COMMENTS

THE FEDERAL PUBLIC TRUST DOCTRINE OF *ILLINOIS CENTRAL*: THE MISUNDERSTOOD LEGACY OF *APPLEBY V. CITY OF NEW YORK*

BY

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The public trust doctrine imposes obligations and restrictions on governments in their exercise of sovereign power over property and resources of great public value. For environmental plaintiffs alleging that the federal government has breached its fiduciary obligation as a steward of natural resources, the vitality of the public trust doctrine hinges on whether courts conclude that it is exclusively a state law doctrine or also applies to the federal government. Courts have split on the issue, disagreeing over the proper scope and application of the U.S. Supreme Court's seminal 1892 public trust case, Illinois Central Railroad v. Illinois.

Several courts, including the D.C. Circuit, have leaned on an isolated quotation from Appleby v. City of New York*—an obscure 1926 U.S. Supreme Court breach-of-contract case that discussed* Illinois Central*—for their conclusions that the public trust doctrine does not apply to the federal government. That presumed pillar of support, however, crumbles under scrutiny of the facts and reasoning of* Appleby. *The* Appleby *Court in fact recognized and ratified the broad principle of* Illinois Central*, under which public trust*

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obligations inhere in sovereignty and would thus bind the federal government along with states.

This Comment offers a thorough analysis of Appleby *that may enable environmental plaintiffs to counter assertions that the Supreme Court has foreclosed the possibility of a federal public trust obligation. Although later Supreme Court dicta suggest otherwise,* Appleby *supports a conclusion that the public trust doctrine binds all sovereigns, including the federal government.*

I. INTRODUCTION

For plaintiffs suing the federal government alleging breach of its fiduciary obligations toward the environment, the continuing vitality of the public trust doctrine may hinge on whether courts conclude that it is exclusively a state law doctrine or also applies to the federal government. The contrasting fates of two nearly identical lawsuits illustrate this point.

In *Alec L. v. Jackson* (*Alec I*),[1] a 2012 D.C. District Court case, a group of youth plaintiffs sued the U.S. federal government for its alleged failure to prevent and reduce greenhouse gas emissions.[2] The plaintiffs argued that the planet is nearing the tipping point of a climate catastrophe and that, unless federal officials took "immediate extraordinary action" to protect the atmosphere, the planet soon would be largely unfit for human life.[3] Seeking to "ensure their rights to a livable future," the plaintiffs asserted that the government had violated its affirmative fiduciary obligation under the "federal public trust doctrine" to protect the atmosphere, a public trust resource.[4] The federal government, the plaintiffs argued, is a co-trustee of the atmosphere, with a corresponding obligation under the public trust doctrine to reduce the country's equitable share of carbon emissions.[5]

The threshold issue was whether the plaintiffs had properly invoked the court's jurisdiction.[6] For the district court, the answer turned on whether the plaintiffs' public trust claim was grounded in "state or federal common law"[7]—in other words, whether the public trust doctrine applied at all to the federal government.

The *Alec I* plaintiffs argued that the public trust doctrine "is an attribute of sovereignty that cannot be abrogated."[8] The D.C. District Court, however, concluded that the U.S. Supreme Court's then-recent decision in *PPL Montana, LLC v. Montana*[9] foreclosed the plaintiffs' assertion that the public trust doctrine applies to the federal government.[10] The district court relied on *PPL Montana*'s cursory

1 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom* Alec L. *ex rel.* Loorz v. McCarthy (*Alec II*), 561 F. App'x 7 (D.C. Cir. 2014).

2 *Id.* at 12. Two environmental advocacy organizations, Kids vs. Global Warming, and WildEarth Guardians, joined the youth plaintiffs. *Id.*

3 Complaint for Declaratory and Injunctive Relief at 2–3, *Alec I*, 863 F. Supp. 2d 11, No. 1:11-cv-02235 (D.D.C. 2012) [hereinafter *Alec I* Complaint] (capitalization normalized).

4 *Id.* at 1, 6.

5 *Id.* at 34–35.

6 *Alec I*, 863 F. Supp. 2d at 15. In dicta, the court concluded that extending the public trust doctrine to the atmosphere would represent a "significant departure" from the doctrine's traditional application: the plaintiffs could cite no cases where courts had considered the atmosphere a public trust asset. *Id.* at 13. As noted below, the *Juliana v. United States* court found it unnecessary to resolve the same issue on a motion to dismiss, although that court did recognize that the public trust *res* may well include the atmosphere. 217 F. Supp. 3d 1224, 1255 (D. Or. 2016), *rev'd on standing grounds*, 947 F.3d 1159 (9th Cir. 2020). See discussion of the *Juliana* court's analysis of the public trust claim *infra* note 51, and discussion of the Ninth Circuit's reversal on the redressability prong of Article III standing, *infra* note 20.

7 *Alec I*, 863 F. Supp. 2d at 15. As discussed below, some courts have concluded that public trust obligation inheres in sovereignty, such that the doctrine is not simply a matter common law. *See, e.g.*, Lawrence v. Clark Cty., 254 P.3d 606, 612 (Nev. 2011) (holding that "the public trust doctrine is not simply a common law remnant"), discussed *infra* note 246.

8 *Alec I* Complaint, *supra* note 3, at 33.

9 565 U.S. 576 (2012).

10 *Alec I*, 863 F. Supp. 2d at 15 (citing *PPL Montana*, 565 U.S. at 603).

statement that "the public trust doctrine remains a matter of state law,"[11] without addressing whether—as the plaintiffs asserted—that statement was merely dictum.[12] The district court considered *PPL Montana* authoritative either way because the court was generally bound by "carefully considered language of the Supreme Court, even if technically dictum."[13] Consequently, the court concluded that the plaintiffs had failed to raise a federal question necessary to invoke the court's jurisdiction, and dismissed the case.[14]

In a brief, unpublished opinion two years later, the D.C. Circuit affirmed the lower court's decision.[15] In *Alec L. ex rel. Loorz v. McCarthy* (*Alec II*), the circuit court restated *PPL Montana*'s declaration that the public trust doctrine "remains a matter of state law."[16] The circuit court cited additional Supreme Court cases in support of that same conclusion, including *Idaho v. Coeur d'Alene Tribe of Idaho*[17] which, the circuit court determined, also treated the public trust doctrine "as a matter of state law."[18] Relying on these cases and holding that the public trust doctrine does not apply to the federal government, the circuit court summarily affirmed the lower court's dismissal.[19]

Two years after *Alec II*, youth plaintiffs in *Juliana v. United States*[20] brought a nearly identical case in the U.S. District Court for the District

11 *Id.* (quoting *PPL Montana*, 565 U.S. at 603).

12 *Id.* Spoiler alert—it was dictum. *See* discussion *infra* Part V.B.

13 *Alec I*, 863 F. Supp. 2d at 15 (quoting Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010)). The district court went even further, concluding that even if the Supreme Court's declaration was not binding, it was nonetheless persuasive. *Id.*

14 *Id.* at 15, 17. The public trust issue was the court's leading consideration, but the court found an alternative basis for dismissal: "[E]ven if the public trust doctrine had been a federal common law claim at one time, it has subsequently been displaced by federal regulation, specifically the Clean Air Act." *Id.* at 15–16.

15 *Alec II*, 561 F. App'x 7, 8 (D.C. Cir. 2014).

16 *Id.* at 8 (quoting *PPL Montana*, 565 U.S. at 603).

17 521 U.S. 261, 284–88 (1997).

18 *Alec II*, 561 F. App'x at 8. The circuit court also cited *United States v. 32.42 Acres of Land, More or Less, Located in San Diego County*, a 2012 Ninth Circuit case that relied on *PPL Montana* to conclude "the contours of [the public trust doctrine] are determined by the states, not by the United States Constitution." *Id.* (quoting *32.42 Acres*, 683 F.3d 1030, 1037–38 (9th Cir. 2012)).

19 *Id.*

20 217 F. Supp. 3d 1224 (D. Or. 2016). The *Juliana* district court denied the federal defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. *Id.* at 1233–34. In January 2020, a Ninth Circuit three-judge panel "reluctantly" reversed the district court's decision and remanded the case with instructions to dismiss for lack of standing. Juliana v. United States, 947 F.3d 1159, 1165, 1175 (9th Cir. 2020). The Ninth Circuit acknowledged both the existential threat of climate change and the government's contribution to greenhouse gas emissions—a contribution "not simply a result of inaction." *Id.* at 1166–67. The court held, however, that the plaintiffs' requested relief, a remedial plan imposed on the federal government, would require "a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171. The case thereby faltered on the Article III standing requirement of redressability. *Id.* at 1173. Because the Ninth Circuit resolved the case on the threshold issue of standing, the court never reached the plaintiffs' public trust claim. The

of Oregon, this time with a different result. In *Juliana,* Judge Ann Aiken reviewed the same Supreme Court cases on which the D.C. courts had relied, but nonetheless concluded that the plaintiffs' public trust claim invoked federal subject matter jurisdiction.[21] Judge Aiken examined *PPL Montana*'s "passing statement" suggesting that the public trust doctrine applies only to the states[22] and concluded that *PPL Montana*, which was "not a public trust case," could not plausibly be interpreted as foreclosing federal public trust claims with respect to federally owned trust assets.[23] Judge Aiken observed that *PPL Montana* had relied on two prior Supreme Court cases that seemed to narrow the holding of *Illinois Central Railroad Co. v. Illinois*,[24] a seminal public trust case on which the *Juliana* plaintiffs relied.[25] In *Illinois Central* the Supreme Court had ruled invalid the Illinois legislature's attempt to convey nearly the entirety of the Lake Michigan waterfront to a private developer, holding that such a grant would violate the state's sovereign trust obligation.[26] The *PPL Montana* Court stated that two subsequent cases, *Coeur d'Alene* and *Appleby v. City of New York* (*Appleby IV*),[27] concluded that *Illinois Central* "was necessarily a statement of Illinois law" and therefore did not support the existence of a federal public trust doctrine.[28] (In fact, *Coeur d'Alene* and *Appleby IV* contain identical language, because *Coeur d'Alene* was quoting *Appleby IV*.[29]) Because Judge Aiken found *PPL Montana* and *Coeur d'Alene* unpersuasive on other grounds,[30] she never examined whether those cases properly relied on *Appleby IV*'s statement that *Illinois Central* "was necessarily a statement of Illinois law"[31] for their conclusions that the public trust doctrine does not apply to the federal government.

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plaintiffs have sought Ninth Circuit *en banc* review. Petition for Rehearing *En Banc* of Plaintiffs–Appellees, Juliana v. United States, No. 18-36082 (9th Cir. Mar. 2, 2020). Regardless of the outcome, future atmospheric public trust cases in the Ninth Circuit may survive motions to dismiss if plaintiffs seek narrower relief. For analysis of the district court's decision, see Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1 (2017).

[21] *Juliana*, 217 F. Supp. 3d at 1256–59.

[22] *Id.* at 1256–57.

[23] *Id.*

[24] 146 U.S. 387 (1892).

[25] *Juliana*, 217 F. Supp. 3d at 1257. The *Alec I* plaintiffs also cited *Illinois Central*. *Alec I* Complaint, *supra* note 3, at 1.

[26] 146 U.S. at 453–54. See discussion of *Illinois Central*, *infra* Part III.

[27] 271 U.S. 364, 395 (1926).

[28] *Juliana*, 217 F. Supp. 3d at 1254, 1257 (quoting *Coeur d'Alene*, 521 U.S. 261, 285 (1997)); *Appleby IV*, 271 U.S. at 395).

[29] *Coeur d'Alene*, 521 U.S. at 285 (quoting *Appleby IV*, 271 U.S. at 395).

[30] *Juliana*, 217 F. Supp. 3d at 1256–57. See discussion of *PPL Montana*, *infra* Part VI.B. Judge Aiken noted that *Coeur d'Alene* "explained that even though *Illinois Central* interpreted Illinois law, its central tenets could be applied broadly (for example, to Idaho)," and she concluded that there was no basis to presume that "the central tenets of *Illinois Central* should apply to another state, but not to the federal government." *Juliana*, 217 F. Supp. 3d at 1257.

[31] *Juliana*, 217 F. Supp. 3d at 1257.

Judge Aiken thus sidestepped the pitfall of the *Alec I* and *Alec II* courts, which relied heavily on Supreme Court dicta in holding that the public trust doctrine is exclusively a matter of state law. The *Alec I* court regarded *PPL Montana*'s public trust discussion as "carefully considered language of the Supreme Court," and therefore authoritative even if dictum.[32] This Comment argues that Supreme Court dictum relying on *Appleby IV* for the proposition that *Illinois Central* "was necessarily a statement of Illinois law" was not, in fact, "carefully considered," and therefore merits no such deference. No court that has cited *Appleby IV*, including the U.S. Supreme Court, has expressly recognized that *Appleby IV*'s discussion of *Illinois Central* was dictum or discussed in detail the *Appleby IV* opinion.[33] Moreover, close reading of *Appleby IV* supports the conclusion that the public trust doctrine recognized in *Illinois Central* binds all sovereigns, including the federal government.[34]

Part II of this Comment introduces the basic principles of the public trust doctrine and its application. Part III reviews the background of *Illinois Central* and explains its holding. Part IV reviews the background of the *Appleby IV* dispute and the New York State court decisions leading to Chief Justice Taft's *Appleby IV* opinion. Part V analyzes Chief Justice Taft's reasoning in *Appleby IV* and explains why the case cannot plausibly support the conclusion that *Illinois Central* was merely "a statement of Illinois law." Part VI examines both later Supreme Court dicta that mischaracterizes *Appleby IV*, and lower federal court and state court decisions that have relied on that dicta. This Comment concludes that a more complete understanding of *Appleby IV* will dissuade courts from improperly relying on that case and on ensuing Supreme Court dicta: *Illinois Central* and *Appleby IV* both support the conclusion that plaintiffs who assert public trust claims against the federal government properly invoke federal subject matter jurisdiction.

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine imposes obligations on governments in their exercise of sovereign power over property and resources of great public value.[35] The doctrine's roots lie in the Institutes of Justinian, part

[32] *Alec I*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (quoting *Overby*, 595 F.3d 1290, 1295 (D.C. Cir. 2010).

[33] At the time of this writing, an exhaustive (and exhausting) search of federal and state case law revealed no such cases. Several law review articles, however, have identified *Appleby IV*'s discussion of *Illinois Central* as dictum. *E.g.*, Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and* Illinois Central Railroad, 45 ENV'T L. 399, 417 (2015); Crystal S. Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.–NW. J. ENV'T L. & POL'Y 113, 146 n.207 (2010).

[34] *See* discussion *infra* Part V.B.

[35] For a general introduction to the public trust doctrine and its origins, see MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3–11 (3d ed. 2015).

of the body of ancient Roman law that became the "foundation for modern civil law systems."[36] The Institutes of Justinian declared that "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea."[37] Common-law courts in England adopted the doctrine,[38] and it received judicial recognition in the United States by the early 1800s.[39] The public trust doctrine incorporates basic trust principles, which impose fiduciary duties on a trustee[40] to "protect the trust property against damage or destruction"[41] and to hold and administer the property for the benefit of a third-party beneficiary.[42] Under the public trust doctrine, a government–trustee holds public trust property for the public–beneficiary: the property must be "devoted to the fulfillment of the purposes of the trust, to wit: the service of the people."[43] Courts consistently apply the public trust doctrine to state actors, but are split over whether the doctrine also applies to the federal government.

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[36] *Juliana*, 217 F. Supp. 3d 1224, 1253 (D. Or. 2016) (quoting Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 L. LIBR. J. 525, ¶ 1 (2007)). Recent research suggests that the Institutes codified earlier Roman law on the public trust. *See* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 130–31 (2020).

[37] J. INST. 2.1.1. *See also Juliana*, 217 F. Supp. 3d at 1253 (discussing the roots of the public trust doctrine).

[38] *See* Shively v. Bowlby, 152 U.S. 1, 11 (1894) ("By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King."). *See also Coeur d'Alene*, 521 U.S. 261, 284 (1997) (explaining that "American law adopted . . . much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose"). Instrumental in the development of the English common law on the public trust was Lord Chief Justice Mathew Hale. *See* Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to* Lamprey *and Oswego Lake*, 43 VT. L. REV. 1, 8–11 (2018).

[39] *See* Arnold v. Mundy, 6 N.J.L. 1, 71 (1821) ("Of [public properties] . . . some are reserved for the necessities of the state, and are used for the public benefit, and those are called '*the domain of the crown or of the republic*;' others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called *common property*. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts."); Martin v. Waddell, 41 U.S. 367 (1842) (holding that "[w]hen the Revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soils under them, for their own common use").

[40] RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2003).

[41] GEORGE G. BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 582 (2016), *quoted in Juliana*, 217 F. Supp. 3d at 1254.

[42] RESTATEMENT (THIRD) OF TRUSTS § 2, cmt. a (AM. LAW INST. 2003).

[43] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 n.25 (1970) (quoting Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957)).

A. The Public Trust Doctrine and the States

That states function as trustees under the public trust doctrine is well established,[44] and the "contours" of that trust are determined by the states.[45] To begin with, the scope of the property (or *res*) to which the public trust doctrine applies varies by jurisdiction, albeit with broad consistencies. Courts have consistently recognized that the trust *res* extends to the navigable waters in a state and living resources within those waters, and to submerged lands, tidelands, and shorelands of navigable lakes and rivers up to the high water mark.[46] Courts have also consistently recognized[47] that title to public trust lands is bifurcated into the *jus privatum*—the proprietary rights of a private landowner (for example, the right to convey property)—and the *jus publicum*—or "trust" title, which derives from the sovereign's "obligation to act in the best interest of its citizens."[48] From that obligation the state derives its power to protect the public interest in trust resources—a responsibility subject to the public trust doctrine.[49] Importantly, private ownership of public trust assets, where permissible, does not extinguish the public's interest in the property or extinguish a state's obligation to ensure the property is managed for public benefit.[50] But to what extent, if any, the public trust *res* extends beyond traditionally recognized assets—for example, to

44 BLUMM & WOOD, *supra* note 35, at 6.

45 *PPL Montana*, 565 U.S. 576, 604 (2012) (dictum). *See also* DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS, AND LIVING RESOURCES OF THE COASTAL STATES 3 (2d ed. 1997) (explaining that "there are over fifty different applications of the doctrine, one for each State, Territory or Commonwealth, as well as the federal government").

46 *See* Nat'l Audubon Soc'y v. Superior Court of Alpine Cty. (*Mono Lake*), 658 P.2d 709, 719–20 (Cal. 1983) (recognizing that it is "well settled in the United States generally . . . that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams"); SLADE ET AL., *supra* note 45, at 13–65 (surveying case law on "lands, waters and living resources" subject to the public trust doctrine).

47 *See infra* note 50.

48 SLADE ET AL., *supra* note 45, at 7.

49 *Id.*

50 In *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), for example, the California Supreme Court barred a private landowner from filling tidelands on his property, holding that the lands were subject to the public trust, *id.* at 378, and that "[t]he power of the state to control, regulate, and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters," *id.* at 380 (citation omitted). Further, the court declared that even state authorization to fill the lands would "not *ipso facto* terminate the public trust." *Id.* at 381. *See also* Sax, *supra* note 43, at 486–89 (reviewing cases in which "courts have held that since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it").

uplands, ecological and aesthetic values, or to wildlife—varies between states.[51] The trust *res* continues to evolve.[52]

A second state-specific aspect of the public trust doctrine is the nature of the obligations (or "restraints") it imposes on sovereign–owners of public trust assets. Here again, courts have reached different conclusions about the doctrine's scope, albeit with some consensus. In his seminal article on the public trust doctrine, Professor Joseph Sax articulated three types of restrictions that the doctrine imposes on government owners of trust resources:

> [F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.[53]

Most state courts have applied the second restriction, which the *Illinois Central* Court enforced against the Illinois legislature. There, the

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[51] The New Jersey Supreme Court, for example, has extended the trust to both public and privately owned dry sand beaches. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363–66 (N.J. 1984). In *Mono Lake*, the California Supreme Court expanded the trust to include the ecological and aesthetic values of Mono Lake. 658 P.2d at 719 (holding that the purposes of the public trust extend to protection of the "scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds"). The Alaska Supreme Court has recognized wildlife as a public trust resource, *e.g.*, Kanuk *ex rel.* Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1099–100 (Alaska 2014), as have several California state courts, *e.g.*, Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1362 (2008) (explaining that wild game falls within the public trust doctrine). At least one federal district court has held that the public trust doctrine imposes on both state and the federal governments a duty to protect the public's interest in natural wildlife resources. *See In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980). *But see, e.g.*, Chernaik v. Brown, 475 P.3d 68, 77–78 (Or. 2020) (Oregon Supreme Court distinguishing between the wildlife trust and the public trust doctrine in Oregon). In *Juliana*, a federal case, the plaintiffs asserted that the atmosphere is a public trust asset, but the court did not reach the issue, holding that because plaintiffs' injuries related to the effects of climate change on federally owned submerged lands, they had "adequately alleged harm to public trust assets." 217 F. Supp. 3d 1224, 1255–56 (D. Or. 2016). Judge Aiken did, however, recognize that both the history and evolution of the public trust doctrine supported the conclusion that the atmosphere is a public trust asset. *Id.* at 1255 n.10. Plaintiffs in state court atmospheric trust cases have similarly asserted that the atmosphere is a public trust resource. *See, e.g.*, Butler *ex rel.* Peshlakai v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *1 (Ariz. Ct. App. Mar. 14, 2013), discussed *infra* Part VI.C. In *Butler*, the Arizona Court of Appeals acknowledged that the trust *res* might conceivably include the atmosphere. *Id.* at *6.

[52] *See* Mineral Cty. v. State, Dep't of Conservation & Nat. Res., 20 P.3d 800, 807–08 (Nev. 2001) (Rose, J. concurring) (noting that "the original scope of the public trust reached only navigable water"); *In re* Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000) ("The public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.").

[53] Sax, *supra* note 43, at 477. For a 50-year retrospective on Sax's article and its significance in the United States and abroad, see Michael C. Blumm & Zachary A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, 44 PUB. LAND & RESOURCES L. REV. (forthcoming 2021).

U.S. Supreme Court held that the state legislature's attempt to convey to a private company nearly all of Chicago's Lake Michigan waterfront, a property of "immense value" and "public concern," was an impermissible abdication of the state's trust obligation.[54] In *Illinois Central* the doctrine functioned in its most traditional[55] sense—as a prohibition on governmental power to alienate trust resources—and state courts have generally recognized *Illinois Central* as binding upon them.[56] And some courts have understood the public trust doctrine as imposing not only an obligation on the sovereign–trustee to retain ownership of the trust *res*, but also an affirmative duty to steward that property for the public–beneficiary (implicating Sax's third restriction).[57] Other courts have enforced the requirement that a property owner must allow the public access to trust resources (implicating Sax's first restriction).[58]

B. The Public Trust Doctrine and the Federal Government

Although courts agree on broad aspects of the scope and application of the public trust doctrine as it applies to states, courts are split on whether it is exclusively a state law doctrine or also applies to the federal government.[59] As the *Alec* cases illustrate, that question presents a threshold issue for plaintiffs suing the federal government in atmospheric trust cases, and a potential trap door mooting plaintiffs' arguments that the trust *res* extends to a particular resource or that the federal

[54] *See* discussion *infra* Part III.B.

[55] *See Juliana*, 217 F. Supp. 3d at 1254 (noting that the "'traditional' public trust litigation model . . . generally centers on [Sax's] second restriction").

[56] *See* Chase, *supra* note 33, at 151–53 & nn.235, 236–37 (surveying case law and concluding that of the thirty-five states in which state courts "have cited *Illinois Central* in the context of articulating their public trust doctrine . . . at least twenty-nine appear to recognize *Illinois Central* as a general statement of federal law . . . that restrains their ability to convey public trust lands").

[57] *E.g.*, *Mono Lake*, 658 P.2d 709, 728 (Cal. 1983) (California Supreme Court holding that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible"); *In re* Waiola O Molokai, Inc., 83 P.3d 664, 693 (Haw. 2004) (Hawai'i Supreme Court quoting *Mono Lake* and holding the same); *Lawrence*, 254 P.3d 606, 611 (Nev. 2011) (Nevada Supreme Court expressly adopting the public trust doctrine, which includes the "duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands" (quoting *Mineral Cty.*, 20 P.3d at 808–09)). *But see, e.g.*, *Chernaik*, 475 P.3d 68, 84–93 (Or. 2020) (Walters, J., dissenting) (critiquing the Oregon Supreme Court majority's refusal to acknowledge the state's affirmative fiduciary duty to prevent substantial impairment of trust resources).

[58] For example, in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005), the Supreme Court of New Jersey held that upland sands on even private beaches—a public trust asset in New Jersey, *id.* at 119–20 (quoting Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363–64 (N.J. 1984))—"must be available for use by the general public under the public trust doctrine," *id.* at 124. In *Juliana*, the plaintiffs asserted that the federal government had violated the first and third of Sax's enumerated restrictions by "nominally retaining control over trust assets while . . . allowing their depletion and destruction . . . ." 217 F. Supp. 3d at 1254.

[59] *See* discussion *supra* Part I; discussion *infra* Part VI.C; *infra* note 239.

government has neglected its fiduciary duty—for example, as the *Alec* plaintiffs asserted, that the atmosphere is a public trust resource and that the federal government, as a trustee of that resource, must act to reduce greenhouse gas emissions.[60]

The outcomes of future atmospheric trust cases against the federal government may hinge on whether the public trust doctrine applies to the federal government, but the doctrine's potential application to the federal government may also be dispositive in cases involving more traditional federal assets. Where the federal government opens federally owned national resources for exploitation,[61] promotes industrial activity despoiling natural resources,[62] shrinks federal monuments,[63] or attempts

[60] *See* discussion of *Alec I* and *Alec II*, *supra* Part I; *Alec I*, 863 F. Supp. 2d 11, 13–14 (D.D.C. 2012) (setting forth plaintiffs' claims).

[61] *See* Jim Robbins, *Open for Business: The Trump Revolution on America's Public Lands*, YALE ENV'T 360 (Oct. 8, 2019), https://perma.cc/2F5B-CQ33 (discussing congressional efforts to open the pristine Arctic National Wildlife Refuge for oil drilling).

[62] During the Trump presidency, the Environmental Protection Agency (EPA) withdrew opposition to the operation of Pebble Mine in Bristol Bay, Alaska, "a massive copper and gold mine that would, scientists had determined, likely have 'significant and irreversible' effects on the salmon fishery in the bay." *Id.*

[63] Three months after taking office, President Trump implemented the largest rollback of federal land protection in U.S. history, reducing the size of two national monuments in Utah by some two million acres. Rachel E. Golden Kroner et al., *The Uncertain Future of Protected Lands and Waters*, 364 SCIENCE 881, 882 (2019); Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://perma.cc/E4GN-Z5V3. The administration's reduction of Bears Ears, a monument designated by President Obama after years of lobbying by local tribes, threatened some 100,000 archeologically important sites, including tribal grave sites, ceremonial grounds, and ancient cliff dwellings. *Id.* The Trump administration also shrank the Grand Staircase-Escalante National Monument by one million acres—almost 50%—to allow access to coal reserves. *Id.* A host of environmental and tribal groups sued for injunctive and declaratory relief. *See* Complaint for Injunctive and Declaratory Relief, Wilderness Soc'y v. Trump, No. 1:15-cv-02587 (D.D.C. Dec. 14, 2017) (initial filing by environmental groups opposing reduction of Grand Staircase-Escalante National Monument); Hopi Tribe v. Trump, No. 17-CV-2590 (TSC), 2019 WL 2494161, at *2 (D.D.C. Mar. 20, 2019) (summarizing the various suits brought in opposition to President Trump's reduction of the Bears Ears National Monument). Although prior administrations have reduced monuments' size, courts have never ruled on whether the power to do so is properly within the power of the executive. Turkewitz, *supra*; Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "the Public" in Public Land Law*, 48 ENV'T L. 311, 324–28 (2018).

The Biden Administration will likely reverse the monument reductions. *See Biden–Harris Plan for Tribal Nations*, BIDENHARRIS, https://perma.cc/35UH-RCV2 (last visited Feb. 17, 2021) ("As President, Biden will take immediate steps to reverse the Trump administration's assaults on America's natural treasures, including by reversing Trump's attacks on the Arctic National Wildlife Refuge, Bears Ears, and Grand Staircase-Escalante."). But absent congressional action clarifying the scope of executive power under the Antiquities Act of 1906, 34 Stat. 225 (codified as amended in 54 U.S.C. §§ 320301–320303), future administrations may attempt similar rollbacks—a lurking threat to hundreds of millions of acres of national monuments and the cultural, historic, and ecological resources therein. *See Monuments List*, NAT'L PARK SERV., https://perma.cc/8KMH-C8LS (last visited Feb. 17, 2021) (listing national monuments and the number of acres respectively affected by presidential administrative actions).

to sell federal lands,[64] litigants opposing these actions may assert that the federal government has impermissibly abandoned its inherent public trust obligation. As explained below, *Illinois Central* recognized that federal obligation, as ratified by *Appleby IV*.

III. *ILLINOIS CENTRAL RAILROAD CO. V. ILLINOIS*

Illinois Central represents the U.S. Supreme Court's clearest statement of the public trust doctrine.[65] Courts have consistently recognized *Illinois Central* as the foundational U.S. Supreme Court public trust decision,[66] and as noted above, a majority of state courts recognize *Illinois Central* as binding upon them.[67] Section A reviews the background of *Illinois Central*, and Section B summarizes Justice Field's reasoning and the holding of the case, including the two enumerated exceptions to *Illinois Central*'s general rule.

Plaintiffs opposing the rescission of federal land protections argued that President Trump's Proclamations shrinking national monuments violated the Antiquities Act and the federal constitution but did not raise public trust claims. *See Hopi Tribe*, 2019 WL 2494161, at *2; Complaint for Injunctive and Declaratory Relief at 2–3, Wilderness Soc'y v. Trump, No. 1:15-cv-02587 (D.D.C. Dec. 14, 2017). Under a federal public trust doctrine, a public trust claim may have been viable: although such monuments, unlike the Chicago harbor, are not metropolitan hubs of commerce, they are nonetheless resources of "immense value" and "public concern." *Illinois Central*, 146 U.S. 387, 454–55 (1892). See discussion of *Illinois Central infra* Part III.

64 In 2017, Utah Congressman Jason Chaffetz introduced a bill to sell some 3.3 million acres of federal lands. Robbins, *supra* note 61. In 2016, the Trump administration's then-future acting director of the Bureau of Land Management, which manages more than a tenth of the nation's land, penned an editorial promoting the sale of all federal land, declaring that "[t]he Founding Fathers intended all lands owned by the federal government to be sold." William Perry Pendley, *The Federal Government Should Follow the Constitution and Sell Its Western Lands*, NAT'L REV. (Jan. 19, 2016), https://perma.cc/8F2Q-4NBJ. The Federal Land Policy and Management Act of 1976 (FLPMA) permits public land sales that "serve important public objectives *including but not limited to*, expansion of communities and economic development . . . ." 43 U.S.C. § 1713(a)(3) (2018) (emphasis added). A public trust obligation would undoubtedly impose a stricter limit; even the sale of the Chicago harbor, had the harbor been deeded by the federal government, might have been justified under FLPMA's criteria. See discussion of *Illinois Central infra* Part III.

65 Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 427 n.7 (1989) (discussing *Illinois Central*, 146 U.S. 387 (1892)). Professor Joseph Sax described *Illinois Central* as the "lodestar" and "most celebrated public trust case in American law." Sax, *supra* note 43, at 489.

66 *See, e.g.*, *Juliana*, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016) (noting that *Illinois Central* remains the seminal U.S. Supreme Court public trust case); *Mono Lake*, 658 P.2d 709, 721 (Cal. 1983) (recognizing *Illinois Central* as "the primary authority even today, almost nine decades after it was decided" (quoting City of Berkeley v. Superior Court of Alameda Cty., 606 P.2d 362, 365 (Cal. 1980)).

67 *See supra* note 56 and accompanying text.

A. Background of Illinois Central

In 1869, the Illinois legislature conveyed to the Illinois Central Railroad Company over 1,000 acres of submerged land—an area comprising virtually the entirety of Chicago's Lake Michigan waterfront[68]—with the intent to cede control "against any future exercise of power over them by the state."[69] Four years later, the legislature recanted its decision, repealed the measure without providing compensation to the railroad company,[70] and asked an Illinois state court to declare the 1869 grant invalid.[71] The railroad company removed the case to federal circuit court.[72]

In the Circuit Court for the Northern District of Illinois,[73] the railroad company argued that the Illinois repealing act of 1873 violated the Contracts[74] and Due Process[75] clauses of the U.S. Constitution, as well as provisions of the Illinois state constitution.[76] Writing for the circuit court, Justice Harlan[77] interpreted the 1869 act as conveying to the railroad company merely a "license" for harbor improvement and concluded that the revocation of the 1869 act violated neither the federal nor the state constitution.[78] To begin with, Justice Harlan interpreted the 1869 conveyance as inconsistent with a grant of "absolute title"[79]: under the 1869 act, the railroad company could not sell or convey the fee to the

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68 *Illinois Central*, 146 U.S. at 448–49, 454.

69 *Id.* at 452.

70 *Id.* at 448–49.

71 *Id.* at 433, 449.

72 Ill. *ex rel.* McCartney v. Ill. Cent. R.R. Co., 16 F. 881, 881 (C.C.N.D. Ill. 1883). Under the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789), which established the U.S. circuit courts and the U.S. district courts, the circuit courts had exclusive original jurisdiction over suits in common law and equity where the disputed amount exceeded $500. *Guide to Federal Records: Records of the District Courts of the United States*, NAT'L ARCHIVES, https://perma.cc/F7V9-5UAB (last visited Feb. 18, 2021). When Congress created the circuit courts of appeals in 1891, it removed the existing circuit courts' appellate jurisdiction. *History of the Federal Judiciary: Jurisdiction: Appellate*, FED. JUD. CTR., https://perma.cc/36FW-GZMN (last visited Feb. 18, 2021).

73 Illinois v. Ill. Cent. R.R. Co., 33 F. 730 (C.C.N.D. Ill. 1888).

74 *McCartney*, 16 F. at 885 (1883 circuit court decision upholding railroad company's removal of the case from Illinois state court and reviewing the litigants' arguments, citing U.S. CONST. art. I, § 10, cl. 1. (prohibiting states from passing any law "impairing the obligation of contracts")).

75 *Id.* (quoting U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")).

76 *Ill. Cent. R.R. Co.*, 33 F. at 772.

77 At the time Justice Harlan wrote the circuit court decision he was also a Supreme Court justice. *Id.* at 732. Under the practice known as "circuit riding," each Supreme Court justice was assigned to one of three geographical circuits and traveled to the districts of that circuit to hear cases on three-judge panels alongside local U.S. district court judges. The practice ended when Congress abolished the circuit court system in 1911. *See Circuit Riding*, FED. JUD. CTR., https://perma.cc/MZ62-NB2M (last visited Feb. 18, 2021).

78 *Ill. Cent. R.R. Co.*, 33 F. at 775.

79 *Id.* at 772–73.

lands.[80] Further, the railroad company was "not a purchaser" of the lands, having paid nothing for them, instead agreeing to pay a percentage of income derived from use of the lands.[81] The legislature, Justice Harlan opined, sought to improve the Chicago harbor in the public interest, and to that end had placed resources of the state in the hands of the railroad company, which thereby functioned merely as an "agency of the state" in fulfilling that public interest.[82] Justice Harlan concluded that the repealing act of 1873 was merely a "change of policy" that "took from the company no franchise or privilege."[83] Accordingly, the court upheld the repealing act as valid.[84] The railroad company appealed to the U.S. Supreme Court, leading to Justice Field's pioneering public trust opinion.

B. Illinois Central's *General Rule and Its Two Exceptions*

Writing for the Court, Justice Field affirmed the circuit court's ruling but on different grounds. Whereas Justice Harlan had emphasized the limiting features of the 1869 conveyance, Justice Field considered the grant, as the attorneys for the railroad contended it was, an "absolute conveyance" of title.[85] Justice Field held that the legislature's attempt to convey title to property of such "immense value"[86] and "public concern" was, "if not absolutely void on its face," then at least "subject to revocation"[87]:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[88]

In other words, the state's conveyance of such valuable public property to a private developer was an impermissible abdication of the state's sovereign power. Considering the "immense value" the Chicago harbor held for the people of Illinois, "the idea that its legislature [could] deprive the State of control over its bed and waters and place the same in the hands of a private corporation" was indefensible.[89]

Justice Field then enumerated two exceptions under which a state might permissibly relinquish its general trust obligation to preserve such

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[80] *Id.* at 772.

[81] *Id.* at 775.

[82] *Id.* at 772–73.

[83] *Id.* at 775. The railroad company had also incurred no significant expenses prior to the repealing act. *Id*. at 774.

[84] *Id.* at 775.

[85] *Illinois Central*, 146 U.S. 387, 450–51 (1892).

[86] *Id.* at 454

[87] *Id.* at 453.

[88] *Id.*

[89] *Id.* at 454.

resources for public use—that is, situations in which a state's alienation of public trust resources would not violate its fiduciary obligation: first, where the state grants parcels for the purpose of "promoting the interests of the public therein"; and second, where the state grants parcels "which when occupied do not substantially impair the public interest in the lands and waters remaining."[90] Such grants were distinguishable from grants "of the whole property in which the public is interested."[91] These two exceptions are key to understanding the limited implications of Chief Justice Taft's opinion in *Appleby IV*.[92]

IV. BACKGROUND OF *APPLEBY V. CITY OF NEW YORK*

This Part examines the background of the U.S. Supreme Court's decision in *Appleby IV*. Section A reviews the events leading up to the dispute between Charles Appleby and the City of New York, and Section B summarizes the New York state court decisions culminating in the New York Court of Appeals decision that Appleby appealed[93] to the U.S. Supreme Court.

A. The Disputed Parcels of Appleby v. City of New York

> *"To have and to hold the said premises hereby granted to the said Charles E. Appleby, his heirs, and assigns to his own proper use, benefit and behoof forever."*[94]

Charles Edgar Appleby was born in 1824 in Middletown, New Jersey to a poor farming family and died in 1913 one of the richest men in New York City.[95] According to newspaper articles from the turn of the twentieth century, Appleby arrived in New York City with two dollars in his pocket and worked in a fish market while studying law.[96] After becoming disenchanted with the practice of law ("The science of the law I loved; its practice I hated."[97]), he entered the real estate business in his early thirties, with considerable success.[98] Appleby lived an austere life,

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90 *Id.* at 453. *Compare with* Chief Justice Taft's interpretation of New York state law in *Appleby IV*. *See infra* note 156 and accompanying text.

91 *Appleby IV*, 271 U.S. 364, 394–95 (1926).

92 *See* discussion *infra* Part V.B.1.

93 Appleby's executors (referred to here as "Appleby") initiated the suit. *Appleby IV*, 271 U.S. at 365.

94 *Appleby IV*, 271 U.S. at 368. Deed conveyance in the mid-1800s may have set investors' hearts aflutter.

95 *Historical Background of Four Plus Corporation*, FOUR PLUS CORP., https://perma.cc/6R5W-5KJM (last visited Dec. 19, 2019) (historical page on file with author); Joe Anuta, *A Dynasty Cashes Out of NYC—for the Next 100 Years, at Least*, CRAIN'S N.Y. (Nov. 8, 2014), https://perma.cc/QYL8-R4Q7.

96 Anuta, *supra* note 95.

97 *Historical Background of Four Plus Corporation*, *supra* note 95.

98 *Id.*

so his estate drew considerable notice when it was one of the first to be subject to the federal inheritance tax; Appleby had amassed a $50 million fortune, one of the largest in the city.[99]

The *Appleby* litigation involved a breach-of-contract claim against New York City over deeds conveying to Appleby two parcels of submerged land on the west side of Manhattan, adjacent to Times Square.[100] As explained in more detail below, the city sold coastal submerged lands to developers like Appleby through deeds envisaging a public–private partnership: developers would fill and maintain the submerged lands in exchange for use rights.[101] The cash-strapped city, however, eventually monopolized Appleby's lots for its pecuniary benefit, refusing to condemn the properties or otherwise compensate their owner.[102] After Appleby sued to enjoin the city's activities, asserting that the city had violated the terms of the conveying deeds, the city raised the public trust doctrine to defend its actions: the city, relying on *Illinois Central*, asserted that the deeds had not conveyed to Appleby the *jus publicum* and that the city had thus retained expansive development rights to both the submerged lands and overlying waters.[103]

The city had executed Appleby's deeds after New York State conveyed to the city the submerged lands surrounding Manhattan. In 1837, the New York Legislature enacted legislation establishing along the west side of Manhattan an aspirational "Thirteenth Avenue," which lay underwater approximately 1,000 feet west of the high tide line, and which the state legislature designated as the "permanent exterior street" along the Hudson River.[104] Those laws also granted to the city all submerged lands between that exterior line and the Manhattan shore, which lay just beyond 11th Avenue, the then-westernmost street of the island.[105]

To promote development of this newly granted submerged land, the city passed ordinances providing for the sale and conveyance of submerged lots to private developers, who would fill, develop, and maintain those parcels, including building streets, bulkheads, and

99 *Id.*

100 Anyone attempting to flee New York City through the Lincoln Tunnel during rush hour will spend a good chunk of time stranded above one of Appleby's former parcels.

101 *See infra* note 106, text accompanying notes 105–108.

102 *See infra* text accompanying notes 118–126.

103 *See* discussion *infra* Part V.B.2.

104 *Appleby IV*, 271 U.S. 364, 366, 369 (1926).

105 *See id.* at 366; Knickerbocker Ice Co. v. Forty-Second St. & Grand St. Ferry R.R. Co., 68 N.E. 864, 865 (N.Y. 1903). The City of New York took title to this land in part through a series of grants from the State of New York that preceded the 1837 grant. First, the charters of 1686 and 1730 that established the City of New York granted to the city title to the tide-way (the land between high and low water) surrounding the island of Manhattan. *Appleby IV*, 271 U.S. at 366. In 1807, the state granted to the city a larger strip of land along the west side of Manhattan, extending from the low water mark to 400 feet into the Hudson River. *Id.*

wharfs.[106] In exchange for their efforts, the developers received unqualified title to the land between the streets and avenues[107] and wharfage rights at the bulkhead area between the streets.[108] The streets and avenues would remain public, and the deeds reserved to the city wharfage rights at the ends of the streets.[109] The deeds provided, however, that the developers would not build the wharves, bulkheads, avenues, or streets until the city either required or gave permission to the developers to do so.[110]

Two nearly identical lots so conveyed later became the subject of the *Appleby* dispute. The first, which Appleby purchased in 1853, lay between West 39th and 40th streets and extended from the high-water mark along the Manhattan shore, west into the Hudson River, terminating approximately 1,100 feet from the high-water mark, at the exterior of the still-aspirational 13th Avenue.[111] Appleby later acquired a second, identical lot that abutted his first lot on its northern border.[112] The lots originally sold for a total of about $11,500[113] (equivalent to roughly $400,000 today).

Subsequent legislation shifted the planned exterior line of the city closer to the Manhattan shore, restricting potential development on Appleby's parcels. In 1857 and 1871, the New York legislature, seeking to eliminate obstructions to navigation along the Hudson River, enacted legislation establishing a new bulkhead line just west of 12th Avenue, thereby effectively abolishing 13th Avenue as the projected exterior line

106 *Appleby IV*, 271 U.S. at 367–69. *See also* Appleby v. City of New York, 152 N.Y.S. 357, 360 (App. Div. 1915) ("[T]he plan and policy of the city [was] for the improvement of its water front [sic] along the North or Hudson river.").

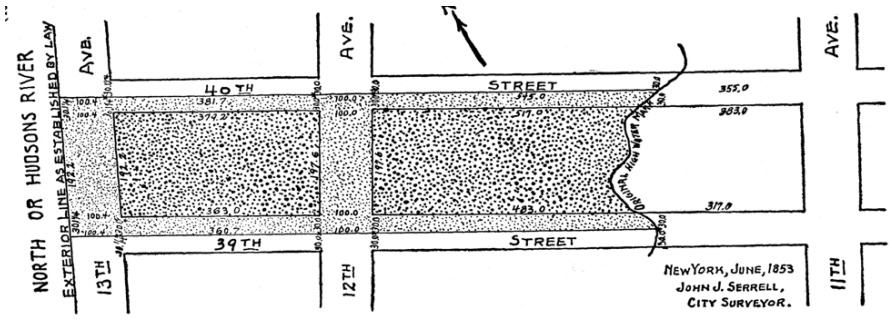
107 Avenues in Manhattan run north–south, streets run east–west. *See* map *infra* note 111.

108 *Appleby IV*, 271 U.S. at 368–69.

109 *Id.*

110 *Id.* at 368. *See also* Appleby v. Delaney, 271 U.S. 403, 408 (1926) (companion case quoting the 1845 ordinance provision in full).

111 *Appleby IV*, 271 U.S. at 367. Perhaps a map would be helpful:



The speckled areas represent the conveyance to Appleby, and the lighter speckling within the streets and avenues represent public thoroughfares to be maintained by Appleby. *Id.* at 369.

112 *Id.* at 365–67.

113 *Id.* at 367.

of the city.[114] The same legislation also reversed the public–private development policy the city had implemented through the conveying deeds: now, the legislature sought to promote development of the waterfront by authorizing the department of docks to acquire by purchase or condemnation any wharf property to which the city had no rights.[115] In 1890, the U.S. Secretary of War[116] fixed the same bulkhead line as that established by state legislation[117] (a detail of some relevance to the later litigation involving remaining development rights west of that line). Four years later the city began a condemnation proceeding against Appleby to appropriate both lots.[118] The city, however, delayed the proceeding for twenty years—"presumably for lack of funds," according to Chief Justice Taft's later assessment.[119] After the city discontinued the proceeding, Appleby initiated his suit.[120]

The "presum[ed] . . . lack of funds" may explain the city's high-handed actions during the pendency of the condemnation—actions which Appleby later sought to enjoin. The city never requested that Appleby fill the lots as specified under the terms of the deeds; instead, over Appleby's objections, the city built concrete and steel piers within the lines of West 39th, 40th, and 41st streets, extending even beyond the line of the now-defunct 13th Avenue.[121] The city excluded the public from the piers and constructed sheds[122] leased to private tenants, who moored boats alongside the piers and used the sheds to store cargo.[123] The city also

114 *Id.* at 369–70. This discussion is a slight oversimplification. The 1857 law had set a slightly different bulkhead line, which the 1871 law modified. *Id.* Appleby had not filled beyond either line, *id.* at 369, so this detail is of little import.

115 *Id.* at 370.

116 This position later became the Secretary of the Army. ARCHIBALD KING, A LEGAL AND HISTORICAL STUDY OF THE RELATIONS OF THE PRESIDENT, THE SECRETARIES OF WAR AND THE ARMY, THE GENERAL OF THE ARMY, AND THE CHIEF OF STAFF, WITH ONE ANOTHER 2 (1960).

117 *Appleby IV*, 271 U.S. at 370.

118 *Id.*

119 *Id.*

120 *Id.* Appleby died in 1913. Anuta, *supra* note 95. Appleby's executors (referred to here as "Appleby") initiated the suit. *Appleby IV*, 271 U.S. at 365.

121 *Appleby IV*, 271 U.S. at 370–71. For reasons that neither *Appleby IV* nor any of the preceding New York State court cases leading up to *Appleby IV* made clear, sometime before 1871 Appleby filled a portion of both lots to approximately 500 feet beyond the original high-water mark but stopped short of what would later become 12th Avenue. *Id.* at 369; Appleby v. City of New York, 152 N.Y.S. 357 (App. Div. 1915) (ending an overlapping line of cases in which Appleby sought to enjoin the city from dredging between the lines of 12th and 13th avenue); Appleby v. City of New York (*Appleby II*), 192 N.Y.S. 211 (App. Div. 1922); Appleby v. City of New York (*Appleby III*), 139 N.E. 474 (N.Y. 1923).

122 The New York State court cases and *Appleby IV* are inconsistent as to whether the city or the tenants constructed the sheds. Perhaps all parties partook in unbridled shed-building. *Compare Appleby IV*, 271 U.S. at 370 (stating that the city placed on the piers "iron or steel sheds and leased these to tenants") *with Appleby II*, 192 N.Y.S. at 217 (stating that the city "permitted the tenants to erect sheds" on the piers).

123 *Appleby IV*, 271 U.S. at 371. The city also constructed additional infrastructure to enable loading and unloading of the tenants' ships. *Id.* Tenants included a "dressed meat

dredged the lots—lots which Appleby had purchased for the express purpose of filling and turning into solid land[124]—to accommodate larger ships, increasing the value of the piers for the city's tenants.[125] Somewhat astonishingly, despite the "substantial rentals and income" that accrued to the city, in 1912 the city demanded that Appleby pay back taxes on the lots, totaling $74,426.01 (equivalent to approximately $1.5 million today).[126]

B. The New York State Court Decisions

Soon after the city discontinued its condemnation proceeding, Appleby[127] sought injunctive relief in the Special Term of the Supreme Court (the state trial court).[128] By all appearances, Appleby hoped to reap a long-awaited return on his investment: by enjoining the city's activities on a claim of trespass, Appleby could require the city to compensate him for use of his property.[129]

company" and a "manure transportation company"—thankfully, distinct entities. *See Appleby II*, 192 N.Y.S. at 217.

[124] *Appleby IV*, 271 U.S. at 368–69.

[125] *Id.* at 371.

[126] *Id.* Appleby's executors fought (and lost) the taxation action in a separate proceeding, City of New York v. Appleby, 154 N.Y.S. 85, 92 (App. Div. 1915), *aff'd*, 113 N.E. 797, 800 (N.Y. 1916), after the city brought two actions for the foreclosure of tax liens in 1912, *Appleby II*, 192 N.Y.S. at 217. The Appellate Division acknowledged the possibility that the city had trespassed on Appleby's land, but held that whether it had done so was irrelevant to the lawfulness of the tax itself. City of New York v. Appleby, 154 N.Y.S. at 91 ("[W]hether or not the city has been guilty of trespass . . . is entirely immaterial in the present case, for the property would still be liable to taxation, even if trespassed upon.").

[127] As noted *supra* note 120, Appleby died in 1913; his executors (referred to here as "Appleby") brought suit, *Appleby IV*, 271 U.S. at 365.

[128] *Id.* at 370; *Appleby II*, 192 N.Y.S. at 211–13. The New York State Court system at the time of the *Appleby* decisions comprised three levels of courts with two levels of counterintuitive nomenclature: the Supreme Court (a lower, statewide court of original and complete jurisdiction, with a district in each county); the intermediate-level Appellate Division of the Supreme Court, and the Court of Appeals, New York State's highest court. The names of the latter two remain today. The Appellate Division comprises four separate courts, one for each judicial department in the state. Each of the four courts handles appeals from the lower courts within that department, which at the time included the Supreme Court, a statewide court of original jurisdiction comprising judicial districts based on county lines. At the time of the *Appleby* decisions, the Supreme Court included the "Special Term," which had original jurisdiction in law and equity, and was where the *Appleby* line of cases began. *See* Jill Paradise Botler et al., *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 929 n.1 (1979); Janet DiFiore & Lawrence K. Marks, N.Y. STATE UNIFIED COURT SYS., NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE (2016); MARC BLOUSTEIN, A SHORT HISTORY OF THE NEW YORK STATE COURT SYSTEM (1985).

[129] The effort succeeded. According to a 1950 New York Times article, after Appleby's executors prevailed in the Supreme Court, his heirs received $3,146,339 in "awards, interest, and damages." *City Block's Value Enhanced 150-Fold*, N.Y. TIMES, Dec. 10, 1950, at 72. That sum in 1930 would equal some $50 million today. INFLATION CALCULATOR, https://perma.cc/WF9Y-KD5W (last visited Feb. 20, 2021).

Appleby met only partial success in the state courts. In 1917, the trial court granted Appleby an injunction against the city, halting the dredging of his lots between the piers,[130] but the court denied two additional injunctions: first, that the city and its tenants cease mooring, docking, and floating boats over Appleby's premises and, second, that the city remove all obstructions on the piers that might interfere with the use of the streets as a public highway or prevent Appleby from filling in and making streets, or filling in the premises between the piers.[131]

Appleby fared no better at the Appellate Division, where the court upheld the two denials. The court also narrowed the trial court's injunction by allowing the city to dredge lands west of the 1871 bulkhead line approved by the Secretary of War,[132] reasoning that the state, subject to federal laws, retained a right to dredge navigable waters to promote commerce, and the owner of the fee to land under such waters therefore held title subject to that state right.[133] The court recognized that in some cases a state may hold property "in public trust" such that its grantees "do not take an unqualified fee,"[134] but in this case the grants involved land "not deemed necessary for navigation."[135] Nonetheless, the court refused to enjoin the mooring and docking of boats over Appleby's submerged lots, reasoning that Appleby still retained a right to fill in his land, and that once he began to do so the city would remove the obstructions.[136]

The parties cross-appealed to the New York Court of Appeals (the high court).[137] The city claimed a right to dredge any underwater portions of the lots, not just the areas west of the 1871 bulkhead line (as the Appellate Division had ruled), and Appleby appealed the lower court's denial of injunctions against the pier obstructions and the boating activity of the city's tenants.[138] The high court affirmed the decree of the Appellate Division, basing its decision in part on the *jus publicum–jus privatum* split estate of public trust resources,[139] and relying on *Illinois Central*.

The high court first concluded that the city could not exclude the public from the use of navigable waters: the grants to Appleby were "not absolute and unqualified, but [were] subject to the rights of the public."[140] The court recognized that the *jus privatum* "is at all times subject to the *jus publicum*," and, citing *Illinois Central*, declared that Appleby's lands

130 Transcript of Record at 199, *Appleby IV*, 271 U.S. 364 (No. 532) (reprinting the Special Term opinion (*Appleby I*)) [hereinafter Transcript of Record].

131 *Id.* at 196–99.

132 *Appleby II*, 192 N.Y.S. at 221.

133 *Id.*

134 *Id.* at 215.

135 *Id.*

136 *Id.* at 220.

137 *Appleby III*, 139 N.E. 474, 475 (N.Y. 1923).

138 *Id.* at 475. In the state proceedings, Appleby sued some of these tenants along with the city. *Id.*

139 *See* discussion of the split estate *supra* text accompanying notes 47–50.

140 *Appleby III*, 139 N.E. at 475.

were subject to the state's right to control navigation over them "in the public interest."[141] Second, the court agreed with the Appellate Division that the Secretary of War's approval of the 1871 bulkhead line removed any authority Appleby may have had to fill in lands west of that line[142] and that the city's dredging west of the 1871 line therefore "invaded no right of plaintiffs."[143] Third, the court held that, had Appleby filled in the submerged lands, they would be free from the regulatory power of the state, but as long as they remained submerged they were "subject to the sovereign power of the state to regulate their use for purposes of navigation"—a power that the state had delegated to the city.[144] The high court thus recognized the split estate of public trust resources, contrasting "mere ownership of the soil" and "the control over it for public purposes"[145]: the waters themselves were public and therefore subject to the power of the state to control, in the public interest, navigation over those waters.[146] For the New York Court of Appeals, this power included the city's right to dredge Appleby's land "in aid of commerce."[147] Appleby appealed the high court's decision to the U.S. Supreme Court.

V. THE *APPLEBY V. CITY OF NEW YORK* OPINION

No court that has relied on *Appleby IV* for the conclusion that the public trust doctrine does not apply to the federal government has discussed in detail the U.S. Supreme Court's opinion in *Appleby IV* or expressly acknowledged that *Appleby IV*'s discussion of *Illinois Central* was dictum.[148] Section A summarizes Chief Justice Taft's reasoning essential to the Court's ruling in *Appleby IV*. Section B examines the Chief Justice's discussion of *Illinois Central* and offers a contextual analysis of his oft-quoted statement that "the conclusion reached" in *Illinois Central* "was necessarily a statement of Illinois law."[149]

141 *Id.* at 476 (citing *Illinois Central*, 146 U.S. 387, 453 (1892)) (italics added).

142 *Id.* at 475.

143 *Id.*

144 *Id.* at 476. The court also concluded that were the city, as successor to the state, to actually retake the land under water by exercise of its police power, the city would have to compensate Appleby. *Id.* The court cited the Supreme Court's then-recent decision in *Pennsylvania Coal Co. v. Mahon*, which announced a "general rule" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* (citing *Pennsylvania Coal*, 260 U.S. 393, 415 (1922)).

145 *Id.*

146 *Id.*

147 *Id.* at 476. The court drew the line at the city constructing slips between the piers, for which reacquiring title—and providing compensation—would be required. *Id.*

148 *See supra* note 33.

149 *Appleby IV*, 271 U.S. 364, 395 (1926).

A. The Analysis and Conclusion of Appleby v. City of New York

At the U.S. Supreme Court, Appleby argued that the New York state courts had upheld and enforced the statutes of 1857 and 1871 so as to "impair the obligation of [Appleby's] deeds," thus violating the Contract Clause of the U.S. Constitution.[150] Chief Justice Taft articulated two questions the Court needed to resolve: first, the proper "construction and effect" of the Appleby deeds and, second, whether subsequent legislation (the acts of 1857 and 1871) as enforced by the state courts impermissibly impaired the obligations of the deeds.[151]

To determine the construction and effect of Appleby's deeds, Chief Justice Taft focused his inquiry on "the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself."[152] The extent of that power, he declared, was a "state question" to be determined from the law of the state at the time the deeds were executed.[153] The key issue was whether the state had the ability to alienate the *jus publicum*, including the "power to preserve and regulate navigation," along with the *jus privatum*.[154]

To resolve that issue, Chief Justice Taft first reviewed two New York state court decisions where the grants from the state to private interests did not convey the *jus publicum*.[155] He concluded that under the law of New York at the time of the grants at issue, a legislature could grant a deed "and exclude itself from its exercise as sovereign of the *jus publicum*," provided that "clear evidence" established both the legislature's intent and the public interest in providing such a grant.[156] Chief Justice Taft then bolstered this conclusion with a lengthy analysis of several cases in which the New York Court of Appeals found the state

150 *Id.* at 366 (citing U.S. CONST. art. I, § 10, cl. 1., which prohibits states from passing any law "impairing the obligation of contracts").

151 *Id.* at 379. Chief Justice Taft posed a third question—whether there was a contract at all, *id.*—but seemed to take the existence of a contract as a given, providing no analysis on the issue.

152 *Id.* at 380.

153 *Id.* Chief Justice Taft noted that ordinarily the state court of last resort would have the final word on state law, but that this general rule did not control when the Supreme Court was tasked with interpreting contracts of states. *Id.* The Chief Justice also acknowledged limits on the states' power to abdicate regulatory control. *See* discussion *infra* Part V.B.1.

154 *Appleby IV*, 271 U.S. at 384. *See supra* text accompanying notes 47–50 (discussing split estate).

155 *Appleby IV*, 271 U.S. at 379–84.

156 *Id.* at 383–84 ("[W]henever the Legislature deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself from its exercise as sovereign of the *jus publicum* . . . it might do so, but that the conclusion that it had thus excluded the *jus publicum* could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted."). *Cf. supra* text accompanying notes 90–92 (discussing the *Illinois Central* exceptions under which a state might relinquish its general trust obligation to preserve submerged lands for public use). *See also infra* Part V.B.1 (discussing *Appleby IV*'s analysis of the *Illinois Central* exceptions).

conveyed the *jus publicum* to private individuals when both requirements were satisfied.[157] He concluded that, under his reading of those cases, there was "no doubt" that the laws of 1857 and 1871 impermissibly impaired the contracts between Appleby and the city.[158]

Chief Justice Taft qualified his ultimate conclusion, holding that so long as the lots remained unfilled, boats could pass over them and "occasional mooring" incident to such use was permissible.[159] But he drew the line there: the city having parted with both the *jus publicum* and *jus privatum* meant that the city did not remain "in unrestricted control of navigation," with the right to dredge the lots or to appropriate the water over them for the purposes of "doing of a great business, largely excluding plaintiffs and all others . . . for the constant private use of the city's tenants, for its profit."[160] Chief Justice Taft noted that the slips between the piers were usually blocked with coal barges, railroad floats, and cattle boats, all moored in the slips for the benefit of the tenants and for the city's "pecuniary profit."[161] For the Chief Justice, this appropriation, along with the dredging of the lots, exceeded what a landowner should endure without protest.[162] Under the terms of the conveying deeds, he noted, the city had retained wharfage rights only at the ends of the projected streets, not their sides.[163] With respect to the water over the lots and the wharfage between the lines of the streets, the deeds had conveyed both the *jus publicum* and *jus privatum*, and the city could retake both only by condemnation.[164]

Chief Justice Taft next addressed the effect of the Secretary of War's 1890 order approving the state legislature's 1871 decision to shift the bulkhead line inward towards the Manhattan shore.[165] Chief Justice Taft concluded that the "only just and possible result" of that order was to qualify Appleby's rights to the extent of compliance with that order, and that the order did not also "confer[] any affirmative power upon the city to detract from the rights which [the city] had granted."[166] Appleby thus retained the right to fill up to the 1871 bulkhead line, and the city's dredging east of that line was a "trespass upon the plaintiffs' rights."[167]

Finally, Chief Justice Taft addressed the city's dredging of Appleby's lots west of the 1871 bulkhead line.[168] He observed that, although the Secretary of War's 1890 order prevented Appleby from filling beyond that line, the order also "expressly authorize[d]," in the place of fill, the

157 *Appleby IV*, 271 U.S. at 384–91.
158 *Id.* at 391.
159 *Id.* at 397.
160 *Id.* at 397–98.
161 *Id.* at 398.
162 *Id.* (characterizing the city's activities as "more than a privilege of sufferance").
163 *Id.* at 398–99.
164 *Id.* at 399.
165 *Id.* at 400–03.
166 *Id.* at 401.
167 *Id.* at 400.
168 *Id.* at 401–02.

construction of piers on piling driven into the lots.[169] The right to construct those piers, he concluded, "must reside in those who have the ownership of the land."[170] Accordingly, the Court extended the state court's injunction against the city dredging to the full extent of Appleby's property, reversing the ruling of the New York Court of Appeals.[171]

B. Chief Justice Taft's Analysis and Application of Illinois Central

The New York Court of Appeals had cited *Illinois Central* in support of its conclusion that because "[t]he lands in question remain under the public waters of the state . . . the right to control navigation over them remains in the state to be exercised in the public interest"; the court thus held that the deeds at issue did not convey the *jus publicum*.[172] But Chief Justice Taft reviewed *Illinois Central*, concluding that the Court's reversal of the state court's ruling was consistent with both the "principle" and "conclusion" reached in *Illinois Central*.[173] This Section explains Chief Justice Taft's discussion of *Illinois Central* and offers a contextual analysis of his oft-quoted statement that "the conclusion reached was necessarily a statement of Illinois law."

1. Appleby's Deeds and the Illinois Central *Exceptions*

In *Appleby IV*, Chief Justice Taft interpreted *Illinois Central* to be fully consistent with his judgment regarding Appleby's deeds.[174] He first distilled the general rule announced in *Illinois Central*, ratifying the notion that the public trust obligation inheres in sovereignty:

> It was held that it was not conceivable that a legislature could divest the State of [the granted lands] absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power, and that a grant of such right was invalid.[175]

Chief Justice Taft then quoted a lengthy excerpt from *Illinois Central* that elaborated on the two exceptions that provided "limitations on the doctrine."[176] First, where the "interests of the people in navigation of the waters and in commerce over them" could be promoted "by the erection of wharves, docks, and piers therein," a state could grant parcels of

169 *Id.* at 402. The state court opinions never mentioned this provision of the Secretary of War's 1890 order. *See generally Appleby I* in Transcript of Record, *supra* note 130, at 171–203; *Appleby II*, 192 N.Y.S. 211 (App. Div. 1922); *Appleby III*, 139 N.E. 474 (1923).

170 *Appleby IV*, 271 U.S. at 402.

171 *Id.* at 402–03.

172 *Appleby III*, 139 N.E. at 476 (citing *Illinois Central*, 146 U.S. 387, 453 (1892)).

173 *Appleby IV*, 271 U.S. at 393–99.

174 *Id.*

175 *Id.* at 393.

176 *Id.* at 393–95.

submerged lands for that purpose.[177] Second, a state could abandon its "control . . . for the purposes of the trust" when granting parcels "which when occupied do not substantially impair the public interest in the lands and waters remaining."[178] Chief Justice Taft then discussed two cases in which the New York Court of Appeals followed both the "general principle and the exception" of *Illinois Central*.[179]

Although Chief Justice Taft never explicitly stated that the Appleby grants fell within the two exceptions recognized in *Illinois Central*, his emphasis on these exceptions—in both the portion of *Illinois Central* he excerpted and in his discussion of the New York Court of Appeals cases that recognized the two exceptions—implicitly reflects that understanding. As Chief Justice Taft recognized, the grants from the city were intended to promote commerce,[180] and he noted no "substantial[] impair[ment of] the public interest in the lands and waters remaining."[181]

2. Illinois Central *as "a statement of Illinois law"*

Before reviewing New York state court cases that had adopted and applied the "principle and the exception" of *Illinois Central*,[182] Chief Justice Taft made a seemingly self-contradictory remark that appeared to narrow the implications of *Illinois Central*:

> That case arose in the Circuit Court of the United States, and the conclusion reached was necessarily a statement of Illinois law, but the general principle and the exception have been recognized the country over and have been approved in several cases in the state of New York.[183]

Later courts, including the U.S. Supreme Court, have relied on Chief Justice Taft's statement that "the conclusion reached was necessarily a statement of Illinois law" to support the broad assertion that, as Justice

177 *Id.* at 394 (quoting *Illinois Central*, 146 U.S. at 452).

178 *Id.* at 394–95 (quoting *Illinois Central*, 146 U.S. at 452–53).

179 *Id.* at 395–96 (discussing Coxe v. State, 39 N.E. 400, 406 (N.Y. 1895) (declaring invalid the state legislature's attempt to grant to a private company a substantial portion of submerged state lands, and holding that "[t]he title which the state holds and the power of disposition is an incident and part of its sovereignty, that cannot be surrendered, alienated, or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit" (citing generally *Illinois Central*, 146 U.S. 387))); *id.* (discussing Long Sault Dev. Co. v. Kennedy, 105 N.E. 849, 851–52 (N.Y. 1914) (holding invalid a grant in which the legislature attempted to abdicate its sovereign duty by giving to a private corporation complete control over the St. Lawrence river after ruling that although "[t]he power of the Legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day . . . [t]he contemplated use . . . must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the Public")).

180 *See id.* at 367–69.

181 *See id.* at 394 (quoting *Illinois Central*, 146 U.S. at 452).

182 *Id.* at 395–97.

183 *Id.* at 395.

Kennedy stated in *PPL Montana*, "the public trust doctrine remains a matter of state law"[184]—that is, *only* a matter of state law.[185]

This reliance is misplaced. Not only was Chief Justice Taft's statement dictum, but a close reading of *Appleby IV* also reveals his understanding that *Illinois Central*'s broader holding would apply not just to the state of Illinois, but rather to any sovereign.

As a threshold matter, Chief Justice Taft's remark that *Illinois Central* was "necessarily a statement of Illinois law" was dictum. The Chief Justice reached his conclusion in *Appleby IV* without relying on *Illinois Central*, which he addressed simply to dismiss the city's argument that the interpretation of the Appleby deeds that Justice Field adopted was "opposed to the judgment of [the Supreme] Court in *Illinois Central*."[186] According to Chief Justice Taft, *Appleby IV* and *Illinois Central* were entirely consistent. Chief Justice Taft first examined New York State court cases to determine the extent of the conveyances at issue and concluded that the Appleby deeds conveyed both the *jus privatum* and *jus publicum*.[187] Under his reading of the state court cases, the laws of 1857 and 1871 impermissibly impaired those contracts.[188] Only then did he turn to cases that had been "cited to the contrary" by the city on appeal to the Supreme Court[189] and by the New York Court of Appeals in the case below,[190] including *Illinois Central*.[191] Chief Justice Taft either distinguished those cases or found their holdings consistent with his conclusion in *Appleby IV*.[192] Chief Justice Taft thus reached his conclusion in *Appleby IV* without relying on *Illinois Central*, a case he discussed only in the context of dismissing the city's argument.[193]

Moreover, Chief Justice Taft expressly recognized the broad implications of *Illinois Central* beyond its application to the state of Illinois. He distinguished between the "conclusion" of *Illinois Central*—presumably that the specific grant by the legislature was invalid[194]—and

184 *PPL Montana*, 565 U.S. 576, 603 (2012).

185 *See* discussion *supra* Part I; discussion *infra* Part VI.

186 *Appleby IV*, 271 U.S. at 393.

187 *Id.* at 391.

188 *Id.*

189 *See* Brief on Behalf of the City of New York, Defendant-in-Error at 13, 17, *Appleby IV*, 271 U.S. 364 (1926) (No. 15) (citing, e.g., People v. Steeplechase Park, 218 N.Y. 459 (1916); *Knickerbocker Ice Co.*, 68 N.E. 864 (N.Y. 1903)).

190 *Appleby IV*, 271 U.S. at 391–97 (citing cases relied on in *Appleby III*, 139 N.E. 474, 475–76 (1923); *e.g.*, Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913); Trustees, etc., of Brookhaven v. Smith, 188 N.Y. 74 (1907); Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378 (1908)).

191 *Appleby IV*, 271 U.S. at 393–96. *Appleby III* cited *Illinois Central* in support of the conclusion that because "the lands in question remain under public waters of the state . . . the right to control navigation over them remains in the state to be exercised in the public interest." 139 N.E. at 476.

192 *Appleby IV*, 271 U.S. at 391–97.

193 *Id.* at 393.

194 *See infra* note 200 and accompanying text.

the "general principle"[195] or "doctrine"[196] that animated that conclusion: "[T]he conclusion reached was necessarily a statement of Illinois law, but the general principle and the exception have been recognized the country over . . . ." [197] As Judge Aiken observed in *Juliana*, the idea that *Illinois Central* "was necessarily a statement of Illinois law" is consistent with the understanding that the public trust obligation is an inherent aspect of sovereignty: "[I]t follows that any case applying the public trust doctrine to a particular state is necessarily a statement of that state's law rather than a statement of the law of another sovereign."[198] That Chief Justice Taft likewise understood public trust obligations as inherent in sovereignty is implicit in his own summary of *Illinois Central*:

> [*Illinois Central*] held that it was not conceivable that a legislature could divest the State of [the granted lands] absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power, and that a grant of such right was invalid.[199]

The Chief Justice recognized that *Illinois Central*'s holding applied, not just to the Illinois legislature at the time of the grant to the railroad, but rather to *any* legislature: he referred to "*a* legislature," not "the" legislature. And the Chief Justice recognized that *Illinois Central*'s holding applied not just to state governments, but to *any* government: he referred to "sovereign governmental power," not "state" sovereign governmental power. Given this context and the Chief Justice's juxtaposition of the "conclusion" and "principle" of *Illinois Central*, his statement that "the conclusion reached was necessarily a statement of Illinois law" is most naturally understood to apply simply to *Illinois Central*'s invalidation of the Chicago harbor grant, which had been executed by the applicable "sovereign" (the state legislature).[200]

Under this reading, Chief Justice Taft's subsequent analysis of the New York state court opinions logically follows his discussion of *Illinois Central*. *Illinois Central* established two exceptions under which a state legislature could permissibly part with both the *jus publicum* and *jus privatum*, but whether the legislature *of a particular state* could do so would necessarily depend on whether the law of that state restricted such

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195 *Appleby IV*, 271 U.S. at 395.

196 *Id.* at 394.

197 *Id.* at 395.

198 217 F. Supp. 3d 1224, 1257 (D. Or. 2016).

199 *Appleby IV*, 271 U.S. at 393.

200 The *Illinois Central* Court also never cited Illinois state law in invalidating the Chicago harbor grant, and it seems unlikely that an opinion that never cited Illinois state law in invalidating the grant would apply only to Illinois. *See* Blumm & Schaffer, *supra* note 33, at 411 (noting that *Illinois Central* identified no state law imposing a trust obligation on the Illinois legislature); Wilkinson, *supra* note 65, at 453–54 (noting that the parties' briefs relied upon both federal and state authorities and that the *Illinois Central* opinion employs language of general applicability).

grants. In *Illinois Central*, the grant to the railroad company did not fall within either exception, so the Court had no need to examine Illinois state law. Appleby's grants, however, fell within both exceptions, and since the grants "were intended to part with both the *jus publicum* and *jus privatum*,"[201] the question in *Appleby IV* was merely whether New York state law would permit such a conveyance.

VI. THE AFTERMATH OF *APPLEBY V. CITY OF NEW YORK*

In two later Supreme Court cases, *Idaho v. Coeur d'Alene Tribe of Idaho*[202] and *PPL Montana*,[203] Justice Kennedy, in dicta, mischaracterized Chief Justice Taft's dictum in *Appleby IV*, thereby undercutting the sweeping language of *Illinois Central*—language that supports a conclusion that the public trust doctrine inheres in sovereignty. Lower federal courts and state courts have since relied on dicta in *Coeur d'Alene*, *PPL Montana*, and *Appleby IV* in rejecting the argument that the public trust doctrine binds all sovereigns, and dismissed plaintiffs' public trust claims as a matter of law. As discussed in Part I, in *Alec I* the D.C. District Court relied on *PPL Montana*'s statement that "the public trust doctrine remains a matter of state law,"[204] a statement the district court regarded as "carefully considered language of the Supreme Court," and therefore binding.[205] In affirming the district court, the D.C. Circuit in *Alec II* quoted the same passage from *PPL Montana*, and also cited *Coeur d'Alene* as a case "treating the public trust doctrine as a matter of state law."[206] Both *Coeur d'Alene* and *PPL Montana*, however, not only discussed the public trust doctrine merely in dicta, but also relied on *Appleby IV* in a manner that distorted Chief Justice Taft's opinion and subverted the broad implications of *Illinois Central*.

This Part examines the facts and analyses in *Coeur d'Alene* and *PPL Montana* and discusses two additional cases in which, as in *Alec I* and *Alec II*, courts relied on Supreme Court dicta from *Coeur d'Alene*, *PPL Montana*, and *Appleby IV* to reject the notion that the public trust doctrine inheres in sovereignty.

A. Idaho v. Coeur d'Alene Tribe of Idaho

In *Coeur d'Alene*, Justice Kennedy cited *Appleby IV* to suggest that *Illinois Central*, while invoking a broader principle, was simply a statement of Illinois law.[207] In *Coeur d'Alene*, the Coeur d'Alene Tribe

201 *Appleby IV*, 271 U.S. at 397.
202 521 U.S. 261 (1997).
203 565 U.S. 576 (2012).
204 *Id.* at 603.
205 863 F. Supp. 2d 11, 15 (D.D.C. 2012).
206 561 F. App'x 7, 8 (D.C. Cir. 2014).
207 521 U.S. at 285.

sued Idaho state officials, seeking declaratory and injunctive relief related to the tribe's asserted entitlement to exclusive use and occupancy of submerged lands within the boundaries of the Coeur d'Alene reservation.[208] In declining to extend to the plaintiffs the *Ex Parte Young* exception to Eleventh Amendment immunity,[209] Justice Kennedy emphasized the "far reaching and invasive" relief the plaintiffs requested: the plaintiffs sought to divest the state of its sovereign control over submerged lands, "lands with a unique status in the law and infused with a public trust the State itself is bound to respect."[210] Navigable waters, Justice Kennedy opined, "uniquely implicate sovereign interests."[211] In support of the assertion that American law adopted the principle recognizing "the weighty public interests in submerged lands," Justice Kennedy discussed the facts and holding of *Illinois Central*.[212]

Justice Kennedy cited *Illinois Central* to emphasize "the principle that submerged lands are held for a public purpose."[213] But in an offhand remark, he then quoted *Appleby IV*, stating that "*Illinois Central* was 'necessarily a statement of Illinois law.'"[214] Although Justice Kennedy here acknowledged a broader "principle" animating *Illinois Central*—that "submerged lands are held for a public purpose"—his remark distorted both Chief Justice Taft's analysis of *Illinois Central* and the case itself. As discussed above,[215] Chief Justice Taft had distinguished between the narrower "conclusion" of *Illinois Central*, which was "necessarily a statement of Illinois law,"[216] and its broader holding, under which public trust obligations inhere in sovereignty.[217] Thus, Justice Kennedy's assertion that "*Illinois Central* was 'necessarily a statement of Illinois Law'" accurately reflected neither *Illinois Central* nor *Appleby IV*.[218]

B. PPL Montana v. Montana

Fifteen years after *Coeur d'Alene*, Justice Kennedy wrote the *PPL Montana* opinion for a unanimous Court,[219] appearing to narrow the

208 *Id.* at 264–65.

209 The Eleventh Amendment generally bars suits against states by citizens and foreign sovereigns, although the Supreme Court has recognized exceptions for certain suits seeking declaratory and prospective injunctive relief against state officers sued in their official capacities. *See id*. at 267–70 (reviewing Eleventh Amendment jurisprudence and the exception established in *Ex Parte Young*, 209 U.S. 123 (1908), for plaintiffs seeking prospective injunctive relief).

210 *Id.* at 262, 283.

211 *Id.* at 284.

212 *Id.* at 285.

213 *Id.* at 284.

214 *Id.* at 285 (quoting *Appleby IV*, 271 U.S. 364, 395 (1926)).

215 *See* discussion *supra* Part V.B.

216 *Appleby IV*, 271 U.S. at 395.

217 *Id. See* discussion of *Appleby IV*, *supra* Part V.B.2.

218 Justice Kennedy also did not mention that Chief Justice Taft's discussion of *Illinois Central* was dictum. *See supra* Part V.B.2.

219 565 U.S. 576 (2012).

implications of *Illinois Central*, again by relying on *Appleby IV*. In *PPL Montana*, the State of Montana[220] asserted that PPL Montana, a hydroelectric facility owner, owed the state compensation for facilities constructed and operated on state-owned riverbeds.[221] The state argued that it obtained title to the relevant riverbeds at the time of statehood under the equal-footing doctrine,[222] under which states gained title to beds of waters that were navigable on the date of statehood and were then free to govern those lands according to state law.[223] The issue was whether the Montana Supreme Court had applied the appropriate test to determine navigability at the time of statehood for relevant segments of Montana rivers.[224] The U.S. Supreme Court reversed the state court's ruling, holding that the Montana Supreme Court's test was flawed.[225]

In dictum,[226] Justice Kennedy then briefly addressed the State of Montana's contention that denying the state title to the disputed riverbeds would undermine the public trust doctrine.[227] The equal-footing doctrine, Justice Kennedy explained, was the constitutional foundation for the navigability rule of riverbed title, whereas "the public trust doctrine remains a matter of state law."[228] In support of this assertion, Justice Kennedy quoted his dictum in *Coeur d'Alene*, along with Chief Justice Taft's dictum in *Appleby IV*, on which Justice Kennedy earlier had relied:

> [T]he public trust doctrine remains a matter of state law, see *Coeur d'Alene*, *supra*, at 285 (*Illinois Central*, a Supreme Court public trust case, was "'necessarily a statement of Illinois law'"); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) (same).[229]

220 *Id.* at 587. The State joined a suit initiated by parents of Montana schoolchildren, who argued that PPL had constructed facilities on state-owned riverbeds that were part of Montana's school trust lands, *id.*, which under the Montana Constitution should be managed to create revenue for public education, PPL Montana, LLC v. State, 229 P.3d 421, 426–27 (Mont. 2010).

221 565 U.S. at 587.

222 *Id.* at 587, 591.

223 *Id.* at 591. States' power to allocate and govern such lands according to state law is "subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'" *Id.* (quoting United States v. Oregon, 295 U.S. 1, 14 (1935)).

224 *Id.* at 580 ("The question is whether discrete, identifiable segments of these rivers in Montana were nonnavigable, as federal law defines that concept for purposes of determining whether the State acquired title to the riverbeds underlying those segments, when the State entered the Union in 1889.").

225 *Id.* at 593–603.

226 Justice Kennedy was explicit that his discussion of the public trust doctrine was dictum. *See id.* at 603 ("The above analysis is sufficient to require reversal of the grant of summary judgment to Montana.").

227 *Id.* at 603–04.

228 *Id.* at 603.

229 *Id.* at 603–04 (citation shortened).

Justice Kennedy's discussion here was also dictum,[230] and cannot plausibly foreclose the possibility of a federal public trust obligation: not only did *PPL Montana* address a narrow application of the public trust doctrine, but the prior case law on which Justice Kennedy relied also did not support his assertion that the public trust doctrine "remains a matter of state law."

PPL Montana addressed the narrow issue of whether Montana held title to certain riverbeds, and the Supreme Court simply stated that if Montana held title under federal law, then state law would define the scope of Montana's public trust obligation.[231] Justice Kennedy again mischaracterized Chief Justice Taft's assessment of *Illinois Central*: as discussed above, Chief Justice Taft had acknowledged the broader implications of *Illinois Central*, under which public trust obligations inhere in sovereignty.[232] Justice Kennedy mischaracterized even his own discussion of the public trust doctrine in *Coeur d'Alene* fifteen years earlier, in which he had acknowledged *Illinois Central*'s broader principles.[233]

Justice Kennedy's dictum addressed only the narrow issue of public trust obligations with respect to state-owned submerged lands and mischaracterized three prior Supreme Court opinions. In sum, Justice Kennedy's discussion of the public trust doctrine in *PPL Montana* was not, as the D.C. courts suggested, "carefully considered"[234] dictum properly relied on for the broad conclusion that the public trust doctrine cannot apply to the federal government.

C. Lower Federal Court and State Court Cases

Other courts, both state and federal, have joined the D.C. courts[235] in relying on *Appleby IV*, *Coeur d'Alene*, and *PPL Montana* dicta to dismiss assertions that all sovereigns are bound by public trust obligations. In *National Post Office Collaborative v. Donahoe*,[236] for example, the U.S. District Court for the District of Connecticut addressed whether the federal government might hold a public trust obligation to protect a historic Connecticut post office.[237] After a brief discussion of *Illinois Central*, the district court quickly rejected the plaintiffs' public trust claim, citing a familiar trio of cases:

> The public trust doctrine does not apply to the federal government, however, and the Supreme Court recently noted that "the public trust doctrine

230 *See supra* note 226. As Judge Aiken observed in *Juliana*, *PPL Montana* "was not a public trust case." 217 F. Supp. 3d 1224, 1256 (D. Or. 2016).

231 *See Juliana*, 217 F. Supp. at 1256–57 (discussing the implications of *PPL Montana*).

232 *Appleby IV*, 271 U.S. 364, 393 (1926). *See* discussion *supra* Part IV.C.

233 *See* discussion *supra* Part VI.A.

234 *Alec I*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012).

235 *See* discussion *supra* Part I.

236 No. 3:13CV1406 (JBA), 2014 WL 4544094 (D. Conn. Sept. 12, 2014).

237 *Id.* at *1–3.

> remains a matter of state law." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) ("*Illinois Central* was 'necessarily a statement of Illinois law.'" (quoting *Appleby v. City of New York*, 271 U.S. 364, 395 (1926)).[238]

The Connecticut district court did not address whether the quoted excerpts were dicta, or whether the cited cases in fact supported the court's perfunctory conclusion that "[t]he public trust doctrine does not apply to the federal government."[239] Similar to the D.C. Circuit,[240] the Connecticut district court improperly relied on *Appleby IV* and ensuing Supreme Court dicta to foreclose the possibility of a federal public trust obligation.

Butler ex rel. Peshlakai v. Brewer,[241] a 2013 atmospheric trust case brought in Arizona state court by youth plaintiffs, illustrates that reflexive reliance on the same Supreme Court dicta may even foreclose public trust claims against *state* governments. In *Butler*, the Arizona Court of Appeals upheld the trial court's dismissal of the plaintiffs' public trust claim against state officials.[242] The *Butler* court acknowledged that it was "up to the judiciary to determine the scope of the [public trust] [d]octrine"[243] and that the public trust *res* might conceivably include the atmosphere.[244] But the court then cited *PPL Montana* and *Appleby IV* dicta for the conclusion that the public trust doctrine "arises under state law,"[245] and looked only to Arizona state law and the state constitution for such a limitation.[246] Finding none, the court concluded that it had no

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238 *Id.* at *2.

239 *Id.* Federal courts that have not relied on *Appleby IV*, *Coeur d'Alene*, or *PPL Montana* dicta in resolving the question of whether the federal government is bound by public trust obligations have reached the opposite conclusion. *E.g.*, United States v. 1.58 Acres of Land Situated in the City of Bos., 523 F. Supp. 120, 124 (D. Mass. 1981) (holding that the public trust "is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign"); City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) ("By condemnation, the United States simply acquires the land subject to the public trust as though no party had held an interest in the land before.").

240 *See supra* text accompanying notes 15–19.

241 No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013).

242 *Id.* at *1. The court also noted, in the alternative, that the plaintiffs' complaint also "suffer[ed] from a standing problem." *Id.* at *7.

243 *Id.* at *3.

244 *Id.* at *6.

245 *Id.* at *3 n.3 (quoting *PPL Montana*'s statement that "the public trust doctrine remains a matter of state law," 565 U.S. 576, 603 (2012), and noting *Appleby IV*'s statement that the conclusion reached in *Illinois Central* was "a statement of Illinois law," 271 U.S. 364, 395 (1926)).

246 *Id.* at *7 ("[W]e would be weaving 'a jurisprudence out of air' to hold that the atmosphere is protected by the Doctrine and that state inaction is a breach of trust merely because it violates the Doctrine without pointing to a *specific constitutional provision or other law* that has been violated." (emphasis added)). The *Butler* court seemed to regard "state law" in "arises under state law" as encompassing only state constitutional or legislative laws, despite a fleeting recognition of a state-common-law-based public trust doctrine. *See id.*, *3 n.3. The court appeared to disregard persuasive authority recognizing a public trust doctrine not explicitly grounded in a state constitutional provision, case law, or common law,

basis for ruling that the state's action (or inaction) was unlawful.[247] As in *Donahoe*, the *Butler* court relied on *Appleby IV* and *PPL Montana* in discounting the possibility of a public trust obligation that inheres in sovereignty.[248]

VII. CONCLUSION

Chief Justice Taft's analysis of *Illinois Central* sanctioned the concept of public trust obligation that inheres in sovereignty and thereby applies to both federal and state governments.[249] In both *Coeur d'Alene* and *PPL Montana*, however, Justice Kennedy lifted an isolated statement from *Appleby IV*, absent context or analysis, distorting Chief Justice Taft's analysis and obscuring the sweeping implications of *Illinois Central*. [250] By foregoing careful analysis of *Illinois Central*, *Appleby IV*, and ensuing Supreme Court dicta, courts have improperly rejected plaintiffs' valid assertions of federal public trust obligations.[251] Courts may avoid this pitfall by heeding the broad implications of *Illinois Central* acknowledged in *Appleby IV*, and giving appropriate, limited weight to Justice Kennedy's later dicta, which misconstrued *Appleby IV* and obscured *Illinois Central*'s "general principle,"[252] under which the public trust doctrine binds all sovereigns.[253] As *Appleby IV* recognized, *Illinois Central* ratified that sovereign obligation, later Supreme Court dicta notwithstanding.

but rather—as recognized in *Illinois Central*—as inhering in sovereignty. The Nevada Supreme Court, for example, has recognized the public trust doctrine as "not simply a common law remnant" embodied in caselaw: "public trust principles are contained in Nevada's Constitution and statutes *and* are inherent from inseverable restraints on the state's sovereign power." *Lawrence*, 254 P.3d 606, 612 (Nev. 2011) (emphasis added). That court has understood the "inherent limitations" on state sovereignty as those recognized in *Illinois Central*. *Id.* at 613. The *Butler* court discussed *Illinois Central*, but only superficially. 2013 WL 1091209, at *3 n.3, *4. *Illinois Central* cited no state common law, state legislative law or state constitutional provision as a basis for its holding, indicating that the rule of *Illinois Central* transcends state law. *See* discussion *supra* note 200.

247 *Butler*, 2013 WL 1091209, at *7.

248 Under the court's analysis, the same result would have followed had the plaintiffs sued *federal* officials in the state court. *See supra* notes 245–246 and accompanying text.

249 *See supra* notes 195–200 and accompanying text.

250 *See supra* Parts VI.A (discussion of *Coeur d'Alene*), VI.B (discussion of *PPL Montana*).

251 *See supra* Part I and Part VI.C.

252 *Appleby IV*, 271 U.S. 364, 395 (1926).

253 *See supra* Parts III.B, V.B.2.