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States, Their Public Trust Doctrines, and Water Resources Management: How Relevant is *Illinois Central Railroad* These Days?

Robin Kundis Craig
Florida State University College of Law
Tallahassee, FL

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ABSTRACT

The U.S. Supreme Court issued its most classic statement of "the" public trust doctrine in Illinois Central Railroad Co. v. Illinois,[1] *protecting public rights of navigation, commerce, and fishing in the navigable waters. These are fairly basic protections for public rights in water, but limited in their usefulness for comprehensive water resources management. Moreover, there is an ongoing debate about the legal origins—state law or federal law—of the public trust doctrine that the Supreme Court announced. As a result, state expansions of their public trust doctrines have been much more important to the application of those doctrines to broader water resource management issues, such as water allocation, public recreation, and maintenance of basic ecological values. This panel explores the use and limits of those state public trust doctrines to address both classic and emerging water issues, such as hydraulic fracking in Louisiana or water management in the face of water shortages in the West. This overview paper, in turn, provides a basic introduction to the state public trust doctrines.*

Introduction to the Public Trust Doctrine

The public trust doctrine has a lengthy legal history, dating back to Roman law.[2] Indeed, the U.S. Supreme Court itself has traced the doctrine to the Institutes of Justinian, which stated that "'[r]ivers and ports are public; hence the right of fishing in a port, or in rivers are in common . . . .'"[3] As the Court also noted, the doctrine has a long and established history in English

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[1] 146 U.S. 387 (1892).

[2] For discussions of this history, see Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 50-54 (2006); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-36 (1986); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICHIGAN L. REV. 471, 475-78 (1970).

[3] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 284 (quoting INSTITUTES OF JUSTINIAN, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841)).

common law, and "[t]he Magna Carta provided that the Crown would remove 'all fish-weirs . . . from the Thames and the Medway and throughout all England, except on the sea coast.'"[4]

The primary importance of the classic public trust doctrine is that it prevents the public/government from being excluded from the use of water resources as a result of privatization of the resource or other abdication of public control. In the Supreme Court's statement of this principle in *Illinois Central Railroad Co. v. Illinois*, "'The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it.'"[5] As a result, the State of Illinois could not fully convey its title to the lands beneath Chicago's harbor into private ownership, nor abdicate its authority over the waters above those lands.[6] Instead, the state held its title to lands beneath navigable waters "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[7]

Notably, the legal basis for the *Illinois Central* decision—whether its public trust rules derive from federal common law, the penumbra of the U.S. Constitution, or Illinois state law—is both debatable and actively debated. Nevertheless, most states have adhered to the Supreme Court's pronouncement in *Illinois Central* as minimal federal public trust requirements. Perhaps the best example of this adherence comes from Arizona, where the state legislature has tried several times since 1987 to eliminate or limit the state's public trust interests, only to be overturned by the Arizona courts on constitutional grounds.[8]

Applying the Public Trust Doctrine: To What Waters Does the Doctrine Apply?

Under federal law, states received title to the beds and banks of the "navigable waters" within their borders. These are the classic public trust doctrine waters.

The issue of what waters count as "navigable waters" for purposes of state title is a federal law issue.[9] The original thirteen states received the title to these waters as a result of their conquest of England.[10] All other states acquired title as a result of the Equal Footing Doctrine,[11] and a given state's title to the beds and banks of navigable waters is fixed as of the date of its admission as a state to the United States.[12] As a result, to be subject to the classic public trust doctrine, such waters must be navigable in their natural state as of the date of statehood.

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[4] *Id.* (quoting M. EVANS & R. JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 53 (1984), and citing Martin v. Waddell's Lessee, 41 U.S. 367, 410-13 (1842)).
[5] *Id*. at 458 (quoting People v. New York & S.I. Ferry Co., 68 N.Y. 71, 1877 WL 11834, at *3 (1877)).
[6] *Id.* at 452-53.
[7] *Id.* at 453.
[8] For a more detailed discussion of these episodes, see ```Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 102-03 (2010).
[9] United States v. Utah, 283 U.S. 64, 74 (1931).
[10] Utah v. United States, 403 U.S. 9, 10 (1971).
[11] Idaho v. United States, 533 U.S. 262, 272 (2001).
[12] Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977).

One category of navigable waters subject to public trust protections are tidal waters—that is, waters affected by the ebb and flow of the tide. State ownership of tidal waters derives directly from English common law,[13] and the Supreme Court confirmed in 1988 that tidal waters are owned by states regardless of their actual navigability.[14]

The second category of navigable waters owned by the states is the "navigable-in-fact" waters. This category is an American invention to accommodate the fact that many of the country's large rivers are not affected by the tides. The test for "navigable in fact" waters under federal law for purposes of state title is the commerce test of navigability. Under this test, waters

> are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[15]

In the context of adjudicating state title, however, the Supreme Court has emphasized that:

> The extent of existing commerce is not the test. The evidence of actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.[16]

States, however, have the authority to impress a greater range of waters with a public trust doctrine under state law. Some have chosen not to. For example, Arizona by statute limits state "navigable waters," and hence the state public trust doctrine, to waters subject to the federal Equal Footing Doctrine.[17]

Other states, in contrast, have greatly expanded their public trust waters beyond the federal navigable waters, and they have a variety of techniques for doing so. One such technique is to create a less demanding state-law test for navigability, such as a pleasure boat test (extending navigability to waters that recreational boats can use)[18] or a log floatation test (extending navigability to any water that can float a log).[19] Alaska, unusually, extends its definition to

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[13] Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892); Barney v. City of Keokuk, 94 U.S. 324, 336-38 (1876).

[14] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476-81 (1988).

[15] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

[16] United States v. Utah, 283 U.S. 64, 82 (1931).

[17] ARIZ. REV. STAT. § 37-1130(5) (LexisNexis 2010).

[18] *E.g.*, ALASKA STAT. ANN. § 38.05.965(13) (2004); State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980); Curry v. Hill, 460 P.2d 933, 935 (Okla. 1969); Coleman v. Schaeffer, 126 N.E.2d 444, 445-47 (Ohio 1955). *See also* S.C. CODE ANN. § 49-1-10 (1976) (imposing a "valuable floatage" test).

[19] *E.g.*, Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc., 709 N.W.2d 174, 218 (Mich. Ct. App. 2005), *rev'd in part for lack of standing*, 709 N.W.2d 447

waters that, *inter alia*, are useful for "landing and takeoff of aircraft."[20] Western states generally declare state ownership of all waters as part of their prior appropriation schemes, and many have used this declaration to extend public trust principles to waters that are neither tidal nor navigable-in-fact.[21]

Applying the Public Trust Doctrine: What Public Uses Does the Doctrine Protect?

As noted, under the Supreme Court's decision in *Illinois Central*, states hold title to navigable waters "in trust for the people of the state" in order to protect three uses—specifically, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . . ."[22] Navigation is a key federal interest in the navigable waters and is protected by the federal navigation servitude as well as the public trust doctrine, and free commerce underscores the importance of the Interstate Commerce Clause under the U.S. Constitution. However, the Supreme Court has also emphasized public rights of fishing, as well.[23]

As with their treatment of the waters to which the public trust doctrine applies, states vary considerably regarding the uses that the doctrine will protect. Many states still adhere to the federal minimum of navigation, commerce, and fishing.[24] Among states that protect additional uses, the most common addition is recreation.[25]

State Public Trust Doctrines and Water Resources Management

Several states have expanded their public trust doctrines to encompass at least some aspects of water resources management:

- As is perhaps well-known, the public trust doctrine in ***California*** can limit private water rights in order to protect inherent public trust values.[26]

(Mich. 2007), *reh'g denied*, 739 N.W.2d 332 (Mich. 2007); ALASKA STAT. ANN. § 38.05.965(13) (2004); Floyd County v. Allen, 227 S.W. 994, 995 (Ky. 1921); Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 976 (Mo. Ct. App. 1920); Felger v. Robinson, 3 Or. 455, 458 (1869).

[20] ALASKA STAT. ANN. § 38.05.965(13) (2004).

[21] *E.g.*, Conater v. Johnson, 194 P.3d 897, 899-902 (Utah 2008); Parks v. Cooper, 676 N.W.2d 823, 833-36 (S.D. 2004); Galt v. Montana, 731 P.2d 912, 915 (Mont. 1987); Day v. Armstrong, 362 P.2d 137, 143-46 (Wyo. 1961); State *ex rel.* State Game Comm'n v. Red River Valley co., 182 P.2d 421, 429-32 (N.M. 1947).

[22] Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

[23] Shively v. Bowlby, 152 U.S. 1, 13 (1894).

[24] *E.g.*, ARIZ. REV. STAT. § 37-1101(9) (2008); People v. Emmert, 597 P.2d 1025, 1027-29 (Colo. 1979); Campbell Brown & Co. v. Wlkins, 93 S.E.2d 248, 260-61 (W. Va. 1956); State v. Harrab, 10 So. 752, 753 (Ala. 1892).

[25] *E.g.*, Fabrikant v. Currituck County, 621 S.E.2d 19, 27-28 (N.C. Ct. App. 2005); Larman v. State, 553 N.W.2d 158, 161 (Iowa 1996); State v. Central Vermont Ry., Inc., 571 A.2d 1128, 1131 (Vt. 1990); Pierson v. Coffey, 706 S.W.2d 409, 412 (Ky. Ct. App. 1985); State v. McIlroy, 595 S.W.2d 659, 664 (Ark. 1980); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); Marks v. Whitney, 491 P.2d 374, 379-80 (Cal. 1971); State v. Slotness, 185 N.W.2d 530, 531 (Minn. 1971); Curry v. Hill, 460 P.2d 933, 935 (Okla. 1969).

[26] National Audubon Society v. Superior Court, 658 P.2d 709, 728-31 (Cal. 1983).

- ***Hawaii***'s public trust doctrine is even more expansive and extends to groundwater, marine water quality, and maintenance of marine life as well as water rights.[27]

- ***Mississippi*** extends its public trust doctrine to environmental protection and preservation, including explicitly "enhancement of aquatic, avarian, and marine life" and "sea agriculture."[28]

- ***New Hampshire***, in implementing its public trust doctrine, permits regulation to prevent runoff and to protect marine fisheries and wildlife.[29]

- The ***New Jersey*** Superior Court has extended that state's public trust doctrine to drinking water supply protection.[30]

- According to the ***South Carolina*** Supreme Court, under the state's public trust doctrine, "everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail; and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks."[31] Moreover, "[t]he State . . . cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access."[32]

Conclusion

Many states consider their public trust doctrines to be evolving and responsive to new management issues—but others are reluctant to extend their public trust doctrines far beyond the basics that the Supreme Court has recognized. Thus, use of the public trust doctrine to address emerging water management issues is very much a state-specific issue.

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[27] In re Water Use Permit Applications, 93 P.3d 643, 657-58 (Haw. 2004); In re Water Use Permit Applications, 9 P.3d 409, 445 (Haw. 2000).
[28] Cinque Bambini Partnership v. State, 491 So.2d 508, 512 (Miss. 1986).
[29] Sibson v. State, 259 A.2d 397, 399-400 (N.H. 1969).
[30] Mayor & Municipal Council of City of Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Super. Ct. 1987).
[31] Sierra Club v. Kiawah Resort Ass'n, 456 S.E.2d 397, 402 (S.C. 1995).
[32] McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003).