THE PUBLIC TRUST: A FUNDAMENTAL DOCTRINE OF AMERICAN PROPERTY LAW

BY
HARRISON C. DUNNING*

Professor Dunning argues that the public trust doctrine, which provides for public access to navigable waters and a significant range of related natural resources, deserves more recognition than it currently receives from property law scholars. He notes the doctrine in some states has taken on the status of an implied constitutional doctrine, which greatly adds to its theoretical interest and practical impact.

I. INTRODUCTION

A provocative article in a recent issue of the *Harvard Environmental Law Review* calls for an "ecological perspective" in American property law.[1] The author, David Hunter, argues that different types of land vary greatly in their ecological significance and that consequently our property law should be shaped with those differences in mind. He goes on to discuss the implications of ecological sensitivity for the shaping of rules of property law, particularly for the takings problem under the fifth amendment.[2]

To suggest today more of an ecological orientation in our property law seems a natural consequence of a growing worldwide interest in environmental problems.[3] The more fundamental idea that property rights in natural resources ought to vary with the nature of the resource, however, is an ancient one, albeit not one

---

* Professor of Law, University of California, Davis. LL.B. 1964, Harvard Law School; A.B. 1960, Dartmouth College.

1. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

2. *Id.* at 337-60.

3. This interest in the United States has been reflected in a great growth in environmental law, the modern phase of which can be dated from Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).

in earlier times motivated by an interest in ecology.[4] As Hunter recognizes, a powerful manifestation of that fundamental idea is the public trust doctrine.[5]

The public trust is a fundamental doctrine in American property law and should be recognized much more widely than it is today. Courts currently use the doctrine with regard to a significant range of natural resources associated with navigable water. For those resources the doctrine represents recognition of important public property rights, and as a consequence, the doctrine also represents severe limitations on private property rights. More indicative of the doctrine's fundamental nature, however, is the way the courts, the originators of the doctrine in this country, have in some states concluded that the doctrine is so entrenched as to be immune from legislative abolition. In those states the public trust doctrine has assumed the character of an implied constitutional doctrine, much like the related equal footing doctrine in federal law.[6]

II. THE NATURAL RESOURCES SUBJECT TO A PUBLIC TRUST REGIME

The types of natural resources subject to a public trust regime in various states include considerable areas of land. Initially, those of major importance were lands along the margins of the sea—tidelands and submerged lands in particular.[7] In the famous *Illinois Central* case, most of the lands at issue were submerged under Lake Michigan.[8] Similarly, most other courts have tradi-

---

4. Although ecology—the study of the relationships between organisms and all the factors (including other organisms) that make up their environment—evolved from the natural history of the Greeks, it was "unfamiliar to the public until recently, and relegated to a second-class status by many in the world of science." 6 THE NEW ENCYCLOPEDIA BRITANNICA 197 (15th ed. 1983).

5. Hunter, *supra* note 1, at 367-82.

6. *See infra* text accompanying notes 49-52.

7. Arnold v. Mundy, 6 N.J.L. 1 (1821). This is true both of land under navigable water and land under nonnavigable water subject to tidal action, even where the latter is several miles from the coast. Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988).

8. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); *cf.* California v. Superior Court (*Lyon*), 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865 (1981); California v. Superior Court (*Fogerty*), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865 (1981) (both discussed lands between the low water and high water marks along the shores of Clear Lake and

tionally treated lands under navigable rivers as subject to a public trust interest.[9] In a few instances in recent years, courts have also treated natural resources landward of the navigable water (for example, the "dry sand" part of the beach),[10] as public trust resources.

In each instance of public trust treatment for some type of land, it is the association of the land with navigable water that has led courts to regard that land as special enough to apply public trust reasoning. Submerged land in a bay, for example, has no unique qualities as land that would commend for it a special property rights regime. Aside, perhaps, from greater salinity, it is similar to land found in many other locations. As it likely contains the same sorts of minerals as ordinary land, it offers the same possibilities for building sites as land elsewhere, assuming that the bay's waters are removed by diking or other means.

The need to deal with the waters of the bay, however, provides the key to why courts frequently view bay lands, like other submerged lands, as special. While land of the type found under bays may not be a particularly limited natural resource, the navigable waters of a bay are limited. Similarly, we have only a relatively few places in the interior of the country with navigable rivers and lakes. This scarcity is critical to the special importance of the lands under or along the edges of those navigable waters and justifies the development of a unique regime of public property rights to protect them.

An examination of the kinds of uses historically protected by the doctrine confirms that the association with navigable water is what makes water-related land suitable for public trust doctrine analysis. Traditionally, courts have identified three public uses: navigation, commerce, and fishing.[11] Commerce generally means

---

Lake Tahoe in California).

9. Barney v. Keokuk, 94 U.S. 324, 338-39 (1876) (discussing the Mississippi River).

10. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984).

11. These three uses are of equivalent significance, as a majority of the Supreme Court indicated recently in rejecting the position of the dissenting opinion that "the fundamental purpose of the public trust is to protect commerce." *Phillips Petroleum*, 108 S. Ct. at 801. Indeed, some state courts have emphasized that public trust protection includes open space and wildlife habitat, as well as the traditional three uses. *E.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374,

maritime commercial activity,[12] so the first two categories overlap somewhat. For each category, the essence of the public use is related to the navigable water, not to the land under or alongside it.

Once one understands the fundamental relationship of the public trust doctrine to navigable water, it is easy to comprehend that the concept should apply where there are property rights in water independent of land. Surprisingly, this point was not clarified in court until the 1980s, when the Supreme Court of California finally so held in the *Mono Lake* decision.[13] In that already famous case the court confirmed that rights to appropriate water—which exist independently of any right to land—are subject to limitation to serve public trust values. Indeed, the rights in question in that decision were to flows in creeks that had not been established to be navigable,[14] but they were deemed subject to the public trust doctrine because of their impact on Mono Lake,[15] a navigable body of water.[16]

Application of the public trust doctrine to property rights in navigable waters, as well as to lands associated with those waters, suggests that the doctrine has fundamental importance in our property law. Additionally, commentators have repeatedly urged the courts to apply the doctrine in a number of other situations where there is not necessarily any link to navigable water.[17] Fish and wildlife, for example, might be candidate natural resources,[18]

380, 98 Cal. Rptr. 790, 796 (1971).

12. *But see* Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968) (highway bridge as within state navigational servitude, which is treated as equivalent to a public trust easement).

13. National Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

14. For a description and diagram of these creeks and how they have been diverted, see California Trout v. State Water Resources Control Bd., 207 Cal. App. 3d 585, 593 (diagram at 634), 255 Cal. Rptr. 184, 187 (diagram at 214) (1989).

15. 33 Cal. 3d at 436, 658 P.2d at 720, 189 Cal. Rptr. at 357.

16. City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 466, 52 P.2d 585, 588 (1935).

17. The leading commentator to make this point is Professor Joseph Sax. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). He argues that the courts have in fact applied the public trust doctrine to disputes over natural resources not associated with navigable water, such as parklands, although generally without the use of public trust terminology.

18. Long ago, in People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374

as might wilderness areas.[19] The possibility of growth in the application of the public trust doctrine to new frontiers achieved (in the evocative words of Professor Sax) by "liberating the public trust doctrine from its historical shackles,"[20] reinforces the notion that this doctrine embraces an idea of fundamental importance for our law on rights in property.

III. THE CONCEPTUAL BASIS AND JURIDICAL STATUS OF THE PUBLIC TRUST DOCTRINE

Considerable controversy surrounds the historical origins of the public trust doctrine.[21] Whatever the doctrine may have meant in Roman law,[22] in medieval continental Europe,[23] or in English law,[24] the courts in this country have treated the public trust largely as a public property right of access to certain public trust natural resources for various public purposes.[25] In addition

---

(1897), the Supreme Court of California treated fish as a public trust resource, regardless of whether found in navigable or nonnavigable water. *Id.* at 400-01, 48 P. at 375. Recently, in reliance on *Truckee Lumber*, a California court decided that "a variety of public trust interest" exists in California in "non-navigable streams which sustain a fishery." *California Trout*, 207 Cal. App. 3d at 630, 255 Cal. Rptr. at 211.

19. Exciting as extension of the public trust doctrine to these new frontiers may be to many, it would be well to acknowledge that the doctrine currently draws a great deal of strength and legitimacy directly from its long historical link with navigable water. Much remains to be done to make the public trust doctrine a truly effective tool to preserve public values in navigable water and associated natural resources; consequently it might be best at this time not to seek to extend the public trust doctrine to entirely new arenas. This is not to deny, of course, that all natural resources ought to be subject to a legal regime appropriate to the nature of the resource.

20. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

21. *Cf.* Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976); MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511 (1975); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

22. J. INST. 2.1.1-2.1.6.

23. LAS SIETE PARTIDAS 3.28.6 (S. Scott trans. & ed. 1932). *Cf.* Sax, *supra* note 20.

24. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968).

25. *See generally* M. SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUB-

to the traditional purposes of navigation, commerce, and fishing, courts today recognize environmental protection purposes, such as preservation of wildlife habitat.[26] Although sometimes the public property right serves to prevent the governmental owner of a public trust resource from alienating it to private persons unless certain exceptional conditions exist,[27] more often the public trust manifests itself as an interest—frequently called an "easement"[28]—that burdens ownership of the resource.[29] Indeed, California courts established that this easement exists as a consequence of state sovereignty;[30] consequently it does not depend on a showing of prior state ownership of the resource.[31] The California courts have repeatedly said, as has the Illinois Supreme Court,[32] that the legislature is free in only very limited instances to abolish the public trust doctrine.[33]

Of central importance to any exploration of the public trust doctrine is to determine why courts have seen fit to assert that, with limited exceptions, this public property right *necessarily* exists with regard to navigable water and various lands associated with such waters. Can anything in response to this inquiry be said beyond noting the scarcity of such resources, as was done above?[34]

LIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789-1920 (1987).

26. *See supra* note 11.

27. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773 (1976).

28. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); People v. California Fish Co., 166 Cal. 576, 593, 138 P. 79, 85 (1913).

29. Marks v. Whitney, 6 Cal. 3d at 259, 491 P.2d at 380 , 98 Cal. Rptr. at 796.

30. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 300, 644 P.2d 792, 799, 182 Cal. Rptr. 599, 606 (1982), *rev'd sub nom.* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984). *Summa* did not challenge the sovereignty theory articulated in *Venice Peninsula Properties.*

31. In *Summa*, the tidelands in question were granted to various individuals by Mexico in 1839, well before California achieved statehood. 466 U.S. at 202.

32. People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773 (1976).

33. In the *Mono Lake* decision, for example, the Supreme Court of California said the state is free to extinguish the public trust interest "*only* in rare cases when the abandonment of that right is consistent with the purposes of the trust." National Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361, *cert. denied*, 464 U.S. 977 (1983) (emphasis added).

34. *See supra* text accompanying notes 10-11.

A helpful starting point for this inquiry is Justice Stephen Field's opinion for the Supreme Court in *Illinois Central*,[35] which in recent decades has been regarded as the country's leading decision on the public trust doctrine.[36] The Court held that there was no unconstitutional impairment of contract when the Illinois Legislature repealed a grant it made several years earlier to the Illinois Central Railroad Company.[37] The grant consisted of extensive tidelands and submerged lands of Lake Michigan, constituting virtually the entire Chicago harbor area.[38] The Court indicated that because these lands were public trust resources, the grant was voidable by the legislature, if not void at the outset.[39]

For many years prior to *Illinois Central*, Justice Field had argued that some activities by their nature are private and others public.[40] In his view, businesses other than state-created monopolies were inherently private. Therefore, in 1877, he dissented from *Munn v. Illinois*,[41] where the Court held that a state did not violate the Constitution when it regulated the rates to be charged by grain warehouses. Control of the harbor of a great city, on the other hand, was for Justice Field an inherently public activity. It was not to be compromised by transferring ownership, and thereby considerable control, of the harbor's submerged land to a private entity.[42] In his view, to do so would be an abdication of

---

35. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

36. For references to decisions from nearly a dozen states treating *Illinois Central* as highly persuasive authority, see Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?* 30 ROCKY MTN. MIN. L. INST. 17-1, 17-11 n.35 (1985).

37. 146 U.S. 387.

38. *Id.* at 450-51.

39. Although *Illinois Central* is ambivalent on this point, the opinion later was read to have treated the grant as void. People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 77, 360 N.E.2d 773, 779 (1976). In *Scott* there was no revocation, but the grant of submerged lands to a steel company by the state legislature was nevertheless invalidated.

40. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); *see also* McCurdy, *Stephen J. Field and the American Judicial Tradition*, in THE FIELDS AND THE LAW 5-20 (P. Bergan, O. Fiss & C. McCurdy eds. 1986).

41. 94 U.S. 113 (1877).

42. Although by 1892 it had long been acknowledged that cities and states could exercise their police powers to regulate the use of private property, the no-

governmental responsibility.[43]

Justice Field was in the minority in 1877 on the proposition that some business activity is inherently private and therefore beyond governmental regulation. The growth of the twentieth century administrative state and the accompanying pervasive regulation of economic activity have rendered that idea obsolete. Nevertheless, the corollary idea that some other kinds of activities are inherently public and consequently the government must tend to them has not vanished. This idea appears often in public trust doctrine cases. A prime example is the *Mono Lake* decision, where Justice Broussard forcefully asserted that the state has a duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands."[44]

Important questions remain, however, regarding that acknowledged responsibility to protect "common heritage" or public trust resources. Why is fulfillment of this duty not left to the legislatures' discretion? A legislature's exercise of the police power is an enormously powerful tool today, even though it was poorly developed in 1892 when the Supreme Court decided *Illinois Central*.[45] What justifies the insistence that the state recognize a public property right, and further that the courts be able to limit legislative abolition or modification of that property right? Can more be said than simply to cite *Illinois Central*, with Justice Field's natural law-like assertions about the nature of things?

The key to answering these difficult questions may lie in the physical characteristics of public trust resources. Navigable bays, lakes, and rivers share, in addition to scarcity, a natural suitability for common use. Many people can navigate, fish, or observe wildlife at these sites. Often the waters are moving, and always people can move easily on those waters. Common use by the general population serves as the basis to characterize these natural resources as common heritage or public trust assets. "Navigable water," a term that has come to mean water usable by the public

---

tion was widely disputed and the subject of many attacks. *See generally* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895 (1969).

43. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

44. National Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361, *cert. denied*, 464 U.S. 977 (1983).

45. *See supra* note 42.

on an *in situ* basis,[46] is the characteristic that historically has served to link these various resources, even though other types of natural resources (a desert, for example) obviously physically permit common use as well.

Natural suitability for common use together with scarcity may explain why courts view natural resources, such as navigable bays, as public assets, and why the state is seen to have a duty to acknowledge and protect public property rights that will permit community access to these resources. There is a sovereign responsibility: the government has an obligation to preserve the people's historic freedom of access. The duty springs from the nature of the resource—from recognition that a public trust resource is, as Justice Holmes once wrote of a river, "more than an amenity, it is a treasure."[47]

Those courts that recognize the public trust interest as not subject to legislative abolition typically do not provide theoretical support for their conclusions. On the one hand, they must believe that the public trust doctrine is more than a conventional notion of the common law, for such rules are fully subject to legislative modification or abrogation. On the other hand, it is difficult to conclude that they believe that no public trust asset could ever be removed from the protection of the doctrine. For example, the courts would never conclude that, as a matter of principle, no navigable bay or lake or part thereof could ever be filled or drained, and devoted to other purposes, regardless of how pressing the need. What they may be saying instead is that the public trust doctrine limits legislative freedom because it is an implied state constitutional doctrine,[48] one that springs from a fundamental notion of how government is to operate with regard to common heritage natural resources. That is, government must protect public access to such resources unless there is a solemn decision to the contrary.

---

46. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C. DAVIS L. REV. 579 (1983).

47. New Jersey v. New York, 283 U.S. 336, 342 (1931).

48. Occasionally, state constitutions provide for explicit protection of public trust resources, as in California where most grants of tidelands within two miles of an incorporated area and fronting water used for navigation are prohibited. CAL. CONST. art. X, § 3. This prohibition, however, was enacted in 1879, long after the state granted massive areas of tideland to private persons. H. GILLIAM, SAN FRANCISCO BAY (1957).

Federal law has for many years articulated a related, implied, constitutional concept that addresses the relationship between government and property: the equal footing doctrine. This doctrine accords equivalent status to all states in the Union. Although this doctrine is primarily a political one,[49] it is the basis for rulings long ago that the federal government holds the beds of navigable rivers in territories in trust for future states,[50] and that upon admission to the Union, states take title to those beds.[51] The equal footing doctrine thus links state sovereignty to property rights, and a recent Supreme Court case reaffirmed the close link between the equal footing and public trust doctrines.[52]

IV. UNJUSTIFIED NEGLECT OF THE PUBLIC TRUST AS A PROPERTY DOCTRINE

During a period of heightened public interest in environmental protection, a comprehensive article by Professor Joseph Sax[53] drew the attention of environmental law students to the public trust doctrine, and among that community, interest and attention have remained high.[54] But among the more numerous community of property law scholars, the public trust doctrine seems generally to have stirred only marginal interest. This is unfortunate, because property scholars provide law students with their first and most fundamental appreciation of the principles used to allocate natural resources.

An examination of contemporary casebooks used in courses for first year law students confirms the marginal status of the public trust doctrine in property law scholarship.[55] Authors of

---

49. A typical application is Coyle v. Oklahoma, 221 U.S. 559 (1911) (right of a state to locate its seat of government).

50. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). Despite the fiduciary obligation, some prestatehood federal disposition of land under navigable waters is authorized. Shively v. Bowlby, 152 U.S. 1, 48 (1894).

51. 44 U.S. (3 How.) at 212.

52. Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988).

53. Sax, *supra* note 17.

54. The leading treatise on environmental law gives the public trust doctrine considerable attention, 1 W. RODGERS, JR., ENVIRONMENTAL LAW 155-68 (3d ed. 1986). There is also extensive law review literature, including a symposium at 14 U.C. DAVIS L. REV. 181 (1980).

55. I am grateful to Boyd Sprehn of the Class of 1989, U.C. Davis School of Law, for his able research assistance in carrying out this examination. Among the

these casebooks almost entirely ignore the doctrine when examining the fundamental question of the nature of property rights;[56] indeed, fewer than half of the casebooks examined even suggest that property rights regimes might vary according to the physical characteristics of each natural resource. When the casebooks discuss land use planning law, they often mention the public trust doctrine and related ideas. Discussion frequently includes the well-known *Just v. Marinette County* decision, in which a Wisconsin court sustained restrictive regulation aimed at preserving the natural use of wetlands.[57] Nevertheless, treatment of the public trust doctrine is not fully developed; overall, property law casebook authors clearly do not regard the doctrine as fundamentally important.

This neglect of the public trust doctrine is unfortunate. The doctrine deserves better treatment simply on the basis of the extensive natural resources it directly affects: bays, shorelands, rivers, and so forth. Even more important is how the public trust doctrine illustrates a fascinating and significant intersection of property rights and constitutional concepts. It provides a dramatic example of how common heritage natural resources, given constitutional protection, can inspire a unique property rights regime. It is a regime more heavily weighted toward public rights than we usually find in our property law, and it deserves much more attention than it gets.

---

casebooks reviewed were the following: O. BROWDER, R. CUNNINGHAM & A. SMITH, BASIC PROPERTY LAW (4th ed. 1984); A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY (3d ed. 1984); R. CHUSED, MATERIALS AND PROBLEMS IN PROPERTY (1988); J. CRIBBET & C. JOHNSON, PROPERTY (5th ed. 1984); C. DONAHUE, T. KEMPER & P. MARTIN, PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (1983); J. DUKEMINIER & J. KRIER, CASES AND MATERIALS ON PROPERTY (2d ed. 1988); P. GOLDSTEIN, REAL PROPERTY (1984); C. HAAR & L. LIEBMAN, PROPERTY AND LAW (2d ed. 1985); G. LEFCOE, AMERICAN LAND LAW (1974); E. RABIN, FUNDAMENTALS OF MODERN PROPERTY LAW (2d ed. 1982 & Supp. 1985).

56. The best introductory coverage to the public trust doctrine was found in C. HAAR & L. LIEBMAN, *supra* note 55, at 179-200.

57. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).