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STUDENT ARTICLES

APPLICATION OF THE PUBLIC TRUST DOCTRINE TO MODERN FISHERY MANAGEMENT REGIMES

KEVIN J. LYNCH*

INTRODUCTION

As the state of the nation's fisheries has declined in recent decades, fishery managers have increasingly sought more effective means for managing fishing efforts to prevent overfishing. The situation is particularly dire in marine fisheries, where studies have shown that populations of large predatory fish species such as tuna, marlin, and swordfish have declined by up to 90%.[1] Conventional explanations for this and other declines in fish populations invoke the concepts of the "tragedy of the commons"[2] and the "race to the fish."[3] The tools favored by economists to

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[1] *See* Ransom A. Myers & Boris Worm, *Rapid Worldwide Depletion of Predatory Fish Communities*, 423 NATURE 280, 282 (2003). Worm recently grabbed headlines again with a new study projecting that if current fishing trends continued there would be a global collapse of fish stocks. Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCI. 787, 790 (2006). This warning was picked up in the popular press, but some commentators have suggested that continued introduction of property rights in fisheries can avert this collapse. *See* John Tierney, Op-Ed., *Where the Tuna Roam*, N.Y. TIMES, Nov. 4, 2006, at A19.

[2] *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (setting out the concept of the "tragedy of the commons" as an explanation for overuse of common pool resources).

[3] The "race to the fish" is a term used to describe the intense competition among fishermen in those fisheries where the season or the catch has been limited below the capacity of the fishing fleet. Fishermen in such a situation will

solve these problems typically involve creating some form of limited private property rights,[4] and legal commentators have called for introducing these principles into U.S. environmental laws.[5]

In the United States, the fisheries controlled by the federal government lie within an area called the Exclusive Economic Zone (EEZ) that extends from three to 200 nautical miles offshore, while state governments control the fisheries out to three miles in what is known as the territorial sea. The inclusion of the EEZ within the jurisdiction of the United States is a relatively recent development that occurred after the passage of the Fishery Conservation and Management Act of 1976,[6] which has come to be known as the

compete with each other to catch a greater proportion of the available catch, or to catch as many fish as possible in a short fishing season, which might be as few as two days or even less. This phenomenon is sometimes referred to as "Olympic" or "derby" fishing. For a more detailed critique of the "race to the fish," see Rod Fujita et al., *Rationality or Chaos? Global Fisheries at the Crossroads*, *in* DEFYING OCEAN'S END: AN AGENDA FOR ACTION 139 (Linda K. Glover & Sylvia A. Earle eds., 2004). *See also* Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 16, 42 (2004); Seth Macinko, *Public or Private?: United States Commercial Fisheries Management and the Public Trust Doctrine, Reciprocal Challenges*, 33 NAT. RESOURCES J. 919, 922 (1993).

[4] "Private property" in this sense is opposed to the traditional concept of fisheries as a publicly owned resource governed by a rule of capture. Economists view the resulting overexploitation of natural resources such as fisheries to be a result of the common public ownership of the fish, which leads to competitive fishing and the loss of profit otherwise extractable from the fishery. *See, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 124, 130–31 (1954). The prescriptions of economists for dealing with this overexploitation often involve a "privatization" of fisheries—the present value of the fishery will be maximized when a user is assured of property rights over a period of time in the future. *See* Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116, 122–23 (1955) (following on Gordon's work and analyzing the economics of a fishery controlled by a "sole owner"). The economic approach to fisheries management has spawned a number of tools that are discussed in more detail *infra* Part II.A.

[5] *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (discussing problems with the old "Best Available Technology" approach and highlighting the power of market-based approaches).

[6] Fishery Conservation and Management Act of 1976 §§ 101-102, Pub. L. No. 94-265, 90 Stat. 331, 336 (codified as amended at 16 U.S.C. §§ 1811-1812). What the Act initially called the "Fishery Conservation Zone" became known as the "Exclusive Economic Zone" after President Reagan issued a proclamation in 1983. *See* Proclamation No. 5030, 3 C.F.R. 5030 (1984); *see also* Casey Jarman, *The Public Trust Doctrine in the Exclusive Economic Zone*, 65 OR. L. REV. 1, 1

Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or the Act).[7] A recent and influential report commissioned by the federal government recommended that Congress amend the Magnuson-Stevens Act to "affirm that fishery managers are authorized to institute dedicated access privileges."[8] Congress followed this recommendation at the end of 2006 when it passed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, calling the management tools "limited access privilege programs" (LAPPs).[9] The Secretary of Commerce has also pledged to work with the Regional Fishery Management Councils to double the use of LAPPs in federal fisheries by 2010.[10] Following the lead of

(1986). The EEZ is defined as a zone contiguous to the territorial sea of the United States, extending "200 nautical miles from the baseline from which the breadth of the territorial sea is measured." 3 C.F.R. § 5030. The concept of the EEZ is found in the current version of the Magnuson-Stevens Act, 16 U.S.C. § 1802(11) (2000) (defining EEZ as the zone established by the Reagan Proclamation). The EEZ differs from the concept of "territorial waters," which is the region currently under state control extending from the shore out to a distance of three geographical miles. *See* 43 U.S.C. § 1312 (2000) (setting the seaward boundary of coastal states). The EEZ thus consists of the belt of sea beyond the territorial waters of the states out to 200 nautical miles.

[7] The Magnuson-Stevens Act is named after two prominent sponsors of fisheries legislation in the Senate. I will use this terminology for the remainder of this Note. The Magnuson-Stevens Act was recently reauthorized, including a reworked section on market-based tools for fishery management. *See infra* note 9 and accompanying text.

[8] U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 290 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf. The report defines "dedicated access privileges" as the preferred general term that includes individual fishing quotas, community quotas, cooperatives, and geographically based programs. *Id.* at 288–89. The report also calls for the creation of national guidelines for dedicated access privileges to address concerns over the tool and retain regional flexibility. *Id.* at 290. "Dedicated access privileges" are also known as "catch shares," "rights-based management," or "limited access privilege programs." *See, e.g.*, *id.* at 289; Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 § 106, Pub. L. No. 109-479, § 106(a), 120 Stat. 3586, 3586–94 (2007) (to be codified at 16 U.S.C. § 1853A).

[9] *See* Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, § 106(a), § 303A, 120 Stat. 3575, 3586–94 (2007) (to be codified at 16 U.S.C. § 1853a); 16 U.S.C. § 1853 (2000).

[10] *See* Press Release, Nat'l Oceanic & Atmospheric Admin., Bush Administration Releases Marine Fisheries Bill (Sept. 19, 2005), *available at* http://www.nmfs.noaa.gov/docs/magnuson-release.pdf; *see also* Office of Sustainable Fisheries, NOAA Fisheries, Limited Access Privilege Program,

Congress, this Note will use "LAPP" as a blanket term encompassing the range of market-based tools proposed by economists and legal commentators to combat the tragedy of the commons and the race to the fish.

In the face of this increasing emphasis on market-based tools, some groups of environmentalists, fishers, and scientists have expressed concern that government managers are abdicating their duties regarding these publicly owned resources by transferring them into private ownership. One of the arguments of these groups is that LAPPs are inconsistent with the public trust doctrine.[11] Although such policy debates about whether to implement LAPPs have made many references to the doctrine, it is not clear that the doctrine would apply as a matter of law to many federally-controlled marine fisheries. The doctrine has traditionally applied to fisheries located near the shore under state management, but it has never been held by the courts to apply to fisheries beyond three miles from shore that are currently under federal control.

Although the public trust doctrine defies a simple and straightforward explication,[12] generally it contains a few broad principles. The public trust doctrine holds that certain resources, particularly navigable and tidal waters and the land submerged beneath them, are held in trust by the government for the people. It imposes limitations on the ability of governments to alienate these public trust resources. It also creates an affirmative obligation on those governments to protect and preserve the resources for use by the public.[13]

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http://www.nmfs.noaa.gov/sf/lapp/ (follow "Current and Expected Future Programs" hyperlink) (last visited Feb. 15, 2007) (doubling programs to sixteen total by 2010).

[11] *See, e.g.*, THE MARINE FISH CONSERVATION NETWORK, INDIVIDUAL FISHING QUOTAS: ENVIRONMENTAL, PUBLIC TRUST, AND SOCIOECONOMIC IMPACTS 4–6 (2004). Critics raise concerns about the alienation of public trust resources and the privatization of public property, the distributional equity of limited entry programs, impacts on class relations, and protection of rural communities. *See* Macinko, *supra* note 3; *see also* Seth Macinko & Daniel W. Bromley, *Property and Fisheries for the Twenty-First Century: Seeking Coherence from Legal and Economic Doctrine*, 28 VT. L. REV. 623 (2004).

[12] *See, e.g.*, Jeffrey W. Henquinet & Tracey Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 347–65 (2006) (documenting the differences among the public trust doctrines of the states bordering the Great Lakes).

[13] *See infra* Part I.

This Note examines the relevance of the public trust doctrine to modern fishery management, particularly in the U.S. EEZ. Part I looks at the origins and nature of the public trust doctrine. Part I.A examines the geographic scope of the public trust doctrine and discusses the open issue of whether the doctrine applies in federal waters. Part I.B covers the uses protected by the doctrine and analyzes the impact of the doctrine on fishery management. Part II then looks at LAPPs in more detail and evaluates the arguments against them based on the public trust doctrine. The remainder of Part II demonstrates how properly designed LAPPs are consistent with the public trust doctrine.

I. THE PUBLIC TRUST DOCTRINE AND FISHERIES

This Part will look at the various aspects of the public trust doctrine more closely. Part I.A will discuss the geographic scope of the doctrine as it has expanded from the traditional coverage of tidelands near to shore to encompass an ever larger area. With this expansion in geographic scope in mind, I will then discuss the open issue of whether the public trust doctrine applies to federal fisheries in the EEZ. Part I.B then looks to the uses protected by the doctrine and the obligations and limitations the doctrine imposes on fishery managers. The doctrine historically protected navigation, commerce, and fishing, but recent judicial decisions have extended the doctrine to protect other uses as well. These developments will be examined in the context of fisheries management at the state level in near-shore and inshore fisheries, although the same principles might be extended to federal fisheries if the public trust doctrine were extended to cover the EEZ. Before getting to these two issues, however, this Note will first present a brief history of the origin and development of the public trust doctrine in the U.S.

The public trust doctrine traces its origin back to ancient Roman times, and was first codified in the Justinian Code.[14] The doctrine was also contained in provisions of the Magna Carta and developed in the English common law before it was adopted by individual United States jurisdictions.[15] The New Jersey Supreme

[14] "Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore." J. INST. 2.1.1 (J.B. Moyle trans.).

[15] *See* Comment, *The Public Trust in Tidal Areas: A Sometime Submerged*

Court provided an early statement of the public trust doctrine in the U.S. in *Arnold v. Mundy*, holding that the state could not go so far as to divest the public of its common right to access public resources—denial of such access would be "a grievance which never could be long borne by a free people."[16] In this case, the court limited the power of the state to dispose of publicly owned oyster beds.[17] The United States Supreme Court first recognized the public trust doctrine when it decided *Martin v. Waddell* two decades later, a case in which the Court concluded that "the shores, and rivers, and bays, and arms of the sea, and the land under them . . . [are] held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery," notwithstanding land grants that appeared to grant the land to an individual.[18]

The most important Supreme Court decision involving the public trust doctrine came several decades later in *Illinois Central Railroad Company v. Illinois*.[19] The case involved a dispute over whether the state legislature had the authority to grant title to most of the submerged lands in the Chicago harbor to a private company.[20] The *Illinois Central* Court outlined what has become the standard formulation for the restrictions on alienation of public trust lands in United States jurisdictions.[21] The Court held that the public trust doctrine in Illinois required that state control of the trust interest in lands beneath navigable waters can only be relinquished when the transfers either 1) promote the interests of the public in the transferred land or 2) do not substantially impair the public's interest in the remaining lands and waters.[22] Recognizing that each state is free to develop its own version of

Traditional Doctrine, 79 YALE L.J. 762, 765–68 (1970) (discussing provisions of the Magna Carta that contained elements of the public trust doctrine); *see also* JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 5 (1994).

[16] Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

[17] *Id.*

[18] Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411–16 (1842).

[19] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). This case has been called the "lodestar" or "most celebrated" case in American public trust law. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

[20] *Illinois Central*, 146 U.S. at 450–52.

[21] *Id.* at 434–37.

[22] *Id.* at 453.

the public trust doctrine, the Court in a subsequent case held that the question of the use of shorelines by private land owners bordering navigable waterways is left to the discretion of the various states as sovereigns.[23]

Some states explicitly adopted the public trust doctrine in their constitutions,[24] while in other states the courts have found support for the doctrine in constitutional provisions relating to natural resources.[25] In other states where the doctrine lacks constitutional protection, the public trust doctrine has been restricted by statutes or by judicial decisions.[26] In those states that lack a statutory or constitutional basis for the doctrine, the *Illinois Central* case provides the dominant view of the doctrine applicable by default.

A. *Geographic Scope of the Public Trust Doctrine*

1. *Development of the Doctrine*

Although the *Illinois Central* case was later described as "necessarily a statement of Illinois law,"[27] many state courts have explicitly adopted the reasoning of *Illinois Central*.[28] Except

[23] Shively v. Bowlby, 152 U.S. 1, 57–58 (1894).

[24] For example, although the public trust doctrine in Hawaii had its origins in the common law, the state constitution now includes express provisions providing for a public trust on all public resources of the state, particularly water resources. *See* HAW. CONST. art. XI §§ 1, 7. Shortly after the *Illinois Central* decision, the courts of Hawaii affirmed the public trust covering all navigable waters and the soil beneath them. *See* King v. Oahu Ry. & Land Co., 11 Haw. 717, 723–25 (1899). Modern decisions by the Hawaii Supreme Court reflect both the common law and state constitutional basis for the doctrine in the state. *See, e.g.*, *In re* Water Use Permit Applications, 9 P.3d 409, 442-44 (Haw. 2000).

[25] *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 576 n.12 (1989) (discussing cases construing state constitutional provisions that either expressly or impliedly create a public trust over water resources).

[26] In response to a series of cases applying the public trust doctrine to disputes over water allocation, the Idaho legislature passed a bill restricting the geographic scope of the public trust doctrine to the beds of navigable waters and prohibiting its application to state trust lands and water rights. *See* 1996 Idaho Sess. Laws 1147 (codified at IDAHO CODE ANN. §§ 58-1201 to -1203 (2002)). Washington law limits the public trust doctrine so that it does not create a public right to take naturally occurring clams from private property. *See* State v. Longshore, 5 P.3d 1256, 1263 (Wash. 2000).

[27] Appleby v. City of New York, 271 U.S. 364, 395 (1926).

[28] *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 61–62 (Mich. 2005); Owsichek v. State, 763 P.2d 488, 495–96 (Alaska 1988); Caminiti v. Boyle, 732

where states have either expanded or contracted the doctrine through subsequent judicial decisions, statutes, or constitutional provisions, an analysis of the *Illinois Central* case will illustrate the public trust doctrine as it exists in American law. *Illinois Central* provides the baseline from which we will measure the development of the public trust doctrine in various state courts.

To better understand how the doctrine has expanded, it is important to clarify precisely what geographic scope the public trust doctrine covers, as delineated in *Illinois Central*. The Court stated that "[i]t 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 . . . ."[29] The Court further explained geographic differences between England and the United States that justify extending state ownership in the United States beyond simply lands covered by water subject to the ebb and flow of the tide.[30] While English common law only applied the doctrine to tidal waters, early American formulations had expanded the doctrine to include navigable waterways such as the Mississippi River.[31] Furthermore, the state's title in the land beneath these waters "necessarily carries with it control over the waters above them whenever the lands are subjected to use."[32] Thus, the American version of the public trust doctrine applies to all state waters that are either navigable or subject to tides and to the land beneath them.

Since the time of *Illinois Central*, state courts have expanded the geographic scope of their public trust doctrines beyond navigable or tidal waters. Various jurisdictions have further expanded the reach of the doctrine to apply the public trust to

P.2d 989, 994–95 (Wash. 1987); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 51–52 (N.J. 1972); Marks v. Whitney, 491 P.2d 374, 379 n.5 (Cal. 1971); King v. Oahu Ry. & Land Co., 11 Haw. 717, 723–25 (1899). The reasoning of *Illinois Central* includes the restrictions on alienation of public trust resources, *see supra* notes 21–22 and accompanying text, as well as the geographic scope of the doctrine (tidal waters and the land beneath them), *see infra* notes 29–32 and accompanying text, and the traditional triad of uses protected (navigation, commerce, and fishing), *see infra* note 66 and accompanying text.

[29] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (citing Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845)).

[30] *Id.* at 435–36.

[31] ARCHER ET AL., *supra* note 15, at 6.

[32] *Illinois Central*, 146 U.S. at 452.

"lakes, tributaries, riparian banks, . . . aquifers, marshes, wetlands, springs, and groundwater."[33] Commentators have called for the doctrine to be expanded even further to other resources.[34] In some states the doctrine also encompasses non-water resources such as parks, forests, wildlife, and ecosystems.[35]

While the public trust doctrine has not yet been held to apply to the open ocean, various courts have exhibited a willingness to expand the geographic scope beyond its traditional boundaries. There are, however, possible countervailing interests that caution against broad expansion of the public trust doctrine. Aggressive application of the doctrine can lead to strong reactions from private landowners who see the doctrine as a threat to their property interests. This can result in legislative attempts to restrict the reach of the doctrine or to prevent its use in settings such as defending against takings claims. The Montana Legislature, for example, proposed anti-takings legislation in 1995 that would have barred the use of the public trust doctrine as a defense against takings claims brought by private property owners, although the legislation was never enacted.[36] In Idaho, the state legislature went further than the Montana proposal by enacting a statute designed to limit the application of the public trust doctrine. The statute restricted the geographic scope of the public trust doctrine to the beds of navigable waters and prohibited its application to state trust lands and water rights.[37]

An expansive public trust doctrine has ramifications for fishery management beyond simply the geographic scope of the

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[33] *See* Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 425 (2005); *see also* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983).

[34] *See, e.g.*, Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to the Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285 (2004) (radio and other wireless communication); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1124–31 (2005) (tribal sacred sites).

[35] *See* Kleinsasser, *supra* note 33, at 425–26.

[36] *See* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 359 (1998).

[37] *See* 1996 Idaho Sess. Laws 1147 (codified at IDAHO CODE ANN. §§ 58-1201 to -1203 (1996)); *see also* Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461, 473 (1997).

doctrine to be applied. Those states with expansive doctrines have shown a willingness to apply the doctrine to confront challenges to environmental resources deemed important to the people of the state.[38] This willingness to apply the doctrine means that courts would likely seek to protect public resources by enforcing more restrictions on government managers seeking to create market-based tools resembling private property rights in those public resources. However, because government officials have an affirmative obligation under the public trust doctrine to protect certain public resources, these same courts are also likely to support government efforts that protect those public resources despite their potential adverse effects on private property owners.[39] Thus these states arguably represent the most challenging situations for designing fishery management schemes. LAPPs in these states will likely be subject to scrutiny under the public trust doctrine, so they must be carefully designed to ensure that the public interest in the fisheries is protected.

2. *Extension of the Public Trust Doctrine to Federal Waters*

As mentioned in the Introduction, the policy debates regarding the use of LAPPs in federal fishery management often include discussion of the public trust doctrine.[40] Some environmentalists and fishers argue that expanding the use of LAPPs in federal waters would be inconsistent with the doctrine by interfering with the public's rights of access to the public trust resources.[41] What this invocation of the public trust doctrine often

[38] California provides perhaps the best example of expansive application of the public trust doctrine by the courts. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust doctrine is "sufficiently flexible to encompass changing public needs"); *Nat'l Audubon*, 658 P.2d at 712, 721 (applying the public trust doctrine to the non-navigable tributaries of Mono Lake).

[39] For an example of a state court recognizing that government efforts to protect public resources can trump harm to private property, see *infra* notes 83–87 and accompanying text.

[40] *See, e.g.*, THE MARINE FISH CONSERVATION NETWORK, *supra* note 11, at 4–6; *see also* U.S. COMM'N ON OCEAN POLICY, *supra* note 8, at 289 (noting concerns of public interest groups that LAPPs create individual property rights to public resources). *See generally, e.g.*, Macinko, *supra* note 3 (discussing the public trust doctrine with respect to commercial fisheries); Macinko & Bromley, *supra* note 11 (discussing legal and economic issues, including the public trust doctrine for fishery management schemes).

[41] *See, e.g.*, Macinko, *supra* note 3, at 934–35.

overlooks is that it is not clear as a matter of law that the doctrine applies to federally managed fisheries. This Part analyzes the arguments for whether the public trust doctrine applies to federal fisheries, although this remains an open issue.

While there is an abundance of authority on the public trust doctrine as a matter of state law, similar authority on the existence of a federal public trust is noticeably lacking. A few important cases hint at the existence of a federal public trust doctrine, although no courts have addressed the issue of a public trust covering federal fisheries. The existing caselaw has applied the public trust doctrine to the federal government in only two circumstances. First, several cases imply that a federal public trust doctrine exists for lands and waters that could one day be subject to state control under a public trust because the federal government holds those lands in trust for the states.[42] Second, courts have discussed the effect of the federal government acquiring through condemnation lands that had been subject to a public trust. In these circumstances, there is a division of authority on whether the U.S. is bound by the public trust doctrine or whether the use of eminent domain extinguishes the public trust.[43]

Moreover, beyond the differences in the application of the public trust doctrine to federally controlled and state controlled resources, the history of the federal waters of the EEZ illustrates

[42] The Supreme Court in *Illinois Central* spoke in broad terms regarding the public trust doctrine and recognized the authority of the federal government to regulate two of the public trust uses: commerce and navigation. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892). The Court also has held that the federal government held "the same title and dominion" over territory acquired or ceded from states which was held "for the benefit of the whole people, and in trust for the several States to be ultimately created out of that Territory." Shively v. Bowlby, 152 U.S. 1, 57 (1894).

[43] In *United States v. 11.037 Acres of Land*, the court held that the exercise of eminent domain created a free and clear title to the land vested in the federal government, unencumbered by the public trust that previously bound the state. 685 F. Supp. 214, 216 (N.D. Cal. 1988). This decision contrasted with that court's earlier decisions which held that if land was subject to the action of the tide at the time of condemnation by the federal government, then the land was acquired under the public trust. *See* City of Alameda v. Todd Shipyards Corp. (*Alameda II*), 635 F. Supp. 1447, 1450 (N.D. Cal. 1986); City of Alameda v. Todd Shipyards Corp. (*Alameda I*), 632 F. Supp. 333, 336–37 (N.D. Cal. 1986). Other cases have supported the view that the federal government can hold resources in a public trust. *See, e.g.*, United States v. 1.58 Acres of Land, 523 F. Supp. 120, 123 (D. Mass. 1981); *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980). For a more detailed discussion of these cases, see ARCHER ET AL., *supra* note 15, at 157–61.

the differences between the EEZ and the near-shore waters controlled by the states. These differences suggest uncertainty as to whether the doctrine does or should apply to these waters. The waters of the EEZ, unlike those near-shore waters traditionally subject to the public trust doctrine, were traditionally treated as a global commons.[44] Through the Law of the Sea Convention and various unilateral proclamations, nations around the world have more recently laid claim to certain rights in the waters of their respective Exclusive Economic Zones, including exclusive fishing rights.[45] The freedom of the high seas that previously existed in the EEZ included the principle that certain resources, including fish, were *res nullius*, meaning they belonged to no one so long as they were free in the wild.[46] This open access property regime differs from the regime proscribed by the public trust doctrine, which essentially makes fisheries a common pool resource with open access only within a limited group—the people of the state holding the trust. The global commons is not generally seen as creating an obligation on the nations of the world to protect fisheries found on the high seas, although attempts have been made to a limited degree through international treaties.[47] Thus, while extension of the public trust doctrine from the near-shore tidelands to the EEZ might seem like a natural next step, the

[44] The idea of freedom of the high seas can be traced back at least as far as the writings of Grotius. *See generally* HUGO GROTIUS, MARE LIBERUM (Ralph Van Deman Magoffin trans., Batoche Books Ltd. 2004) (1609) (proposing a right for people of all nations to fish and navigate the seas).

[45] *See* United Nations Convention on the Law of the Sea art. 56, Dec. 10, 1982, 1833 U.N.T.S. 397, 418.

[46] *See, e.g.*, GROTIUS, *supra* note 44, at 25.

[47] For example, the U.N. Fish Stocks Agreement applies to fisheries where the species is either highly migratory and moves between various jurisdictions or the species straddles the high seas and the EEZ of one or more countries. *See* Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, S. TREATY DOC. NO. 104-24, 2167 U.N.T.S. 88. This agreement has not yet extended to cover fisheries found entirely on the high seas. However, in December 2006 the U.N. General Assembly adopted a resolution attempting to deal with issues of unsustainable fishing on the high seas but failing to impose a moratorium on bottom trawling. G.A. Res. 61/105, U.N. Doc. A/RES/61/105 (Dec. 8, 2006); *see also* Press Release, General Assembly, General Assembly Calls for 'Immediate Action' to Sustainably Manage Fish Stocks, Protect Deep Sea Ecosystems from Harmful Fishing Practices, U.N. Doc. GA/10551 (Dec. 8, 2006), *available at* http://www.un.org/News/Press/docs/2006/ga10551.doc.htm.

history of the high seas indicates that this would be quite a dramatic change from past practice.

In some respects though, the federal law governing fisheries in the EEZ is already consistent with the public trust doctrine. National Standard 4 of the Magnuson-Stevens Act, for instance, prohibits the implementation of any conservation and management measures that discriminate between residents of different states.[48] This standard is consistent with the decisions of state courts under the public trust doctrine that allow municipalities to charge reasonable fees for the use of their beaches, but do not allow them to "discriminate in any respect between their residents and nonresidents."[49] While National Standard 4 does not by itself establish that the public trust doctrine applies in federal waters, it does show that Congress may have been influenced by rationales similar to those underlying the public trust doctrine when it extended national jurisdiction further out into the oceans.

In addition to federal statutes that have incorporated elements that are consistent with the public trust doctrine, a prominent Supreme Court decision has discussed the trust responsibilities of the government in the territorial waters of the United States. If the public trust doctrine were extended to cover the EEZ this would create additional trust responsibilities and also provide more consistent rules governing federal fisheries, which often cross the federal-state boundary three miles from shore. In the 1947 case *United States v. California*, the Supreme Court rejected attempts by the State of California to lay claim to the lands of the continental shelf and the oil and gas reserves beneath them, which were at the time controlled by the federal government.[50] The Court held "that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[51] The decision was limited to the three-mile zone that has subsequently been returned

[48] 16 U.S.C. § 1851(a)(4) (2000).

[49] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 49, 55 (N.J. 1972) (relying explicitly on the public trust doctrine, as opposed to arguments based on the Equal Protection or Commerce Clauses).

[50] United States v. California, 332 U.S. 19, 38–39 (1947).

[51] *Id.*

to state control in the intervening years by federal statute.[52] However, the reasoning that a coastal nation must have dominion over the seas near its shores can be naturally extended to suggest that the federal government has the same rights in and power over the EEZ. Just as the federal government's "assertion of national dominion over the three-mile belt" was binding on the *California* Court,[53] so too the assertion of dominion over the EEZ establishes the rights of the United States in that zone. Protection and control of these areas of the sea is "a function of national external sovereignty."[54] According to the Court's opinion, coastal nations have paramount rights—"powers of dominion and regulation"—over their territorial seas because they "must be able to protect [themselves] from dangers incident to [their] location."[55] Regarding ownership of marine resources by the federal government, the Court states that "whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use."[56] The Committee to Review Individual Fishing Quotas relied on the broad language of the *California* case to conclude that "[w]ith sovereign authority comes sovereign responsibility."[57]

However, simply because the federal government has dominion over the resources in the EEZ does not necessarily mean that those resources are held under the public trust doctrine. Yet other language in the *California* case indicates that some kind of public trust exists over the resources of the territorial sea. The State of California argued that past government action signaled the federal government's forfeiture of its rights to the resources in the federal waters.[58] However, the Court rejected those claims, stating

[52] *See* Submerged Lands Act of 1953, ch. 65, §§ 2(a)(2), 3(a), 67 Stat. 29, 29-30 (1953) (codified as amended at 43 U.S.C. §§ 1301(a)(2), 1311(a) (2000)).

[53] *California*, 332 U.S. at 34.

[54] *Id.*

[55] *Id.* at 35.

[56] *Id.*

[57] COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, NAT'L RESEARCH COUNCIL, SHARING THE FISH: TOWARD A NATIONAL POLICY ON INDIVIDUAL FISHING QUOTAS 44 (1999). The Committee was formed at the direction of Congress in the 1996 Amendments to the Magnuson-Stevens Fishery Conservation and Management Act, and it consisted of scientists, legal academics, and government employees with expertise in fishery management. *See* Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(f), 110 Stat. 3559, 3577 (1996); COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra*, at 2.

[58] *California*, 332 U.S. at 39.

that the United States "holds its interests here as elsewhere in trust for all the people" and thus cannot forfeit them due to erroneous actions on the part of government employees.[59] Although this language does not clearly state that the public trust doctrine applies, the Court's use of the term "trust" suggests that the federal government has some duty to preserve the resource.

Even though the *California* Court discusses a trust, it is not necessarily the trust of the public trust doctrine. The trust over resources in the territorial waters discussed in the *California* case by the Court, or extended to the EEZ, could refer to either the public trust doctrine or the trust in which federal public lands are held.[60] The trust on federal public lands differs from the public trust doctrine in several ways. Although resource extraction figures prominently in both trusts, public lands faced a unique set of policy goals as the federal government sought to encourage expansion of the country and settlement of western lands through homesteading.[61] The territory of the EEZ is not usable for homesteading, development, or many of the other uses to which western land has been dedicated; however it is useful for the triad of uses (commerce, navigation, and fishing) protected by the public trust doctrine.[62] Additionally, most of these public lands were acquired directly by the federal government through "discovery or purchase," and so "it was deemed to have the sole right of ownership and disposal" of the lands.[63] The federal government's rights in the EEZ, however, are subject to rights of free passage and overflight,[64] and thus the government has lesser

[59] *Id.* at 40.

[60] *See* Jack H. Archer & M. Casey Jarman, *Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources*, 17 OCEAN & COASTAL MGMT. 253, 255–60 (1992). This article discusses doctrines that might involve trust responsibilities for the federal government, going beyond the generic statement that a trust exists as presented in the *California* case. *Id.*

[61] *See* Jarman, *supra* note 6, at 11.

[62] While it can be argued that extraction of mineral and metal resources can occur both in the EEZ and the western lands, the match between the EEZ and the public trust doctrine is much more coherent.

[63] *See* Jarman, *supra* note 6, at 11 (citing Shively v. Bowlby, 152 U.S. 1, 51 (1894)).

[64] *See* United Nations Convention on the Law of the Sea art. 58, para. 1, Dec. 10, 1982, 1833 U.N.T.S. 397, 419 (recognizing freedom of overflight for all nations in any EEZ). Although the United States has not ratified the Law of the Sea Convention, it has generally acquiesced to the creation of customary international law based on the principles of that convention related to the EEZ.

control over the EEZ than public lands in the West. Because the EEZ is more like the tidelands covered by the public trust doctrine, it makes more sense to apply the public trust doctrine, and not the federal public lands trust, to the EEZ.[65] Although this reasoning is far from conclusive, when combined with policy considerations it might persuade a judge to extend the geographic scope of the public trust doctrine to cover federal waters. Courts would not likely invalidate per se federal fishery management measures expressly authorized by Congress, but they might apply the public trust doctrine to influence the form of those measures in a way that protects the public's interest in the fisheries. Given this potential for expansion in geographic scope, federal fishery managers would be wise to consider the implications of the doctrine on its actions even though courts have yet to explicitly apply public trust principles in reviewing fishery management activities.

B. *Uses Protected by the Public Trust Doctrine*

1. *Development of the Doctrine*

Just as the geographic scope of the public trust doctrine expanded over time through judicial decisions, the uses protected by the doctrine have also grown in recent years. The traditional view suggested that public trust resources are 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."[66] The public trust doctrine thus protects the rights of the public in navigation, commerce, and fishing as against private parties, but does not protect the public rights of access as absolute.

See George D. Haimbaugh, Jr., *Impact of the Reagan Administration on the Law of the Sea*, 46 WASH. & LEE L. REV. 151, 162–69, 183–85 (1989); *Developments in the Law: International Environmental Law*, 104 HARV. L. REV. 1484, 1537–38 (1991).

[65] *See* Jarman, *supra* note 6, at 24–31. Jarman notes that the trust on federal public lands derives from the Property Clause of the Constitution, and the legislative history of the Outer Continental Shelf Lands Act shows that Congress believed its power over minerals of the Continental Shelf also derived from the property clause. *Id.* at 22–24. Because the resources of the high seas were regarded as common property prior to creation of the EEZ, and now the federal government owns the resources of its EEZ in trust for the people of the United States, it is more reasonable to apply the tidelands trust (Jarman's name for the public trust doctrine) to the EEZ. *Id.* at 24–31.

[66] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

As discussed above, the state may transfer title in public trust land when doing so would either improve the public's interest in the transferred land or would not impair the public's interest in the remaining land.[67] The uses protected by the doctrine have recently expanded, going beyond navigation, commerce, and fishing to include environmental, recreational, aesthetic, and preservation uses.[68] California courts took the lead in expanding the modern public trust doctrine. California justified this expansion of the public trust doctrine by citing the flexibility of the doctrine "to encompass changing public needs."[69] In contrast, other states have resisted expansion and insisted that the public trust doctrine creates only limited public rights on public trust lands.[70]

2. *Application of the Public Trust Doctrine to Fisheries*

Bearing in mind the expansion of the public trust doctrine both in terms of geographic scope and protected uses, this Part will discuss the implications the public trust doctrine has had on fishery management at the state level. As discussed earlier, the statement of the doctrine found in *Illinois Central* ensures that the public is able to fish in public trust waters, free from interference by third parties.[71] This right to fish means that private individuals may not stop members of the public from fishing in public waters.[72] However, this does not create a per se legal right, but rather "gives the state standing as trustee to vindicate any rights that are infringed."[73] Additionally, the state may not transfer public waters to private individuals in a way that would interfere with the public rights of fishing.[74] At the very least, the public trust doctrine creates a presumption that a state legislature "did not intend to convey lands in a manner that would impair public trust rights."[75]

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[67] *See supra* note 22 and accompanying text.

[68] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

[69] *Id.*

[70] *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 75 (Mich. 2005).

[71] *See supra* note 66 and accompanying text.

[72] *See, e.g.*, Conservation Law Found. v. Dep't of Envtl. Prot., 823 A.2d 551, 563 (Me. 2003) (coastal property owner's rights subject to public's right to fish); Lehigh Falls Fishing Club v. Andrejewski, 735 A.2d 718, 719 (Pa. Super. Ct. 1999) (riparian owners do not have exclusive right to fish).

[73] State v. Deetz, 224 N.W.2d 407, 412 (Wis. 1974).

[74] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892); *see also Deetz*, 224 N.W.2d at 412.

[75] Gwathmey v. State, 464 S.E.2d 674, 684 (N.C. 1995).

Many states follow the rule that the legislature may not convey public trust lands into private ownership unless such action promotes the interest of the public or does not substantially impair it.[76] Some states even go so far as to say that only in rare cases will abandonment of public control over public resources be consistent with the purposes of the public trust.[77] However, it is clear that governments may transfer title in public trust resources into private control, so long as the public's interest is protected according the doctrine of *Illinois Central*.

Traditional fishery management techniques place limits on the quantity or size of fish that may be captured and do not raise the same issues as transfers of title would raise. These techniques may limit the time, location, or manner of fishing that is allowed. The public trust doctrine has not presented an obstacle to these management techniques. Thus states are free to impose such restrictions on all members of the public.[78] Additionally, state courts have held that certain limited access programs are consistent with the public trust doctrine. In Washington, for example, a program granting private harvesting rights (but not ownership of tidelands) was found to be consistent with the public trust doctrine because the state retained the right to impose measures necessary to protect the interests of the state and also had the authority to revoke the harvesting agreements.[79]

In addition to limitations on alienation of public trust resources, state courts also often speak of a duty or obligation to protect those resources, not simply the right or authority to do so.[80] More than merely requiring access to fisheries, the public trust doctrine "impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all

[76] *See, e.g.*, Caminiti v. Boyle, 732 P.2d 989, 994–95 (Wash. 1987). I put aside concerns about transfer of title because the LAPPs at issue do not typically involve transfer of title to the seabed. For more discussion of the types of private interests created by LAPPs, see *infra* Part II.A.

[77] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983).

[78] *See, e.g.*, State v. Millington, 377 So. 2d 685 (Fla. 1979) (prohibition on possessing small shrimp found to be within the state's police power); Commonwealth v. Savage, 29 N.E. 468 (Mass. 1892) (prohibition on possessing undersized lobsters upheld).

[79] *See* Wash. State Geoduck Harvest Ass'n v. Dep't of Natural Res., 101 P.3d 891, 897 (Wash. Ct. App. 2004).

[80] *Nat'l Audubon*, 658 P.2d at 724.

people."[81] The public trust doctrine must create an affirmative duty on the state to protect and conserve public trust resources, otherwise simply providing access until the resources are destroyed would not meet the obligations on the government to protect public resources for use by the public. Thus, fishery managers have a duty to take action to prevent overfishing and protect fish populations.

The public trust doctrine has been particularly effective in Louisiana, where the state constitution contains strong language imposing a public trust on all the natural resources of the state.[82] The Louisiana Supreme Court recently affirmed the strength of the public trust doctrine in a 2004 case threatening the State's ability to protect and restore coastal marshes and wetlands.[83] Recognizing that the levee system designed to prevent flooding also interfered with the replenishing of wetlands through the addition of sediments and freshwater, the state and federal governments created major freshwater diversion projects to enhance the wetland ecology.[84] These new diversions had an impact on the oyster industry, because the diversions affected the salinity levels on oyster beds leased by the industry from the state, causing those oyster beds to become unprofitable.[85] When the oystermen brought a takings challenge claiming that their leases were damaged by the diversion projects, the court upheld the validity of "hold harmless" clauses inserted into oyster leases that required lessees to forfeit any claims against the state for damages caused by diversions made to protect the health of coastal wetlands.[86] The court upheld these hold harmless clauses on the theory that the diversion project was an exercise of the state's duty under the public trust doctrine:

> [T]he implementation of the . . . project fits precisely within the public trust doctrine. The public resource at issue is our very coastline, the loss of which is occurring at an alarming rate. The risks involved are not just environmental, but involve the health, safety, and welfare of our people . . . . [T]he redistribution of existing productive oyster beds to other areas

[81] Owsichek v. State, 763 P.2d 488, 495 (Alaska 1988).
[82] LA. CONST. art. IX, § 1.
[83] Avenal v. State, 886 So. 2d 1085 (La. 2004).
[84] *Id.* at 1088.
[85] *Id.* at 1091.
[86] *Id.* at 1096–97, 1101–02.

> must be tolerated under the public trust doctrine in furtherance of this goal.[87]

By employing the public trust doctrine as a shield for government action addressing an increasingly apparent environmental harm, the Louisiana Supreme Court demonstrated the potential power of the public trust doctrine to enable governments to protect valuable coastal resources. This case demonstrates both the affirmative duty of the state to protect public trust resources as well as the state's authority to take actions that may adversely affect fishing interests in the short term in order to protect the public trust.

II. LAPPS AND THE PUBLIC TRUST DOCTRINE

A. *Background on LAPPs*

Today, the most commonly used LAPPs include catch shares such as Individual Fishing Quotas (IFQs) (as they are known in the U.S.) and Individual Transferable Quotas (ITQs) (as they are known in places like New Zealand, Australia, Canada, and Iceland). ITQs give holders the right to catch a share of the Total Allowable Catch (TAC), usually expressed as a percentage.[88] IFQs are essentially the same as ITQs though they need not be transferable.[89] Other LAPPs allocating a share of the total catch to individuals or groups include Individual Vessel Quotas (IVQs), Individual Processor Quotas (IPQs), and Community Development Quotas (CDQs).[90] These catch shares all give the holder rights of access and withdrawal, but typically the government retains the rights of management, exclusion, and alienation. Even when the

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[87] *Id.* at 1101–02.

[88] *See, e.g.*, Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 156 (2005).

[89] U.S. COMM'N ON OCEAN POLICY, *supra* note 8, at 288 (distinguishing ITQs from IFQs based on whether they are transferable).

[90] *See id.* at 288–89 (describing the variety of access privileges); *see also, e.g.*, COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 57, at 47; Avi Brisman, *A Less Tragic Commons: Using Harvester and Processor Quotas to Address Crab Overfishing*, 26 SEATTLE U. L. REV. 929, 930–31 (2003); Kenneth Kaoma Mwenda & Pierre-Oliver Leblanc, *European Fisheries in Crisis: Implementing Individual Transferable Quotas as a Solution*, 20 WHITTIER L. REV. 783, 813 (1999); Alison Rieser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 ECOLOGY L.Q. 813, 825–26 (1997).

LAPP is transferable the government retains the authority to regulate or condition its transfer.[91]

Territorial Use Rights in Fishing (TURFs) are another form of LAPPs. Instead of allocating a share of the catch, they allocate a section of the ocean to be used exclusively by the holder of the TURF. This type of LAPP works best for relatively sedentary species such as mollusks and crustaceans.[92] TURFs are similar to a system Harold Demsetz described, in which the local population used hunting territories to manage the fur trade in the Labrador Peninsula.[93] The U.S. EEZ itself is a form of a TURF, because the U.S. has the exclusive right to fish within its boundaries.[94] This Note will use the term in the more localized sense, typically involving a small, well-defined section of the ocean.[95] In addition to rights of access and withdrawal, TURFs generally give the holders the right to exclude others from their section of the ocean.[96] Government typically retains some management rights and the authority to regulate transfer of TURFs.[97]

Cooperatives can form when a group pools its allocated share of the catch in a particular fishery or its TURFs,[98] yet because the cooperative is not controlled by the public, the same analysis on public trust grounds applies. Cooperatives involve contractual arrangements between private parties to allocate quota and fishing

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[91] U.S. COMM'N ON OCEAN POLICY, *supra* note 8, at 288–89.

[92] FRANCIS T. CHRISTY, JR., FAO FISHERIES TECHNICAL PAPER 227, TERRITORIAL USE RIGHTS IN MARINE FISHERIES: DEFINITIONS AND CONDITIONS 1 (1982), *available at* http://www.fao.org/DOCREP/003/T0507E/T0507E00.HTM.

[93] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351–53 (1967).

[94] *See* CHRISTY, *supra* note 92, at 3.

[95] *Id.* at 5.

[96] *Id.* at 4.

[97] Alison Rieser, *supra* note 90, at 825–26 (1997); Svein Jentoft, *Fisheries Co-management: Delegating Government Responsibility to Fishermen's Organizations*, 13 MARINE POL'Y 137, 144–45 (1989).

[98] *See, e.g.*, NOAA Fisheries, Nat'l Marine Fisheries Serv., Crab Rationalization Program Overview and Frequently Asked Questions (last visited Apr. 23, 2007), http://www.fakr.noaa.gov/sustainablefisheries/crab/rat/progfaq.htm#chc; *see also* N. PAC. FISHERY MGMT. COUNCIL, FISHERY MANAGEMENT PLAN FOR GROUNDFISH OF THE BERING SEA AND ALEUTIAN ISLANDS MANAGEMENT AREA, 41–42 (2005), *available at* http://www.fakr.noaa.gov/npfmc/fmp/bsai/BSAI.pdf; Svein Jentoft & Trond Kristoffersen, *Fishermen's Co-management: The Case of the Lofoten Fishery*, 48 HUM. ORG. 355 (1989).

effort among themselves.[99] Cooperatives can operate somewhat independently from government managers, such that they have *de facto* if not *de jure* management rights.[100] The details of the individual allocation and management are left to the group, although government retains ultimate authority to impose limits on catch, gear, season, and other factors.[101] Government also retains rights of alienation and even rights of exclusion where the cooperative is based on pooled catch shares.[102]

B. *Arguments Against LAPPs Based on the Public Trust Doctrine*

Opponents of LAPPs have raised a variety of concerns based on their interpretation of the requirements of public trust doctrine. These concerns share a common contention that public trust resources should be controlled by government for the benefit of the public, while LAPPs give exclusive rights to harvest and manage fishery resources to private individuals. One of the specific concerns is that of distributional equity because LAPPs represent a specific allocation of benefits that favors some participants over others.[103] This concern was particularly present in the creation of the IFQ program for Alaska Halibut and Sablefish.[104] Critics argue that giving away harvest rights is tantamount to transferring public land into private control.[105] LAPP opponents also argue that the creation of these forms of "private property" carry with them the specter of takings claims when fishery managers implement conservation measures that reduce the value of the LAPPs.[106] Although the statutory language authorizing LAPPs disclaims the creation of any private property right protected by the Takings Clause,[107] analogies to other areas like grazing rights and water

[99] U.S. COMM'N ON OCEAN POLICY, *supra* note 8, at 288.

[100] *See also* Rieser, *supra* note 90, at 825–26.

[101] *See* Jentoft, *supra* note 97, at 144–45; Reiser, *supra* note 90, at 827–29.

[102] *See* Reiser, *supra* note 90, at 825–26.

[103] Macinko, *supra* note 3, at 924 (discussing opposition to ITQs based on the distributional implications of these programs).

[104] *See* Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996) (challenge to Alaska sablefish and halibut LAPP program based on distributional equity).

[105] *See, e.g.*, THE MARINE FISH CONSERVATION NETWORK, *supra* note 11, at 4.

[106] *See, e.g.*, *id.* at 4–5.

[107] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479,§ 106(a), § 303A(b), 120 Stat.

rights make potential takings claims a serious issue. Although potential takings claims are not the subject of this Note, the concern over "privatization" of public resources influences the discussion of the public trust doctrine. Additionally, LAPP opponents raise objections regarding the "gifting" of exclusive harvest rights to private individuals, rather than making them pay for such rights.[108] More generally, fishery management in the U.S. has been roundly criticized on the theory that the short-term interests of fishers do not match with the long-term conservation interests of the public.[109] This concern is reflected in critiques of the Regional Fishery Management Councils, which are composed of fishing interests and are often criticized as lacking sufficient representation of conservation and consumer interests.[110] The generalized concern that private interests do not correspond to the public interest in long-term sustainable fisheries suggests a motivation for opposition to LAPPs based on the public trust doctrine.

Once limited access rights have been allotted to private individuals or groups, the transferability of many types of LAPPs also raises more specific concerns. Concerns about potential consolidation of the industry and barriers to entry for future generations reflect the more general concern that LAPPs can exclude most members of the public from fishing while favoring a select few who control the harvest rights.[111] All of these concerns can basically be reduced to an argument that the public has rights of access to the fish, and LAPPs keep the public out of fisheries.

C. *LAPPs Are Consistent with the Public Trust Doctrine*

Opponents of LAPPs often seize on the public right of fishing by pointing out that LAPPs create exclusive harvest rights in individuals or groups that prevent open access by the public.[112]

3575, 3586–94 (2007) (to be codified at 16 U.S.C. § 1853A(b)).

[108] THE MARINE FISH CONSERVATION NETWORK, *supra* note 11, at 5.

[109] *See, e.g.*, THE MARINE FISH CONSERVATION NETWORK, *supra* note 11, at 7–8.

[110] *See* JOSH EAGLE ET AL., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS 27–31 (2003) (pointing out conflicts of interest on Regional Fishery Management Councils as reasons for poor performance on conservation measures).

[111] *See* Macinko, *supra* note 3, at 925.

[112] The rights created by different LAPP tools were discussed previously. *See supra* Part II.A.

This view of the public trust doctrine is excessively narrow for two reasons. First, the argument mischaracterizes the statement of the doctrine in early leading cases; the public trust doctrine does allow for the alienation of public trust tidelands in certain situations.[113] However, most LAPPs simply give individuals rights to catch a specified amount of fish or to fish in a given area, and they do not give private individuals rights to interfere with public access.[114] Public access to the fishery can properly be limited by government managers because under the public trust doctrine, public rights of access are not absolute; they simply must be protected from interference by private parties.

Second, the argument ignores the larger issue. The public trust doctrine would require the government to limit access where unlimited access threatens to deplete the entire stock. Fishery managers abdicate their public trust responsibilities when they fail to take action to prevent overfishing caused by inadequate management of a scarce resource and misaligned incentives of fishers. The introduction of LAPPs is one way to take action to prevent overfishing. In deciding what action to take, fishery managers must balance the dual interests of sustainable use and public rights of access. However, not every fishery can be appropriately put to each use. Different groups among the population may only have access to a subset of those fishing rights, so long as the public as a whole retains sufficient rights.

Even if the creation of LAPPs that allocate harvest rights to a limited number of individuals resembles the wholesale granting of the entire harbor to private control in *Illinois Central*, the action may still be valid under the public trust doctrine. In such a situation, fishery managers must look to see if the transfer of rights meets the *Illinois Central* test in that it either 1) promotes the public interest in the particular fishery or 2) does not impair the public's interest in what remains.[115] While it may seem strange to

[113] For my characterization of the doctrine, see *supra* notes 72–77 and accompanying text.

[114] This characterization applies most directly to criticisms of IFQ programs, which are the main targets for criticism. Other LAPPs such as TURFs raise additional challenges for fishery managers because they give private individuals the right to exclude, but additional measures in those areas can still ensure they are consistent with the public trust doctrine. *See generally* CHRISTY, *supra* note 92, at 6–7 (commenting on TURFs that develop in spite of the public trust doctrine).

[115] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

argue that the public's interest is improved when they can no longer access a fishery, when compared with the alternative of a common pool resource that is over-exploited to the point of collapse, the introduction of these new management schemes is a vast improvement. Additionally, by preventing the collapse of commercial fish stocks, fishery managers can prevent the severe ecological disturbance that is likely to occur when important species, such as top predators, are greatly reduced in population. Thus, modern fishery management tools, while often preventing public access to the fishery, nevertheless reduce the likelihood of collapse. This improves the public's interest in both commercial fish populations and healthy marine ecosystems, even if the tools employed to protect fish populations involve market-based tools that resemble the creation of private property interests in public fisheries.

In addition to applying an overly narrow interpretation of the public trust doctrine, LAPP opponents also often mischaracterize LAPPs as representing complete privatization of fisheries. Admittedly, LAPPs can be designed to achieve such a result, but they do not necessarily do so.[116] Properly designed LAPPs will not lead to problems with distributional equity or excessive concentration of shares. Indeed, fishery managers should heed the concerns of these opponents to ensure they design LAPPs in an appropriate manner.

The interests of communities that depend on access to a fishery for their survival can be protected by the creation of community development quotas (CDQs). Rather than granting rights to specific individuals or entities, fishery managers grant quotas to the entire community for the benefit of all.[117] CDQs can mitigate the inevitable social disruption caused by the rationalization of a bloated fishing and processing industry. Those communities that rely on a fishery for subsistence may receive CDQs or a sufficient number of individual fishing quotas (IFQs) so that they may satisfy their needs. While CDQs do not preserve

[116] Macinko has claimed that because some proponents of LAPPs, specifically individual transferable quotas, have called for the complete privatization of ocean resources, all LAPPs are therefore suspect. *See* Macinko, *supra* note 3, at 946–47. However, few LAPPs actually call for the complete privatization of all ocean resources, and properly designed LAPPs that take public trust principles into account can avoid this result.

[117] *See* U.S. COMM'N ON OCEAN POLICY, *supra* note 8, at 288.

access rights of the entire public, they do preserve the rights of access of that subset of the public at large which is most likely to have the means and desire to access a particular fishery. As a result, when CDQs are implemented, concerns about keeping the public out of the fishery are greatly diminished.

It is also worth noting that members of the public who would like to enter a fishery may do so by purchasing LAPPs in the marketplace, so long as the system is designed to keep barriers to entry sufficiently low. In order to keep barriers to entry low, fishery managers might structure a LAPP so that a certain percentage of the available LAPPs are sold at auction each year, thus preventing existing LAPP holders from refusing to sell to new competition. Excessive accumulation of LAPPs and the threat of monopoly power it creates can be controlled by imposing limits on the number or percentage of LAPPs that any individual or entity may control.[118] Another approach for preventing excessive accumulation is to limit the duration of rights granted under LAPPs, which reduces barriers to entry and provides a natural opportunity to reevaluate the program.[119] The initial allocation of LAPPs can also favor small fishers to lessen the likelihood that they will be driven out of business by larger competitors.

The public's needs relating to fisheries have changed since the public trust doctrine was introduced into American law. Although some communities still rely on fishing for subsistence, such groups can be accommodated through new developments, such as the use of CDQs. More generally, however, today the general public's interest in fisheries takes the form of recreation, consumption, and conservation, but only rarely subsistence. Properly designed LAPPs allow for recreational fishing interests to receive an appropriate share, thus enabling members of the public to participate in the fishery. LAPPs that are effective in reducing overfishing also promote conservation interests, as well as consumer interests, by providing more fresh fish to consumers and

[118] The Alaska Halibut and Sablefish ITQ programs contained several measures to address distributional equity concerns, such as limitations on transferability between vessel size classes and caps on the total quotas. *See* Macinko, *supra* note 3, at 929.

[119] This approach is noted but dismissed in the SHARING THE FISH report because it reduces the fishermen's incentive to invest in having a sustainable fishery in the long term, beyond the scope of the LAPP. *See* COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 57, at 201.

ensuring a long-term supply of fresh fish. Additionally, LAPPs lead to better economic performance when fishery managers implement tools such as IFQs that are favored by economists.[120]

TURF programs are most useful in the context of fisheries that are located within small, well-defined geographical regions. Many important sessile or sedentary species of shellfish and crustaceans can be found relatively near to shore and are subject to state public trust doctrines.[121] While not all states extend the public trust to shellfish,[122] those that do must ensure that they design their management systems to fulfill the public trust duties. The modern management tool particularly suited to these immobile species, TURFs, allocates exclusive harvest rights for specified areas to individual fishers. While TURFs do give holders the right to exclude others from their fishing grounds, such limited alienation of trust resources does not impair the public interest in the remaining trust. This limited exclusion serves the public good of promoting conservation, and thus should satisfy any procedural requirements imposed by the public trust doctrine, at least where sufficient specificity is used in creating the TURF.

Finally, rather than prohibiting the use of LAPPs, the public trust doctrine actually justifies their use in many instances. A good example can be found in the Louisiana cases involving diversions of water from the Mississippi River to restore wetlands that harmed oyster beds leased to oystermen by the state.[123] Here the public trust justified the harm to the oyster industry and provided a defense against takings claims by the oystermen. This use of the public trust doctrine as a defense of government action taken to protect public trust resources supports the idea that the doctrine would allow the use of LAPPs designed to combat overfishing and the race to the fish. As an alternative example, fishery managers might be forced to revoke quota shares or limit the catch for a

[120] *See, e.g.*, ENVIRONMENTAL DEFENSE, SUSTAINING AMERICA'S FISHERIES AND FISHING COMMUNITIES: AN EVALUATION OF INCENTIVE-BASED MANAGEMENT 18–19 (2007) (finding increased revenue per boat due to higher yields and higher dockside prices), *available at* http://www.environmentaldefense.org/documents/6119_sustainingfisheries.pdf.

[121] *See generally*, *e.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411–16 (1842) (applying public trust to New Jersey oyster fisheries); Avenal v. State, 886 So. 2d 1085 (La. 2004) (Louisiana oysters subject to state public trust doctrine).

[122] *See, e.g.*, State v. Longshore, 5 P.3d 1256, 1263 (Wash. 2000).

[123] *See supra* notes 82–87 and accompanying text.

temporary period to allow depleted fish stocks to recover. Temporarily preventing public access to the fisheries conforms to the public trust doctrine because managers must protect and preserve the fishery over a long time horizon, and small disruptions in fishing allowances do not amount to a violation of the public trust.[124] The public trust doctrine also acts as a shield against takings claims in these situations because it authorizes government action to prevent the public harm of overfishing even if private property interests are harmed.[125]

CONCLUSION

The push for increasing use of market-based approaches to managing fisheries seems to be gaining momentum.[126] Since there is a reasonable chance that federal courts might apply public trust principles in the EEZ, fishery managers should take public trust principles into account when designing and administering management plans. Because many of these approaches involve creating some form of limited private property rights, public trust concerns require that fishery managers protect the public interest in fisheries and place limitations on the alienation and exercise of fishing rights.

Protecting fisheries from overfishing is not only consistent with the public trust doctrine, it is required. By ending the race to the fish and ensuring that viable fish populations are protected from depletion, LAPPs fulfill the obligation of fishery managers under the doctrine to preserve public trust resources. Fishery managers must therefore focus their efforts on ensuring the LAPPs are designed and implemented in such a way that each program is consistent with the public trust doctrine by ensuring that public rights of access to the fishery are preserved through a variety of

[124] *See, e.g.*, Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 101 P.3d 891, 896 n.5 (Wash. Ct. App. 2004) ("[T]he applicability of the public trust doctrine does not open the door for public use if the resource regulation is in the public interest."); Glass v. Goeckel, 703 N.W.2d 58, 75 (Mich. 2005) (pointing out that the public trust doctrine "does not create an unlimited public right to access" public trust resources). This principle is also analogous to the rule that a temporary restriction on private property is not a *per se* taking of that property. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337 (2002)

[125] *See* Rose *supra* note 36, at 358–59.

[126] *See supra* notes 8–10 and accompanying text.

channels and that the introduction of LAPPs does not lead to full-scale privatization of public trust resources.

Several fishery management plans already contain LAPPs, and the Bush Administration expects a doubling of the number of fisheries using these modern tools by 2010.[127] The call for greater use of these market-based approaches has led to greater attention from critics wary of introducing anything resembling private property in our oceans.[128] This attention should be focused to ensure that best management practices are implemented in the new LAPPs so that these will adequately protect the public interest in marine fisheries.

While the geographic scope and extent of the public trust doctrine and the limitations it places on fishery managers cannot be precisely stated, the general principles of the doctrine provide a useful guide for how to design modern fishery management regimes. Limitations on public access to fisheries and the granting of exclusive harvest rights to private parties do raise concerns under the public trust doctrine, but these can be addressed by properly designed systems that protect fisheries from the dangers of overfishing while providing public access for subsistence and recreational fishing and keeping barriers to entry low for commercial fishing. In order to fulfill their public trust obligations to protect and preserve fisheries for the public, fishery managers need powerful new tools to combat overfishing. LAPPs and other market-based approaches provide just such a tool, and fishery managers should take full advantage of these new capabilities.

[127] *See* Office of Sustainable Fisheries, NOAA Fisheries, *supra* note 10.

[128] *See, e.g.*, THE MARINE FISH CONSERVATION NETWORK, *supra* note 11 (outlining concerns about LAPPs).