Governmental Expansion of Recreational Water Use Opportunities

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Governmental Expansion of Recreational Water Use Opportunities

The growing popularity of public boating and related water-based recreation is increasingly taxing the capacity of available lakes and streams. As a result, accelerating demands have been made for public use of otherwise unavailable, "private" bodies of water. Although existing economic and governmental mechanisms to expand recreational opportunities may be adequate in theory, they have failed to...

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A recently published article offers statistical data from the state of Wisconsin which helps to put the magnitude of recreational water use in perspective:

As of December 31, 1976, there were 10,478 sailboats, 284,905 motorboats under 16 feet, 81,217 motorboats 16-26 feet, 2,322 motor boats 26-40 feet, 294 motor boats 40-65 feet, and 17 motor boats over 65 feet registered with the DNR pursuant to Wis. Stat. § 30.51 (1975). In addition, there are unknown numbers of sailboats under 12 feet, government boats, canoes and other boats not propelled by machinery which are exempt from registration. Wis. Stat. §§ 30.50(2) and 30.51 (1975). DNR, Report of Certificates of Number Issued to Boats, U.S.C.G. Form CGHQ 3923. Over the last ten years, there has been a 125% growth in ownership of recreational boats. The increased number and horsepower of recreational boats logically lead to additional speed, congestion and accidents on Wisconsin's navigable waters.


2 See text accompanying notes 144-47 infra.
respond to these new demands coherently.³ This Article proposes that
government enjoys additional power to increase the public's opportunity
for water-based recreation.

The purpose of this Article is to lay a comprehensive, doctrinal
foundation for broad governmental action. Simultaneously, this Article
counsels a substantial degree of governmental self-restraint. Accord­
ingly, the Article is in two parts. Part I describes a coherent theory
of public recreational water rights applicable to all natural existing
waters,⁴ including those currently viewed as wholly private.⁵ Part II
describes the limits of public recreational opportunities. In particular,
it advocates limiting recreational rights when necessary to afford
environmental protection of lakes and streams or to insure fair treat­
ment of private landowners. Moreover, Part II suggests that gov­
ernment undertake affirmative planning, regulatory, and enforcement
obligations when it increases public access to and use of recreational
waters.

I

PUBLIC RIGHTS TO RECREATIONALLY VALUABLE WATERS

A. The Nature of the Proposed Doctrine

The central tenet of this Article is that all naturally existing, recre­
ationally valuable waters are available for public recreational use. Al­
though public rights are not without their limitations,⁶ they may per­
tain to any natural body of water. Thus, public recreational water rights
could attach to large rivers and small mountain streams, to intercon­
ected waterways and isolated lakes, to waters surrounded by private
homes and those bounded by commercial development. The touchstone
for public recreational rights is the suitability of the water for recre­
ation. If a waterbody is recreationally valuable, then public rights apply.

The uniformity with which this Article formulates public recreational
rights contrasts sharply with the varied, often confusing, theories upon

³ See generally text accompanying notes 7–13 infra.

⁴ This would not include artificially created waterbodies. Such waters are
neither within the reach of the tradition which establishes common rights of use,
nor are they within the class of waters which are appropriate for government
action.

⁵ Little emphasis will be placed on distinguishing lake-based recreation and
littoral rights from streams and riparianism, nor will effort be made to account for
the special problems arising in those states which reject riparianism in favor of
prior appropriation. The pure appropriation states are Arizona, Colorado, Idaho,
Montana, Nevada, New Mexico, Utah, and Wyoming. See 1 WATERS AND WATER
RIGHTS § 4.1, at 31 (R. Clark ed. 1967) [hereinafter cited as CLARK TREATISE].
The states with mixed systems are California, Kansas, Nebraska, North Dakota,
Oklahoma, Oregon, South Dakota, Texas, and Washington. 1 W. HUTCHINS,

⁶ See text accompanying notes 195–200 infra.
which public rights currently depend. Apart from the federal navigation servitude, most water rights are creations of state law. Among the states, local topographic, economic, and historic differences have led to a rich doctrinal diversity. Public water rights, for example, may depend on the type and size of the water, the local definition of navigability, or even the configuration of bed ownership. Although the public invariably enjoys rights in waters used for commercial navigation, public rights in other waters are less certain. Moreover, almost every state recognizes private rights of use or proprietorship in the owners of some submerged or adjacent fast lands. These private rights may carry the power to exclude others from the waters. The resulting restrictions, in addition to uncertain state definitions of public rights, function to limit public enjoyment of recreationally valuable inland waters.

This Article seeks to replace the diverse, and often unnecessarily restrictive, theories which currently define the public's recreational water rights with a theory which stresses that public recreational rights are a function of the recreational value of the water. Although this view already enjoys limited recognition in American water law, its consonance with Anglo-American traditions and theories of property commend its broader application.

7 A need for such uniformity is well recognized:

The cases on the private right of use of waters where the beds are privately owned show a remarkable diversity of rule as well as theory.

There are probably few areas of law in which similar problems have arisen in the several states where the courts have split so widely, or based their decisions on such diverse theories.

Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 Nat. Resources J. 1, 33 (1967).

8 Some preliminary explanation may be helpful for those not already familiar with the servitude. Federal regulation of inland and coastal waters derives from the commerce power, and apart from allowing regulation of vessels and trade, it also allows regulation of navigable waters and the lands beneath them. See generally Clark Treatise, supra note 5, § 37.2(c), at 208-09 nn.34-36 and cases cited therein. The existence of this federal power to prohibit state and private activities inconsistent with the needs of commercial navigation is usually referred to as the navigation servitude. See, e.g., United States v. Rands, 389 U.S. 121, 123 (1967).

9 See text accompanying notes 37-82 infra.


11 See generally text accompanying notes 51-82 infra.

12 See Farnham, *Waters and Water Rights* 1618 (1904); cf. Stone, supra note 10, § 37.4(A), at 213-17 (implying that such rights continue to exist).


14 See text accompanying note 80 infra.
B. Ancient Recognition of Public Rights

1. The Concept of Public Use

The roots of contemporary public water rights are found in many of the primary antecedents of American jurisprudence. The belief that water resources are a public asset, subject to a unique pattern of use and management runs in an almost unbroken line from Roman times to the present. One scholar,\(^5\) for example, notes that the *res publicae* classification in Roman law included such state-owned resources as navigable rivers. A separate Roman classification, *res communes*, described things common to all, such as the air, running water, and the sea.\(^6\) This notion of public uses was incorporated into early English law. Professor Lauer contended that the doctrine may have been recognized as early as the twelfth century\(^7\) but that it was clearly established in *The Fleta*\(^8\) and the writings of the English jurist, Bracton, in the thirteenth century.\(^9\) By the seventeenth century, the controlling principles in England approached the position that "no man has a property interest in the flowing waters themselves, but simply a usufructuary interest in them as they pass over his land."\(^10\)

Public water rights under early English law were not absolute.\(^21\) Several English jurists appeared to recognize a class of waters not subject to ordinary public claims of right.\(^22\) Nevertheless, the expression of any public rights was significant in an era of English property law whose outstanding characteristic was clarification of the individual's exclusive right to possess.\(^23\) Accordingly, the articulation of public

\(^6\) Id., at 49–50.
\(^8\) Id., at 70.
\(^9\) Id., at 66–69.
\(^10\) Id., at 77–78 (commenting on the passage: "And therefore I am of opinion, that taking this word Aqua for the bare running water, there can be no property therein, but as the same is incident to the soil, taking them two for one, it is drawn with the property thereof." The passage is from CALLIS, READING UPON THE STATUTE OF SEWERS 56 (1647)).
\(^21\) See id., at 66 (citing H. BRACTON, DE LEGIBNS ET CONSUEUDINIBUS ANGLIAE, Bk. I, Ch. 12, §§ 5–6); id., at 78–79 (citing CALLIS, READING UPON THE STATUTE OF SEWERS 78 (1647)).
\(^22\) Id.

\(^23\) The outstanding characteristic of English property law after the Norman Conquest was: "[A] tendency to agglomerate in a single person, preferably the one currently possessed of the thing that is the object of inquiry, the exclusive right to possess, privilege to use and power to convey the thing." Donahue, Introduction: The Future of the Concept of Property Predicted from Its Past 7 (unpublished manuscript scheduled for publication in a forthcoming volume of NOMOS). Similarly, the recognition of public rights belies Coke's famous statement: "cujus est solum ejus est usque ad coelum." E. COKE, FIRST INSTITUTE 4a, at 198 (Thomas ed. 1818).
water rights in all but a narrow set of cases attests to the durable nature of society's interest in water resources.

2. The Doctrine of Inalienable Royal Stewardship

The central role of government in controlling use of water resources has developed from a second, distinct doctrine. In the later Middle Ages, the King began to be viewed less as an absolute ruler and more as a temporary official in a position of trust. Natural resources, including waters, were included among the property under the King's stewardship. In his management of these resources, the King might grant the right of exclusive use to an individual but not to the extent of complete alienation of the public property. Accordingly, an individual grantee took his rights of exclusive use subject to the King's prerogative to revoke or grant a superseding liberty to another. The lack of power to completely alienate water resources, consistent with the nature of the King's temporary trusteeship, limited the grantee's interest.

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24 See Lauer, supra note 17, at 67, noting Bracton's failure to pursue the distinction between public and private waters.

25 P. Riesenber, Inalienability of Sovereignty in Medieval Political Thought 3 (1956).


[T]hings are his which by the jus naturale ought to be the property of the finder, as treasure trove, wreck, great fish, sturgeon, waif, things said to belong to no one. Also . . . [things] which by natural law ought to be common to all, as wild beasts and undomesticated birds which by natural law ought to be acquired by apprehension and capture of fowling . . .

Id.

27 Id. at 168. Bracton defined a liberty as follows: A liberty is "the setting aside of a servitude, the two being contraries and therefore repugnant to each other, as where one is bound by virtue of a servitude to give something, as toll and customs, by virtue of a liberty he may be saved from giving them." Id.

28 Id. at 168–69. The King's freedom in this regard remained intact, despite the apparent restriction that:

When the lord king grants liberties, as was said above, what he has once given he cannot resume de jure, nor give to others, especially a thing of which he is not in seisin, [nor] grant them to the prejudice [of the liberties] of others, as where he has first granted to one the liberty of having warren throughout all of his land and fee and then grants the same to another within the same liberty.

Id. It is quite clear that the first donee could not seek to restrain the latter donee from use of the resources because such resistance would have been viewed as questioning the King's authority, a serious deriliction of service to the King. In making this point Bracton cites an example whereby the abbot of St. Albans, though first donee, lost his rights by obstructing the use of Galfrid of Childwicke, the second donee. Id. at 169. Bracton thus cautions that the subsequent grant of a new liberty "does [the first donee] an injuria and curtails the liberty first granted, which he has perhaps used for a long time." Id.
The doctrine of inalienable royal stewardship, not unlike the modern public trust doctrine, eroded the ability of private owners to wholly control public water resources. Government necessarily retained sufficient power to provide for all aspects of the general welfare.

3. The Doctrine of Natural, Harmless Water Rights

A broad concept of public water rights finds additional support in the 17th Century work of Grotius. For Grotius, rivers were a resource in which public and private rights co-existed and complemented one another. Grotius reasoned that a riparian owner might use his water rights for private profit, for example, by running a pier into the river. The flowing water of the river, however, would remain common for drawing or drinking. In this sense, water was public property. The determinant of legitimate public use, for Grotius, was that public rights not overly “disadvantage” private rights.

Grotius’ view supports public water rights in two distinct ways. First, the nature of water resources, for Grotius, suited them to national ownership. Second, private ownership of water was subject to the public’s residual right to make important use of water that did not unduly affect the private “owner’s” rights. Recreational use, of course, was not in issue for Grotius. Grotius’ schema, however, supports the compatibility of public recreational uses with continued private rights of ownership and enjoyment.

The examination of ancient authority fails to reconcile absolutely the conflict between public and private control of recreationally valuable waters. Instead, it demonstrates that several of the primary antecedents of the modern property system accord substantial recognition to the community’s claims for use of water resources. Important at this stage

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29 See text accompanying notes 58–60 infra.
30 As earlier notes suggest, this aspect of inalienability of sovereignty is probably traceable to canonist views of the Middle Ages. See notes 25–28 supra and accompanying text. Cf. B. TIERNEY, MEDIEVAL POOR LAW (1959) (natural resources viewed as God-given and therefore to be managed by the Church or Crown for benefit of all).
31 H. GROTIUS, DE JURE BELLII ET PACIS, (S. Whewell trans. 1853). Of roughly equal renown is the 17th Century work of Pufendorf, OF THE LAWS OF NATURE AND OF NATIONS. Analysis of that treatise reveals similar conclusions to those derived in this article from Grotius’ work. See S. PUFENDORF, OF THE LAWS OF NATURE AND OF NATIONS Bk. IV, Ch. IV, 318–22 (B. Kennet trans. 1703).
32 H. GROTIUS, supra note 31, at 242–43.
33 Id.
34 Id.
35 Id.
36 Subsequent discussion will show that there will likely be few justifiable “owner” claims of incompatibility. See text accompanying notes 100–08 infra. Further, losses to the “owner” in most cases of incompatibility can be mitigated by appropriate governmental practices. See text accompanying notes 134–35 infra.
Recreational Water Use

is the recognized commonality of these resources. Important to Part II of this Article are the concepts that (1) resource control can be useful in managing the resource for the good of all and (2) private investment and improvements in water resources should be free from unduly damaging public uses.

C. Existing Doctrines of Public Rights


The American pattern of public and private water rights, which initially borrowed English precepts, has an interesting and complex history. On the federal level, American water law traditionally recognizes public rights only on commercially navigable waters. The roots of this tradition can be traced to English law and its emphasis on commercial navigability. English law, in turn, has been described as a response to the commercial needs of awakening industry located on an island nation laced by a network of harbors and tidal rivers. The most obvious need of the English was unimpeded shipping. As island shipping rarely extended beyond the tidal reaches of bays and rivers, English law described navigable rivers in terms of the ebb and flow of the tide. For all practical purposes, the legal test divided the waters of England into those suited to commercial transport and those unsuited. Public rights of free passage applied to all navigable waters.

On the American continent, the initial adoption of the English navigability test was due partly to the general influence of English law and partly to the practical similarities of channeling goods inland along the abundant river systems of the Atlantic coast. Common sense recognition of America's continental expanse, however, dictated that the federal navigation power should extend beyond tidal waters. Despite a few

37 See note 10 supra and accompanying text.
38 See Stone, supra note 10. See also Kaiser Aetna v. United States, 100 S. Ct. 383, 395-96 (1979) (dissenting opinion).
39 Stone, supra note 10, § 35.2, at 180-81.
40 See, e.g., discussion of this point in Justice Field's opinion in Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) :
At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. Accord, The Genesee Chief v. Fitzhugh, 53 U.S. (12 How). 443, 454-55 (1851).
early decisions which restricted federal admiralty jurisdiction to coastal waters, the United States Supreme Court soon extended the admiralty power, with equal force, to any public waters used for commercial purposes or foreign trade. Public waters, in turn, were defined by Justice Field as those waters, in their ordinary condition, which were used, or were capable of being used, as "highways for commerce." Justice Field's formulation extended public rights to those rivers which were "navigable-in-fact."

The significance of the federal navigability test extended beyond issues of trade and commerce, it bore importantly on the division of power between federal and state government and between public and private water rights. The navigation servitude played an integral part in fashioning the dominant role of the federal government in matters of interstate and international commerce. Perhaps because of its jurisdictional overtones, the navigation servitude and the public rights it represents have been given extraordinary preeminence in two centuries of judicial review. Repeatedly, it has been held that the servitude does not "take" private rights but rather reflects the "lawful exercise of a power to which the interests of riparian owners have always been subject."47

42 See, e.g., The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 465 (1825) (refusing to exercise admiralty jurisdiction over a seaman's wage claim arising on the Mississippi and Missouri Rivers).


44 The Daniel Ball, 77 U.S. (19 Wall.) 557, 563 (1870). See also Utah v. United States, 403 U.S. 9, 10-11 (1971) (affirming the Daniel Ball view of navigability).

45 See note 8 supra.

46 The servitude is generally traceable to the Constitution's grant of commercial authority. U.S. Const. art. I, § 8, cl. 3. It is, however, sometimes viewed as having its origins in a more expansive pre-constitutional surrender of sovereignty by the several states. Cf. ARTICLES OF CONFEDERATION, art. IV, 1 Stat. 4 (1778) (right of free passage between the states). See generally Leighty, The Source and Scope of Public and Private Rights in Navigable Waters, 5 LAND & WATER L. REV. 391, 414-18 (1970).

47 United States v. Rands, 389 U.S. 121, 123 (1967). The unstated importance of the pre-constitutional surrender of sovereignty is that it acts as a limit upon the States' creation and recognition of private property rights related to the waters in question. It obviates any tenth amendment claim of State authority to inhibit the servitude as well as fifth amendment due process claims of private owners whose rights are defined by state law. See Michelman, Property Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1240-41 (1967). Cf. Coquillette, Mosses From an Old Manse: Another Look at some Historic Property Cases About the Environment, 64 CORNELL L. REV. 761, 799-805 (1979) (noting that some forms of non-exclusive ownership have been recognized in western property law).

The recent decision in Kaiser Aetna v. United States, 100 S. Ct. 383 (1979), does not significantly repudiate this view. Justice Rehnquist's majority opinion
The balance between public and private water rights reflects more than the mechanical application of static principles. The extent of public rights has varied with the changing demands American society has placed on its water resources. It is no more surprising that public rights in navigable waters have been held to include pleasure boating and fishing, than that the very definition of navigability evolved beyond the English "ebb and flow" test. Accordingly, commercially navigable waters, under the "navigability-in-fact" test, carry with them a set of public usufructuary rights that may be enforced against private owners who would try to exclude the public from those waters or substantially limit public recreational use of the surface.

2. The State Components: State Ownership and Navigability

State law provides the public with rights to use waters beyond those guaranteed by the federal navigation servitude. Professor Sax states:

There are any number of ways in which states can, and have, found a right of common use in lakes, whether the beds are publically/privately owned, and whether the courts use the doctrine of riparian rights, state ownership of water, or the existence of the state law servitude in favor of public use.

As Professor Sax indicates, these public rights most frequently arise expressively distinguished cases such as Rands, "[b]ecause the factual situation in this case is so different from typical ones involved in riparian condemnation cases we see little point in tracing the historical development of that doctrine here." Id. at 391. The principal distinctions offered to justify this view were (1) that navigability in Kaiser Aetna was predicated upon private improvements of the water, (2) traditional state law recognition of the specific private claim of right, and (3) the consent of government to the private alteration of the waters involved without warning that such works would establish public usufructuary claims. Id.


49 But see Kaiser Aetna v. United States, 100 S. Ct. 383 (1979) (holding that navigability under the federal test need not always result in public usufructuary rights, finding such rights are instead a function of the purposes for which the water is found navigable).

50 Here again, there are some minor exceptions. Treaty obligations of the government may be grounds on which to limit public fishing. See, e.g., United States v. State of Michigan, 471 F. Supp. 192 (W.D. Mich. 1979); United States v. Pollmann, 364 F. Supp. 995 (D. Mont. 1973). The states are also authorized to grant exclusive rights to cultivate oyster-beds and other types of aquaculture which may be viewed as limiting the public's right to full use of the resource. See Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

under three rubrics. First, the state may grant public rights by exercising its prerogatives as owner of submerged lands. Second, the state may define navigability more broadly than the federal test. Third, the state may grant public rights as a function of its outright ownership of the water itself. Inquiry into the justifications of these three doctrines, however, reveals that they more coherently fit within the central tenet of this Article that the nature of water as a societal resource is the wellhead of public rights.

(a) State Ownership of Bottomlands

In *Martin v. Waddell*, the Supreme Court first accepted the rule, expanded by subsequent cases, that the states owned the bed and underlying commercially navigable waters within their respective boundaries. Since *Martin*, almost all states have retained their ownership of these lands. In fact, it is unlikely that a state can alienate any significant fraction of these lands if such a grant would substantially diminish the value of the water resources to the public. State ownership of these subaqueous lands is viewed as ownership in trust for the people. Accordingly, the overlying waters are usually open to satisfy the needs of the general public.

This doctrine, which casts government as a trustee, reflects an ancient tradition which was in part alluded to by Chief Justice Taney in *Martin v. Waddell*. In particular, Taney described the trust responsibility in...
terms of protecting the public right of fishing, "a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary. . . ."61

The royal mantle of preserving this trust was transferred to the people and thence to the states:

For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.62

Taney's extension of the trusteeship responsibilities beyond navigation indicates recognition of a broad conception of public rights. The Anglo-American concept of commercial navigability, while perhaps a convenient vehicle to establish state ownership of subaqueous lands, fails to account for the recognition of broader public rights such as fishing. Thus, although public water rights created by Martin were ostensibly a function of state title to bottomland,63 these rights derive more logically from the qualitative nature of the resource and thereby are subject to public demands for broader uses.

(b) State Law Definitions of Navigability

States are free to open additional waters to public use by adopting claim predicated upon ownership of the underlying beds. The claimant relied on a pre-revolutionary patent from Charles II of England to the Duke of York and subsequent conveyances which were literally adequate to convey to him the submerged mud flats. Chief Justice Taney reasoned that the grant to the Duke of York was intended to provide the foundation for re-creating English legal patterns in the new world: "Whatever was held by the King as a prerogative right, passed to the duke in the same character." 41 U.S. (16 Pet.) at 413. Thus:

[The land under the navigable water passed to the grantee, as one of the royalties incident to the powers of government; and were to be held by him, in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown.]

Id. at 413-14. See also Reed, Use It and Lose It—Surface Water Rights in Idaho, 15 Idaho L. Rev. 569, 573-75 (1979).

61 41 U.S. (16 Pet.) at 412 (quoting from M. Hale, De Jure Maris, Et Brachiorum Ejusdem (Hargrave's Law Tracts 1787)).


63 The states may own bottomlands by virtue of patent or purchase as well as under the doctrine of Martin. Cf. CLARK TREATISE, supra note 5, § 37.2(c), at 209-10 (acknowledging similar public rights but cautioning against viewing them as a function of bed ownership). It is also somewhat ironic to note that in Martin the Court upheld the exclusive private use of the same navigable waters by the rival claimant whose title derived from a grant from the State of New Jersey. 41 U.S. (16 Pet.) at 367. This apparent anomaly can be reconciled by comparing the scope of the competing grants and applying the principles the Supreme Court later articulated in Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
broader definitions of navigability. In fact, several states did so, early in their history, primarily to accommodate the local developmental needs of frontier society. Typical of these states is Wisconsin which adopted a "saw-log" test of navigability: if the water could float a log to the mill at high water, then it was navigable. Other courts, however, disregarded the niceties of navigability and forthrightly recognized the more secure footing of public rights: the unique character of the water resource and its value to society.

In 1974, in *Kelly ex rel MacMullen v. Hallden*, the Michigan Court of Appeals held that the public enjoyed recreational boating and fishing rights on the St. Joseph River, regardless of the river's "navigability" under Michigan's log-floating standard. The log-floating standard had been adopted one hundred years earlier by the Michigan Supreme Court in *Moore v. Sanborne*. Interestingly, the *Moore* court had not designed its log-floating test as the *sine qua non* of navigability. Instead, the court fixed on the standard as a changeable but convenient one in a region whose principal businesses included lumbering. Significantly, the court held:

The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use. The public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient.

Noting that in the intervening century *Moore*’s rationale had been viewed as a pragmatic one, correlating public water rights with public necessity for their use, the *MacMullen v. Hallden* court held that recre-
Recreational Water Use

However states determined navigability, state-created public rights came to include recreational navigation as well. The public's recreational rights, however, generally extended only to the waters themselves. Private owners of riparian or littoral lands were often successful in limiting associated land-based recreational uses such as picnicking or camping and could even rely on trespass actions to prohibit overland access to the waters. Nonetheless, the candor of decisions like Moore and Hallden illuminate an important precept: public water rights are best described as a function of the myriad human uses to which the water resource is suited. These decisions implicitly recognize that the state, by choosing a particular navigability test, allocates water use opportunities. Like Chief Justice Taney in Martin v. Waddell, these decisions recognize a governmental role insuring that water resources provide broad societal benefits.

(c) State Ownership of Water

At least three western states claim ownership of all surface waters.

70 In reaching its conclusion, the court of appeals claimed the company of nine other states, California, Maryland, Minnesota, New York, North Dakota, Ohio, Oregon, South Dakota, and Wisconsin. 51 Mich. App. at 188 n.11, 214 N.W.2d at 862 n.11. Being picayune, one might note that the Minnesota precedent, Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893), had been overruled in relevant part by State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954). But see Johnson v. Seifert, 237 Minn. 159, 100 N.W.2d 689 (1960) (divorcing public usufructs from navigability).

71 See, e.g., Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816, 820 (1914) (hunting and fishing are incidents of the right of navigation). See also Johnson & Austin, supra note 7, at 45-47.


73 See generally 1 R. Powell, The Law of Real Property ¶ 160, at 641-42 (rev. ed. 1977); see also, Johnson & Austin, supra note 7, at 34 n.142.

74 There is an admittedly unsatisfying aspect to this type of inductive argument which attempts to prove that water is a special, uniquely public resource by presenting many examples of its being accorded such treatment. The examples, standing alone, fail to negate the possibility that their consistency is more than mere coincidence, or worse, error compounded by repetition of an incorrect early precedent or conception. To meet these doubts, effort will be made to scrutinize the rationale as well as the fact of special treatment in each of several contexts. See, e.g., text accompanying notes 60-63 supra; text accompanying notes 76-82 infra. Cf. K. Wittfogel, Oriental Despotism (1957) (emphasizing the societal importance of water by demonstrating its role as determinant of crucial facets of political and social order).
within their boundaries. Although public rights in these states are often described in terms of the state's ownership of water, the underlying justification for these rights again seems to rest on a more fundamental basis. For example, in *Southern Idaho Fish & Game Association v. Picabo Livestock, Inc.*, the Idaho Supreme Court upheld public recreational rights on waters flowing through defendant's land. Although the court could have based its decision on narrow statutory grounds, it relied on the Idaho Constitution and the state's ownership of water to broadly hold that, "[T]he basic question of navigability is simply the suitability of a particular water for public use." 

Essentially, Idaho's claims of water ownership reflect the importance of public control over the resource. Especially in the arid west, the rela-
tive scarcity of water has been frequently used to justify extensive state regulation of the resource. Historically, western states have exercised this authority to encourage private appropriative uses for mining and agriculture. In *Picabo Livestock*, the court affirmed the power of the state to promote public water rights as well. Moreover, the court's suitability-for-use test shifted attention from the traditional doctrines of state ownership and navigability and underscored the public's entitlement to enjoy the resource free of all private restraints except those recognized by government as being for the good of the state. *Picabo Livestock* supports the premise that public rights are a function of the unique characteristics of water; traditional standards of ownership and navigability are but vehicles by which public uses are established.

**D. Constitutional “Takings” and Contemporary Legal Theory**

As public use of “private” waters increases, private riparian or littoral landowners may claim a taking of their right to exclude others from the water, requiring just compensation. In most of these situations, however, private landowners do not enjoy sufficiently exclusive use of the water upon which a claim for compensation can be grounded. Currently, few 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 land surrounding the waterbody. If anyone else owns riparian land, their personal use

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81 See, e.g., Clark v. Nash, 198 U.S. 361 (1905), where the Court noted: The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States ... for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference in climate and soil, which render necessary these different laws in the States so situated.

*Id.* at 370.


84 A degree of relative exclusivity is also possible if a small number of individuals own all the riparian or littoral lands and mutually agree to severely limit use. The mutual covenant may create an enforceable use limitation similar to sole ownership.
and power to license others to use the waterbody strips exclusivity of its common meaning. Moreover, as developed above, many states already recognize public usufructuary rights on waters whose beds and shores are privately owned. Nevertheless, occasional destruction of exclusive use remains a possible consequence, a “hard case,” in which to explore the takings issue.

Four recent United States Supreme Court decisions are particularly instructive in addressing the public taking of the private right to exclude. In Kaiser Aetna v. United States, the Court found that exclusive recreational water rights may sometimes be a property right whose deprivation requires compensation. In three other decisions, Andrus v. Allard, Prune Yard Shopping Center v. Robins, and Penn Central Transportation Co. v. City of New York, however, acknowledgments of public rights were held not to constitute takings, despite their adverse impacts on private property owners. The interplay between Kaiser Aetna and these three cases offers guidelines for responsible employment of governmental power, while confirming the wide latitude given state governments in the management and allocation of their natural resources.

1. Kaiser Aetna v. United States

At issue in Kaiser Aetna was the development of a private Hawaiian lagoon, Kuapa Pond, into a residential-marina subdivision connected to the Pacific Ocean by a privately constructed channel. The developer, Kaiser Aetna, received a permit to construct the channel from the United States Army Corps of Engineers which, after the channel’s completion, informed Kaiser Aetna for the first time that the lagoon was thereby rendered navigable and available for public use. Kaiser Aetna sued the United States, claiming that the Corps’ insistence on public access deprived the development’s investors of their rights of exclusive use, requiring just compensation. The United States responded that the lagoon’s navigability-in-fact subjected it to public use under the “no compensation” rule of the federal navigation servitude.
Recreational Water Use

The Supreme Court agreed with the Corps that Kuapa Pond had been transformed into navigable water for the purposes of government regulation under the Commerce Clause and the navigation servitude. Justice Rehnquist, however, writing for the majority, maintained that "[t]his Court has never held that the navigation servitude creates a blanket exception to the Takings Clause . . . ." The Court found that private rights had been taken, emphasizing (1) the private initiative and expenditure in creating the channel, (2) the longstanding state recognition of the Pond as private property, and (3) the Corps' permission to dredge without mention of future public use. Accordingly, the Court held that public use of Kuapa Pond required the payment of just compensation.


Impairment of an individual's right to exclude others from private waters does not automatically indicate a taking. In even those cases where all adjacent land is owned by a single riparian, public use does not constitute a physical appropriation of the water nor infringe upon any incidents of ownership associated with the fast lands themselves. The property owner retains the great bulk of rights associated with ownership of the property, he need only share with the public a single strand of his bundle of property rights, reasonable recreational use of the water. In Andrus v. Allard, the Court held: "[T]he denial of one traditional property right does not always amount to a taking. At least where the owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

At issue in Allard was disposition of eagle feathers (and other parts of birds) acquired lawfully by a dealer in Indian artifacts but subse-

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96 Id. at 388.
97 Id. at 389.
98 Id. at 386-93.
99 Id. at 393.

100 Physical appropriation of a fee interest by the government or its agents is, most commonly, a successful basis for a taking claim. See, e.g., United States v. Causby, 328 U.S. 256 (1946); United States v. Miller, 317 U.S. 369 (1943).

101 There is, however, an undeniable sense in which loss of potential solitude that accompanies exclusivity of use is a real loss. Additionally, the owner may suffer financial loss where private waters are licensed for use for a fee and free access subsequently becomes available. It is contended that these "losses," although real, do not amount to a taking.

102 100 S. Ct. 318, 327 (1979). The appellee in this case retained all rights to possess, transport, or exhibit his property; only his right to sell the property was denied. See text accompanying notes 104-07 infra.
quently protected by Congressional legislation. The legislation permitted Allard to possess, transport, or exhibit the artifacts but prohibited their sale, even though they had been lawfully obtained prior to the statute's enactment. The Court admitted that the most profitable

103 The Eagle Protection Act provides:

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: Provided, That on request of the Governor of any State, the Secretary of the Interior shall authorize the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds in such State, in accordance with regulations established under the provisions of this section, in such part or parts of such State and for such periods as the Secretary determines to be necessary to protect such interests: Provided further, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior: Provided further, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking, possession, and transportation of golden eagles for the purposes of falconry: except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry. Provided further, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking of golden eagle nests which interfere with resource development or recovery operations.


The Migratory Bird Treaty Act provides:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or eggs thereof, included in the terms of the conventions between the United States and Great Britain . . . for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.


use of the property was precluded because Allard had clearly bought the items for resale. Nevertheless, no taking was found because at least some economic benefit from the artifacts might be salvaged. For example, the Court suggested that the artifacts might be successfully displayed for an admission charge.

In comparison to the Allard case, any diminution of private property values that might accompany increased public water rights, would be slight. Even when the private owner's use was truly exclusive, public use will seldom limit reasonable use of the parcel as severely as the regulation in Allard. The private owner would retain both personal use of the water and the right to license the use of others. The value of such rights is evidenced by the high prices currently paid for riparian tracts on public waters and by the economic success of private marina and boat launching facilities which thrive on such waters in spite of publicly provided recreational access and use. Allard, in contrast, left property owners with only the hope that the public would pay to view eagle feathers in a private museum.

The Kaiser Aetna formulation of private recreational water rights was recently distinguished in Prune Yard Shopping Center v. Robins. In Prune Yard, the Court denied the owners of a private shopping center the right to exclude members of the public who sought to exercise their rights of free speech, guaranteed them by the California Constitution. Justice Rehnquist, again writing for the majority, held that in this case the exercise of public rights on private property did not constitute a taking. Kaiser Aetna was distinguished in two ways. First, the expensive development of the Kaiser Aetna marina complex, including the dredging of the artificial canal, was interpreted as generating "reasonable investment backed expectations" of exclusive use which were fatally absent from the Prune Yard development. Second,
Prune Yard stressed that the California legislature was uniquely qualified to balance the competing values of California property rights with the state interest in expansive rights of free speech. While the state's redefinition of property rights could not conflict with the fourteenth amendment's due process guarantees, Prune Yard apparently reiterates the burgeoning state authority to weigh competing values in its definition of property.

Prune Yard and Allard help to clarify the scope of Kaiser Aetna. First, the exclusive recreational water rights recognized in Kaiser Aetna may have been a unique byproduct of the "investment backed expectations" raised by Kaiser Aetna's extensive marina developments. In that event, the more typical riparian owner who has failed to make such extensive changes may have no greater "investment backed expectations" of exclusive use than did the shopping center owner in Prune Yard. Moreover, if takings are to be found on the basis of the diminution of economic value of the property, Allard indicates that "backed" his expectation of the "right to exclude" with the capital needed to build the shopping center in the first place, the Court held that he had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of [his] property that the state-authorized limitation of it amounted to a 'taking.'" Id. Apparently, the Court felt that the general construction and operational investments were made primarily with the expectation of generating a return flow of rental income and not, specifically, for the purpose of building a facility from which public speech activities could be excluded.

The text does not discuss the constitutional result when the landowner can successfully demonstrate that all reasonable investment-backed expectations have been frustrated. Several factors justify this omission. First, private development expenditures can likely be recouped in spite of recognized public rights. See text accompanying notes 107-08 supra. Second, an expectation of exclusivity is arguably unreasonable in light of the variability of state laws concerning public recreational rights and their traditional recognition in Anglo-American jurisprudence. See text accompanying notes 15-36 & 51-82 supra. Third, states which implement public rights responsibly might well opt to favor some private entrepreneurial operations associated with exclusivity and low density use. See text accompanying notes 190 & 191 infra. Fourth, to the extent the value "taken" is attributable to the parcel's proximity to a public resource, no compensation is required. See United States v. Rands, 389 U.S. 121, 124 (1967). Finally, any remaining situations will likely be sufficiently limited that the state can either purchase public rights or grant these few landowners their private rights without affecting the regulatory or fiscal integrity of the state's overall plan.

114 100 S. Ct. at 2040-41.

115 Id. at 2041-42. Justice Rehnquist clearly allocates such authority to the states when he claims, "Nor as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to define 'property' in the first instance." Id. at 2042.

116 The diminution of value test was perhaps best articulated by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). See Michelman, supra note 47, at 1190-93.
even the primary economic value of a property right can be significantly affected without constituting a compensable taking.

Second, *Kaiser Aetna* may have been decided differently had the State of Hawaii, either judicially or legislatively, previously extended public recreational rights to Kuapa Pond based on the Pond’s suitability for recreational use. The importance given in *Prune Yard* to state determinations regarding property rights parallels the emphasis in *Kaiser Aetna* that Kuapa Pond, under Hawaii law, was private. As California was free to promote public speech in a private shopping center, any state could similarly promote public recreational rights on any suitable lake or stream. This distinction accords with recent Court decisions recognizing particularly broad state authority concerning the management and allocation of the states’ natural resources, especially water. Finally, state adoption of a suitability-for-use test would comport with the previously discussed ancient recognition of public water rights and the underlying rationale of changing federal and state definitions of navigability. Thus, in all but the most attenuated circumstances, recognition of public recreational water rights would “take” nothing from private landowners.

3. Foreshadowing the Preferred Model of Governmental Action: Penn Central Transportation Co. v. City of New York

In *Kaiser Aetna*, the Court found that resolution of the takings issue depended less upon mechanical formulas than upon ad hoc inquiries of fairness. Nevertheless, much of the opinion criticized the delayed, somewhat ad hoc manner in which the Corps notified the marina developers that their efforts had opened Kuapa Pond to public navigation. In fact, *Kaiser Aetna* was decided in part on an unusual theory of administrative estoppel stemming from the Corps’ conspicuous

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117 *Prune Yard* fully puts to rest any broad reading of *Kaiser Aetna*’s ringing statement, “In this case, we hold that ‘the right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.” 100 S. Ct. at 393.


119 100 S. Ct. at 390.

120 Id. at 392-93.

121 Justice Rehnquist apparently relied on a distinction between estoppel and
failure to warn the developers that their proposed canal would carry public access consequences. This failure apparently led to the fruition of expectancies in the landowner which, the court felt, required condemnation. These expectancies may not have legitimately developed, however, had the scope of public recreational water rights been clearly articulated in an established and comprehensive policy. In *Penn Central Transportation Co. v. City of New York*, the Court found that government regulation was far less likely to constitute a taking when done pursuant to a general plan.

In *Penn Central*, the owners of Grand Central Station were prevented from converting the structure into a high-rise office building by New York City's Landmark Preservation Law. The owners argued that this limitation was both a compensable taking of their property rights and an arbitrary exercise of "spot zoning." The Court found neither argument persuasive. Justice Brennan concluded that a taking had not occurred because the law did not interfere with Penn Central's "primary expectation" concerning the use of the property. The law did not operate arbitrarily, he continued, because it was based on a "comprehensive plan to preserve structures of historic or aesthetic interest requiring government to pay for private expectations generated by the action (or lack of action) of government employees. Although Justice Rehnquist claimed government could not be estopped, he held it could be forced to pay compensation for public rights "lost" by the silence of administrators. One wonders whether this is a valid distinction. In an era of fiscal restraint, public rights can be forfeited as effectively by the requirement of compensation as they can by estoppel.


100 S. Ct. at 386. The Corps' only comment to the developers was that the "deepening of the channel may cause erosion of the beach." *Id.*


*Id.* at 132.

The contemplated use was expressly acknowledged by the Court as being consistent with general social policy as expressed in the City's zoning laws. *Id.* at 116.

*Id.* at 132.


*Id.* at 132.

*Id.* at 136.
wherever they might be found in the city..." In a footnote, Justice Brennan added that an individual's property rights could be singled out for less favorable treatment if necessary to implement the objectives of the overall historic preservation program.

Historic preservation and public recreational water rights both seek to secure public rights of use\(^\text{132}\) while leaving the underlying property in private ownership. Each accomplishes this goal at the expense of a valuable privilege of the owner, be it high-rise development or deprivation of recreational solitude. Most importantly, clearly-stated rights of public use, like historic preservation, can likely inflict these “losses” without compensation when done pursuant to a general plan designed to enhance the societal value of “private” property, a societal value that inheres in the unique nature of water resources as well as in a marvelous structure like Grand Central Station.

Apart from its guidance on the takings issue, \textit{Penn Central} also offers insights which can aid the political acceptability of expanded public water rights. In \textit{Penn Central}, the owners of Grand Central Station had been granted transferable development rights to mitigate their pecuniary loss, a factor which Justice Brennan took into account in considering the impact of regulation.\(^\text{134}\) These development rights helped to make the restrictions on \textit{Penn Central} less unfair. While the absence of such mitigation hardly characterizes government action, ipso facto, as a taking, its presence can dispel perceived unfairness and enhance a regulatory scheme's political acceptability. As will be explored in Part II, the government can and should "mitigate" the adverse impacts of public recreational water use by creating and enforcing adequate regulations for use of the resource.\(^\text{135}\)

\section*{II}

\textbf{A Preferred Model For Governmental Action}

\textbf{A. The General Warrant for Legislative Action}

There is a meaningful sense in which Part I of this Article can

\(^{130}\) Id. at 132.

\(^{131}\) Id. at 132 n.28 (quoting the decision below, Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 330, 366 N.E.2d 1271, 1275, 397 N.Y.S.2d 914, 918 (1977)).

\(^{132}\) The public "uses" historic buildings by enjoying them as part of their cultural and architectural heritage. Continued use of Grand Central Station as a train station is a fortuitous public benefit and not necessary to the use of the building as an historic landmark.

\(^{133}\) To be free of a compensation requirement does not destroy the possibility that perceived inequity may make compensation a governmental choice. See Sax, \textit{Takings, Private Property and Public Rights}, 81 YALE L.J. 149, 177-78 (1971); cf. Michelman, \textit{supra} note 47, at 1214-24 (describing the conditions under which "unfairness" renders compensation less costly to society than regulation alone).

\(^{134}\) 438 U.S. at 137.

\(^{135}\) See text accompanying notes 195-227 infra.
stand alone in establishing public rights in all recreationally valuable waters. These rights, inherent in the natural law antecedents of Anglo-American law and the concept of government trusteeship, can and should be recognized as presently existing rights, requiring no affirmative government action save their judicial recognition as controlling principles. For judges to do so, however, raises a potential conflict with the broadest readings of Kaiser Aetna which suggest that compensation must be paid whenever exclusive recreational use is destroyed.\(^{136}\)

Although, as noted in Part I, there are grounds of distinction between Kaiser Aetna and the central thesis of this Article,\(^{137}\) full acceptance of the suitability-for-use measurement of public rights leads inescapably to the conclusion that Kaiser Aetna was wrongly decided. The Kaiser Aetna majority failed to appreciate both traditional and recent recognition of public water rights. Instead, it improvidently relegated them to the realm of "[o]ld, unhappy, far off things, and battles long ago."\(^{138}\)

The major purpose of this Article, however, is to establish a coherent governmental response to the problem of recreational shortfall, thus, the profound disagreement with Kaiser Aetna need not be a stumbling block. As Part II will attempt to demonstrate, there are adequate distinctions between the model advocated by this Article and the Kaiser Aetna situation.\(^{139}\)

The initial concern is to identify reasons why the legislature should act in the public's behalf.

There is substantial room for expansion of public recreational water rights at the present time. Not all states have adopted positions as favorable to public recreation as the suitability-for-use standard.\(^{140}\) Moreover, most states adopting that test or its equivalent do so rather indirectly, relying on common law reasoning to explain statutory enactments. For example, the suitability-for-use tests articulated in Hallden\(^{141}\) and Picabo Livestock\(^{142}\) occurred against clear statutory backdrops that defined public rights in terms of navigability.\(^{143}\)

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\(^{136}\) 100 S. Ct. at 393.

\(^{137}\) See text accompanying notes 100–18 supra.

\(^{138}\) 100 S. Ct. at 391.

\(^{139}\) See notes 195–227 and accompanying text infra.

\(^{140}\) For an excellent catalogue of the various positions of the western states, see Johnson & Austin, supra note 7, at 33–52. No comparable compilation exists for eastern states but the diversity of views is at least as great. Compare Bartke, supra note 41, with Comment, Public Recreation on Nonnavigable Lakes and the Doctrine of Reasonable Use, 55 Iowa L. Rev. 1064 (1970) and Note, Water and Watercourses—Recreational Rights—A Determination of the Public Status of West Virginia Streams, 80 W. Va. L. Rev. 356 (1978).


\(^{143}\) See text accompanying notes 64–82 supra.
Recreational Water Use

is a somewhat curious legal hybrid whose vitality may not be clear. Thus, even in states that have achieved rough approximations of this Article's thesis, there remains an apparent reticence to adopt a consistent legislative and judicial position that public rights should be solely a function of the recreational value of the waters involved.

To affirmatively persuade governments to expand water rights, inquiry must proceed in several directions. First, the need for expanded opportunities must be demonstrated. Second, the societal preference for private market distribution of goods and services must be overcome. Third, the expansion of public rights must be proven functional, administrable, and most important for present purposes, legally and politically acceptable.

B. The Demand For Water Recreation and the Inadequacies of Market Supply

Public demand for water-based recreation is well-documented.144 Michigan, for example, has nearly 700,000 registered boats.145 In California, participation in swimming and boating is the fastest growing of all outdoor recreation activities.146 One study indicated that almost half the national population preferred water recreation to any other type.147 It is not surprising, therefore, that water recreation is already recognized as a public good, as evidenced by government action to facilitate public use.148 Simultaneously, however, the market system has attempted to provide private recreational opportunities.149 One tenet of this Article is that the market system is an inadequate mechanism to provide needed public rights of use.150

Currently, the benefits associated with water recreation are poorly distributed. This conclusion rests upon the premise that water resources should be widely shared.151 If this assumption is correct, it is proper to view unsatisfied demand for water recreation, despite an apparently adequate supply of resources,152 as proof that the market system has not


146 CALIFORNIA DEP’T OF PARKS AND RECREATION, CALIFORNIA RECREATION AND PARKS STUDY—PART II at 179 (1965).

147 U.S. OUTDOOR RECREATION RESOURCES REVIEW COMM’N, OUTDOOR RECREATION FOR AMERICA, A REPORT TO THE PRESIDENT AND TO THE CONGRESS 173 (1962).


149 See Note, supra note 144.

150 See P. Steiner, PUBLIC EXPENDITURE BUDGETING 9, 14–16 (1969).

151 See text accompanying notes 15–36 supra.

152 See, e.g., MICHIGAN DEP’T OF NATURAL RESOURCES, supra note 1, at 47 (advocating state intervention upon finding of adequate, but under-utilized resource base in conjunction with unsatisfied demand for recreational water use).
adequately distributed the benefit. It is the thesis of this Article, moreover, that the market is functionally incapable of adequately distributing the recreational resource.

One problem is that an individual or firm may enjoy a monopoly position in a recreational-waters market or submarket. This would occur, for example, if one owner held all the land surrounding a lake in or near a metropolitan area. As a result, that individual's profit-maximizing strategy may artificially restrict recreational opportunity well below the capacity of the resource to support high quality recreation. The fortuity of land ownership patterns should not allow a monopolist to withhold recreational opportunities from the public.

A second problem lies in the common-pool aspect of water resources. One feature of a commons, such as water, is that shared usufructuary rights often lead to overuse, destroying the resource value for all. In a lake surrounded by numerous owners, for example, all would have a like incentive to provide public access and maximize revenues. When all littoral owners compete, the resulting degree of public use may make economic sense but create ecological disaster. The tragedy of the commons is compounded because private developments, which might enhance resource quality or the quality of the recreational experience, are discouraged. Lack of control over access provided by others discourages individual investments which depend on common amenity values. An unregulated commons cannot protect the profit incentives needed to protect the resource or to produce an adequate variety of recreational opportunity.

Market distribution is also distorted by two final problems: legal uncertainty and transaction costs. Legal uncertainty is created by ambiguous limitations on private use (which usually rely on a "reasonableness" standard) and changeable definitions of public rights which tend to fluctuate over time. The resultant uncertainty, much like the problems of the common pool, deter individual investment in resource improvement. Market distribution is also distorted by relatively high

153 See note 150 supra.
154 Cf. P. Steiner, supra note 150, at 9-14 (canvassing externalities and market imperfections as preconditions of recognition of need for public goods).
157 Id.
158 Id.
159 But cf. text accompanying note 174 infra (recognizing demands for high-quality recreation).
160 The central element of riparianism and littoralism has long been the doctrine of "reasonable" use. See, e.g., 1 J. Kent, COMMENTARIES ON AMERICAN LAW 384 (1st ed. 1828).
161 See text accompanying notes 64-70 & 75-82 supra.
Recreational Water Use

transaction costs. Providing consumer information, for example, is more expensive if left to independent, competing entrepreneurs than if provided in a single governmental pamphlet to a statewide audience.

In defense of markets, it might be urged that maldistribution of recreational opportunity reflects the original maldistribution of rights and wealth and not the virtue of the market system itself, which operates neutrally on pre-existing conditions. The virtue of neutrality, however, renders markets ineffective if social policy requires a deliberate redistribution of wealth. Nonetheless, many economists seek to correct this deficiency by making money transfers to the victims of the original maldistribution. They argue that the public will manifest its true preferences for water recreation by the manner in which they spend their money. There is no simple system of transfer payments, however, which would approach the efficiency of a governmental declaration of public rights. The nature of recreational water rights does not allow quantification of their relative value nor easy identification of their beneficiaries. At bottom, the private market system cannot conveniently redistribute a resource on a basis which corresponds to the in-kind benefits associated with public usufructuary rights.

C. Toward Optimum Governmental Action: Weighing Benefits and Costs

This Article suggests governmental intervention based on three positions. First, the public has a right to use any suitable water for recreation. Second, government should condemn adjacent fast lands to create

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162 Transaction costs arise because transactions themselves often cost money. Professor Calabresi uses the example of the costs involved in getting large numbers of people together to bargain. Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. of L. & Econ. 67, 68 n.5 (1968).


165 The beneficiaries of maximum public rights would not be an homogeneous socio-economic group as is frequently the case with many existing "welfare" programs. Instead, the group would be all those, rich and poor, who do not presently have rights to recreational water use and who have heretofore been unwilling or unable to pay the price set by the private market system or to avail themselves of existing public opportunities.

166 See P. Steiner, *supra* note 150, where he states: "This familiar argument does not persuade, if one regards as legitimate a desire of society to interfere with the pattern of consumption that would result from market determinations. A society may choose to affect income distribution and the pattern of consumption jointly." *Id.* at 16. See also Thurow, *Government Expenditures: Cash or In-Kind*, 5 Phil. & Pub. Aff. 361, 362-66 (1975) (in-kind transfers may be justified because conferring the specific benefit increases welfare of donor class).
access to public waters. Third, compensation for these fast lands need not reflect the private landowners' loss of exclusive water use. Should a state wish to adopt all three positions, the tools are readily available. A legislature could recognize public rights pursuant to its general police power. Access could be provided under existing condemnation laws with compensation awards limited to fast-land values. If funding permitted, all recreationally valuable waters could be made available for public use, truly a maximum solution but not necessarily an optimum one. Once the maximum power of the government has been established, practical problems arise in determining precisely when and how public opportunity should be expanded.

The reason to restrain maximum governmental action defies easy categorization. It includes considerations usually weighed by legislatures concerning prospective benefits and costs. The benefits, of course, are increased public use of the state's recreationally valuable waters. Beyond brief references to the monetary cost of acquiring public access, this Article has not yet addressed the issue of costs. Since private markets are not adequate decision-making mechanisms, government must scrutinize the question of costs for itself.

The tangible costs of government action will seldom be high. The enactment of legislation and purchase of property have no consumptive resource costs. The costs of clearing and paving access roads, parking lots, and maintaining limited support facilities are likely to be small compared to the corresponding recreational benefits. The tangible costs of declining resource quality may be more significant. Overcrowd-

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167 See text accompanying notes 192–94 infra.

168 Authority to condemn is usually vested in state administrative agencies by legislation passed pursuant to authority granted by the state constitution. See generally 6 J. Sackman, Nichols' The Law of Eminent Domain §§ 25.1–7 (rev. 3d ed. 1979).

Existing condemnation powers have been used to provide recreational access. See, e.g., Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W.2d 105 (1961) (duck hunting); Salisbury Land & Imp. Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913) (public beach and bathinghouse).


170 The term "tangible costs" is simply meant to describe those costs with direct physical consequences associated with them. These costs are in contrast to costs which result from the reactions of individuals to employment of the model. Cf. Michelman, supra note 47, at 1214–18 (defining and exemplifying demoralization costs associated with uncompensated " takings" of property).

171 The relevant benefits are limited to those associated with the increase in recreation. No meaningful recapture of costs should be expected from state-imposed user charges. In Michigan, for example, the fees collected for use of state water recreation areas do not even cover the operational budget of the facilities. See Michigan Dept of Natural Resources, supra note 1, at 62–64.
ing of recreational waters can devalue the quality of recreation. Additionally, recreational uses have environmental costs, such as the introduction of water pollutants. These costs may be minimized, however, if expanded use is kept within the carrying capacity of the resource.\footnote{These costs are difficult to quantify but they seem to be insignificant as long as the refinements of the model to prevent overuse are employed. See text accompanying notes 195–200 infra. Carrying capacity is defined in Kusler, \textit{Carrying Capacity Controls for Recreation Water Uses}, 1973 WIS. L. REV. 1, 4–7.}

In spite of government regulation, the possible loss of exclusive recreational opportunities may create indirect costs. Some users may entirely forego their recreation because of the lack of relative solitude. Other users, who have already made significant investments with the expectation of exclusive use, may suffer demoralization losses.\footnote{See Michelman, \textit{supra} note 47, at 1214. The problem of demoralization losses is discussed in the text accompanying notes 176–81 infra.} These losses, in turn, may be felt sympathetically by wider segments of the public at large. In a sense, the basis of these costs lies in the value American society places on recreational solitude. One can easily appreciate the contrast between canoeing in a wilderness area or an exclusive resort and canoeing armada-style on an overcrowded stream. Heretofore, recreational solitude has often been preserved by private landowners at the expense of public rights.\footnote{In addition to this type of private action there is also a stock of pristine recreational sites open to the public such as the Boundary Lakes National Canoe Area in Minnesota.} The elimination of this private power, if coupled with universal provision of public access by government, makes it possible that opportunities for solitude may decline. While a legislature might readily accept this result, a better solution may be to temper provision of public rights to preserve opportunities for enjoying solitude.\footnote{The choices involved in using the model to insure continued provision of high-quality recreation are discussed in text accompanying notes 199–200 infra.}

Apart from the potential reduction of opportunities for solitude, there remains the problem of demoralization losses. Professor Michelman, in a slightly different context,\footnote{Professor Michelman is concerned with giving content to the fifth amendment compensation requirement. He argues that a utilitarian calculus be employed which includes demoralization losses and urges that compensation be paid in those cases where social costs would be thereby minimized. See Michelman, \textit{supra} note 47, at 1218–24.} has theorized that governmental regulation which disproportionately burdens an individual owner may be widely perceived as so unfair that it destroys the public confidence necessary to promote the expenditure of capital and labor on new socially valuable ventures. Several factors reduce the likelihood that expanded public water rights cause widespread demoralization losses. First, as developed previously, few owners are situated in such a way that their
losses will be severe enough to prompt demoralization in others. Second, part of Michelman's demoralization losses stem from the perception that the burden has been impressed arbitrarily.\textsuperscript{177} If the loss results from an evenhanded application of a generally accepted program, no demoralization occurs.\textsuperscript{178} Third, to the extent government limits the quantity of public use and engages in sound resource management,\textsuperscript{179} the severity of the loss is further reduced. Thus, a touchstone of model government action should be protection of the amenity value of the recreational resource.

A very few cases may remain, however, in which even a good regulatory and management program fails to avert all demoralization costs.\textsuperscript{180} In these cases, amortization,\textsuperscript{181} a device borrowed from the zoning field, might be employed to allow the private owner temporary enjoyment of exclusive rights. Similarly, increasing public access gradually can also lessen the severity of the owner's loss.

\section*{D. Specific Limitations on Public Recreation}

Although government should respond appropriately to public demand for recreation, not all waters must be open for maximum public access and use. Any governmental action is likely to be protested by the affected private owners.\textsuperscript{182} These protests may attack the necessity for expanded public use or claim that a particular body of water is unsuited to additional uses. To responsibly address these questions, the decisionmaker\textsuperscript{183} must have an adequate information base consisting of two primary components: an account of public demand and an accurate census of the resource base. The decisionmaker must then establish a clear goal for utilizing the available resources and adopt an approach which insures its attainment.

\textsuperscript{177} See Michelman, supra note 47, at 1217.
\textsuperscript{178} See also text accompanying notes 119–33 supra (discussing non-arbitrariness as relevant to the takings issue).
\textsuperscript{179} The suggested model requires systematic planning and regulation. See text accompanying notes 195–200 infra.
\textsuperscript{180} The rarity of these cases may be further insured by an administrative policy which considers the fairness of destroying exclusivity as a factor in the decisionmaking process.
\textsuperscript{182} See note 145 supra.
\textsuperscript{183} The term "decisionmaker" is employed to allow flexibility to the states. The legislature may wish to act directly through its committee system or its general deliberative process. The decision may be delegated to an administrative agency of the state's executive branch. The locus of the decision is immaterial to the sound exercise of the model.
1. Indicia of Need

One premise of this Article is that current demand for water recreation remains unsatisfied. Any state wishing to employ the model should begin by measuring the extent of this unmet demand. The detailed design of such a study is a task best left to those with suitable expertise. Present purposes will be satisfied by delineating some areas of particular interest.

Water-based recreation is enjoyed by a heterogeneous group whose members are drawn from a broad cross-section of society. Their recreational preferences and disposable incomes vary. Nonetheless, some generalizations are possible. The advocated model has a tendency to expand the recreational opportunities of the less well-to-do; affluent users are more likely to have already purchased their "place in the sun." Therefore, any study of demand should pay particular attention to the needs of middle and lower socio-economic groups. Reciprocally, however, the study should also ascertain the effects of expanded public use on those who currently enjoy relative recreational solitude. It should be noted that the model may not necessarily reduce the enjoyment of solitude. Frequently, the low use rates resulting in solitude are less a function of access limitation than the product of relative inconvenience. In any event, an accurate measurement of demand must be sophisticated enough to reflect concern about the qualitative, as well as the quantitative, aspects of recreational demand.

2. Indicia of Resource Suitability

The public's right to use suitable waters for recreation in part requires some definition of suitability. To this end, a comprehensive catalogue of a state's recreationally valuable waters should be compiled. The catalogue should consider fundamental factors such as the size of a body of water, its carrying capacity, and its proximity to population centers. The catalogue must also answer two difficult questions: (1) which waters have minimal recreational value? and (2) what kinds of use are suitable in a given lake or stream?

To answer the first question, the catalogue must set criteria to deter-
mine the recreational value of a water body.\textsuperscript{187} If, as determined by these criteria, the water has only minimal value, care must be taken to avoid additional use. Increases in public use would have a greater effect on surrounding landowners than if the water had a higher recreational value. In turn, these owners could support their claims of unfairness by noting that theirs is the "hard" case, close to the line which should leave them free of regulation.\textsuperscript{188}

The foregoing observations may seem to suggest that the resource catalogue can minimize problems of marginal value by including only waters of obvious recreational worth. Such a conclusion, however, loses sight of the catalogue's function. The catalogue is an aid to the decisionmaker, it is not by itself a decisional instrument. Opening to public use marginally valuable resources in close proximity to a metropolitan region might be a crucial means of responding to local demand. The tradeoffs involved are essentially political and should therefore be made by a well-informed decisionmaker, not \textit{sub silentio} by an informational document. Accordingly, the catalogue must include an account of even marginal resources so that their inclusion or rejection in a recreation plan represents a conscious determination of policy.

The second question concerns the suitability of particular waters. While a vast marsh with shallow expanses of open water may be suited to canoeing or duck hunting, it is unsuited for swimming or water-skiing. In general, suitability can be the subject of set criteria.\textsuperscript{189} Nonetheless, the catalogue should also attempt comparative evaluations. The marsh, for example, may be best suited to duck hunting but also valuable for other types of recreation. The competing recreational uses should be arrayed in the catalogue to give the decisionmaker choices among clearly articulated alternatives.

Having compiled data about need, recreational value, and suitability,
the impacts of proposed changes in recreational use should be evaluated. A process similar to the now familiar environmental impact statement might be useful. The consequences of suggested alternatives should be assessed, with care taken to solicit the suggestions of interested citizens.

3. A General Standard for the Decisionmaker

The data collected regarding demand and resource suitability will sometimes suggest the path to be followed by the decisionmaker. Vast, unsatisfied demand and suitable resources counsel governmental action to expand public rights. This is, however, guidance in gross; it offers no guide by which to determine how much state intervention is desirable. Absent a general standard for decisionmakers, the employment of the model might prove haphazard or arbitrary.

The core problem is one of reconciling conflicting or at least competing forms of resource use. Writing in a different context, Professor Sax suggests a general procedure for rationally resolving competing demands for use of a resource complex. One attempts to ascertain the course of action which would be pursued if the entire complex were owned by a single individual or firm. While the primary aim of Sax's inquiry is designed to eliminate disregard of externalities in decision-making his unified perspective is of assistance to a model program of water recreation.

Assuming a single entity distributed water recreation, it would seek that combination of uses which maximizes benefits. This strategy is similar to that used by a private manufacturer which sells a line of related products. In assessing the demand for its goods, the firm scrutinizes the specific components of demand, as well as its aggregate strength. As a result, the firm may try to produce a variety of related products which allows it to satisfy the needs of the greatest number of consumers. Similarly, the water recreation decisionmaker must consider whether there are discriminate demands which can all be satisfied by using the model as a complement to private market activity.

It is entirely possible, of course, that a resource base cannot be used to satisfy all types of recreation demand. The unique nature of a river, stream, or marsh may make it suitable for only one type of use. In the difficult trade-offs, however, the governmental decisionmaker should

190 See Sax, supra note 133, at 172. Professor Sax was there concerned with regulatory schemes which preferred one private use over another and with the more general problem of the takings issue.

191 The firm would like to satisfy all segments of the demand curve. This is sometimes done by selling a small amount of their product to those relatively few consumers willing to purchase at the highest prices, while marketing and selling slightly differentiated products each of which appeals to increasingly lower-priced segments of the demand curve. See, e.g., J. Bain, supra note 155, at 400-01; R. Leftwich, supra note 155, at 197-200.
rely on those values which justified expansion of public use in the first place. The communal or societal interest in water resources, recognized by the ancients and reaffirmed in the modern era, suggests that quantitative concerns be given preference. Accordingly, the decisionmaker should employ a calculus which makes recreational waters accessible to larger numbers of people. Such an equation need not create uncontrolled public use; it merely announces that the goal of providing recreational opportunities for a large number of people generally supersedes the goal of providing low-density opportunities. Coupled with a concern for resources suitability, this order of priority provides a standard by which opportunities for recreational water use should be allocated.

4. Public Access

Apart from governmental articulation of public rights of use, the public must be able to reach the water in order to make use of it. In many cases, public access is already adequate, most commonly due to public ownership of riparian or littoral lands. In these cases, government can actively promote access by providing boat launching ramps and marina facilities or more passively, by simply allowing the public to enter waters from adjoining public lands or roadways. There remain, however, a group of recreationally valuable waters without existing public access.192 The paradigm of this situation is the small, but recreationally-valuable, spring-fed lake completely surrounded by private property.

Without access, public usufructuary rights have little value. While access might be provided in several ways, the simplest practice is governmental condemnation of sufficient rights-of-way. The power to condemn is indisputable in these situations because it promotes the common good, satisfying the legal requirement that takings of private property be for public use.193 One key issue, however, is the level of compensation. The price to be paid for acquiring access is of utmost practical importance. If public rights are to be viable, the fiscal burden cannot be too great. If, for example, government were forced to condemn not only an access road but all lands surrounding a lake, available state funds would be quickly exhausted. Similarly, if compensation for public rights-of-way were required to reflect the private landowner’s loss of exclusivity, the resultant fiscal burden would be prohibitive. Such a requirement, however, would simply recast the proposition that destruction of exclusivity constitutes a taking. Since the claim fails in all but the most unusual and extreme cases,194 it would likewise fail here.

192 See note 145 supra.
193 See 2A J. SACKMAN, supra note 168, § 7.1.
E. Employing the Model Responsibly

Once recreationally valuable waters are identified, public rights to their use expressed, and access provided, the regulatory obligations of responsible government need to take effect. This section seeks to define these obligations, focusing first on resource quality controls and, second, on mechanisms to reduce the burden on private landowners.

1. Regulatory Protection of Amenity Values

If the model creates a new class of recreational users, it poses a set of dangers to existing amenity values. Currently, users of private waters are riparian and littoral owners or their licensees. In general, their proprietary interest works to preserve the positive characteristics of the lake or stream. In addition, peer pressure from the interested community also works to maintain water qualities. This pressure is reinforced by the relatively unchanging pattern of land ownership surrounding recreationally attractive waters.

The expansion of public rights creates a larger class of users, including those who may lack a continuing relationship to the resource and the corresponding incentives to preserve its qualities. Moreover, the sheer number of these additional users, if unchecked, might devalue the common recreational experience. Evidence of these dangers has already surfaced in lawsuits which have claimed resource misuse by littoral owners’ licensees. In these cases, relief has often been granted based on the riparian doctrine that owners, including government, are limited to reasonable use of the resource. Increased public use, however, may strain the effectiveness of this doctrine. Because the model suggests public rights that are independent of land ownership, the applicability of the reasonable use doctrine is far from clear.

To promote amenity values, a responsible program of water recreation should establish protective regulations. In fact, such regulations may be required. In *Penn Central*, public usufructuary rights did not take private property rights, in part, because of mitigation measures used by the City of New York. Analogously, governmental protection of amenity values might also be required in order to mitigate

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195 The significance of the model in contributing to this class is not trivial because the model should not be employed absent a finding of significant unsatisfied demand for recreational opportunities. See text accompanying notes 184 & 185 supra.


198 Lacking ownership of riparian or littoral lands, the normal predicate for the reasonable use limitation is absent. Also absent are the typical ownership opportunities for access control and licensure of recreational users.

199 438 U.S. at 137.
the public's interference with landowners' enjoyment of high-quality water recreation. Moreover, condemnation of access is constrained by the rule that the government may take no more than is necessary to serve the public purpose.\textsuperscript{200} As the public has an interest only in recreationally suitable waters which are, in part, defined in qualitative terms, it can be argued that there is no public purpose in creating access to overcrowded (unsuitable) waters. As a result, the ability to condemn access may depend on regulatory protection of amenity values.

2. Enforcement of Regulation

Governmental regulation would be primarily directed at preventing two types of abuse: overuse of the water resource and unauthorized use of adjacent private lands. Both of these dangers might be met by regulatory strategies that have already been developed as general water management tools. The primary regulatory methods are access metering and lake zoning.\textsuperscript{201} Secondary controls on overuse or misuse include such devices as fishing license requirements, daily catch limits, anti-littering statutes, the provision of convenient refuse receptacles or employment of clean-up crews. While these devices theoretically ameliorate the dangers to amenity values, further attention must be given to the gap between theory and practice. In spite of government's good intentions regarding enforcement, it is not difficult to foresee practical obstacles, such as understaffing, which would hamper acceptable results.

One consequence of the past failures of regulatory agencies has been sporadic lawsuits by private riparian and littoral owners to enjoin conduct that unreasonably affected amenity values.\textsuperscript{202} The practical obstacles to such suits, however, are cost and uncertainty of victory. An adversely-affected landowner must carry the burden on issues such as irreparability of harm\textsuperscript{203} and the balance of equities.\textsuperscript{204} Trespass actions are somewhat more likely to succeed but plaintiffs still face difficulties such as establishing non-trivial damages and identifying the proper defendants. An isolated trespass or littering of property does de minimus damage and will not make the action monetarily worthwhile. Those entering recreational waters are a changing set of individuals, few of whom are likely to repeat tortious invasions of any particular tract and none of whom, alone, are likely to have significantly degraded the re-

\textsuperscript{200} Excess condemnation is the acquisition by the government through eminent domain of more property than is necessary for a public improvement. \textit{See} 2A J. Sackman, \textit{supra} note 168, § 7.5122.

\textsuperscript{201} \textit{See} Kusler, \textit{supra} note 172, at 7–19.

\textsuperscript{202} \textit{See}, \textit{e.g.}, Botton v. State, 69 Wash. 2d 751, 420 P.2d 352 (1966).

\textsuperscript{203} \textit{See}, \textit{e.g.}, D. Dobbs, \textit{Handbook on the Law of Remedies} § 2.5 (1973); O. Fiss, \textit{Injunctions} 9–27 (1972).

\textsuperscript{204} \textit{See}, \textit{e.g.}, D. Dobbs, \textit{supra} note 203, § 2.4, at 52–54; O. Fiss, \textit{supra} note 203, at 84–91, 168.
Recreational Water Use

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source. Further, they are almost by definition strangers to the immediate area and thus enjoy a degree of anonymity which tends to insulate them from prosecution unless physically apprehended and identified. Thus, if traditional private remedies prove ineffectual in restraining those who misuse the resource, landowners must force government to control the public's actions.

Suits against government may not fare well under existing legal rules, for suits seeking governmental enforcement must successfully run a gauntlet of legal hurdles concerning both threshold and substantive issues. Immunity, for example, may be a complete or partial bar to suit. Many states still claim immunity for tort damages in a variety of contexts, some of which are arguably similar to the present problem. Further, judges are understandably reluctant to dictate to administrators the methods of administration. Finally, cost and inconvenience may deter suits against state officials, particularly if state statutes limit venue or jurisdiction to a distant forum.

The substantive problems involved in a suit to compel government to regulate or to enforce regulations are also of considerable magnitude. One approach to such cases is to seek a writ of mandamus ordering the responsible official to act. Issuance of the writ is usually limited to those cases in which the official has shirked a non-discretionary duty, but enforcement functions are almost invariably clothed with some degree of discretion. An exception to this general rule may exist, however, if the public-use and excess-condemnation arguments of the previous section in fact impose a duty on government to both regulate and enforce use limitations on the general public.

One alternative to mandamus may be to hold government vicariously responsible for the tortious acts of public users. Even if viable, such a theory is at best incomplete, for not all violations of the regulations would be tortious. To the extent the resource is harmed by the acts of many, a doctrine might be developed allowing plaintiffs to aggre-

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207 Frequently, state agencies or administrative officials cannot be sued in local courts of general jurisdiction. See, e.g., Mich. Comp. Laws Ann. § 600.6419 (1968) (vesting exclusive jurisdiction over claims against the state in a single court of claims).


209 See text accompanying note 200 supra.

gate these harms to demonstrate a tortious invasion of private rights.\textsuperscript{211} There remains, however, the more fundamental problem of holding government vicariously liable for the acts of the public. The crux of many decisions concerning vicarious responsibility is the ability to control the actor. Traditionally, mere licensure or its equivalent\textsuperscript{212} has been deemed inadequate control,\textsuperscript{213} thus rendering vicarious liability of government even more dubious.

Apart from administrative law and tort approaches, private owners may try to sue government on a property theory. A degree of success has been achieved by suing government as a co-riparian, claiming that its use of the surface unreasonably interferes with the correlative use of the other owners. Interestingly, the leading decision, \textit{Botton v. State},\textsuperscript{214} was originally argued and decided on an inverse-condemnation theory.\textsuperscript{215} In modifying the trial court's action which required the state to close a public access site until it condemned the rights of all other riparians,\textsuperscript{210} the Washington Supreme Court said:

\begin{quote}
The state, as a riparian owner, does not have to acquire by condemnation the rights of the other riparian owners before it permits fishermen in reasonable numbers access to the waters of Phantom Lake; but it does have the obligation, and counsel for the state so concede, to so regulate the number and conduct of its licensees as to prevent any undue interference with the rights of other riparian owners.\textsuperscript{217}
\end{quote}

Even \textit{Botton}, however, does not adequately quiet fears that the model will result in frequent instances of regulatory failure. The melange of other obstacles persists and, even in \textit{Botton}, the state conceded the key issue, the existence of a duty to regulate.\textsuperscript{218} A model government program must provide firmer, less costly assurances that regulatory powers will be exercised.

An important assurance that can be built into the model is to prohibit condemnation of access sites until the state proves it has devised an

\begin{footnotesize}
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\item \textsuperscript{211} In these tort actions the alleged invasion of right would sound in nuisance or trespass and plaintiffs must therefore demonstrate a threshold level of interference. See \textit{id.} at 63-65, 583-602.
\item \textsuperscript{212} The model casts government as a facilitator of access and not as a licensor because the usufructuary rights of the public are no longer dependent on government's proprietorship of water or adjacent land.
\item \textsuperscript{214} 69 Wash. 2d 751, 420 P.2d 352 (1966).
\item \textsuperscript{215} \textit{Id.} at 753, 420 P.2d at 354.
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Id.} at 757, 420 P.2d at 356.
\item \textsuperscript{218} \textit{Id.} at 753-54, 420 P.2d at 354.
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adequate regulatory and enforcement scheme. The cost of contesting the scheme's adequacy would remain marginal because the landowner is already party to the condemnation, the forum is necessarily local, and the burden of proof rests with government to affirmatively demonstrate adequacy. If desired, the model might go further and provide that any condemnation award may include reasonable attorney's fees for non-frivolous litigation of the adequacy-of-regulation issue. Finally, intervention-as-of-right should be allowed to any other riparian or littoral owners on the water body, and intervention-by-leave-of-court should be allowed to any other individual or group expressing an interest in the regulatory scheme. Such procedures would assure the promulgation of public controls in a forum convenient to those most immediately concerned with the adequacy of the regulations.

Problems of enforcement can also be overcome within the condemnation proceeding. To avoid the shortcomings of the mandamus or vicarious liability theories and the expense of protracted litigation, a remedial scheme might be substituted which relies on procedures developed in the area of civil contempt of court. If the judgment of condemnation incorporates an injunction which allows public access only upon implementation of an approved regulatory plan, a new protection would be available for the landowners: failure to comply with the injunction would result in contempt of court. The landowner would need only go to the local forum and show the plan's non-enforcement to establish a prima facie case of civil contempt. Remedies for contempt include damages for harm done, directives that enforcement occur, or imprisonment of responsible parties to compel obedience. Moreover, civil contempt decrees routinely award the costs incurred in enforcing the previously granted injunctive rights.

Although it may be unwise to attempt it, the injunction and contempt mechanism also provides a plausible legal avenue for direct private enforcement of the regulations against members of the public. While these

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219 Typically condemnation statutes require their exercise to be accomplished via judicial hearing. See 6 J. Sackman, supra note 168, § 26.11. The model here proposes adding an element to the state's required showing.

220 Most states have jurisdictional and venue requirements requiring a local forum in condemnation cases. See, e.g., id., § 24.7.

221 The potential sovereign immunity problem, previously discussed in text accompanying note 205 supra, is obviated by the waiver implicit in state-initiated proceedings.

222 See generally D. Dobbs, supra note 203, § 2.9; O. Fiss, supra note 203, at 703–74.

223 See generally D. Dobbs, supra note 203, § 2.9; O. Fiss, supra note 203, at 703–74.

224 See generally D. Dobbs, supra note 203, § 2.9; O. Fiss, supra note 203, at 739–74.

225 See generally D. Dobbs, supra note 203, § 3.8.
recreational users were not parties to the original suit which gave rise to the injunction, knowing disobedience of an injunction is sometimes treated as contempt of court.²²⁶ In such an action, the landowner would have the benefit of definite standards of conduct established by the regulatory injunction and would not need to rely on the more amorphous standards applicable in trespass or nuisance suits. The costs of obtaining the remedy could be charged to the violator but the problems of identifying and subsequently locating the violator would persist. It also might be difficult to charge the violator with sufficient notice of the injunctive standards. For these reasons, contempt citations may prove most useful in the event of repeated violations by an identified individual, previously warned of the offensive nature of his conduct.

The preceding discussion has been limited to cases where the state resorts to condemnation to provide access for the public’s usufructuary rights. Frequently, a state will already own access sites and merely need to alter its law to expand the public’s rights. Although the justifications for concomitant regulation would apply, the expedient of a specialized condemnation decree would not be available. In such cases, a legislative enactment which recognizes public rights might require the appropriate state regulatory agency to bring a lawsuit which would fulfill the same function.²²⁷

**Conclusion**

This Article began by claiming that all naturally existing recreationally valuable waters are available for public recreational use. Support for this conclusion was found in both ancient and modern law and was reconciled with the recent “takings” pronouncements of the United States Supreme Court. In its later stages, the Article discussed the limitations on expanding public recreational opportunities and developed a model for responsible governmental action.

The recreational value of natural waters is a uniquely public asset. The concept of public water rights can be traced from Roman law to the English doctrine of inalienable royal stewardship to early American notions of navigability. In American water law, the development of the federal navigation servitude, state ownership of bottomlands and waters, and expansive state definitions of navigability, all square with the thesis of this Article, that the public has recreational rights to any suitable body of water. Moreover, a responsible program of public

²²⁶ See, e.g., In re Lennon, 166 U.S. 548 (1897); In re Reese, 107 F. 942 (8th Cir. 1901).

²²⁷ This suit could be either in the nature of a quiet title action to confirm the newly asserted rights of use in the waterbody or a declaratory judgment action seeking approval of a proposed regulatory/enforcement plan.
rights would not likely constitute a taking of private rights under the Supreme Court's recent *Kaiser Aetna, Prune Yard, Allard,* and *Penn Central* decisions.

The key to an acceptable program of public recreational rights is governmental responsibility. The inadequacies of market distribution of the recreational resource make governmental action necessary, but government must nevertheless act with an appropriate degree of self-restraint. The suggested model seeks to avoid unnecessary unfairness to affected private landowners and to protect the resource from overuse. Consequently, decisions must be made by a visible and accountable decision-maker on the bases of an adequate information base and some general precepts concerning proper allocation. Finally, the model requires a regulatory plan that will be enforced and therefore casts the regulatory scheme into an injunctive setting by which those interested in regulatory enforcement could obtain the procedural and substantive benefits of civil contempt actions.

The model which has emerged is no doubt open to criticism and subsequent refinement. Nevertheless, the model has immediate value for it demonstrates that there is a systematic and significant role for government to play in responsibly acting to provide expanded opportunities for recreational water use.