Chapter III

Navigational Servitudes: Sources & Public Trust, Prerogative & Constitution

The navigational freedom principle was carried to colonial North America by emigrant Englishmen as their public rights to fishing and navigation protected at common law,¹ and held in constitutional public trust under the Royal Prerogative *jus publicum*² rather than the *jus privatum*.³ Those rights, as evolved into servitudes applicable to navigable waters within the coastal belt, became implemented in colonial North America through both the Royal Prerogative and the colonial charter requirements for application of the laws of England.⁴ The *jus publicum* public rights to navigation and fishing eventually came to be continued in public trust for the American People under the Commerce Clause of the 1789 United States Constitution. Thus the concept of public trust under the Royal Prerogative *jus publicum* is critical to understanding how the federal navigation servitude exists today over the navigable waters of the United States.

A. *Prerogative Public Trust*

The Royal Prerogative is both a complex subject and the governmental template for the organization of public and legal rights in colonial North

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¹ “From the first the colonists in America claimed the benefit and protection of the common law.” Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 23 (1883). For a discussion about the colonists and the common law, see id. at 21, 24.

² *Jus publicum* refers to the Crown’s governmental function to protect and preserve public rights and property.

³ *Jus privatum* refers to the Crown’s individual rights, including property, as distinguished from its governmental functions.

⁴ See supra pp. 122–27.
America. The rights of colonial governments to govern, to enjoy benefits, privileges and franchisees, and the rights of emigrant Englishmen to the common law and to the public rights of fishing and navigation, each and all involve the Royal Prerogative. That is, the Royal Prerogative as ultimate and non-divestible governmental executive authority vested in the King, a governmental office, separate from but the source of local administrative authority assigned to colonial governments. This nascent federal arrangement later set the stage for the evolution of federal and state governments and the structure for resource management within the United States federal system,5 because local colonial administrative authority established by the Royal Prerogative affected a bifurcation between the national government and the colonial administrations.

After 1776 the state governments, as successors to colonial administrative predecessors, held “police powers”,6 whereby state governments may recognize public navigation as a right of its citizens. But state governments hold no authority to preserve or to act on behalf of that right outside the police powers for establishing peace, order and good government; that is, there must be a police power issue for state government regulatory action over navigable waters. There is no state “navigation servitude” creating an a priori public navigation right as a matter of state common law. As a result, state exercise of the police powers on behalf of navigation are solely governmental regulatory servitudes and must have a public purpose, and will require compensation to the owners of affected riparian or littoral estates. In contrast, the jus publicum public right of navigation was always a national a priori right of the English People, not a right of colonial governments. As such the jus publicum public rights passed neither to the state governments nor to the people forming their resident populations. The reformation of colonial governments into member state governments of the United States could not change these public rights of navigation and fishing as being held by the national population and, therefore, the rights of the English People to navigation and fishing both remained and became the national public rights of the successor American People.

Those national public rights now are protected and preserved by the Federal Government under its constitutional authority over commerce. The a priori public right of the American People to fishing and navigation,

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5 Story, infra note 122, at 22.
6 See infra pp. 128, 141.