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## The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View

Crystal S. Chase

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## The *Illinois Central* Public Trust Doctrine and Federal Common Law: An Unconventional View

Crystal S. Chase\*

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## I. Introduction

In 1970, Joseph Sax sounded a call for reinvigorating the public trust doctrine as a means for developing comprehensive legal solutions to natural resource management challenges.<sup>1</sup> Since then, states have applied the public trust doctrine in many forms, including as a rule of statutory interpretation, a potential background principle of state property law in cases alleging takings, and a procedural overlay for administrative decision-making processes.<sup>2</sup> However, the heart of the public trust doctrine lies in its original formulation as a restraint on state alienation of public trust lands under navigable waters, as first articulated by Justice Stephen J. Field in the United States Supreme Court’s decision in *Illinois Central Railroad v. Illinois*.<sup>3</sup> The *Illinois Central* opinion established the original public trust limitation on state power. A state may not abdicate control over public trust lands, subject to two narrow exceptions: for purposes promoting the trust, and conveyances which do not work a substantial impairment of the public interest.<sup>4</sup>

Although much has been written about *Illinois Central*,<sup>5</sup> it remains

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1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

2. See, e.g., Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 578 (1989) (arguing the public trust operates as a democratizing principle in at least four distinct ways: (1) as a public easement guaranteeing access, (2) as a restrictive servitude barring takings claims, (3) as a rule of statutory construction creating presumptions against trust termination, and (4) as a requirement of reasoned decision-making).

3. *Illinois Cent. R.R. Co. v. Illinois (Illinois Central)*, 146 U.S. 387, 453–55 (1892).

4. *Id.* at 453.

5. A December 2, 2008 Westlaw search reveals the case has been cited in 551 law review articles. See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004) (describing the factual history behind the case); Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849, 851 (2001) (arguing the “underpinnings” of the *Illinois Central* public trust doctrine are found in the Contract Clause of the United States Constitution and the reserved powers doctrine); Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 422–28 (1987) (explaining that although the Constitutional basis for the *Illinois Central* public trust doctrine is not clearly evident from the opinion, the case is best explained by the Equal Protection Clause of the United States Constitution because “[w]hen property is conveyed out of public trust for inadequate consideration, some

unclear whether the origins of the opinion's public trust doctrine lie in federal or state law. The answer to this question is essential because if the *Illinois Central* public trust doctrine arises from federal law, then the rule against alienation applies to all states, not just to Illinois.<sup>6</sup> In his seminal article, Charles Wilkinson explored the origins, or the "headwaters" of the public trust.<sup>7</sup> Tracing the history of the public trust doctrine back to Roman and English common law, Wilkinson observed how the real foundations for the trust lay in the "high public value in water" recognized by countless societies.<sup>8</sup> He explained that the United States was no exception, as the nation's rivers functioned as natural highways for transportation and commerce since the foundation of the republic.<sup>9</sup> Wilkinson persuasively argued that the Supreme Court's *Illinois Central* decision must "have been premised on federal law" because the most logical explanation is to view the trust as an implied condition of statehood designed to keep navigable watercourses free from obstructions to navigation.<sup>10</sup> He concluded that the public trust doctrine operates as a creature of both federal and state law because it provides broad discretion to the states to control trust lands, while retaining a federally imposed limit on the ability of states to abdicate their responsibility as trustees.<sup>11</sup>

Wilkinson briefly discussed how many state courts have treated the underlying principles of *Illinois Central* as law of general applicability, rather than a creature of Illinois state law.<sup>12</sup> Other commentators characterized the treatment of *Illinois Central* as highly persuasive, but stopped short of describing the states' views of *Illinois Central* as mandatory or binding.<sup>13</sup> Still

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citizens receive disproportionate benefits, while others receive disproportionate losses" in violation of equal protection); *see also* sources cited *infra* notes 8, 9, & 13.

6. Cf. Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 721 (1996) ("Resolving the status of *Illinois Central* proves significant because, if the case is understood to be only persuasive, rather than mandatory, states may contract, eliminate, or halt the expansion of the [public trust] doctrine.").

7. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

8. *Id.* at 429-31, 431.

9. *Id.* at 431-38.

10. *Id.* at 453, 458.

11. *Id.* at 461-62.

12. *See id.* at 463 & n.163 (citing state cases).

13. HARRISON DUNNING, *WATERS AND WATER RIGHTS*, § 30.02(b)(1) & nn.140 & 154 (Robert E. Beck ed., 1991); *see also* Michael C. Blumm, Harrison C. Dunning, & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill, 794*, 24 ECOLOGY L.Q. 461, 484 & n.130 (1997) (describing how some state courts have treated *Illinois Central* as persuasive, but "have accorded the decision enormous deference as they have shaped their own state law on sovereign rights and the public trust doctrine"); James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrine*, 32 LAND & WATER L. REV. 1, 71-73 & nn.264-70 (1997)

other commentators have recognized the deference accorded to *Illinois Central* by state courts, but argue such deference is misplaced.<sup>14</sup> This paper engages in a more in-depth examination of the varying approaches taken by state courts in an attempt to answer the following question: If *Illinois Central* is not a creation of federal law, why do most states characterize it as the seminal authority in public trust jurisprudence?

Ultimately, this paper challenges the assumption, shared by the United States Supreme Court,<sup>15</sup> that the source of the public trust doctrine is entirely rooted in state law. Section II explores the philosophical underpinnings of the *Illinois Central* public trust doctrine in early United States Supreme Court jurisprudence. Section III briefly explains how the case arrived at the Supreme Court for review and examines the language of the *Illinois Central* opinion. In light of the Court's prior jurisprudence and the language of the *Illinois Central* opinion, Section IV reconsiders the competing explanations for the doctrine's origins, including the equal footing doctrine, congressional preemption, the Commerce Clause, and state law, before concluding that federal common law provides the strongest explanation. Section V considers several Supreme Court opinions suggesting the public trust doctrine is a state law doctrine and explains that these statements were either dicta or were referring to aspects of the public trust doctrine other than the core federal restraint on alienation. Section VI tests the hypothesis that the *Illinois Central* restraint on alienation is a creature of federal, not state, law by examining state court opinions to have considered the case. The paper concludes by arguing that the *Illinois Central* public trust doctrine is grounded in federal common law.<sup>16</sup>

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(discussing approaches taken by state courts in examining, expanding, and conflating the *Illinois Central* doctrine).

14. See Blumm, Dunning, & Reed, *supra* note 13, at 484 (noting some "state courts have treated *Illinois Central* as persuasive rather than binding authority"); Pearson, *supra* note 6, at 719 (citing the differing treatment given to *Illinois Central* by state courts); see also *id.* at 740-41 (concluding the decision was inherently flawed, implicitly overruled, or limited by later decisions, and that consequently "states that have viewed *Illinois Central* as mandating or controlling the content of the public trust doctrine should revisit the question").

15. See, e.g., *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) ("the conclusion reached was necessarily a statement of Illinois law"); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.")

16. This paper does not address the issue of whether there is a federal public trust, in the sense of a public trusteeship guiding federal management of federal public lands (such as the national forests, national parks, and so forth). For a consideration of that issue by courts, see, e.g., *Light v. United States*, 220 U.S. 523, 537 (1911) ("All the public lands of the nation are held in trust for the people of the whole country. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.") (internal quotations omitted);

A persuasive explanation of the *Illinois Central* rule must meet three criteria. It must: 1) be consistent with the language and reasoning of the *Illinois Central* court; 2) explain, or at least not contradict, the Supreme Court's treatment of the case in later decisions; and 3) explain why state courts have injected continuing vitality to the decision. The federal common law theory meets each of these three criteria. Ultimately, understanding the federal core of the public trust doctrine provides much needed balance to public trust jurisprudence, as it does not impose unreasonable restrictions on state interpretations of the doctrine, yet precludes states from renouncing the public trust.

## II. Background: Nineteenth Century Jurisprudential Underpinnings of *Illinois Central*

Although *Illinois Central* is sometimes interpreted as the sole case establishing the public trust doctrine in American jurisprudence, earlier Supreme Court decisions had laid much of the groundwork for the *Illinois Central* public trust doctrine. Justice Field actually based his analysis in *Illinois Central* on two points of "settled law."<sup>17</sup> First, sovereignty over submerged lands below navigable waters was held by the state in trust for the public.<sup>18</sup> Second, states had the power to convey or lease those submerged lands, provided the conveyance did not impair the public interest, and subject to the paramount right of Congress to control navigation.<sup>19</sup> As authority for these two premises, Justice Field cited four

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*Sierra Club v. Dep't of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975) ("[A] general trust duty [is] imposed upon the National Park Service, Department of the Interior, by the National Park System Act, 16 U.S.C. § 1 et seq., to conserve scenery and natural and historic objects and wildlife (in the National Parks, Monuments and reservations) and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."). *But see Sierra Club v. Dep't of Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976) (holding that the Secretary of Interior satisfied the trust obligation by taking "good faith steps" to fulfill his duties, and that ultimate authority to authorize funds necessary to carry out the trust responsibilities lies with Congress). For a discussion of the federal government's trust responsibilities on federal public lands, see Charles F. Wilkinson, *The Public Trust Doctrine in Public Lands Law*, 14 U.C. DAVIS L. REV. 269, 273-74, 278 (1980) (arguing that federal lands are impressed with a public trust responsibility, but recognizing that the source of this responsibility is distinct from the source of the *Illinois Central* public trust impressed upon the states in submerged lands).

17. *Illinois Central*, 146 U.S. at 435 (1892)

18. *Id.* at 457-58 (explaining that sovereignty over submerged lands are "held by the people of the state in their character as sovereign in trust for public uses for which they are adapted").

19. *Id.* at 435 ("It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done

earlier Supreme Court cases.<sup>20</sup> This section examines those four cases to ascertain whether they provide support for the two points of “settled law” that underlie the *Illinois Central* opinion. Examining the jurisprudential origins of the American public trust doctrine provides a useful backdrop for understanding why the *Illinois Central* rule derives from federal law.<sup>21</sup>

**A. *Martin v. Waddell's Lessee*: The Supreme Court Ratifies the Public Trust Doctrine**

In 1842, in *Martin v. Waddell*, the Supreme Court considered the issue of competing claims by riparian landowners to harvest oysters from submerged mudflats below New Jersey’s Raritan River and Bay. After the riparian landowner, Merrit Martin, interfered with William Waddell’s lessee’s harvest of oysters from submerged lands, Waddell’s lessee filed an ejectment action against Martin in the Circuit Court for the District of New Jersey in 1835.<sup>22</sup> Both parties claimed exclusive rights to harvest oysters based on riparian land ownership.<sup>23</sup> After the jury traced the chain of possessory title to the lands,<sup>24</sup> it ruled in favor of Waddell’s lessee, and Martin appealed to the

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without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.”).

20. *Id.* at 435, 457-58. Justice Field cited to *Martin v. Waddell*, 41 U.S. 367 (1842), *Pollard v. Hagan*, 44 U.S. 212 (1845), *Weber v. Board of Harbor Commissioners*, 85 U.S. 57 (1873), and *McCready v. Virginia*, 94 U.S. 391 (1876). Each of these cases is discussed below in full.

21. See *Kearney & Merrill*, *supra* note 5, at 826 (“Without some understanding of the shifting sands of nineteenth-century law regarding ownership of submerged lands, one cannot comprehend . . . the legal theories advanced in the *Illinois Central* litigation.”).

22. *Martin v. Waddell*, 41 U.S. at 369.

23. *Id.* at 407-08. Martin claimed possessory right under a lease issued by an 1824 New Jersey state law which declared the submerged lands under the Raritan Bay and River should be set aside for planting and harvesting oysters. *Id.* at 379, 407-08. Waddell’s lessee claimed possessory right by terms of a pre-statehood grant from one of the original twenty-four proprietors charged with settlement of New Jersey. *Id.* at 407-08. An 1834 state survey recognized Waddell’s lessee’s claim. *Id.*

24. The jury found that in 1664, King Charles II granted to his brother James, the Duke of York, letters-patent to the lands that later became New Jersey. *Id.* at 369-74 (quoting text of letters-patent in full). The Duke of York granted those lands to persons who then conveyed their interest in the lands to twenty-four proprietors. *Id.* at 375-77. The Duke of York executed a 1682 grant conveying his interests in the lands to these twenty-four proprietors for settlement purposes, and King Charles II subsequently recognized the rights of these proprietors to possess, settle, and dispose of the “province of East Jersey” in 1683. *Id.* at 377-78. In 1702, the proprietors surrendered all their governmental powers to Queen Anne, retaining their private property rights in their lands. *Id.* at 378, 407.

United States Supreme Court.<sup>25</sup>

The Supreme Court reversed.<sup>26</sup> Chief Justice Taney for the Court concluded that Waddell's lessee could not show possessory title to the submerged lands because his pre-statehood grant conveyed only private, not public rights,<sup>27</sup> and the public right of fishery in navigable waters vested in the people of the state of New Jersey after the American Revolution.<sup>28</sup> Neither a 1664 grant from King Charles II to the Duke of York, nor a 1682 grant from the Duke of York to New Jersey's original twenty-four proprietors<sup>29</sup> vested the recipient with the power to dispose of public rights (also called *regalia* or prerogative rights) in the submerged lands to private ownership.<sup>30</sup> Justice Taney explained that such a power would have impermissibly interfered with the public trust in which the Crown held the lands by excluding settlers from accessing, fishing, harvesting oysters from, or bathing in New Jersey waters.<sup>31</sup> According to *Martin*, the public rights in submerged lands beneath navigable waters like Raritan River and Bay (including the public right of fishery) passed from the British Crown directly to the people of the colonies as a consequence of the American Revolution.<sup>32</sup> Acting as trustee for the people of the New Jersey, the state

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25. *Id.* at 369. The case seems to have been appealed directly from the circuit court, acting as a trial court. *Id.*

26. *Id.* at 418.

27. *Id.* at 410, 415.

28. *Id.* at 410.

29. See discussion *supra* note 30.

30. The Court held the 1664 grant from King Charles II to the Duke of York included a grant of public rights because the grant was from one sovereign to another sovereign and because the purpose of the 1664 grant was for the Duke to establish and govern the colony of New Jersey under the authority of the King. *Martin*, 41 U.S. at 412. The language of the 1664 grant conveyed public rights in the submerged lands, but it did not explicitly vest the Duke of York with authority to *dispose* of those public rights to private ownership. *Id.* at 414. Nor did the 1664 grant implicitly authorize disposal of public rights to private hands, because such an interpretation could have destroyed the public right of fishery. *Id.* at 411-13. Similarly, the 1682 grant to the twenty-four proprietors did not vest the proprietors with the authority to convey submerged lands into private ownership; such authority would have directly conflicted with the 1682 grant's primary purpose of settling New Jersey because private landowners could then have impeded settlement by limiting public access to New Jersey waters. *Id.* at 414.

31. *Id.* at 414.

32. *Id.* at 416. Any prerogative rights held by the Duke returned undiminished to the Crown in 1702 when the twenty-four proprietors abandoned their governance claims to Queen Anne. *Id.* Justice Taney explained that as a result of the American Revolution, "the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 410.

passed laws that preserved the oyster fishery for public benefit,<sup>33</sup> including the law authorizing Martin's lease of the oyster beds.<sup>34</sup> Thus, the Court upheld Martin's exclusive right to harvest oysters under his lease.<sup>35</sup>

*Martin* established two important principles of public trust law. First, Justice Taney ratified the doctrine, articulated twenty years earlier by the New Jersey Supreme Court in *Arnold v. Mundy*,<sup>36</sup> that the English Crown held the beds of navigable rivers in trust for public ownership at common law.<sup>37</sup> Second, *Martin* clarified that sovereignty of the public rights in trust lands, including the public right of fishery, transferred to the people of the several states following the American Revolution.<sup>38</sup> *Martin*, however, did not resolve the nature of the state's title to the lands,<sup>39</sup> nor the ability of the state to permanently convey trust lands.<sup>40</sup> The *Martin* Court never reached the issue of whether a state could convey title to submerged lands<sup>41</sup> because the facts involved a state lease of exclusive fishing rights on a small parcel of land, not a grant of fee simple title.<sup>42</sup> Consequently, although *Martin* resolved several important issues of public trust law, it left other questions unanswered.

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33. *Id.* at 416, 417.

34. *See id.* at 408, 418.

35. *Id.* at 418.

36. *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821).

37. *Id.* at 53.

38. *Martin*, 41 U.S. at 416.

39. *See, e.g.*, Pearson, *supra* note 6, at 731 ("*Martin* is silent on the issue of whether a public trust obligation restricting a state's power of alienation encumbers the state's title to submerged stream beds of navigable waterways."); Rasband, *supra* note 13, at 29 (explaining that Justice "Taney cannot be credited with, or criticized for, the invention of the public trust doctrine" because he only applied the reasoning of New Jersey Chief Justice Kirkpatrick from *Arnold* and did not develop the doctrine the way that Justice Field did in *Illinois Central*).

40. *But see Arnold v. Mundy*, 6 N.J.L. at 78 ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.").

41. *Martin*, 41 U.S. at 410 (explaining that the facts in the case did not raise the question of the power of the King of England to grant private rights in submerged lands); *see also id.* at 388 (explaining the argument for Waddell's lessee that the Supreme Court need not answer "whether the King of England can grant the soil of the sea and its arms, so as to destroy or prejudice public rights.").

42. *Id.* at 407.

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## B. *Pollard v. Hagan*: The Supreme Court Articulates the Equal Footing Doctrine

The next significant Supreme Court public trust case was *Pollard v. Hagan*, which involved competing claims to submerged lands beneath the Mobile River. John Pollard, who claimed title to the submerged lands from an 1836 federal patent issued after Alabama became a state,<sup>43</sup> brought an ejectment action against John Hagan in Alabama state trial court.<sup>44</sup> Hagan claimed title to the lands from an 1802 Spanish grant that had been confirmed by the Alabama state legislature in 1824.<sup>45</sup> The trial court found for Hagan, and Pollard appealed to the state supreme court, arguing the trial court had erroneously instructed the jury to find for Hagan if the disputed lands were below the ordinary high water mark at the time of Alabama's admission to the Union.<sup>46</sup> The state supreme court affirmed the trial court's jury instruction, and Pollard appealed.<sup>47</sup>

In an 1845 opinion authored by Justice McKinley, a majority of the United States Supreme Court affirmed.<sup>48</sup> The Court concluded that Pollard's 1836 federal patent was invalid because the federal government issued it after Alabama's admission to the Union, at a time when the United States retained no authority to dispose of the territory of the states, except for disposal of federal public lands.<sup>49</sup> To reach this conclusion, the Court articulated what has become known as the equal footing doctrine,<sup>50</sup> which contemplated political sovereignty for each newly admitted state equal in

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43. *Pollard v. Hagan*, 44 U.S. 212, 219 (1845); see Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 102 (2000) ("Most Jacksonian leaders . . . agreed that when territories became states, the federal government retained title (though not jurisdiction) over unappropriated and waste lands. Consistent with this belief, the national government continued selling and giving away . . . lands after a territory became a state.").

44. *Pollard*, 44 U.S. at 213.

45. *Id.* at 214-15 (argument for Hagan); see also Graber, *supra* note 43, at 102 ("Hagan claimed title by virtue of a grant from Alabama to the shore lands.").

46. *Id.* at 213, 214.

47. *Id.* at 213.

48. *Id.* at 230. Justice Catron dissented, arguing the lands at issue were waste and unappropriated lands that had been disclaimed by Alabama, and were subject to disposal by the United States. *Id.* at 234-35 (Catron, J., dissenting).

49. *Id.* at 223 ("When Alabama was admitted into the union . . . she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States . . . . Nothing remained in the United States according to the terms of the agreement, but the public lands.").

50. See Rasband, *supra* note 13, at 30.

kind to the political sovereignty held by the original thirteen colonies.<sup>51</sup> The Court explained that the United States never held sovereignty over the lands of the new states, but rather, held the lands in trust until the creation of those new states.<sup>52</sup> Thus, when Alabama entered the Union under the 1819 Admissions Act, Alabama, as Georgia's successor, inherited sovereign rights in submerged lands beneath navigable waters.<sup>53</sup> Congress lacked the power to issue patents to submerged lands after Alabama's admission because such a power would conflict with Alabama's sovereignty.<sup>54</sup> Thus, the Court held Pollard's claim of title from the federal grant invalid.<sup>55</sup>

*Pollard v. Hagan* filled the gap left open by *Martin* regarding the status of submerged lands beneath navigable waters. *Pollard* explained the legal process for the transfer of sovereignty from the crown to states other than the original thirteen colonies. By articulating the equal footing doctrine as the mechanism by which new states gained sovereignty over submerged lands,<sup>56</sup> the *Pollard* Court confirmed that state trusteeship over submerged lands for the public was an essential component of the political sovereignty of states.<sup>57</sup>

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51. *Pollard*, 44 U.S. at 222; see Rasband, *supra* note 13, at 32-34. The language of "equal footing" first appeared in the Ordinance of 1784, explaining that any territories to become states would enter as political equals to the original thirteen states. *Id.* at 32-33. The Continental Congress amended the Ordinance in 1787 to adopt "a more restrictive approach to territorial government." *Id.* Section 13 of the introduction of the 1787 Northwest Ordinance stated that one of its purposes was to provide "for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States." Northwest Ordinance of 1787, Introduction, § 13. Article 5 of the 1787 Northwest Ordinance declared that when a territory reached 60,000 free inhabitants, "such State shall be admitted . . . into the Congress of the United States, on an equal footing with the original States, in all respects whatever[.]" Northwest Ordinance of 1787, Art. 5. (emphasis added). After ratification of the United States Constitution, the first Congress of the United States adopted the language of the 1787 Ordinance in 1789. See Rasband, *supra* note 13, at 33-34 & 33 n.130.

52. *Pollard*, 44 U.S. at 221. Thus, the United States temporarily held the lands ceded by Georgia in trust for the future states to be formed from those lands. *Id.* at 221, 222. This trust terminated on Alabama's admission to the union. *Id.* at 223. The only limit on Alabama's sovereignty was a temporary loss of control over federal public lands until the United State disposed of those lands to pay the Revolutionary War debt. *Id.* at 224.

53. *Id.* at 229.

54. *Id.* at 230.

55. *Id.*

56. *Id.* at 223, 230.

57. *Id.* at 229.

### C. *Weber v. Board of Harbor Commissioners: The Public Trust Limits the Right to Wharf Out*

In 1851, the California state legislature passed a statute leasing submerged lands beneath San Francisco harbor to the city of San Francisco for maintenance of a permanent waterfront.<sup>58</sup> Also in 1851, the state legislature enacted legislation authorizing the city to construct wharves for public use at the end of all streets that met the San Francisco Bay.<sup>59</sup> After the passage of these statutes, Weber acquired title to lands along the waterfront and, in 1854, constructed a private wharf.<sup>60</sup> In 1863, after the state legislature passed a statute granting the Board of Harbor Commissioners (Board) authority to take possession of private wharves and make harbor improvements,<sup>61</sup> Weber sued the Board in the Circuit Court for the District of California to restrain the Board from constructing wharves, landings, and other harbor improvements that would destroy his wharf.<sup>62</sup> The trial court dismissed Weber's suit, and Weber appealed to the United States Supreme Court.<sup>63</sup>

The Supreme Court affirmed the lower court in 1873.<sup>64</sup> The Court held that Weber took title to the lands subordinate to the Board's authority over the San Francisco harbor, as delegated by the state.<sup>65</sup> Consequently, the

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58. *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 66 (1873). The 1851 Act required the city to keep the space beyond 500 yards of shore free of all obstructions, reserving the right of the state to regulate wharves and other improvements. *Id.*

59. *Id.* at 66-67. This act required "that the space between the wharves, when extended, should remain free from obstructions and be used as public slips for the accommodation and benefit of the general commerce of the city and State." *Id.* at 67. Thus, the two 1851 acts furthered, not undermined, the public trust by facilitating commerce and public use of the harbor.

60. *Id.* at 67.

61. *See id.* at 69, 71 ("[T]he act creating the harbor commissioners and authorizing them to take possession and improve the water front, was a public act relating to a matter of public concern."). Because the 1863 Act granted possession of the harbor to the Board for purposes of advancing public trust purposes, the 1863 Act in *Weber* is distinguishable from the 1852 grant in *Illinois Central* from the city to the railroad. Additionally, in *Weber*, the state did not intend to alienate its control over the ability to protect public uses of the lands by the 1863 delegation of authority from the State to the city and the Board of Harbor Commissioners, in contrast to the *Illinois Central* facts where the Supreme Court viewed the legislature's grant to the railroad as conveying essential attributes of sovereign ownership to a private company. *See id.*; *Illinois Central*, 146 U.S. 387, 452 (1892).

62. *Weber*, 85 U.S. at 67, 69.

63. *Id.* at 63. Weber appeared to have appealed the case directly from the circuit court. *Id.* at 59.

64. *Id.* at 71.

65. *Id.* at 67. Further, a statute of limitations cited by Weber did not bar the state's claim of ownership over the submerged lands because the statute only

Board had the authority to protect the public trust by limiting Weber's right to wharf out.<sup>66</sup> On behalf of the Court, Justice Field reiterated the proposition from *Pollard* that when California entered the Union, dominion over submerged lands passed to the state as trustee for the public under the equal footing doctrine.<sup>67</sup> The *Weber* opinion reaffirmed that the state held the submerged lands beneath the harbor in trust for the public,<sup>68</sup> and therefore could limit the ability of a riparian proprietor to wharf out.<sup>69</sup>

#### **D. *McCready v. Virginia*: The Public Trust As a Power to Regulate Common Property for the Public Good**

In the mid-1870s, McCready, a Maryland citizen, planted oysters in the beds of Virginia's Ware River, in violation of a Virginia statute prohibiting non-Virginia citizens from planting oysters in Virginia riverbeds.<sup>70</sup> The state of Virginia convicted him and fined him \$500.<sup>71</sup> The Virginia Supreme Court of Appeals affirmed the conviction, and McCready appealed to the United States Supreme Court, alleging the conviction violated the Privileges and Immunities Clause of the Constitution.<sup>72</sup>

In 1876, the Supreme Court upheld the Virginia law and affirmed McCready's conviction.<sup>73</sup> Chief Justice Waite framed the issue as whether Virginia could prohibit the citizens of other states from planting oysters in its submerged lands in order to protect that privilege for its own citizens.<sup>74</sup> The Court recognized that the states owned the beds of tidewaters within their jurisdiction as representative of the public's sovereign authority<sup>75</sup> because submerged lands are the "common property" of the public.<sup>76</sup> But the Court concluded that Virginia's law did not violate the Constitution's

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applied to lands held by the state "as private proprietor" and not to lands held by the state "as sovereign in trust for the public." *Id.* at 68. Alternatively, the 1863 Act authorizing the Harbor Commissioners to take control of improvements on the harbor was an effective assertion of ownership barring any implication that the state intended to abandon its rights in the submerged lands. *Id.* at 69.

66. *Id.* at 67.

67. *Id.* at 65-66, 69.

68. *Id.* at 69 (explaining the city held the water front "as sovereign in trust for the public").

69. *Id.* at 67.

70. *McCready v. Virginia*, 94 U.S. 391, 391 (1876).

71. *Id.* The opinion does not make clear whether the Ware River was navigable, however it was subject to the ebb and flow of the tide. *Id.* at 394.

72. *Id.* at 391, 393.

73. *Id.* at 397.

74. *Id.* at 395.

75. *Id.* at 394-95.

76. *Id.* at 395.

Privileges and Immunities Clause<sup>77</sup> because the right to use the submerged lands was a property right, “not a mere privilege or immunity.”<sup>78</sup> Consequently, McCready’s claim failed because the Privileges and Immunities Clause did not require that citizens of one state have access to “the common property of the citizens of another State.”<sup>79</sup> McCready thus affirmed that, due to the public trust, each state may manage submerged lands for the public’s benefit because ownership of the lands lies in the public, not the state.<sup>80</sup>

The Supreme Court’s rulings in *Martin*, *Pollard*, *Weber*, and *McCready* support the two points that the *Illinois Central* Court characterized as settled law. *Pollard* and *Weber* detailed how the concept of equal footing gives a state sovereignty over submerged lands and may abdicate control of submerged lands in ways that do not offend the public interest. *Martin*, *Pollard*, and *McCready* made clear that states exercise their sovereignty over the submerged lands in their capacity as trustee for the public. As these cases arose in four different states (New Jersey, Alabama, California, and Virginia), the Supreme Court’s use of these two generally applicable principles of public trust law in each case suggests these principles are rooted in federal, not state, law. These four cases outlined the legal context for the *Illinois Central* decision, which raised the question of whether a state may terminate the public trust in submerged lands by granting control of those lands to a private party.<sup>81</sup>

### III. The Facts and Law of *Illinois Central*

This section considers the factual background of the *Illinois Central* case as well as the language and rationale of the *Illinois Central* opinion. Although

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77. U.S. CONST. art. IV, § 2. The Court also held Virginia’s law did not violate the commerce clause (U.S. CONST. art. I, § 8), because the “cultivation and production” of oysters did not constitute commerce. *McCready*, 94 U.S. at 396.

78. *Id.* at 395.

79. *Id.* at 395-96. Further, the Court emphasized the property right in harvesting oysters stemmed from the sovereignty of the people of the state. *Id.* at 396 (“[T]he right thus granted is not a privilege or immunity of general but of special citizenship. It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia . . . They owned it, not by virtue of citizenship merely, but of citizenship and domicile united . . .”) (quotations omitted).

80. *See id.*

81. *See also Florida v. Black River Phosphate Co.*, 13 So. 640, 647 (Fla. 1893) (explaining that to the extent the language in *McCready* and *Weber* differs from the articulation of the public trust in *Illinois Central*, the differences can be explained because no facts in *McCready* nor *Weber* “called for or justified a precise definition of the nature of the tenure of trusts upon which lands below low-water mark are held, or of the powers of the legislature, as the representative of the people, to dispose of them . . . . The issues in the Illinois [Central] case were, however, altogether different, and required the full adjudication and exposition there made[.]”).

Justice Field's majority opinion did not explicitly resolve the origins of the public trust doctrine, his reasoning strongly suggested the public trust doctrine grounded in federal, not state, law.

### A. The Factual History Behind the Case: How *Illinois Central* Arrived Before the Supreme Court

By the mid-nineteenth century, the city of Chicago had long been concerned with building a better Chicago harbor.<sup>82</sup> Swirling Lake Michigan currents created sandbars, impeding navigation in the harbor, and caused erosion that placed the homes of wealthy lakefront residents at risk.<sup>83</sup> In the 1840s, the city engaged in three failed attempts to build breakwaters to limit erosion and improve navigation.<sup>84</sup> Then, in 1851, the Illinois Central Railroad made the city an offer it couldn't refuse: In exchange for the city allowing the railroad to locate its rail line right-of-way (granted by the state) along the lakefront, the railroad would finance and construct a breakwater.<sup>85</sup>

Accepting the railroad's offer, the city of Chicago enacted several ordinances that allowed the railroad to site its rail line along the Chicago lakefront.<sup>86</sup> Nearly two decades later,<sup>87</sup> after much political maneuvering,<sup>88</sup> the state legislature passed the Lake Front Act of 1869,<sup>89</sup> which granted the railroad "appropriation, occupancy, use and control" of a substantial portion of the harbor.<sup>90</sup> But, by 1873 the public's view of the railroad soured,<sup>91</sup> and

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82. See Kearney & Merrill, *supra* note 5, at 810-23 (detailing the City's efforts and challenges). Kearney & Merrill's article contains an in-depth analysis of the factual history of *Illinois Central*, which proved extremely instructive and helpful to the development of the much briefer factual summary contained within this paper.

83. *Id.* at 811-12, 817-18.

84. *Id.* at 817 ("The solution to the erosion problem south of the river was widely perceived to be the construction of a breakwater offshore in the lake. Three attempts to build such a structure were undertaken in the 1840s. The first two proved inadequate to withstand the force of the lake. The third foundered in a dispute over funding.") (citation omitted).

85. *Id.* at 819.

86. *Id.* at 820, 822-23.

87. *Id.* at 823. Development of the rail line paused in the late 1850s because of the Civil War and an economic downturn. *Id.*

88. See *id.* at 839-77 for a detailed discussion of the political schemes and positioning behind the ultimate passage of the law, including a discussion of the initial 1867 proposal that Kearney & Merrill describe as a "classic rent-seeking scheme," excerpts from contemporaneous Illinois newspaper articles and editorials, the role of state lobbyist-turned-legislator Alonzo W. Mack, and the final vote by the legislature to override the Illinois governor's veto of the 1869 Act.

89. *Illinois Central*, 146 U.S. at 448.

90. *Id.* (quoting section 3 of the Act). The Act further provided that "nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation." *Id.* at 449. Professors Kearney & Merrill describe how

the legislature repealed the rights it previously granted to the railroad.<sup>92</sup> The state attorney general proceeded to sue the railroad in state court, seeking a determination that it had the sole and exclusive title to the Chicago harbor lands both reclaimed from and submerged under Lake Michigan.<sup>93</sup> Alleging presence of federal questions, the railroad removed the case to federal circuit court.<sup>94</sup>

In an opinion written by Supreme Court Justice Harlan sitting as a circuit court judge, the Circuit Court upheld the validity of the 1873 repealing act, and thus ruled the state held title to the submerged lands.<sup>95</sup> Framing the case as a contract dispute, Justice Harlan held the Constitution's contract clause rule prohibiting legislative repeal of vested rights guaranteed by a contract did not control because the rule applied only to good-faith purchasers for value, a category which did not include the railroad.<sup>96</sup> Consequently, Justice Harlan viewed the 1873 Act as permissibly revoking a license granted to the railroad by the 1869 Act passed to improve

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"[t]he practical effect of the Lake Front Act, in terms of the market for harbor facilities in Chicago, was to authorize the creation of a large, privately owned harbor facility in the lake that would act as a supplement to the harbor facilities that already existed[.]" See *Kearney & Merrill*, *supra* note 5, at 881.

91. *Id.* at 905–06 (discussing how the early 1870s witnessed the rise of the Granger Movement, "a form of rural populism that made railroads a particular focus for political agitation" that centered in Illinois, and how legislative "deliberations were negative and recriminatory in nature" with a focus on "whether to punish the [railroad] and its supporters for their assumed venality in 1869 by repealing the Lake Front").

92. *Illinois Central*, 146 U.S. at 449 ("On the 15th of April, 1873, the legislature of Illinois repealed the act."); *Kearney & Merrill*, *supra* note 5, at 905-12 (explaining the murky history behind the 1873 repealing act).

93. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. 730, 750 (N.D. Ill. 1888).

94. See *Kearney & Merrill*, *supra* note 5, at 916. The railroad raised defenses of constitutionally protected vested-rights, interpretations of the federal Northwest Ordinance, and inconsistencies with the Illinois Statehood Act. *Id.* at 916 n.529. In 1883, Justice Harlan denied the state's motion to remand to the state court because he believed federal issues existed regarding whether the 1869 Act repealing the grant violated the contracts clause or the due process clause of the Fourteenth Amendment. *Illinois v. Illinois Central R. Co.*, 16 F. 881 (N.D. Ill. 1883). Consequently, the removal of the case to federal court sheds no light as to whether the Supreme Court opinion turned on state law or federal law because at the time the presence of federal arguments in an answer satisfied federal question jurisdiction. See *Kearney & Merrill*, *supra* note 5, at 916.

95. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. 730, 775-76 (N.D. Ill. 1888). The Circuit Court also ruled the city held title to the non-submerged lands comprising Lake Front Park. *Id.* at 776.

96. *Id.* at 774-75. (limiting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "to the facts and issues in the particular case in which it was used" and holding "[t]he present case is not controlled by *Fletcher v. Peck*. The railroad company was not a purchaser of the submerged lands. It paid nothing for them.").

the Chicago harbor.<sup>97</sup> The railroad appealed to the Supreme Court.<sup>98</sup>

The task of writing the *Illinois Central* opinion fell to Justice Stephen J. Field, who had previously authored opinions that addressed the adjudications of title and rights to submerged lands.<sup>99</sup> Justice Field wrote the 1870 *Daniel Ball* opinion, which adopted the navigability-in-fact test as determinative of whether waters are subject to federal Commerce Clause jurisdiction,<sup>100</sup> as well as the *Weber* opinion, where the Court used the public trust doctrine to limit a private landowner's right to wharf out in submerged lands.<sup>101</sup> He also wrote the 1891 opinion of *Packer v. Bird*,<sup>102</sup> in which the Supreme Court held a landowner's post-statehood federal patent granting the landowner the east and west bank of a navigable stream did not include title to an island in the middle of the stream because the language of the patent did not clearly evidence an intent to convey the submerged lands.<sup>103</sup> In *Packer*, Justice Field observed that submerged land<sup>104</sup> "properly belongs to the states by their inherent sovereignty."<sup>105</sup> Threads of these prior decisions

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97. *Id.* at 775 ("In short, [the railroad] accepted the grant of the submerged lands with the knowledge that the only purpose of the state was to improve the harbor of Chicago . . . . The repeal of the act making the grant was therefore nothing more than a change of policy upon the part of the state, which . . . in effect, only revoked the license which had been granted to the [railroad] company to improve the harbor of Chicago.").

98. *Illinois Central*, 146 U.S. at 433.

99. For general discussion of Justice Field's career, see generally sources cited in Wilkinson, *supra* note 7, at 451 nn.106-11, including references to works by Justice Field's biographer, Charles W. McCurdy.

100. *The Daniel Ball*, 77 U.S. 557, 563 (subjecting waters to federal commerce clause jurisdiction only when they qualified as navigable-in-fact because they were "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"). The United States had filed a suit for libel after the steamboat vessel *Daniel Ball* used the Grand River within the State of Michigan without inspection or license from the United States, as required by federal statutes. *Id.* at 558-59. Concluding the Grand River was navigable under the enunciated navigable-in-fact test, the United Supreme Court affirmed the decision of the circuit court that reversed the district court's dismissal of the libel suit. *Id.* at 559, 565, 566.

101. See discussion *supra* notes 58-69 and accompanying text.

102. 137 U.S. 661 (1891).

103. *Id.* at 662, 663, 669, 673. A riparian landowner, claiming ownership of the land by virtue of a post-statehood federal patent, sued a trespasser to regain possession after the trespasser began using an eighty-acre island in the middle of the Sacramento River. *Id.* at 662. Finding the federal patent conveyed no ownership rights in the island, the Supreme Court affirmed the judgment of the lower and state supreme court judgments for defendant. *Id.* at 662.

104. State law defines submerged lands as lands beneath either the high water mark or low water mark. *Id.* at 669.

105. Because the Supreme Court held the federal patent to the landowner did not demonstrate intent to convey the lands below the limits of high water, the court

likely shaped Justice Field's consideration of the facts in *Illinois Central*.<sup>106</sup>

### **B. Examining the Source: The Language and Rationale of *Illinois Central***

A majority of the Supreme Court affirmed Justice Harlan's opinion,<sup>107</sup> which found that the state retained title to the submerged lands, but on different grounds.<sup>108</sup> The Court ultimately invalidated the legislature's 1869

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did not reach the question of whether the United States *could* have conveyed the lands. *Id.* at 672 (“[T]he United States has wisely abstained from extending, *if it could extend*, its survey and grants beyond the limits of high water.”) (emphasis added).

Justice Field had previous experience with judicial management of conflicting claims to natural resources in his tenure as Chief Justice on the California Supreme Court, when the state court clarified California water appropriation and mining law. See generally Charles W. McCurdy, Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America, 10 LAW & SOC'Y REV. 235, 240-46 (1975). One possible reason for Justice Field's decision to resolve the dispute in *Illinois Central* by enunciating a broad general principle restraining alienation of trust lands is that his prior experience on the California Supreme Court had demonstrated the difficulty of judicial resource management on a case-by-case basis. See *id.* at 262 (explaining how “[t]he delicate structure of water rights erected by the California court managed to survive until it encountered passive new pressures that made it impossible to reconcile the conflicting interests of resource-users on a case-by-case basis” requiring articulation of more general principles).

106. See, e.g., Kearney & Merrill, *supra* note 5, at 924 (concluding, after an in-depth historical examination of the underlying facts of *Illinois Central*, that “Justice Field did not think that submerged land should remain frozen in its original condition. He was all in favor of isolated grants of lands for wharves and docks. What he opposed was what he imagined to be the conferral of a monopoly over the Chicago harbor on a private corporation.”).

107. *Illinois Central*, 146 U.S. 387, 464 (1892). The United States Supreme Court directed the lower court to investigate whether any of the piers or docks installed by the railroad could remain in the river as incident to the railroad's riparian ownership rights, i.e., because they were not in navigable waters. *Id.* at 463, 464.

108. The participating justices split four to three, with Justice Harlan joining the majority. Chief Justice Fuller recused himself, as he had served as counsel for the City of Chicago on the lower court case. *Id.* at 464; see also Kearney & Merrill, *supra* note 5, at 839 n.176. Similarly, Justice Blatchford did not participate because he owned stock in the railroad. *Id.* at 918; see also *Illinois Central*, 146 U.S. at 464.

Justice Shiras authored the dissent for himself, Justice Gray, and Justice Brown. 146 U.S. at 476. The dissenters agreed that the public had rights in the lands below navigable waters, but viewed the state's public trust challenge as essentially unripe. See *id.* at 474 (Shiras, J., dissenting). The dissenters agreed the state could not part with its sovereign powers over the submerged lands, but read the 1869 act as expressly and impliedly limiting the railroad's title and control over the lands, concluding that there “will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.” *Id.* at 473-74. The dissenters would have upheld the 1869 grant and invalidated the Illinois legislature's 1873 repeal of the grant as an unlawful impairment of contract. *Id.* at 473, 475.

conveyance to the railroad for violating the state's responsibilities as trustee for the public benefit and therefore upheld the 1873 legislative act repealing the 1869 act as valid and effective.<sup>109</sup> The Court's language and analysis clearly relied on federal common law as the foundation of the public trust doctrine.

The parties framed the issue as whether the state or the railroad held title to the submerged lands of Chicago harbor,<sup>110</sup> but answering that question turned on the Court's resolution of the obligations and authorities characterizing a state's title in submerged lands.<sup>111</sup> Determining which party held title depended upon the validity of the 1869 Lake Front Act conveying submerged lands to the railroad.<sup>112</sup> The validity of the 1869 act, in turn, depended on the answer to the following question posed by Justice Field: "[W]hether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters."<sup>113</sup> By framing the issue as one of legislative power to convey the lands, rather than of legislative intent,<sup>114</sup>

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109. *Illinois Central*, 146 U.S. at 459, 460.

110. *Id.* at 433.

111. *Id.* at 452. Grant has argued that the public trust doctrine articulated in *Illinois Central* actually fits within the broader reserved powers doctrine. Grant, *supra* note 5, at 851. This doctrine emphasizes that, because the legislative power is vested in the legislative branch, and only temporarily held within any given legislature, that legislature cannot impair the legislative powers of a later legislature. *Id.* at 872.

112. *Illinois Central*, 146 U.S. at 450 ("As to the grant of submerged lands, the act declares that all the right and title of the state in and to the submerged lands, constituting the bed of Lake Michigan . . . 'are granted in fee to the railroad company, its successors and assigns' . . . This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.") (emphasis added). Professor Pearson argued that this line of analysis should be considered to be dicta because the court improperly interpreted the conveyance, *see* Pearson, *supra* note 6, at 736. However, the Court's characterization of the conveyance as a fee simple grant is not dicta, but instead a part of the Court's holding because that characterization served as an essential basis of the Court's decision.

113. *Illinois Central*, 146 U.S. at 452. The characterization of the grant as a permanent conveyance represents a significant departure from the Circuit Court's treatment of the grant as a revocable license. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. 730, 775 (C.C.N.D. Ill. 1888) (opinion of Justice Harlan).

114. *See Illinois Central*, 146 U.S. at 452 ("The question, therefore, to be considered is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands . . .") (emphasis added); *See* Rasband, *supra* note 13, at 63 ("Had the Supreme Court applied the *prima facie* rule of the common law, its

Justice Field analyzed in what manner the state holds title to lands under navigable waters.<sup>115</sup>

As backdrop for its analysis, the *Illinois Central* Court relied heavily on the equal footing doctrine and its relationship to state sovereignty. The Court held that when Illinois entered the Union, it was “on an equal footing with the original states, in all respects.”<sup>116</sup> Justice Field explained that under the concept of equal footing, “[t]here can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise.”<sup>117</sup> Turning to the character of “dominion”<sup>118</sup> possessed by the states in the submerged lands, Justice Field explained that the states held the same type of “dominion and sovereignty” as the English Crown exercised, meaning the submerged lands held by the states were “subject to the same trusts and limitations” as those held by the English Crown.<sup>119</sup>

The *Illinois Central* Court determined that each state, by virtue of its sovereign power, held submerged lands of navigable waters in the same nature as the English Crown’s common law title to tidelands.<sup>120</sup> As a generic rule, all states own these lands in trust for the public, subject to the public purposes of navigation, commerce, and fishing.<sup>121</sup> As a result, a state may not “sanction the abdication of the general control” over such lands.<sup>122</sup> Field’s comparison of a state’s attempt to relinquish its public trust

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analysis would have been short. The legislation left no ambiguity concerning the 1869 legislature’s intent to convey the submerged lands to the Railroad. Rather than analyzing the legislature’s intent, however, the Court . . . analyzed the legislature’s power to convey.”)

115. See *Illinois Central*, 146 U.S. at 452.

116. *Id.* at 434.

117. *Id.* at 434.

118. As it related to submerged lands, Justice Field viewed “dominion” as the power of the state to guarantee unimpaired public access and use of the trust lands. *Id.* at 436.

119. *Id.* at 436-37, 457 (“[T]he same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held . . . subject to the same trusts and limitations. Upon that theory we shall examine how far dominion, sovereignty, and proprietary right have been encroached upon by the railroad company”).

120. *Id.* at 452.

121. *Id.*

122. *Id.* Justice Field emphasized the special nature of the state’s obligation as a trustee of the submerged lands. *Id.* at 454 (“So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.”)

responsibilities to a state effort to abdicate its police powers<sup>123</sup> confirmed the linkage between the public trust and the essential sovereign character of a state<sup>124</sup> because the comparison demonstrated how state ownership of trust lands, like state police power, is an inalienable responsibility of all states by virtue of their sovereignty.<sup>125</sup>

Consistent with the nature of the state's ownership of sovereign lands, Justice Field announced the rule of *Illinois Central*: The public trust operates as a restraint on alienation.

The trust devolving upon the State for the public . . . cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.<sup>126</sup>

*Illinois Central* thus established that a state may not abdicate its trust responsibilities through a transfer of property to private interests. This general rule is subject to two exceptions: a state may alienate trust lands when: 1) the transfer promotes the public interest, or 2) the transfer of land does not substantially impair the public trust.<sup>127</sup> Applying this rule, the court concluded the 1869 transfer to the railroad was inoperative.<sup>128</sup>

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123. *Id.* at 453 (“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

124. *Id.* at 453.

125. The Supreme Court had earlier analogized the sovereign power of governance to a trust duty in *Stone v. Mississippi*, 101 U.S. 814 (1879). In *Stone*, the Mississippi legislature had granted a charter to a lottery company in 1867, only to outlaw lotteries via state constitutional amendment in 1868. *Id.* at 816. The Court held that the adoption of the state constitutional provision, which effectively repealed the lottery charter did not violate the contracts clause of the United States Constitution, because a state government cannot divest itself of its power to protect “public health or the public morals” because “the power of governing is a trust committed by the people to the government, no part of which can be granted away.” *Id.* at 819, 820. Consequently, the company accepted the lottery charter with the implicit understanding that it could be removed as necessary for the state to guard the public good. *Id.* at 821.

126. *Illinois Central*, 146 U.S. at 453.

127. *Id.*

128. *Id.* at 460. Justice Field was particularly concerned about the 1869 Lake Front Act's potential for allowing the railroad to exercise monopolistic control over the harbor by giving the railroad the power to “delay indefinitely the improvement of the harbor,” and allowing it to make and renew leases for any period. *Id.* at 451. He

*Illinois Central* built on the principles enunciated in *Martin, Pollard, Weber*, and *McCready* by defining a key substantive obligation imposed by the public trust doctrine on states as trustees of submerged lands for the public - namely, that state control over trust resources must fulfill their trust obligations.<sup>129</sup> Justice Field drew heavily on the federal principles of equal footing and the nature of state sovereignty over public lands to articulate a generic rule of when a state may abdicate control of its lands consistent with its trust responsibilities, suggesting that the restraint against alienation has its roots in federal common law.

#### **IV. Explaining the Origins of the *Illinois Central* Restraint Against Alienation**

In light of the case law laying the foundation for *Illinois Central*, and the language and rationale of the opinion itself, federal common law provides the best explanation for the source of the *Illinois Central* rule against unqualified alienation of trust lands. This section first explores competing theories for the source of the *Illinois Central* public trust doctrine and explains why those explanations prove unpersuasive when tested against the language and rationale of the *Illinois Central* decision. Next, the section articulates why interpreting the *Illinois Central* public trust doctrine as grounded in federal common law is consistent with both the text and reasoning of the decision, and why a federal common law reading of *Illinois Central* provides the case with continuing legitimacy, even after the Supreme Court's 1938 *Erie Railroad*<sup>130</sup> decision which limited the reach of federal common law.

##### **A. Eliminating Unpersuasive Theories**

The language used by Justice Field in *Illinois Central* contradicts the theory that the *Illinois Central* restraint on alienation is a statement of state

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saw the Act as essentially converting the public harbor into a private asset the railroad could use "not simply for its own purpose as a railroad corporation, but for its own profit generally." *Id.* at 451. *Illinois Central* thus serves as an example of how Justice Field's anti-monopoly perspective contributed to his wariness of government attempts to alienate its powers to private corporations. See C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287, 302 (1988) ("Field felt that private business should neither be subsidized by government nor subject to its regulation, and that government has the duty, on the one hand, not to interfere in private business and, on the other hand, not to alienate its powers, privileges, or publicly-owned property. Both views reach essentially the same conclusions, differing, however, in their emphasis on political or jurisprudential terminology.").

129. See *Illinois Central*, 146 U.S. at 453.

130. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

law.<sup>131</sup> First, nowhere in the opinion does the Court rely on Illinois state court precedent, despite existing decisions on the issue.<sup>132</sup> In contrast, Justice Field cited only to statements of federal common law addressing the nature of state ownership of trust lands.<sup>133</sup> Second, language of the *Illinois Central* opinion discussed generic characteristics of state dominion and sovereignty over lands below navigable waters,<sup>134</sup> not characteristics uniquely held by Illinois. A similar analysis of the case's language and rationale led Professor Wilkinson to conclude there is little doubt that the *Illinois Central* decision was "premised on federal law."<sup>135</sup>

However, Wilkinson's explanation that the public trust derives from either congressional preemption or the Commerce Clause<sup>136</sup> seems unpersuasive. Wilkinson first argued that the trust is based on congressional preemption because the language in the Northwest Ordinance of 1787 and in multiple statehood acts guarantee that rivers shall be "forever free."<sup>137</sup> In the alternative, Wilkinson contended that authority can be found in the Commerce Clause as an implied limit on state authority paralleling the navigation servitude.<sup>138</sup> Both explanations prove

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131. For arguments that *Illinois Central* is a statement of state law, see Pearson, *supra* note 6, at 740 (arguing that "states should view *Illinois Central* as persuasive, rather than mandatory authority"); Grant, *supra* note 5, at 851 (arguing that a close reading of *Illinois Central* reveals it was based on the reserved powers doctrine under state law, which relates to, but is not limited by, the Contract Clause of the United States Constitution).

132. See, e.g., Pearson, *supra* note 6, at 728 (discussing an 1884 Illinois Supreme Court decision in *Parker v. State*, 111 Ill. 581 (1884) that addressed the state's power to make a grant of rights involving lands below navigable waters); Kearney & Merrill, *supra* note 5, at 829-30 (citing prior Illinois case law articulating how private rights in submerged lands are subject to the public's paramount interest in navigation). Justice Field's choice to ignore Illinois state law, despite the availability of state authority on the nature of public and private rights in submerged lands, and instead to rely on previous United States Supreme Court decisions, suggests the decision's origins lie with federal, not state, law. But see Grant, *supra* note 5, at 865 (arguing Field's citations to case law reflected a use of all available cases, state or federal, for the purposes of "discerning state law on the validity and terms of the 1869 grant").

133. See discussion *supra* Section II (discussing the four major cases providing the foundation for the *Illinois Central* opinion).

134. 146 U.S. 387, 435, 437, 452-53 (1892).

135. Wilkinson, *supra* note 7, at 454-55 (noting the parties were arguing principles of general applicability, the briefs relied on cases from multiple states, the opinion itself refers to "a state" and not to Illinois).

136. See *id.* at 456-59.

137. *Id.* at 456-57.

138. *Id.* at 458-59. As articulated by Wilkinson, the federal navigational servitude, which originates in Congress' authority to regulate commerce in interstate waters, "allows the United States to condemn land, including state land, up to the high water mark [of navigable waters] without being required to pay just compensation." *Id.* at 449.

unsatisfactory because they do not explain the *Illinois Central* court's reliance on the equal footing doctrine. Additionally, reliance on congressional preemption or the Commerce Clause misconstrues the public trust doctrine as centering on the relationship between Congress and the states, rather than, as articulated in *Illinois Central* (and earlier in *Martin* and *McCready*), on the relationship between the state and the public.<sup>139</sup> Further, because the *Illinois Central* court plainly relied on equal footing, any persuasive theory explaining the origins of the *Illinois Central* public trust must recognize and incorporate the equal footing doctrine.<sup>140</sup>

Professor Rasband has argued the equal footing doctrine and the public trust doctrine are so closely intertwined that they should not be articulated as two separate "doctrinal constructs,"<sup>141</sup> and that the public trust doctrine should give way to the equal footing doctrine.<sup>142</sup> Rasband characterized the equal footing doctrine as a presumption against United States' intent to convey submerged lands in pre-statehood grants,<sup>143</sup> and the public trust doctrine as "defin[ing] a state's power over the land under navigable water that it acquired at statehood."<sup>144</sup> Essentially, Rasband argued that requiring courts to apply two separate standards for grants of submerged lands - the rebuttable presumption intent analysis to pre-statehood conveyances by the United States, and the question of sovereign power to convey under the *Illinois Central* doctrine - creates irreconcilable

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139. See *id.* at 452-53 (discussing the relationship between the trust responsibilities and a state's obligations to maintain them); *Martin*, 41 U.S. 367, 416 (1842) (discussing how the "prerogatives and regalities" of the crown now lie with the state as representative of the people); *McCready*, 94 U.S. 391, 394-96 (1876) (discussing the relationship between the state citizenry and Virginia's regulation of public trust rights).

140. E.g., Harrison Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 524 (1989) (recognizing the "close link" between the public trust and the equal footing doctrine because of their shared emphasis on issues of state sovereignty over submerged lands).

141. Rasband, *supra* note 13, at 4, 5 ("[T]he separation of the two doctrines is driven more by ideology than legal necessity."). Rasband characterized the public trust doctrine as a creature of state common law and the equal footing doctrine as federal common law. *Id.*

142. *Id.* at 7. To choose between the two doctrines, Rasband invoked practical considerations, arguing that "the approach in public trust cases has less historical support, unreasonably defeats investment-backed expectations of grantees, risks takings challenges, and, by requiring judges to divine the public interest . . . forces them to engage in a task for which they are not particularly well-suited." *Id.*

143. See *id.* at 3 ("The equal footing doctrine defines the United States' power to convey or retain land under navigable water prior to statehood and therefore describes the lands under navigable waters which a state acquires at statehood.").

144. *Id.* at 3.

conflicts.<sup>145</sup>

Professor Rasband contended the public trust doctrine and equal footing doctrine analysis should be collapsed into a single inquiry.<sup>146</sup> However, the two inquires must remain separate because the former analyzes issues of state power, while the latter resolves questions of federal intent.<sup>147</sup> Moreover, Rasband's approach mistakenly conflated the "trust" in which the United States held pre-statehood lands for the states with the "trust" in which the states hold the lands for the public. The two "trusts" are not interchangeable because they inject different content to three key elements of a trust relationship - trustee, corpus, and beneficiary.<sup>148</sup> Under the equal footing doctrine, the United States is the trustee;<sup>149</sup> under the public trust doctrine, that role belongs to the states.<sup>150</sup> The character of the trust corpus under the equal footing doctrine was temporary,<sup>151</sup> whereas in the public trust doctrine, trustee duty is permanent.<sup>152</sup> Finally, the beneficiaries of the pre-statehood equal footing trust were the yet unformed

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145. *Id.* at 7, 84 ("[O]ne cannot consistently advocate the presumption approach to pre-statehood United States' grants and simultaneously support the public trust approach to state grants. The two approaches conflict[.]"). However, when the equal footing doctrine is viewed as the mechanism by which the public trust rights and responsibilities passed from the Crown to the states, any perceived conflict between the doctrine dissipates.

146. *Id.* at 4.

147. Compare *Montana v. United States*, 450 U.S. 544, 554 (1981) (applying presumption against pre-statehood conveyances by the federal government to land under a riverbed unless intent is clear and plain) with *Illinois Central*, 146 U.S. 387, 453 (1892) (analyzing whether a state has power to completely alienate trust lands).

148. See BOGERT ON THE LAW OF TRUSTS AND TRUSTEES § 1 (2d ed. 1965) (describing the trust property, the trustee, and beneficiary as three elements of a trust relationship); RESTATEMENT (THIRD) ON TRUSTS § 3 (2003) ("[1] The property held in trust is the trust property. [2] the person who holds property in trust is the trustee. [3] A person for whose benefit property is held in trust is a beneficiary").

149. *Pollard v. Hagan*, 44 U.S. 212, 221, 224 (1845)

150. *Illinois Central*, 146 U.S. 387, 453 (1892) ("The control of the state for the purposes of the trust can never be lost," except for conveyances that promote or do not substantially impair the public interest.).

151. *Pollard*, 44 U.S. at 221, 224.

152. One of the purposes of the Northwest Ordinance was for the lands ceded by the Eastern states to "be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever" as repayment for the war debt and to erect new states. *Id.* at 221. Thus, retention by the United States of federal public domain lands within the states at the time of statehood did not offend equal footing because the states and federal government viewed such retention for "temporary purposes" relating to development of the country and because the heart of equal footing relates to territorial sovereignty as a political principle, not as an absolute percentage of acreage. See *id.* at 223.

states,<sup>153</sup> while the beneficiaries of the public trust doctrine are members of the public.<sup>154</sup> Because the elements and the analysis of the equal footing doctrine and the public trust doctrine significantly diverge, the two doctrines cannot be conflated, but must remain distinct.

Further, Rasband's approach highlighted a fundamental reason why the equal footing doctrine, standing alone, cannot provide a complete explanation for the public trust doctrine as articulated in *Illinois Central*. Equal footing centers on the transfer of submerged lands from the federal government to the new states - and the pre-statehood trust relationship between the United States and future states - but it fails to explain the nature of the title received by the states upon transfer, or any accompanying limitations on the states' ability to convey that title.<sup>155</sup> In short, equal footing explains *how*, but not *what*. By contrast, a satisfactory explanation of *Illinois Central* must explain how and why the *Illinois Central* Court concluded that the content of the public trust included a restriction on alienability.

### **B. Developing a Persuasive Explanation for the Source of the *Illinois Central* Public Trust Doctrine**

Although most commentators have dismissed the idea that federal common law provides the source for the *Illinois Central* public trust doctrine,<sup>156</sup> federal common law actually provides the most compelling explanation for the origins of the *Illinois Central* public trust doctrine.<sup>157</sup>

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153. *Id.* at 221, 224.

154. *Illinois Central*, 146 U.S. at 483.

155. See Grant, *supra* note 5, at 852-53. Professor Grant explained that “[f]or the equal footing doctrine to serve as the basis of the public trust doctrine, an additional premise is necessary . . . . The additional premise is that the implied federal transfer of title to beds of navigable waters came with strings attached, namely, that the states took them with responsibility to protect the public right of use and with limitations on their power to dispose of them into private ownership.” *Id.* Grant called this premise “logically problematic” because it does not explain how and what constraints the public trust doctrine places on the original 13 states. *Id.* at 853. However, the *Martin* Court’s explanation of how public trust duties passed directly from the Crown to the original thirteen colonies seemed to have resolved this concern. See *supra* text accompanying notes 30-35.

156. See, e.g., Wilkinson, *supra* note 7, at 455 (considering the possibility that the federal public trust doctrine could be explained by federal law before rejecting it because it “is not in favor and is unlikely to be employed”); Pearson, *supra* note 6, at 733 (arguing federal common law cannot explain *Illinois Central* because *Swift v. Tyson*, 41 U.S. 1 (1842) carved out an exception for the local law of real property, and because *Illinois Central* “cannot continue to lay claim to legitimacy on that basis” since *Erie Railroad v. Tompkins* abolished the federal common law doctrine).

157. Federal common law arises when the courts engage in “fashioning federal rules applicable to . . . federal questions.” *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). In other words, federal common law develops when a court bases its rule of decision on judicial interpretation of the meaning of a federal statutory or

Because federal common law is widely viewed as a discredited source of law in a post-*Erie Railroad v. Tompkins* judicial world,<sup>158</sup> this section first addresses circumstances that justify reliance on federal common law post-*Erie*. It then explains how the *Illinois Central* decision meets the requirements of valid federal common law, and why the text of the *Illinois Central* opinion supports a federal common law interpretation.

Although *Erie Railroad v. Tompkins*<sup>159</sup> overruled *Swift v. Tyson*,<sup>160</sup> the *Erie* decision did not eliminate the ability of courts to develop federal common law when implicitly authorized by a positive law source, such as a statute or the Constitution.<sup>161</sup> Both *Swift* and *Erie* interpreted section 34 of the Judiciary Act of 1789,<sup>162</sup> which provides that “the laws of several states” provide the rules of decision in cases where they apply.<sup>163</sup> The difference between the

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constitutional provision. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (“Other problems will lie in the penumbra of express [federal] statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy . . . . Federal interpretation of the federal law will govern, not state law.”); Cf. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (describing federal common law as a “rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial ‘creation’ of a special federal rule of decision”).

158. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885 (1986) (explaining how *Erie* appeared to question the legitimacy of federal common law, and that the “received academic tradition on federal common law assumes that there are particular enclaves in which federal common law is in fact appropriate, but that after *Erie*, federal common law power is the exception, not the rule”).

159. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (overruling *Swift* by rejecting the idea that there is a floating transcendent body of law that federal courts can use their powers to discover).

160. *Swift v. Tyson*, 41 U.S. 1, 19 (1842) (holding the Rules of Decision Act’s requirement that federal courts apply state law “is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.”).

161. See Field, *supra* note 159, at 928 (1986) (“All of the cases allowing federal common law are reconcilable with *Erie* on the basis that the federal common law there made was authorized by some provision . . . . Deciding whether common law can be made in any given case is a matter of interpreting each possible enabling authority to see whether or not it supports federal common law.”).

162. For the modern-day equivalent of the provision, see 28 U.S.C. § 1652 (2000) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”)

163. Field, *supra* note 159, at 928; see *Id.* at 902-903 (describing how *Swift* and *Erie* turned on opposing interpretations of the Rules of Decision Act).

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two cases was that *Swift* interpreted the phrase “the laws of several states” to include both positive law and natural law, while *Erie* limited this phrase as applying only to positive law.<sup>164</sup> The result of *Erie* is that courts may no longer use natural law<sup>165</sup> to create general federal common law rules of decisions, but may still fashion non-general federal common law when interpretation of a provision of positive law so requires.<sup>166</sup> Under the current United States Supreme Court approach, a federal court may create non-general federal common law when “relevant federal interest warrants the displacement of state law.”<sup>167</sup>

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164. See Field, *supra* note 159, at 928. The *Erie* decision recognized that the *Swift* approach had not produced the desired uniformity regarding law governing commercial transactions. See *Erie*, 304 U.S. at 74-75.

165. See *Erie*, 304 U.S. 64, 79 (1938) (explaining that the fallacy underlying the *Swift* rule was to assume there was a transcendent body of natural law principles that exist independently of positive sources of law); see also Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 *HAMLIN L. REV.* 372, 383 n. 56 (“The *Erie* decision marked a jurisprudential shift from the idea of natural law to legal positivism.”).

166. See Field, *supra* note 159, at 928; see also PETER W. LOW & JOHN C. JEFFRIES, JR., EDS., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 15 (5th ed. 2004) (“Notwithstanding legislative primacy in law-making, there are occasions when federal courts make federal common law and when it is generally (though not unanimously) accepted they should do so.”).

167. *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 692 (2007) (citing *Boyle v. United Tech. Co.*, 487 U.S. 500, 504-07 (1988) (also framing the inquiry as whether state law significantly conflicts with a unique federal interest, warranting displacement of state law). The Supreme Court has also recognized the nature of the federal governmental structure may require the Court to create federal common law. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (deciding, on the same day as *Erie Railroad*, that federal common law provided the rule of decision for determining the appropriateness of judicial apportionment of interstate waters).

Thus, although express application of federal common law is not frequently invoked by the modern Supreme Court, it has not fallen into desuetude. For example, the Court has frequently applied federal common law to interstate disputes over use of water bodies or apportionment of interstate waters. E.g., *id.*; *Illinois v. Milwaukee*, 406 U.S. 91, 103, 107-08 (1972) (remitting a suit to abate a public nuisance in interstate or navigable waters under the Clean Water Act with authority to fashion an appropriate federal common law remedy); *Arizona v. California*, 373 U.S. 546, 562 (1963), *overruled on other grounds by* *California v. United States*, 438 US 645, 646 (1978) (“Resolution of this [interstate water dispute between Arizona and California] requires a determination of what apportionment, if any, is made by the Project Act and what powers are conferred by the Act upon the Secretary of the Interior. Unless many of the issues presented here are adjudicated, the conflicting claims of the parties will continue, as they do now, to raise serious doubts as to the extent of each State’s right to appropriate water from the Colorado River System for existing or new uses. In this situation we should and do exercise our jurisdiction.”). In some respects, the federal interests compelling creation of the *Illinois Central* public trust doctrine were similar to the federal interests behind creation of a federal common

In short, two requirements must be met for federal common law to function as a persuasive explanation of the *Illinois Central* restraint on alienation.<sup>168</sup> First, the *Illinois Central* rule of decision restraining alienation must have derived from a constitutional or statutory provision requiring judicial interpretation. Second, there must have been a relevant federal interest that merited the *Illinois Central* Court's displacement of Illinois state public trust law as the rule of decision.<sup>169</sup>

The positive source of law authorizing the *Illinois Central* rule against alienation was the equal footing doctrine. Justice Field relied heavily on the concept of equal footing: that new states enter the Union on equal political footing, with the same attributes of dominion and sovereignty.<sup>170</sup> In *Coyle v. Smith*, the Supreme Court confirmed the equal footing doctrine is constitutional in nature, deriving the doctrine from the language in Article 4, section 3 of Constitution calling for admittance of new states into "this Union."<sup>171</sup> Thus, the *Illinois Central* public trust doctrine, which articulated the

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law rule for interstate apportionment of water rights because both focus on use of public resources, and in both cases the need for a federal common law remedy was the product of the apportionment of power between the federal government and the states, detailed in the Constitution.

168. The *Illinois Central* opinion was not entirely devoid of natural law reasoning, and the Supreme Court would not likely articulate the same reasoning if it decided the case again today. See generally George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 322 (2006) (discussing natural law undertones of *Illinois Central* opinion). Analyzing the federal common law rule of *Illinois Central* to determine whether it meets the modern test is merely intended to show how the *Illinois Central* common law rule retains its legitimacy even today.

169. The *Swift* exception that state law traditionally governs "rights and titles to things having a permanent locality, such as the rights and titles to real estate," *Swift*, 41 U.S. 1, 1-2 (1842); see *id.*, does not apply determine the law governing the public trust doctrine, even though the public trust doctrine involves the nature of a state's title in submerged lands because it is not the type of local property law referred to by the exception. Additionally, as discussed *infra* notes 171-73 and accompanying text, the public trust doctrine does not fall into the *Swift* real property exception because it stems not from state law but from federal common law that governs the state's public trust duties in its capacity as a sovereign member of "this Union."

170. See discussion *supra* notes 116-19 and accompanying text.

171. U.S. CONST. art. IV, § 3 ("New states may be admitted by Congress into this Union . . ."); *Coyle v. Smith*, 221 U.S. 559, 566 (1911). In *Coyle*, a citizen of Oklahoma challenged an act of the Oklahoma legislature providing for the relocation of the state capitol from Guthrie to Oklahoma. *Id.* at 563-64. The United States upheld the validity of the Act, holding the guarantees of political sovereignty embodied in equal footing included the power of a state to locate and change its seat of government. *Id.* at 565-66. In its holding, the Court characterized the constitutional text of "this Union" as referring to "a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567; see also Rasband, *supra* note 13, at 56 (arguing the only "coherent" way of explaining the equal footing doctrine case law is "to recognize

nature of the state's trusteeship over submerged lands, derives from an interpretation of the rights and responsibilities that attach to the admission of a sovereign state to the Article 4, section 3 language of "this Union."<sup>172</sup>

Federal interests in uniformity and preservation of state sovereignty provided ample justifications for the result in *Illinois Central* concerning the state's title to public trust lands. The federal government has a unique interest in ensuring states are admitted to the Union on equal terms and in uniformly defining the equal footing concept to fulfill the equal footing guarantee of political equality.<sup>173</sup> Further, the federal interest in ensuring that states retain sovereign trusteeship over submerged lands fosters the federal interest in keeping watercourses free for public use.<sup>174</sup> In sum, the *Illinois Central* Court fashioned a federal common law remedy preventing the state from abdicating sovereign control over submerged lands by prohibiting conveyances that impair the public trust.

A close examination of the text of the *Illinois Central* opinion confirms that federal common law is the source of the public trust doctrine. Although Justice Field did not expressly tie his analysis to any constitutional provision, federal common law explains the link he drew between equal footing and the principle of the public trust as a restraint on alienation.<sup>175</sup>

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that Congress is indeed constitutionally obligated to admit a new state with sovereignty equal to that of all other states . . .").

172. See Henry P. Monaghan, *The Supreme Court, 1973 Term, Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 17 (1975) ("The ultimate source of judicial lawmaking authority is the constitutional text."). An analogous situation lies in the willingness of federal courts to strike down state legislation under the so-called "dormant commerce clause" where state laws conflict with the free trade philosophy embodied in the Commerce Clause, demonstrating the ability of the federal courts to create non-general federal common law under implicit authorization from the text of the Constitution. See LOW & JEFFERIES, *supra* note 167, at 17 (citing Monaghan).

173. Allowing state law to define the nature of the equal footing doctrine would be inappropriate, because it would result in potentially fifty different interpretations, which runs directly contrary to the equal footing premise of ensuring uniform political rights and responsibilities for all states. See *Pollard v. Hagan*, 44 U.S. 212, 222 (1845).

In *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977), the Court applied state law, rather than federal common law, to govern the issue of whether state sovereign title followed with post-statehood accretions and avulsions. *Id.* at 367-68. However, the Court noted that federal common law would still have applied to determine whether, at the time of the state's admission, the lands passed to the state under the equal footing doctrine, explaining that "the contrary approach would result in a perverse application of the equal footing doctrine." *Id.* at 377-78.

174. See Wilkinson, *supra* note 7, at 431-38 (discussing the importance of free travel on U.S. watercourses for trade, transportation, and commerce).

175. Justice Field explained that under the equal footing doctrine, states took title to the lands subjects to the same trusts as held by the Crown. *Illinois Central*, 146 U.S. 387, 436-37. Trusteeship over submerged lands followed from the responsibility

Both are grounded in Article IV, section 3 of the United States Constitution, which grants Congress the authority to admit new states. Equal footing is the federal common law that explains *how* new states obtained title to the submerged lands, while the public trust doctrine is the federal common law explains *what* obligations accompanied that title by virtue of a state's position as a sovereign within "this Union."<sup>176</sup> The nineteenth century jurisprudential focus on natural law helps explain why Justice Field did not explicitly tie his reasoning to a textual provision of the United States Constitution: a lack of explicit references to positive law was a hallmark of opinions written in the natural law tradition.<sup>177</sup> A federal common law basis for the public trust doctrine deriving from a constitutional provision also explains how the rule could operate as a limitation on state legislative power.<sup>178</sup> In sum, federal common law supplies a persuasive explanation for

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of a state, as sovereign, to govern for the common good, and consequently functioned to restrict alienation of trust resources. *See id.* at 453.

176. U.S. CONST. art. IV, § 3.

177. *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 54 (2000) ("[T]he American jurists did not expressly think of themselves as Platonists. Many of them failed to precisely define natural law and natural rights, much less delineate the relations between natural law and positive law, including case decisions."); *see also* Epstein, *supra* note 5, at 427 (commenting that "Field work[ed] very much in the 'natural' or 'higher' law tradition. *Illinois Central* contains no citations to [a] particular constitutional provision, and the opinion reads like an essay that runs for 20 pages without case citation.") (citations omitted); *Cf.* Rasband, *supra* note 13, at 65 ("Field made no attempt to locate in the Constitution this new constraint on legislative power. Instead, in fine pre-*Erie* form, he turned to the common law."); Sax, *supra* note 1, at 490 (commenting that "[t]he Court in *Illinois Central* did not specify its reasons for adopting the position which it took, but the attitude implicit in the decision is fairly obvious" that "governments operate in order to provide widely available public services, such as schools, police protection, liberties, and parks.")

Justice Field's natural law values included a concern for preserving public rights from the hands of a private monopoly. *See* Smith & Sweeney, *supra* note 169, at 321 (arguing that the *Illinois Central* public trust reflects natural law values within the American constitutional framework that when balanced, "implicitly require protection of the navigable waterways."); McCurdy, *supra* note 105, at 266 ("Throughout his entire judicial career, Field believed that . . . the courts were capable of resolving allocation problems so as to simultaneously protect property rights, release entrepreneurial energies, and provide all men with an equal opportunity to share in the material fruits of a vigorously-expanding capitalist society."). Because the *Illinois Central* public trust doctrine can be independently explained on federal common law grounds, Justice Field's partial reliance on natural law does not undermine the continuing validity of *Illinois Central*.

178. *Cf.* Rasband, *supra* note 13, at 65 n.243 ("The absence of a constitutional basis for the public trust rule of *Illinois Central* has been the subject of much commentary for the obvious reason that the rule works as a limitation on the power of the legislature something [that] the [English or state] common law theoretically cannot do.")

the language and rationale of *Illinois Central*.

## V. Reconciling *Illinois Central* and Subsequent Supreme Court Decisions

A trilogy of subsequent Supreme Court decisions exist that, at first glance, appear to have limited, undermined, or implicitly overruled *Illinois Central*'s limit on state conveyance of trust lands, and seem to support the notion that the *Illinois Central* public trust doctrine is not based on federal law.<sup>179</sup> But properly understood, none of these decisions erode the *Illinois Central* rule of decision restricting the state's ability to abdicate sovereign control over submerged lands. Instead, these later decisions can be distinguished as resolving issues distinct from those presented in *Illinois Central*. Moreover, the principles articulated in these cases are not inconsistent with the *Illinois Central* federal rule against alienation of sovereign control of public trust lands.

### A. *Shively v. Bowlby*: The Court Considers the Validity of Pre-Statehood Federal Grants of Submerged Lands

In 1894, two years after *Illinois Central*, the Supreme Court decided *Shively v. Bowlby*, a case involving competing claims by private landowners to lands submerged under the Columbia River in Astoria, Oregon.<sup>180</sup> After Charles Shively dedicated his title in streets adjacent to the lands to the public, John Bowlby brought a quiet title action against Shively in the circuit court for Clatsop County, Oregon to remove the cloud on his title effectuated by the dedication,<sup>181</sup> and Shively counterclaimed for quiet title.<sup>182</sup> Shively claimed title under a pre-statehood federal Oregon Donation Act claim executed in 1850,<sup>183</sup> and perfected by an 1865 federal patent.<sup>184</sup> Bowlby claimed title under an 1876 deed issued by the state of Oregon.<sup>185</sup> After the trial court ruled for Bowlby, Shively appealed to the Oregon Supreme Court, which affirmed the trial court's decision on the basis that Shively's federal grant conveyed no title or right to lands below the high-water mark.<sup>186</sup>

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179. *Shively v. Bowlby*, 152 U.S. 1 (1894), *Appleby v. City of New York*, 271 U.S. 364 (1926); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); See, e.g., Pearson, *supra* note 6, at 736-37 (arguing *Shively* marked a retreat from *Illinois Central* and that *Appleby* "overruled" or "severely limited" the *Illinois Central* holding).

180. *Shively v. Bowlby*, 152 U.S. 1, 2 (1894).

181. *Id.* at 2, 7.

182. *Id.* at 7.

183. Oregon Donation Act, Act of Congress of Sept. 27, 1850, chap. 76, 9 Stat. 496.

184. *Shively*, 152 U.S. at 2.

185. *Id.*

186. *Id.* at 8.

Shively then appealed to the United States Supreme Court.<sup>187</sup>

A unanimous Supreme Court affirmed.<sup>188</sup> The Court ruled that Shively's federal donation land grant and subsequent patent did not include title to lands below the high-water mark because construing general pre-statehood land grants to settlers to convey title to submerged lands would impair the sovereignty of newly admitted states.<sup>189</sup> Consequently, the Court held that Bowlby's title to the lands via conveyance from the state of Oregon prevailed.<sup>190</sup>

The Court referenced *Illinois Central* as one in a string of cases establishing principles governing ownership of sovereign lands,<sup>191</sup> citing the decision for the general principle applicable to "the several states" that a state may dispose of sovereignty over tidelands or submerged lands only when that disposal does not impair the public trust.<sup>192</sup> The Court also recognized that, after statehood, states regulate the uses of public trust lands, subject only to constitutional limitations.<sup>193</sup>

The *Shively* decision was entirely consistent with a federal common law reading of *Illinois Central* grounded in federal common law because the *Shively* Court viewed the rule of *Illinois Central* as "the settled law of this country," applicable to all states, not just to *Illinois*.<sup>194</sup> Further, the *Shively* Court

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187. *Id.*

188. *Id.* at 58.

189. *Id.*

190. *Id.* "Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States." *Id.* (emphasis added).

191. *Id.* at 46-47. Reviewing a lengthy chain of cases beginning with *Martin v. Waddell*, the Court surveyed the laws in the thirteen original colonies and discussed relevant nineteenth century Supreme Court jurisprudence. *Id.* at 15-47. The *Shively* Court drew the general conclusion from its examination of the laws and practices in the thirteen original states that each of these states "has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as considered for the best interests of the public." *Id.* at 26. Thus, the *Shively* court recognized a uniform requirement that considerations of the public interest drive state decisions regarding control of submerged lands, even though the power to rule on the validity of such a conveyance remains within the purview of each individual state.

192. *Id.* at 47.

193. *Id.* at 58. Under the interpretation that the public trust doctrine is grounded in federal common law deriving from the equal footing clause of the Constitution, the *Shively* Court's statement that there are constitutional limits on state regulation of trust lands includes limits imposed by the public trust doctrine.

194. *Id.* at 47.

applied *Illinois Central's* sovereignty rhetoric.<sup>195</sup> Nothing about the listing of *Illinois Central* as only one of many cases developing the public trust doctrine undermines the vitality of the *Illinois Central* decision;<sup>196</sup> indeed, the *Shively* Court recognized *Illinois Central* as the leading authority regarding trust restraints on states' complete abdication of state control of trust lands.<sup>197</sup> Instead, *Shively* cited multiple public trust cases to trace, in some detail, the development of the American public trust jurisprudence, culminating its discussion with *Illinois Central*.<sup>198</sup> Finally, the general principle drawn by the *Shively* Court, that "the title and the control of [submerged lands] are vested in the sovereign, for the benefit of the whole people"<sup>199</sup> is entirely consistent with the language and rationale of *Illinois Central*. *Shively* is thus properly read as reinforcing the trust relationship that was the basis for the *Illinois Central* restraint on alienation.

**B. *Appleby v. City of New York: The Court Upholds a Conveyance of Submerged Lands that Does Not Substantially Impair the Public Trust***

In 1853, the City of New York issued a deed for approximately a block-and-a-half plat of submerged land beneath the Hudson River to Charles Appleby in exchange for Appleby's agreement to build four wharves, fill necessary lands, and not to build without permission from the city.<sup>200</sup> The state legislature subsequently passed laws prohibiting private fill or bulkhead construction in certain areas and requiring state approval for construction of docks, thereby preventing Appleby's ability to fill in the plat.<sup>201</sup> In 1914, Appleby sued the city and the lessees of the city's piers, maintaining that the state laws wrongly impaired city's obligations of

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195. *Id.* at 57.

196. One commentator perceived *Shively* as undermining *Illinois Central* because the *Shively* court listed *Illinois Central* as only one of many cases giving content to the nature of state sovereignty in submerged lands. See Pearson, *supra* note 6, at 737 ("Significantly, *Illinois Central* received no more attention from the Court than the other cases in the post-*Martin* era, and the Court did not refer to *Illinois Central* as a break from precedent. Thus, only two years after deciding *Illinois Central*, the Court viewed it as simply the last in a consistent line of cases and of no particular singular significance within that line.")

197. *Shively*, 152 U.S. at 47.

198. *Id.*

199. *Id.* at 57.

200. *Appleby v. City of New York*, 271 U.S. 364, 367-68 (1926). The city issued the deed after approval by the state legislature in 1845. *Id.* at 366. New York City exercised general control over a strip of land below the high water line, surrounding Manhattan by virtue of pre-statehood grants confirmed by an 1807 act of the legislature. *Id.*

201. *Id.* at 371.

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contract and seeking an injunction restraining the city and its lessees from dredging the lands or using his lands as a slip for mooring.<sup>202</sup> After a New York trial court denied Appleby's injunction request and the state appellate courts affirmed, Appleby appealed to the United States Supreme Court.<sup>203</sup>

The Supreme Court reversed.<sup>204</sup> In an opinion delivered by Chief Justice Taft, the Court held that the public trust doctrine did not apply to restrict Appleby's private ownership rights in the submerged lands because the City intended to, and effectively did, convey both *jus publicum* and *jus privatum* interests in the 1853 grant to Appleby, thereby extinguishing the public trust in Appleby's plat of submerged lands.<sup>205</sup> The Court rejected the city's plea to apply *Illinois Central* to invalidate its 1853 grant to Appleby, referring to *Illinois Central* as "necessarily a statement of Illinois law,"<sup>206</sup> but recognizing that "the general principle and the exception have been recognized the country over and have been approved in several cases in the state of New York."<sup>207</sup> Instead, the *Appleby* Court drew a "distinction" between the facts in *Appleby* and the facts in *Illinois Central* and two New York cases where the courts had invalidated grants conveying massive tracts of submerged lands to the control of private companies.<sup>208</sup> The Court thus

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202. *Id.* at 371, 379. The suit was actually brought by the executors of Appleby's estate. *Id.* at 365.

203. *Id.*

204. *Id.* at 403.

205. *Id.* at 397.

206. *Id.* at 393.

207. *Id.* at 394. Because the *Appleby* Court ultimately declined to apply *Illinois Central*, distinguishing *Appleby* on its facts, the statement that the case is "necessarily a statement of state law" is mere dicta, because it is not essential to the court's holding or reasoning.

208. *Id.* at 393-96. The *Appleby* Court characterized *Illinois Central*, 146 U.S. 387 (1892), as a case where Supreme Court invalidated a state legislature's attempt to convey over 1,000 acres of the Chicago harbor to a private railroad because the conveyance was a "gross perversion of the trust over the property under which it was held, [and] an abdication of sovereign governmental power." *Appleby*, 271 U.S. at 393. Similarly, the *Appleby* Court considered two New York cases that had invalidated conveyances via application of the *Illinois Central* rule. *Id.* at 396 (emphasizing "the distinction between the *Illinois Central*, the *Coxe*, and the *Long Sault* cases and grants like those we are considering. It is clear that the ruling in those cases has no application here.") (italics added).

The facts underlying the first case, *Illinois Central*, are discussed *supra* text accompanying notes 86-94. In the second case, *Coxe v. New York*, 39 N.E. 400 (N.Y. 1895), the state supreme court affirmed the invalidity of a law giving a private marsh land corporation eminent domain authorities over all wet and overflowed lands adjacent to Staten Island and Long Island. Third, in *Long Sault Dev. Co. v. Kennedy*, 105 N.E. 849 (N.Y. 1914) the state supreme court invalidated a grant by the legislature that would have given "complete control of the navigation of the St. Lawrence river in the region of Long Sault Rapids to a private corporation and abdicate its sovereign

ruled that Appleby could enjoy the city's dredging and use of the submerged lands.<sup>209</sup>

The *Appleby* result, upholding a grant of a block-and-a-half plat of submerged lands to a private landowner, is not inconsistent with *Illinois Central* because the scope of Appleby's grant was small compared to the grant at issue in *Illinois Central*, and therefore lacked the abdication of sovereign control present with the *Illinois Central* railroad grant. Although the *Appleby* Court did not clearly explain its rationale, the most textually grounded reading is that the *Appleby* Court declined to invoke the *Illinois Central* rule to invalidate the city's deed to Appleby because the deed fell within the first exception articulated in *Illinois Central*: Namely, that a state may abdicate sovereign control over submerged lands - relinquishing public trust responsibilities - when the conveyance to a private entity does not substantially impair the public trust.<sup>210</sup> Under this interpretation, *Appleby* did not overrule nor undermine *Illinois Central*; instead the Court implicitly applied an exception to the *Illinois Central* rule to uphold the 1853 deed to Appleby.

### **C. *Phillips Petroleum Co. v. Mississippi*: The Court Officially Extends the Public Trust to Non-navigable Tidewaters**

In 1973, the Mississippi state legislature charged the state marine resources council with preparing maps identifying state-owned wetlands.<sup>211</sup> In 1997, relying on these maps, the Mississippi Mineral Lease Commission issued an oil and gas lease covering 600 acres of lands submerged below the north branch of Bayou LaCroix and other tidally influenced drainage streams.<sup>212</sup> Record titleholders, including Phillips Petroleum, who traced their claim of title from pre-statehood Spanish land grants confirmed by federal and state patents, learned of the leases and sued the state to remove

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function." *Appleby*, 271 U.S. at 396. Although the *Appleby* Court did not elucidate on the "distinction" it perceived between these three cases and the facts in *Appleby*, the clearest distinction is that the earlier three cases involved large-scale conveyances to entire sections of city harbors that almost inherently will impair the state's public trustee responsibilities, as opposed to the facts in *Appleby* where the City conveyed only a single plat of land to a private land owner for purposes (fill, construction of a wharf) that could even have been perceived as furthering public uses. In essence, the *Appleby* conveyance did not offend the *Illinois Central* rule because it fell into the exception that a state may effectuate conveyances that do not substantially impair the public trust.

209. *Id.* at 402-03.

210. *Illinois Central*, 146 U.S. 387, 453 (1892).

211. *Cinque Bambini P'ship v. Mississippi*, 491 So.2d 508, 511 (Miss. 1986), *aff'd sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1998). Once prepared, the maps were recorded with local chancery clerks. *Id.*

212. *Id.* at 511; *Phillips Petroleum*, 484 U.S. at 472.

clouds of title.<sup>213</sup> The state counterclaimed, asserting public trust ownership of the lands on the basis of the equal footing doctrine.<sup>214</sup> After the trial court rejected the titleholders' argument that the state held title only to lands under navigable waters, not waters subject to the ebb and flow of the tide, it ruled for the state, and the state supreme court affirmed.<sup>215</sup> The record titleholders appealed to the United States Supreme Court.<sup>216</sup>

The Supreme Court affirmed by a vote of 5-3.<sup>217</sup> The sole issue before the Court was whether the state of Mississippi, when admitted to the Union, took title to non-navigable tidewaters influenced by the ebb and flow of the tide under the equal footing doctrine.<sup>218</sup> The Court rejected the record titleholders' contention that Mississippi could not claim public trust ownership of non-navigable tidewaters because the original thirteen states did not uniformly make similar public trust claims of title.<sup>219</sup> Justice White's majority opinion explained that the practices of other states were not dispositive to the legitimacy of Mississippi's claims because "it has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."<sup>220</sup> The majority further observed that the American jurisprudential expansion of the public trust to include lands beneath navigable-in-fact nontidal waters did not signify an intent to depart from the English common law ebb-and-flow test for tidal lands.<sup>221</sup> Consequently, the *Phillips Petroleum* Court reaffirmed the Supreme Court's "long-standing precedents" holding that the equal footing doctrine vested ownership with

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213. *Cinque Bambini*, 491 So.2d at 511; *Phillips Petroleum*, 484 U.S. at 472.

214. *Phillips Petroleum*, 484 U.S. at 473.

215. *Id.* at 472-73.

216. *Id.* at 472.

217. *Id.* at 473. Justice Kennedy took no part in the decision. *Id.* at 471. Justice O'Connor dissented, joined by Justices Stevens and Scalia. *Id.* at 485. The dissenters disagreed with the majority's conclusion that the public trust extended to nonnavigable tidal waters, arguing that the decision would upset settled expectations of coastal property owners, and that "[n]avigability, not tidal influence, ought to be acknowledged as the universal hallmark of the public trust." *Id.* at 493, 486.

218. *Id.* at 472.

219. *Id.* at 475-76 ("Some of the original States, for example, did recognize more private interests in tidelands than did others of the thirteen more private interests than were recognized at common law, or in the dictates of our public trusts cases. Because some of the cases which petitioners cite come from such States (i.e., from States which abandoned the common law with respect to tidelands), they are of only limited value in understanding the public trust doctrine and its scope in those States which have not relinquished their claims to all lands beneath tidal waters.") (citations omitted).

220. *Id.* at 475.

221. *Id.* at 478-79.

the states of all waters subject to tidal ebb-and-flow,<sup>222</sup> concluding that the submerged lands at issue became public trust property of Mississippi on its admission to the Union in 1817.<sup>223</sup>

*Phillips Petroleum* neither contradicts the holding nor the rationale of *Illinois Central*. Yet one commentator argued *Phillips Petroleum* decision undermined *Illinois Central* because of the Court's mention that "it has been long established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."<sup>224</sup> But Justice White made this statement to explain why the choice of some states to recognize private interests in tidelands did not preclude those states (or other states) from claiming public trust ownership to lands beneath non-navigable tidal waters.<sup>225</sup> Moreover, the Court explicitly affirmed the public trust doctrine by explaining that even in states recognizing private ownership of tidelands, private rights are subject to a public easement for trust purposes.<sup>226</sup> Further, the absence of reliance on *Illinois Central* by the *Phillips Petroleum* Court is unremarkable, considering the facts of the *Phillips* case did not raise a challenge to alienation of submerged lands, but instead centered on the issue of whether the equal footing doctrine applied to non-navigable tidal waters. Consequently, *Phillips Petroleum* is consistent with *Illinois Central* on the principle that states may develop their public trust doctrines as they see fit, provided they do not impermissibly abdicate control of sovereign trust lands.

Thus, neither *Shively*, *Appleby*, nor *Phillips Petroleum* contradict or undermine the validity of the *Illinois Central* rule that a state may not abdicate sovereign control of its trust lands unless such a conveyance promotes or does not substantially impair trust purposes.<sup>227</sup> Neither *Shively* nor *Phillips Petroleum* confronted questions of state abdication of sovereign lands, and *Appleby's* upholding of a small conveyance falls within *Illinois Central's* second exception, as a conveyance too small to offend the public trust.<sup>228</sup> The

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222. *Id.* at 476.

223. *Id.* at 484.

224. *Id.* at 475; See Pearson, *supra* note 6, at 738 (arguing this statement undermines *Illinois Central* because it "indicated that states have the power to determine the scope of the public trust doctrine within their respective borders").

225. *Phillips Petroleum*, 484 U.S. at 475.

226. *Id.* at 483 n.12 ("It is worth noting, however, that even in some of these States - *i.e.*, even where tidelands are privately held - public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized.").

227. *Illinois Central*, 146 U.S. at 453.

228. Interestingly, the text of *Illinois Central* includes an inherent rebuttal to the argument that subsequent court decisions undermine the holding because they treat the case briefly, if at all, or fail to mention the public trust doctrine as a restriction on state power. Justice Field explained that "[g]eneral language sometimes found in

notion that states may determine the scope of their public trust by defining public trust uses or recognizing subordinate private rights in public trust lands is entirely inconsistent with interpreting the public trust as a federal floor that prohibits states from eliminating their trust responsibilities.<sup>229</sup>

## **VI. *Illinois Central's* Legacy On State Court Jurisprudence**

Interpreted as a whole, the Supreme Court's jurisprudence from *Martin* to *Phillips Petroleum* outlines a consistent principle: *Illinois Central* announced a general rule - a federal common law floor - concerning the responsibilities and constraints the public trust doctrine places on all states with respect to submerged lands. So long as states do not offend this general restraint on alienation, they are free to fill out the content of their own public trust doctrines by defining protected public trust uses and developing their own analytical approaches to analysis of conveyances alleged to offend the public trust.<sup>230</sup> This section examines how state courts have interpreted *Illinois Central*. This section first explains that state courts generally regard *Illinois Central's* restraint on alienation as a binding statement of federal law, then discusses how state courts have relied on *Illinois Central* to give content to the precise nature of the state's trustee obligations.

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opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, *must be read and construed with reference to the special facts* of the particular cases." *Id.* When construed with reference to the special facts of each case, neither *Shively*, *Phillips*, nor *Appleby* undermine or limit *Illinois Central*.

229. See *Phillips Petroleum*, 484 U.S. at 473, 483 n.12 (explaining that recognition of private interests in tidelands does not necessarily equate with relinquishment of state title or control to such lands).

230. Cf. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986). Justice Brennan explained "[s]tate experimentation cannot be excoriated simply because the experiments provide more rather than less protection for civil liberties and individual rights. While the Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, our federalism permits diversity. As tempting as it may be to harmonize results, . . . our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so." *Id.* In this sense, the relationship between the *Illinois Central* rule against alienation is analogous to the Supreme Court's approach to the federal Bill of Rights incorporated against the states. Under Supreme Court individual rights jurisprudence, states are free to enforce more stringent protections of individual liberties in their state constitutions and court systems, provided they do not fall below the minimum floor of protections guaranteed under the Constitution. *Id.* Similarly, with the public trust doctrine, states may expand, develop, or limit their own public trust jurisprudence, provided they do not violate the minimum floor of public trust protections required by the *Illinois Central* restraint on alienation.

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### A. Truly a “Lodestar”? General Trends in State Court Treatment of *Illinois Central*

Some state courts refer to *Illinois Central* as the “seminal case”<sup>231</sup> or adopt the language of Joseph Sax<sup>232</sup> and herald the case as the “lodestar” of American public trust jurisprudence.<sup>233</sup> Although several commentators have suggested that states recognize *Illinois Central* as persuasive but non-binding,<sup>234</sup> a close examination of state court decisions reveals that a majority of courts appear to cite *Illinois Central* as mandatory authority. Some thirty-five state courts have cited *Illinois Central*<sup>235</sup> in the context of

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231. *City of Berkeley v. Super. Ct.*, 606 P.2d 362, 365 (Cal. 1980); *In re Water Use Applications for the Waihole Ditch (Waihole Ditch)*, 9 P.3d 409, 440 (Haw. 2000); *Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983).

232. Sax, *supra* note 1, at 489 (calling the case a “lodestar in American public trust law”).

233. See *Owsichuk v. State Guide, Licensing, and Control Bd.*, 763 P.2d 488, 496 (Alaska 1988) (referencing the “lodestar of American public trust law, *Illinois Central*”) and *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. 1984) (“The ‘lodestar’ of the public trust doctrine in American law is *Illinois Central*[.]”). Black’s Law Dictionary defines “lodestar” as having the primary meaning of “[a] guiding star; an inspiration or model.” BRYAN A. GARNER, ED., BLACK’S LAW DICTIONARY 960 (8th ed. 2004).

234. See *Dunning*, WATERS AND WATER RIGHTS § 30.02(b) (“[G]enerally the state court decisions do not treat *Illinois Central* as binding upon them.”); *Rasband*, *supra* note 13, at 71-73 (explaining the different approaches taken by state courts); see *Pearson*, *supra* note 6, at 719 (“State courts have relied on *Illinois Central* to different degrees when adopting the public trust doctrines.”)

235. The thirty-five states to have cited *Illinois Central* in the context of developing their public trust doctrine are as follows: Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. See *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988) (“*Illinois Central* remains the leading case regarding public rights in tide and submerged lands conveyed by the state. . . . [We] hold that any state tideland conveyance which fails to satisfy the requirements of *Illinois Central* will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce and fishery.”); *Ariz. Ctr. for Law in Public Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991) (“From *Illinois Central*, we derive the proposition that the state’s responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself. . . . From *Illinois Central* we also derive the core proposition that the state must administer its interests in lands subject to the public trust consistent with public trust purposes.”); *Arkansas v. S. Sand & Material Co.*, 167 S.W. 854, 855, 856 (Ark. 1914) (recognizing that although a state may grant the right to extract gravel, such a right “does not imply the right of the state to relinquish its control over the river bed or to permit its use in a way which would interfere with navigation” and citing *Illinois Central* for “explicit approval” of that idea); *City of Berkeley v. Super. Ct.*, 606 P.2d 362, 33 (Cal. 1980) (“*Illinois Central* . . . was the seminal case on the scope of the public trust doctrine and remains the primary

authority even today. . . . The decision established the principle that a state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.”); N.Y., *New Haven & Hartford R.R. Co. v. Armstrong*, 102 A. 791, 794 (Conn. 1918) (citing *Shively* and *Illinois Central* for the proposition that a state may grant submerged lands when the grant does not offend the public interest); *State v. Black River Phosphate Co.*, 13 So. 640, 644 (Fla. 1893) (explaining *Illinois Central* articulated “the settled law of this country” that a state may only dispose of submerged lands when no substantial impairment of the public interest results); *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 1899 WL 1502, at \*5 (1899) (citing *Illinois Central* for the principle that the state of Hawaii holds land under navigable waters in trust for the people of Hawaii); *Kootenai Envtl. Alliance*, 671 P.2d 1085, 1088 (Idaho 1983) (citing *Illinois Central* as the “seminal case on the scope of the public trust doctrine” and the authority for “the principle that a state, as administrator of the trust in navigable waters, does not have the power to abdicate its role as trustee in favor of private parties”); *Att’y Gen. v. Kirk*, 162 Ill. 138, 146-49 (Ill. 1896) (citing and applying *Illinois Central* to uphold extension of Lake Front drive when no substantial interference with public uses); *Fenel v. City of Harpers Ferry*, 620 N.W.2d 808, 814 (Iowa 2000) (declining to extend public trust to public streets and alleys, but recognizing *Illinois Central* as “prohibit[ing] a state from conveying important natural resources to private parties”); *Winters v. Myers*, 140 P. 1033, 1037 (Kan. 1914) (citing *Illinois Central* for the proposition that there is an important distinction between grants that abdicate control over public uses in submerged lands and grants of lands that do not have that effect); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576, 589 (La. 1975) (phrasing the *Illinois Central* rule against abdication of sovereign control as a general rule applicable to “the states”); *Norton v. Town of Long Island*, 883 A.2d 889, 897, 899 (Me. 2005) (holding United States had not impliedly condemned the state’s public trust interests and recognizing general *Illinois Central* principle that states hold land in trust and that private interests in tidelands ordinarily fall subordinate to the state’s retained public trust rights); *Opinion of the Justices*, 424 N.E.2d 1092, 1099-1100, 1108 (Mass. 1981) (citing *Illinois Central* for the principle that “the general view in this country is that . . . a gross and egregious disregard of the public interest would not survive constitutional challenge” but considering mainly state law to determine a legislative act had authorized acquisition of private interests in, but not disposal of, submerged land); *Glass v. Goeckel*, 703 N.W.2d 58, 51-61 (Mich. 2005) (upholding pedestrian use of privately owned shoreline under public trust because the “state lacks the power to diminish[public rights in trust lands] when conveying littoral property to private parties, as recognized in *Illinois Central*”); *State v. Longyear Holding Co.*, 29 N.W.2d 657, 669 (Minn. 1947) (citing *Illinois Central* for the proposition that “in the exercise of such trust the state may dispose of partial interests in such lands, in the interest of all the people of the state, provided the primary purposes of the trust are not unduly abridged or burdened thereby”); *Rice v. Stewart*, 184 SO. 44, 50 (Miss. 1938) (relying on *Illinois Central* and state case law for the assertion that Mississippi owns land beneath tidal navigable lands “with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters”); *Dep’t of State Lands v. Pettibone*, 702 P.2d 948, 956-57 (Mont. 1985) (citing *Illinois Central* for the proposition that a state may not abdicate trust in public property); *Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 52(N.J. 1972) (citing *Illinois Central* as the “leading case” but grounding the New Jersey doctrine in even earlier roots of *Arnold v. Mundy*, 6 N.J.L. 1 (1824)); *Waterford Elec. Light, Heat & Power Co. v. State*, 203 N.Y.S. 858, 869 (N.Y.A.D. 1924) (using *Illinois Central* to articulate the limitations on the “rights of the Legislature of the state to release its governmental powers over navigable waters”); *Gwathmey v. State Dept. of Envtl. Health*,

articulating their public trust doctrine.<sup>236</sup> Of those, at least twenty-nine appear to recognize *Illinois Central* as a general statement of federal law by the United States Supreme Court that restrains their ability to convey public trust lands - further supporting the notion that a federal core principle underpins the *Illinois Central* rule restraining alienation of public trust lands.<sup>237</sup>

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*and Nat. Res.*, 464 S.E.2d 674 (N.C. 1995) (citing *Illinois Central*, but noting it did “not involve North Carolina law”); *Utd. Plainsmen Ass’n v. ND St. Water Conserv. Common*, 247 N.W.2d 457, 460-62 (N.D. 1976) (holding the state engineer’s discretionary authority to “allocate vital state resources” of water is circumscribed by the *Illinois Central* rule, as codified in North Dakota statutes); *Squire v. City of Cleveland*, 82 N.E.2d 709, 729-30 (Ohio 1948) (quoting from the “landmark” case and describing it as a “scholarly and persuasive” opinion before upholding city must condemn private lands before constructs aid to navigation in those lands); *Pac. Milling & Elev. Co. v. City of Portland*, 133 P.72, 79, 82 (Or. 1913) (holding Oregon became owner of the Willamette river on its admission to the Union after referencing *Illinois Central* for the limitation on the ability of the state to alienate submerged lands); *Reichard v. Flinn*, 20 Pa. C.C. 129 (Pa. Com. Pl. 1897) (referencing *Illinois Central* but holding the facts of the case do not require the court to reach the inquiry of whether the legislature may grant a municipal corporation power to dispose of public property to private hands); *Champlin’s Realty Assoc. v. Tillson*, 823 A.2d. 1162 (R.I. 2003) (citing *Illinois Central*); *State v. Columbia Ry., Gas & Elec. Co.*, 100 S.E. 355, 356 (S.C. 1919) (explaining public property in rivers “ingrafted with a trust for the benefit of the public, and was inalienable except for certain purposes”); *Parks v. Cooper*, 676 N.W.2d. 823, 829 (S.D. 2004) (noting *Illinois Central* as “first articulation” of public trust doctrine but concluding trust does not apply because beds of waters are non-navigable); *Natland Co. v. Baker’s Point, Inc.*, 865 S.W.2d 52, 59-60 (Tex. App. 1993) (discussing how the evolution of Texas public trust jurisprudence has significantly limited application of the public trust); *Colman v. Utah State Ld. Bd.* 795 P.2d 622, 635 (Utah 1990) (explaining *Illinois Central* is the “controlling case” on the nature of a state’s obligations relating to conveyances of public trust lands to private interests); *Vermont v. Ctl. Vt. Ry., Inc.*, 571 A.2d 1128, 1129, 1133 (Vt. 1990) (applying *Illinois Central* to frame inquiry as to whether railway can sell filled submerged lands to private developer, but noting states may develop different approaches to the doctrine); *Caminiti v. Boyle*, 732 P.2d 989, 994-95 (Wash. 1987) (referencing and applying *Illinois Central* inquiry to evaluate statute eliminating fees for installation of private recreational docks); *Doemel v. Jantz*, 193 N.W. 393 (Wis. 1923) (explaining the nature of the public trust doctrine in Wisconsin in light of *Illinois Central* principles); *City of Hampton v. Watson*, 89 S.E. 81, 82 (Va. 1916) (recognizing *Illinois Central* principle against alienation of submerged lands as controlling on Virginia).

236. The fifteen states that do not appear to have cited *Illinois Central* in the context of discussing public trust are Alabama, Colorado, Delaware, Georgia, Indiana, Kentucky, Maryland, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, Tennessee, West Virginia, and Wyoming.

237. The six states where the status of *Illinois Central* has not been fully clarified are Nebraska, Ohio, Pennsylvania, North Carolina, Texas, and South Dakota. Nebraska has cited *Illinois Central* only once, as one among a line of United States Supreme Court cases supporting the principle that when waters are navigable, “the bed thereunder would belong to the state, and be held by it in trust for the people. The waters in such streams would be held to be publici juris, and not subject to

Of the states considering the issue, only North Carolina raised some doubt as to whether *Illinois Central's* restraint on alienation was an expression of federal law<sup>238</sup> in a case involving competing claims of ownership between

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riparian claims by the adjoining landowner." *Crawford Co. v. Hathaway*, 93 N.W. 781, 789 (Neb. 1903), *overrul'd on other grounds by Wasserburger v. Coffee*, 141 N.W.2d 738 (Neb. 1966). Similarly, because Ohio, Pennsylvania, and South Dakota's scant treatment of the doctrine in a single case that did not raise the exact issue of the ability of the state to convey public trust lands, those states' view of the doctrine cannot be certainly described as binding. See *Squire v. City of Cleveland*, 82 N.E.2d 709, 729-30 (Ohio 1948); *Reichard v. Flinn*, 20 Pa. C.C. 129 (Pa. Ct. Com. Pl. 1897); *Parks v. Cooper*, 676 N.W.2d. 823, 829 (S.D. 2004). The limits of the North Carolina and Texas approaches are discussed *infra* notes 237-45 and accompanying text.

238. Professor Rasband argued that three states, North Carolina, South Carolina and Texas, have refused to apply the *Illinois Central* restraint on alienation as binding federal law, instead employing a rule of construction requiring a presumption against state intent to convey public trust interests in trust lands. Rasband, *supra* note 13, at 71-72 (citing to these three states in support of his argument that "[a] few state courts have refused to follow *Illinois Central* and have instead applied a presumption [against conveyances] akin to the approach taken in the equal footing cases . . ."). Professor Rasband cited to three decisions in support of his argument: *Gwathmey v. State Dept. of Envtl. Health, and Nat. Res.*, 464 S.E.2d 674 (N.C. 1995); *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133 (S.C. 1979); *State v. Lain*, 349 S.W.2d 579, 583 (Tex. 1961).

However, Professor Rasband's argument does not prove persuasive for two reasons. First, a state court's application of a presumption against conveyance of public trust interests is entirely consistent with *Illinois Central* because the *Illinois Central* Court expressly recognized that, prior to analyzing whether a legislature conveyed public trust lands in violation of the public trust doctrine, a court's preliminary inquiry should be whether the legislature intended to effectuate a conveyance. 146 U.S. 387, 450 (1892). Second, neither Texas nor South Carolina has rejected *Illinois Central* as a statement of federal law.

The South Carolina case, *Hobonny Club*, 252 S.E.2d 133, does not even mention *Illinois Central*, and on other occasions, South Carolina appellate courts have appeared to read *Illinois Central* as binding precedent on South Carolina courts. E.g. *State v. Columbia Ry., Gas & Elec. Co.*, 100 S.E. 355, 356 (S.C. 1919) (citing *Illinois Central* as one case supporting the general rule that "[t]he property of the state in . . . rivers was ingrafted with a trust for the benefit of the public, and was inalienable except for certain purposes"); *State v. Head*, 498 S.E.2d 389, 392 (S.C. Ct. App. 1997) (citing *Illinois Central* for the proposition that [t]he state holds tidal navigable watercourses subject to a public trust, and the state's ownership of the public trust is generally not alienable").

Similarly, the Texas case cited by Professor Rasband, *State v. Lain*, 349 S.W.2d 579 (Tex. 1961) does not undermine the claim that *Illinois Central* is grounded in federal law. After Galveston city ferry operators and managers began construction of a ferry landing and dredging of a ferry channel across submerged lands owned by private landowners, landowners sued the city and the state under a trespass theory to enjoin the operation. *Id.* at 550. The trial court granted the state's motion to be dismissed from the case as a non-party, and issued an injunction against the city. *Id.* The Texas Supreme Court affirmed the lower courts' issuance of an injunction because only the state could assert public rights by challenging the validity of the

private landowners and the state to marshlands beneath Middle Sound and High Creek. The state appealed an adverse decision by the trial court to the state supreme court,<sup>239</sup> arguing that because the public trust doctrine precluded the state from conveying title to private landowners free of public trust rights, the trial court erred in holding certain privately owned marshlands were not impressed by the public trust.<sup>240</sup> The state relied on an earlier North Carolina case, *Shepard's Point Land Co. v. Atlantic Hotel*,<sup>241</sup> which had cited *Illinois Central* for the rule that the legislature may not convey lands subject to the public trust doctrine to private ownership when the transfer would impair public interests.<sup>242</sup> Distinguishing *Shepard's Point* on its facts, the court disavowed the case to the extent that it implied a complete prohibition on the ability to convey submerged lands to private parties without reserving public trust rights.<sup>243</sup> In rejecting the state's argument, the court dropped a footnote mentioning that *Illinois Central* "did not involve North Carolina law."<sup>244</sup> However, the supreme court ultimately ruled for the state, upholding public trust right in the marshlands because the landowners failed to rebut the presumption against conveyance of public trust rights from the state.<sup>245</sup>

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land owner's title under the public trust, and the state had refused to participate in the litigation. *Id.* at 558-59 (musing that "the State . . . could have challenged the plaintiffs' title and . . . [h]ad it done so, operation of the ferry could not have been enjoined"). Thus, *Lain* is better explained as a case where the public trust doctrine could not be enforced because the state did not, in its capacity as trustee, assert public rights. The court's affirmation of the validity of the landowner's (or rather, his predecessor's) grant from the Republic of Texas does not contradict *Illinois Central* rule because the court expressly noted there was no indication that the private ownership was interfering with public uses. *Id.* at 583, 584.

239. The state appealed the state trial court's holding that the majority of the lands were not impressed by the public trust directly to the state supreme court. *Gwathmey*, 464 S.E.2d 674, at 677.

240. *Id.* at 683 n.5 (N.C. 1995). In approximately 1987, the North Carolina submerged lands program issued letters to private landowners confirming their ownership of marshlands beneath Middle Sound and High Creek, subject to a reservation of public trust rights by the state. *Id.* at 676. The state board of education had conveyed the marshlands between 1926 and 1945, using language characteristic of a fee simple grant. *Id.* The landowners sued the state, seeking declarations on the quality of their titles in the lands. *Id.*

241. *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39 (N.C. 1903).

242. *Gwathmey*, 464 S.E.2d at 682-83.

243. *Id.* at 683.

244. *Id.* at 683 n.5. In its entirety, the footnote read: "It is worth noting that the Supreme Court in *Illinois Central* admitted that no authority supported its proposition. More importantly, that case did not involve North Carolina law." *Id.* (citation omitted).

245. *Id.* at 686. The court remanded the case to the trial court on other grounds to clarify factual findings, and because the trial court potentially erred by

The *Gwathmey* decision does not undermine the general theory of *Illinois Central* as federal common law. The North Carolina court declined to apply an earlier state court decision, not *Illinois Central*, and only rejected the state case to the extent that it suggested an absolute rule against alienation: that conveyance of public trust resources is *never* permissible.<sup>246</sup> Limiting its consideration of *Illinois Central* to a footnote, the court commented only that *Illinois Central* “did not involve North Carolina law;” it did not state that the decision was not binding on the states. Indeed, the ultimate result reached in the case - the application of a presumption against conveyance of public trust rights to preserve state control of trust rights - is entirely consistent with *Illinois Central*.<sup>247</sup> State courts’ treatment of the *Illinois Central* decision, with the majority of states having considered the doctrine and cited it as binding authority, corroborates the doctrine’s federal core.<sup>248</sup> The next section builds on these observations, using specific examples of state court decisions adopting and applying the *Illinois Central* restraint on alienation.

### **B. How States Have Put the *Illinois Central* Public Trust Doctrine To Work**<sup>249</sup>

This section first examines how state courts have employed *Illinois Central* as a foundational tool for filling in the details of the public trust doctrine then explains how state courts have articulated their public trust doctrines through a coordinated reading of *Illinois Central* and state constitutional provisions by considering examples from state courts that have used *Illinois Central* as the foundational principle for public trust alienation analysis. This section illustrates how state courts are applying *Illinois Central* and how the approach of state courts is consistent with a federal common law explanation of *Illinois Central*. Thus, *Illinois Central*

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making its navigable-in-fact determinations based on actual use of the waters, rather on capacity of the waters to support navigation. *Id.* at 688.

246. *Id.* at 683. Such an absolute rule is stricter than the one announced in *Illinois Central*, so the North Carolina court’s rejection of an *absolute* restraint on alienation under state law does not necessarily renounce the *qualified* restraint on alienation required under *Illinois Central*.

247. See *Illinois Central*, 146 U.S. 387, 450 (1892) (determining, as a preliminary inquiry, whether the state *intended* to convey public trust rights).

248. Although the state cases do not explicitly explain that the state recognizes the *Illinois Central* rule as directly binding, this is unremarkable since Supremacy Clause principles logically support that quotation of a Supreme Court decision by a state court constitutes a tacit recognition of the decision as binding on the court.

249. The Coastal States Organization coined the phrase “Putting the Public Trust Doctrine to Work” as the title of its treatise on coastal state approaches to the public trust doctrine. See DAVID C. SLADE, ET AL, EDS. PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997); see also DAVID C. SLADE, THE PUBLIC TRUST DOCTRINE IN MOTION, 1997-2008 (2008).

establishes not only a binding federal floor on state public trust doctrines, but also supplies a useful starting point for state development of state public trust law. Some states have put the public trust doctrine to work by using *Illinois Central* as the foundational principle underlying their development of a public trust doctrine.<sup>250</sup> For example, Alaska explicitly adopted the *Illinois Central* rule as its test for “determining whether a state conveyance has passed title to a parcel of tideland free of any trust obligations.”<sup>251</sup> Affirming a lower court’s dismissal of a landowners trespass claim against a state lessee who was net fishing in tidewaters,<sup>252</sup> the Alaska Supreme Court applied *Illinois Central* as a two-prong inquiry: (1) whether the conveyance furthered a public trust purpose, or (2) whether the conveyance did not substantially impair the public interest in the tidelands.<sup>253</sup>

The landowner could not meet the first prong because language of the state tideland patent, under which the landowner claimed title to the tidelands, did not clearly express the state’s intent to abdicate its trust responsibilities over the land.<sup>254</sup> And the landowner failed to satisfy the second prong because, although his tideland parcel was small, a ruling in favor of the landowner could substantially impair the public trust by implicating public trust rights in nearly all tidelands occupied before Alaska obtained statehood in 1958.<sup>255</sup> The Alaska Supreme Court thus applied the *Illinois Central* inquiry, giving meaning to the term “substantial impairment” as including consideration of both the size of the submerged land parcel at issue and the broader statewide implications for the public trust that could stem from the precedent set by eliminating public trust rights in the specific

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250. E.g., *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (Alaska 1988); *Caminiti v. Boyle*, 732 P.2d 989, 994-95 (Wash. 1987).

251. *CWC Fisheries*, 755 P.2d at 1119.

252. *Id.* at 1116-1117.

253. *Id.* at 1119.

254. *Id.* at 1119.

255. *Id.* at 1120. Alaska also relied on the *Illinois Central* articulation of public uses to reject a claim that mining is a public trust purpose under Alaska’s public trust doctrine. *Hayes v. A.J. Assoc., Inc.*, 846 P.2d 131, 133 (Alaska, 1993). After a lessee of mineral rights on filled tidelands staked a claim to a mineral estate, the lessor sought to eject the lessee. *Id.* at 131. The lessee argued he could not be ejected because mining is a public trust activity. *Id.* at 133. Reversing the trial court’s summary judgment in favor of the lessee, the Alaska Supreme Court held mining was not a public trust use because the uses described in *Illinois Central* had the common thread of “commerce in the sense of trade, traffic or transportation of goods over navigable waters” whereas mining involved an “exclusive, depleting use of a non-renewable resource for private profit.” *Id.* at 133. The *Hayes* decision is an example of the state relying on *Illinois Central* to fill in the content of the state’s public trust by defining the trust uses recognized under state law.

parcel at issue.<sup>256</sup>

A number of states have codified protections for common natural resources within their constitutions.<sup>257</sup> Some of these constitutional provisions have the effect of expanding the scope of public trust rights beyond traditionally recognized uses in submerged lands.<sup>258</sup> State courts

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256. See *CWC Fisheries*, 755 P.2d at 1120. (“The statute at issue here made available for private ownership virtually all Alaska tidelands occupied and developed prior to statehood. To hold that persons receiving title under that statute hold the fee free of any public trust obligations would, we believe, amount to a substantial impairment of the public’s interest in state tidelands as a whole.”) (citations omitted).

Similarly, in *Caminiti v. Boyle*, 732 P.2d 989, 994-95 (Wash. 1987), the Washington Supreme Court upheld the constitutionality of a state statute abolishing lease or rental fees adopted a two-prong inquiry for testing a state’s alienation of public trust lands. *Id.* The *Caminiti* court framed its inquiry as (1) whether the state has given up its right of control over the *jus publicum* interests in trust lands, and if so, (2) whether the state has promoted the interests or not substantially impaired the *jus publicum*. *Id.* Applying the two-prong test, the state supreme court upheld challenge to the validity of a state statute abolishing lease or rental fees previously charged by the state to tideland and shoreland owners for the right to install and maintain private recreational docks on submerged lands. *Id.* at 991. The court observed that the legislature gave up relatively little control over the tidelands, as the statute only applied to private recreational docks, and the state also retained the ability to regulate the size and construction of the docks as well as the ability to repeal the statute. *Id.* at 995, 996. Moreover, the statute did not substantially impair the *jus publicum* because use of private docks promotes public use of waters. *Id.* at 996.

257. See William Araiza, *Democracy, Distrust and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 438, 438 n.244 (1997) (noting “[t]he constitutions of approximately two-thirds of the fifty states include provisions that, in some way or another, aim at the protection of natural resources” and listing provisions); see also *id.* at 451 (“At least fifteen constitutions either claim some type of natural resource as the public domain, for reasons other than pure reservation of exploitation rights, or restrict or qualify the government’s power to alienate such resources.”) (citations omitted).

258. See *Owsichek v. State Guide Licens’g and Control Bd.*, 763 P.2d 488 (Alaska 1988), where the state supreme court relied on the Common Use Clause of Alaska’s Constitution (reading, in relevant part that “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use”) to overturn a state statute granting certain geographic areas as exclusive hunting domain of designated hunting guides as violating the state’s public trust. *Id.* at 491-97 (quoting ALASKA CONST. art. VIII, § 3). See also *Save Ourselves, Inc. v. La. Envtl. Control Comm’n*, 452 So.2d 1152, 1154 (La. 1984) (remanding case after explaining how Art. IX, § 3 of Louisiana’s Constitution protects “air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy”); *Winters v. Myers*, 140 P. 1033, 1038 (Kan. 1914) (relying on state constitutional equal protection clause and *Illinois Central* to hold state cannot convey island in middle of navigable river under state grant of school trust lands to private owner because the state holds submerged lands for the

have applied these constitutional principles in conjunction with, or in lieu of<sup>259</sup> an *Illinois Central* analysis. For example, the Arizona Court of Appeals struck down a state statute that substantially relinquished the state's title to beds of navigable watercourses as violating the public trust doctrine<sup>260</sup> as well as Arizona's Constitution.<sup>261</sup> State courts' use of state constitutional provisions to articulate or expand the public trust does not run contrary to the theory of *Illinois Central* as grounded in federal law. Instead, these interpretations are compatible with an understanding of *Illinois Central* as establishing a federal common law "floor" limitation on state power, upon which states are free to expand using state law.<sup>262</sup>

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benefit of the public and "[a] statute which has the effect of thus transferring the property of all the people, without compensation or public advantage, to a few, denies the equal protection and benefit to the people for which government is instituted"): *See also* cases cited *infra* note 271 (expanding public trust uses to water rights after analysis of state constitutional provisions and *Illinois Central* public trust principles)

259. *See Opinion of the Justices*, 437 A.2d 597 (Me. 1981) The state supreme court issue an advisory opinion upholding the constitutionality under state law of state statute releasing filled lands from public trust claims by the state, applying the state public trust doctrine as requested by the referred questions from the legislature to the court. *Id.* at 604. The court applied a five-prong test derived from the Legislative Powers Clause of the Maine Constitution (art. IV, pt. 3, § 1) to evaluate whether the legislative action conferred public benefit. *Id.* at 604, 607-09.

260. *Ariz. Ctr. for Law in Public Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991). The act, H.B. 2017, effected an "uncompensated quitclaim of the state's equal footing interest in all watercourses other than the Colorado, Gila, Salt, and Verde Rivers and in all lands formerly within those rivers but outside their current beds" and a \$25 per acre quitclaim fee for the rivers excluded from the uncompensated quitclaim. *Id.* at 162.

261. The Arizona court rooted its state law grounds for the decision in the state's "constitutional commitment to the checks and balances of a government of divided powers" and in the Gift Clause, the text of which prohibits the State from making "any donation or grant . . . to any individual, association, or corporation") *Id.* at 168; ARIZ. CONST. art IX, § 7. The court construed the Gift Clause as the state "constitutional framework for judicial review of an attempted legislative transfer of a portion of the public trust." *Id.* at 170.

262. This approach is analogous to that taken by the Supreme Court between the federal Constitution and state governments in protecting individual rights and civil liberties that have been incorporated under the Fourteenth Amendment against the states. *See* Brennan, *supra* note 229, at 550 ("the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor. . . . While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment."); *see, e.g., Hassell*, 837 P.2d at 167 (characterizing *Illinois Central* as explaining a "common law" doctrine that "restricts the sovereign's ability to dispose of resources held in public trust" but that "[w]hether an attempted disposition of public trust property meets such criteria [laid out in *Illinois Central*] is not determined pursuant to federal common law. Rather, as an attribute of

California's use of its state law - in conjunction with the general principles of *Illinois Central* - to extend the public trust doctrine to water rights provides a good example of a state using *Illinois Central* as a federal floor for its public trust jurisprudence. Although by its terms *Illinois Central* applied a trust responsibility only to lands submerged beneath navigable waters,<sup>263</sup> the California Supreme Court, in its *Mono Lake* decision, used the underlying principles of *Illinois Central* doctrine to expand the scope of the public trust to apply to water rights.<sup>264</sup> After state-authorized water diversions from non-navigable feeder streams depleted the level of navigable Mono Lake,<sup>265</sup> doubling the salinity level and exposing local bird species to predators, environmentalists filed suit in 1979 to enjoin the diversions, arguing a violation of the state's public trust duties.<sup>266</sup>

Vacating the trial court's judgment, the California Supreme Court ruled for the environmentalists.<sup>267</sup> The state supreme court cited *Illinois Central* and state cases applying *Illinois Central* principles to flesh out the state's trust duties in submerged lands, concluding the "cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust."<sup>268</sup> The court ruled that the public trust impressed the state with a "duty" to "protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."<sup>269</sup> Seeking an accommodation of the demands of the state water rights

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federalism, each state must develop its own jurisprudence for the admission of the lands it holds in public trust.").

263. *Illinois Central*, 146 U.S. 387, 453 (1892)

264. *Nat'l Audubon Soc'y v. Super. Ct. (Mono Lake)*, 658 P.2d 709 (Cal. 1983). In 2000, the Hawaii Supreme Court followed California's lead of relying on the *Illinois Central* public trust doctrine and a state constitutional provision to protect water as a public trust resource. *In re Waihole Ditch*, 9 P.3d 409, 439-445 (Haw. 2000).

265. "Mono Lake, the second largest lake in California, sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. The lake is saline; it contains no fish but . . . [i]slands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of Northern Phalarope, Wilson's Phalarope, and Eared Grebe." *Mono Lake*, 658 P.2d at 711.

266. *Mono Lake*, 658 P.2d at 712, 713-18 (describing factual and procedural history of the case); see Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 705-06 (1995) (describing the history behind the Mono Lake decision).

267. *Mono Lake*, 658 P.2d at 732-33.

268. *Id.* at 723.

269. *Id.* at 724.

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system<sup>270</sup> and the public trust doctrine,<sup>271</sup> the California Supreme Court held the public trust principle that “[t]he state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters” applies to water rights as well as submerged lands.<sup>272</sup> In its capacity as trustee, California thus had a duty to exercise continuous supervision to ensure consideration of trust values in water rights allocations, including revocation of revoke water rights when necessary prevent harm to trust uses.<sup>273</sup>

Renowned for its impact on both California water allocation and public trust law,<sup>274</sup> the *Mono Lake* decision also stands for several important principles about the relationship between the *Illinois Central* restraint on alienation and state development of public trust law. It illustrates how *Illinois Central's* restraint on alienation outlines only one component of a state’s public trust duties, which extend more broadly to encompass the duty to administer an ongoing trust.<sup>275</sup> Moreover, *Mono Lake* provides an example of how a court can harmonize a state’s trustee duty with existing state law frameworks, because the California court required the state to accommodate the state water law system in its duty to preserve public trust resources. Finally, *Mono Lake* demonstrates how a state may go beyond the federal floor (restraint on alienation of submerged trust lands) to expand the public trust doctrine to other resources, such as water, when such an expansion is compatible with state law. The *Mono Lake* decision is but one example of how state courts have harmonized the *Illinois Central* federal common law restraint on alienation with state law to develop a body of

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270. The court considered not only California’s water code, but also Article X, section 2 of the California Constitution, which reads in part: “It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people for the public welfare.”

271. *Mono Lake*, 658 P.2d at 727 (explaining the court was “seeking an accommodation” between the two systems because “[t]o embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decay as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust”).

272. *Id.*

273. *Id.* at 727-29; *see also* Blumm & Schwartz, *supra* note 265, at 707-08 (emphasizing the significance of decision’s development of the balance between water law and public trust principles in California).

274. *See generally* Blumm & Schwartz, *supra* note 265 (discussing the landmark nature of the *Mono Lake* case as an expression of the public trust doctrine, its legacy in California law, and its progeny in other western states).

275. *Mono Lake*, 658 P.2d at 723.

public trust jurisprudence.<sup>276</sup>

## **VII. Conclusion**

The *Illinois Central* public trust doctrine is best understood as the result of federal common law reasoning, based on the Supreme Court's interpretation of the equal footing doctrine and the phrase "this Union" in Article 4, section 3 of the Constitution.<sup>277</sup> The public trust doctrine, restraining the states from abdicating control over the lands they hold in trust for the public as part of their duty as trustee, devolved from English common law to the states.

Grounding the doctrine in federal common law is consistent with both the text and rationale of the *Illinois Central* opinion. Neither the jurisprudential shift away from general federal common law since *Erie* nor subsequent Supreme Court decisions on the nature of a state's right in submerged lands erode the applicability of *Illinois Central* as binding precedent on the states.<sup>278</sup> Interpreting the *Illinois Central* public trust doctrine as a federal common law "floor" on state public trust responsibilities<sup>279</sup> provides enduring protection against private monopolies of public resources while allowing each state to flexibly apply and expand its own public trust jurisprudence.

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276. See *supra* notes 249-60 and accompanying text.

277. U.S. CONST. art. IV, § 3, cl. 1.

278. See *supra* notes 156-66 and accompanying text.

279. See *supra* note 229 and accompanying text.

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