The Role of the Public Trust Doctrine in Environmental Protection

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Table of Contents

I. Introduction
   A. Introduction
   B. Precaution and Environmental Protection

II. The Public Trust Doctrine
   A. The Historical Background
   B. Propagating the Doctrine in American Jurisprudence
   C. Original Uses and Further Potential Uses
   D. Mechanics of the Public Trust
      i. The Trustee and the Agency Problem

III. Scope of the Public Trust
   A. Environmental Protection under the Doctrine
      i. Tragedy of the Commons
      ii. Anthropocentrism
      iii. Water Protection

IV. Conclusions

References

Works Cited
The Role of the Public Trust Doctrine in Environmental Protection

Introduction

Though societies have been dependent on aspects of the environment – namely water – stretching back to antiquity and legal structures have existed to regulate the interaction of society and the environment stretching back to Roman law, the concept of a distinct body of environmental law did not exist until the twentieth century. It wasn't until that time that humanity was aware of the various social benefits offered by the biotic community which extend well beyond the physical boundaries of that community. It was around this time that the field of conservation biology came about, suggesting that processes degrading the environment, caused by human activities, would one day threaten our own existence. Influenced by a growing awareness of the fragility and unity of Earth's various ecosystems following mankind's first steps into space, increasing public concern over industrial activity's impacts on resources and public health, and the advent of environmentalism as a political movement, recognition of the fragility of nature translated into legal structures protecting nature and development of those structures into the body of law known as “environmental law” occurred in the 1960's.

Conservation of the natural world is a difficult task and requires synergy of different tools. One such tool is the Public Trust Doctrine (PTD). In Common Law jurisprudence, a trust “is 'the legal relationship between one person having an equitable ownership in property and another person owning the legal title to such property.'”¹ In the case of the public trust, the legal

title is vested in the state, while the public holds the equitable title; thus, the government, as trustee, has a fiduciary responsibility to the public to hold or use the land in trust for the benefit of the public. It has been described as “more rhetorically than legally charged,” but also as “the most promising legal basis upon which individual members of the public could maintain a lawsuit to protect natural resources from needless degradation and destruction.” The purpose of this paper is to examine the PTD's potential for economically efficient environmental protection. First, before examining the doctrine in US jurisprudence, the precautionary principle of environmental protection will be explored. Third, the application of the doctrine as a branch of trusts law will be examined. Then, the scope and efficacy of the doctrine will be examined in the light of its potential applications before the paper concludes.

*Precaution and Environmental Protection*

The precautionary principle of environmental protection is best framed by the court in the case of *Lead Industries Association v. Environmental Protection Agency*, wherein the court held that “man's ability to alter the environment often far outstrips his ability to foresee with any degree of certainty what untoward effects these changes may bring.” Thus, the precautionary principle states that if a proposed activity may give harm to the public or the environment, regardless of a scientifically established causal relationship, the burden of proof that the activity is not harmful is placed on the proponents of the activity. In some legal systems, the principle has been codified to be applied in some areas of law; however, it is not part of the US code. What

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sets the PTD apart from other common law doctrines, then, is that it can be invoked before any harm has come to pass upon the trust lands: “it does not require that dead fish float on the surface of rivers and streams before its farsighted environmental protections can be invoked.”

The Public Trust Doctrine

In essence, the public trust doctrine holds that certain resources are inalienably owned by the public and are to be held and managed by the government in the interests of the public. Any attempt to further define the doctrine is folly: in the US, the PTD exists at a federal level but is employed at the state level. Individual states set the scope and scale of the doctrine's application, leading to a wide discrepancy in the nature of its various invocations. It should be noted, however, that the amorphous definition affords the doctrine the flexibility required of legal tools to defend ever-changing concerns.

The Historical Background

The origin of the modern public trust law traces back to a concept that received much attention in British and Roman Law – the ownership of navigable waters and the lands thereunder. The concept first appeared in The Institutes of Justinian, a unit of the *Corpus Juris Civilis*, the collection of fundamental jurisprudence issued by Justinian I, wherein it was codified that “by the law of nature, these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea.” From there it was brought to the English common law by Bracton in the 13\textsuperscript{th} century. The legal development of the doctrine in England has been given

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6 Baslar, K. The Concept of the Common Heritage of Mankind in International Law. Martinus
THE PUBLIC TRUST DOCTRINE

considerable attention and is tied closely with the struggle between the Crown and Parliament in England. A point that should be emphasized, though, is that “no evidence is available that public rights could be legally asserted against a recalcitrant government,” even though it was understood that certain common properties were dedicated to the perpetual use of the public.⁷

— Propagating the Doctrine in American Jurisprudence

An expedition to uncover the true origins of the PTD in the US could easily be a novella of its own, but it came to the nonetheless, via the 'Equal Footing Doctrine'. This doctrine provided that each state will join the union with the same rights the original states had, and, in accordance with the original states' ability to develop jurisprudence, it left precise interpretation to the judicial and legislative review processes of the new states. Two cases brought the doctrine into the US: Arnold V Mundy, wherein the court affirmed that “the rivers that ebb and flow, the bays, and the coasts are common to all citizens and are sources from which they can find their sustenance”,⁸ and Illinois Central Railway Co v Illinois, which has been called the “lodestar” in American public trust law. It has been called this because the US Supreme Court held that all navigable waterways were to be held in trust for the benefit of the public.⁹

— Original Uses and Further Potential Uses

The driving force behind the distinction between trust lands and general public property, which can be granted to private owners at the discretion of the sovereign, was always primarily

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⁸ Arnold v Mundy 6 N.J.L 1 (1821) at 76 - 78
⁹ Sax, J. op. Cit footnote 6
economic: the distinction is contingent upon the potential uses of the land, which were, originally *commerce*, which depended heavily upon *navigation*, and *fishing*. Thus, the sovereign was to prevent development of the land which would impede public access to, as well as commerce, navigation, and fishing on, any lands held in trust, which are those lands underneath, and along, navigable waters.

Based on that evidence, it would seem that the Public Trust Doctrine is not a useful tool for environmental protection: modern environmental concerns extend beyond navigable waters including diverse and distinct areas of the environment as the air quality and terrestrial wildlife. Moreover, mankind has discovered the unfortunate side effects of air quality degradation. The economy no longer moves primarily by sea either; it moves by air, and also by the electromagnetic spectrum (there is even evidence of electromagnetic spectrum in PTD). Yet despite all of this, evolving views tend to be recognized in a democracy: as more evidence comes to support an idea, the idea becomes more mainstream until, eventually, the majority may come to hold that idea; thus will judges become more supportive of many cases of environmental protection. Indeed, the doctrine has already been extended to include non-navigable waters in most states, and the scope has been extended to far-reaching elements of the environment, though that will be discussed later, under *Scope*.

Nonetheless, there are limitations to what the doctrine can do. First, the doctrine applies only to riparian lands. Also, the original cause for the public trust, the protection of commerce, is, as Lazarus points out, “hardly a focus of resource protection values”\(^\text{10}\). However, the fields of environmental and natural-resource economics offer a plethora of tools for the dynamically efficient – meaning net benefits are equal across time – allocation and protection of resources.\(^\text{ii}\)

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Mechanics of the Public Trust

What separates the PTD from other legal precedents is that it is a trust device, not unlike any other, though analogous to a charitable trust. What the trust device does that most private law systems do not, is add a layer of beneficiaries which introduces a temporal nature and a hefty body of legal precedent to support the doctrine. These trust attributes have the potential to greatly benefit the task of efficient environmental management, but introduce complications involved with making a recalcitrant government yield to public rights.

Trustee's Duties

The doctrine's structure as a trust means that trustees have a fiduciary duty to protect trust resources, and prevents private appropriation. The fiduciary obligations thus require more extreme duties than those that might be required of a “good business manager”\textsuperscript{11}. Because the State is the trustee in the US, the Supreme court, in the Illinois Central decision, stated the idea thusly: “this duty obliges the state to ensure that the public trust property 'can never be lost, except as to such parcels as are used in promoting the interests of the public therein, a disposition to fulfil Public Trust purposes or a disposition of trust lands that will not substantially impair trust use.’’\textsuperscript{12}

A positive effect of this is that the State's legislature is, ideally, the most fit to act for the benefit of the public, because the legislature mirrors the constituency in a democracy. However, governmental decision makers are influenced by special interest groups, a vocal minority, or any

\textsuperscript{11} In re Waiola O Molokai, Inc., 83 P.3d 664 (Hawaii, 2004) at 684

\textsuperscript{12} Illinois Central Railroad v. Illinois 146 U.S. 387, (1892) at 452-453.
other forms of political pressure. But the complex American legal structure presents other complications to this trust: the federal level mandates simply that each State be the trustee for the public trust, requiring no minimum scope, leaving each state to develop the details; also, the doctrine of legal precedent\textsuperscript{iv} means that court decisions set a powerful precedent, but are also paid considerable attention as a result.

Ultimately, the issue with the structure of the Public Trust Doctrine is that, in US jurisprudence, those who determine what is in the public interest (state legislature) are also the trustees. This system, which is flawed, allows that some members of the legislature do not truly represent the majority's will. Separating the legislature and the trustee would, however, create a problem known in the financial world as the agency problem, which occurs whenever a body and the agent acting for that body have misaligned incentives.\textsuperscript{v} A substantive remedy to this (admittedly small) issue would require its own essay.

Scope of the Public Trust

As promised, the disparities in the scope of the doctrine across states will be illuminated. Some states still allow only the consideration of economic uses when managing the trust, though these states are mostly the middle American states which have few trust lands anyway.\textsuperscript{vi} This is changing, however, as more states expand power to the public trust; the divergent applications include: protecting hunting, swimming, recreational boating, aesthetical values, climate scientific study, environmental and ecological quality, open space,\textsuperscript{vii} wildlife habitat preservation,\textsuperscript{viii} water allocation\textsuperscript{ix} and biospheres such as wetlands\textsuperscript{x}. However, there are those who, in their fervor for environmental protection, dismiss the legislation because the precedent of its economic origins
means that the doctrine serves a goal antithetical to conservation.\textsuperscript{xii}

\textit{Environmental Protection under the Doctrine}

The argument of this essay is that the Public Trust Doctrine, for any minor failings in scope it may have, is the most effective tool for the encouraging of dynamically efficient use of resources. Economics has supplied tools which can closely estimate the value of resources, and it is a folly to say that economists consider only the monetary value of resources in cost-benefit analysis: this is a vast and demonstrably false oversimplification.\textsuperscript{xiii}

\textit{Tragedy of the Commons}

Trust lands are public lands. Public goods are marked by a lack of exclusivity, meaning that a person cannot be stopped from consuming the good. Thus, trust lands are subject to the same issue as all public goods: the familiar 'tragedy of the commons'. It is the principle that the lack of well-defined property rights for the good leads to waste by overuse. The power of the trust easily prevents the tragedy from occurring to trust resources if the precautionary principle is considered: if an action threatens the waste of trust resources by overuse, judicial intervention would prevent the activity from occurring until the proponent proved that it will not waste the resource. The idea is that an active public member will attempt to initiate judicial action on the grounds that the trustee has violated his fiduciary responsibility to the trust.

\textit{Anthropocentrism}

Though specifically economic, the doctrine's heritage is more generally of an
anthropocentric nature. Thus, it has become increasingly difficult to expand the doctrine to include environmental protection. However, the anthropocentric nature could support expansion such that the doctrine would govern aspects of environmental protection. The value of some object as measured by economists, is the sum of its use values, including extractive and non-extractive uses and the option-to-use value, and its non-use values, one example of which is its existence value. The idea is that the object's existence may have value to a person; thus, they will spend money for its continued existence with no intention of ever using it. This is how the PTD's anthropocentric nature can help: if it is found to be in the best interest of the public to protect the continued existence of a tract of trust resources, those resources must be, according to the doctrine, held in their current state to maximize trust values.

However, trust resources continue to be tied to riparian lands, such that the PTD is not applicable unless the actions are occurring on riparian lands. The framing of the original structure states that certain resources are to be held in trust for public use; the lands it mentions are tidal shorelines. The code within the *Corpus Juris Civilis* states that these lands are common by virtue of their connection to tidal waters. The text also states that *air* is common to all. Should it not be the case that air is a trust resource? If air quality decreases, everybody is adversely affected. Prevention of such a scenario was the intention of the original doctrine. Why should the doctrine not ensure quality air, in direct contravention to the idea of maximizing value of resources common to all? Surely the air is the most common resource of all. It is in this way that the scope of the PTD's applications might be extended.

*Water Protection*
Similarly, it is hard to imagine a resource as supportive to as many people, yet so badly misused as fresh water. Though the doctrine applied traditionally to navigable waters, it has been expanded to include all non-navigable and non-tidal waters too. Thus, any abuse of any water resources contradicts the public trust doctrine, which takes precedence to any prior agreements. The landmark litigation that established this power was *National Audubon Society v. Superior Court of Alpine County*, wherein the plaintiff argued, successfully, that a prior agreement with the City of Los Angeles Water Department had allowed that entity to appropriate so much water from the ecosystem that violated the PTD on the basis that the State of California had a fiduciary obligation to maintain “scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds.” This also establishes the idea that the State must maintain ecosystems as part of trust resources, which has been applied to a court decision in Wisconsin.

Conclusions

US jurisprudence lacks strong and meaningful tools to support, analyze, and regulate the environmental and downstream (i.e. affecting future generations) effects of decisions. The US constitution does not provide for environmental protection in any form; a third of the states' constitutions mention it. There are those who would look at that fact, look at the progress that has been made in expanding the Public Trust Doctrine's powers to protect the environment, and declare the doctrine a failure. What these ideas ignore is the fact that the fields of natural resource and environmental economics offer powerful tools for the valuation of the environmental resources. From there it is a matter of convincing the sovereign that he is not
acting in your best interests.

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vii Marks v Whitney 6 Cal.3d 251 (1971)

viii National Audubon Society v. Superior Court of Alpine Count 33 Cal. 3d 419; 658 P.2d 709; 189 Cal. Rptr 346 (1983)


x Just v. Marinette County, 201 N.W.2d 761, 768-70 (Wis.1972).


xiv See Just v. Marinette County, 201 N.W.2d 761, 768-70 (Wis.1972).
