

## THE PUBLIC TRUST DOCTRINE

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### Private and Public Property

From the outset political and legal theory have long been divided on the question of whether various forms of natural resources are in the original position held in common ownership or, alternatively, are subject to private ownership by individual acts of appropriation. Locke, for example, tries to work both sides of the street. He first appeals to Biblical authority to demonstrate that God gave mankind the earth to be held in common: "God, as King David says, Psalm cxv.16, 'has given the earth to the children of men,' given it to mankind in common." (Locke 1690, ch. 5, ¶25). Thereafter he argues that individuals "fix" their property in that portion of the common good with which they mix their labor, even when they act without the consent of others.

Locke's argument rested in part on a theistic foundation. Once that is removed, however, accounting for property rights is far more difficult, for there is no obvious starting point for the analysis, as mankind in general cannot be regarded as joint donees who take by transfer, rather than by acquisition. Locke's argument does not tell us how to think about property when there are no rights, and no grantor, in the state of nature. No longer is the inquiry, how does one get private rights out of public ones, or indeed how to get public rights out of private ones. No longer is there any necessary presumption that all property rights should be either private or public. A mix of rights, some public and some private, is surely conceivable, even if their relative proportions are unclear. Historically, both the common law and Roman traditions were able to accommodate both forms of property, with the navigable waters being perhaps the most nota-

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ble forms of public property—often “inherently” so (see Rose 1986; Sax 1970). The task for a unified theory of property is to develop an account of the original position which accomplishes two things. First, it allows for some property rights to be private and others to be public. Second, it permits correction of any initial allocative mistakes by providing a way for assets to move from one regime of property rights to another. In dealing with these two themes, my emphasis is on property that is owned by the public at large. The “public trust” title given to the paper refers to the legal rules that limit the power of the people, or (in time) the legislature, to dispose of public property.<sup>1</sup>

In addressing the original position, no government is already in place with the power to assign rights in property to single individuals or the public at large. Locke may not have established that mankind in common is the donee of all property, but surely he demolished the divine rights of kings. The inability to locate the original grantor of property in God or in the state has had profound consequences on the shape of political theory, for it has forced both legal and political thinkers to take a more explicit consequentialist view of legal rules and social arrangements. The task of justification has been to show what general set of legal institutions will advance the welfare of the public at large, when measured against its next best alternative. The task is surely daunting, as there is no obvious means to take information about individual utilities and combine them into any unique social welfare function. But by the same token that task is in some sense quite unavoidable: for if one does not look to *any* of the consequences of legal rules, however nebulous and uncertain, then what could furnish a justification for any practice?

In addressing the original position, I believe that the most fruitful line of inquiry stresses the relationship between the rules of transfer and the rules of original ownership (see Holderness 1985). In some logical sense rules of initial acquisition are necessarily prior to the rules of transfer. After all, how can anyone transfer property that he

<sup>1</sup>In more recent times efforts have been made to expand the scope of the public trust doctrine so that a public trust is impressed upon ordinary private property simply because individuals have notice of the types of regulations that might be imposed. “Expectations must be deemed to change as time, circumstances and public attitudes change, and expectations which might have been reasonable at one time can cease to be reasonable.” See Sax (1981, p. 10). Stated in this form, the public trust doctrine strays from its original function, that of limiting government power over public assets, and addresses a new function, that of expanding government power over private property. The newer approach to the public trust doctrine is simply another unfortunate effort to create instability in private rights, in harmony with the modern efforts to eviscerate the eminent domain clause. I have said enough about eminent domain already (see Epstein 1985a) and do not address this constellation of issues further here.

does not own? Yet in another sense one can determine the rules of original acquisition only with an appreciation of the importance of the rules of transfer. The needed explanation rests in a single phrase: "mutual benefit." There are all sorts of reasons why someone who now owns one thing no longer wishes to keep it: I want to sell my house in Chicago because I have a new job out of town. A rule of voluntary exchange allows the owner to get rid of something he has in order to acquire something to which he has greater value. In the ordinary case, these rules of exchange leave both parties to the transaction better off than they were before; otherwise they would not enter into them. The mutual benefit between the parties creates a presumption that the transfer in question is a social good, for someone is better off and thus far no one is worse off. But this presumption is not absolute. In turn it could be rebutted by a showing that the transfer has created negative effects on some third parties.

Here there is need to be careful, for every transfer has *some* negative external effects on the welfare of at least one third person. Nonetheless the overall effects of voluntary exchange will usually be positive. The increase in wealth of the immediate parties will generally increase the opportunities for exchange left open to all third parties. The disappointed competitor in the one case may well turn out to be the successful bidder in the next, so a system of property rights which facilitates free exchange is one that will in the long run work to the advantage of all its participants by increasing the amounts of available goods and services. In marriage markets, for example, no one would (I hope) think that A's decision to marry B and not C, could justify a system of regulation that would oust the principle of joint consent. The usual libertarian line has been that between competition and violence, and it is a very accurate proxy for which rules have, in the aggregate, third party effects that are overall negative or positive. In the absence of force, or the threat of force against third parties (Epstein 1985b), it is very difficult to rebut the original presumption that ordinary voluntary exchanges (unlike contracts to kill or steal) should go forward.

Voluntary exchanges are then a critical part of any sensible legal system. The question of whether these exchanges in fact can take place is, however, critically a function of the original design of a system of property rights. Here of course it is quite impossible for any human being or human institutions to engage in self-conscious acts of deliberation that will yield some perfect set of original rights or for that matter a perfect set of legal institutions. The line between violence and competition is, for example, a first approximation, one which leaves open the limited possibility that further corrections can

be made in the original allocation of rights should the circumstances require it: for example, some laws restricting the enforceability of cartel arrangements. The questions to be asked, therefore, are two: What rules will in general promote voluntary transactions? And what methods does the legal system have to “correct” those original allocations that turn out to be arguably wrong? The first of these questions addresses the mix of public and private property. The second addresses the role of the eminent domain principle and its analogue for public property, the public trust doctrine. The eminent domain rules govern the forced conversion of private to public property. Rightly understood, the public trust rules do the reverse, and govern the forced conversion of public to private property.

### The Original Position

The first question is, why should some things be regarded as unowned in the original position and others subject to a common indivisible ownership? I believe that a single theory accounts for both types of ownership. In the original position property should be subject to that form of ownership that minimizes the bargaining problems associated with moving the asset to its highest-valued use. In most cases that proposition points to a system of private property, where a *single* person enjoys the right to the possession, use, and disposition of a given thing. The existence of a single owner means that normally one person is needed to sell, and only one to buy. Stated otherwise, two distinct people are the logically necessary minimum for any exchange to take place. The system of private ownership tends to ensure that any two people who choose to pair up are able to so act, without the consent of others.

This concern with voluntary exchanges helps explain the original distribution of rights to the person and many forms of real and personal property. With the person, that result is achieved under the traditional protection of individual autonomy, long associated with natural rights theory. Each person is the sole owner of himself, and hence can sell his labor without the consent of other individuals. Autonomy quite literally means capable of movement by the self—alone. There is no need in this view to have any rule which specifies how any person acquires ownership of himself; he has it by being in necessary possession of his own body: “every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are properly his.” (Locke, ch. 5, ¶27).

No rule of original ownership for human talents could possibly operate at lower cost. Yet here too there are qualifications, for it is necessary to specify a guardian for individuals during infancy. Parents assume that role in part because they are in possession of the child at birth, and in addition have strong biological motives to protect the child until its maturity. The automatic selection of a very small number of guardians again facilitates the voluntary transactions entered into for the care and raising of the child.

With respect to land and chattels, there is no obvious assignment of any external things to any particular individual. In this context the first possession rule at common law allows persons to come forward and become single owners of external things (Epstein 1979). Once those things are reduced to single owners, they can then be disposed of in voluntary transactions that in the typical case involve two (or very few) persons. In both cases the distributional consequences of the first possession rule are distinctly secondary in importance. What matters is that resources with positive value not be left without any owners to fend for them, or with too many owners to squabble over them. In principle the entire process of assigning things to private ownership can take place, moreover, without the intervention of the extensive administrative state and its powers of centralized control. Initiation lies in the hands of private persons. The role of government is only to police the rules whereby ownership is acquired and transferred.

The desirability of this system of first possession changes radically when we consider, for example, the use of navigable rivers and lakes for transportation. Now any system of divided private ownership, based on first possession, tends to create the very bargaining and holdout problems that the institution of private property is designed to overcome. Each segment of the river is worth very little for transportation unless all segments could be subjected to uniform ownership. The risk is that the owner of one segment will hold out against all the others, so that bargaining breakdown will prevent any use of the river at all for navigation. It is precisely to overcome such difficulties that one of the most unproblematic uses of the eminent domain power has always been the condemnation of private lands for public highways, open to all. The formation of the highway removes, or at least controls, the risk of holdout which might otherwise dominate voluntary negotiations to lay out and construct roads.

If we need highways, then why is the land for public highways not owned by the public at large in the original position? The answer is quite simply this: while in the original position we know that there is some need for public highways, we do not know *where* they are

best located. That decision turns on subsequent events, including the pattern of land use development and the emerging routes for internal and external trade. The location of the highway involves some degree of discretion and must necessarily await future events. In the interim, private ownership of the underlying land facilitates its beneficial use. At some later time when the land is needed for the road, it can be condemned, where the requirement of compensation offers an effective way to constrain the state into making wise decisions about what lands should be taken (see Epstein 1985a, pp. 12–17).<sup>2</sup>

There is, however, no reason to wait for government action to dedicate navigable rivers to commerce. The location of the common highway is determined by nature. There is no need to begin with private ownership, and then to allow the property to be taken for public use upon payment of just compensation to private owners. So long as there is good reason to think that navigation along the river will be socially beneficial—an easy call—then the original recognition of navigation servitude prevents the blockade of the river by any single riparian or interloper. No system of eminent domain is costless to administer. Sometimes it is difficult to identify the owner of a particular asset; it is always tricky business to value their interests; and someone must levy and collect the taxes necessary to pay the needed compensation. The transactions costs are quite considerable. In contrast, the questions of which rivers are navigable, and what conduct counts as their obstruction can be answered by ordinary common law litigation. It is therefore possible to have a system of public ownership without an extensive government to administer it. The recognition of the public's navigation servitude in the original position ironically serves to *reduce* the size of government while recognizing the customary public ownership of public goods, which was firmly established if imperfectly justified.

There will of course be some difficult questions of how to define the limit of the scope of public ownership over navigable waters. The bilateral monopoly problem does not extend to all use of the

<sup>2</sup>Note in some cases cash compensation will not be needed, because the very presence of the highway will increase the value of the retained lands, so that each landowner's reduced holdings are worth more with the road in place than his larger holdings are worth without the road. Note too that the allocation of this surplus is nonetheless important. If there is no system of transfer payments after the highway is put in place, each owner will have an incentive to try to get the road located on the land of a neighbor, but adjacent to his own land. Requiring some fair division of the surplus created by the introduction of the road reduces this particular form of rent dissipation. In this context too there is a powerful correspondence between intuitive notions of fairness (that each person be treated equally) and the economic fear of rent dissipation.

waterways (see Rose 1986, p. 749). There is no reason to adopt a system that speaks of some inherent right of public access to navigable waters over private riparian lands. While there may be only a single navigable river, there can be many places where access to that river can be gained. Competition between landowners will keep the price of entry down, and if public access points are desired, then individual landowners can be compensated for the loss of their exclusive possession. Unless that is done, each riparian will be prepared to undertake steps to influence government powers to place public access ways over the lands of others. Requiring compensation reduces the costs of these wasteful games, while at the same time public officials face a budget and a taxing constraint whenever they wish to expand the scope of access.

Issues like fishing and bathing in navigable rivers are closer calls (Rose 1986, pp. 754ff.), but in the end these, unlike access rights, should probably be regarded as public. Once there is a guaranteed access to the river in question, it is hardly conceivable to think of effective ways to prevent persons on the river from using it for these purposes, and not obvious to imagine how a principle of first possession could reduce fishing and bathing rights across the board to private ownership.<sup>3</sup> It is very difficult to exclude persons from using navigable waters when they cannot be excluded from gaining access to it. Navigable rivers are therefore a mixed asset, some of whose attributes should remain private and others should be public. In sorting out the various cases, the guiding principle throughout should remain constant: choose that form of ownership that minimizes the expected number of bargaining breakdowns. The historical divisions between public and private rights often followed that general rule.

### Nor Shall Public Property Be Transferred to Private Use, Without Just Compensation

The parallels between public and private property can be extended to the second of our inquiries, the correction of individual allocative mistakes. In dealing with private property, the system of ownership created under the rule of first possession will not always prove optimal. To be sure, private bargains can often work the needed reassignment of property rights. Yet in other cases, when the bargains must touch the rights of multiple owners, the parties face the very set of bargaining barriers that private ownership was designed to

<sup>3</sup>This is not to say that some form of regulation by the state will not in the end be necessary. Common fisheries present the obvious and classical common pool problem (see Hardin 1968).

avoid. The problems of the common fishery, of oil and gas, and even of bankruptcy are often taken as illustrations of cases where voluntary bargains are unable to correct allocative imbalances brought about in a system of private property based upon the principle of first possession.

In this world the use of government takings is thought to play an important role. The government takes property from private parties and pays them compensation, in cash or in kind, for what they have lost (Epstein 1985a, chaps. 14–15). The point of the system is that if the state can afford to pay the compensation for the losses that it imposes upon private owners, then there is good reason to believe that the entire set of coerced takings will benefit all (or virtually all) members of society simultaneously. The reason why compensation is strictly required is both prudential and universal. If takings could be made by state fiat alone, then, to avoid abuse, there would necessarily have to be elaborate administrative reviews to estimate, first, the value to the state of the property taken, and second, the losses the taking imposes upon the private owner. The taking should only go forward where the gains to the state (or the people it represents) exceed the losses that the taking imposes. But no administrative process is equal to that task. These investigations would be expensive to supervise, and in the end there would be little reason to have any confidence that only the “right” takings were undertaken by the state. The requirement of just compensation thus serves as an effective bulwark against government abuse by making public officials back up speech with dollars. Questions of the size of public gain are largely removed by judicial review, leaving the price feature as a powerful deterrent to unwise state action. If the court sets the price of the taking correctly, then there is some insistent legal pressure for public officials to estimate accurately the benefits from their own takings. Where the prices are set incorrectly (as when losses to good will are improperly ignored in the calculations), then there will be too many takings brought about by the state.

The analogous problem of correcting imbalances could also arise with property that is originally held by the public in common. Suppose some property which is given to the state is more valuable in private hands. The question is how does one determine what property that is, and transfer control over it to some private person. Initially the problem is complicated because property that has been customarily held in common cannot be disposed of by the (disorganized) public at large. Some group of persons must have the power to dispose of it, and to control the use of the proceeds that has been so obtained. The need to transfer resources from state control is just



one reason why some organized system of collective ownership has been imposed upon public property. But whenever power is created, abuse may follow in its wake. The question is what rules, if any, should regulate those transactions that seek to move public property into private hands.

Two questions have to be addressed. The first is whether the transfer should be made, and the second is, when made, what level of compensation should be provided. The problem of disposing of public property thus raises the mirror image of public use and just compensation questions under the takings clause of the Fifth Amendment: "Nor shall private property be taken for public use, without just compensation." The underlying problems are not any simpler when dealing with property which was originally held by the public in common, for now the guiding principle is in a sense the converse of the original eminent domain clause, to wit: "No *public* property may be transferred to *private use*, without just compensation," payable to the public at large. This reverse eminent domain clause in turn reduces itself into the same two questions raised in the ordinary takings context, first, whether the state transfer should be made, and second, what compensation, if any, should be provided.

In dealing with the first of these issues, it is clear that the transfer is desirable only if it can improve the lot of everyone in society, that is, by the creation of general social improvement. In order for that conclusion to hold, there must be some reason to believe that the private owner of the asset can make better use of it than the public owner. In dealing with the navigation servitude over the river that conclusion does not seem very promising. Initially, any transfer of the navigable servitude to two or more persons, each entitled to do with his interest as he pleases, cannot have the desired effect, because it necessarily reintroduces the bilateral monopoly problems that the system of public ownership was designed to overcome.

In principle it might be possible to escape this problem by selling the navigation servitude to a single firm. But other problems remain. Surely the sale of the navigation rights limits the otherwise unlimited access to the public waters. In order to recoup the initial cost, the owner of the navigation servitude must charge a positive price to all users of the system—a price which will usually be in excess of the very low marginal cost that each additional user brings upon the system. And there would be a real skewing of benefits from privatization unless the new owner were required to accept *all* users at some nondiscriminatory price. The moment this condition of universal access is added, however, it becomes a doubtful question whether the navigation servitude has been really made private. The

insistence upon universal access impresses the public trust upon the navigation servitude even after legal ownership is vested in private hands. The absolute right to exclude, long thought the essence of private property, is denied the purchaser who takes, as it were, subject to the original public trust.

The theoretical gains from this type sale are, then, very hard to see. Yet its practical difficulties are very great. First, there are considerable costs associated with trying to organize a sale of so complex an asset as a navigable river. Who does the packaging of the rights and measures their value? Is it possible to really sell off the entire Mississippi river system from Minnesota to New Orleans? Unlike the case of highways, there is no obvious way to allow the new monopolist to limit the use of the river by riparian owners, who have previously had unlimited access to it. It is for good reason, then, that privatization has not come to the navigation servitude. The social gains just do not seem to be there.

At this point the parallels to the ordinary principles of eminent domain become explicit. When it is said that public rights over navigable waters are "inalienable," then the law in effect has applied by analogy the "public use" limitation of the ordinary eminent domain clause to property held by the public. If the transfer of the navigation servitude into private ownership *reduces* the levels of wealth (or utility), as seems likely here, then no system of side payments, no system of just compensation, can make all individuals better off than before when all gains and losses are taken into account. Someone has to bear the bottom line losses of the contemplated change in ownership rights. Under these circumstances, it is better therefore simply to prevent the transfer from taking place. Exactly that result is obtained by saying that public waterways are inalienable, and must remain, "inherently" public.

Yet in some situations, it seems clear that public ownership of resources is not necessarily a good thing. Consider the important case of minerals located in the riverbeds of navigable rivers. In the original position, it is arguably a close question of whether these should be treated as property held in common by the public at large, or as unowned resources subject to acquisition under the principle of first possession. On the one hand, private ownership of minerals does not create the same type of blockade situation that would arise with private ownership of a river or a lake. Yet by the same token, the removal of minerals from a riverbed may well require an extensive dislocation of transportation along the river, for surface easements are needed to mine. The dangers posed to navigation by unlimited private access to mineral rights over public waters are not

a trivial concern. Public ownership of the bed of the river and the mineral rights it contains avoids just that difficulty, and the general rule so provides (*Barney v. Keokuk*, 94 U.S. 324 [1876]).

Nonetheless it is doubtful that the public or the government has any natural advantage in the way in which it mines minerals. A system of ownership that treats the unorganized public as the owner of the minerals effectively withdraws them from gainful exploitation. The recognition that the state is the owner of these resources, in trust for the public at large, now endows a single group of individuals with the power to dispose of the minerals to private parties. The language of the public trust is far more than an idle metaphor because it is quite clear that the public officials in question cannot treat the proceeds of sale as their private property. Instead they are required to hold the moneys received as part of the public treasury, that is, for the benefit of all the individuals who had in the original position some undivided interests in the underlying mineral rights.

Some sales of public assets are for public benefit, but some are not. But which are which? Now attention has to be given to the question of what legal institutions will secure for members of the public at large the right price and the right terms for its asset. The first question raises the precise parallel to the "just compensation" requirement found in the eminent domain clause. If the transfer is simply made to private individuals without any restraint, there is the enormous temptation to use political influence and intrigue to divert public property to private hands. Requiring just compensation from the private acquirers of the mineral interests limits the possibility that the rights will be given away for a song, and strongly suggests that a competitive auction to maximize public revenues may be required as a constitutional matter.

This stringent compensation requirement, however, does not of itself answer the second question: What is the bundle of rights that the state itself should put up for auction? The problem is of great importance with minerals, where the structure of the access rights may alter the value of the navigation servitude that is retained. The pricing system is not able to handle this question because bids for the assets sold will not reflect the diminution in the value of the property rights retained by the public. Some form of administrative action is necessarily required. A division of power among various public officials is, accordingly, a necessary part of the program of any sale of public assets. That these additional steps are required should not be surprising. Private corporations often must confront the perils of self-dealing, and they take similar procedural precautions. If anything, the conflict of interest problem is far more acute with the

disposition of publicly held assets. Unlike the corporation situation, there is no systematic selection of individuals into the public venture based upon their common attitude toward risk, or their attitudes on consumption. Still every member of the public is a beneficiary of the public trust. Their fundamental divergence of opinions and attitudes only makes it more difficult to decide whether, and if so how, these public assets should be disposed of. The procedural safeguards are as much a part of the program for the disposition of public assets as the just compensation requirement.

### Illinois Central Railroad v. Illinois

The above framework should make it possible to explain the enormous intellectual difficulties in that most important of the public trust cases, *Illinois Central Railroad v. Illinois* (146 U.S. 387 [1892]). The history of the case should be recounted in some detail. An Illinois statute of 1852 had given the Illinois Central Railroad permission to construct a line along the shore of Lake Michigan. That original grant was then confirmed in a statute of 1869. More controversially, the 1869 statute also granted to the Illinois Central Railroad title to extensive submerged lands in Lake Michigan, about 1,000 acres in all, including all of the outer harbor along Lake Michigan, and some additional submerged lands as well (146 U.S. at 454). The new grant provided that the railroad should hold title to the land in perpetuity, but should not have the power to grant, sell, or convey the fee, that is, outright ownership, therein to any other person. The state retained no express power to revoke the grant. Illinois Central was given the same freedom of control over the lands as if they were uplands, that is, lands not subject to the original navigation servitude. The grant also provided that Illinois Central could not “authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged” (id. at 451). In exchange for the conveyance of the land, Illinois Central agreed to carry over the compensation formula that the 1852 act used to set the moneys payable by the railroad to the state, and to pay some fraction of its gross earnings from its use, occupation, and control of the submerged lands in question. The 1869 grant, however, did not oblige the railroad to enter into any immediate efforts to make improvements on the lands so conveyed.

The entire arrangement under the 1869 statute was short-lived, for the original grant was revoked by new legislation, without compensation, four years later. In the interim period the Illinois Central had used some but not all of the waters conveyed to it for its railroad

business, but did not appear to pay any revenues to the state. The challenge made to the 1873 act was, when all was said and done, that the revocation of the 1869 act was an illegal taking. The railroad's case was that the grant of the submerged lands had conveyed an indefeasible title in the railroad in accordance with the terms of the grant. At that point the state could still revoke, but only if it paid compensation for the property so taken. Once the state conveyance is made the private title is as good as that which is acquired from any other source.

The argument for the state was that its original conveyance was in violation of the public trust under which those submerged lands had been held. As such at most a mere license was created by the 1869 act, so that an asserted legal title in the railroad was void (or at least voidable) at the option of the state. The upshot was that no compensation was required when the new legislature reversed the field of the old one.

The decision in the case was close, but the state prevailed by a four to three vote.<sup>4</sup> The opinion for the Court was written by Justice Stephen J. Field, normally a staunch defender of individual liberty and private property. (See, e.g., his powerful dissent in *Munn v. Illinois* 94 U.S. 113 [1877]). His refusal to uphold the original legislative grant has been taken to be inconsistent with his general philosophical position. On reflection I believe this is a mistake. In order to understand the case, it is necessary to apply the two-step analysis of public trust cases developed above.

The first question is whether the conveyance to Illinois Central is per se out of bounds because it necessarily is a losing proposition. However, it is hardly clear that the case falls into this category. The 1869 statute did not convey the entire lake itself to a private party. The use of Lake Michigan for navigation remains unimpaired, and the development of the harbor is consistent with the original use of the lake itself, for the grant itself prevented the railroad from obstructing navigation. In addition, there may be some efficiency gains in integrating the operations of the shipping and rail traffic. Finally, the risks that the railroad will abuse its position are reduced given that the state reserved powers to regulate its activities on the submerged lands. A categorical denunciation of the grant is hard to establish.

The question therefore turns on the second of the two issues identified above: Did the state receive just compensation from the private

<sup>4</sup>Two justices were disqualified: Chief Justice Melville Fuller because he had represented the City of Chicago, and Justice Blatchford who was a shareholder in Illinois Central Railroad.

party for the lands which it had conveyed out? In order to answer this question it is necessary to value the consideration received by the state for the submerged lands conveyed away.<sup>5</sup> By treating the question strictly as one of the capacity of the city to convey its submerged properties, Justice Field (and the dissent of Justice Shiras) did not explicitly address the compensation issue. But it is clear that this issue lies at the root of the case. Note, initially, there was no competitive bidding situation for the rights to the submerged land, and the price paid over was shrouded in mystery. Thus the 1869 statute called for the payment of \$800,000 in installments to the city for the submerged lands, but the city comptroller refused to accept the first payment from the railroad if acceptance meant a waiver of the city's rights to challenge the grant. The remaining payments from the railroad were only conditional upon its receiving revenue from its development of the project in question. None (it appears) had been paid over in the interim four-year period that the statute had been in effect, and the railroad had complete control over the timing of any improvements that it chose to make. Clearly there are always conflicts of interest between the city and the railroad with the timing of improvements, and the 1869 act reduced the cost of delays to the railroad. Finally, the amount of land conveyed in the 1869 grant had been quite considerable in extent and value. It was as large as the docks along the Thames; much larger than those of Liverpool, and nearly as large as those of New York (*id.* at 454). The consideration for so substantial a grant should be quite considerable indeed.

In spite of its critical importance the just compensation issue was never addressed, except obliquely. Justice Field insisted that small grants of particular bits of waterfront for the development of piers and wharfs were well within the power of the state to grant. For this he was chided forcefully by the dissent of Justice Shiras, which said that if the state has the capacity to convey out bits and pieces of the waterfront, it could convey out the entire area at once. If the only issue had been the capacity to convey, then Shiras's objection would have seemed well grounded, but once the focus turns to the just

<sup>5</sup>There is also a second takings issue hidden in the case. If the moneys received by the "state" are paid into the state treasury, then there may well be an implicit transfer among citizens of the state. The citizens of Chicago are the obvious beneficiaries of the use of the submerged lands in Lake Michigan, but the proceeds of sale inure only in part to their benefit, with the remainder going to citizens downstate. The implicit wealth transfer between different segments of the public creates rent seeking opportunities. The public trust doctrine does not only address the opposition between the individual recipients of the trust property and the public at large, but also the parallel tensions between different members of the public. I shall, however, not pursue these issues further here.

compensation requirement, then the reverse is true. It is easier to monitor whether the state is getting fair value if it sells off small parcels for immediate use by competitive bid. It is far harder to measure compensation with the giant deal that was organized here. The clear sense of the Court's majority was that the city had been "ripped off" by the railroad which had gotten the advantage of a bargain purchase under the 1869 statute. Once that is done, then only complete nullification of the original grant will set the situation aright. Condemning the lands back again only allows the railroad to cash out a gain to which it was not entitled in the first instance.

It might of course have been possible for the railroad to place a different gloss on these facts. The railroad, for example, could have tried to show that the city's retained power of regulation over its wharves and piers eliminates the dangers of monopoly profits, and that the percentage of future revenues reserved under the grant are substantial in character. And even if the railroad does not have perfect incentives to develop the property, it surely has some, for the longer it keeps the waterfront in its undeveloped state, the longer it has to wait to realize a return from its asset. In his argument, the railroad's lawyer made explicit reference to the fact that the common council of Chicago gave its consent "on conditions that were extremely burdensome, but they have been fully complied with" (id. at 416).

At this distance it is extremely difficult therefore to make a judgment about how the adequacy of consideration issue should be ultimately resolved. Yet when all is said and done there is no denying its relevance. Suppose a private corporation sold all its assets to one of its shareholders. The risk of self-dealing is so great that the transaction could always be challenged by the remaining shareholders on the ground that the corporation had not received adequate compensation for the property it had distributed. *Illinois Central Railroad* raises that same issue of self-dealing in the public sphere. When Justice Field struck down the grant to the railroad, he acted not to restrict the power of ordinary conveyances, but to prevent the abuse of legislative power that might well have transpired. His position is thus consistent with his own theory of limited government, which everywhere places limitations on public officials that are not imposed upon private individuals.

Notwithstanding the internal logic of Field's opinion, there are many disquieting elements about *Illinois Central*, both at an institutional and a constitutional level. As an institutional matter, it is surely a source of some disquiet that the case was finally resolved only 19 years after the 1873 statute. That delay works in no one's interest, for in the interim neither the city nor the railroad knows whether it is in a position to develop the land. The time to resolve

doubts about public grants is before, or shortly after, they are made. In part this can be done by procedural protections. Public hearings about the terms and conditions of the grant, its costs and its benefits, seem clearly appropriate before the grant is made. Such deliberations are held before corporations sell substantial assets to shareholders.

There is, however, no certainty that these will be sufficient. The question therefore is what types of judicial challenges can be made to set aside the grant. *Illinois Central* reached the courts only because the subsequent legislature revoked the earlier grant, without paying compensation. But why should the grant remain beyond challenge if it is not revoked? The underlying fear is both familiar and recurrent: the first legislature has been bought off. If so, then the next legislature could be bought off as well. To condition challenge to the grant on its repeal means that in some cases needed challenges will never take place. *Any* citizen should have standing to challenge a major transfer of public assets. What seems to be called for is a system which allows a prompt (if that word can ever be used about the judicial system) challenge to the original grant on grounds of inadequacy, as by declaratory judgment. But the fuse should be short, and once the period has passed, the grant should be regarded as fully valid, and not subject to subsequent attack in any forum. Its future revocation would then require compensation.

### Constitutional Issues

The constitutional issues raised by *Illinois Central* are, if anything, more puzzling. The public trust doctrine is the mirror image of the eminent domain clause. Both are designed to place limitations upon the power of legislature to divert property, whether held privately or in common, from A to B, or more generally from a group of As to a group of Bs. Both doctrines derive from a strong sense of equity that condemns these uncompensated transfers as a genteel form of theft, regardless of whether the original holdings are public or private. In each case the prohibition upon legislative behavior has beneficial allocative consequences as well, because it prevents the dissipation of valuable resources that are used to obtain or resist uncompensated transfers. In principle the public trust doctrine should operate at the constitutional level, as a parallel to the eminent domain clause. Nonetheless the basis for the public trust doctrine in the United States Constitution is difficult to identify.<sup>6</sup>

<sup>6</sup>Many state constitutions have specific public trust provisions in them. See, e.g., Montana Constitution, Art. 9, §3(3), which provides:

All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law.



Consider the way the public trust question arose in *Illinois Central*. That action was brought by the railroad to challenge the revocation of the original grant under the 1873 statute. The railroad claimed that the earlier conveyance had made the submerged lands its private property, protected against the confiscation by any government action. If the railroad did indeed own the lands, then its case was airtight. Accordingly the state's defense rested on the proposition that the original grant was invalid under the public trust doctrine. The public trust question was thus raised by indirection only. At this point, the juridical status of the public trust doctrine in the legal hierarchy becomes critical to the analysis. If the doctrine applied only at common law, then the state legislature could trump it. If the principle were embodied only in the Illinois constitution, then the case should not be heard in the U.S. Supreme Court. If the public trust principle found its application in the U.S. Constitution, then Justice Field should have said where. But the opinion is not "clause-bound" (see Ely 1980) in any sense at all. Instead Field works very much in the "natural" or "higher" law tradition (see Grant 1931). *Illinois Central* contains no citations to particular constitutional provision, and the opinion reads like an essay that runs for 20 pages without case citation (146 U.S., at 436 to 456).

It is therefore an open question whether the public trust doctrine has a constitutional home. Here two alternatives present themselves, each with its own interpretative difficulties. The first is the standard due process clause of the Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." There is a long but an uneasy tradition that reads the last phrase, "without due process of law" to be the equivalent of "without just compensation" (*Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 236 [1896]). On that substantive reading, the due process clause seems to apply because the "property" to which it refers includes not only private property, but also the fractional share that each person holds in the trust property. At this point the outcome in *Illinois Central* depends upon the adequacy of consideration received by the state, just as this due process analysis appears to provide.

The second possible source of constitutional rights is the equal protection clause, which provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." Unlike the due process clause, this clause is not tied to the protection of any particular interest in property, public or private. The modern law of equal protection confers upon the states a massive degree of discretion for dealing with property and other economic issues (*Minnesota*

*v. Clover Leaf Creamery Co.*, 449 U.S. 456 [1981]) because such is not regarded as either a “fundamental right” like voting (*Harper v. Virginia State Board of Elections*, 383 U.S. 663 [1966]); or a “suspect classification” like race (see *Brown v. Board of Education*, 347 U.S. 483 [1954]). Neither gloss on the clause, however, appears to be compelled by the text, or even consistent with its general language. The principle of equal protection is stated in universal terms: *no state shall deny any person equal protection of the laws*. Accordingly the clause seems to prohibit any invidious classification that the state makes among its citizens, wholly without regard to fundamental right or suspect classification.

Viewed in this expanded light, the public trust cases appear to fall under the clause. When property is conveyed out of public trust for inadequate consideration, some citizens receive disproportionate benefits, while others receive disproportionate losses. The uncompensated transfer of public property to private use thus disadvantages some at the expense of others. Those who have come up short under the transfer have been denied the equal protection of the law. Success or failure under the equal protection clause thus turns on the presence or absence of compensation when property rights are taken. This close connection between disproportionate impact and just compensation is not simply invented for the occasion. It is quite explicit in the ordinary eminent domain cases. “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole” (*Armstrong v. United States*, 364 U.S. 40, 49 [1960]; Epstein 1985a, pp. 204–9). This “equal protection” dimension of the eminent domain problem arises with equal force in the public trust cases as well. The net losers under the transfer have not received equal protection of the law.

## Conclusion

The preceding discussion has examined the public trust doctrine in the area of its birth. In closing it is worth asking how far the doctrine can be extended. From the above arguments the scope should be broad indeed. So long as one deals with property which is held by the people in common in the original position, then its disposition is governed by the public trust doctrine as formulated in *Illinois Central*. Some sense of the sweep of the doctrine is captured by

Professor Sax (1970, p. 566) in his early and influential treatment of the subject:

It is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests [e.g. rivers, streams or parklands] or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.<sup>7</sup>

The source of the danger is evident. Well-organized political groups may well be able to obtain net transfers from legislation. As such the connection between the defects of the political process and the public trust doctrine is as explicit as the connection between the defects of the political process and the eminent domain clause (Epstein 1985a). As the takings clause, in my view, reaches all forms of taxation and regulation, it should not be surprising that the public trust doctrine has a similar scope.

The closeness of the public trust doctrine and the eminent domain power can be shown in yet another way. Thus far the inquiry has taken place on the assumption that all property held by the public was acquired by it in the original position. That assumption is clearly false in the modern setting, where enormous amounts of property held on the public account have been acquired by either purchase (with tax dollars) or condemnation. With respect to property so acquired the eminent domain principle and the public trust principle now converge. The two principles impose identical limitations on the disposition that public officials can make of public property. The nature of the limitations could be quite substantial, and it might be appropriate in closing to mention a few illustrations of their reach. Assume that land has been condemned for use as a public highway. If it is thereafter held in public trust, then it is highly questionable whether the state may allow some individuals free access to the highways which it denies to others. There is thus serious doubt as to whether the state can issue licenses for commercial transportation to some firms, while denying those licenses to others. At the very least it should be required to sell those licenses in a competitive market, so that the gain from the license remains with the public at large. The elaborate prerogatives of licensing bus and taxi services on a favored basis is more than nettlesome. It is an impermissible diversion of public assets to some persons to the exclusion of others.

<sup>7</sup>Sax then adds rights of way for utilities, wetland regulation, and air pollution to the list of questions. But the comprehensive scope of the theory goes further.

The same point of course applies with respect to exclusive franchises over public waters. The great case of *Gibbons v. Ogden* (22 U.S. [9 Wheat.] 1 [1824]), for example, involved a grant by the state of New York to Livingston and Fulton of the exclusive right to run steamships in New York Harbor. The grant was held to be invalid because it was preempted by federal statutes enacted pursuant to the power of Congress to regulate commerce among the several states. If the analysis above is correct, exclusive grants of that sort are improper diversions of public resources under the public trust, even if authorized by Congress. There is little reason to believe that a system of monopoly control promises superior social results to one of free entry, and in any event, there was no evidence that Livingston and Fulton paid full value for the franchise that they so acquired.

Over a broad range of cases, then, the public trust and the eminent domain theory impose in principle parallel restrictions upon the application of government power, no matter what the original distribution of rights. This is as it should be, for a comprehensive theory of governance should be able to account for all forms of government control of property, regardless of whether that property is public or private in the original position.

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