

JUSTINIAN'S LEGACY: MUSINGS ON THE PUBLIC TRUST DOCTRINE AND PRIVATE PROPERTY RIGHTS

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Justinian's Legacy: Musings on Public Trust and Private Property Rights

- o Importance of clarifying the basis of rights/responsibilities being asserted:
 - o Public Trust Doctrine
 - o Private Property Rights
 - o Eminent Domain
 - o Shared or Common Rights in Resources
 - o Public Access
 - o Police Power (public health and safety)

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- o Shared – although not identical governmental objectives - advance **public purpose, public use, public interest.**
- o Important to focus on **who is asserting the rights and against whom** ...executive, legislative, federal, state, local, governments vs. individual or part of a more comprehensive, societal scheme.
- o Key question in each case is the **legitimacy** of the assertion of authority given the right being asserted, the public purpose and who is asserting against whom

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- Go back to the core elements of the Public Trust Doctrine as a touchstone:
 - A common law doctrine of property law....It is a property right.
 - Held by the states in their sovereign capacity.
 - In tidal waters to their farthest reaches, tidelands, navigable waters and permanently submerged lands.
 - For the benefit of the public - in trust for the public

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- What is being protected is the **right of the public to use** certain lands and waters
 - Traditionally navigation, commerce and fishing.
- But the common law – as interpreted by the courts can evolve...because the public benefit, what is common can change.
- This is where it can become confusing because - how public trust use evolves, and gets reflected in the public arena often involves different public authorities e.g. police power.
- So, I think it is important to try to be clear on whether the public trust doctrine itself has evolved to include public uses beyond the traditional big three.

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- So why is it so important that the public use of public trust resources be protected?
 - That connection was intuitive in the beginning given critical role of fishing, fouling and navigation to both economic and social systems.
 - Now, of course, more than 50% of the population lives on the coast and more than 200 billion in economic activity associated with the coast in 2000.
 - While the terminology was not invented at the time, I would also contend that the public trust doctrine was one of the first articulations of the idea of ecosystem services and what is now called ecosystem-based management.

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- “Ecosystem-based management is an integrated approach to management that considers the entire ecosystem in a healthy, productive and resilient condition so that it can provide the services that humans want and need.”

Scientific Consensus Statement

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- Remember that the Public Trust Doctrine, protects the property rights in specific shared resources along the coast and out into the ocean.
- The public trust (*jus publicum*) coexists with and overlaps the rights of adjacent, riparian property owners (*jus privatum*).
- Private property owners take their property subject to the public trust. Once we start talking about potential of imposing limitations on private ownership or 'takings' of property we are no longer talking about the public trust doctrine but, rather, of other competing public interests.

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- To what extent does the public trust doctrine protect the “services that humans want and need” along the coast.
- Are those “services” limited to the traditional uses?
- Note: That this focus on services and uses, although linked with ecosystem productivity, is not the same as the proposition advanced by many commentators that the public trust doctrine is to protect the coastal environment...’tho the end point may be the same.

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- The key tensions around public trust and private property rights arise primarily from two factors:
 - Timing...if the public trust and common law can evolve, are property owners limited by the new uses that the court deems are protected (e.g. recreation); and
 - Limitations of government's role to advance the purported public interest vs. individual property rights.

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- Regarding the former...to the extent that circumstances and realities have shifted necessitating a reinterpretation of the public trust doctrine to assure legitimacy of the underlying principles of the public trust, I would contend that the property right under the trusts can “accrete” to the public, without violating private property rights because they are subject to the trust.

Exactly, how the public trust doctrine develops and is defined is a question for another day.

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- On the other hand, if the assertion of rights rests on governmental authority other than the public trust such as police power; legislative or regulatory requirements; the extent of the government's authority to take by eminent domain for public use a different analysis applies to determine (i) whether there is a legitimate basis for asserting the governmental/public right, and (ii) whether some compensation is due the property owner.

(e.g. is there a legitimate state interest; does it bear a reasonable relation to the interest served; is the burden proportional to the impact; what is the extent of the limitation on use or benefit; was there notice of the limitation..etc.)