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Environmental Law - the Public Trust Doctrine - Possible State Violations and the Potential for United States Supreme Court Review

I. Introduction

For several decades, a premise has existed in this country that Americans are depleting our public “commons.” “Commons” are those land areas or resources which are not owned by any particular individual, but are used by all.¹ When left unprotected and subject to free, unlimited, and unregulated use, the common areas and resources are likely to be overused and destroyed. Even state administrative bodies have managed public lands poorly or have converted them to private uses in a non-accountable fashion.² The public trust doctrine evolved in this country to protect these lands and resources from such abuses.

The public trust doctrine in American law is “a general rule that land titles from the federal government [extend] only to the high-water mark, with title seaward of that point remaining in the states, which, upon their admission to the Union, acquired such shore lands in ‘trusteeship’ for the public.”^{3, 4} The doctrine is premised on the idea that a state which holds land in trust for the public is most likely to allocate it equitably among users. The goal has been for states to foster a form of “sustainable development” — that level of use which does not deplete a resource, but allows it to rejuvenate so that people may continue to use it. State implementation of the public trust doctrine has led more often to a contrary result, however, as well as extensive litigation.

¹ “Commons” are defined specifically as: “Squares; pleasure grounds and spaces or open places for public use or public recreation owned by towns or cities - in modern usage usually called ‘parks’.” BLACK’S LAW DICTIONARY 278 (6th ed. 1990).

² Thomas A. Campbell, *The Public Trust, What’s it Worth?* 34 NAT. RESOURCES J. 73, 81 (1994).

³ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970) (citing *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894)).

⁴ The law regarding trust land is well established, while the law dealing with trust resources is less developed. Campbell, *supra* note 2, at 76.

Since the nineteenth century,⁵ the United States Supreme Court has adjudicated several key issues relating to lands preserved for the public trust.⁶ In its most recent case,⁷ the Court affirmed that “the [s]tates, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”⁸ The Court also indicated that the states cannot divest their ownership of public trust lands when they transfer ownership to private parties, regardless of how long the private parties hold record title or pay taxes on the lands.⁹ In an earlier case,¹⁰ however, the Court implied that state abdication of control over small tracts of trust land is possible if the public benefits from these ownership transfers.¹¹

Whether in ignorance or in defiance of these precedents, courts in California, New Jersey, and Rhode Island have derived their own rules regarding their states’ abdication of control over public trust land to private parties.¹² The Supreme Court of California sustained private parties’ complete ownership of a large tract of formerly public trust lands in the San Francisco Bay area on the basis that predecessors relying on their ownership rights had filled the lands.¹³ The State of New Jersey has adopted a constitutional amendment which provides that where the State fails within a given period of time to assert its right to lands subject to the

⁵ “The American development of the public trust doctrine can be traced to the case of *Martin v. Waddell* decided in 1842.” John P. Ellington et al., Comment, *State Riparian Claims: A New Direction in Revenue Raising*, 2 DICK. J. ENVTL. L. & POL’Y 35, 37 (1992) (citation omitted).

⁶ See generally *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) (lands held by the King in trust for the people were subsequently granted to the original thirteen colonies subject to the same condition); *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845) (the public trust doctrine extended to all states upon their entry to the Union); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

⁷ *Phillips Petroleum*, 484 U.S. 469 (1988).

⁸ *Id.* at 476.

⁹ *Id.* at 484.

¹⁰ *Illinois Cent.*, 146 U.S. 387.

¹¹ See *id.* at 453. “A grant of *all* the lands under the navigable waters of a [s]tate has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.” *Id.* (emphasis added). The Court allowed, however, that states may relinquish the use and control of “parcels” of trust land to private parties if such action does not impair the public interest in remaining lands and waters. *Id.* See also *Sax*, *supra* note 3, at 486, 489 (noting that the Supreme Court held that a state may not divest itself of its authority to govern an area where the state is responsible for exercising its police power).

¹² See generally *City of Berkeley v. Superior Ct. of Alameda*, 606 P.2d 362 (Cal.), *cert. denied*, 449 U.S. 840 (1980); *Dickinson v. Fund for Support of Free Pub. Schs.*, 469 A.2d 1 (N.J. 1983); *Greater Providence Chamber of Commerce v. Rhode Island*, 657 A.2d 1038 (R.I. 1995).

¹³ See *City of Berkeley*, 606 P.2d at 373.

ebb and flow of the tide, title vests in upland owners.¹⁴ Presumably, title to formerly public lands, granted before the specified time period, remains in private ownership. The Supreme Court of Rhode Island has held that certain private parties may have obtained ownership rights in previously state-owned public trust land. These parties must have reclaimed the land from the sea by filling below mean high tide out to a harbor line¹⁵ and subsequently obtained title by a valid state legislative grant.

These state courts have either misconstrued the Supreme Court's rules regarding abdication of ownership of public trust lands, or they may be attempting to bend those rules for purposes of economic benefit via land sales or taxes. Whether actions of these states infringe upon or violate the public trust law of this country is the subject of this Comment. Following a brief explanation of public trust law, this Comment will address each of these cases in more detail. It will then analyze how these court actions threaten the viability of the public trust doctrine. Finally, it will consider how cases like these might reach the United States Supreme Court for adjudication, although the states are supposedly the final arbiters of public trust issues.

II. The Extent Of The Public Trust Doctrine

American public trust law derived from Roman and English precedent and their ideas concerning "the nature of property rights in rivers, the sea, and the seashore."¹⁶ Both of these legal systems supported the notion that "certain public uses ought to be specially protected."¹⁷ In England, for example, the King was the trustee who held the rights to land in trust for the public.¹⁸ Following the American Revolution, the citizens of each state in the newly established United States assumed ownership of the common lands that the King had held in trust, and the concept of protecting them was likewise transferred.¹⁹

Modern American public trust law generally imposes three types of restrictions on governmental authority over public trust lands.²⁰ First, trust property must be used for a public purpose and be held available for

¹⁴ *Dickinson*, 469 A.2d at 3.

¹⁵ *See Greater Providence*, 657 A.2d at 1039, 1041.

¹⁶ *Sax*, *supra* note 3, at 475.

¹⁷ *Id.* at 476 (footnote omitted).

¹⁸ *See Ellington et al.*, *supra* note 5, at 37.

¹⁹ *See id.*

²⁰ *Sax*, *supra* note 3, at 477.

the general public's use.²¹ Second, "[trust] property may not be sold, even for a fair cash equivalent"²² Finally, a state must maintain trust property for specific uses;²³ traditionally these uses were navigation, commerce, and fishing.²⁴ Some states, however, have preserved public trust lands for recreational purposes, scenic views, open space, bird and marine life habitat, and in order to support ecological and scientific study.²⁵

Absent these restrictions on governmental authority regarding public trust lands, courts might be more likely to accept claims of private property rights, and the effect "would be to prohibit the government from ever accommodating new public needs by reallocating resources."²⁶ The landmark case in American public trust jurisprudence,²⁷ *Illinois Central Railroad Co. v. Illinois*,²⁸ addressed this issue. In that case, the Supreme Court determined whether the state legislature's conveyance to a railroad company of submerged public trust lands in the Chicago harbor was invalid, thus enabling the State to repossess the lands previously granted.²⁹

In its opinion, the Court differentiated between public lands and public lands covered by navigable waters.³⁰ While public lands are subject to preemption and sale, a state holds public lands under navigable waters or submerged lands in trust for the people for navigation, commerce, and fishing purposes.³¹ Private parties may not obstruct or interfere with the specific uses of submerged public trust lands.³² The Court thus defined the public trust doctrine with respect to submerged lands and established limits regarding the extent to which a state controls such lands and could relinquish its control.³³

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Illinois Cent.*, 146 U.S. at 452 (The public trust title "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein[,] freed from the obstruction or interference of private parties.").

²⁵ See Campbell, *supra* note 2, at 77 (citations omitted).

²⁶ Sax, *supra* note 3, at 482.

²⁷ *Id.* at 489.

²⁸ *Illinois Cent.*, 146 U.S. 387.

²⁹ *Id.* at 452.

³⁰ *Id.* See also Ellington et al., *supra* note 5, at 40.

³¹ *Illinois Cent.*, 146 U.S. at 452.

³² *Id.*

³³ The Court stated:

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 without substantial impairment

The Supreme Court emphasized that abdicating ownership of public trust lands under navigable waters was inconsistent with the notion of preserving such areas for public use.³⁴ It indicated that the public trust doctrine prevents a state from abdicating its control over the land under an entire body of water such as a bay, harbor, lake, or sea.³⁵ The Court did find, however, that grants of parcels of land under navigable waters to serve as foundation for docks, wharves, and piers, would aid commerce and would not greatly interfere with the public interest in remaining lands and waters.³⁶ Thus, while the Court imposed limits on a state's ability to divest public trust lands as a whole,³⁷ it seemed to uphold a state's grants of parcels of land, subject to two narrow exceptions: a state could abdicate its control for trust purposes over parcels of land only if (1) the private use promoted the public interest, or (2) the disposition would not substantially impair the public interest in the remaining lands and waters.³⁸

Although the Court in *Illinois Central* ultimately upheld state divestiture of public trust lands under navigable waters, it emphasized that the state's power to hold land in trust "cannot be placed entirely beyond the direction and control of the [s]tate."³⁹ Thus, the State of Illinois retained the right to revoke its grant of public trust land to a private party.⁴⁰ In *Illinois Central*, however, only four years passed between the State's grant of trust land to the railroad and its act to reassert ownership over those lands.⁴¹ It is conceivable that a state could revoke grants of former public trust lands to private parties at any time, even hundreds of years after the transfer.⁴²

In 1988, nearly one hundred years after the Supreme Court decided *Illinois Central*, the Court articulated broader standards for the public trust doctrine in *Phillips Petroleum Co. v. Mississippi*.⁴³ This case involved a dispute between the State of Mississippi and Phillips Petroleum ("Phillips")

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.

Id. at 435.

³⁴ *Id.* at 453.

³⁵ *See id.* at 452-53.

³⁶ *Illinois Cent.*, 146 U.S. at 452.

³⁷ *See id.* at 453.

³⁸ *Id.*

³⁹ *Id.* at 454.

⁴⁰ *See id.* at 453-54.

⁴¹ *See* Ellington et al., *supra* note 5, at 41.

⁴² *Id.*

⁴³ *Phillips Petroleum*, 484 U.S. 469, 485 (O'Connor, J., dissenting).

over the title to forty-two acres of land underlying non-navigable waters.⁴⁴ Phillips' claim to the land arose from prestatehood Spanish land grants.⁴⁵ The State of Mississippi contended that "it acquired at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not."⁴⁶ The Court held that the land area, although not navigable, was still subject to the ebb and flow of the tide, and thus the State obtained title to such land upon entry into the Union.⁴⁷ The rule from *Phillips Petroleum* that the ebb and flow of the tide, not navigability, defines the boundaries of public trust lands still prevails in this country.

In deriving the rule of *Phillips Petroleum*, the Court specifically "recognized the importance of honoring reasonable expectations in property interests,"⁴⁸ but concluded that Phillips' expectations were not reasonable in light of Mississippi cases which "made [it] clear that the State's claims were not limited to lands under navigable waterways."⁴⁹ The Court also stated that the outcome in this type of situation does not change because property owners hold record title for a given length of time or because they have paid taxes on such lands.⁵⁰ Thus, the Court rejected Phillips' argument that the company owned the land at issue because it had long held the record title and because the company and its predecessors-in-interest had paid taxes on the lands for over a century.⁵¹

Although the Supreme Court in *Phillips Petroleum* vested title in the land to the State of Mississippi, the Court gave reassurance that the case would not upset title records in states that previously divested public trust claims to lands subject to the ebb and flow of the tide.⁵² Considered in conjunction with *Illinois Central*, however, the *Phillips Petroleum* case casts doubt on private property titles throughout the country.⁵³ The *Phillips Petroleum* decision "endorsed a state's claim of ownership to land which the state had a duty to administer [for the public trust] and yet ignored for many years."⁵⁴ The Court in *Illinois Central* supported a state's revoca-

⁴⁴ *Id.* at 472.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 476.

⁴⁸ *Phillips Petroleum*, 484 U.S. at 482.

⁴⁹ *Id.*

⁵⁰ *Id.* at 484.

⁵¹ *Id.* at 482, 484.

⁵² *Id.* at 483.

⁵³ *See, e.g.,* Ellington et al., *supra* note 5, at 43.

⁵⁴ *Id.* In *Phillips Petroleum*, once Mississippi determined that the land overlaid valuable oil, gas, and mineral deposits, the State's potential to earn money from developing the land was likely

tion of title to public trust lands previously granted to private parties.⁵⁵ Adding to the uncertainty is the Supreme Court's statement in *Phillips Petroleum* that the individual states retain discretion to develop and administer the law of real property.⁵⁶ As a result, the states have adopted widely varying public trust policies and legislation that are inconsistent and threaten private property titles.⁵⁷ The combination of these factors has resulted in court rulings in several states that potentially violate the standards of the public trust doctrine.

III. Several States' Potential Violations Of The Public Trust Doctrine

The concept of the public trust doctrine became vague following the Supreme Court's decision in *Phillips Petroleum*, thus the states interpreted and applied it differently. These interpretations, embodied in state legislation and policy, have created title conflicts and made public trust law the subject of much adjudication in the states. A discussion follows concerning cases in California, New Jersey, and Rhode Island,⁵⁸ the holdings of which appear to violate the most basic requirements of the public trust doctrine.

A. California

As a result of the California Supreme Court's decision in *City of Berkeley*,⁵⁹ title to a large tract of land along the San Francisco Bay shoreline vested in private owners, and, regarding some parcels, was not subject to the public trust.⁶⁰ The court decided the case several years

the driving factor for its renewed interest in the land. See *Phillips Petroleum*, 484 U.S. at 492-94 (O'Connor, J., dissenting).

⁵⁵ See *Illinois Cent.*, 146 U.S. at 453-54.

⁵⁶ *Phillips Petroleum*, 484 U.S. at 484.

⁵⁷ See Ellington et al., *supra* note 5, at 43. "The *Phillips Petroleum* decision will . . . [throw] a cloud on an unknown number of [private property] titles." *Id.* For an analysis of the public trust doctrine as it exists in New Jersey, Mississippi, Louisiana, Delaware, and Rhode Island, see *id.* at 44-86. "[A] number of states have reexamined the function of the public trust within their states." *Id.* at 73. See also *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 60 (Tex. Ct. App. 1993) ("This doctrine that the sovereign holds submerged lands in trust for the . . . public . . . has not fared well in Texas jurisprudence."); Opinion of the Justices, 437 A.2d 597 (Me. 1981) (determining the constitutionality of a statute which proposed to release to private parties the State's ownership interest in filled tidelands).

⁵⁸ See *supra* note 12.

⁵⁹ *City of Berkeley*, 606 P.2d 362.

⁶⁰ In its opinion, the court stated that "almost one-quarter of the Bay is claimed by private persons." *Id.* at 366. The court concluded "that tracts of land granted by the [State] that have been improved or filled are, to the degree hereinafter described, free of the public trust." *Id.* at

before the United States Supreme Court decided *Phillips Petroleum*.⁶¹ *City of Berkeley* involved conflicting ownership claims over tidelands⁶² along the San Francisco Bay shoreline.⁶³ A private developer and a private landowner brought an action against both the State of California and the City of Berkeley to quiet title to seventy-nine acres of land along the Bay.⁶⁴ The plaintiffs claimed title pursuant to an 1870 legislative act under which the State conveyed title to their predecessors.⁶⁵ The City filled most of the tidelands as part of a garbage disposal program many years after that transfer of title.⁶⁶

The California Supreme Court held that the 1870 act conveyed filled properties free of the public trust, whether or not private parties substantially improved them, "to the extent the areas of such parcels [were] not subject to tidal action."⁶⁷ In its decision, the court provided a brief explanation of *Illinois Central* to delineate the general scope of the public trust doctrine.⁶⁸ It also noted that "[t]he principles of *Illinois Central* have suffered a checkered history in California."⁶⁹ The court then applied the principles of an earlier California public trust case, *People v. California Fish Co.*,⁷⁰ in deciding *City of Berkeley*, without reaching the same solution as in *California Fish*.⁷¹

The facts in *California Fish* and *City of Berkeley* were similar in that "private claimants asserted that they owned title to tidelands free of the public trust."⁷² Thus, the court analyzed the validity of the 1870 statute at issue in *City of Berkeley* "on the basis of the principles expressed in *California Fish*."⁷³ The result was that the court in *City of Berkeley*

363.

⁶¹ The Supreme Court of California decided the *City of Berkeley* case in 1980; the United States Supreme Court decided *Phillips Petroleum* in 1988.

⁶² *City of Berkeley*, 606 P.2d at 363 n.1 (Tidelands "are lands between the lines of mean high tide and mean low tide, whereas 'submerged lands' are those seaward of mean low tide and not uncovered in the ordinary ebb and flow of the tide.").

⁶³ *Id.* at 363.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.* at 363-64, 364 n.2.

⁶⁷ *City of Berkeley*, 606 P.2d at 373.

⁶⁸ *Id.* at 365.

⁶⁹ *Id.*

⁷⁰ *People v. California Fish Co.*, 138 P. 79 (Cal. 1913).

⁷¹ *City of Berkeley*, 606 P.2d at 369, 373.

⁷² *Id.* at 367.

⁷³ *Id.* at 369.

[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in

concluded that “the 1870 statute may and should [have been] interpreted to preserve the public’s rights in the tidelands that it authorized the [State] to convey to private parties.”⁷⁴ The court noted that, by its decision, it would not divest any landowners of their property titles; the only consequence was that some landowners would hold interest in properties acquired by their predecessors “subject to the public trust.”⁷⁵

Although the court in *City of Berkeley* considered the *California Fish* “rule” in deciding the title issue, it departed from the earlier case in its application of those principles that comprised the rule. Rather than “declar[ing] that all grants made under the 1870 act [were] subject to the public trust, or . . . that [the] decision [was] prospective only,”⁷⁶ the court chose an intermediate approach. It balanced the public’s interest in the previously conveyed tidelands against the interests of the current landowners, and it retained for the public trust only those properties which were useful and valuable for trust purposes.⁷⁷ The court reasoned that unfilled and unimproved tidelands were likely to remain unfilled and unimproved, and that they were therefore appropriately allocated for continued trust uses.⁷⁸ The court also justified its decision based on the policy that it needed to avoid excessive litigation concerning similar title holding conflicts and “to preclude clouding the titles of landowners around the Bay who own[ed] filled or improved properties conveyed under the 1870 act.”⁷⁹

The United States Supreme Court refused to review *City of Berkeley*,⁸⁰ thus the case has never been evaluated pursuant to the rules established in *Phillips Petroleum*. The outcome of *City of Berkeley* seems to violate the modern public trust doctrine, however, because it conflicts with standards articulated by the Supreme Court in both *Phillips Petroleum* and *Illinois Central*.

The *City of Berkeley* decision may violate the *Illinois Central* holding in two ways. First, *Illinois Central* established the rule that states may not abdicate ownership of trust lands to private parties, except where use of

tidelands, the court must give the statute such an interpretation.

Id. See also *California Fish*, 138 P. at 86, 88.

⁷⁴ *Id.* at 371.

⁷⁵ *Id.* at 372.

⁷⁶ *City of Berkeley*, 606 P.2d at 373.

⁷⁷ *Id.* “[T]he interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.” *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 374.

⁸⁰ *Santa Fe Land Improvement Co. v. City of Berkeley*, 449 U.S. 840 (1980).

such parcels would promote the public interest in the lands, or where disposal would not substantially impair the public interest in remaining waters and lands.⁸¹ When the California Supreme Court upheld certain legislative grants to private landowners in *City of Berkeley*, the court noted that whether such filled property had been substantially improved was not a determinative issue.⁸² The court should have considered this factor, however, because an improved, filled parcel can be used to promote public interests.⁸³ Furthermore, when a parcel has yet to be developed, a court cannot know whether disposal of that property would substantially impair the public interest.

The second way that the California court's decision in *City of Berkeley* may violate the rules of *Illinois Central* is regarding the size of its grant to private landowners. In *Illinois Central*, the Supreme Court held that a state could transfer "parcels" of trust land if such grant satisfied the Court's exceptions, but it implied that a large grant of state public trust land is inappropriate.⁸⁴ The Court refused to uphold a grant of submerged lands in the Chicago harbor to a railroad company.⁸⁵ In *City of Berkeley*, the City had filled nearly all of the seventy-nine acres of trust land in dispute along the San Francisco Bay shoreline.⁸⁶ It is conceivable that the land grants in *City of Berkeley* constituted transfers that were larger than the "parcels" contemplated by the Supreme Court in *Illinois Central*.

The California Supreme Court's decision in *City of Berkeley* may also violate the *Phillips Petroleum* holding regarding two aspects. The first is similar to the violation of *Illinois Central* regarding grants of large parcels. In *Phillips Petroleum*, the Supreme Court returned to the State of Mississippi the title to forty-two acres of previously granted tidelands.⁸⁷ A disposition to private parties of title to seventy-nine acres along a

⁸¹ *Illinois Cent.*, 146 U.S. at 453.

⁸² See *City of Berkeley*, 606 P.2d at 373.

⁸³ For example, improved filled tidelands as trust property could be used as beach area, open space, parklands, scenic views, wildlife habitat and ecological study areas. See, e.g., Campbell, *supra* note 2, at 77 (citations omitted). The Supreme Court in *Phillips Petroleum* seemed to support the extension of the public trust doctrine to areas beyond the traditional uses of navigation, commerce, and fishing. See 484 U.S. at 482.

⁸⁴ *Illinois Cent.*, 146 U.S. at 453. "A grant of all the lands under the navigable waters of a [s]tate has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." *Id.*

⁸⁵ See *id.* at 463.

⁸⁶ *City of Berkeley*, 606 P.2d at 364.

⁸⁷ *Phillips Petroleum*, 484 U.S. at 484-85.

popular bay shoreline would seem to contradict the Supreme Court's refusal to vest title to forty-two acres of tidelands in private parties.

Regarding the second potential violation, in *Phillips Petroleum* the Supreme Court held that it would not honor private landowners' expectations in property interests on the basis of their holding record title for many years and paying taxes on such property.⁸⁸ Although this rule did not exist at the time the California court decided *City of Berkeley*, that decision now stands in conflict with the Supreme Court's rule. The California court clearly stated in its opinion that it approved the grants of filled tidelands to private owners for the purpose of precluding the clouding of titles of certain landowners around the Bay.⁸⁹ It also noted that, in some situations, courts should recognize a landowner's reliance interest to some degree.⁹⁰ These statements by the California court suggest that it honored private landowners' expectations in property rights on the basis of the parties' reliance interests. Thus, in light of the *Phillips Petroleum* case, the court's decision violates the current conception of the public trust doctrine.

B. New Jersey

The Supreme Court of New Jersey's holding in *Dickinson v. Fund for Support of Free Public Schools*⁹¹ may violate the public trust doctrine in a manner different from that of the Supreme Court of California in *City of Berkeley*. The facts and key issue in *Dickinson* are also distinguishable from the California case. In *Dickinson*, the court examined the constitutionality of an amendment to the New Jersey Constitution that "bar[red] the State's claims to lands that [had] not been tidally flowed for a period of 40 years unless the State . . . 'specifically defined and asserted' its claims within that period."⁹² The amendment also provided the State with an additional year to define and assert its claim "to lands not tidally flowed during the forty years or more" prior to the amendment's adoption.⁹³

The state legislature drafted the amendment in response to an earlier case, *O'Neill v. State Highway Dept.*,⁹⁴ in which the New Jersey Supreme Court acknowledged that, under certain circumstances, the State could not

⁸⁸ *Id.* at 482.

⁸⁹ *City of Berkeley*, 606 P.2d at 374.

⁹⁰ *Id.*

⁹¹ *Dickinson*, 469 A.2d 1.

⁹² *Id.* at 3.

⁹³ *Id.*

⁹⁴ *O'Neill*, 235 A.2d 1 (N.J. 1967).

be estopped from asserting its title to privately held tideland property.⁹⁵ In *O'Neill*, the court stated that the State did not lose title to such lands as a result of the State's "delay or inaction" in asserting its title, on a basis of "a presumption of a lost grant," or "by mere inaction."⁹⁶ The combination of these reasons left landowners without any substantial theory to assert an argument that supported divesting the State of its ownership of the tidelands.⁹⁷ The amendment attempted to address uncertainties and lessen anxieties regarding the status of legal titles to upland⁹⁸ properties, and to expedite resolution of title disputes that arose subsequent to *O'Neill*.⁹⁹

The plaintiffs in *Dickinson* who challenged the validity of the constitutional amendment included landowners, taxpayers, the holder of a New Jersey school district bond, public school students, and a public school teacher.¹⁰⁰ These parties made several allegations, including a charge that "the Amendment was invalid because it purported to convey title to certain riparian lands to upland owners without consideration to the State."¹⁰¹ The amendment generally afforded abutting private property owners the title to land that formed naturally upland, regardless of the length of time over which that process occurred.¹⁰² In addition, the amendment "time-barred" the State's claims with respect to defining and asserting title to certain tidelands.¹⁰³ The plaintiffs contended that, where the State could not sufficiently complete a mapping requirement to define its specific claims within the allotted time, the State would surrender such land to private parties.¹⁰⁴

The plaintiffs were concerned about this negative effect of the legislation primarily for monetary reasons. The amendment included a provision that "any proceeds from the sale, lease or transfer of the State's interest would be paid to the Fund for the Support of Free Public Schools ("Fund")."¹⁰⁵ The plaintiffs argued that the Fund would suffer a

⁹⁵ See *id.* at 8.

⁹⁶ *Id.*

⁹⁷ Ellington et al., *supra* note 5, at 46.

⁹⁸ "Upland is land 'above mean high water.'" *Dickinson*, 469 A.2d at 5 (quoting *City of Newark v. Natural Resource Comm'n*, 336 A.2d 46 (N.J. Super. Ct. Law Div. 1974), *aff'd*, 372 A.2d 644 (N.J. Super. Ct. App. Div. 1977)).

⁹⁹ *Id.* at 6.

¹⁰⁰ *Id.* at 3-4.

¹⁰¹ *Id.* at 4. "The crucial underlying historical fact is that the State owned all land below the mean high-water mark on tidally flowed property." *Id.* at 5.

¹⁰² *Id.* at 7.

¹⁰³ *Dickinson*, 469 A.2d at 7.

¹⁰⁴ See *id.* at 11.

¹⁰⁵ N.J. STAT. ANN. § 13:1B-13.13 (West 1991).

“possible consequential loss of funds” due to the State’s surrender of title claims that it could not define or assert within the time limit.¹⁰⁶

The New Jersey Supreme Court held that the amendment was constitutionally valid and that it could deprive the State of its interest in riparian lands within a reasonable time.¹⁰⁷ According to the court, “[t]he goals of eliminating uncertainties of title, of identifying properties and alerting owners of state claims, and of advancing economic development [were] legitimate ends justifying the repose after [forty] years’ existence of a condition indicating the absence of a State interest.”¹⁰⁸ The court also held that the plaintiffs’ argument that the amendment deprived the Fund of its interest in some tidelands had no merit.¹⁰⁹ The court stated that the Fund derived its existence from the New Jersey Constitution, and that the citizens of New Jersey could modify the Constitution’s terms with respect to the Fund provision, including eliminating the Fund’s existence entirely.¹¹⁰

As a result of the court’s approval of the constitutional amendment in the *Dickinson* case, landowners in New Jersey obtained “an effective weapon to preclude the State from asserting a claim to their property.”¹¹¹ Like the California case, *City of Berkeley*, however, the *Dickinson* case was decided prior to the United States Supreme Court’s decision in *Phillips Petroleum*.¹¹² Although the New Jersey Supreme Court has not revisited the issue raised in *Dickinson*, the case’s outcome appears to conflict with the Supreme Court’s holding in *Phillips Petroleum*. Thus, the Supreme Court would likely reject the validity of the amendment if the issue of its constitutionality was to reach the Court today.

In *Phillips Petroleum*, the Court asserted that the states have the right to develop and administer real property law,¹¹³ but it also limited the equitable considerations that property owners could advance to divest a state of its ownership in disputed tidelands.¹¹⁴ Private landowners’ reliance on title ownership and their contributions to the tax base for many

¹⁰⁶ *Dickinson*, 469 A.2d at 11.

¹⁰⁷ *Id.* at 11, 12.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.* at 12-13.

¹¹⁰ *Id.* at 12.

¹¹¹ Ellington et al., *supra* note 5, at 52.

¹¹² The New Jersey Supreme Court decided *Dickinson* in 1983, nearly five years before the United States Supreme Court decided *Phillips Petroleum*.

¹¹³ “We see no reason to disturb the ‘general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer.’” *Phillips Petroleum*, 484 U.S. at 484 (quoting *Hughes v. Washington*, 389 U.S. 290, 295 (1967)).

¹¹⁴ *See id.*

years were not sufficient reasons for the Supreme Court to leave land titles in the possession of private property owners.¹¹⁵ The New Jersey Supreme Court's justifications for upholding the constitutional amendment, which barred the State's claims to property titles after forty years, arguably exceed these limits.

In its *Dickinson* opinion, the court stated that two of the goals that justified the amendment's existence included advancing economic development and eliminating uncertainties of title.¹¹⁶ The Supreme Court today could liken these two goals to broader versions of the private property owners' arguments in *Phillips Petroleum*. Contributing to the tax base is a form of advancing economic development, and reliance on ownership is one basis for eliminating uncertainty of title. Although the goals of the New Jersey amendment barring the State's claims are not as narrow as the private landowners' arguments for retaining their properties in the *Phillips Petroleum* case, New Jersey is removing land from the public trust for monetary reasons and on the basis of landowners' expectations in property interests. The Supreme Court, which rejected these reasons for retaining record title in private owners in *Phillips Petroleum*, is likely to reject them again if it had the occasion to review the validity of New Jersey's amendment.

The amendment also conflicts with both *Phillips Petroleum* and *Illinois Central* because it established a forty-year time period within which the State had to define and assert its title claims to tidelands.¹¹⁷ The United States Supreme Court refused to set any time limits on state ownership of public trust lands. To the contrary, in *Illinois Central*, the Court held that "[t]he control of the state for the purposes of the trust can never be lost"¹¹⁸ The Court in *Phillips Petroleum* never addressed this question and therefore kept the rule intact. In addition to violating the *Illinois Central* rule, the New Jersey amendment fails to satisfy the two exceptions that the Court expressed in *Illinois Central*.¹¹⁹ First, the amendment's specific time limitation on the State's claims to titles of tideland fails to promote the public interest. The State simply would "lose" land to private parties where, for whatever reason, it failed to define and assert a claim in

¹¹⁵ *See id.*

¹¹⁶ *Dickinson*, 469 A.2d at 12.

¹¹⁷ *See id.* at 3.

¹¹⁸ *Illinois Cent.*, 146 U.S. at 453 (emphasis added).

¹¹⁹ *See id.* In *Illinois Central*, the Court held that the State may not abdicate its ownership of parcels of trust property except where such lands "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." *Id.*

the allotted time. Second, the amendment ignores any consideration as to whether disposing of the lands would substantially impair the public interest in remaining lands and waters.

The amendment at issue in *Dickinson* also ignores the exceptions in *Illinois Central* regarding State abdication. The amendment provides that proceeds from title sales and leases be paid into a school trust fund. Although improving the public school system is undoubtedly in the public's interest, the money earned from sales of public trust property would not be returned to the State for improving existing trust lands or obtaining new trust areas. Applying such funds to trust land purposes, on the other hand, would likely promote and enhance the public interest in the spirit implied by the Court in *Illinois Central*. Furthermore, the amendment would not violate the Supreme Court's *Illinois Central* rule if it provided that earnings from the disposition of trust lands would fund State acquisition of additional trust lands or be used to subsidize efforts to retain title to existing trust lands.

C. Rhode Island

Like the New Jersey and California Supreme Court cases that may violate the public trust doctrine, a more recent decision by the Supreme Court of Rhode Island, *Greater Providence Chamber of Commerce v. State*,¹²⁰ may also violate settled trust law. Prior to *Greater Providence*, the Rhode Island Supreme Court had ruled on a number of cases involving the public trust doctrine and land title conflicts.¹²¹ The court's decisions supported the principle that "Rhode Island historically . . . recognized public rights in submerged lands and foreshores."¹²² Additionally, the court stated that "[b]y combining the public trust common law and statutory law, states can better define the rights of the public."¹²³ The State had adopted its protective attitude in response to increasing pressure

¹²⁰ 657 A.2d 1038 (R.I. 1995).

¹²¹ See *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038 (R.I. 1995); *Hall v. Nascimento*, 594 A.2d 874 (R.I. 1991); *Nugent v. Vallone*, 161 A.2d 802 (R.I. 1960) (holding that pursuant to the public trust doctrine, the State holds title to all lands below the mean high-water mark in trust for the public); *City of Providence v. Comstock*, 65 A. 307 (R.I. 1906) (supporting the notion that a valid legislative state grant is sufficient to extinguish the public trust doctrine).

¹²² Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U. L. REV. 353, 378 (1990) (footnote omitted).

¹²³ *Id.* at 418 (footnote omitted).

to develop the Rhode Island oceanfront.¹²⁴ In *Greater Providence*, however, the court disregarded this protective attitude. More importantly, the court's holding in *Greater Providence* may contradict the Supreme Court's decisions regarding the public trust doctrine.

In *Greater Providence*, the Chamber of Commerce, the Rhode Island School of Design, and two utility companies sought declaratory judgments concerning their interests in certain properties adjacent to Narragansett Bay.¹²⁵ The land at issue was originally formed when the plaintiffs' predecessors filled in tidal lands beginning in the eighteenth century.¹²⁶ In its opinion, the court focused primarily on whether valid state legislative grants extinguished the public's trust rights in the land.¹²⁷

The court held that the plaintiffs owned title to the filled lands pursuant to the grants made to their predecessors.¹²⁸ Moreover, it concluded that an express or implied legislative grant, or implied State approval, can extinguish the public trust in filled land.¹²⁹ The court even adopted a two-part test for establishing property rights in filled tide-lands.¹³⁰ The court's statement that it had "never cast aside the public trust doctrine"¹³¹ may have been in error, however. By declining to extend to the *Greater Providence* decision certain principles advanced in a prior Rhode Island public trust case,¹³² *Hall v. Nascimento*,¹³³ the court disregarded the State's protective attitude towards the public trust.

In *Hall*, the court refused to place title to dredged property in certain private owners.¹³⁴ The court cited *Phillips Petroleum* and *Illinois Central* in support of its holding that the State holds title to filled or submerged lands, subject to the public trust, unless the State transfers this claim to a

¹²⁴ See *id.* at 353-54.

¹²⁵ *Greater Providence*, 657 A.2d at 1039.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1040, 1041.

¹²⁸ *Id.* at 1041.

¹²⁹ See *id.* at 1044. "[T]he state is in error in arguing that only an express legislative grant can extinguish the public trust in filled land." *Id.*

¹³⁰ *Greater Providence*, 657 A.2d at 1044. A property owner who fills land along his or her shoreline with the State's implied or express approval, and who "improves upon the land in justifiable reliance on the approval" may establish title to the land free of the public trust. However, the owner must not have created any interference with the traditional public trust uses of navigation, commerce, and fishing. "The test should be applied on a case-by-case basis according to the facts in each situation." *Id.*

¹³¹ *Id.* at 1042.

¹³² See *id.* at 1043.

¹³³ *Hall*, 594 A.2d 874.

¹³⁴ *Id.* at 878.

private individual pursuant to a legislative grant.¹³⁵ The record in *Hall*, however, was void of any evidence of a legislative grant to the plaintiffs. Thus, those private parties who claimed ownership of the dredged land did not hold the land title by deed.¹³⁶ In addition, “because a private party cannot adversely possess public property,”¹³⁷ the plaintiffs’ title claim failed on that basis as well. The court did acknowledge that the defendants in the action, also private parties, maintained rights in the area subservient to the State’s rights, and thus to the public trust doctrine, as long as their use of the land was not inconsistent with trust uses.¹³⁸

Just as it did in *Hall*, the court in *Greater Providence* adjudicated the title claims pursuant to the legislative grant condition.¹³⁹ In upholding the grants, however, the court did not consider whether the plaintiffs’ uses were consistent with the public trust.¹⁴⁰ Instead, the court placed greater emphasis on whether the private owners improved or filled the land in justifiable reliance on State approval.¹⁴¹ It noted that the State could restrict such filling of the land, “provided it [did] so before a [landowner] . . . changed position in reliance on government permission.”¹⁴² The court also stated that once private parties accepted the State’s invitation to fill land or acted on the basis of the State’s permission, “the upland owner who relied on [that] permission acquired title from the [S]tate.”¹⁴³

In awarding title to the plaintiffs, the court in *Greater Providence* focused primarily on the existence of legislative grants and the plaintiffs’ reliance on those state grants.¹⁴⁴ It did not seem to consider any interference with other traditional trust uses. Thus, it failed to follow the second part of its own test as articulated in its *Greater Providence* opinion. It is possible that the court was attempting to reconcile the title conflicts that resulted following *Hall*. Indeed, the court adopted the test in *Greater Providence* in an attempt to establish consistency among Rhode Island courts that were making decisions regarding title claims involving shoreline

¹³⁵ *Id.* at 877. The legislative grant itself must be consistent with the public trust doctrine.
Id.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Hall*, 594 A.2d at 877.

¹³⁹ See *Greater Providence*, 657 A.2d at 1040, 1041, 1044. But see *id.* at 1043 (stating that *Hall* has no application to *Greater Providence* because *Hall* did not involve legislative authorization for filling in land areas).

¹⁴⁰ See *supra* note 135.

¹⁴¹ See *Greater Providence*, 657 A.2d at 1044.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *supra* text accompanying notes 139-143.

properties.¹⁴⁵ Unfortunately, the Rhode Island Supreme Court's opinion did not completely resolve the status of the numerous wholly or partially filled parcels of land which did not lie near the harbor.¹⁴⁶

Although the Rhode Island Supreme Court's decision in *Greater Providence* diverges from the rule expressed in *Hall*, the presence of utility companies as plaintiffs in *Greater Providence* may explain the opposing outcomes. The utility companies were identified in the court's opinion only as Narragansett Electric Company and Providence Gas Company.¹⁴⁷ The court provides no additional information about these companies, but it may have considered these utility companies to be quasi-governmental entities because they provided public services. If so, a grant of public trust land to these companies would have constituted a transfer from one governmental unit to another. Thus, the court could have reasoned that the trust lands would not escape from public service.

Although *Greater Providence* may be distinguished from *Hall*, this does not change the fact that the decision may violate principles established by the United States Supreme Court in *Illinois Central* and *Phillips Petroleum*. In *Illinois Central*, the Supreme Court held that a state may not abdicate ownership of land subject to the public trust, except where such disposition promotes the public interest or does not substantially impair the public interest in the remaining lands and waters.¹⁴⁸ The Rhode Island Supreme Court's failure to consider whether a private owner's filling activities interfered with other traditional uses of public trust land seems to disregard this rule. On the other hand, *Phillips Petroleum* stands for the proposition that private owners' reliance on land titles granted by a state does not establish reasonable expectations in property rights.¹⁴⁹ The court in *Greater Providence* seems to have violated this rule when it awarded absolute title in tidelands to private owners on the grounds that their predecessors had relied on the State's grant of permission to fill the lands as a transfer of title. The Supreme Court never reviewed the Rhode Island Supreme Court's holding, however.

¹⁴⁵ See *Greater Providence*, 657 A.2d at 1044. The court noted that it adopted the two-part test "[i]n an effort to resolve some concerns that [would] remain" following its decision in *Greater Providence*. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1039.

¹⁴⁸ See *supra* text accompanying notes 37-38.

¹⁴⁹ See *supra* text accompanying notes 48-51.

IV. The Supreme Court's Review Of Cases That Potentially Violate The Public Trust Doctrine

The Rhode Island Supreme Court's decision in *Greater Providence* is one of three cases this Comment reviews that addressed title disputes involving public trust lands.¹⁵⁰ Relying on legislative grants or various policy reasons, the Supreme Courts of California and New Jersey also upheld transfers to private owners of tidelands previously held by the states in trust for the public. A closer examination of the holdings in these three cases reveals potential violations of the public trust doctrine. Because the states are supposed to be final arbiters of the trust,¹⁵¹ however, whether the United States Supreme Court would review cases of this type is questionable.

A consideration of whether the Supreme Court would review other public trust cases such as those decided in California, New Jersey, and Rhode Island must logically begin with an analysis of the basis of the Court's jurisdiction in *Illinois Central* and *Phillips Petroleum*. The Supreme Court did not address directly its jurisdiction in its opinions for those cases. Likewise, the numerous articles written about these landmark public trust cases include little or no discussion about the basis of the Supreme Court's jurisdiction. However, the Supreme Court may review cases such as *Illinois Central* and *Phillips Petroleum* on the basis of

¹⁵⁰ These three cases are by no means inclusive of public trust land conflicts. Numerous law review articles have discussed the public trust doctrine and related cases in other states such as Massachusetts, Wisconsin, Mississippi, Louisiana, Delaware, Alabama, Georgia, Maine, Maryland, Alaska, Florida, Hawaii, Texas, and Washington. See, e.g., Sax, *supra* note 3, at 491-523; Ellington et al., *supra* note 5, at 71-81; Andrew Watry, Comment, *Resolution of the Public Trust Doctrine: Analysis of the Impact of Phillips Petroleum Co. v. Mississippi*, 24 U.S.F. L. REV. 471, 484-503 (1990).

"The public trust doctrine comes in many different forms." Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989) (footnote omitted). It "derives from constitutional, statutory, and common-law sources." *Id.* at 426 n.6. "The federal public trust doctrine announced in [*Illinois Central*], and the varying, state-law based trust doctrines total 51 separate public trust doctrines" in this country. *Id.* at 425 n.1.

¹⁵¹ "The United States Supreme Court has recognized significant state discretion in defining the scope and reach of the public trust doctrine within the borders of each state." Steven W. Turnbull, Note, *The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds — Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 108 S. Ct. 1996 (1988), 63 WASH. L. REV. 1087, 1109 (1988) (footnote omitted). "Public trust issues are governed solely by state law and do not raise federal jurisdiction questions." R. Prescott Jaunich, *The Environment, The Free Market, and Property Rights: Post-Lucas Privatization of the Public Trust*, 15 PUB. LAND L. REV. 167, 168 n.15 (1994) (citations omitted).

constitutional law.¹⁵² In addition, it could have examined those cases under the guise of federal admiralty law or the federal government's paramount interests in navigation, commerce, and national defense.

Article III of the Constitution of the United States provides that the Supreme Court's judicial power extends to all cases arising under the Constitution and the laws of the United States, including cases of admiralty and maritime jurisdiction.¹⁵³ The Supreme Court has appellate jurisdiction in cases of this nature.¹⁵⁴ The Constitution also states that the Supreme Court has original jurisdiction in all cases in which a state is a party.¹⁵⁵ Thus, the Supreme Court had federal jurisdiction to review both landmark public trust cases, even though *Illinois Central* was decided in federal court and *Phillips Petroleum* was a state court judgment.

In addition to the constitutional basis for the Supreme Court having reviewed these cases,¹⁵⁶ it is possible that the Court applied federal admiralty and maritime law, particularly in deciding *Illinois Central*.¹⁵⁷ "The Court's implication, that the reach of the public trust doctrine would be parallel to the reach of the national government's admiralty jurisdiction, followed from navigation being the primary subject of protection and regulation in both contexts."¹⁵⁸ In addition, Congress admits new states

¹⁵² "[T]he Supreme Court has consistently given a constitutional cast to state and federal prerogatives and obligations with regard to waters navigable for title, due ultimately to the key role of these watercourses in the country's commerce and society . . ." Wilkinson, *supra* note 150, at 459. Thus, "the public trust doctrine has strong constitutional overtones and[,] . . . in significant part, courts are engaging in state or federal constitutional adjudication, where the role of the courts traditionally is the broadest." *Id.* at 469.

¹⁵³ U.S. CONST. art. III, § 2, cl. 1.

¹⁵⁴ *Id.* § 2, cl. 2.

¹⁵⁵ *Id.*

¹⁵⁶ However, "locating the public trust doctrine in the Constitution itself is perhaps [a] more persuasive [argument]." Wilkinson, *supra* note 150, at 458.

¹⁵⁷ "*Illinois Central* . . . seems plainly to have been premised on federal law." Wilkinson, *supra* note 150, at 453. See also *id.* at 454-55, 460; *Illinois Cent.*, 146 U.S. at 435.

¹⁵⁸ Turnbull, *supra* note 151, at 1091 n.34. See also *Illinois Cent.*, 146 U.S. at 436; Brent R. Austin, Comment, *The Public Trust Misapplied: Phillips Petroleum v. Mississippi and the Need to Rethink an Ancient Doctrine*, 16 *ECOLOGY L.Q.* 967, 971 (1989) ("Navigability was the driving concern in . . . [many early public trust] cases."). In addition, the Court has implied that federal courts have federal maritime law jurisdiction over "activities substantially performed 'upon the sea, or upon waters within the ebb and flow of the tide.'" *Id.* at 990 (footnote omitted).

The Supreme Court's dissent in *Phillips Petroleum* also mentioned federal admiralty jurisdiction. The Court stated that "[b]ecause the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of federal admiralty jurisdiction." *Phillips Petroleum*, 484 U.S. at 488. The dissent argued that navigability, not the ebb and flow of the tide, characterized waterways that are suited to public trust purposes. *Id.* at 489.

into the Union as a matter of federal law;¹⁵⁹ “[t]hus, . . . a federal test of navigability applies to issues of determining original state title in navigable waters and their underlying lands, and Supreme Court decisions are binding as to the tests determining state title.”¹⁶⁰

Navigability, however, is no longer the exclusive measure of the public’s interest in water¹⁶¹ (and thus submerged lands). Therefore, the Court probably heard later cases such as *Phillips Petroleum* based on a different premise — that is, that there are federal interests which are “paramount,” regardless of state sovereignty and real property law of the particular states.¹⁶² For example, the federal government clearly has jurisdiction to protect commerce¹⁶³ and national security, as well as its admiralty interests. This notion that the federal government has paramount interests even in the presence of the States’ sovereign interests arises from Justice Frankfurter’s dissent in *United States v. California*.¹⁶⁴ While the majority held that the federal government has title to submerged lands “extending seaward three nautical miles,”¹⁶⁵ Justice Frankfurter argued that the federal sovereign rights apply to internal waters as well as offshore in the open sea.^{166, 167} The case ultimately established the principle that when a state violates the public trust, the paramount rights

¹⁵⁹ Donna A. Golem, Note, *The Public Trust Doctrine Unprecedentedly Gains New Ground in Phillips Petroleum Co. v. Mississippi*, 22 LOY. L.A. L. REV. 1319, 1328 (1989) (footnote omitted). “[S]ince a state upon gaining statehood receives title from the United States to navigable waters and their underlying lands, federal law defines navigability in determining title for this purpose.” *Id.* (footnote omitted).

¹⁶⁰ *Id.* (footnote omitted).

¹⁶¹ Austin, *supra* note 158, at 1009.

¹⁶² See *United States v. California*, 332 U.S. 19, 43-45 (1947) (Frankfurter, J., dissenting).

¹⁶³ “Commerce includes navigation . . . This necessarily includes the power to keep [major watercourses] open and free from any obstruction to their navigation . . .” Wilkinson, *supra* note 150, at 457 (footnote omitted) (quoting Justice Swayne in *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865)). “[T]oday the [Supreme] Court has found federal regulatory power over commerce to be nearly unlimited . . .” *Id.* at 449 (footnote omitted).

¹⁶⁴ See 332 U.S. at 43-45. In his dissent, Justice Frankfurter argued that although states may have proprietary interests in property, the federal government can prevent any state from interfering with those interests by virtue of the federal government’s paramount sovereign interests. For other cases which interpret the relationship between the federal and state governments (*vis a vis* the Submerged Lands Act), see generally *United States v. Louisiana*, 339 U.S. 699 (1950) and *United States v. Texas*, 339 U.S. 707 (1950).

¹⁶⁵ 332 U.S. at 22.

¹⁶⁶ *Id.* at 43-45 (Frankfurter, J., dissenting).

¹⁶⁷ Congress subsequently adopted the Submerged Lands Act, partially in light of Justice Frankfurter’s interpretation of the case. See 43 U.S.C. §§ 1301-1315 (1991). Justice Frankfurter’s dissenting opinion is reflected primarily in § 1314(a).

of federal sovereignty give the Supreme Court original jurisdiction to hear a case on this issue.¹⁶⁸

The Court seems to have reviewed *Phillips Petroleum* based on this jurisdictional principle that it established in *United States v. California*. The Court accepted that the State of Mississippi “could . . . steer the course of its public trust according to its views of public policy.”¹⁶⁹ But “the paramount public interest in the trust corpus” allows the State to go only so far.¹⁷⁰ Thus, “although the Court chose to give great deference to state property law, there remains a basis for Supreme Court review of violations of the public trust by the state.”¹⁷¹

The argument that the federal government has paramount interests that justify the Supreme Court’s jurisdiction to hear public trust cases can be extended to the *Illinois Central* case as well. First, the State’s action of divesting its claim to all the submerged lands in the Chicago harbor could have so greatly affected navigation, commerce, and fishing - the traditional uses of public trust land - that the Supreme Court invoked its jurisdiction to review the State’s action and determine whether the State had exceeded its basic powers. Second, because the State had abdicated its role as trustee by its disposition of trust land,¹⁷² only the Supreme Court was in a position to interpret whether the State had violated the trust.

As this cursory review of jurisdiction demonstrates, with no uniform basis for the Supreme Court’s jurisdiction in *Illinois Central* or *Phillips Petroleum*, excepting the Constitution, states’ court decisions that seem to violate the public trust doctrine are unlikely to make their way to the Supreme Court’s docket. Thus, as in the cases in California, New Jersey, and Rhode Island, courts will continue to simply apply existing public trust law standards, as they perceive them, to abdicate state ownership of trust lands to private parties. Perhaps unwisely, the Supreme Court implied that it supported this approach when it explicitly stated in *Phillips Petroleum*

¹⁶⁸ See 332 U.S. at 25.

¹⁶⁹ Stephen A. Deleo, Note, *Phillips Petroleum Co. v. Mississippi and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U. L. REV. 571, 593 (1989) (footnote omitted).

¹⁷⁰ *Id.* (footnote omitted).

¹⁷¹ *Id.* The Court in *Phillips Petroleum* “federalize[d] only the issue of what lands were included within the states’ respective trusts at the time of statehood. It [did] not purport to disturb state law which recognizes a stricter geographical limitation on trust property.” *Id.* (footnote omitted).

¹⁷² Wilkinson, *supra* note 150, at 470. “That is precisely how the traditional doctrine arose in the first place, with the dedication of far too much of Chicago harbor to the private interests.” *Id.* (footnote omitted).

that the individual states were responsible for developing and administering the law of real property.¹⁷³

The Supreme Court could still review states' cases on other jurisdictional grounds, however.¹⁷⁴ A case involving a public trust amendment similar to the one at issue in New Jersey may reach the Supreme Court on the basis of federal constitutional issues concerning the validity of such an amendment. Similarly, the Supreme Court could examine another case with an issue similar to that which was previously adjudicated in California in order to clarify what amount of acreage constitutes a "parcel" as the term was used in the *Illinois Central* holding.¹⁷⁵ A case involving an issue like the one addressed in the Rhode Island case could serve as the Court's basis for a decision regarding abdication of control over trust land to quasi-governmental entities, especially since this issue would require the Court's addressing the extent of police powers in the public service area. Finally, the Supreme Court could possibly review any and all of these cases based on the previously suggested reasons for its having exercised its jurisdiction to examine *Illinois Central* and *Phillips Petroleum*.¹⁷⁶

V. Conclusion

The public trust doctrine has an historical and solid foundation in American law. The basic concept of the public trust doctrine is that the states, upon their admission to the Union, hold title to land below the high-water mark in trust for the public. As early as the nineteenth century, the Supreme Court defined the public trust law; in cases such as *Illinois Central* and *Phillips Petroleum*, the Court has had the opportunity to expand upon and clarify the doctrine.

In *Illinois Central* and *Phillips Petroleum*, the Court held that states may abdicate their control over public trust lands, but only under certain

¹⁷³ *Phillips Petroleum*, 484 U.S. at 484.

¹⁷⁴ Sax, *supra* note 3, at 543. The state courts in California, New Jersey, and Rhode Island, as well as other state courts, may be playing a role - that is, an "attempt to affect future cases." Furthermore, "[w]hile such a technique is of little aid to the litigants in the case[s] at bar, it is of considerable importance for public trust law developments generally." *Id.*

¹⁷⁵ "It remains unclear whether *Phillips Petroleum* and *Illinois Central* mandate an affirmative duty to rehabilitate a public trust in . . . 'substantially valueless' lands." Watry, *supra* note 150, at 498. See also *City of Berkeley*, 606 P.2d at 373.

¹⁷⁶ Furthermore, if the Supreme Court can review state court action that interferes with an individual's right of privacy because of the "penumbra" of rights emanating from the First Amendment to the Constitution of the United States (see *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)), surely the overwhelming themes of commerce, navigability, and admiralty affect such a prevailing number of interests that the Supreme Court, under a similar type of penumbra, should hear state court actions that involve these areas as well.

circumstances. The states have subsequently grappled with the interpretation and application of modern public trust law and the Supreme Court's established requirements for abdicating ownership of trust lands. The Supreme Courts of California, New Jersey, and Rhode Island, for example, have upheld land transfers to private parties. These decisions, however, seem to violate the United States Supreme Court's established principles regarding the public trust doctrine.

The courts in California, New Jersey, and Rhode Island cited various reasons for upholding abdicating those States' interests in trust lands: 1) the tidelands were filled and thus were rendered valueless to the public trust; 2) the State had a limited time period within which it could define and assert claims to such lands; and 3) the lands were transferred pursuant to either implied or express state legislative grants. Although these decisions seem to ignore the Supreme Court's standards set in *Illinois Central* and *Phillips Petroleum*, the holdings in these cases remain intact.

Yet, while court decisions such as those in California, New Jersey, and Rhode Island seem to challenge the viability of the public trust doctrine, it is doubtful that the Supreme Court will review these types of cases. After all, according to the Court, the states are supposed to be the final arbiters of the trust. Furthermore, such public trust cases do not seem to present issues that satisfy the Supreme Court's jurisdictional requirements for reviewing cases. Thus, it remains to be seen how and when the Supreme Court will entertain the appeals of cases regarding the disposition of public trust lands so as to further guide the states in implementing this doctrine.

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