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THE PUBLIC TRUST DOCTRINE AND FEDERAL CONDEMNATION: A CALL FOR RECOGNITION OF A FEDERAL COMMON LAW

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INTRODUCTION

In the aftermath of the American Revolution, the people of each of the newly formed states supposedly acquired the "absolute right to all . . . navigable waters and the soils under them for their own common use . . . ."[1] Thus, the public trust doctrine was established. In 1988, however, a federal district court, in *United States v. 11.037 Acres of Land*,[2] issued a decision which, for the first time, cast doubt upon how 'absolute' this so-called public trust would be.

In *11.037 Acres*, the court noted that the State of California had acquired the tidal lands in question as an attribute of sovereignty upon admission to the union. Under the public trust doctrine, these lands were to be preserved for the public uses of navigation, commerce, and fishing.[3] The State of California subsequently conveyed the property to the City of Oakland for use

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The views expressed in this article are those of the authors and are not to be taken as expressing the views of the State of Vermont or its Attorney General's Office, or of the State of Maine.

1. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

2. 685 F. Supp. 214 (N.D. Cal. 1988).

3. *See infra* note 33 and accompanying text.

as a port facility. Eventually, the lands were filled in and ceased to be tidal. In 1983, the United States filed a Complaint and Declaration of Taking against the property and sought thereby to obtain fee simple title subject only to an existing subsurface easement for the Bay Area Rapid Transit District. In its Answer, the State of California sought a declaration that the federal government's taking was subject to the public trust easement of the State.[4]

Reasoning that under the Supremacy Clause the state may not limit or frustrate the federal power of eminent domain, the court rejected California's claim and held that the federal government's condemnation of the lands "extinguished" the state's public trust easement.[5]

With many federal facilities nationwide on filled land, and with the specter of the closing of federal military bases in the 1990s, there is a considerable possibility that the federal government may convey some of its lands to private parties for private development.[6] If the court in *11.037 Acres* is correct in its conclusion that the state's public trust interest is extinguished by federal condemnation,[7] then subsequent conveyances by the United States may leave unprotected the public right to use such lands.

This article explores the possibility that a federal common law of public trust must be recognized as an alternative protection from the threat that once-public assets may be forever lost to public use. First, this article briefly reviews the origins of the public trust doctrine and its consideration as a public right. Second, it analyzes how the United States Supreme Court has addressed the interaction between public trust doctrine and principles of federal-

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4. 11.037 Acres, 685 F. Supp. at 215.

5. *Id.* at 216-17.

6. Filled lands along navigable waterways are often prime targets for private development for condominiums, offices, and retail space. *See, e.g.*, Vermont v. Central Vermont Ry., Inc., ___ Vt. ___, 571 A.2d 1128 (1989), *cert. denied*, Central Vermont Ry., Inc. v. Vermont, 110 S. Ct. 2171 (1990).

7. For discussion purposes, this article will initially accept as correct the *11.037 Acres* analysis. This decision may well be flawed, however, because a state is powerless to abdicate its trust over navigable waters and underlying lands "so as to leave them entirely under the use and control of private parties." Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 453-54 (1892). Moreover, because the states retained control of the navigable waters as an essential attribute of state sovereignty, the federal government is incapable of gaining such control by condemnation or otherwise. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). Finally, if the states did not delegate public trust control to the federal government in the Constitution, then the federal government does not have the power to vitiate a state's control of the trust.

ism. Third, the article reviews the law of federal condemnation (or eminent domain). Fourth, the article exposes the inconsistencies created by the fusion of the public trust doctrine and federal condemnation of trust property. It addresses the extent to which the federal government can displace state management control over public trust property when it condemns trust property located within an affected state. The article further discusses whether the federal government must assume management control over trust property, assuming it can displace state control. It also suggests that a federal common law of public trust should be formally adopted by courts to bind the federal government to manage trust property once state control is lost. Finally, the article reviews whether courts can fashion the proposed federal common law given existing federal legislation.

I. Origins of the Public Trust Doctrine

A. English Common Law

Modern public trust jurisprudence has evolved from Roman and English law.[8] By English common law, title to the sea and the sea-bed were vested in the king.[9] Further, the king controlled tidal waters under his *jura regalia*, or prerogative rights that were incident to the powers of the sovereign to control commerce.[10]

As initially articulated in Lord Hale's treatise, *De Jure Maris*, the king's rights and responsibilities in navigable waters were defined by three concepts: (1) the *jus publicum*, or the rights of the general public; (2) the *jus regium*, or the right to manage resources for the benefit of the public; and (3) the *jus privatum*, or the private right of title.[11] Even though the king could convey a *jus privatum* interest to private parties, English common law recognized that such a conveyance was subject to the *jus publicum* in-

8. A detailed analysis of the historical origins of the public trust doctrine can be found in many works and is beyond the scope of this article. *See generally* Shively v. Bowlby, 152 U.S. 1, 11-15 (1893); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410-14, 421-24 (1842). *See also* 1 R. Clark, Waters and Water Rights §§ 35-37 (1967); J. Gould, Law of Waters §§ 17-21, 67 §§ 30-34, 77 (1883); Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 633-37 (1986); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-78 (1970).

9. *Shively*, 152 U.S. at 11; J. Gould, *supra* note 8, § 3.

10. J. Gould, *supra* note 8, § 17, at 33.

11. *Shively*, 152 U.S. at 11-13; J. Gould, *supra* note 8, § 17, at 34; Lazarus, *supra* note 8, at 636.

terest.[12] Thus, the king's own powers were limited by the rights of the general public. Even a grant of the *jus privatum* by the king himself could not extinguish the public rights of commerce, navigation, and fishery.[13]

B. Common Law Recognition by the States

The application of this English common law to American law is not without confusion. As the United States Supreme Court recognized:

> When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.[14]

The states' rights in their navigable waters and the soils under them included not only those rights which the king possessed, but also the rights and responsibilities held by the Parliament.[15]

It is now generally recognized that, after the American Revolution,[16] the states gained control over both the *jus privatum* and *jus publicum* in their sovereign capacities.[17] State control may be limited, however, when in conflict with the superior powers of the federal government.[18]

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12. *Shively*, 152 U.S. at 12-13, 48; J. GOULD *supra* note 8, § 17, at 34-35.

13. J. GOULD, *supra* note 8, § 17, at 34-35, § 20. "It is incompetent for the Crown in modern times to abridge or destroy, by its own act, the public rights either of navigation or fishery, and it cannot confer upon its grantee a greater power in this respect than that with which it is itself vested." *Id.* § 21, at 43.

14. Shively v. Bowlby, 152 U.S. 1, 16 (1893) (quoting Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)).

15. *Martin*, 41 U.S. (16 Pet.) at 416; J. GOULD, *supra* note 8, § 32, at 72.

16. Chief Justices Kirkpatrick and Taney believed that the king never intended to clothe the states with both *jus privatum* and *jus publicum* rights, but merely the *jus publicum* which was essential to the powers of government. J. GOULD, *supra* note 8, § 32, at 74. It is recognized however, that the *jus privatum* was abandoned by the crown and not asserted by the states until after the Revolutionary War. *Id.* at 74-75.

17. *Shively*, 152 U.S. at 14-15; Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845); *Martin*, 41 U.S. (16 Pet.) at 410. *See also* 1 R. CLARK, *supra* note 8, § 36, at 192-95; J. GOULD, *supra* note 8, § 32, at 75; Lazarus, *supra* note 8, at 637-38; SAX, *supra* note 8, at 476.

18. J. GOULD, *supra* note 8, § 32, at 71-72. "And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, *subject to the rights surrendered to the national government by the Constitution of the United States.*" *Shively*, 152 U.S. at 14-15 (emphasis added). *Cf.* U.S. CONST. amend. X.

C. The United States Supreme Court Recognizes the Public Trust Doctrine

The earliest pronouncement by the United States Supreme Court regarding the title and dominion over the tidal waters and the lands underlying them was in *Martin v. Waddell.*[19] In *Martin*, a resident of New Jersey brought an ejectment action claiming title to one hundred acres of submerged land which had previously been conveyed by charter from the King to the Duke of York.[20] The Duke granted title to private individuals who subsequently conveyed their interests to the plaintiff.[21]

The *Martin* Court rejected the plaintiff's claim of absolute ownership and construed the grants by the King to the Duke very strictly.[22] The Duke was said to have received the lands under the grant "in the same condition in which they had been held by the crown, and upon the same trusts."[23] The Court held that "[n]o words [in the grant were] used for the purpose of separating them from the *jura regalia*, and converting them into private property . . . ."[24] Because the King was prevented from vitiating the "public trust [which was] for the benefit of the whole community, to be freely used by all for navigation and fishery,"[25] the Duke was also barred from alienating the lands independent of the trust.[26]

Moreover, "when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the State."[27] The *Martin* Court made it clear that, after the American Revolution, the states succeeded to all the rights, incidents, and limits possessed or imposed upon the crown, subject only to the superior rights of the federal government.

It was not until the landmark case of *Illinois Central Railroad*

19. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).
20. *Id.* at 407.
21. *Id.*
22. *Id.* at 408-11.
23. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842).
24. *Id.*
25. *Id.*
26. *Id.* at 413-14.
27. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842).

Co. v. Illinois[28] that the United States Supreme Court defined the scope of the obligations imposed upon the states by the public trust doctrine. In 1869, the Illinois legislature granted to the Illinois Central Railroad Company fee simple absolute in all the land underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along Chicago's major business district.[29] Subsequently, in 1873, the Illinois legislature repealed the 1869 grant.[30] The Illinois legislature then brought an action seeking a judicial determination of the title to the submerged lands in question.[31]

The Court, treating the 1869 grant as a conveyance, sought to determine whether the state legislature was competent to make a grant which deprived the state of ownership of the submerged lands and the consequent control of its waters.[32] The Court distinguished the title held by the state to lands under navigable waters from that held in other lands. The former is a "title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[33] Because the state as sovereign is *required* to preserve such waters for use by the public, the public trust doctrine would not "sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake."[34]

In holding that the control of the State can *never* be lost, the Court noted that the State may delegate its trust powers to another body for a limited period, but there "always remains with the State the right to revoke those powers [to prevent them from being] placed entirely beyond the direction and control of the State."[35] Thus, "[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the

28. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

29. *Id.* at 448-49.

30. *Id.* at 449.

31. *Id.* at 433.

32. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

33. *Id.*

34. *Id.* at 452-53. "The control of the State for the purposes of the trust can *never* be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453 (emphasis added).

35. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453-54 (1892).

State can be resumed at any time."[36]

The Court's holding, although lacking explicit constitutional footing, flows from "the public character of the property, being held by the whole people for purposes in which the whole people are interested,"[37] and the *jus reqium* power exercisable in the state for the benefit of every citizen.

D. The Public Trust Doctrine as a Public Right

Two principles emerged from *Martin* and *Illinois Central,* and have remained unfettered throughout modern public trust litigation. First, that the states, after the American Revolution, inherited all the rights, incidents and limits once possessed by, or imposed upon, the king, subject only to the superior rights of the federal government.[38] Second, that no state can forever abdicate its public trust obligations.[39] These principles are firmly founded upon the same principles described in English common law.[40]

Common law public trust principles recognized that the rights

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36. *Id.* at 455.

37. *Id.* at 456. In the *Illinois Central* case, the Court stated that:

> The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right.

Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (quoting People v. New York and Staten Isl. Ferry Co., 68 N.Y. 391, 392 (1876)).

38. *See supra* note 14 and accompanying text.

39. *See supra* note 34 and accompanying text.

40. *See supra* notes 8-13 and accompanying text. As to the states' assumption of the King's role as sovereign, Chief Justice Taney observed:

> Indeed, it could not well have been otherwise; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another.

Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842).

to the sea and the tidelands were common to all the public.[41] The obligation of the king to the *jus publicum* rests upon the notion that:

> '[m]any of the king's rights . . . are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have a right of navigation and of fishing.' So far as the use of tidewaters is necessary for these purposes, the public are invested with rights which are as clearly established as those of the Crown, and its private right is burdened with a trust or charge in favor of the public.[42]

As *Illinois Central* clearly recognized, the states, as sovereigns, owe an obligation to the general public to prevent the interference or obstruction of the use of the seas, tidelands and inland navigable waters by private parties.[43] The "State represents the people, and the ownership is that of the people in their united sovereignty."[44] It is now undisputed that the soil under navigable waters is held by the state in trust for its citizens for their common use in navigation, commerce, and fishing.[45] The idea that the state can forever vitiate its trust obligation to the public is void as against public policy.[46] Moreover, courts have consistently recognized that the public trust doctrine is intended to prevent the usurpation of public rights.[47]

Recognition of the public trust doctrine as a public right is important in several respects. First, as a trustee of navigable waters, the state is obligated to preserve and protect these waters for use by the public. Thus, the state may bring legal actions on behalf of the public against property owners who threaten to violate the public trust. Members of the public, however, may also be permitted to maintain legal actions to prevent violations of the trust.

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41. *See supra* note 13. *See also* Lazarus, *supra* note 8, at 633-35. *See generally* J. GOULD, *supra* note 8, § 3, at 6-7 (civil law notions of the sea and the seashore as being *res communes*, or common property).

42. J. GOULD, *supra* note 8, § 20, at 41 (quoting Blundell v. Catterall, 5 B. & Ald. 268; 106 E.R. 1190; [1814-23] All E.R. 39F, 48E-F (K.B. 1821) (Bayley, JJ.)).

43. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

44. J. GOULD, *supra* note 8, § 32, at 73.

45. *Illinois Cent.*, 146 U.S. at 452. Modern decisions also recognize that the public trust doctrine protects bathing, swimming, boating and other water-related recreational uses. *See, e.g.*, Morse v. Oregon Division of State Lands, 285 Or. 197, 590 P.2d 709 (1979); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969).

46. *Illinois Cent.*, 146 U.S. at 454.

47. *See* Lazarus, *supra* note 8, at 640-46.

Second, the principle of the public trust as a public right provides sufficient flexibility to allow the federal government, as sovereign, to assume the role as trustee of navigable waters when it acquires title to trust properties.[48] If the federal government serves as trustee, it would still be bound by the public's rights. While the sovereign trustee may vary, the rights of the public remain constant.

II. Public Trust and Federalism

Although the public trust doctrine is a clearly recognized concept of state common law, its current status at the federal level is uncertain.

"Federalism" is a term used to describe the division of powers between the states and the federal government. In the early years after the American Revolution, the original states inherited and continued to use much of the English common law. When the Constitution was adopted, however, the individual states delegated certain finite and limited powers to the federal government. The federal government thus became the superior sovereign with respect to those delegated powers.[49]

A. The Need to Protect State Public Trust Interests Is Recognized

One principle of English common law inherited by the states was that the sovereign owns the tidewaters and lands below the mean high water mark[50] and the associated trust obligation to hold these resources for use by the public.[51] By the early twentieth century, it became clear that the public trust principles announced in

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48. *See infra* notes 115-26 and accompanying text.

49. *See* Shively v. Bowlby, 152 U.S. 1, 14-15 (1894). "And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." *Id.* at 14-15.

50. *See supra* note 9; *see also Shively*, 152 U.S. at 26; Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 416 (1842). While the "mean high water mark" is often used as the boundary of the sovereign's interest in tidal waters, other standards may be used for navigable fresh waters in inland states. For example, Vermont uses the "low water mark" or water's edge. Hazen v. Perkins, 92 Vt. 414, 419, 105 A. 249, 251 (1918).

51. *Illinois Cent.*, 146 U.S. at 452.

Illinois Central were a matter of individual state law.[52]

As early as the mid-nineteenth century, however, the Supreme Court faced the issue of whether the federal government could deprive a state of its ownership interest in lands beneath the mean high water mark of navigable waters located within a state by conveying the lands to private persons. *Pollard's Lessee v. Hagan*[53] addressed the controversy created when, in order to form a new state that would later be known as Alabama, Virginia and Georgia granted portions of their lands to the federal government.[54] The grants were intended to:

> [I]nvest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them.[55]

The deeds of cession executed by Virginia and Georgia made clear that the land was intended to be used to form a new state which would be admitted into the Union when certain stipulations and conditions were satisfied.[56]

In addition, when Alabama sought statehood, it entered into a compact with the United States to permit its admission into the Union.[57] In that compact, the United States had exacted an agreement with Alabama that the "people of Alabama for ever disclaimed all right or title to the waste or unappropriated lands lying within the state, and that the same should remain at the sole dis-

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52. *See* Appleby v. City of New York, 271 U.S. 364, 395 (1926). The dominant role of state public trust law had already been alluded to by the United States Supreme Court some 32 years earlier in *Shively*, 152 U.S. at 26.

53. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

54. *Id.* at 219-22.

55. *Id.* at 222.

56. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222 (1845). The condition included in the Virginia deed was that the new state should be "not less than 100, nor more than 150 miles square." *Id.* at 221. The Georgia deed stipulated that a new state be formed and admitted as soon as it contained 60,000 free inhabitants. *Id.* at 222. Notwithstanding these deeds, the United States also claimed title to some of the lands in question under rights acquired from the King of Spain. *Id.* at 220, 225-26. Regarding the rights inherited by the United States from Spain, the Court proclaimed that the United States was limited by United States law and not entitled to the broader powers provided by Spanish law. *Id.* at 225-26.

57. *Id.* at 220-21.

posal of the United States."[58] The agreement further provided that "the land under the navigable waters, and the public domain above high water, were alike reserved to the United States."[59] The federal government retained the right to sell those lands.[60] Subsequently, the United States, through various acts of Congress, conveyed to a private party some of the lands that lay below the high water mark within the state of Alabama.[61]

The *Pollard* Court determined that it had to "draw the line that separates the sovereignty and jurisdiction of the government of the union [from that of] the state governments, over the subject in controversy."[62] Invalidating the federal grant of tidal lands to a private party, the Court stated that:

> [A] proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures.[63]

The Court reasoned that the United States merely accepted the cession of the territories in trust to "hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories."[64] A contrary conclusion would have deprived Alabama of rights to which it was entitled pursuant to the equal footing doctrine.[65]

The *Pollard* decision marked the outer boundary of permissible federal encroachment upon powers normally held by the states. In finding that the federal government actually possessed eminent domain powers,[66] the Court carefully noted that this power did not

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58. *Id.* at 221.

59. *Id.*

60. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845).

61. *Id.* at 219.

62. *Id.* at 220.

63. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845).

64. *Id.* at 222-23.

65. *See id.* at 224, 228-29. "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights." *Id.* at 229.

66. The "eminent domain" described by the *Pollard* Court is broader than the federal government's eminent domain power described elsewhere in this article. The *Pollard* Court was referring to the more general "right which belongs to the society, or to the sovereign, of

include all sovereign powers.[67] The Constitution denies the federal government the "capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state."[68] The United States is allowed the exercise of such power only when it temporarily deprives a state of control over public lands.[69] Accordingly, the Court found that the United States held the public lands within the new states only pursuant to deeds of cession or statutes connected with them, and not pursuant to any municipal sovereignty power.[70]

Critical to the *Pollard* decision was that the federal government sought to convey title to Alabama's public trust lands *after* Alabama had been formed and admitted into the Union as a new state. Because Alabama succeeded to the same rights possessed by all other states under the equal footing doctrine, the Court reasoned that Congress could not deprive this new state of its sovereign rights. The import of *Pollard* is that Congress cannot interfere with the rights retained by the states and not delegated to the federal government. These are rights essential to state sovereignty and not capable of abrogation by the federal government.

B. Piecemeal Dispositions of Trust Lands to Private Persons Disfavored

It was almost 50 years later that the Supreme Court explained and expanded upon the *Pollard* ruling in another tidal lands case involving a newly formed state. In *Shively v. Bowlby*,[71] the Court adjudicated a claim to tidal lands in the Columbia River which had been acquired by the defendant, while Oregon was still a territory, under an 1850 act of Congress. Subsequent to Oregon's statehood the plaintiff had obtained from the state a deed of conveyance to

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disposing, in case of necessity, and for the public safety, of all the wealth contained in the state . . . ." Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222-23 (1845).

67. *Id.* at 223.

68. *Id.*

69. *Id.* at 224.

70. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224 (1845). Therefore, the stipulations and conditions in the deeds or statutes have the force of depriving the federal government of such control or power. *Id.* "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." *Id.* at 230.

71. Shively v. Bowlby, 152 U.S. 1 (1893).

the same lands, where he later built and maintained a wharf. As in *Pollard*, the Court again refused to give precedence to a federal enactment which interfered with a state's administration of its sovereign rights over navigable waters.[72] The Court did, however, recognize that there are limited circumstances in which the federal government can make lawful grants of tidal lands.

The Court further explained its recognition in *Pollard* that the federal government can hold municipal sovereignty powers for temporary purposes.[73] "Undoubtedly [pursuant to those powers] Congress might have granted this land to the patentee, or confirmed his Spanish grant, *before* Alabama became a State."[74] The Court clearly stated that the Constitution vests in the United States "entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition."[75] The Court thus recognized that:

> Congress has the power to make grants of lands below [the] high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.[76]

The *Shively* Court made the historical observation that "Congress has never undertaken by general laws to dispose of such lands."[77] But the Court continued, however, to reason that:

> [T]he navigable waters and the soils under them . . . shall be held by the United States in trust for the future States . . . [and] shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State . . . .[78]

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72. *See id.* at 49-50.

73. *See supra* note 69 and accompanying text; *see also Shively*, 152 U.S. at 27 (quoting Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845)).

74. *Shively* 152 U.S. at 47 (quoting Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850)) (emphasis added).

75. Shively v. Bowlby, 152 U.S. 1, 48 (1893).

76. *Id.*; *cf.* Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

77. *Shively*, 152 U.S. at 48.

78. *Id.* at 49-50; *cf.* City of Alameda v. Todd Shipyards Corp., 632 F. Supp. 333, 336 (N.D. Cal. 1986); United States v. 1.58 Acres of Land, Etc., 523 F. Supp. 120, 121 (D. Mass. 1981).

A narrow reading of the Court's analysis might mean that Congress is free to dispose of such parcels of land below the high water mark of navigable waters only under limited circumstances and when the United States is holding territories in trust for future states. By implication, this ability may no longer exist because, assuming that the United States will not expand its boundaries to include new states, the federal government will no longer hold territories in trust for future states.

Any broader reading of *Pollard* and *Shively* would have to recognize a strong public policy disfavoring actions by the federal government, while in possession of public trust lands, which will undermine a state's ability to administer the trust on these lands in the future.

III. Federal Condemnation and the Need for a Federal Common Law

Given that new states are not likely to be formed in the near future, the need to recognize, as in *Pollard* and *Shively*, a trust obligation in the federal government in order to avoid interference with state sovereignty has diminished considerably. However, modern day federal condemnations of public trust lands similarly threaten state sovereignty and present anew the need for recognition of a trust obligation in the federal government.

A. Condemnation Law Generally

The fifth amendment to the United States Constitution provides the federal government with the power of condemnation or eminent domain.[79] This power is plenary and cannot be frustrated[80] provided certain conditions are satisfied.[81] Relying on the pervasiveness of the federal condemnation power, the United States District Court for the Northern District of California, in *United States v. 11.037 Acres of Land*,[82] held that the federal government may acquire a fee simple absolute interest in condemned public trust lands and oust the affected state of any vested "public trust" interest it may have had in the land.[83] This decision is sig-

79. U.S. Const. amend. V.
80. U.S. Const. art. VI, § 2.
81. U.S. Const. amend. V.
82. 685 F. Supp. 214 (N.D. Cal. 1988). *See supra* note 4 and accompanying text.
83. *Id.* at 216.

nificant because, if correct, it exposes a situation in which the state may forever lose its power to manage public trust lands.

Traditionally, courts have viewed actions in eminent domain as actions *in rem*.[84] The exercise of eminent domain establishes "a new title and extinguishes all previous rights."[85] Accordingly, "an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist."[86] Notwithstanding this seemingly far-reaching pronouncement, some courts have held that the sovereign can acquire only that title held in the property by the previous owner.[87]

In 1931, Congress enacted the Federal Declaration of Taking Act[88] as a mechanism to facilitate the exercise of the federal government's power of eminent domain.[89] It provides that the federal government must commence its exercise of eminent domain by filing a declaration of taking.[90] The declaration must contain, among other things, "a statement of the estate or interest in said lands taken . . . ."[91]

Because Congress "has the plenary power to define the quantum of interest of estate which may be acquired by eminent domain . . . . [t]he interest taken depends upon the construction of the statute authorizing the taking."[92] Generally, the extent of the exercise is limited to the express terms or clear implication of the granting statute.[93] In addition to permitting a taking in fee simple absolute,[94] the federal Declaration of Taking Act contains a built-in presumption favoring a taking in full fee.[95]

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84. *See, e.g.*, A. W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1924); United States v. 3,276.21 Acres of Land, 194 F. Supp. 297, 300 (1961). *See generally* 26 AM. JUR. 2D *Eminent Domain* § 130 (1976).

85. *Duckett*, 266 U.S. at 151.

86. *Id.*

87. *See* 26 AM. JUR. 2D *Eminent Domain* § 130, nn.7-8 and accompanying text. This view is significant because it would require the sovereign to specify all the interests in the land that exist and condemn each interest independently of the others.

88. 40 U.S.C. § 258a (1986).

89. Bishop v. United States, 288 F.2d 525, 528 (1961). *See also* FED. R. CIV. P. 71(a).

90. 40 U.S.C. § 258a.

91. *Id.* § 258a (3).

92. 26 AM. JUR. 2D *Eminent Domain* § 132 nn.4-5.

93. *Id.* § 132 n.7.

94. 40 U.S.C. § 258a.

95. *Id.* The government, however, need not take the full fee when "such less estate or interest therein . . . is specified . . . ." *Id.*

B. Public Trust Implications

Ownership of land in fee simple absolute denotes the unconditional power of disposition.[96] Consequently, when the federal government acquires a fee simple absolute interest in land, it obtains an unconditional right thereafter to sell or otherwise dispose of the land according to its own terms.[97] This principle becomes problematic, however, when the federal government condemns lands traditionally subject to public trust management by a state. If the federal government can acquire a fee simple absolute interest in these lands, "serious constitutional and statutory questions are raised concerning the power of the federal government to destroy forever an important aspect of the [state's] sovereignty."[98]

First, if the federal government effectuates such a complete taking, what becomes of the affected state's obligation to manage, or interest in managing, the lands in trust for the benefit of all the public? Second, if the federal government can in fact acquire a fee simple absolute interest in public trust lands, can it thereafter sell the lands piecemeal to private individuals without violating traditional public trust principles? Third, if, consistent with public principles, the government cannot alienate the land to private individuals, is the source of this limitation rooted in a federal common law? Finally, if the limitation is a federal common law obligation, has it been modified by Congress?

1. Public Trust, Condemnation, and the State's Interests

In a highly confusing portion of its decision in *Illinois Central*, the Supreme Court, on the one hand, recognized the states' never-ending control of public trust properties, and, on the other hand, identified two exceptions under which state control might be lost:

> [t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[99]

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96. BLACK'S LAW DICTIONARY 554 (5th ed. 1979).

97. *Cf.* 41 C.F.R. §§ 101-47.300 to 47.305 (1989).

98. United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122 (D. Mass. 1981).

99. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892). While the *Illinois Central* exceptions are discussed at length here, it is important to note that these exceptions have not been adopted by all of the states. *See, e.g.*, Vermont v. Central Vermont Ry., Inc.,

Some courts have regarded this "state control" as creating in the state a vested property interest in public trust lands.[100] Other courts consider the public trust obligation an essential attribute of sovereignty.[101] The *11.037 Acres* court held that the federal government can acquire a fee simple interest in the lands through a condemnation action and extinguish any interest in the land belonging to the state. As the action operates upon the *res*, the land, the federal government acquires *all* interests.[102]

Under this logic, the "control of the state for the purposes of the trust" can be lost through condemnation. One way to reconcile this conclusion with the *Illinois Central* language is to test the federal action against the two *Illinois Central* exceptions.[103] Satisfaction of these exceptions, however, depends less on what uses the federal government would have for the property, than on what happens to the property when, and if, the United States later disposes of it. Since all condemnations must be for public uses, it is likely that, while the federal government holds the property, it would be "used in promoting the interests of the public therein." If, however, the government later decides to convey the property to private persons, it is difficult to imagine how the interests of the public would continue to be protected. Under *Illinois Central* there would seem to be either some obligation on the part of the federal government to convey the property back into state hands, or, in the event of conveyance to a third party, the state's public trust authority would once again have to be recognized by the courts.

The *Illinois Central* language can also be reconciled with federal condemnation power by interpreting the Court's use of the word "state" in a generic sense, referring to the "state" as merely any sovereign entity.[104] Under this interpretation, there would be no need to inquire into the *Illinois Central* exceptions because the

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___ Vt. ___, 571 A.2d 1128 (1989), *cert. denied*, Central Vermont Ry., Inc. v. Vermont, 110 S. Ct. 2171 (1990).

100. *See, e.g.*, United States v. 11.037 Acres of Land, 685 F. Supp. 214 (N.D. Cal. 1988) (public trust easement).

101. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See also* Vermont v. Central Vermont Ry., Inc., *supra* note 6.

102. *See supra* notes 84-86 and accompanying text.

103. *See supra* note 34 and accompanying text.

104. This approach was taken by the United States District Court for the District of Massachusetts. *See* United States v. 1.58 Acres of Land, Etc., 523 F. Supp. 120, 124 (D. Mass. 1981).

control of a sovereign entity over the property would not be lost by condemnation. This interpretation would place the federal government in much the same relationship with the states as it was in *Pollard's Lessee* and in *Shively*, namely, as an interim trustee over property which may eventually revert back to state control.

2. *Public Trust, Condemnation, and the Federal Obligation*

If we accept that the federal government has the capacity to acquire public trust land by eminent domain in fee simple absolute and therefore extinguish the state's public trust management obligation, *Illinois Central* suggests that the federal government must then assume the public trust management obligation. *Illinois Central* clearly states that the obligation owed to the public cannot vanish.[105] "The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[106]

The Court's analogy between public trust obligations and police power obligations helps determine the source of the obligation to manage trust properties acquired through condemnation by the federal government. The Supremacy Clause of the United States Constitution declares state laws to be pre-empted when they conflict directly with federal laws regulating the same subject matter. Just as a state may be pre-empted from exercising its police powers by a conflicting federal enactment, so too might a state lose its public trust management powers pursuant to a federal taking in fee simple absolute. The conflicting federal enactment must, however, fill the void created by the pre-emption and not leave the field unattended.

Federal fee simple absolute ownership of public trust lands may not only extinguish any vested state public trust interest but may also terminate the ability of the state to regulate the federal use of the property. Accordingly, in order not to leave public trust concerns unattended and without recourse, the federal government must assume the obligation to manage the trust lands as a sovereign entity for the benefit of the public.

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105. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

106. *Id.* at 453. If a state cannot abdicate its trust obligation, then its delegation of power to the federal government under the Constitution did not serve to extinguish trust obligations associated with powers granted to the federal government.

Permitting the federal government not to assume trust obligations leads to absurd results. Perhaps the greatest protection afforded by the public trust doctrine is that the sovereign will not dispose of trust lands against the public interest to private parties in fee simple absolute. If the federal government can acquire trust properties in fee simple absolute, and not be bound by the dictates of the doctrine, it is free to convey trust properties to private persons in fee simple free of the public trust.[107] Consequently, the obligation of the sovereign to manage these lands in trust for the benefit of all the people would be entirely abrogated. Such a result would be wholly inconsistent and irreconcilable with the spirit of the *Illinois Central* decision.

Given that condemned public trust properties should not be alienated to private parties free of the trust, courts must, for the purposes of preserving sovereign control over the management obligation, ensure that the federal government acts as the sovereign trustee. The federal government should essentially step into the shoes of a state government and be obligated to preserve the trust. If courts hold otherwise, they would create a distinction between the state and federal sovereigns which for public trust purposes would be neither rational nor reasonable.

3. *Federal Common Law Theories*

If the federal and state governments' public trust obligations have the same sources, the obvious question is whether there is a

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107. Such a result could be extremely significant given the enormity of federally owned lands. The federal government owns approximately one third of all the land in the United States, a total land area of about 740 million acres. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCE LAW, 3-4 (1981); Owens, *Land Acquisition and Coastal Resources Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 635 n.41 (1983); *see generally* G. COGGINS & C. WILKINSON, *supra*, at 1-33.

Many of these holdings include shorelines and water bodies. For example, pursuant to the wildlife acquisition programs administered by the Department of the Interior: "As of 1979, the U.S. Fish and Wildlife Service owned 31 refuges on Atlantic and Gulf barrier islands, encompassing 388,582 acres and nearly 180 miles of beach frontage." Owens, *supra*, at 627 n.8. Furthermore, "[a]s of 1979, the federal government had acquired nine national seashores, one national recreation area, and part of a national park on the country's coastline . . . . These holdings amounted to 220,000 acres." *Id.* at 627 n.11 (citations omitted).

By further example, nearly one half of all public lands are located in Alaska, with ninety-five percent of the state's land being publicly owned. G. COGGINS & C. WILKINSON, *supra*, at 4. Moreover, Alaska has 6,640 coastline miles and approximately 1,800 islands. 1 ENCYCLOPEDIA AMERICANA 462 (1986). These features reveal that a significant portion of Alaska's coastline is federally owned.

federal common law of public trust. The Federal District Court for the District of Massachusetts seems to have so held.[108] One federal court's adoption of a common law theory does not, however, create a recognizable body of federal common law regarding the public trust. A threshold issue, whenever a party seeks to invoke a new federal common law claim, is "whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context."[109]

Federal rights are created in two distinct manners. Congress may create rights, either expressly or by clear implication.[110] In limited instances, rights may also be created through the power of a federal court to fashion a federal common law.[111] "These instances are 'few and restricted' . . . and fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,'. . . and those in which Congress has given the courts the powers to develop substantive law."[112]

Where Congress has not provided federal courts with the power to develop substantive law independent of its authority under Article I of the Constitution, federal common law may only exist in those areas:

> [C]oncerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.[113]

To create a federal common law of public trust, public trust concerns must fall within an area where federal common law applies. In order for the courts to formulate federal common law, they must find that a federally recognized public trust doctrine im-

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108. United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981).
109. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 638 (1981).
110. *Id.*
111. *Id.*
112. *Id.* at 640 (citations omitted).
113. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

plicates "uniquely federal interests," and where "the authority and duties of the United States as sovereign are intimately involved," such a unique federal interest should be found.[114]

Under these standards, recognition of a federal common law of public trust seems highly appropriate. As has already been noted, federal condemnation of public trust lands may operate to sever, at least temporarily, any state control over the property. Nevertheless, the *Illinois Central* decision seems to suggest that a sovereign's duty to observe the trust may never be lost. Therefore, once the federal government has condemned public trust property, the interest and obligation to protect and manage the property in the public interest becomes a uniquely federal concern for as long as the government holds the property. The recognition of a federal common law is, therefore, amply justified.

The case law is still unsettled on the existence of a federal common law of public trust. However, there are two possible theories that avoid the federal/state supremacy problems raised by the federal condemnation power. One theory would recognize the state and the federal government as co-trustees with the federal government exercising the dominant control in any instance where its interests might conflict with those of the state. The other theory would recognize the United States as the sole trustee, even if only temporarily, for so long as it holds the condemned property.

a. Co-Trustee Theory

The co-trustee theory was adopted by the United States District Court for the District of Massachusetts in *United States v. 1.58 Acres of Land.*[115] In *1.58 Acres*, the Commonwealth of Massachusetts objected to a federal condemnation action against Boston waterfront property which the federal government intended to use for the improvement of a Coast Guard Support Center. Massachusetts argued that the federal taking in fee simple absolute could vitiate the perpetual public trust administered by the Commonwealth on land below the low water mark because the United States might at some future date convey a fee simple absolute title in the submerged land to a private individual free of the trust.[116]

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114. *Id.*

115. *See supra* note 108 and accompanying text; United States v. 1.58 Acres of Land, 523 F. Supp. 120, 123 (D. Mass. 1981).

116. *Id.* at 121.

While the *1.58 Acres* court did not discuss whether there were grounds to recognize a federal common law of public trust, its decision was clearly grounded on a federal common law theory. Under our "federal system of dual sovereignty," the court reasoned that a common law public trust theory bound the federal government to act as trustee of the *jus publicum* in the exercise of its commerce powers and other federal powers.[117] Simultaneously, the states would act as co-trustees of the *jus publicum* in the exercise of their non-pre-empted responsibilities for trust properties.[118]

The court avoided the supremacy clause conflict between state public trust law and federal condemnation law, later addressed in *11.037 Acres*,[119] simply by reasoning that the federal government was bound by a *federal* common law of public trust and that, while the federal government held the property, it could not convey the property to private individuals free of the sovereign's *jus publicum*.[120]

b. Temporary Trustee Theory

The *11.037 Acres* court explicitly rejected the *1.58 Acres* theory of co-trusteeship. It held, instead, that federal condemnation extinguished state public trust interests.[121] If the *11.037 Acres* court was correct in concluding that state public trust interests are extinguished, then a concept of temporary trusteeship might provide a viable common law theory which would still preserve the public trust.

As has already been discussed above, the United States acted as a temporary trustee in *Shively v. Bowlby*[122] while it held lands

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117. *Id.* at 123.

118. *Id.*,

119. *See supra* note 5 and accompanying text.

120. United States v. 1.58 Acres of Land, 523 F. Supp. 120, 123-24 (D. Mass. 1981). Although the court's analysis does not confront the issue that a taking by condemnation is *in rem*, see Part II, *supra*, the court's decision suggests that the limitation on the alienation of the property stemmed not from any limitations in the title to the property, but from the common law strictures placed upon the United States as sovereign to act as a trustee for the public.

121. United States v. 11.037 Acres of Land, 685 F. Supp. 214, 217 (N.D. Cal. 1988). Curiously, the *11.037 Acres* court ignored its own decision, issued only two years earlier, which found that filled lands condemned by the United States were still impressed with public trust obligations imposed by state law. *See* Alameda v. Todd Shipyards Corp., 632 F. Supp. 333 (N.D. Cal. 1986).

122. 152 U.S. 1 (1893).

and navigable waterways in preparation for ultimate conveyance to the newly formed State of Oregon. Recognizing the federal government's trust obligation to the public, the Supreme Court reasoned that the navigable waters and underlying soils "shall not be disposed of piecemeal to individuals as private property."[123]

The *Shively* case dealt with the peculiarities of the federal government holding territories as a prelude to conveying them to newly formed states. However, *Shively* provides an apt analogy to our modern-day situation. The United States now holds properties by condemnation, but in the future it may desire to convey them to third parties. In the same way that the Supreme Court in *Pollard*[124] and *Shively*[125] recognized a federal trust obligation to preserve public lands, courts today could assert a similar principle. Upon acquisition of public trust lands by condemnation, the federal government should be bound, as a matter of federal common law, to manage traditional public trust properties while it retains title to the lands.[126]

4. Pre-emption of Federal Common Law

In *District of Columbia v. Air Florida*,[127] the Court of Appeals for the District of Columbia suggested that "the public trust duties that have been recognized under state law as pertaining to state governments [may] also apply to the federal government when it holds title to the shores and bed of a navigable river."[128] Relying on federal common law language,[129] and on a finding that the District of Columbia has an "interest in the public trust doctrine [that] does not exist independently of its status as representative

123. *Id.* at 49-50.

124. *See supra* notes 53-70 and accompanying text.

125. *See supra* notes 71-78 and accompanying text.

126. Under this theory, the state's public trust interest would be "extinguished" while the federal government held the property, but would resume when the United States disposed of the property. This theory is analogous to federal-state pre-emption, wherein the existence of a federal statute conflicting with a state's police power pre-empts the state's police power. However, if the federal statute were later repealed, the state's power would resume.

127. 750 F.2d 1077 (D.C. Cir. 1984).

128. *Id.* at 1085.

129. " '[O]ur federal system does not permit . . . controvers[ies] to be resolved under state law . . . [when] the authority and duties of the United States as sovereign are intimately involved . . . .' " *Id.* at 1085 (quoting Texas Industries v. Radcliff Materials, 451 U.S. 630, 641 (1981)).

of the United States' interests,"[130] the court considered whether a new federal common law might bind the rights and duties of the United States.[131] Though the court declined to so hold, it did recognize that two federal courts had applied a common law of public trust to the federal government.[132]

The specter of a judicially created federal common law rule, however, raises the issue of pre-emption by federal legislation. Because federal common law is "subject to the paramount authority of Congress"[133] and resorted to in "absence of an applicable Act of Congress,"[134] Congress is free to pre-empt "some or all of the field which a federal common law public trust doctrine would occupy."[135]

The leading case with respect to pre-emption of federal common law analysis is *Milwaukee v. Illinois*.[136] It involved a suit brought by the State of Illinois against the City of Milwaukee alleging a public nuisance grounded in the federal common law of water pollution as applied to interstate or navigable waters.[137] The City of Milwaukee, together with others, constructed, operated and maintained sewer facilities that served Milwaukee County.[138] The facility, however, suffered from overflow discharge problems caused by excessive rainfall.[139] These overflows discharged directly into Lake Michigan or its tributaries.[140]

Illinois filed suit complaining that the discharges threatened the health of its citizens and the vitality of the Lake.[141] In an earlier proceeding arising from the same controversy the United

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130. *Air Florida*, 750 F.2d at 1085.

131. The *Air Florida* court recognized the validity of the issue, but declined to rule on it because the public trust argument was not raised at the district court level. District of Columbia v. Air Florida, 750 F.2d 1077, 1084 (1984).

132. *Id.* at 1083, citing United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981); *In re* Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980). *Steuart*, however, is of limited application because the opinion fails to inform the reader of the basis of the court's decision.

133. Milwaukee v. Illinois, 451 U.S. 304, 313 (1980) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)).

134. *Id.* at 314 (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)).

135. District of Columbia v. Air Florida, 750 F.2d 1077, 1085 (D.C. Cir. 1984).

136. Milwaukee v. Illinois, 451 U.S. 304 (1980).

137. *Id.* at 309-10.

138. *Id.* at 308.

139. *Id.* at 308-09.

140. Milwaukee v. Illinois, 451 U.S. 304, 309 (1980).

141. *Id.*

States Supreme Court recognized the existence of a nuisance claim caused by interstate water pollution.[142] The Court cautioned, however, that:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.[143]

In 1972, Congress enacted the Federal Water Pollution Control Act (Clean Water Act) which established a scheme of regulation requiring dischargers to obtain permits.[144] At trial, Illinois proved noncompliance with the Act and thus the existence of a nuisance under federal common law.[145] On appeal, Illinois convinced the Court that the Clean Water Act had not pre-empted the common law nuisance cause of action.[146] The Supreme Court granted certiorari to determine the effect of the Act on the nuisance claim.[147]

The Court described the role of federal common law as subservient to the will of Congress.[148] When Congress speaks directly to an issue, the separation of powers doctrine mandates that the federal courts must bow to the will of the people.[149]

Careful not to confuse issues, the Court cautioned that Congressional pre-emption of federal common law is quite distinct from the pre-emption of state law.[150] Under federal common law pre-emption analysis, the Court found no single provision of the Clean Water Act that manifested the intention of Congress to pre-empt a federal nuisance cause of action. The Court did, however, hold that the "establishment of a comprehensive regulatory pro-

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142. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 106-07 (1972).

143. *Id.* at 107.

144. *See* 33 U.S.C. §§ 1311, 1342 (1988).

145. Milwaukee v. Illinois, 451 U.S. 304, 311 (1980).

146. *Id.* at 312.

147. *Id.* at 307-08.

148. *See id.* at 313-14. "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 314.

149. Milwaukee v. Illinois, 451 U.S. 304, 315 (1980).

150. *Id.* at 316. Where the clear and manifest purpose of Congress is to displace the historic police powers of the state, the Court has not hesitated to declare pre-emption of state law. *Id.* at 316. The pre-emption of state law analysis rests not upon notions of separation of powers, but upon the federalism notion of diffusion of powers. *Id.* at 316-17.

gram supervised by an expert administrative agency" so occupied the field as to displace the federal nuisance action.[151] No interstices remained to be filled by the continued use of a federal common law.[152]

"The question is whether the field has been occupied, not whether it has been occupied in a particular manner."[153] Thus, the ultimate question to be resolved is whether, accepting the existence of a federal common law of public trust, Congress has already "spoken directly" to the issue sufficient to pre-empt the federal common law. Because the public trust doctrine directly affects the alienability of trust lands by the sovereign, its recognition as a body of federal common law raises pre-emption issues with other laws. Pre-emption depends upon whether Congress has spoken to public trust issues in any federal land disposal programs.

Through a multitude of statutes, Congressional legislation authorized a federal regulatory program that "prescribes the policies and methods governing the utilization and disposal of excess and surplus real property and related personal property" within the United States and its related territories.[154] The policies of the federal government are: "(a) [t]hat surplus real property shall be disposed of in the most economical manner consistent with the best interests of the Government, [and] (b) [t]hat surplus real property shall ordinarily be disposed of for cash consistent with the best interests of the Government."[155]

The disposal of federal real property must be done "for public use purposes."[156] The disposal agency[157] must classify all surplus properties according to the estimated "highest and best use" to determine the methods and applicable conditions to the disposal.[158] Furthermore, "[t]he disposal agency shall . . . enable[] a State to establish the single point of contact process or other appropriate procedures to review and comment on the compatibility of a proposed disposal with State, regional and local development plans

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151. *Id.* at 317.
152. *Id.* at 323.
153. Milwaukee v. Illinois, 451 U.S. 304, 324 (1980).
154. 41 C.F.R. § 101-47.000 (1990); *see id.* §§ 101-47.200 to 101-47.314-2.
155. *Id.* § 101-47.301-1.
156. *Id.* § 101-47.302-1.
157. *See id.* § 101-47.103-6.
158. 41 C.F.R. § 101-47.303-1 (1990).

and programs."[159] The state is allowed to submit to the federal agency a recommendation which must be accepted, compromised or rejected with explanation.[160]

Prior to any sale, the disposal agency must first notify public agencies of intended disposals before it notifies the general public.[161] If public agencies do not act within a specified time, the disposal agency can assume that no public agency desires to purchase the property.[162] The federal agency is then free to attract interested private buyers.[163] Finally, disposals, whether to a public agency or private buyer, must be by "quitclaim deed or deed without warranty in conformity with local law and practice."[164]

Tested against the *Milwaukee* standards, the government's disposal program does not address piecemeal federal conveyances in fee simple absolute of public trust properties to private individuals. The focus of the program is primarily on economics and not on the need to preserve public uses. While the policies speak of "the best interests of the Government," nowhere are those interests defined. However, the context in which this phrase is used suggests that the "best interests" involve efficient and economical sales for cash.

Federal regulations require that the disposals be made for public use purposes. Again, these purposes are not defined. "Public use" is a term of art primarily employed in eminent domain jurisprudence, but also used in many different contexts. The definition of "public use" for eminent domain purposes is much broader than its public trust counterpart.[165] Traditionally, the public trust doc-

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159. *Id.* § 101-47.303-2.
160. *Id.*
161. *Id.* § 101-47.303-2(b).
162. 41 C.F.R. § 101-47.303-2(f) (1990).
163. *Id.* § 101-47.304-3.
164. *Id.* § 101-47.307-1.
165. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954). Both of these cases involved federal condemnations of land for public uses. In the former, private land was condemned for the purpose of redistribution, through sales, to non-fee holders. In the latter, private land was condemned for an urban renewal project whereby the land was later sold to private parties. The Court upheld both cases against challenges that no public use was served by sales to private parties. In the public trust context, however, governmental dispositions of trust properties to private parties free from the trust is prohibited. Although both the public trust doctrine and eminent domain actions must protect public use, the trust doctrine contemplates a more direct public use of trust properties than sales to private parties which arguably accomplish an indirect public benefit.

trine has concerned itself primarily with protecting commerce, navigation and fishing. By contrast, eminent domain actions serve a much broader range of concerns and purposes. Therefore, this "public use purpose" clause is not definite and specific enough to imply that Congress has directly addressed the public trust issue.

The requirement that, along with development plans or programs, states are permitted to submit comments regarding the consistency of the disposal is very indefinite. These comments are only advisory in nature, as the federal agency need merely offer an explanation for choosing to reject the comments.[166] This provision does not protect the state's or the public's interests in ensuring that private parties do not acquire fee simple absolute title to public trust lands.

The disposal agency must also offer other public agencies, including states, a "right of first refusal" before it offers the lands to private parties. This provision, however, does not act to prevent the piecemeal dispositions feared in *Shively v. Bowlby*.[167] Instead, the provision thrusts upon the states the opportunity to buy the lands, thus placing an economic burden upon them to buy back lands they once possessed as an attribute of sovereignty. If a state lacks the funds to buy a certain piece of property, or does not respond to the notice of disposal in a timely manner, the fears voiced by the *Shively* Court may still be realized. Because an opportunity to purchase cannot realistically preserve public trust principles, Congress could not have intended through this program to pre-empt the common law of public trust.

The policy of using quitclaim deeds or deeds without warranty explicitly recognizes the possibility of quiet title actions. Courts will construe the language of grants and deeds to determine the extent of an interest owned, and thus capable of alienation. Congress did not speak specifically enough about whether the federal government is free to convey a fee simple absolute interest in condemned public trust properties for courts to find a pre-emption.

Finally, the federal program does not provide any remedial provisions. The *Milwaukee* Court held federal common law nuisance actions pre-empted primarily because the Clean Water Act

166. 41 C.F.R. § 101-47.303-2 (1990).
167. 152 U.S. 1, 50 (1894).

provided a comprehensive remedial scheme.[168] Therefore, the absence of a remedial component further implies that this program is not comprehensive enough to pre-empt a federal common law of public trust.

Despite the utilization and disposal regulatory program, other federal statutory enactments, providing for the disposition of federal real property,[169] are not comprehensive enough to conclude that a federal common law of public trust is pre-empted. Although federal courts have applied the *Milwaukee* analysis in many contexts, it has not been generally applied in such a broad manner as to pre-empt a significant number of federal common law causes of action.[170]

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168. Milwaukee v. Illinois, 451 U.S. 304, 317-19 (1981).

169. *See* 40 U.S.C. § 484(k)(1)(A) (1988) (educational purposes); 40 U.S.C. § 484(k)(1)(B) (1988) (public-health purposes); 40 U.S.C. § 484(k)(2) (1988) (public park or recreation areas); 40 U.S.C. § 484(k)(3) (1988) (historic monuments); 50 U.S.C. app. § 1622(g) (1988) (public airport purposes); 16 U.S.C. § 667b (1988) (wildlife conservation purposes); 23 U.S.C. § 107(c) (1988) (federal aid and other highways); 40 U.S.C. § 345c(a) (1988) (widening of public highways, streets, or alleys); 50 U.S.C. app. § 1622(d) (1988) (power transmission lines); 40 U.S.C. § 122 (1988) (transfers to District of Columbia).

170. International Paper Co. v. Ouellette, 479 U.S. 481, 503 (1987) (Brennan, J., concurring in part, dissenting in part) (Congress expressly spoke to issue and reserved common law claims to source states); County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 236-37 (1985) (Non-Intercourse Act did not pre-empt federal common law right of action because Congress did not speak directly to issue of violations of Indians' property rights); United States v. Arthur Young & Co., 465 U.S. 805, 816-17 (1984) (Court did not uphold lower appellate court creating work-product immunity from disclosure to IRS auditors under 26 U.S.C. § 7602 absent Congressional policy embodied in the statute reflecting contrary intention); Weinberger v. Romero-Barcelo, 456 U.S. 305, 317-18 (1982) (Clean Water Act not intended to abolish courts' equitable discretion to order remedies); Merchant v. American S.S. Co., 860 F.2d 204, 208-10 (6th Cir. 1988) (Congress did not address the subject of retaliatory discharges in Labor Relations Management Act as it related to maritime law); Conille v. Secretary of Housing and Urban Development, 840 F.2d 105, 111 (1st Cir. 1988) (Congress did not address issue of contractual relations between HUD Secretary and HUD tenants in enacting 12 U.S.C. § 1701z-11; instead court was forced to fashion a federal rule of decision); Federal Deposit Ins. Co. v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (enactment of 12 U.S.C. § 1823(c) did not pre-empt common law rule of estoppel when FDIC sues as receiver of failed bank because no indication of Congressional intent); Gardiner v. Sea-Land Service, Inc., 786 F.2d 943, 947 (9th Cir. 1986) (Congress has not spoken directly to question of seamen's traditional right to maintenance through federal labor laws and thus did not pre-empt maritime law); United States v. Waste Industries, Inc., 734 F.2d 159, 167 (4th Cir. 1984) (Congress expressly authorized use of federal common law in CERCLA § 7003, 42 U.S.C. § 6973); United States v. M/V Big Sam, 681 F.2d 432, 442 (5th Cir. 1982) (46 U.S.C. § 183(a) did not pre-empt remedies in simple negligence maritime tort but did exclude potential remedies of U.S. under Refuge Act against third party non-discharging vessel); Van Orman v. American Ins. Co., 680 F.2d 301, 311-13 (3d Cir. 1982) (express Congressional authorization of federal common law under ERISA); Barany v. Buller, 670 F.2d 726, 736-37 (7th Cir. 1982) (statutory remedies provided in 12 U.S.C. § 1786 do not afford aggrieved parties at least a reasonable facsimile of the relief sought under federal

CONCLUSION

It is painfully apparent that, if the public trust doctrine is to vest in the public "absolute" rights,[171] a federal common law of public trust can and should be recognized. While federal courts in the District of Massachusetts and the Eastern District of Virginia have recognized such a doctrine on the federal level,[172] no other court has squarely confronted whether the traditional grounds for fashioning a federal common law exist or whether such a common law would withstand a pre-emption challenge.

Illinois Central seems to suggest that a sovereign's duty to observe the trust may never be lost.[173] If this message is to provide more than lip service in instances of federal condemnation of lands subject to the trust, then courts will need to be less bashful in describing the federal government's obligations. Courts will have to recognize explicitly that the federal government, like the states, bears the duty as sovereign to protect public trust resources which have been taken by condemnation. The door to recognition of a federal common law of public trust is clearly open. It is now up to the courts to act.

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common law and thus do not preclude federal common law remedies); Matter of Oswego Barge Corp., 664 F.2d 327, 345 (2d Cir. 1981) (Congress did not speak to problem of polluting foreign waters and no presumption of pre-emption applies to recovery of costs for oil spill pollution in international waters).

Cf. National Audubon Society v. Department of Water, 869 F.2d 1196, 1201-02 (9th Cir. 1989) (federal common law of nuisance based on air pollution is pre-empted by Clean Air Act); Buckeye Sugars, Inc. v. Commodity Credit Corp., 744 F.2d 1240, 1243-44 (6th Cir. 1984) ("Courts should not search for gaps in legislation in order to fashion and apply federal common law."); Conner v. Aerovox, Inc., 730 F.2d 835, 840 (1st Cir. 1984) (Congress pre-empted federal common law nuisance under maritime tort law). *See also* Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 168-69 nn.261-63 (1985); Redish, *Abstention, Separation of Powers and the Limits of Judicial Function*, 94 YALE L. REV. 71, 83 (1984).

171. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

172. United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981); *In re* Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980).

173. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452-53 (1892).