see I WATERS AND WATER RIGHTS § 39.3 at 242-45. (Clark ed. 1967). See also Johnson, *supra* note 5 at 33-47.

60. ARK. STAT. ANN. § 10-1011 (Supp. 1969).

61. *Id.* at § 21-101 (1968); see *Central Clay Drainage Dist. v. Booser*, 143 Ark. 18, 219 S.W. 336 (1920).

62. CAL. HARB. & NAV. CODE §§ 101-106 (West 1955); ILL. STAT. ANN. Ch. 19 § 41 (1963) (Illinois River and Des Plaines River).

63. CAL. HARB. & NAV. CODE § 100 (West 1955).

64. *Id.* at § 36 (1970 Supp.). The concluding exception has the same circular characteristics as those found in other state statutes. See note 49 *supra*.

v. Appalachian Elec. Power Co.:⁶⁵ “any public waters which are or can be made usable for water commerce.”⁶⁶

The type of commercial use and the extent of that activity have provided the bases for a number of state statutory variations. Idaho, for example, has made navigable waters open as public highways for fishing purposes below ordinary high water mark⁶⁷ and has defined navigable waters as “. . . every other stream or part of a stream on which logs or timber can be floated to market or place of use during the high water season of the year.”⁶⁸ The same section defines logs and timber as “any cut timber having a diameter in excess of six (6) inches.” By contrast, Georgia and New Hampshire have specifically rejected log floating as an acceptable commercial use for purposes of navigability. Georgia requires “. . . boats loaded with freight in [the] regular course of trade. The mere rafting of timber or transporting of wood in small boats shall not make a stream navigable.”⁶⁹ The New Hampshire rule is essentially a copy of the definition in *The Daniel Ball*,⁷⁰ but it states that the term “navigable waters” shall not apply to streams which are merely used to float logs.⁷¹ Another variation is found in the unusual definition drafted by the Iowa legislature which states that “navigable waters” include lakes and streams capable of supporting vessels carrying one or more persons for a total of six months in one year out of every ten.⁷² Historical overtones permeate the Mississippi provision:

All rivers, creeks, and bayous in this state, twenty-five miles in length, that have sufficient depth and width of water for thirty consecutive days in the year, for floating a steamboat with carrying capacity of two hundred bales of cotton, are hereby declared to be navigable waters of this state.⁷³

65. 311 U.S. 377 (1940).

66. See ILL. STAT. ANN. ch. 19, §§ 153, 252, 285 (1963). See also note 49 *supra*.

67. IDAHO CODE ANN. § 36-901 (1961).

68. *Id.* at § 36-907.

69. GA. CODE ANN. § 85-1303 (1970). A similar definition is provided for “navigable tidewater.” *Id.* at § 85-1308. If the water is nonnavigable, then by statute the riparians are given exclusive use and enjoyment, including fishing and other recreational pursuits. See *id.* at §§ 85-1304, 1305.

70. 77 U.S. (10 Wall.) 557, 563 (1870).

71. N.H. REV. STAT. ANN. § 271:9 (1966).

72. IOWA CODE § 106.2 (Supp. 1971).

73. MISS. CODE ANN. § 8414 (1957); accord, *id.* at § 686.

Montana statutes provide for public fishing rights on navigable rivers⁷⁴ and define navigable lakes⁷⁵ and streams⁷⁶ as all those which are "navigable in fact" plus all those "... which have been meandered and returned navigable by the surveyors employed by the government of the United States"⁷⁷ In addition, "streams of sufficient capacity to transport the products of the country" are declared to be public highways for purposes of such commercial uses, subject to the proviso that there shall be no impairment of rights acquired prior to the enactment.⁷⁸ Under New York law, "navigable in fact" means navigable in its natural and unimproved condition.⁷⁹ New York, like New Hampshire, apparently prefers the federal test used in *The Daniel Ball* rather than the expanded *Appalachian* rule:

"Navigable in fact" shall mean navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation.⁸⁰

74. MONT. REV. CODE § 26-338 (1967) (between the lines of ordinary high water).

75. *Id.* at § 26.336.

76. *Id.* at § 26.337.

77. *Id.*

78. MONT. REV. CODE § 89-501 (1964). An alternative approach might be to declare all waters of the State a public resource but state that, "this shall not be construed as granting any new or additional rights of access nor as impairing riparian rights. The rights heretofore secured under the common law shall continue in full force and effect. . . ." Senate Bill No. 1236 (Mich. 1970). This bill died in committee, but similar legislation with substantial language changes has been proposed for the 1971 session of the Michigan legislature. See House Bill No. 4948 (Mich. 1971). The thrust of this particular bill is lake or stream modification or alteration, but the approach might be equally applicable to public surface use definitions. See Mich. Dept. of Natural Resources Legislative Proposal No. 7 (1971).

79. N. Y. NAV. LAW § 2(5) (McKinney 1941).

80. *Id.* This provision, however, is a definition for the limited purposes of a particular New York Code. Broader recreational uses under case decisions will be discussed in part three.

South Carolina apparently has taken a position at least slightly favoring the *Appalachian* rule:

All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this state as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly. S.C. CODE ANN. § 70-1 (1962). (Emphasis added.)

Demonstrating the diversity of state views of police power controls over navigable waters, North Dakota and Oregon say nothing with respect to "navigability in fact" but borrow the Montana concept of defining navigability in terms of surveys made by the federal government.⁸¹ In North Dakota meandered lakes are navigable for conservation purposes and for purposes of water development, storage, and distribution.⁸² No statutory comment is made concerning North Dakota streams, and the scope of surface uses on both lakes and streams has been left to judicial determination. (Oregon has dealt with streams in the context of improving navigation.)⁸³ Moreover, the North Dakota courts have limited sovereign exercises of power by the legislature to areas below ordinary high water.⁸⁴ Similarly, state statutes may be subject to judicial review under the federal test for navigability. For example, an early Oklahoma statute⁸⁵ was held invalid in the narrow context of ownership of bed title.⁸⁶ Here the federal rule is mandatory; subsequently the legislature repealed the provision.⁸⁷

South Dakota refers to both "navigable" waters and to "public" waters in several statutes but provides no definition for either term.⁸⁸ Land below ordinary high water mark may be regulated by state statute.⁸⁹ However, the legislature has only attempted to measure the upland boundary of public and private rights without defining "navigability" and with-

81. N.D. CODE ANN. § 61-15-01 (1960); ORE. REV. STAT. § 274.430 (1969).

82. N.D. CODE ANN. § 61-15-02 (1960) (limiting police power exercises to areas below ordinary high water mark). See also note 20 *supra* and accompanying text.

83. In Oregon any watercourse "susceptible of being made navigable" can be improved for useful transportation. The rule is similar to the federal test under the *Appalachian* standard. See ORE. REV. STAT. § 780.010 (1969). Once a watercourse becomes navigable, it is declared a public highway for steamboats and other craft. *Id.* at § 780.030. See also *id.* at § 274.430 (beds of meandered lakes declared to be state owned). However, as in the case of North Dakota, surface use rules have turned to common law developments. See *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936).

84. See *State v. Brace*, 76 N.D. 314, 36 N.W.2d 330 (1949). However, there is *dicta* to the effect that attempts to destroy totally a given water resource could be prevented by legislative action above high water. See *Bigelow v. Draper*, 6 N.D. 152, 163, 69 N.W. 570, 573 (1896).

85. OKLA. REV. LAWS (1910) § 6639.

86. *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77 (1922).

87. OKLA. STAT. ANN. ch. 75, § 1 (1965).

88. See S.D.C.L. ANN. §§ 46-25-5, 46-26-1 (1969). Section 46-25-5 describes "public waters" on the basis of the amount of contamination they may lawfully receive, as determined by a stream classification committee.

89. *Id.* at § 43-17-1.

out spelling out the extent and scope of usufructuary surface interests for recreational purposes:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways.⁹⁰

The Texas definition is perhaps the most consistent with the principles of predictability:

All streams so far as they retain an average width of thirty feet from the mouth up shall be considered navigable streams⁹¹

However, Texas courts have insisted that the determination of navigability is a *judicial* question.⁹² Public lakes in Texas are those for which the state owns the bed or "reserves the right of access for its citizens for fishing, boating, hunting or other recreation."⁹³ Thus the mere lack of roads to such a lake (or to a stream navigable under the thirty-foot rule) creates a "public necessity" for purposes of authorizing public road construction.⁹⁴

Vermont statutes contain a mixture of definitions of "navigable" waters and "public" waters. "Navigable waters" mean:

Lake Champlain, Lake Memphremagog, the Connecticut River, all natural inland lakes within Vermont and all streams, ponds, flowages and other waters within the territorial limits of Vermont, including the Vermont portion of boundary waters, which are boatable under the laws of this state.⁹⁵

90. *Id.* at § 43-17-2.

91. TEX. CIV. STAT. ANN. art. 5302 (1962).

92. *State v. Bradford*, 121 Tex. 515, 50 S.W.2d 1065 (1932).

93. TEX. CIV. STAT. ANN. art. 6711a(7) (1960).

94. *Id.*

95. VT. STAT. ANN. tit. 10, § 1101 (Supp. 1970). There is also a broad public trust declaration with respect to state lakes.

Public lands lying under lakes and ponds which are public waters of Vermont are a public trust, and it is hereby declared to be the policy of the state that these lands shall be managed in the public interest and to promote the general welfare. . . . *Id.* at tit. 29, § 401 (1970). However, these declarations may relate only to the jurisdiction of the Vermont Water Resources Board.

On the other hand, "public" waters mean "navigable waters excepting those waters in private ponds and private preserves. . . ."⁹⁶ The statutory definition of a private pond is ". . . a natural pond of not more than twenty acres or an artificial pond entirely upon his premises. . . ."⁹⁷ However, these definitions are found in a shoreland protection act. Actual recreational uses may still require case decisions.⁹⁸ (Hence there is the general caveat to the reader not to review any one of the three parts of this study in isolation.)⁹⁹ Moreover, the definitions in Vermont as well as many of those for the other states discussed may have the inherent limitation of being defined *only for the purpose* of a particular code.¹⁰⁰ The mere fact that a legislature has drafted a definition in some context may or may not provide a basis for determining the scope of public or private surface rights in any given state. A full survey of the cases and statutes in each state therefore is essential.¹⁰¹ Here the objective is merely to demonstrate the amount of legislative activity that has occurred to date.

Virginia is another illustration of this last point. Virginia provides that the Commonwealth, subject to prior land grants, owns the *beds* of bays, rivers, and creeks (as well as the shores of the sea) within its territorial jurisdiction. This bed ownership is also declared to be the basis for establishing a "common" with respect to these lands to be used by "all the people of the State for the purpose of fishing and fowling, and taking and catching oysters and other shellfish, subject to . . . any future laws that may be passed by the General Assembly."¹⁰² Another section of the same statute declares riparian rights to extend only to low-water mark.¹⁰³ But on the face of the legislation there is little more than the impression that the public may pursue diverse fields of recreation over the surface

96. VT. STAT. ANN. tit. 10, § 1101 (Supp. 1970).

97. *Id.* at § 5210.

98. See, e.g., State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944).

99. Part three will integrate the statutory rules developed in this article with applicable case law.

100. See, e.g., NEV. REV. STAT. §§ 537.010 - .030 (1967); N.Y. NAV. LAW § 2(5) (McKinney 1941).

101. This has been done in a few states. See, e.g., Bartke, *Navigability in Michigan in Retrospect and Prospect*, 16 WAYNE L. REV. 409 (1970); Waite, *Public Rights in Indiana Waters*, 37 IND. L.J. 467 (1962); Waite, *Public Rights in Maine Waters*, 17 MAINE L. REV. 161 (1965); Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335.

102. VA. CODE § 62.1-1 (1968).

103. *Id.* at § 62.1-2.

waters of Virginia's inland lakes and streams. If navigability remains a relevant consideration for dividing private and public rights, the boundary is left unclear. As indicated earlier in this part of the study, such declarations may be merely a convenient method for expressing the state's intention to provide public surface rights over "private" waters, those where bed title is held by the riparian.¹⁰⁴ Of course, the statute itself only vaguely reveals the beds which remain state owned. Therefore, courts¹⁰⁵ may still be required to measure the respective limits of public and private interests under the federal test for navigability. In short, like the special purpose legislation in the last paragraph, this statute may be limited to a rather narrow area of application. If indeed public rights are limited to state owned beds, then these rights will be measured by a judicial determination of the navigability of *each* lake and stream under the federal test in *The Daniel Ball*¹⁰⁶ on the date Virginia was admitted to the Union.

Wisconsin and West Virginia are the last two states which have demonstrated legislative activity concerning "navigability." As indicated earlier, West Virginia does not provide a definition of this term. However, "navigable" and "floatable" are used in a context which provides a weak argument that the two terms were intended to be used synonymously.¹⁰⁷ On the other hand, Wisconsin has a rather complete statutory program. The Wisconsin Constitution, which was discussed in part one of this study,¹⁰⁸ provides:

. . . the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.¹⁰⁹

104. See note 19 *supra* and accompanying text.

105. See, *e.g.*, *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965); *Boerner v. McCallister*, 197 Va. 169, 89 S.E.2d 23 (1955).

106. 77 U.S. (10 Wall.) 557, 563 (1870). See also *Utah v. United States*, 39 U.S.L. WEEK 4717 (U.S. June 7, 1971).

107. W. VA. CODE § 61-3-47 (1966). See also W. VA. CONST. art. 2, § 1.

108. Leighty at 414-18. See generally Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335; Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542.

109. WIS. CONST. art. 9, § 1.

This provision is complemented by *broad* statutory language:

(1) All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.

(2) All streams, sloughs, bayous and marsh outlets, which are navigable in fact *for any purpose whatsoever*, are declared navigable¹¹⁰

2. Other Concepts of Public Waters

While Indiana has some early case law in point, statutes have been the focal point for providing a basis for public surface rights to recreational waters. Since Professor Waite has provided a thorough discussion of this particular state,¹¹¹ only a few brief comments need be made here.¹¹² Moreover, the

110. WIS. STAT. ANN. § 30.10 (1964). (Emphasis added.) See also Note, *The Muench Case: A Better Test of Navigability*, 1957 WIS. L. REV. 486.

111. See generally Waite, *Public Rights in Indiana Waters*, 37 IND. L.J. 467 (1962). See also Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322, 1339-40 (1968); Note, *The State v. the Riparian—A Problem of Water Use and Control*, 1961 WASH. U.L.Q. 257.

112. There is some mixture of "navigable waters" and "public waters" in the Indiana statutory scheme. "Public" waters are discussed in the text, but notice should be given to "navigability" because many states (*e.g.*, Michigan) are still struggling with statutory definitions and approaches to that term. Indiana, like California and Illinois, has declared certain named waters to be "navigable." *E.g.*, IND. ANN. STAT. § 68-109 (Burns 1961) (Kankakee River).

The current session of the Michigan legislature will have before it for consideration a stream classification bill. The bill was developed by the Michigan Department of Natural Resources but does not yet have an official Senate number. Section one of the bill was drafted by this author. The remainder of the bill is largely the product of others and provides for (1) a stream classification committee (now designated the Michigan Natural Resources Commission) which is appointed by the governor (2) petitions to the committee by individual riparians, county boards of commissioners, or state water agencies "to make a finding and determination of the public or private status of all or a part of such waters" (3) notices and public hearings (4) a determination of which waters or segments thereof are "public" (5) filing the determination as "prima facie proof of the fact of public or private status for all purposes, unless modified by a court order" (6) judicial review by aggrieved riparians. The "public" waters definition in section one deliberately omitted consideration of *lakes* (based on the assumption that significant lakes would have a navigable inlet or outlet or would have other public access points), but it does provide the standard under which the Commission is to make its determination:

Sec. 1. A river, stream, creek or channel which, during any stage, including the ordinary high water stages, has been or is being used or is capable of being used in its natural and ordinary condition for floating any boat, canoe, skiff, or craft with at least on person aboard, or for floating products for transportation purposes is declared public. Mich. Dept. of Natural Resources Legislative Proposal No. 7 (1971).

In like manner, Indiana has established the mechanism for stream classification:

primary objective here is merely to describe the statutory approaches and to reserve categorical statements about state "rules" for the case interpretations provided in part three of this study.

The Indiana legislature has not emphasized bed ownership and has instead been concerned with usufructuary interests. *Streams* have been subjected to broad exercises of the police power. While all public rights have not been specifically listed (which would perhaps be both impossible and undesirable), recreational surface uses may be guaranteed to the extent that they serve a "useful and beneficial purpose:"

Water in any natural stream, natural lake, or other natural body of water in the state of Indiana which may be applied to any useful and beneficial purpose is hereby declared to be a natural resource and public water of the state of Indiana and subject to control and/or regulation for the public welfare as hereinafter determined by the general assembly of the state of Indiana. Diffused surface water flowing vagrantly over the surface of the ground shall not be regarded as public water. . . .¹¹³

On the other hand, public rights in *lakes* have received even greater legislative attention: First the public is declared to have a *vested* interest in these waters.

The natural resources and the natural scenic beauty of Indiana are declared to be a public right, and the public of Indiana is hereby declared to have a *vested* right in the preservation, protection, and *enjoyment* of all the public fresh water lakes, of Indiana in their present state, and the use of such waters for recreational purposes.¹¹⁴

Then public fresh water lakes are defined not by reference to bed title but by using the police power to codify existing

The boards of commissioners in the several counties in this state are authorized to declare any stream or water-course in their respective counties navigable, on the petition of twenty-four [24] free-holders of the county, residing in the vicinity of the stream. . . . IND. ANN. STAT. § 68-101 (Burns 1961).

However, the county board is only to make a study and to declare a stream navigable "if satisfied that the stream, if navigable, would be of public utility." *Id.* at § 68-102. Thus, the board is not provided with a standard on which to rest its determination.

113. *Id.* at § 27-1402 (Burns 1970).

114. *Id.* at § 27-620 (1970). (Emphasis added.)

customs, basing public use on a theory of common law dedication.¹¹⁵ Rather than risking the constitutional challenge of a "taking," the sovereign exercise is extended only to essentially unused "rights" for which public user has been acquiesced in by riparian owners.

Public fresh water lakes shall mean all lakes which have been used by the public with the acquiescence of *any* or all riparian owners. . . .¹¹⁶

Finally, a brief listing of public rights in Indiana lakes is attempted:

The state of Indiana is hereby vested with full power and control of all of the public fresh water lakes in the state of Indiana both meandered and unmeandered and the state of Indiana shall hold and control all of said lakes in trust for the use of all of its citizens for fishing, boating, swimming, . . . and for *any purposes* for which said lakes are ordinarily used and adapted, and no person owning lands bordering any such lakes shall have the exclusive right to the use of water of any such lake or any part thereof.¹¹⁷

Bed title is also viewed as immaterial by the Minnesota legislature. Reference is made in the statute to existing rights, but these probably include only naked title to submerged lands.¹¹⁸ Riparian usufructuary considerations have been subordinated to surface use and enjoyment by the public.¹¹⁹ Thus, all waters (whether a lake or a stream) which are "capable of substantial beneficial public use are public waters subject to the control of the state."¹²⁰ This statute, recognizing the mandatory nature of the federal test for navigability in the narrow context of bed title, has extended controls for surface use to areas in which the submerged lands are privately owned:

The public character of water shall not be determined exclusively by the proprietorship of the under-

115. See authorities cited note 111 *supra*.

116. IND. ANN. STAT. § 27-621 (Burns 1970). (Emphasis added.) See also Sax, *supra* note 2 at 562-63 (distribution of natural resources as trust assets between public and private interests).

117. IND. ANN. STAT. § 27-654 (Burns 1970). (Emphasis added).

118. See Johnson v. Seifert, 257 Minn 159, 100 N.W.2d 689, 694 (1960).

119. See State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699 (1963); Johnson v. Seifert, *supra* note 118. *But cf.* State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954).

120. MINN. STAT. ANN. § 105.38 (1964).

lying, overlying, or surrounding land or on whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union. This section is not intended to affect determination of the ownership of the beds of lakes or streams.¹²¹

The precise extent of public rights is unclear, but private riparian interests probably do not extend beyond bed title, all surface uses being held in common. The statute itself does not state this position with respect to recreational uses quite so bluntly, but case interpretations have gone a considerable distance in that direction.¹²² However, it should be noted that the right of a citizen to exercise one of these uses is protected under this system in an *indirect manner*. The state merely controls the waters by protecting them from being modified or consumed to the detriment of recreational functions.¹²³

Ohio and Utah, by contrast, have mentioned "public" waters on a much more limited basis. For example, under its drain code Ohio has created public rights in *artificial* watercourses serving as agricultural drainage ditches. After the watercourse has been established for seven years, the public has the same rights (left unspecified) to these waters as they have to natural watercourses, but subject to subsequent improvement projects.¹²⁴ Similarly, Utah has declared all waters within the territorial jurisdiction of Utah to be the property of the public.¹²⁵ However, except for New Mexico and Wyoming (discussed earlier), these declarations in most western states probably were intended only to control consumptive (not surface) uses.¹²⁶

121. *Id.* See also MINN. CONST. art. II, § 2.

122. See authorities cited note 119 *supra*.

123. See *State v. Kuluvar*, 266 Minn. 408, 123 N.W.2d 699 (1963).

The broad interest of the public in the beneficial use of the numerous and varied lakes of Minnesota does not lend itself to cataloging the countless ways in which any particular interference with public waters may be detrimental to public use and enjoyment. The standard must necessarily be broad and rest upon the application of judgment to a given set of facts. Moreover, the character of the change must be one which affects the public as distinguished from private interest. The statute is not designed to protect private rights, since a remedy for their infringement is available. *Id.*, at 417, 123 N.W.2d at 705-06.

124. OHIO REV. CODE ANN. § 6131.59 (1954).

125. UTAH CODE ANN. § 73-1-1 (1963).

126. See *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1905). See also *Monroe v. State*, 111 Utah 1, 175 P.2d 759 (1946).

III. CONCLUSION

A. Analysis

As long ago as the Institutes of Justinian, running water belonged collectively to the people. At some point in time the law of real property began to place emphasis on exclusive use and enjoyment by private interests. To oversimplify, movements toward or away from collective ownership of natural resources appear historically to have been partially a function of population density—the more extensive the resource, the more available for allocation to private control. As indicated in the first part of this study, under Anglo-American common law developments, some peculiar property concepts emerged; dry land was treated in a different manner than was the navigable lake or stream and its bed. In a somewhat different context, Mr. Justice Holmes has perhaps captured the essence of the problem: “Upon this point, a page of history is worth a volume of logic.”¹²⁷

As a nation approaches its two-hundredth anniversary, it might not be presumptuous to suggest that a return to more collective recreational “ownership” and use of lakes and streams is in order. The weight of history on the *source* of public and private rights in navigable waters (discussed in part one of this study) and upon the *scope* of these rights (as more particularized in part three) is not to be treated lightly. The expectations of private investments should not be cast aside by a single legislative enactment. However, a theoretical basis for radical change exists in most states. Outside some general statements (frequently made by way of conclusion and not as the product of analysis) to the effect that riparian rights are property rights which cannot be destroyed—the constitutional challenges do not appear to be significant.¹²⁸ On the other hand, the legislative mechanism should provide for a *gradual* elimination of existing, *private* riparian rights in navigable and other public waters. If without begging the question the enactment “takes” only “unused” rights, proceeds on the basis of the police power, and protects existing rights and expectations by treating them as

127. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

128. See generally authorities cited note 9 *supra*.

nonconforming uses and providing for their eventual elimination—a state court should have an ample range of theoretical bases for developing concepts of collective “ownership” and expanded public recreational use of surface waters. The implications of sovereignty discussed in the introduction seem clear; this approach is the direct one. An alternative approach might be to limit the transferability of the surface use aspects of the “bundle” of riparian rights. This approach might be supplemented by heavy taxation of the right to transfer these usufructs as part of the land value. The taxation might provide the incentive to transfer these limited surface interests to a public body.¹²⁹ Other bases for direct elimination of private controls over surface use, under the police power, include variations of the public trust doctrine, state counterparts to the federal navigational servitude,¹³⁰ and expansions of the concepts of “navigability” and “public” waters.¹³¹ It would appear that a legislature could, using any of the alternatives listed here, provide for public use of resources traditionally described as “private waters.” The heart of the problem is an analysis of the nature of the “property” interest in surface water use—whether this interest is held in public or private “ownership.” At least one author has grasped the essence of this interest:

The legal basis of this governmental power to control the uses of watercourses may take one of several particularized forms; nevertheless through all of these forms run the common threads of the public good and those governmental powers inherent in any organized society. Unquestionably all property in society is held subject to being affected by the powers of the sovereign, exercised in the common good. However, it is noteworthy that the governmental power over watercourses is more substantial than that relating to property rights in things other than natural resources. The explanation of this fact lies in the greater public interest in natural resources.¹³²

129. Cf. MALONEY, PLAGER & BLADWIN, *supra* note 48, § 125.3(c).

130. See Comment, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521 (1969). See also Note, *Public Right of Navigation and the Rule of No Compensation*, 44 NOTRE DAME LAWYER 236 (1968).

131. See generally authorities cited notes 9, 10 *supra*.

132. Lauer, *supra* note 9 at 223.

A further consideration is environmental protection legislation. Michigan has recently passed a unique form of legislation designed to facilitate private litigation to protect "the air, water and other natural resources *and the public trust therein.*"¹³³ The public trust doctrine includes the concept that the general public, collectively representative of state sovereignty, *owns* the natural resources of the state—not in the proprietary sense, but as an extension of residual *imperium*. Hence, when the distributive share of available resources (*e.g.*, surface waters) has been reduced by allocations to private control, the "public trust" has been impaired.¹³⁴ Though somewhat unlikely, a court could therefore extend this piece of legislation to eliminate private interests in navigable waters. It might require, however, a number of individual suits.

A final problem is that of public responsibility. Even if the legislature turns all surface rights over to public use, riparians will still live along these bodies of water. Excessive public use of traditionally private waters could destroy not only the values related to privacy and aesthetics but also all other reasonable upland property values. A brief reading of the facts in *Botton v. State*¹³⁵ will provide a description of the extent to which public abuses may go. The state has the obligation through appropriate legislation and implementation to protect the riparians' interests.¹³⁶

B. A Proposal

The significance of a page of history soon becomes obvious when one attempts to draft a legislative definition of navigable or public waters. "Vested" rights become important; the balancing of public and private interests is essential. This author can throw few stones at those who continue to attempt to divide public and private rights on the basis of

133. P.A. No. 127 of Public Acts of Michigan (1970). (Emphasis added.)

134. See generally Sax, *supra* note 2. *But see* Kerpelman v. Board of Public Works, 276 A.2d 56 (Md. 1971).

135. 69 Wash. 2d 751, 420 P.2d 352 (1966).

136. *Id.* at 757, 420 P.2d at 356. See generally Johnson & Morry, *Filling and Building on Small Lakes—Time for Judicial and Legislative Controls*, 45 WASH. L. REV. 27 (1970); Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1970); Note, *The Tale of Two Lakes—A New Chapter in Washington Water Law*, 43 WASH. L. REV. 475 (1967).

the "navigability" of the water. Strong lobbying groups must be considered in the drafting process if any realistic hope of passage is to be created. Hence, frequently the navigability touchstone must remain. However, the more indirect the approach the more difficult implementation becomes. Therefore, the following proposal is based on the assumption that the more *direct* legislative approaches described in this article will be employed.

The first requirement would appear to be a broad state constitutional mandate. The Michigan provision might be a starting point.

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.¹³⁷

However, a more direct approach declaring the public ownership of usufructuary interests, and patterned after the language of the Minnesota statute quoted above, might be more appropriate.¹³⁸ To provide a degree of certainty to support the mandate, a description of both public and private rights is required. The language of the Indiana statutes appears sufficiently forceful to serve this function.¹³⁹

On the other hand, one may find himself in the position of this author when asked to avoid the problems of "naviga-

137. MICH. CONST. of 1963, art. 4, § 52.

138. See Note 121 *supra* and accompanying text.

139. See notes 111-117 *supra* and accompanying text.

Michigan has recently passed the Natural River Act of 1970 under which the Michigan Natural Resources Commission is given authority to designate wild and scenic rivers. To implement this program the Commission is given broad administrative rule-making powers. In addition, *state* and/or local zoning is authorized.

The commission, in the interest of the people of the state and future generations, may designate a river or portion thereof, as a natural river area for the purpose of preserving and enhancing its values for water conservation, its free flowing condition and its fish, wildlife, boating, scenic, aesthetic, flood plain, ecologic, historic and recreational values and uses. The area shall include adjoining or related lands as appropriate to the purposes of the designation.

P.A. No. 231 of Public Acts of Michigan (1970).

bility” and at the same time to codify the common law concerning rights in public waters.¹⁴⁰ The task of course is impossible. However, looking hard at the compromise requirements of the legislative process described above concerning lobbyists, and attempting to provide at least a modicum of certainty, the following passage was drafted without apology:¹⁴¹

Sec.1. A river, stream, creek or channel which, during any stage, including the ordinary high water stages, has been or is being used or is capable of being used in its natural and ordinary condition for floating any boat, canoe, skiff, or craft with at least one person aboard, or for floating products for transportation purposes is declared public.

140. The legislative efforts in Michigan have been a reaction to a recent Michigan case: *Petition of County Board of Supervisors*, 381 Mich. 180, 160 N.W.2d 909 (1968). See generally Bartke, *Navigability in Michigan in Retrospect and Prospect*, 16 WAYNE L. REV. 409 (1970).

141. For a discussion of some of the limitations of the bill see note 112 *supra*. The Michigan struggle for an adequate legislative definition has been a political issue for some time. See House Bill No. 2377 (Mich. 1970); House Bill No. 3105 (Mich. 1967). These earlier bills never passed.