NOTES

RECREATIONAL RIGHTS IN PUBLIC WATER OVERLYING PRIVATE PROPERTY

Introduction

Vermont law is unclear as to the scope of the public's right to recreate on public bodies of water which overlie privately held property. The need to delineate the scope of both public and private rights is becoming increasingly urgent in light of the growing number of water use conflicts and the accelerating development on the shores of Lake Champlain.[1] Shoreland is a finite resource and the major locus of conflicts between water recreationists and private landowners.[2] Indeed, " 'the greatest concentration of water-oriented recreation occurs at the shoreline.' "[3]

Two issues of paramount importance to future recreational water use in Vermont were recently presented before the Franklin County District Court:[4]

> To what point do the boundaries of the littoral property owners of Lake Champlain extend? [and]
> Irrespective of the point(s) to which the boundary of the litteral [sic] proprietors of Lake Champlain extends, does the public have the right to use the overlying waters of Lake Champlain between the ordinary low water level and ordinary high water level for recreational purposes, including that of hunting?[5]

This note will address these issues in light of Vermont's policy that the state's role as trustee of its navigable waters is to provide for the multiple use of the waters in a manner consistent with the

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1. Burlington Free Press, Aug. 31, 1982, at 1A, col. 4.

2. *See, e.g.* State v. Thomas, Nos. 837-828-10-79, 839-840-10-79, 841-842-10-79, slip op. (D. Ct. of Franklin County, Vt. Oct. 14, 1982) [hereinafter cited as *Thomas*]; State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944); Hazen v. Perkins, 92 Vt. 414, 105 A. 249 (1918).

3. Interim Report: Allocation and Management of Vermont Lakes for Recreation, Prepared for the Vermont Agency of Environmental Conservation 49 (Aug. 29, 1981) (citation omitted).

4. *Thomas*, *supra* note 2.

5. *Id.* at 1-2.

best interests of the citizens of the state.[6] Part I of the analysis examines the historical development of the concept of "public waters" in view of the changing demands that society has placed on its water resources. It will also recommend judicial clarification of the characteristics of Vermont's public waters which render them susceptible to public status. A precise definition of "public waters" is imperative to notifying both littoral landowners and public water recreationists of their corresponding rights at the shoreline. Part II of the analysis will address the question of whether a judicial determination that the public has a right to recreate on the waters of a marsh, which is periodically subject to seasonal inundations from Lake Champlain, constitutes a "taking" in violation of the fifth and fourteenth amendments of the United States Constitution.

I. Sources of Public Rights in Navigable Waters

A. *The Federal Concept of Navigability*

1. The Commerce Clause Rationale

Traditionally in the United States, a particular body of water was deemed to be "public" if it was "navigable" by virtue of its capability of supporting commercial transportation.[7] While the United States Constitution does not mention navigable waters, it vests in Congress the power to "regulate Commerce with foreign Nations and among the several States . . . ."[8] Because much of the interstate commerce of the nineteenth century was conducted on waterways,[9] the commerce power was early held to include the power to regulate navigation.[10]

The federal definition of navigability, for the purpose of delineating the extent of the federal regulatory power in inland waterways under the commerce clause, was first enunciated by the United States Supreme Court in *The Daniel Ball*:[11]

> Those rivers must be regarded as public navigable rivers in

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6. *See* Vt. Stat. Ann. tit. 10, § 1421 (1973); Vt. Stat. Ann. tit. 29, § 401 (1970 & Cum. Supp. 1983).

7. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

8. U.S. Const. art. I, § 8.

9. *See* Bartke, *Navigability in Michigan in Retrospect and Prospect*, 16 Wayne L. Rev. 409, 410 n.13 (1970).

10. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

11. 77 U.S. (10 Wall.) 557 (1870).

> law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[12]

In 1899, Congress enacted the Rivers and Harbors Appropriation Act,[13] thereby initiating the federal water pollution control effort.[14] The extent of federal jurisdiction for this purpose was statutorily limited to waters that were deemed to be "navigable."[15] Therefore, any subsequent judicial broadening of federal jurisdiction under the statute necessarily had to be effectuated by expanding the definition of "navigability."

Thus, in 1921, the United States Supreme Court broadened Congress' definition of navigability to include bodies of water whose past history of commercial use made them navigable despite subsequent physical or economic changes which prevented commercial use.[16] In 1940, the Court further expanded the meaning of navigability by holding that a waterway would be deemed navigable in fact if by "reasonable improvements" it could be made navigable.[17]

In 1972, Congress again exercised its power under the commerce clause by enacting the Federal Water Pollution Control Act Amendments.[18] The amendments established a comprehensive regulatory program designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[19] Shortly thereafter, in *United States v. Holland*[20] the United States District Court for the Middle District of Florida interpreted the meaning of "navigable waters" as the term is used within those

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12. *Id.* at 563.

13. Act of Mar. 3, 1899, ch. 425, § 9, 30 Stat. 1151 (codified at 33 U.S.C. § 401 (1977)).

14. *See* Act of Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151 (codified at 33 U.S.C. § 403 (1977)); *see also* Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152 (codified at 33 U.S.C. § 407 (1977)).

15. *See* Act of Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151 (codified at 33 U.S.C. § 403 (1977)); *see also* Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152 (codified at 33 U.S.C. § 407 (1977)).

16. Economy Light & Power Co. v. United States, 256 U.S. 113, 123 (1921).

17. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940).

18. Act of Oct. 18, 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. § § 1251-1376 (1977).

19. 33 U.S.C. § 1251 (a) (1977).

20. 373 F. Supp. 665 (M.D. Fla. 1974).

amendments.[21]

At issue in *Holland* was whether a point source,[22] located above the mean high water line,[23] which discharged pollutants into man-made canals adjoining a bayou arm of Tampa Bay, was subject to federal regulatory power for the purpose of water pollution control. While the polluting source was situated on land and thus above the mean high water line, the land was subject to periodic inundation by the waters of a navigable bayou. The court found that even the "occasional lapping" of the bayou waters had conveyed pollutants into the waters of the United States.[24]

The court forthrightly rejected the limiting "geographic" and "transportation" definitions of navigable waters under the commerce clause.[25] It stressed the clear intent of Congress to break from the jurisdictional limitations inherent in the judicial concept of navigability under the Rivers and Harbors Appropriation Act.[26] The court held that the commerce clause gives Congress ample authority under the Federal Water Pollution Control Act to regulate polluting activities, even though they are located above the mean high water line, because they are subject to periodic inundation by tidal waters.[27]

Holland signifies a clear break from past judicial readings of "navigability" in order to sustain congressional action. While the

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21. "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1980).

22. A point source is defined as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14) (1977).

23. "[T]he test of the mean high water mark [has become] the inveterate standard to be applied in limiting federal authority over navigable waters." *Holland*, 373 F. Supp. at 671. The mean high tide is technically defined by the United States Coast and Geodetic Survey as "the average height of all the high waters" at a given place over a period of 18.6 years. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26-27 (1935) (footnote omitted).

24. *Holland*, 373 F. Supp. at 675.

25. In rejecting the traditional definitions of navigability, the court relied on the virtually limitless expansion of congressional powers under the commerce clause, as they evolved through twentieth-century case law. *Holland*, 373 F. Supp. at 672-73 (citing Perez v. United States, 402 U.S. 146 (1970); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 341 (1964); United States v. Darby, 312 U.S. 100 (1941)).

26. *Holland*, 373 F. Supp. at 673.

27. *Id.* at 676.

court did not articulate a new test, it made clear that the congressional delegation of federal authority over "waters of the United States" will permit the imposition of federal regulatory power over any water which will ultimately "affect" navigable waters.[28]

Finally, the Army Corps of Engineers, in delineating the extent of its regulatory authority, has defined navigable waters for the purpose of preventing their obstruction.[29] While these regulations acknowledge that "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation"[30] a general definition provides that:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.[31]

More specifically, the definition addresses the geographic and jurisdictional limits on rivers and lakes:

> (a) *Jurisdiction over entire bed.*
> Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark.
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> . . .
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> (2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.[32]

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28. A narrow reading of *Holland* would limit federal jurisdiction to non-navigable waters solely in the regulation of polluting activities, while retaining the jurisdictional boundaries of the traditional definition of navigability for other purposes. But see Scenic Hudson Preservation Conference v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973), in which such an argument was rejected as being unsupported by the language and the legislative history of the Federal Water Pollution Control Act.

29. 33 C.F.R. § § 329.1-.16 (1982).

30. *Id.* § 329.3 (1982).

31. *Id.* § 329.4 (1982).

32. *Id.* § 329.11 (1982).

The amorphous concept of navigability under the federal definition has thus expanded to accommodate changing societal needs and values. While the traditional definition[33] apparently remains alive and well to an extent,[34] both legislative and judicial forces have provided an elasticity to the concept of navigability. Thus, what is non-navigable one day may become navigable the next. Although this imprecision accommodates changing social policy, littoral and riparian owners can only guess as to whether a particular waterbody may be subject to the federal regulatory power.

2. The Acquisition of Title Rationale

English common law conferred the status of navigability only upon those waters which were subject to the ebb and flow of the tide.[35] Title to land bordering on these navigable waters extended only to the ordinary high water mark.[36] Title in the sea, and in arms of the sea was vested in the King,[37] except insofar as an individual had acquired rights in it by express grant or prescription.[38]

In 1842, the United States Supreme Court held in *Martin v. Waddell*[39] that at the time of the revolution, the citizens of each state acquired the royal prerogative of title to tidal navigable waters and the submerged lands lying thereunder. "[A]nd in that character [they] 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."[40] It was thus early established that upon admission to the Union, the individual states acquired title to the beds of all navigable waters below the high water mark as an attribute

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33. *See supra* text accompanying note 12.

34. *Compare* 33 C.F.R. § § 329.4, 329.6 (1982) (navigable waters are those which have been or are capable of being used to transport interstate or foreign commerce) *with* United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) (navigable waters include all waters of the United States).

35. Barney v. Keokuk, 94 U.S. 324 (1876); *see also* M. Hale, *De Juris Maris* in S. Moore, History and Law of the Foreshore and Seashore 378 (3d ed. 1888).

36. Shively v. Bowlby, 152 U.S. 1, 13-14 (1894); Barney v. Keokuk, 94 U.S. 324, 336, 338 (1876).

37. M. Hale, *supra* note 35, at 376-79. The King thus had title in both the waters of the sea and the underlying soil between the ordinary high-water and low-water marks. *Id.* at 378-79.

38. M. Hale, *supra* note 35, at 385-405; Shively v. Bowlby, 152 U.S. 1, 13 (1894) (citations omitted).

39. 41 U.S. (16 Pet.) 367 (1842).

40. *Id.* at 410.

of state sovereignty.[41]

In 1876, the United States Supreme Court extended the common law rule to non-tidal navigable waters in *Barney v. Keokuk.*[42] The Court found the ebb and flow test to be equally applicable to those waters located above the flow of the tide.[43] It reasoned that "the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience."[44]

The problem remained, however, to articulate the meaning of navigability in order to determine which bodies of water had been acquired in the accession to state sovereignty. Once navigability could be shown, a state would thereby acquire paramount title and dominion over the navigable waters and the lands lying thereunder, as against claims of individuals and political entities such as Indian tribes[45] and the federal government.[46]

It was not until 1922, that the United States Supreme Court adopted the established rule of *The Daniel Ball*[47] to define navigability for title purposes. In *Oklahoma v. Texas*,[48] the Court found that:

> [N]avigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[49]

In *United States v. Holt State Bank*,[50] the Court further articulated the law defining navigability for title purposes. In *Holt*, the Chippewa Indians claimed title to the bed of Mud Lake because it was located entirely within their reservation. The Court held that title to the bed belonged to the State of Minnesota, again relying principally on the well-recognized "highway for commerce"

41. Shively v. Bowlby, 152 U.S. 1, 49 (1894).
42. 94 U.S. 324 (1876).
43. *Id.* at 337-38.
44. *Id.* at 338.
45. United States v. Holt State Bank, 270 U.S. 49 (1926).
46. United States v. Utah, 283 U.S. 64 (1931).
47. *See supra* notes 11-12 and accompanying text.
48. 258 U.S. 574 (1922).
49. *Id.* at 586 (footnote omitted).
50. 270 U.S. 49 (1926).

test.[51] However, the Court added that:

> [N]avigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact . . . that the stream in its natural and ordinary condition affords a channel for useful commerce.[52]

The *Holt* test was expanded in *United States v. Utah*.[53] There, the Court indicated that when actual commerce and navigation have been infrequent due to the location of the stream and the history of its exploration and settlement, its navigability may be proved by its physical characteristics as well as by its historical uses.[54] "The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources."[55] Thus, while the definition remained tied to the concept of commercial usefulness, the determinative factor of the waters' public status was their capacity to support future uses.

In *United States v. Oregon*,[56] the Court examined the physical characteristics of three lakes and their connecting waters to determine whether title had passed to the State of Oregon.[57] In denying state ownership, the Court concluded that the physical condition of the lakes rendered them non-navigable in character.[58] They were extremely shallow and subject to seasonal evaporation and large variations in water area. Further, they were surrounded by mud flats and thus had no clearly defined banks. Finally, the lakes had never been used for any commercial purpose and were not susceptible to use as highways for commerce in their natural condition.

Then, in 1971, the Court held in *Utah v. United States*,[59] that

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51. *Id.* at 56.
52. *Id.* (citations omitted).
53. 283 U.S. 64 (1931).
54. *Id.* at 82.
55. *Id.* at 83.
56. 295 U.S. 1 (1935).
57. The Court noted that because a state's admission to the Union is based on federal action, the question of navigability for title purposes is a federal question. *Id.* at 14.
58. *Id.* at 23.
59. 403 U.S. 9 (1971).

title to the Great Salt Lake belonged to the citizens of Utah. The Court premised its conclusion that the lake was navigable, on three findings of fact. First, ranchers had used the lake to transport livestock between the mainland and the islands. Second, one boat had been operated for the purpose of carrying passengers and freight. Finally, other boats had used the lake to transport ore and salt.[60]

While these modes of water transport were sporadic and had mostly terminated prior to Utah's admission to the Union in 1896, the Court relied on the fact that the lake had sustained navigation in the manner customary at that time. Despite the fact that the Court relied on the *Daniel Ball* test,[61] it made no finding of commercial use, either past, present or future, in sustaining the lake's navigability. "The lake was *used* as a highway and that is the gist of the federal test. . . . [I]t is that feature that distinguished navigability and non-navigability."[62]

B. *Vermont's Concept of Navigability*

1. The Vermont Constitution

a. *Boatability—The "Of Common Passage as a Highway" Test*

Section 67 of the Vermont Constitution secures to the inhabitants of Vermont the "liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made . . . by the General Assembly."[63] This source of public water rights is particularly important for two reasons. First, it designates hunting, fowling and fishing as being constitutionally secured rights. Second, it specifies that boatable waters are subject to the public right of fishing.

In 1895, the Vermont Supreme Court construed the meaning of "boatable" waters as enunciated in Vermont's constitution in *New England Trout and Salmon Club v. Mather*.[64] In that case, the plaintiff claimed that the defendant had "trespassed" by fishing in his pond. The pond was seventy-five acres in size, had no inlet, and only a small brook for an outlet. The court held that

60. *Id.* at 11-12.
61. *Id.* at 10.
62. *Id.* at 11 (emphasis added).
63. VT. CONST. ch. II, § 67 (Cum. Supp. 1983).
64. 68 Vt. 338, 35 A. 323 (1895).

"boatable waters, within the meaning of the [Vermont] Constitution, are waters that are of 'common passage' as highways."[65] Elaborating on this definition, the court followed federal law in specifying that:

> [T]he *capability* of use by the public . . . affords the true criterion of the navigability of a river rather than the extent or the manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be carried on, it is navigable in fact, and therefore becomes in our law a public river or highway.[66]

The court further expanded its definition by indicating that boatable waters need not have the capacity as a highway at all seasons of the year:

> [A stream] may be subject to periodical fluctuations in the volume and height of its water, attributable to natural causes and recurring with the seasons, yet if its periods of high water ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement.[67]

Finally, the court alluded to the purposes for which the public easement may be established, thereby expanding the federal requirement of a highway for commerce: "But the easement is not confined to business merely; it extends to pleasure as well, the same as does the easement of a highway by land."[68]

Though the pond was boatable in fact, it was entirely surrounded by private property and had only a small brook for an outlet. Since it was not viewed by the court as being part of an aquatic highway, it could not be considered boatable within the meaning of the Vermont Constitution, and thus was not subject to public use.[69]

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65. *Id.* at 345, 35 A. at 325.

66. *Id.* at 345-46, 35 A. at 325 (emphasis added).

67. *Id.* at 347, 35 A. at 326.

68. *Id.*

69. It should be noted that since the waterbody at issue was entirely surrounded by private property, the defendant necessarily had to trespass to reach the plaintiff's pond. This alone would preclude the pond from public status.

The court also summarily dismissed the contention that the words "not private property" in Section 67 of the Vermont Constitution modify "boatable" as well as "other waters":

> [it] is not enough that waters are boatable in fact; that to be boatable under the Constitution they must be of such volume and size that they can be ad-

The court derived the "of common passage as highway" test from the federal test for navigability as articulated in *The Daniel Ball*.[70] However, by adopting this definition of navigability to define "boatability" within the meaning of the Vermont Constitution, the court failed to acknowledge the jurisdictional and commercial purposes for which it was originally intended under the commerce clause.

In a vigorous dissent, Justice Thompson urged that the term "boatable" should be construed according to the ordinary meaning of the word, "boatable in fact,"[71] with no further requirement for being "of common passage as highways." He noted that the latter test unduly limited the "boatable" provision of the constitution and would be applicable to only a small number of the waters of the state.

He further stated that should the word be given any meaning other than its plain one, it should be construed in light of the circumstances under which the Vermont Constitution was adopted, the rights intended to be conveyed, and the habits and customs of the people and the times in which they lived. "Hitherto in our history as a state, our people, young and old, rich and poor, have fished as a matter of right in all the waters of the state, which were boatable in fact."[72]

In stressing the independence of Vermont inhabitants, Justice Thompson referred to the oppressive fish and game laws of England, whereby the rights of hunting and fishing were enjoyed by the ruling class to the exclusion of the common people.[73] He viewed the change in meaning from "boatable in fact" to boatable by means of "common passage as a highway," as being due solely to the pressure brought by those who wished to purchase and control large bodies of water to the detriment of the citizens of the state.[74]

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vantageously used by boats at certain seasons of the year for transporting the products of the surrounding country, the products of the mines, the fields, and the forests.

Id. at 341, 35 A. at 324.

70. *Id.* at 345, 35 A. at 325; *see supra* text accompanying note 12.

71. *Id.* at 356, 35 A. at 329 (Thompson, J., dissenting).

72. *Id.* at 358, 35 A. at 330 (Thompson, J., dissenting).

73. *Id.* at 353, 35 A. at 328 (Thompson, J., dissenting).

74. *Id.* at 356, 35 A. at 329 (Thompson, J., dissenting).

b. *Boatability—A Question of Fact*

In 1918, the Vermont Supreme Court determined the "boatability" of a lake in *Hazen v. Perkins*.[75] In that case, the defendant owned a water privilege on an outlet stream, located downstream from a privilege owned by the plaintiffs. The defendant claimed he had been granted the right to control the flow of water from the lake in connection with the use and enjoyment of his privilege, by raising and lowering the water level of the lake for the operation of his mill. He further maintained that he and his grantors in title had exercised this right continuously, openly, notoriously, exclusively, and under a claim of right for more than 120 years.[76]

In holding that the lake was boatable as a matter of law, the *Hazen* court made no inquiry or findings as to the lake's capability for "common passage as a highway," the essential criterion for the determination of boatability in the *Mather* decision.[77] Instead, the court focused on the size of the lake, the actual uses of the lake and its shoreline, and the apparent economic benefit accruing to the area because of such uses.

The court found that the lake had an area of 640 acres. On its shoreline there were summer cottages occupied for pleasure and recreational purposes during the summer season. Also located on the lake were two hotels, a large casino, and several camps which made the lake a popular summer resort. The lake was used extensively for boating by canoe, rowboat, and motorboat. Finally, a steamboat was operated during the summer months for the purpose of carrying passengers around the lake. The court held that "[o]n these facts the waters of Lake Morey are boatable, as a matter of law, and therefore they are public waters within the provisions of the Constitution as construed in *New England Trout and Salmon Club v. Mather*."[78]

The *Hazen* decision is substantially at variance with the principle enunciated in *Mather*, though the latter case has not yet been overruled. *Hazen* stands for the proposition that the boatable, and thus public character of a waterbody may be determined as a ques-

75. 92 Vt. 414, 105 A. 249 (1918).
76. *Id.* at 417, 105 A. at 250.
77. *See supra* notes 64-69 and accompanying text.
78. 92 Vt. at 418, 105 A. at 250.

tion of fact and as a function of the water uses actually existing at the time a conflict of use arises.[79] *Mather*, however, maintains that the boatable quality of a waterbody arises solely as a function of its capability of serving as a common passage as a highway for commerce. Though both courts required a finding of "boatability" to confer a public classification upon the waters, no clear definition of public waters emerges from their holdings.[80]

The scope of the test of navigability articulated in *The Daniel Ball* and adopted by the *Mather* court reflects the establishment by the federal government of its dominant jurisdictional role over interstate commerce and is thus commensurate with its original purpose. However, the definition of navigability for federal purposes does not necessarily determine navigability for state purposes. As long as a state recognizes the dominant federal power to regulate commercial navigation, it is free to adopt its own test for defining public waterways for its own legitimate purposes.[81]

The balance between public and private water rights has varied with the changing demands society has placed on its water resources. Today, recreational pursuits are a vital basis of Vermont's economy,[82] and may well overshadow commercial transportation as a primary use in terms of the socio-economic benefit to the state. A broad definition of boatable waters for the purpose of public water recreation would render many waters available, which would otherwise be foreclosed from public use under the *Daniel Ball* test for navigability.[83]

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79. *Id.* The court's holding provides little guidance for the determination of public, boatable waters whose shorelines may be undeveloped; *cf.* Boutwell v. Champlain Realty Co., 89 Vt. 80, 86-87, 94 A. 108, 111 (1915) (The court cited *Mather*, 68 Vt. 338, 35 A. 323 (1895), for the proposition that the determination of whether a stream is boatable, and therefore a public highway, is a question of fact.).

80. Arguably, the two cases may be viewed as consistent if *Hazen* stands for the proposition that once various water uses are established on a particular waterbody, that waterbody is public. The "of common passage as a highway" test set forth in *Mather* might be deemed to apply to those waters which are not subject to established public use. However, if this is the case, the *Hazen* court's reliance on *Mather* is inappropriate.

81. 1 CLARK, WATERS AND WATER RIGHTS, § 37.4(A), at 213 (1967); *see also* Abrams, *Governmental Expansion of Recreational Water Use Opportunities*, 59 ORE. L. REV. 159, 167-68 (1980).

82. "[G]ross receipts of the marina industry and the gross expeditures of participants in boating, waterfowl hunting, fishing, camping, and swimming on and along Lake Champlain was $46,012,073 in 1977." GILBERT & WINANT, THE ECONOMIC VALUE OF WATER-ORIENTED RECREATION ON LAKE CHAMPLAIN, Prepared for the Water-Oriented Outdoor Recreation Task Force of the Lake Champlain Basin Study iii (Dec. 1977).

83. *See Mather*, 68 Vt. at 352, 35 A. at 328 (Thompson, J., dissenting).

2. The Legislative View of Navigability

In 1968, the Vermont Legislature delegated jurisdiction to the Water Resources Board[84] to regulate all proposed projects of "encroachments"[85] in "public waters."[86] In 1971, the board's jurisdiction was designated to include the lakes and ponds which were public waters of Vermont and to the lands lying thereunder up to the mean water level.[87] While this designation of jurisdiction specified the *extent* to which the board's jurisdiction could be invoked on the surface of a public body of water, it failed to designate *which* waters were subject to public classification.

The board was also given broad authority to establish rules and regulations for the use of public waters "in a manner to provide for the best interests of the citizens of the state."[88] No reference was made to the mean water level as the lateral limitation on the board's jurisdiction for this purpose.[89] However, "public waters" were finally defined as being "navigable waters excepting those waters in private ponds and private preserves . . . ."[90] Thus, the extent of the board's jurisdiction for the purpose of providing for the multiple use of public waters became embodied in the statutory definition of "navigable waters":

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84. 1968 Vt. Acts No. 308 § 1 (Adj. Sess. 1967) (codified as amended at VT. STAT. ANN. tit. 29, § 401 (1970 & Cum. Supp. 1983). The Board consists of five members appointed biennially by the governor for a term of six years. *See* VT. STAT. ANN. tit. 10, § 903 (1973 & Cum. Supp. 1983).

85. An encroachment was defined as "(a) plac[ing] any material in or displac[ing] the public or boundary waters of the state with construction, fill or other artificial encroachment, or (b) alter[ing] the bed of any lake or pond underlying such public or boundary waters." 1968 Vt. Acts No. 308 § 1 (Adj. Sess. 1967) (codified as amended at VT. STAT. ANN. tit. 29, § 402(3) (1970 & Cum. Supp. 1983)).

86. The term "public waters" was not defined with this grant of jurisdiction.

87. 1970 Vt. Acts No. 281 § 1 (Adj. Sess. 1969) (codified as amended at VT. STAT. ANN. tit. 29, § 401 (1970 & Cum. Supp. 1983)).

88. 1970 Vt. Acts No. 281 § 1100 (Adj. Sess. 1969) (codified at VT. STAT. ANN. tit. 10, § 1421 (1973); *see-also* VT. STAT. ANN. tit. 10, § 1424(c) (Cum. Supp. 1983).

89. Instead, in establishing its rules, the board must consider:

> the size and flow of the navigable waters, the predominant use of adjacent lands, the depth of the water, the predominant use of the waters prior to regulation, the uses for which the water is adaptable, the availability of fishing, boating and bathing facilities, the scenic beauty and recreational uses of the area.

1970 Vt. Acts No. 281 § 1103(b) (Adj. Sess. 1969) (codified as amended at VT. STAT. ANN. tit. 10, § 1424(b) (Cum. Supp. 1983)).

90. 1970 Vt. Acts No. 281 § 1101(5) (Adj. Sess. 1969) (codified at VT. STAT. ANN. tit. 10, § 1422(6) (Cum. Supp. 1983).

> "Navigable water" or "navigable waters" means 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 the state.[91]

In 1976, this definition of navigable waters was incorporated into the board's jurisdiction for the purpose of regulating the placement or construction of encroachments in public waters.[92] Today, the extent of the board's jurisdiction for this purpose remains

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91. *Id.* § 1101(3) (codified at VT. STAT. ANN. tit. 10, § 1422(4) (Cum. Supp. 1983)) (emphasis added). A dialogue from the minutes of a meeting of the Vermont Senate Energy and Natural Resources Committee, recently convened to consider amendments to the Management of Lakes and Ponds Act, illustrates the confusion which may accompany the interpretation of this definition of navigability:

> Q: "For the purpose of this chapter jurisdiction extends to all," and then you've inserted the word "public" and I can just see someone asking me what are public waters and I wouldn't blame them a bit, because I'm asking the question now.
> A: Page 82, line 14.
> . . .
> Q: Anything that floats a leaf?
> A: Navigable.
> . . .
> Q: How does the department define navigable waters?
> . . .
> A: "Navigable water means . . . 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 the state . . . ."
> Q: What's boatable mean? Canoe?
> A: You have to drag the canoe away and they're still navigable?
> . . .
> Q: Okay, "Navigable waters mean Lake Champlain . . . all natural lakes within Vermont." How do you define a natural inland lake?
> A: Something not made by a dam or—
> A: Spring fed.
> . . .
> Q: "And all streams, ponds, flowages." What's a flowage?
> A: Moving water.
> Q: All right, a spring freshet that dries up in the summer, is that a flowage?
> A: The only time I ever heard it used is in flowage rights on a dam, on dams, which allows you to impound and flood land.
> Q: And "other waters", what other waters?
> Q: Puddles?

Minutes from the Senate Energy and Natural Resources Committee 36-39 (Jan. 12, 1982) (available on microfilm at the Department of Public Records, Montpelier, Vt.).

92. 1976 Vt. Acts No. 162 § 2(3), (6) (Adj. Sess. 1975) (codified at VT. STAT. ANN. tit. 29, § 402(7) (Cum. Supp. 1983)).

limited to the mean water level[93] of boatable waters, which are not private ponds or preserves.[94] A littoral landowner whose land adjoins public waters is thereby subject to state regulation should he "encroach" beyond this jurisdictional limit.[95]

However, the correlative right of the public, individually and collectively, to use the public waters of the state is not subject to the mean water line limitation.[96] While public usage may be regulated in the public interest by the Water Resources Board, "to aid in the fulfillment of the state's role as trustee of its navigable waters,"[97] the only express limitations on the extent of its jurisdiction in this respect are that the waters are boatable[98] and not a private pond or preserve.[99]

With respect to the latter limitation, a private pond is defined in the following manner:

> A person owning a natural pond of not more than twenty acres or an artificial pond *entirely upon his premises*, stocked at his own expense . . . may take fish from such pond . . . provided that the sources of water supply for such pond are *entirely upon his premises* or that fish do not have access to such pond from waters not under his control or from waters stocked at the expense of the state.[100]

The Vermont Legislature has thus defined private ponds with regard to strict specifications. The classification of an expanse of

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93. *See* VT. STAT. ANN. tit. 29, § 401 (Cum. Supp. 1983).

94. *See* VT. STAT. ANN. tit. 29, § § 401, 402(4), (7) (Cum. Supp. 1983); VT. STAT. ANN. tit. 10, § 1422(4), (6) (Cum. Supp. 1983).

95. Such a littoral owner may thus place fixtures or materials on his property or alter his property up to mean water line on the landward side, regardless of whether that property is covered by public water. *See* VT. STAT. ANN. tit. 29, §§ 401, 403 (Cum. Supp. 1983).

In addition, there are some exceptions to the statutory requirement of a permit in order to encroach on or into public waters and their beds. These exceptions, however, are subject to the qualification that navigation and boating are not unreasonably impeded. VT. STAT. ANN. tit. 29, § 403(b) (Cum. Supp. 1983).

96. The lateral extent of the Board's jurisdiction is particularly significant in determining the permissible bounds of public water recreation, inasmuch as the shoreline is the major locus of conflicts between water recreationists and private landowners. *See supra* text accompanying notes 2-3.

97. VT. STAT. ANN. tit. 10 § 1421 (1973).

98. *See supra* note 91 and accompanying text.

99. *See supra* note 90 and accompanying text; *but see* VT. STAT. ANN. tit 10, § 6086(a) (Cum. Supp. 1983) (state control extended to all major developments for the purpose of regulating both the conservation and planned development of the environment, regardless of whether the waters are public).

100. VT. STAT. ANN. tit. 10, § 5210 (1973) (emphasis added).

water as private is dependent first, upon the pond as being within the maximum acreage requirement. Second, the pond and its source must be either entirely surrounded by an owner's fastland[101] or bordered by waters not stocked by the state or from which fish do not have access to the pond. Finally, the private status of these waters is addressed solely with respect to the taking of fish.[102]

Similarly, the concept of a private preserve is inextricably tied to the prohibited activity of poaching:

> A person who, without the written consent of the owner or person having the exclusive right to take fish or wild animals, takes fish, game, or other animals or carries or possesses a firearm, bow and arrow, or wild animal trap in private preserve as posted under section 5201 . . . shall be fined not less than $25.00 nor more than $100.00.[103]

Considering that "public waters"[104] are "navigable waters excepting those waters in private ponds or preserves,"[105] the definition of private preserve does little, if anything, to clarify the limitations of public waters already set forth in the definition of private ponds. Inasmuch as fish and wild animals are *ferae naturae*, they are the common property of the state.[106] Therefore, any exclusivity with regard to the right of capture and appropriation must derive from the owner's right to exclude others from the place from which they are taken.[107] Thus, in order for a littoral owner to claim the right to exclude the public from waters on or adjoining his premises, the boundaries of his property must be comprised entirely of fastland and/or nonboatable, or private

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101. "Fastland" is generally recognized as being "[the] mainland; *esp*: land that is high and dry near water: upland." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 827 (unabridged 3d ed. 1965).

102. See OP. ATT'Y GEN. 156 (Vt. 1932) for a statement regarding the circumstances in which this statute might apply:

> [I]f the water of the pond in question is so enclosed as to be absolutely within the owner's control and the free passage of fish to and from it entirely and rightfully obstructed, then a license would not be required, since the exercise of the right to take fish would in no way interfere with the rights of others. If the pond in question is otherwise, then I believe a license should be required.

Id. at 157.

103. VT. STAT. ANN. tit. 10, § 5204(a) (1973); *see also id.* § 5201(a).

104. VT. STAT. ANN. tit. 10, § 1422(6) (Cum. Supp. 1983).

105. *Id.*; *see also id.* §§ 1422(4), 5204, 5210.

106. State v. Theriault, 70 Vt. 617, 622-23, 41 A. 1030, 1032 (1898).

107. *Id.* at 623, 41 A. at 1032.

waters.[108]

The touchstone of this rather circuitous definition of "public waters" lies within the meaning of "boatable waters."[109] The "of common passage as a highway" test set forth in *Mather*[110] affects by implication the meaning of boatable waters as that term was used by the legislature in defining public waters.[111] As indicated above, this test is based on archaic societal needs and values and is unnecessarily limiting in the number of waterways rendered available for public use. It should therefore be overruled.

The legislative definition of public waters in Vermont has been increasingly clarified, both in terms of which waters fall within the state's jurisdiction and for which purposes. Yet, the boatability limitation remains inherently ambiguous due to varying judicial construction.[112]

An adoption of the "boatable in fact" test urged by the dissent in *Mather*[113] for the purpose of public water recreation would serve two functions. First, this would allow many lakes, ponds, and streams having the capability of sustaining reasonable recreational use, to fall within the protection of the state's trusteeship, even though they have no characteristics as "common passages as highways."[114] Second, the effect of the "boatable in fact" test is that water recreational rights, particularly along the shoreline, become a function of both local topography and the regularity with which a particular expanse of water is subject to inundation.[115] Thus, the

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108. *See, e.g.*, Op. Att'y Gen. 191 (Vt. 1972) (Land posted against hunting, which became flooded each spring was not susceptible to public right to take muskrat on the land from boats on the theory that the waters were boatable. The test for boatable waters is whether, in their ordinary condition, they are capable of carrying public transportation or commerce. The flooded land was not boatable under this test.).

109. *See supra* notes 90-91 and accompanying text.

110. *See supra* text accompanying note 65.

111. D. Bradley, Outdoor Recreation and the Law—An Analysis of Selected Legal Problems in Vermont 76 (Dec. 1977).

112. *Compare* New England Trout and Salmon Club v. Mather, 68 Vt. 338, 35 A. 323 (1895) (boatable waters are those that are "of common passage as highways") *with* Boutwell v. Champlain Realty Co., 89 Vt. 80, 94 A. 108 (1915) (whether waters are boatable, and therefore a public highway, is question of fact) *and* Hazen v. Perkins, 92 Vt. 414, 105 A. 249 (1918) (waters' boatability is function of waters' usage actually existing at time of conflict).

113. *See supra* note 71 and accompanying text.

114. *See infra* notes 116-73 and accompanying text.

115. " 'The majority rule within the states that have confronted the issue now appears to be that *capacity* for recreational navigation confers the *right* of recreational activity.' " *Thomas*, *supra* note 2, at 6 (quoting 80 W. Va. L. Rev. at 365 & nn.48-49 (emphasis in original)); *see also infra* notes 147-67 and accompanying text.

adoption of this test would place both littoral owners and water recreationists on notice of the characteristics which establish a given area of water as open for public use or restricted to private use.

C. *The Public Trust Doctrine*

1. Generally

Under the public trust doctrine, the states as sovereigns hold title to the beds and overlying waters of navigable bodies of water in trust for the public uses for which they are adapted.[116] The historic premise of the doctrine is that the individual states, upon admission to the Union, acquired title to the beds of all navigable waters below the ordinary high water mark as an attribute of state sovereignty.[117] The title, however, was split between the *jus privatum*[118] and the *jus publicum*,[119] the former being freely alienable, but always held subject to the public right, or *jus publicum* of navigation and fishing.[120]

A state acting in its capacity as trustee for its citizens may subsequently convey these submerged lands to private owners. However, "[n]o state has adhered to the view that the public interest may be alienated in fee to private persons without regard to the utility and need of the property for navigation, and without assur-

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116. *In re* Establishment of Water Levels of Lake Seymour, 117 Vt. 367, 375, 91 A.2d 813, 818 (1952); State v. Malmquist, 114 Vt. 96, 101, 40 A.2d 534, 538 (1944); State v. Quattropani, 99 Vt. 360, 363, 133 A. 352, 353 (1926); Hazen v. Perkins, 92 Vt. 414, 419, 105 A. 249, 251 (1918).

117. *See supra* note 41 and accompanying text.

118. "The right of a person acquiring title to lands under navigable waters to fill in such lands, making upland out of foreshore, and thus extinguishing *jus publicum* subject to right of sovereign to make public improvements on tide water for benefit of commerce." BLACK'S LAW DICTIONARY 774 (rev. 5th ed. 1979).

119. "The right shared by all to navigate on waters covering foreshore at high tide and, at low tide, to have access across foreshore to waters for fishing, bathing or any other lawful purpose. BLACK'S LAW DICTIONARY 774 (rev. 5th ed. 1979).

120. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Sax extends the rights of commercial navigation and fishing, those traditionally protected under the public trust doctrine, to current public interests which have a "peculiarly public nature that makes their adaptation to private use inappropriate." *Id.* at 485. See also Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979), wherein the Supreme Judicial Court of Massachusetts stated that public trust land "is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representative an interest and responsibility in its development." *Id.* at 649, 393 N.E.2d at 367.

ance that the property will be used to promote at least a quasi-public purpose . . . ."[121] Thus, while a part or all of the bed of a navigable body of water may be held in private ownership, the overlying waters remain impressed with the public trust, such that the private use of the bed must be consistent with the exercise of public rights of use.[122] Consequently, "there is so little of proprietary nature left in the riparian that his is a strange 'ownership' indeed."[123]

The public trust doctrine finds its first clear articulation in a decision by the United States Supreme Court. In *Illinois Central R.R. v. Chicago*,[124] the Court described the nature of the title held in public waters: "It 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."[125]

An examination of the public trust doctrine in Vermont reveals first, that it applies to "public waters," those which are deemed to be "boatable;"[126] second, that the public waters must be protected to "provide for the multiple use of the waters in a manner to provide for the best interests of the citizens of the state;"[127] and third, that boating, fishing, swimming, and other recreational uses are among those activities sought to be protected under the state's trusteeship.[128]

2. The Extent of the Public Trust

The extent of the public easement arising under the public trust doctrine must be distinguished from the scope of the easement, though discussion of one frequently necessitates discussion of the other. The extent of the easement refers to the actual sur-

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121. 1 CLARK, *supra* note 81, § 36.4(A), at 196 (footnotes omitted).

122. The Supreme Court of California has held that the private ownership of the bed underlying public waters is "subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state . . . to enter upon and possess the same for the preservation and advancement of public uses . . . ." People v. California Fish Co., 166 Cal. 576, 599, 138 P. 79, 88 (1913); *see also* Marks v. Whitney, 6 Cal. 3d 251, 261, 98 Cal. Rptr. 790, 797, 491 P.2d 374, 381 (1971).

123. *See* 1 CLARK, *supra* note 81, § 36.4(A), at 198-99.

124. 146 U.S. 387 (1892).

125. *Id.* at 452.

126. VT. STAT. ANN. tit. 10, § 1422(4), (6) (Cum. Supp. 1983).

127. *Id.* § 1421 (1973).

128. VT. STAT. ANN. tit. 29, § 405(b) (Cum. Supp. 1983).

face area of a body of water which falls within the state's trusteeship; the scope of the easement refers to the particular uses of the water which the state must protect in its capacity as trustee.

In *State v. Malmquist*[129] the State of Vermont sought to enjoin the owner of a dam on a boatable lake from lowering the level of the lake. The court found that the lowering of the lake level was not reasonably necessary for the operation of his mill, that such lowering was detrimental to the propagation of fish in the lake, and that this use of the lake adversely affected both boating and bathing.[130]

In so finding, the court noted that "the *entire* body of water . . . [was] subject to the common rights of fishing and navigation and to all other incidents of public water."[131] The court applied the public trust doctrine in stressing the obligatory role of the state as trustee of boatable waters. "As trustee for the people, the State cannot waive the rights and interests of those who are the beneficiaries of the trust."[132]

The court employed a "reasonable use" test in enjoining the defendant from impairing these common rights of the public. Considering the various uses made of the lake, the defendant's lowering of the water level was deemed to be "substantially harmful to [the] dominant [public] interest"[133] and therefore was unreasonable.

In *State v. Cain*[134] the defendants owned land bordering Lake Champlain and attempted to place landfill in the lake immediately in front of their shoreline property. The issue before the lower court was the extent of private ownership of the land bordering the lake. On appeal, however, the Vermont Supreme Court found that the limit of private ownership was not the crucial issue in the case. Rather, the issue should have been the extent of public ownership of the waters of Lake Champlain.[135] Thus, in attempting to delineate public and private rights of use, the court implicitly held that the determination of public rights required definition prior to the

129. 114 Vt. 96, 40 A.2d 534 (1944).
130. *Id.* at 101, 40 A.2d at 537-38.
131. *Id.* at 102, 40 A.2d at 538 (emphasis added).
132. *Id.* at 106, 40 A.2d at 540.
133. *Id.* at 104, 40 A.2d at 539.
134. 126 Vt. 463, 236 A.2d 501 (1967).
135. *Id.* at 469, 236 A.2d at 505.

determination of private rights. By so holding, however, the court failed to acknowledge the unique nature of title held in beds submerged by public water.[136]

The court remanded the case for consideration of the extent of public water rights, noting the importance of recreational considerations even though recreational use of the waters was not directly at issue:

> [T]he determination of such questions is vitally important to the public interest and welfare of that substantial part of the general public who sail upon the waters of Lake Champlain, as well as to that other substantial portion of people in this State who own real estate bordering upon the lake. . . .[137]

The case was never appealed again, so the issue remains open.

Before remanding the case, the court took judicial notice that Lake Champlain is one of the larger natural lakes existing in the United States and is extensively used for recreational purposes:

> Lake Champlain is public, navigable waters. . . . It is extensively used for boating, fishing and other sports, and there are numerous tourist homes, summer camps, lodges and hotels along the lake front. It is used for recreational purposes by some millions of people, and the number of such users are continually increasing.[138]

In so characterizing the lake, the court apparently recognized that its socio-economic utility derived, at least in part, from the recreational purposes for which it is used. Yet it expressly stated that the rights of the public to sail, hunt, and fish over lands bordering Lake Champlain, between the ordinary high and ordinary low water marks, when such lands are covered with water, have not yet been decided.[139]

In light of the current expansion of development surrounding Lake Champlain, and the increasing concentration of water recrea-

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136. The court's holding exemplifies the fact that "[j]udicial application of the trust theory . . . has seldom contemplated the simultaneous enjoyment of both public and private rights." Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 563 (1982).

137. *Cain*, 126 Vt. at 471, 236 A.2d at 506.

138. *Id.* at 470, 236 A.2d at 506 (citation omitted).

139. *Id.* at 471, 236 A.2d at 506.

tion along its shoreline,[140] the issue left open in *Cain* should be resolved. Since the waters of Lake Champlain have been statutorily designated as public, navigable waters,[141] the public trust doctrine may be used to sanction reasonable recreational use on the entire surface of these waters when they overlie privately owned land.

3. The Scope of the Public Trust

Once the extent of the public trust has been established, the question becomes: Which public uses are protected? The answer to this question can never be absolute. As history determines public needs and demands, specific answers may change in accordance with legislative direction on behalf of the public interest.[142]

The Vermont Legislature has addressed the purposes for which the public trust doctrine may be invoked. The legislature has mandated that the Secretary of Environmental Conservation "shall prepare a comprehensive plan relating to water resources as a guide for [land use or development plans]."[143] Moreover, it has required that "[p]articular attention shall be given to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; [and] the capability of the water resource . . . ."[144]

The scope of the state's public trust jurisdiction is further addressed within the context of the statutory regulation of construction activities in public waters: "Lakes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of the state that these waters and lands shall be managed to serve the public good . . . ."[145] This statute reiterates the purposes and activities for which the public trust doctrine may be invoked, again recognizing the importance of protecting water recreation.[146]

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140. *See supra* note 1 and accompanying text.

141. *Cain*, 126 Vt. at 470, 236 A.2d at 506; *see also* VT. STAT. ANN. tit. 10 § 1422(4), (6) (Cum. Supp. 1983).

142. 1 CLARK, *supra* note 81, § 36.4(B), at 200.

143. VT. STAT. ANN. tit. 10, § 1423(b) (Cum. Supp. 1983).

144. *Id.* § 1423(b)(6).

145. VT. STAT. ANN. tit. 29, § 401 (1970 & Cum. Supp. 1983). The "public good" is defined as meaning "that which shall be for the greatest benefit of the people of the State of Vermont." *Id.* § 402(6).

146. For example, in determining whether an encroachment will adversely affect the

Recently, *State v. Thomas*[147] raised two issues similar to those presented in *Cain*.[148] The dispute arose out of a duck hunting expedition. The defendants entered Lake Champlain in an airboat, proceeded up a creek, and finally ventured into an inundated marsh area, disregarding signs prohibiting "hunting, shooting and trapping." The signs had been posted at the ordinary low water level, which was determined to be the actual boundary of this particular "property" in 1949.[149] The defendants were thus situated in the water at an elevation between the ordinary low and ordinary high water levels of Lake Champlain when they were arrested for unlawful trespass[150] and poaching.[151] They never left their boat while they were in the posted area.[152]

An interlocutory appeal was granted to determine controlling questions of law, which were set forth as follows:

> (1) To what point do the boundaries of the littoral property owners of Lake Champlain extend? [and]
> (2) Irrespective of the point(s) to which this boundary extends, does the public have the right to use the overlying waters of Lake Champlain between the ordinary low water level and the ordinary high water level for recreational purposes, including that of hunting?[153]

The Vermont Supreme Court dismissed the appeal as improvi-

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public good, the Department of Water Resources and Environmental Engineering must consider the effect the proposed encroachment will have on "navigation and other recreational and public uses, including fishing and swimming." *Id.* § 405(b).

147. *Thomas, supra* note 2.

148. *See supra* text accompanying notes 135-39.

149. Cabot v. Hemingway, No. 2165 slip op. (D. Ct. of Franklin County, Vt., Feb. 10, 1949).

150. VT. STAT. ANN. tit. 13, § 3705(a)(1) (Cum. Supp. 1983) provides that:

> A person shall be imprisoned for not more than three months or fined not more than $500.00, or both, if, without legal authority or the consent of the person in lawful possession, he enters or remains on any land or in any place as to which notice against trespass is given . . . .

While the signs beyond which the defendants passed did not prohibit "trespassing," the defendants were asked to leave the area, as they had guns in their possession.

151. VT. STAT. ANN. tit. 10, § 5204(a) (1973) provides that:

> a person who, without the written consent of the owner or person having the exclusive right to take fish or wild animals, takes fish, game or other animals . . . in private preserve as posted under section 5201 . . . shall be fined not less than $25.00 nor more than $100.00.

152. Brief of the Appellants at 2, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).

153. *Id.* at 4-5.

dently granted and remanded the case.[154] However, it cryptically alluded to the unique nature of the title held by lake shore landowners: "Such littoral boundaries require recognition of the fluctuations in water level of Lake Champlain, and the public's right to use the waters overlying the land between the ordinary low and high water levels, for recreational purposes."[155]

At trial, the defendants contended that because there was no low water mark for the waters at issue, the littoral proprietors' exclusive property rights extended only to the waters' edge.[156] Thus, the public's right to hunt was claimed to extend under the public trust doctrine with the boatable waters of the state. The court found that because the area was "marshy," it was not susceptible to a "readily ascertainable low water mark,"[157] and focused solely on the extent of the right of public use. Relying on *Cain*, the court conceptually separated private littoral rights from public water use rights by indicating that the former need not be determined to ascertain the extent of the latter.[158]

The court found that " '[t]he majority rule [w]ithin the states that have confronted the issue now appears to be that *capacity* for recreational navigation confers the *right* of recreational activity . . . .' "[159] Noting that the waters of Lake Champlain are public waters and thus held by the state as a public trust, the court reasoned that "the effect of this trust is that . . . littoral landowners hold their property subject to a public servitude allowing public use for 'recreation' and 'other' purposes."[160] Finding the defendants not guilty of the crimes charged, the court held that "littoral landowners on public waters . . . do not have a superior right of possession of those waters as against public users. . . .[and] are not capable of the degree or character of possession which would support either of the crimes here charged."[161]

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154. *Thomas*, 140 Vt. at 405, 438 A.2d at 402.

155. *Thomas*, 140 Vt. at 404, 438 A.2d at 401.

156. The boundary line of littoral property in Vermont extends to the waters' edge, unless the lake or pond has a definite low water mark which establishes the property's boundary. *See* Hazen v. Perkins, 92 Vt. 414, 419, 105 A. 249, 251 (1918); McBurney v. Young, 67 Vt. 574, 579, 32 A. 492, 493 (1895). For a discussion of the problems associated with determining the ordinary low water mark, see *infra* notes 283-93 and accompanying text.

157. *Thomas*, *supra* note 2, at 3.

158. *Id.* at 3 n.1. *See also supra* note 136.

159. *Id.* at 6 (quoting 80 W. VA. L. REV. at 365 & nn.48-49 (emphasis in original)).

160. *Id.* at 5.

161. *Id.* at 6-7.

The court apparently was not concerned with the possible ramifications of sanctioning recreational hunting at the waters' edge.[162] Noting the legislature's express designation of "recreational" uses as falling within the ambit of the "public good," the court summarily disposed of the issue concerning the recreational status of hunting: "It is axiomatic that, in Vermont, 'recreation' includes duck hunting from a boat, pursuant to a valid license in the regular season."[163]

The court's decision is consistent with the modern trend which extends the scope of public protection of water rights beyond the traditionally recognized travel and transportation uses to include, among others, hunting, boating, bathing, and fishing.[164] Under the "capacity" test,[165] the scope of the public easement for water recreation is commensurate with its purpose in much the same way that the scope of the federal easement for navigation is commensurate with its purpose.[166]

Yet the difficulty inherent in recognizing a broad definition of the public right to water recreation arises with respect to defining the characteristics of "public water". The effect of an application of a particular definition to a given area of water implicitly denies littoral owners the right to exclude the public. Consequently, a judicial determination that the public may use a particular area of water which historically has been posted against public access raises the question of whether the denial of a littoral proprietor's "right" to exclude is a "taking" in violation of the fifth and fourteenth amendments.[167] To answer this question, an initial determination must be made as to whether the proprietor ever "owned" the right to exclude.[168]

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162. Perhaps this is due to two underlying factual aspects of the case. First, there was no contention that the defendants had trespassed on either the submerged or surrounding land to retrieve the fruits of their expedition. Second, the marsh was suitable specifically for the purpose of hunting waterfowl and was used by the proprietors primarily for this purpose. There were apparently no considerations of public safety at issue.

163. *Thomas*, *supra* note 2, at 6.

164. *See* 1 CLARK, *supra* note 81, § 37.4(B), at 214 (noting the strong trend of authority which supports public use of waters over private lands on the basis that the waters are simply suitable for public use).

165. *See supra* text accompanying note 159.

166. *See supra* notes 7-34 and accompanying text.

167. *See* Amicus Brief for the Appellees at 6, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).

168. *See generally* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391 (1970).

Implicit in the *Thomas* court's holding is the acknowledgment that recreational water rights are legally sanctioned because they are exercised in public water, and therefore are protected under the public trust doctrine. Yet the court failed to address the "boatability," or public character of the particular expanse of water at issue. Instead it was able to confer public status to the marsh waters based on the parties' stipulation that the creek adjoining the marsh was a part of Lake Champlain, which is expressly designated by statute as public waters.[169] However, absent such a fortuitous designation, an initial determination of the public status of an area of water is necessary before a subsequent determination can be made as to the attendant private rights and any alleged unconstitutional denial of those rights.

Therefore, a precise definition of "boatable" waters is imperative to a clear understanding by both littoral landowners and water recreationists of their respective rights. Although the Vermont Legislature has used the term "boatable" in designating which waters are "navigable,"[170] and thus "public,"[171] precise definitions of "navigable" or "boatable" are ultimately dependent on judicial interpretation.[172] An overruling of the *Mather* decision and an affirmance of the "capacity" test[173] would provide the needed clarification. However, whether the application of the capacity test to the situation presented in *Thomas* results in a compensable taking is a separate question.

II. The Demarcation Between Public and Private Water Rights

A. *The "Taking" Issue*

The fifth amendment to the United States Constitution provides that "private property [shall not] be taken for public use,

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169. Vt. Stat. Ann. tit. 10, § 1422(4), (6) (1973 & Cum Supp. 1983).

170. *Id.* § 1422(4).

171. *Id.* § 1422(6).

172. *See supra* note 30 and accompanying text.

173. The application of the "capacity" test, at least as it appears in *Thomas*, does not comprehend the right of the public to trespass across private fastland to reach a waterbody that has the capacity to support recreational water rights. Nor does it allow for the exercise of public recreational rights on a privately owned bed underlying the waters, that is more than incidental to the primary use of the overlying waters. *See infra* text accompanying notes 239-60. *But see* note 260. The effect of this test is thus virtually identical to the "boatable in fact" test advocated by the dissent in New England Trout and Salmon Club v. Mather, 68 Vt. 338, 35 A. 323 (1895); *see supra* text accompanying notes 113-15.

without just compensation."[174] The rationale underlying this constitutional mandate is to "require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[175] On the other hand, however, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[176]

1. The Federal Navigational Servitude

When a taking claim has arisen in connection with the exercise of the right of navigation over public waters, the United States Supreme Court has held in many cases that compensation is not required.[177] This is due to the historical treatment of the federal navigation servitude as an exception to the taking clause.[178] Judicial interpretation of the scope of the "dominant servitude,"[179] has thus given favorable regard to the right of public commercial use in navigable waterways.[180] Title to
riparian or littoral property on navigable waterways has been viewed as a qualified one, held subject to "such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."[181]

The exercise of the public right to commercial navigation on water overlying or abutting privately held land has repeatedly been held not to constitute a "taking" of property within the meaning of the fifth amendment.

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.[182]

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174. U.S. CONST. amend. V.

175. Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

176. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

177. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

178. *Id.*

179. United States v. Rands, 389 U.S. 121, 123 (1967) (citing FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954)).

180. Abrams, *supra* note 81, at 166.

181. *Kaiser Aetna*, 444 U.S. at 176 (citing Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

182. *Rands*, 389 U.S. at 123 (citing United States v. Chicago, M. St. P. & P.R. Co., 312

Recently, the United States Supreme Court addressed the compensation requirement of the fifth amendment in the context of the assertion of the public right of navigation under the federal navigational servitude to a formerly private pond, subsequently made navigable through private enterprise.[183] In *Kaiser Aetna v. United States*,[184] the owner and lessee of Kuapa Pond, a shallow Hawaiian lagoon, conducted dredging and filling operations to connect the private pond to a navigable bay of the Pacific Ocean in developing a marina complex on the pond.

The pond was located approximately two miles inland from the bay, covered 523 acres, and was approximately two feet in depth. It was also contiguous with the bay and therefore subject to the ebb and flow of the tide, despite the presence of a barrier beach and the maintenance of sluice gates constructed in a stone wall barrier. While the barriers did not prohibit the periodic inundation of the pond by the ocean tides, they did prohibit the possibility of even the shallowest of boats from floating directly from Kuapa Pond to the open bay. Historically the pond and its fish had been strictly regarded as private property under Hawaiian law.[185]

The Court identified several factors upon which it based its decision that governmental authorization of public access to the marina required the payment of just compensation. First, Kuapa Pond in its natural state could not have been navigated;[186] second, the pond was undoubtedly private property under Hawaiian law;[187] third, the petitioners had invested millions of dollars in its improvement in reliance on the apparent consent of the federal gov-

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U.S. 592, 596-97 (1941)).

183. *Kaiser Aetna*, 444 U. S. at 169.

184. 444 U.S. 164 (1979).

185. The private status of the pond derived originally from its integral role in the maintenance of the Hawaiian feudal system. Hawaiian chiefs imposed tabus on the taking of fish from their fishponds. Fishponds in conquered chiefdoms became the personal property of the conquering high chief, which he could grant or take away at will. The commoners thus had no right to fish in Hawaiian ponds, nor in the portion of the ocean adjacent to the chief's land. *Kaiser Aetna*, 408 F. Supp. 42, 46-47 (D. Hawaii 1976).

The emphasis on the private nature of Hawaiian fishponds stands in sharp contrast to the historically recognized public right of fishing in boatable waters of Vermont, referred to by Justice Thompson in his dissent in New England Trout and Salmon Club v. Mather, 68 Vt. 338, 35 A. 323 (1895); *see supra* text accompanying note 72.

186. *Kaiser Aetna*, 444 U.S. at 178.

187. *Id.* at 179.

ernment;[188] fourth, the petitioners were being denied the right to exclude others from their property, "so universally held to be a fundamental element of the property right;"[189] and fifth, free public access to the petitioner's marina would result in an actual physical invasion of petitioners' private property.[190] Even though the improved pond was "navigable," a denial of the right to exclude, given the petitioners' substantial investment expended with the government's apparent consent, required the payment of just compensation.[191]

The *Kaiser Aetna* characterization of private rights was subsequently distinguished in *Prune Yard Shopping Center v. Robins*.[192] In that case, the owner of a private shopping center was denied the right to exclude members of the public for exercising their free expression and petition rights which were guaranteed by the California Constitution.[193] The Court held that in that situation, the exercise of public rights on private property did not constitute a taking.[194]

Kaiser Aetna was distinguished in two ways. First, the expensive development of the Kaiser Aetna marina complex with the apparent consent of the Army Corps of Engineers was interpreted as causing "reasonable investment-backed expectations."[195] Second, the Court in *Prune Yard* stressed the authority of the state to recognize individual liberties more expansive than those set forth in the United States Constitution.[196] *Prune Yard* thus sets the unique factual context of *Kaiser Aetna* in perspective, while implicitly acknowledging the state's authority to reconcile private and public rights in its definition of property.

Applying the result reached in *Kaiser Aetna* and its subsequent interpretation in *Prune Yard* to the facts in *State v. Thomas*,[197] it is apparent that no compensable taking has occurred as a result of the district court's decision.[198] First, in *Kaiser Aetna*,

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188. *Id.*
189. *Id.* at 179-80.
190. *Id.* at 180.
191. *Id.* at 179-80.
192. 447 U.S. 74 (1980).
193. CAL. CONST. art. 1, §§ 2, 3.
194. 447 U.S. at 83.
195. *Id.* at 84.
196. *Id.* at 81.
197. *See supra* notes 147-63 and accompanying text.
198. *Thomas*, *supra* note 2.

a primary factor underlying the Court's rationale was the "reasonable investment-backed expectations" of the developers, engendered by their reliance on the apparent authorization of the Army Corps of Engineers. The Corps advised the developers that they were not required to obtain permits for either the development or future operations in Kuapa Pond. Relying on this authorization, Kaiser Aetna made improvements worth millions of dollars. When the Corps attempted to require the petitioners to allow public access to Kuapa Pond,[199] the Court found that the substantial expenditure made in reliance on the Corps' apparent authorization required the payment of just compensation.[200]

In *Thomas*, the plaintiffs maintained that a judicial determination allowing public access to their marsh would violate their "reasonable investment-backed expectations" and thus would constitute a compensable taking.[201] They contended, in part, that because riparian owners in Vermont own to the low water mark[202] and because that mark for their property was expressly determined in *Cabot v. Hemingway*,[203] the allowance of unlimited public access "would be a modication [sic] of existing Vermont property law in a way that owners of marshland could never have foreseen."[204]

However, the plaintiffs' reliance on *Hemingway* was misplaced. In that case, the defendant had erected and maintained "duck blinds" in a corner of the plaintiff's[205] real property which adjoined public water. He claimed that he had a legal right to do so because the blinds were located in public water. The court first determined the actual low water mark of the property, which established the property's boundary. It then enjoined the defendant from "going on, through or over"[206] the plaintiffs' lands.

While the injunction thus prevented the defendant from using the march waters above the low water mark, it was premised on

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199. *Kaiser Aetna*, 444 U.S. at 168. As the result of the improvements, Kuapa Pond became a navigable and thus public water of the United States. *Id.*

200. *Id.* at 179-80.

201. Amicus Brief for the Appellees at 15, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).

202. *See supra* note 156.

203. No. 2165 slip op. (D. Ct. of Franklin County, Vt., Feb. 10, 1949).

204. Amicus Curiae Brief for the Appellees at 14, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).

205. The plaintiffs in *Hemingway* were the predecessors in title of the plaintiffs in *Thomas*.

206. *Hemingway*, No. 2165 slip op. at 2.

two important findings of fact. First, the defendant had maintained his duck blinds in the plaintiff's soil, thereby permitting a continuing trespass on the *jus privatum*.[207] Second, the defendant was a professional guide for sportsmen,[208] and was renting the blinds to members of the public, thereby deriving undue profit from his use of the trespassing blinds. Thus, while the low water mark of this property constitutes the boundary of the owner's soil, or the *jus privatum*, it does not represent the littoral boundary of the overlying waters. These waters remain impressed with the *jus publicum*[209] and may be used for noncommercial public purposes.

Moreover, the substantial expenditure invested in *Kaiser Aetna* was conspicuously absent in *Thomas*. In *Thomas* there was no indication that the plaintiffs had expended any labor or capital in the improvement of their property in reliance on "governmental authorization"[210]—or the boundary determination rendered in *Hemingway*. Indeed, they inherited the property at issue[211] and sought not to improve their inheritance but rather only to deny the public right of access.[212]

Next, the pond at issue in *Kaiser Aetna* was indisputably private property under Hawaiian law, having been historically acknowledged as an integral part of the Hawaiian feudal system. Prior to the attempted establishment of public access to Kuapa Pond, Kaiser Aetna unquestionably had the right to exclude others because of the well-recognized private status of the pond.

In *Thomas*, however, the plaintiffs never owned the right to exclude the public from the marsh's waters. The record of that case indicates that in time of seasonal low water, usually late August through October, the marsh's westerly boundary is mud and not covered by water.[213] Yet throughout the remainder of the year,

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207. *See supra* note 118 and accompanying text.

208. Cabot v. Hemingway, 115 Vt. 321, 323, 58 A.2d 823, 824 (1948).

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

210. *See supra* text accompanying note 200.

211. Amicus Curiae Brief for the Appellees at 1, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).

212. See Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 608-10 (1982) wherein the author recognizes the propriety of the application of estoppel principles to governmental acquiescence in private action, solely with regard to the construction of private improvements impairing the navigational servitude.

213. Amicus Curiae Brief for the Appellees at 4, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981). There was no contention in *Thomas* that the public had the right of access to

the marsh is subject to periodic inundations from Charcoal Creek, designated in plaintiffs' deed as a part of the public waters of Lake Champlain.[214] As was noted in *New England Trout and Salmon Club v. Mather*,[215] in the court's elaboration of the "of common passage as a highway" test,[216] if periods of high water "ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement," which extends to "pleasure" as well as to "business."[217] The very meaning of the servitude is that it nullifies private property rights when they conflict with public use.[218]

Finally, as the district court in *Kaiser Aetna* noted, if Kuapa Pond had been navigable water prior to its development, the post-development status of the pond would have been undoubtedly subject to the public right of access.[219] The court emphasized the lack of evidence supporting the capability of the barrier beach and stone wall barrier of allowing "even the shallowest of boats"[220] to float directly from the pond to the open bay. The United States Supreme Court also apparently recognized the significance of the lack of navigability of Kuapa Pond prior to its development: "While it was still a fishpond, a few flat-bottomed shallow draft boats were operated by fishermen in their work. There is no evidence, however, that even these boats could acquire access to the adjacent bay and ocean from the pond."[221]

In the dissent, Justice Blackmun applied the "ebb and flow" test of navigability in maintaining that the pre-development status of the pond *was* navigable, and therefore subject to the navigational servitude.[222] This test states that estuarine tidal areas which are regularly inundated by the mean high tide are subject to the

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the marsh when the boundary to the littoral property was mud, and thus not covered by water.

214. *See* Amicus Curiae Brief for the Appellees at 1, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981) *and* Cabot v. Hemingway, No. 2165, slip op. (D. Ct. of Franklin, County, Vt., Feb. 10, 1949).

215. 68 Vt. 338, 35 A. 323 (1895).

216. *See supra* note 67 and accompanying text.

217. *See supra* text accompanying notes 67-68.

218. *See* United States v. Rands, 389 U.S. 121 (1967); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913).

219. *Kaiser Aetna*, 408 F. Supp. at 49.

220. *Id.*

221. *Kaiser Aetna*, 444 U.S. at 178 n.10.

222. *Id.* at 182 (Blackmun, J., dissenting).

federal navigational servitude.[223] Under this test, the waters' presence confers the right to public navigation,[224] concommitantly negating the right to exclude. Therefore, the denial of such a right could not amount to a compensable taking, since it could never have vested in the first place.[225]

The fact situation in *Thomas* is distinct from that presented in *Kaiser Aetna* because the critical element of public access from the navigable waters of Lake Champlain is and has been physically and regularly available throughout most of the year, due to seasonal inundation from contiguous public waters.[226] The waters of the marsh are thus navigable for public recreational use and for the common good.

2. The Public Servitude Under the Public Trust Doctrine

a. *Generally*

The duty of the state to protect and regulate the use of its water resources under the public trust doctrine is analogous to the federal power to protect and regulate interstate navigable waters for commerce and transportation purposes. However, there has been little legal discussion regarding the possible compensable consequences of a judicial determination of the extent to which the

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223. *Id.* This test was expressly adopted by the third circuit in United States v. Stoeco Homes, Inc., 498 F.2d 597, 605-06, 610 (3d Cir. 1974).

224. *See* 33 C.F.R. § 329.12(b) (1982).

225. As under common law, the ebb and flow test of navigability applies only to tidal waters. The regulations promulgated pursuant to 33 U.S.C. § 401 (1982) recognize the Army Corps of Engineers' jurisdiction over "bays and estuaries" solely with respect to those subject to tidal action:

> Jurisdiction thus extends to the edge . . . of all [bays and estuaries subject to tidal action], even through portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered 'navigable in law,' but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test . . . which generally applies to inland rivers and lakes.

33 C.F.R. § 329.12(b) (1982).

The general test for inland rivers and lakes, however, also recognizes the importance of the waters' presence: "Federal regulatory jurisdiction . . . extend[s] laterally to the entire water surface . . . of a navigable waterbody . . . below the ordinary high water mark. 33 C.F.R. § 329.11(a) (1982). While these tests define the lateral extent of federal regulatory jurisdiction, they are persuasive authority for the general proposition that it is the waters' presence which invokes governmental protection of the waters as against littoral claims to the right to exclude the public.

226. *See infra* text accompanying notes 264-70.

public water easement exists for recreational purposes. In Vermont, the issue of whether a "taking" of private littoral rights has occurred, has generally arisen in connection with the application of a statute which permits an interference with a littoral owner's fastland,[227] submerged soil,[228] or his claim to exclusive fishing rights.[229]

Cases from jurisdictions which have addressed the extent of public water recreational rights are often presented within the context of trespass or nuisance actions. These cases implicitly require a determination as to whether a littoral proprietor owns the right to exclude the public from the waters at issue. Generally, the courts have sanctioned water recreational rights by invoking the broad ambit of the public trust doctrine.[230] Regardless of the particular type of waters at issue, most cases recognize two factors inherent in water use conflicts involving the delineation of public recreational and private littoral rights: (1) the regularity with which a particular expanse of water may be expected to submerge a privately owned bed, and (2) the reasonable coexistence of the *jus privatum*[231] and the *jus publicum*[232] at the shoreline of a public body of water.

b. *Rivers and Streams*

A riparian proprietor is "[a]n owner of land, bounded generally upon a stream or river of water, and as such having a qualified

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227. *See, e.g.*, Foster v. Stafford National Bank, 57 Vt. 128 (1884) (statute authorizing construction, maintenance, and control of gates at outlet of public lake held unconstitutional as lacking provision for payment of damages to littoral owners); Boutwells v. Champlain Realty Co., 89 Vt. 80, 94 A. 108 (1915) (statute authorizing private paper company to float logs on boatable stream and authorizing company's agents to enter on private land abutting stream to reclaim logs washed upon these lands without fault of agents held constitutional because of statutory provision for payment of damages caused by agents' negligence).

228. Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974) (legislative establishment of "public on-foot free right-of-passage" between mean high water line and extreme low water line denied owners' right to exclude and therefore would be compensable taking).

229. State v. Theriault, 70 Vt. 617, 41 A. 1030 (1898) (statute authorizing fish and game commissioners to prohibit fishing in ponds or streams three years after they were stocked, and to classify the stocked waters as public, subject to right of littoral proprietor to post the waters after five years, held constitutional as reasonable exercise of police power to preserve and increase the common property).

230. *See, e.g.*, *Thomas*, *supra* note 2, at 5-6; 1 CLARK, *supra* note 81, § 36.4(A).

231. *See supra* note 118.

232. *See supra* note 119.

property in the soil to the thread of the stream or the river with the privileges annexed thereto by law."[233] A riparian owner "has the right to expect the natural flow of the water as it passes his land."[234] Legally, the definition of natural flow is based on the reasonable use of the waters in the stream, by each riparian owner.[235] Riparian rights are not owned; rather they are "usufructory," such rights being "of such use and enjoyment of a resource, although the property is owned by another."[236]

In *Elder v. Delcour*,[237] a riparian owner fenced and posted his farmland through which a stream flowed. Under state law, the stream was non-navigable for bed title purposes (private), but a public highway nonetheless. Ignoring the warnings, a canoeist pressed the fence out of the way and proceeded to fish, wade, portage, and picnic along the banks owned by the riparian. The plaintiff-canoeist sought a declaratory judgment to ascertain his rights to use the stream. The court relied on the floatable character of the stream in holding that it was a commercially valuable public highway.[238] Notwithstanding the private status of the bed and surrounding land, the plaintiff's activities on the fastland and submerged bed were free from trespass.

In *Day v. Armstrong*,[239] the defendants owned land through which the North Platte River flowed. They maintained that they had the right to fence the river channel upon their own land and to use the channel in the conduct of their ranching business. The plaintiffs maintained that the river was navigable because it was capable of floating craft, and that therefore the bed of the river was public property and could be used by the public between its high water marks. They claimed the right to fish and hunt, both from a boat and while wading or walking within the confines of the channel. They also claimed the right to camp within and upon the channel of the river.

In seeking to maximize the incidents of both the public owner-

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233. BLACK'S LAW DICTIONARY 1192 (rev. 5th ed. 1979).

234. *Id.*

235. *See, e.g.*, State v. Theriault, 70 Vt. 617, 621-22, 41 A. 1030, 1032 (1898).

236. LAPPING, VERMONT WATER LAW AND RIGHTS 6 (Vermont Water Resource Research Center - University of Vermont) (undated).

237. 364 Mo. 835, 269 S.W.2d 17 (1954).

238. *Id.* at 847, 269 S.W.2d at 26. *But see* Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900) (even though stream could float small pleasure boats, it was not commercially useful or valuable and therefore was private).

239. 362 P.2d 137 (Wyo. 1961).

ship of the waters and the private ownership of the bed and channel, the court designated a horizontal division of ownership. Use of the land adjoining and beneath the river, were thus separate and distinct from the state's ownership of the waters flowing over the land. The "actual usability" of the waters was deemed to be the sole limit of the public's right to use them, subject to whatever statutory limitations might be imposed by state or federal authorities.[240]

The court held that while the riparian owners held title to the bed and channel of the river, such title was subject to an easement for flotation.[241] Corollary to the full enjoyment of this right, the public could, when necessary, disembark and walk on the submerged lands in order to traverse shallows, rapids or obstructions. The public was also authorized to hunt and fish from their craft.[242] However, the court found that it had no power to authorize any use of the submerged bed or channel which was more than incidental to the right of flotation. Thus, a primary use of the bed or channel, such as wading, walking or camping, was unlawful.[243]

Implicit in the *Armstrong* court's holding is the recognition that the waters' presence confers the public right of flotation, so long as it is accessible without trespassing on the riparian's real estate. The waters' presence also confers such incidental rights as are necessary to make the enjoyment of flotation rights meaningful. However, the inherent nature of a river is that its waters move. Thus, the legal sanction of the public right to flotation and its incidental corollaries, recognizes that the public enjoyment of these rights is a relatively temporary one at any one location. The interference with the rights arising from the ownership of the underlying bed or adjacent land may thus be viewed as minimal. Theoretically, this permits the enjoyment of reciprocal rights without the destruction of either. Thus, the court articulated an accommodating solution, while clarifying the degree to which the *jus publicum* can be exercised under the public trust without unduly interfering with the *jus privatum*.[244]

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240. *Id.* at 143.

241. *Id* at 146-47.

242. *Id.* at 151.

243. *Id.*; *see also* People v. Mack, 19 Cal. App. 3rd 1040, 97 Cal. Rptr. 448 (1971) (riparian owner enjoined from maintaining boom fences and low bridges across river to obstruct public pleasure boating, though no finding made as to permissible uses of privately owned bed).

244. The *Armstrong* court was able to rely on the Wyoming Constitution as conferring

Similarly, in *People v. Waite*,[245] the court was careful to distinguish between the incidents of ownership arising from the *jus publicum* and those arising from the *jus privatum*. In that case, a hunting and fishing club had leased land adjoining the St. Regis River. The lease described the premises as extending to the center of the river and also purported to grant exclusive hunting and fishing rights in the demised premises. The defendant had been convicted in the trial court of trespassing in the demised area by fishing from a boat which was tied to some brush located along the shore.

In reversing the conviction, the court stressed that its opinion was rendered without regard to the question of whether the appellant had trespassed by tying a line from the boat to the brush.[246] While the trial court's holding was premised on the assumed lawful posting of the stream, the appellate court held that riparian proprietors cannot own the waters flowing in front of their premises. "A person boating on the waters is, therefore, not a trespasser, even if he utilizes the stream for fishing, barring situations where a trespass infraction may be found if the boat is tied to the shore or anchored."[247]

Thus, while the *Waite* court did not need to reach the question of which incidents to the public right of flotation are protected, it did recognize the significance of an intrusion upon the riparian's submerged soil or fastland. As in *Armstrong*, the court implicitly found that the waters' presence conferred the public right to recreate therein, while recognizing some limitation on the interference with the *jus privatum*.

c. *Swamps, Bays and Lakes*

Littoral rights are "[r]ights concerning properties abutting an ocean, sea or lake rather than a river or stream . . . . [They] are usually concerned with the use and enjoyment of the shore."[248] Landowners whose land lies adjacent to swamps and bays are usu-

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state jurisdiction over *all* waters within the boundaries of Wyoming. *Armstrong*, 362 P.2d at 145. In Vermont, however, both the courts and the legislature have stated that waters are public only if they are "boatable." *See supra* notes 65 & 91 and accompanying text.

245. County Court of County of St. Lawrence, New York (Dec. 19, 1979).

246. There had been insufficient evidence before the trial court as to whether the brush was growing from the bank or from within the river itself. *Id.* at 2.

247. *Id.* at 4.

248. BLACK'S LAW DICTIONARY 842 (rev. 5th ed. 1979).

ally deemed to have the same expectations concerning their water rights as do littoral owners on ponds or lakes.[249]

Mendota Club v. Anderson,[250] cited by the Vermont Supreme Court in *State v. Malmquist*,[251] involved a factual situation which was virtually identical to the one presented in *State v. Thomas*.[252] In *Anderson*, the defendants entered a bog adjacent to a navigable creek by means of a skiff to hunt and fowl. The plaintiff, however, had bought the bog in order to own exclusive hunting and fishing rights. Although the plaintiff had established title to the area, the defendants were on waters which were a part of a navigable lake. The court implicitly recognized the connection between the bog waters and the public waters of the adjoining creek, in holding that no right had vested in favor of the plaintiff to exclude the public from the water.[253]

Similarly, in *Diana Shooting Club v. Husting*,[254] the defendant had entered the waters of a public river, and with the aid of a pole and paddle, propelled his boat down the river to a marsh to shoot wild ducks. His boat was floating in twelve inches of water amidst a growth of vegetation which grew from the submerged soil to a height of from four to five feet above the surface of the water. Despite the incidental interference with the underlying soil and vegetation, the court found the defendant not guilty of trespass, relying on the presence of the waters from the navigable river:

> Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary highwater marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation.[255]

In *People v. Kraemer*,[256] the defendants were charged with

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249. *See, e.g.*, State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944); Hazen v. Perkins, 92 Vt. 414, 105 A. 249 (1918).

250. 101 Wis. 479, 78 N.W. 185 (1899).

251. 114 Vt. 96, 102, 40 A.2d 534, 538 (1944).

252. *Thomas, supra* note 2.

253. *Anderson*, 101 Wis. at 492-93, 78 N.W. at 189-90.

254. 156 Wis. 261, 145 N.W. 816 (1914).

255. *Id.* at 271, 145 N.W. at 820; *see also* Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912) (public easement for hunting from boats found to exist in side channel of navigable river adjoining Pacific Ocean, despite fact that bed of side channel was almost entirely exposed each day at low tide).

256. 7 Misc. 2d 373, 164 N.Y.S.2d 423 (1957).

trespass for having dropped anchor on posted and privately held lands underlying waters in a public harbor. The harbor had been used continuously by pleasure boats during the boating season for over thirty years. The court found that the public right of navigation for legitimate purposes "is entirely separate and distinct from the rights of the owner of the land under the water,"[257] and that the latter rights have no special bearing on the former.[258] In discussing the nature of a littoral owner's title in land submerged by public waters, the court stated that those private rights must yield to a reasonable exercise of the dominant right to navigation.[259] The public right of navigation, including the right of temporary anchorage, was thus held to invoke legal sanction.[260]

Finally, in *Wilbour v. Gallagher*,[261] a town ordinance granted an electric company the right to impound the water of a public lake and to raise it to an elevation of twenty-one feet above its natural water level. The grant included the right to inundate various tracts of land. For thirty-five years the dam was closed in May to allow the water to rise to the prescribed level. It was maintained at this level until the dam was opened in September, when the water gradually receded to its natural level. The defendants claimed the right to fill their land at a point between the natural and raised water levels of the lake. The plaintiffs claimed that their rights to fishing, boating, and swimming had thereby been impaired.

The court noted that riparian owners whose lands are periodically submerged due to natural causes have the right to exclude the public from their land located between the high and low water marks when that land is not submerged. Relying on this periodic submergence by public waters, the court held that an artificially created fluctuation in water level should be accorded the same legal effect as natural or seasonal fluctuations.[262] "As the [water]

257. *Id.* at 381, 164 N.Y.S.2d at 430.

258. *Id.*

259. *Id.* at 383, 164 N.Y.S.2d at 432.

260. *Id.* at 384, 164 N.Y.S.2d at 433. However, there may be a common law right enabling the public to use a privately owned bed underlying navigable waters, based on the theory that the state cannot convey these lands in violation of the public trust. *See, e.g.*, State v. Malmquist, 114 Vt. 96, 101, 40 A.2d 534, 538 (1944); Hazen v. Perkins, 92 Vt. 414, 419, 105 A. 249, 251 (1918).

261. 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1969).

262. *Gallagher*, 77 Wash. 2d at 315, 462 P.2d at 238; *see also* Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436 (1899).

level rises, the rights of the public to use the water increase since the area of water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights."[263]

The foregoing cases demonstrate that the regularity with which a privately owned bed is submerged by water requires a public classification of the waters.[264] Given the regular inundation of shoreline property, due either to a natural flow or to daily or seasonal fluctions, it is the waters' presence which requires the legal sanction of public water recreation. Because the regularity of inundation establishes predictability as to the waters' presence at a given area of shoreline, expectations arise with respect to the incidents of ownership which derive from both the *jus publicum* and the *jus privatum*.[265] Public rights generally may not be exercised on littoral fastland, and may infringe on a privately owned bed only temporarily as an incident to the public right of flotation. Private rights may coexist with public rights, but they cannot interfere with the exercise of the dominant public right. Thus, neither set of rights is absolute at the waters' edge.[266]

The marsh at issue in *Thomas*[267] was subject to periodic seasonal inundations from a public waterbody. At times of seasonal low water, usually late August through October, the western boundary was comprised of mud, and not covered by water.[268] Throughout this period, the littoral owners were entitled to exclusive possession of their land because it was not submerged by public waters. Moreover, the inundations were seasonal, and thus established the regularity and predictability by which both public and private interests could be determined.

Finally, the marsh in *Thomas* was specifically suited for the purpose of hunting waterfowl.[269] By subjecting that public waters inundating the marsh to reasonable public use, the law does not cause the littoral owner to lose his right to hunt waterfowl. The

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263. *Gallagher*, 77 Wash. 2d at 315, 462 P.2d at 238.

264. This conclusion assumes, of course, that the public has access to a particular area of water without trespassing on littoral or riparian fastland.

265. *See supra* notes 118-20 and accompanying text.

266. *see also supra* note 260.

267. *Thomas*, *supra* note 2.

268. Amicus Curiae Brief for the Appellees at 4, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).

269. *Id.* at 3.

right being usufructory, and not one of ownership,[270] he must share the right with others as a common right of use of public waters when they cover his land.

"[F]ew landowners are in a position to wholly exclude others from recreational waters because riparian and littoral doctrines of common use vitiate exclusivity unless one owner owns all the land surrounding the waterbody."[271] The Vermont Supreme Court adopted a similar view in *Austin v. Rutland R.R. Co.*,[272] noting the value of littoral land as being attributable to its proximity to the water.

> He had only, and at most, so far as the lake was concerned, a right, in common with all other persons, to use the waters of the lake in any proper way, and for any proper purpose. As the absolute owner of [a certain lot of land] he had the exclusive right to use it in passing to and from the lake. But this gave him no peculiar or additional right as to the lake itself.[273]

B. *The Boundary Conflict*

Vermont's rule of boundaries on public waters provides that private ownership stops at the definite low water mark if one exists; otherwise, exclusive private ownership stops at the water's edge.[274] Four Vermont cases specifically address the boundary issue in attempting to designate with precision the boundary between public water and private property. Each has emphasized the low water mark and avoided relying on the water's edge as a boundary.

The first case to address the boundary issue was *Flecther v. Phelps*.[275] In that case, the dispute concerned the number of acres contained in a parcel of land bordering a stream which emptied into Lake Champlain. At times of high water on the lake, the stream overflowed its banks and spread over a portion of the parcel. At times of low water, the creek receded into its channel. The court set the boundary at the edge of the channel, which it held to

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270. State v. Theriault, 70 Vt. 617, 622-23, 41 A. 1030, 1032 (1898).
271. Abrams, *supra* note 81, at 173.
272. 45 Vt. 215 (1872).
273. *Id.* at 243-44.
274. State v. Cain, 126 Vt. 463, 469, 236 A.2d 501, 505 (1967).
275. 28 Vt. 257 (1856).

be the definite low water mark.[276]

In the second case, *McBurney v. Young*,[277] the defendant was charged with trespass for hunting on the waters of Lake Champlain, which were eight inches deep when covering the plaintiff's land. The court held that the common law term of "low water mark" meant ordinary low water mark, and then determined the boundary of the private land.[278]

In arriving at this conclusion, however, the court relied heavily on a case from Maine,[279] which had established this test with regard to the tides of the ocean. In clarifying the meaning of low water mark, the Maine Supreme Court stated:

> It evidently contemplates and refers to a mark which could be readily ascertained and established; and that, to which the tide on its ebb usually flows out, would be of that description. That place, to which the tide might ebb under an extraordinary combination of influences and of favoring winds . . . could not form such a boundary, as would enable the owner of flats to ascertain satisfactorily the extent to which he could build upon them. Much less would other persons, employed in the business of commerce and navigation, be able to ascertain with ease and accuracy, whether they were encroaching upon private rights or not . . . . It would seem to be reasonable, that high and low water marks should be ascertained by the same rule. The place to which tides ordinarily flow at high water, becomes thereby a well defined line or mark, which at all times can be ascertained without difficulty.[280]

In *Hazen v. Perkins*,[281] the third case, the court further defined the boundary of lands bordering on public waters. The court held that since the particular waters at issue were public waters according to the constitution, "the grants of land bounding upon the lake pass title only to the water's edge, or to the low water mark *if there be a definite low water line.*"[282]

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276. *Id.* at 262.

277. 67 Vt. 574, 32 A. 492 (1895).

278. *Id.* at 579, 32 A. at 493.

279. *Id.* at 577, 32 A. at 492 (quoting Gerish v. Propr's of Union Wharf, 26 Me. 384, 46 Am. Dec. 568 (1869)).

280. *Young*, 67 Vt. at 577, 32 A. at 492 (quoting Gerish v. Propr's of Union Wharf, 26 Me. 384, 46 Am. Dec. 568 (1869)).

281. 92 Vt. 414, 105 A. 249 (1918).

282. *Id.* at 419, 105 A. at 251 (emphasis added).

Finally, in *State v. Cain*,[283] the issue addressed by the lower court was the proper method of ascertaining the ordinary low water mark, set forth in *Young* as being the boundary line between public and private property.[284] Each party offered a different method of averaging the water level readings. The chancellor rejected both averaging methods and devised a third, by averaging the annual extreme lows over a thirty-seven year period, excluding drought years.

On appeal, the Vermont Supreme Court found the Chancellor's method to be erroneous, because he had ignored the ordinary mean low water mark in favor of the extraordinary low water levels, excluding drought years.[285] The court criticized the entire process of averaging low water levels as lacking definiteness:

> The record of the case before us discloses no evidence was presented that there was a definite low water mark present on the shore line of the property of the defendants. On the contrary, all the evidence in the case was directed to establishing a mythical low water mark by mathematical computations.[286]

In *Thomas*,[287] expert testimony showed that the water level of Lake Champlain "changes gradually from day to day, from month to month and from season to season."[288] Expert testimony also showed that even on the lake itself, two different ordinary low water levels have been found at Rouses Point, New York, and at Burlington, Vermont.[289] The court found that because the area was "marshy," it was not susceptible to a "readily ascertainable low water mark,"[290] and therefore "the public's right extend[ed] to the water's edge."[291]

Since the rise and fall of the water level of Lake Champlain does not occur on a regular daily basis, as is the case with ocean tides, no definite low water mark is uniformly apparent on its shores. Likewise, the flooding conditions in the Lake Champlain

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283. 126 Vt. 463, 236 A.2d 501 (1967).
284. *Id.* at 466, 236 A.2d at 504.
285. *Id.* at 467, 236 A.2d at 504.
286. *Id.* at 469, 236 A.2d at 505.
287. 140 Vt. 403, 438 A.2d 400 (1981).
288. Defendants' Memorandum in Opposition to Motion to Dismiss at 10, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).
289. The Printed Case at 6, State v. Thomas, 140 Vt. 403, 438 A.2d 400 (1981).
290. *Thomas*, *supra* note 2, at 3.
291. *Id.* at 4.

Basin, and the rise and fall of waters in creeks, streams, and marshes adjoining the public waters of Lake Champlain, are incapable of creating the readily ascertainable water marks contemplated in *Young*. Therefore, the water's edge should be the dividing line between exclusive private use and the area for public water recreation.

Aside from the difficulties in determining the proper method of ascertaining the ordinary low water mark or level, it would be difficult, if not impossible, to restrict public recreational activities on this basis, since this mark would often be covered by water and out of sight. As the Supreme Court of Wisconsin noted in *Mendota Club v. Anderson*,[292] in regard to an artificially raised water level: "Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam."[293] Finally, the determination of which water level actually is the ordinary low water level at a particular location must be addressed on a case by case basis and may require costly and time-consuming litigation.

Conclusion

The scope of the definition of "navigability," under both state and federal law has gradually been expanded to accommodate the changing demands that society places on its water resources. The test set forth in *Mather*, that only waters "of common passage as highways" are public, should be refined by the Vermont Supreme Court. The purposes for which this test was originally adopted are no longer controlling in terms of the value of Vermont's water resources.

For the purpose of recreation, an adoption of the "boatable in fact" test advocated by the dissent in *Mather*, or an affirmance of the "capacity" test set forth in *Thomas*, would accord with the majority of modern decisions which support a broad interpretation of navigability. An adoption of either of these tests would expand the area of waterways available as recreational resources. In addition, either test would place littoral landowners on "boatable" waters on

292. 101 Wis. 479, 78 N.W. 185 (1899).
293. *Id.* at 493, 78 N.W. at 190.

notice of both the public status of the water adjoining or located on their property, and the corresponding recreational rights which attach to those waters as a function of local topographical characteristics.

The state has the duty to protect its public waters up to the high water level for the common good of all its citizens under the public trust doctrine. Case law has consistently upheld the exercise of recreational rights and their incidental corollaries over privately owned beds. This law encompasses an implicit recognition of the regularity with which a particular water area may be expected to submerge that land.

Provided that public access is available without trespassing on private property, the judicial sanction of reasonable recreational use of public waters which regularly submerge a privately owned bed is mandated under the public trust doctrine. Periodic seasonal inundations provide the requisite regularity, thereby notifying both littoral landowners and the public of their corresponding rights at the shoreline. Absent detrimental reliance on express governmental authorization to improve private littoral property, the denial of an alleged right to exclude the public from such waters is not a compensable taking.

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