Joseph Sax -- The Father
of the Modern Public
Trust Doctrine

Michael C. Blumm and R.D. Guthrie of Lewis & Clark Law School have an interesting new paper soon to appear in the U.C. Davis Law Review, pointing out that the public trust doctrine has assumed enormous significance in the jurisprudence of several countries around the world, including India, Pakistan, the Philippines, Uganda, Kenya, South Africa, Brazil, and Canada. (h/t: PropertyProf Blog)

This is something of an irony, because of course the modern version of the doctrine was first articulated by Joseph Sax in a classic article, and explicitly used by the California Supreme Court in the famous 1983 Mono Lake case. But since then, it is fair to say that the public trust doctrine has not had the impact that many believed it would when the Mono Lake case was decided. Hawai'i's Supreme Court has adopted it for groundwater, and it remains vital in California, but it has not transformed western water law in the way that it could have.

Why would such a doctrine have achieved such prominence internationally but remain so modest in the nation of its intellectual birth?

Blumm and Guthrie do not explicitly attempt to answer the question. They note that in other countries, courts have derived it from constitutional and statutory sources, but I am not fully persuaded by it. For example, in India, where the doctrine has achieved its most significant influence, the Supreme Court derived it from the Constitution's right to life, a provision that exists here as well. The African countries have explicit environmental constitutional rights, but Pakistan, Canada, and the Philippines do not.

One obvious answer might be the growing conservatism of US courts: after 1983, the American judiciary turned sharply rightward. That is true, and perhaps might be a primary cause, but I don't think that it fully explains the issue, either. Courts throughout the United States have endorsed gay marriage at the same time, and despite the efforts of many conservatives, have maintained many pro-plaintiff tort doctrines developed in the 60's and 70's such as strict liability for manufacturing defects and comparative negligence.

So here's one other factor, which I think sometimes gets overlooked: the American focus on judicial restraint. This focus comes not from democratic institutions, but rather from the history of the federal judiciary intervening to strike down progressive legislation. That makes most judges quite fearful of being labeled activist. Other countries just don't have that problem: they are coming from political cultures where the legislature and executive could all be quite tyrannical on their own, thank you, and didn't need the judges to help. Indeed, in many of these countries, the authoritarian history of government meant that at times the judiciary was seen as the most popular branch of the government. It was the Allahabad High Court, for example, whose insistence on holding that Indira Gandhi would have to stand trial for (arguably miniscule) election law violations, that caused her to declare the Emergency in 1975.

Other countries seem to have little problem in recognizing the judicial decisions do not undermine democracy, but actually facilitate it. If the public trust doctrine regains prominence in the United States, it could reveal a growing maturity of our American political culture.