



Lakefront and the Public Trust Doctrine

BY JOSEPH D. KEARNEY AND THOMAS W. MERRILL

This past May, Cornell University Press published *Lakefront: Public Trust and Private Rights in Chicago*, written by Joseph D. Kearney, dean and professor of law at Marquette University, and Thomas W. Merrill, Charles Evans Hughes Professor of Law at Columbia University. The product of more than 20 years of research, much of it greatly assisted by Marquette law students, *Lakefront* explores a number of questions important not only to Chicago history but also to property law and urban planning in the United States more generally.

This summer, Dean Kearney and Professor Merrill were invited by a set of national blogs to expound—and, ideally, expand—upon the themes of *Lakefront*. They posted three sets of original blog posts (not simply excerpts from the book). In reverse chronological order: The five entries in August, on *PrawfsBlawg*, explored the role of *possession* in property law, and the five-part series on *The Faculty Lounge*, in July, considered the implications of *Lakefront*'s cases and chronicles for the law of *standing to enforce public rights*. The first five-part series, published at *The Volokh Conspiracy* in June, focused on the *public trust doctrine*.

The public trust doctrine, while often said to have ancient roots, first sprang into view (if you will) in American law on the Chicago lakefront, in the form of an 1892 decision by the U.S. Supreme Court. The doctrine is a matter of broad interest in environmental law today. We present here, lightly edited, Kearney and Merrill's guest posts at *The Volokh Conspiracy*.

1. The Origins of the American Public Trust Doctrine

A new book begins by explaining the real origin story of the American public trust doctrine.

Resources in the United States are generally held as private property, which gives the owner the right to exclude others. There is one glaring anomaly: certain resources are subject to a “public trust,” prohibiting the authorization of private exclusion rights. Where did this doctrine come from, and how has it played out over time? We explore this issue in depth in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press). We are most grateful for the opportunity, as guest bloggers, to present some highlights from the book or reflections based on it.

The public trust doctrine's conventional origin story goes something like this: In 1869, a corrupt Illinois

legislature granted 1,000 acres of submerged land in Lake Michigan, east of downtown Chicago, to the Illinois Central Railroad, including the right to build a new outer harbor in the lake. Four years later, a new legislature, voted in by an outraged citizenry in the midst of the Granger Movement, repealed this “Lake Front Steal.” The U.S. Supreme Court, in the landmark *Illinois Central Railroad Co. v. Illinois* decision in 1892, upheld the repeal, on the ground that the submerged land under a body of navigable water is held in trust for all the people, to ensure they always and forever have access to such waters.

The Court's decision became a model for various states to recognize this “trust” in certain resources that are “inherently public” (Professor Carol Rose's helpful term from 1986). The doctrine functions as a kind of anti-privatization rule: although most resources are subject to a

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right to exclude, public trust resources come with an *inalienable* right of the general public *not* to be excluded. Unsurprisingly, the public trust doctrine has become a favorite of environmentalists and other activists who would like to see public control extended over a variety of resources, ranging from wilderness areas to wildlife, cyberspace, and the climate or atmosphere itself.

Lakefront's in-depth research into the origin story and the monumental 1892 decision reveals a number of surprising points. One is that the Illinois Central's 1869 manipulation of the state legislature was triggered by a change in the law: a most surprising 180-degree turn in property rights. Up to about 1860, the conventional view, following the common law of England, had been that the bed of Lake Michigan, like other submerged land in Illinois, was owned by whoever happened to be the riparian owner of the land bordering the water.

After 1860, the view shifted—not yet authoritatively but perceptibly—toward the State of Illinois as the owner of the bed of Lake Michigan. Since the state at that time had no capacity to develop this newly discovered right, a variety of machinations broke out to secure a grant from the legislature, transferring the rights to some private or local-government group. This was deeply threatening to the Illinois Central, which over a decade and a half (beginning in 1852) had made very significant investments in railroad and terminal facilities on landfill in the lake. So, having survived threats in the 1867 legislative session, the railroad in 1869 basically outthrust, with some bribery likely involved, rival groups to secure a grant of the land for itself. The railroad's motivation, in other words, was largely *defensive*.

A second point concerns the odd fact that nearly 20 years passed between the repeal of the grant to the railroad (1873) and the Supreme Court decision upholding the repeal under the public trust doctrine—and even a decade between the repeal and the beginning of the lawsuit in 1883. The basic reason for this was that the Illinois Central had been convinced by its lawyers that the repeal was unconstitutional. After all, the Supreme Court had held in *Fletcher v. Peck* in 1810 that a completed grant of land by a state legislature is protected against repeal by the Contract Clause of the Constitution—even in the face of plausible allegations that the original

grant was corrupt. The Court in its post-Civil War incarnation had reaffirmed this principle of vested rights. So the Illinois Central refused to compromise with the city of Chicago over whether the railroad had the right to construct an outer harbor protecting (and augmenting) its facilities along the lakefront.

When the issue finally reached the Supreme Court, the vote was close: 4 to 3. There were two recusals, one by a stockholder in the railroad (Justice Samuel M. Blatchford) and the other by Chief Justice Melville W. Fuller, who had represented the city against the railroad in the lower court—and who, apparently unbeknownst to all save (presumably) him, had been a principal in one of the earlier (1867) schemes to obtain a grant of the submerged land for a group of private investors. The dissenters, led by the newly appointed Justice George Shiras, Jr., agreed with the railroad that the repeal was unconstitutional under established doctrine.

The majority opinion, by senior-most Justice Stephen J. Field, adopted the public trust idea, *scarcely mentioned or developed in the litigation*, and construed it as a principle embedded in the state's title—you will recall this title to have been only recently and not yet authoritatively recognized—to the land under Lake Michigan. Field's opinion resonates with his Jacksonian-Democrat suspicion of government grants creating monopoly franchises—hence the language in the opinion disapproving of the grant to a corporation favored by other generous government land grants and created for purposes other than constructing a harbor.

To obtain a fourth vote, Field needed Justice John Marshall Harlan, who had decided the case as circuit justice in the court below on the theory that the grant could be construed as conveying only a revocable license. Accordingly (we conjecture), Field tossed in a long paragraph describing the Harlan theory, without expressly endorsing it.

In short, by the narrowest possible margin, the public trust doctrine joined the police power as an exception to the vested-rights principle of the Contract Clause. The accumulating exceptions would contribute to the gradual demise of the once-powerful Contract Clause and the rise of substantive due process during the same era. Very soon after the *Illinois Central* decision (in *Shively v. Bowlby* in 1894), the Court decided that the public trust doctrine was a matter of state law,

Major Areas Along the Chicago Lakefront

not federal constitutional law. So the doctrine gradually developed a number of variations in different states, which limited its visibility, but also opened it up to a variety of creative extensions.

Our next post will explore some of the ambiguities that emerged with the original public trust doctrine—for example, who the trustee is, who has standing to enforce it, and what resources are covered by the trust.

2. The Confoundments of the Public Trust Doctrine

Basic questions presented by the public trust doctrine have made the judicial process challenging.

The American public trust doctrine—a kind of anti-privatization rule for certain kinds of resources—made its spectacular debut in the *Illinois Central* decision of 1892, as we described in our initial entry. The stakes in the case were high: the question was whether the submerged land in Lake Michigan, just east of downtown Chicago, would be given over to a rail and harbor complex, to be owned by a private railroad, or would be kept forever open to the general public. The decision was by the most prominent of tribunals—the Supreme Court of the United States. And the rhetoric of Justice Stephen J. Field’s majority opinion, speaking of navigable waters and the land beneath them as belonging to the state “in trust” for the public, was stirring.

Unsurprisingly, the decision spawned a significant body of cases in Illinois and in many other states. Our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press), allows us to probe more deeply into what kind of “trust” was created by this doctrine, when viewed as a species of trust law more generally. While we use the Chicago lakefront, or Illinois, as an extended case study, the issues explored are important wherever the public trust doctrine can be found. This second of five entries suggests some questions inherent in the doctrine and perhaps inimical to its development.

Here is one question of obvious importance: who is the trustee? The Supreme Court did not specifically address the question in *Illinois Central*, except insofar as it implicitly regarded itself as the trustee. The issue soon arose explicitly in a case called *People ex rel. Moloney v. Kirk* (1896), where the question was whether the state



This map, prepared by Chicago Cartographics, is Figure 0.2 in *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press 2021). It shows the lakefront’s various areas, many of which have been the subject of public trust controversies and cases since the U.S. Supreme Court’s decision in the *Illinois Central* case in 1892. The book also addresses the public dedication doctrine, used by Aaron Montgomery Ward and others to keep buildings off the downtown lakefront, and the use of boundary-line agreements as an innovative device to enable cash-strapped park districts in the 20th century to obtain riparian rights necessary to build Chicago’s lakefront parks and the now-renamed DuSable Lake Shore Drive. *Lakefront* includes 90 figures, such as plats, maps variously historical or original, architectural renderings, and photographs.

The doctrine functions as a kind of anti-privatization rule: although most resources are subject to a right to exclude, public trust resources come with an inalienable right of the general public not to be excluded.

could transfer submerged land to a park district, on the understanding that the park district would then sell some of the land to fund a segment of Chicago's Lake Shore Drive.

The Illinois Supreme Court held in *Kirk* that the state legislature was the trustee of the resources impressed with the trust. The state owned the land subject to the trust, the court ruled, but the legislature was in control of the trust: "The legislature represents not only the State, which holds the title . . . , but the legislature also represents the public, for whose benefit the title is held" If the legislature is the trustee, then *Illinois Central* and *Kirk* describe a trustee with great discretionary powers. The legislature as trustee can transfer trust lands to private parties, if it determines this to be consistent with the trust (*Kirk*). Or, it can revoke a transfer of trust lands to a private party, if it concludes *that* to be consistent with the trust (*Illinois Central*).

Another question: who has standing to assert that the trust has been violated? Here, the Illinois courts have oscillated between two analogies. First, they thought the proper analogy to be public nuisance law, which makes the principal legal officer of the state (as relevant here, the state attorney general) the proper party to represent the public in bringing an action alleging a breach of the public trust. Later, after an intense internal debate, the Illinois Supreme Court decided that the better analogy is to certain state constitutional provisions regarding misuse of public funds, which had been held to allow any taxpayer to sue.

Today, then, any Illinois taxpayer can bring an action claiming a violation of the public trust. As the Seventh Circuit held in August 2020, in one of the last intermediate-appellate opinions by then Seventh Circuit Judge Amy Coney Barrett, this means that Illinois permits suits to enforce the public trust without a plaintiff's having suffered injury in fact, as is required by Article III for an action in *federal* court.

A third question: if the attorney general or an Illinois taxpayer gets to court and asserts a violation of the public trust, what standard of review will the court apply in deciding whether the state legislature, as trustee, has breached its fiduciary duty to the public? On this question, the decisions are very difficult to reconcile. Some, like the *Kirk* case, seem to say that the

legislature has virtually unreviewable discretion. Others have invoked a standard that sounds almost like strict scrutiny.

In a 2019 decision involving a public trust challenge to the construction of the Obama Presidential Center in Chicago's Jackson Park, along the lakefront some seven miles south of downtown, U.S. District Judge John Robert Blakey thought that a different standard of review applies depending on whether the proposition is to fill land under the lake, to change the use of *previously* filled land, or to change the use of public land that was never under the lake. (In rejecting a challenge to the project, Blakey concluded that the Obama Presidential Center is slated to be built on land that was never under the lake; Blakey's decision was vacated on jurisdictional grounds by Judge Barrett's Seventh Circuit decision mentioned above.)

And, finally, perhaps the most important question: what resources are covered by this public trust? What is the *res* of the trust? *Illinois Central* and most succeeding cases were reasonably clear: the trust is designed to ensure that "the people of the State . . . may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Hence, the trust applies to navigable waters and the land beneath them.

For the most part, the Illinois decisions have remained faithful to this understanding. The one major exception involves a decision in 1970 (*Paepcke v. Public Building Commission*) that concerned a proposal to build a schoolhouse in a public park created on land that had never been submerged. But the Illinois Supreme Court in that case, though viewing the park as impressed with a public trust, never explained why this should be so—and no consequences attached to the view, as the court rejected the claim that placing a school building there would violate the trust.

The theory of *Illinois Central* in 1892 was that the trust applies to navigable waters, and the land beneath, because these resources were conveyed to the state when it was admitted to the union on the (implicit) understanding that these resources were to be held in trust for the public. A public park on land that was never submerged can be acquired in multiple ways—by donation, purchase, or condemnation—with or without any condition that the park be held in trust for the public.

It is probably a good idea to provide some legal check on decisions by local politicians to turn parks into other uses. Perhaps such actions should require the explicit approval of the state legislature. But there is no clear theory that would allow the public trust recognized in *Illinois Central* to expand beyond the nexus to navigable waters, on the mere say-so of the courts—that is, no theory that would explain why the title to parks, or why only some parks, should be viewed as held in a trust of that sort.

All in all, the public trust doctrine, when viewed as a type of trust law, is afflicted with, if not imponderables, then questions not readily susceptible to principled or especially persuasive resolution. Who is the trustee? Who can sue to enforce the trust? What is the standard of review in determining whether an action breaches the trust? What is the trust *res*? Courts have struggled to answer these questions, leaving us with a doctrine that is most uncertain in its scope and application.

We will spend more time with the public trust doctrine, as it has developed, in subsequent posts, but we will next focus on this: Given the confounding questions presented by the

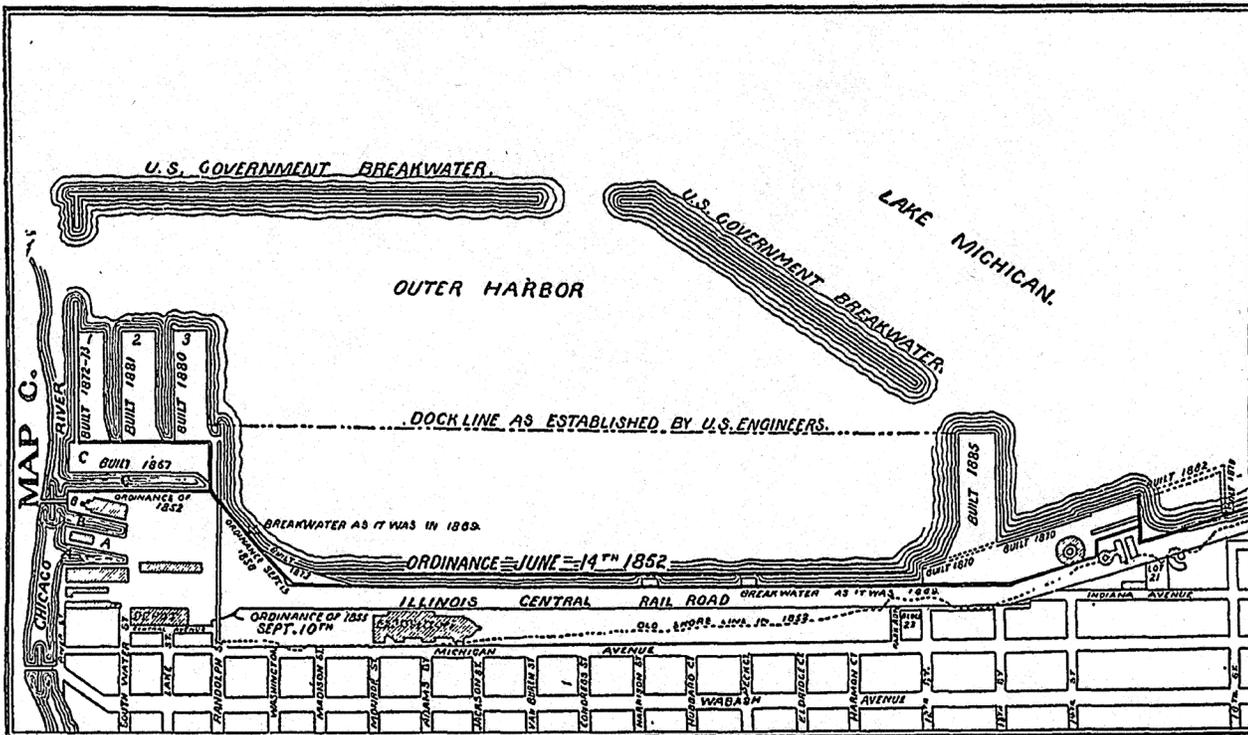
public trust doctrine, how *did* Chicago succeed in creating and then preserving a splendid lakefront? The answer lies in part in a doctrine that we will consider in our next (third) post: the similar-sounding, but quite different, public dedication doctrine.

3. Comparing Public Trust and Public Dedication

A right that *private* property owners enforced—called the public dedication doctrine—rather than the public trust doctrine has been the successful device for preserving Chicago’s famous downtown lakefront park.

The public trust doctrine is frequently invoked by environmentalists and preservationists who want courts to block particular projects. The Chicago lakefront, its modern birthplace (as recounted in our inaugural post in this guest series), provides a kind of natural experiment for considering how well the public trust doctrine performs in realizing this preservationist ideal. As documented in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell

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The so-called Morehouse map, reprinted here from the reporter’s statement of the case in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 413 (1892), shows the Chicago lakefront east of downtown in the early 1880s, including the Illinois Central operations and improvements. The map here runs horizontally, north (left) to south (right), from the Chicago River at one end to 16th Street at the other. Much of the area both west (closer to shore) and east of the dock line was subsequently filled and today is Grant Park.

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University Press), there were two competing doctrines, applicable to different segments of the Chicago lakefront. The public trust doctrine applies up and down the eastern front of the city, to land under (or once under) Lake Michigan.

In the *center* of the city's lakefront, in what is now called Grant Park, a different legal precept—called the public dedication doctrine—has been in play. It turns out that the public dedication doctrine has proved a more powerful form of protection against encroachment on public rights than the public trust doctrine.

The public dedication doctrine is a creature of equity. It holds that a private party who purchased property abutting land that is marked on some kind of public map or plat as being dedicated to a public use can sue to enjoin a deviation from that public use. In the case of downtown Chicago, lots were sold by early developers using maps that identified the area east of Michigan Avenue as being a “public ground for ever to remain vacant of buildings,” or words to that effect.

Persons who bought lots on the west side of Michigan Avenue were willing to pay a premium for such a lot because it gave them a direct view of the lake. These purchasers could plausibly maintain that they had relied on the dedication appearing on the early maps and thus expected that their view of the lake would never be encumbered by the erection of “buildings.”

The Michigan Avenue owners were not shy about acting to enforce their public dedication rights. In 1864, for example, they sued to block the Democratic Party from erecting a temporary “wigwam” in the dedicated area for the purpose of nominating General George B. McClellan as its candidate for president.

The most persistent litigant was Aaron Montgomery Ward, the catalog merchant, who brought or threatened to bring dozens of legal actions in the late 19th and early 20th centuries against various proposed structures and activities in the protected area. His greatest triumph was to block the construction of the Field Museum of Natural History in the center of what is now Grant Park, which is why the museum had to be located outside of the dedicated area, to the south of the park, at what is now called Roosevelt Road. Popular though the Field Museum (or Soldier Field, to its immediate south) is today, this is far enough from the commercial center of the city that most will not *walk* the distance.

Even after Ward's passing from the scene in 1913, the public dedication doctrine has been invoked by generations of Michigan Avenue owners to keep Grant Park largely free of encroachments. The only major exceptions, built more than 100 years apart, are the Art Institute and the whimsical structures of Millennium Park, in the northwest corner of the dedicated area. These were allowed based on representations (somewhat dubious in both cases) that they enjoyed the *consent* of all directly abutting property owners.

At times, the property owners have been overzealous. A new bandstand in Grant Park was blocked for years with threatened lawsuits, even after the old one was so decrepit that it caused a grand piano to fall through the stage. But it is undeniable that the 319-acre park in the center of the city is remarkably free of monumental structures. For which, the public dedication doctrine deserves the credit.

In theoretical terms, public dedication is rather the opposite of the public trust. Public dedication is designed to protect private rights—the right of owners to rely on dedications that enhance the value of their private property. The public trust doctrine is designed to protect public rights—the right of the public to use certain resources free of exclusion rights exercised by private property owners.

In *practice*, by harnessing the interests of private owners, the public dedication doctrine has proved to be the more powerful in protecting certain public interests: namely, the right of the public to enjoy the open space of a huge, centrally located, metropolitan park. It is worth pondering why this might be so. A primary factor concerns who has standing to sue.

The public trust doctrine in Illinois (this aspect of its development is among the things sketched out in our second post) can be enforced either by the attorney general or by any taxpayer. In practice, this means that either one faction of the political establishment must sue to block what another faction of the political establishment wants to do, or a coalition of taxpayers must form that has sufficient funding and unity of purpose to oppose what the (often-united) political establishment wants to do. These conditions will not always be satisfied.

The public dedication doctrine, by contrast, can be enforced by any private property owner whose land abuts a dedicated space and who believes that

what the political establishment wants to do will devalue his or her property more than it will cost him or her to sue. At least for major deviations from the dedication, this may elicit a more consistent enforcement of public rights than does the public trust doctrine.

The major weakness of the public dedication doctrine is that there must be a dedication, whether it be for a park, or an open space free of buildings, or something else. The area that comprises Grant Park was favored with such a dedication. Other areas up and down the lakefront were not. Hence, we see a more checkered pattern of protection of public rights outside the center of the city, especially when projects are proposed that have the strong support of the political establishment.

As we shall see in our fourth (and penultimate) post, the Illinois Supreme Court repudiated the common-law public dedication doctrine in 1970, casting its lot exclusively with the public trust doctrine. In our view, this was a mistake. Often, harnessing private rights can do more to protect the public interest than can a more overtly public-sounding doctrine.

4. The Public Trust Doctrine—Enter Professor Sax

In 1970, the public trust doctrine got new life, simultaneously with a larger environmental revolution.

Our first and second posts in this guest series described not only the U.S. Supreme Court's unexpected announcement of the public trust doctrine in the 1892 *Illinois Central* decision but also the subsequent determinations by the Illinois Supreme Court that the state legislature was the trustee of the public trust and that the judiciary would defer to the trustee's decisions. With this latter set of determinations, the public trust doctrine effectively became little more than a requirement that the legislature *authorize* any project entailing landfilling in Lake Michigan. As we recount in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press), this understanding of the trust prevailed for the next 75 years.

Then, in 1970, the Illinois Supreme Court abruptly changed direction. Relying on a new article in the *University of Michigan Law Review* by Joseph L. Sax, a professor at that school, the

court reformed and invigorated the public trust doctrine, even if the precepts were scarcely clearer than they had been when the doctrine emerged from the U.S. Supreme Court in 1892.

The understanding that the public trust doctrine required little more than legislative approval was dramatically illustrated by an episode that occurred in the early years of the 20th century. A large steel mill owned by the U.S. Steel Corporation, known as the South Works, was discovered to have augmented the size of its holdings by dumping slag into Lake Michigan, on the far South Side of Chicago. After litigation between the company and local authorities (which wanted to recover property taxes on the filled land), the state legislature in 1909 resolved the issue by granting the company 234 acres of submerged land—more than enough to ratify the illegal fill. The state attorney general, in a superficial analysis, assured the governor that he could sign the bill without any concern that the grant violated the public trust identified in the *Illinois Central* decision.

The following decades would see landfilling up and down the lakefront, all authorized by the legislature. Perhaps most consequentially, park districts on the North and South Sides of the city (later merged into a single Chicago Park District) were given authority by the legislature to fill the lake along the shore so as to construct a system of parks and, as part of the construction, to extend Lake Shore Drive farther north and south.

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Professor Joseph L. Sax, ca. 1967. Courtesy of the University of Michigan Law School.

The most striking illustration of the state of the public trust doctrine was the decision by Northwestern University, in the early 1960s, to double the size of its campus in Evanston by landfilling in the lake. . . . The lawyers were familiar with the *Illinois Central* decision, but counseled that it was “very old” and “obsolete.”

of the retained property somewhat more to the east (into the lake), these agreements gave the riparian owners additional submerged land, typically about 100 feet wide, which they could fill and do with as they pleased. This land was no longer in the water or at its immediate edge, given the construction of the parks and drive between the new boundary and the lake (farther) to the east, but it was *more land* for the private party. No lawsuit was ever filed challenging this massive disposition of submerged land as a violation of the public trust.

Other public projects that entailed landfilling approved by the legislature also passed muster with little controversy. The construction of Navy Pier (begun in 1914), of a water filtration plant (approved in 1954), and of the McCormick Place convention center (1958) all fit this description. The latter two projects stimulated litigation, primarily by taxpayers objecting to the cost, but attempts to raise the public trust as grounds for objection were brushed aside by the courts with a perfunctory analysis.

The most striking illustration of the state of the public trust doctrine was the decision by Northwestern University, in the early 1960s, to double the size of its campus in Evanston by landfilling in the lake. The university’s lawyers advised that the project could go forward so long as the legislature approved a grant of the submerged land for this purpose and the U.S. Army Corps of Engineers signed off that the new land would not interfere with navigation. The lawyers were familiar with the *Illinois Central* decision, but counseled that it was “very old” and “obsolete.” They were right: with the blessing of the legislature and the Army Corps, the project elicited no recorded objection based on the public trust doctrine (or on any other basis to speak of).

In 1970, this minimalist conception of the public trust suddenly changed. Professor Sax published in that year what is undoubtedly the most consequential article ever written about the public trust doctrine. The article was motivated by Sax’s fear that public authorities could be induced to convey valuable public lands to private interests with little input from the public. He recognized that change is inevitable, and he did not oppose all such transfers. But he argued that the public trust doctrine, as invoked in the *Illinois Central* decision and in other scattered cases outside Illinois, could be reformulated to require some kind of public approval process before such transfers take place, with courts applying a sufficiently probing

review to assure that proper deliberation and consideration of the public interest had occurred.

Later that same year, the Illinois Supreme Court heard a challenge to a proposal to transfer a portion of an inland public park on the South Side for the construction of a public school (this was Washington Park, shown on the map on p. 33 of this magazine). The plaintiffs in the case, *Paepcke v. Public Building Commission*, challenged the proposal on statutory grounds, under the public dedication doctrine, and under the public trust doctrine. The court was unanimous in rejecting the challenge on all counts. But as fate would have it, the assignment to write the opinion went to one Justice Marvin F. Burt, who had recently been appointed to fill a vacancy on the court created by the resignation of a justice embroiled in a scandal. Burt, a longtime supporter of public parks, wrote an opinion that illustrates the power of the sequencing of issues and of dicta.

Burt’s opinion in *Paepcke* concluded several things, explicitly or implicitly: (1) that any taxpayer in Illinois has standing to bring a public trust claim; (2) that the common-law public dedication doctrine (the topic of our third post) is no longer of any force in Illinois; (3) that the public trust applies to a public park, without regard to whether it sits on land that was once under navigable waters; and (4) that the public trust doctrine is not limited to protecting the public’s interest in accessing navigable waters to engage in commerce or fishing, but applies to any decision to subject public resources “to more restricted uses *or* to subject public uses to the self interest of private parties.”

For the last proposition, including the emphasis, Justice Burt quoted with approval the law review article published earlier that year by Professor Sax. Without anything that could be described as meaningful analysis, he then proceeded to approve the use of the park for construction of a school as consistent with the public trust, generating the disposition of the case—which rejected the plaintiffs’ challenge on all counts—as approved by all the other justices.

After *Paepcke*, the public trust doctrine in Illinois took a very different turn. It would be flattering to the law professoriate to think that Professor Sax should be credited with the change. His article unquestionably was consulted by Justice Burt, and gave the justice confidence that the public trust doctrine was the ticket to enlisting the courts in the cause of providing greater protection to public parks.

Yet the precise proposal advanced by Sax—a call for greater deliberation through public hearings before public lands are turned over to private interests—makes no appearance in Burt’s opinion. Sax would have applauded universal citizen standing, the implicit extension of the public trust to resources other than those connected with navigable waters, and the caution against giving politicians free rein to transfer public resources to private interests. But he would have been perplexed by the absence of any institutional mechanism to ascertain the public will, other than the occasional lawsuit asserting a violation of a nebulous trust doctrine.

Primary credit for the transformation of the public trust doctrine must be given to the temper of the times. The year 1970 saw the first Earth Day in April, with widespread public demonstrations supporting greater environmental protection. Congress got into the act, passing the National Environmental Policy Act and the Clean Air Act. The Nixon administration created the Environmental Protection Agency by executive order, using reorganization authority since repealed. And the D.C. Circuit was busy giving a “hard look” to governmental decisions affecting the environment.

Paepcke was yet another manifestation of this public mood. Sax’s role was to legitimate what one member of the Illinois Supreme Court wanted the law to say. *Paepcke* put the public trust doctrine on a new path. But, as we shall see in our fifth and final post, that path was not at all clearly marked.

5. The Public Trust Doctrine Today: A Litigation Roulette Wheel

Success via the doctrine depends more on somehow securing federal jurisdiction, at least briefly, and on decisions judges make in managing their dockets, than on any remotely predictable criteria.

The transformation of the public trust doctrine in *Paepcke v. Public Building Commission* in 1970, described in the fourth entry of this five-post guest series and at greater length in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press), soon bore fruit in terms of the first (and only) invalidation by the Illinois Supreme Court of a legislatively authorized project involving landfilling of Lake Michigan.

The story involved U.S. Steel’s South Works. In 1963, the legislature authorized U.S. Steel to

fill an additional 194.6 acres in the lake for the steel plant’s expansion on the far South Side of Chicago. The Illinois Supreme Court rejected one challenge to the plan in 1966. But for reasons that are unclear, the corporation waited until 1973 to tender the modest sum of money (\$100 per acre) needed to take title to the submerged land. In the meantime, the political winds had shifted.

The state attorney general in the early 1970s, William Scott, was busy nurturing a reputation as a champion of the environment, which he hoped to parlay into the Republican nomination for a U.S. Senate seat (both political parties sought to capture the environmental vote back then). Suing on behalf of the people, he asked the courts to block the sale of submerged land to U.S. Steel as a violation of the public trust doctrine.

In 1976, in *People ex rel. Scott v. Chicago Park District*, the Illinois Supreme Court ruled against the project. Citing and quoting Professor Sax as in *Paepcke*, the court suggested that the public trust doctrine prevents any conveyance of public lands for private purposes. It acknowledged that the legislature had made express findings that the conveyance in question

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LAKEFRONT

Public Trust and Private Rights in Chicago

JOSEPH D. KEARNEY AND THOMAS W. MERRILL



Loyola’s plan was *much* more modest than Northwestern’s Everyone from local politicians to community groups to the state legislature to agencies of the federal government signed off.

would turn “otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people.” But it rejected “[t]he claimed benefit [of] additional employment and economic improvement” as “too indirect, intangible and elusive to satisfy the requirement of a public purpose.”

Factually, the *Scott* case was closer to the original (1892) *Illinois Central* case than to *Paepcke*. The proposal involved a plan to fill a large amount of open water for the benefit of a private corporation, not the transfer of a chunk of inland park to construct a public school. Thus, the *Scott* decision did little to clarify what resources are covered by the public trust or what is meant by a private, as opposed to a public, purpose for a transfer. It did suggest, however, that the broad deference to the legislature, which characterized the decisions before *Paepcke*, had been replaced by something closer to strict scrutiny.

The aggressive stance reflected in *Scott* was soon emulated by a federal district court in a decision that provides an ironic juxtaposition to the Northwestern campus expansion in the early 1960s. In the late 1980s, Loyola University, on the North Side of Chicago and barely four miles south of Northwestern, was effectively blocked from expanding into the surrounding neighborhood, just as Northwestern had been in Evanston. Like Northwestern, it concluded that its best option was to fill a portion of the lake to the east.

Loyola’s plan was *much* more modest than Northwestern’s; included public access and uses; and, unlike Northwestern’s, underwent a rigorous environmental review that resulted in modifications designed to satisfy a variety of federal and state environmental agencies. Everyone from local politicians to community groups to the state legislature to agencies of the federal government signed off.

But Loyola’s plan was contested by an environmental group that got into federal court based on its challenge to the federally mandated environmental review and that raised the public trust doctrine as a matter of what is now called supplemental jurisdiction. The federal court ignored the federal challenge; extrapolating from *Paepcke* and *Scott*, it held that the project violated the state law public trust doctrine. Loyola soon announced that the funds it had set aside for the project had been exhausted by consulting and legal fees, and decided not to appeal, despite the district judge’s curious exhortation that it should do so.

Subsequent decisions can only be described as a mixed bag. In *Friends of the Parks v. Chicago Park District* (2003), the Illinois Supreme Court upheld a remake of the venerable Soldier Field, designed to retain the Chicago Bears as principal tenant of the stadium. Although accommodating the wishes of a professional football team might seem to be a “private purpose,” the court stressed



This image, from the *Chicago Tribune*, January 20, 1891, shows illustrations of the five buildings envisioned for Lake (Grant) Park as part of the 1893 Columbian Exposition, reflecting a street-level view from Michigan Avenue (top image) and the ground plan (bottom). Left to right (going south, from Monroe Street to Park Row, near 12th Street or modern-day Roosevelt Road) were the imagined fair homes of Fine Arts, Decorative Arts, Water Palace, Electric Display, and Music Hall. These renderings were designed to build public support for a downtown location; *Lakefront* unearths why, instead, the world’s fair was built approximately seven miles to the south, in Jackson Park.

that the park district would remain “the owner” of the stadium and hence would retain significant “control” over the use of the facility. The court assumed without discussion that the public trust applies to the stadium, built on landfill in 1924 by a predecessor of today’s park district.

The two most recent decisions, both in federal court, came in citizen suits challenging nonprofit foundations that wanted to build museums on the lakefront honoring the accomplishments of notable individuals.

The first involved a proposal to build the Lucas Museum of the Narrative Arts, to be paid for and operated by a foundation established by the filmmaker George Lucas and to display (among other things) props from his *Star Wars* films. Although the city establishment was enthusiastic about the proposal, envisioning additional jobs for the economically distressed South Side and more tourist traffic, the Friends of the Parks did not like the design or the self-referential aspect of the project. The group managed to get the matter into federal court on a dubious theory of federal jurisdiction and to tie it up there. In 2016, George Lucas got disgusted with all the delay and announced that he would build his museum in Los Angeles (opening is projected for 2023).

The second involves the Obama Presidential Center (OPC), a museum honoring the nation’s first African American president and sometime Chicago resident. The facility will include a digitalized version of what was once called a presidential library. Chicago won the competition to be the site of the OPC, to general acclaim. The only disagreement was whether the OPC should be located in Jackson Park, on the lakefront, or farther west, in and along Washington Park.

A group calling itself Protect Our Parks sued in federal court to block the use of the Jackson Park site as violating the public trust doctrine. This was rejected by Judge John Robert Blakey on the ground that the site in question had never been submerged land, and that the relevant precedent (*Paepcke*) only required express legislative authorization, which had been secured. The decision was vacated on appeal, in an August 2020 opinion by then-Judge Amy Coney Barrett, on the ground that the plaintiffs had failed to plead injury in fact, as required to establish federal court jurisdiction. The group is now back in the district court, with a new lawsuit, arguing that the federal review of

environmental impacts was inadequate. It also raises the public trust question anew, based on supplemental jurisdiction. [Subsequently this past summer, the district court denied an injunction to halt commencement of the Obama Presidential Center project in Jackson Park, and the Seventh Circuit and U.S. Supreme Court similarly denied relief.]

Collectively, the post-*Paepcke* decisions suggest that the public trust doctrine has become a kind of roulette wheel in determining whether particular development can move forward on the Chicago lakefront. It is unpredictable whether advocacy groups will sue to enforce the doctrine. It is unpredictable how the courts will respond. The Lucas Museum case and the Loyola case show that one need not secure a final judgment in order to affect the outcome. Rulings by trial courts refusing to dismiss a case can impose enough delay to cause the cancellation of projects. These concerns are magnified if the matter is litigated before a single federal judge insulated from the ordinary political process.

This is not what Professor Joseph Sax envisioned when he advocated an expanded use of the public trust doctrine to allow broader public participation in decisions to transfer public resources to private entities. And where federal permits are needed, a participatory process may be required by the National Environmental Policy Act. States are free to mandate a similar process when state and local parks, wilderness areas, or other state-owned natural resources are proposed to be privatized in some fashion. Explicit approval by the state legislature, consistently required by the Illinois public trust doctrine for 125 years, is another good idea. This assures that a broadly representative body, the state legislature, takes a close look at a project before it is finally approved. But asking a court, often a single federal judge, to decide whether the nebulous public trust has been violated, serves only to defeat the popular will on what amounts to a random basis.

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This is our fifth and final guest post. Great thanks to Eugene Volokh, Jonathan Adler, and the other members of *The Volokh Conspiracy* for this privilege. See you at *The Faculty Lounge* and at *PrawfsBlawg* later this summer—and perhaps at the *Lakefront*. ■

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