

SOVEREIGNTY AND WATER RESOURCES

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Within the American political system, should the courts prohibit a legislature or a popular majority from dissolving the state, the ultimate privatization of previously public functions? Less dramatically, what should happen if a legislature at a given moment in time in some manner seeks to abolish its police power to act to protect public health, safety, welfare and morals? Or purports to suspend its power to tax forever, or perhaps for a fixed period of time?

These questions are perplexing, for they bring into conflict the democratic ideal of self-government and the notion of some irreducible minimum of power inherent in the state. On the one hand, it is commonly thought in a democracy the majority should prevail, subject of course to constitutional requirements. Thus, although we have a Bill of Rights to ensure fundamental rights, those constitutional provisions are themselves subject to repeal in accordance with a constitutionally specified process. On the other hand, many would accept that regardless of constitutions a majority could go "too far" in purporting to reduce the power of the state and thus the ability of the people in the future to express its will through public means.

To understand the bearing of these general questions on water resources, one must explore the way in which in American legal thought sovereignty has sometimes been linked with public property rights and how that linkage on occasion has led courts to strike down legislative efforts to surrender the public property rights in question. Our legal history in this regard has centered on navigable waters, which two hundred years ago in a time of no air transportation and limited surface land transportation were of central importance to the community. Although the community interest was in access for commercial purposes to the navigable waters, judicial attention tended to be directed to the ownership of the land beneath the navigable waters. Often those beds of navigable waters were assumed to be inherently public — simply not subject to alienation into private ownership regardless of what the majority or, perhaps, even all the people might wish. Thus in 1798 the highest court in Virginia declared flatly that the ownership of a bed of a navigable river "is

in the Commonwealth and cannot be granted." (Home, 1798).

Nineteenth century disputes over access to oyster beds beneath navigable waters in New Jersey led to some noteworthy judicial decisions on sovereignty and property rights. In 1821 a state court decision stated that navigable bays and rivers "are common to all the citizens" and that title to their beds is vested in the sovereign for their benefit. (Arnold, 1821). This suggests not only that the beds are inalienable to private parties — or, at a minimum, that any permitted alienation is subject to a special protective legal regime — but also that for all purposes the sovereign holds title as a fiduciary. Hence, the thought emerges that the beds of navigable bodies of water, like the navigable waters themselves, are subject to a "public trust," an idea which has blossomed in the twentieth century.

Martin v. Waddell, a U.S. Supreme Court decision in 1842, recognized the link between sovereignty and property rights, saying that the state court decision of 1821 was "unquestionably entitled to great weight." (Martin, 1842). Martin dealt with a tangled web of grants of large parts of New Jersey by the English King, but its essence is found in the statement that private domination of the beds of navigable waters is unacceptable. As Chief Justice Roger Taney declared:

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

EQUAL FOOTING

Although our earliest judicial pronouncements about the special status of navigable waters and their bedlands came in regard to disputes arising in the thirteen states which had formed the Union, the Supreme Court was quick to extend the same thinking to other states. (Pollard's Lessee, 1845). The vehicle for this extension was the "equal footing" doctrine — largely a political idea, but one which developed a proprietary aspect. As a political idea, equal footing assures that we do not have first-class and second-class states within the American nation — later admitted states have the same status as the original thirteen states. This idea is explicitly expressed in the acts admitting most of the states (Hanna, 1951), and the Supreme Court has indicated in any event it is rooted in the U.S. Constitution (Oregon ex rel. State Land Board, 1977).

As a proprietary idea, equal footing means that upon admission to the Union, each state by operation of law acquires title to the beds of all navigable waters within its boundaries. Very limited exceptions are recognized for prestatehood grants by prior sovereigns of an area — Mexico, for example, in the case of the Southwest and California — or by the federal government during the territorial period, but for the vast majority of the beds of navigable waters the state upon admission acquires ownership as a function of state sovereignty. This process is in stark contrast to the extended bargaining and explicit grants which occurred for other types of federal land turned over to the states. (Gates, 1968). And, as the English idea that "navigable" waters were those where the tide ebbs and flows was replaced by the American concept that in addition navigable waters exist where rivers and lakes in the interior of the country are susceptible to use for commercial purposes, the amount of land recognized as held in a state sovereign capacity has increased considerably. (Dunning, 1996)

THE PUBLIC TRUST DOCTRINE

State title to the beds of navigable waters is an important matter, but the fiduciary manner in which that title is held is of even greater significance. For the beds, as for other sovereign resources, the state has a duty "to protect the people's common heritage" (National Audubon Society, 1983). Exercise of this duty can have important consequences for private rights in land and other natural resources, including water. Most legal analysis of this duty occurs under the rubric of the "public trust doctrine."

(U.C. Davis Law Review, 1980; Environmental Law, 1989). One judicial decision, now over one hundred years old, has had enormous influence on both courts and commentators in their analysis of the public trust doctrine, particularly in the past thirty years. (Dunning, 1996). That is Illinois Central Railroad Company v. Illinois, a U.S. Supreme Court decision which dealt with an uncompensated legislative revocation of a grant of over a thousand acres of Chicago's outer harbor to a railroad. The Court there rebuffed the railroad's challenge to the revocation, and in doing so it emphasized both the sovereign basis of the public trust doctrine and the consequence of the fiduciary obligation which grows out of the sovereign status. It said, for example, that the beds of navigable waters such as Lake Michigan are held "by the people in trust for their common use and of common right as an incident of their sovereignty" (emphasis added), attributing sovereignty to the people themselves, and that as a consequence disposition of those beds cannot be subject to an "irrepealable" contract. (Illinois Central, 1892). Illinois was free to revoke its ill-advised grant — one an historian has suggested was tainted by corruption (Myers, 1968) — without compensating the railroad for any increase in the value of the property. (The City of Chicago, designated in the original bill as the grantee of the harbor lands and in the final legislation as the recipient of the purchase price of \$800,000, had refused to accept any payment.)

Illinois Central has been followed by courts in over three dozen states, often in disputes over the alienation of the beds of navigable waters to private persons or entities. A dramatic recent example of the power of the public trust doctrine involved another grant of part of the bed of Lake Michigan in Chicago, this time a mere 18.5 acre parcel conveyed by the Illinois legislature for the expansion of a private university campus. Despite various indications in the legislation of how the expansion would be in the public interest, a federal district court in reliance on Illinois Central and subsequent state court decisions permanently enjoined the university from placing fill material on the parcel. (Lake Michigan Federation, 1990).

Most public trust doctrine cases in this century have dealt with the beds of navigable waters, and most have sought to accommodate the public right to access to navigable waters for navigation, fishing and other purposes with the constant pressure to fill and develop these areas for business use, housing, airports and other uses. Until the modern environmental movement of the last thirty years,

generally the accommodation favored development — witness the fact that over forty percent of San Francisco Bay, the West Coast's largest estuary, was filled by 1966. (San Francisco Bay Conservation and Development Commission, 1966). Within the past thirty years, however, development in areas of navigable water has slowed considerably, often because of coastal zone or shoreline management and regulatory schemes of one kind or another.

One consequence of the modern environmental protection movement for the public trust doctrine has been a broadening of the purposes stated for the protective fiduciary duty. To the historic trilogy of use for navigation, commerce and fishing — with "commerce" clearly involving that linked to navigation, such as business on wharves — courts in some jurisdictions have added preservation. In California, for example, in a dispute over tidelands in Tomales Bay, the state supreme court noted that the public uses of tidelands "are sufficiently flexible to encompass changing public needs" and said there is "growing public recognition that one of the most important public uses . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." (Marks, 1971). Statements such as these subtly move the public trust doctrine from a right of access to navigable waters in whatever condition they are found to one that requires that some quantitative and/or qualitative standard be maintained. In other words, the "natural state" of tidelands can exist only if the water is there.

THE MONO LAKE LITIGATION

For sovereignty and water rights, a decision of major significance was handed down in 1983 in litigation in California over diversions by the City of Los Angeles from fresh water tributaries of the highly saline Mono Lake. (National Audubon Society, 1983). Increasing diversions by the city since 1940 had caused a dramatic decline in the lake's level, creating serious concerns both over the impact on wildlife and, given fierce dust storms dominated by alkaline material from the newly exposed lakeshore, human health. Those challenging the diversions advanced several legal theories, but their success came from invocation of the public trust doctrine.

Until the Mono Lake litigation, cases involving the public

trust doctrine in California typically had involved a conflict between sovereign prerogatives and private rights in land. (Dunning, 1980). From a public use perspective, however, the concern had usually been access to the navigable waters above some parcel of land, for example land a private grantee might seek to fill for development. Although no public trust doctrine case had involved water rights, it had always been obvious that the exercise of water rights could have the same sort of detrimental effects as the exercise of land rights. To dry up a lake over time by diverting all the inflow is functionally comparable to drying it up by draining and filling it.

In its 1983 Mono Lake decision, the Supreme Court of California noted the tension between the public rights of access to and preservation of navigable waters — Mono Lake had been found to be such in an earlier decision (City of Los Angeles, 1935) — and the rights of water appropriators to divert water and put it to reasonable beneficial use. It said the public trust doctrine and the prior appropriation water right system were in some sense on a "collision course," but it refused to subordinate one to the other. Instead, it ruled, there must be an accommodation: the exercise of appropriative water rights is to be limited whenever feasible in order to protect public trust values.

Precisely what the Mono Lake ruling in 1983 meant for diversions of water by the City of Los Angeles in the Mono Basin took many years to work out. After a number of different judicial proceedings, however, a state agency decided upon an accommodation which severely restricts diversion. (Koehler, 1995). Very little diversion will be permitted until the lake recovers to a specified level; thereafter, the city's diversions will be less than half the volume of water routinely diverted prior to the litigation.

The Mono Lake litigation promises profound consequences for California water rights law, as long-established diversions and impoundments approved in an earlier time are reevaluated. The ethic of the past that fresh water reaching the sea in California (or a saline sink such as Mono Lake) is "wasted" — an ethic which supported a constitutional amendment in California — is being replaced by an accommodation that is far more sensitive to environmental concerns. (Dunning, 1993). This realignment is being driven partly by the public trust doctrine and partly by some statutory fish protection measures which are often regarded as a partial codification of the public trust doctrine, but water quality and endangered species legislation are playing an

important role as well.

IDAHO'S STATUTORY RESTRICTIONS

These developments in California water law have not been greeted with enthusiasm in all quarters. The most hostile reaction has been in Idaho, a state currently dominated politically by agricultural, timber and mining interests threatened by the prospect of a natural resources realignment giving greater weight to environmental protection. Recent legislation in Idaho purports to preclude most applications of the public trust doctrine, raising squarely the question whether public rights rooted in sovereignty can be so drastically reduced. Just as one can ask whether a legislature may be permitted to dissolve the state, one can question whether it may disavow long standing public rights to the enjoyment of navigable waters.

The public trust doctrine has never been used in Idaho to restrict the exercise of a water right, but shortly after the Mono Lake decision in California in 1983 the Idaho Supreme Court in a case about a yacht club lease undertook a thorough review of the public trust doctrine. In its comprehensive discussion, the court stated its approval of the Mono Lake decision and commented that "the public trust doctrine takes precedence even over vested water rights." (Kootenai Environmental Alliance, 1983). This point was reaffirmed a few years later in a decision on the massive Snake River Basin Adjudication, although in the context of that adjudication environmental groups were denied permission to intervene in order to raise public trust concerns. (Idaho Conservation League, Inc., 1995). Timber interests joined farmers in their alarm over the public trust doctrine when that same year the Idaho Supreme Court ruled that an environmental group could make a public trust claim where it alleged a timber sale on state endowment lands would produce erosion damaging to a navigable water way. (Selkirk-Priest Basin Association, 1995).

Agricultural and timber interests in Idaho prevailed upon the legislature in 1996 to enact a radical measure on the public trust doctrine. An act commonly known as House Bill 794 states, for example, that in Idaho the public trust doctrine "shall not apply" to the appropriation or use of water or to the granting, transfer, administration or adjudication of water rights. (Idaho Code, 1996).

Proponents of this legislation justified it on the theory the public trust doctrine is a creature of the "common law," i.e. judge-made law, and that therefore the doctrine can be

modified or eliminated at will by the legislature. Legislative findings asserted that the public trust doctrine creates "confusion" in the management of state waters and endowment lands and that other laws sufficiently protect the public interest in those resources. (Idaho Code, 1996).

Although House Bill 794 is vulnerable to attack on both federal and Idaho constitutional grounds, (Blumm et al., *in press*) it is the give-away of public rights rooted in sovereignty which is the most offensive feature of the statute. The error of the Idaho legislature is to treat the public trust doctrine as merely a conventional common law rule. In fact, in American legal thought — as in the legal thought of societies as far back as the Eastern Roman Empire (Stevens, 1980) — sovereign rights are fundamental ones not subject to comprehensive repudiation by the legislature. As one court noted, "[t]he very purpose of the public trust doctrine is to police the legislature's disposition of public lands." (Lake Michigan Federation, 1990). As the Mono Lake litigation demonstrates, through the public trust doctrine the courts also when appropriate provide for constraining the legislatively authorized award of water rights which, when exercised, impact navigable waters. They act when the legislature abdicates the state's role as trustee to the advantage of private parties.

Idaho is not the only state where courts have had to deal with legislative abdication of sovereign rights in recent years. In 1987, the Arizona legislature purported to "quitclaim" any state title "based on navigability" to many bedlands throughout the state. (Arizona Session Laws, 1987). Four years later, the Arizona Court of Appeals invalidated the statute. (Arizona Center for Law in the Public Interest, 1991). In a judicial opinion which combined an analysis of the public trust doctrine with consideration of the gift clause of the Arizona constitution, which prohibits public entities in Arizona from making "any donation or grant, by subsidy or otherwise, to any individual, association, or corporation" (Arizona Constitution, 1910), the court found by failing to allow for a particularized assessment of the public rights being surrendered the legislature was derelict regarding "the state's special obligation to maintain the trust for the use and enjoyment of present and future generations." (Arizona Center for Law in the Public Interest, 1991). The Arizona legislature responded by setting up a navigable stream adjudication commission to engage in the particularized assessment referenced by the Court of Appeals. (Arizona Session Laws, 1992).

At the time of writing of this paper, to the author's

knowledge no litigation has been filed to challenge Idaho's House Bill 794. Should such litigation develop, the courts will be called upon to review its validity. Any court hesitates before striking down a majoritarian measure, particularly where there is no express constitutional provision upon which to rely. But in the case of sovereign rights, ones which historically involve the public's enjoyment of our heritage of navigable waters, courts on a number of occasions have found that legislatures have gone too far in their privatization efforts. In Illinois Central, the Illinois legislature itself realized its mistake and revoked its grant of Chicago's outer harbor to the railroad. But in later Illinois cases, as in the Arizona situation, there was no legislative revocation. Yet courts in those instances acted to protect public sovereign rights — to enforce the state's duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands." (National Audubon Society, 1983). The Idaho courts should do no less.

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