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THE PUBLIC TRUST DOCTRINE: AN ECONOMIC PERSPECTIVE

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The history and current state of the public trust doctrine have been discussed ad nauseam.¹ As an economist, I am particularly sensitive to the

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1. See, e.g., Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991); Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989); Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565 (1986); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217 (1984); Janice Lawrence, Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CAL. L. REV. 1138 (1982); Stephen A. De Leo, Note, *Phillips Petroleum Co v. Mississippi and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U. L. REV. 571 (1989); Richard P. Shanahan, Comment, *The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Lake Basin*, 34 HASTINGS L.J. 1293 (1983); Richard Ausness, *Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407 (1986); Lynda L. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. PITT. L. REV. 95 (1985); John B. Arum, Comment, *Old-Growth Forests on School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151 (1990); Kevin M. Raymond, *Recent Developments, Protecting the People's Waters: The California Supreme Court Recognizes Two Remedies to Safeguard Public Trust Interests in Water*, 59 WASH. L. REV. 357 (1984); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989); John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1 (1986); Timothy J. Conway, Note, *National Audubon Society v. Superior Court: The Expanding Public Trust Doctrine*, 14 ENVTL. L. 617 (1984); Deborah B. Schmidt, *The Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675 (1982); Mary K. McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683 (1989); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515 (1989); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989); See also JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* (1970); Michael B. Huston & Beverly J. Ard, *The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623 (1989); Jan S. Stevens, *The Public Trust and In-Stream Uses*, 19 ENVTL. L. 605 (1989); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Jan S. Stevens, *The Public Trust; A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980).

For a thorough summary of the topic, I particularly recommend to the reader Professor Richard Lazarus' article *Questioning The Public Trust Doctrine*, *supra*.

inefficiency of reinventing the wheel, and so this essay will not recapitulate the oft-told story of that body of law and commentary. I will instead direct my energies primarily at both the normative and positive economics of the public trust doctrine.

I. THE THREE PUBLIC TRUST DOCTRINES

To make sense of the public trust doctrine it is useful to treat it as not just one doctrine, but three. First, there is *the public trust doctrine that was*, i.e., the English doctrine that evolved over a period of several hundred years and was the progenitor of, and authority for, the modern American doctrine. Second, we have *the public trust doctrine that is*, i.e., the jumbled and evolving body of case law and commentary that constitutes the current legal requirements and understanding of the doctrine. And, finally we might imagine *the public trust doctrine that ought to be*, i.e., the doctrine that, if we could write on a clean slate, would serve as a useful social wealth increasing constraint on the government custodianship, disposal, and reclassification of communal property.

The position I will set forth in this article is that: (1) *the public trust doctrine that was*, the law that existed in England at the founding of this country, was an obscure, unfixed, unclear, doctrine of communal rights to fishing and commercial uses of tidal lands, held in trust by the King of England—that doctrine was, if normatively sensible at all in its own time and place, of little or no application to our republican form of government; (2) *the public trust doctrine that is*, particularly the post-1970 American case law and commentary, bears only a tangential relation to its antecedents; it is far less clear as to content, radically changed in focus, and enormously enlarged in scope; and (3) that while there may be a *public trust doctrine that ought to be*, in the sense of some legal rule or principle that would efficiently constrain legislatures and private individuals from destroying or disposing of communal property, and *the public trust doctrine that was* and *the public trust doctrine that is* both speak faintly to those concerns, that relationship is entirely too spare, and unstable a base on which to erect an edifice of useful positive law. While it is not entirely possible to compartmentalize my discussion into these three separate perspectives on the doctrine, such compartmentalization will, for the purpose of clarity, form the basic outline of this article.

II. THE PUBLIC TRUST DOCTRINE THAT OUGHT TO BE

Because I must employ a somewhat technical economic vocabulary throughout the article, and that vocabulary will be most fully developed in relation to the optimal public trust doctrine, that shall be our starting point. Does the public trust doctrine have a core that speaks to a necessary, or at least valuable, element of an efficient property law regime?

Not only has a small army of specialists in environmental law written on the public trust doctrine but so has Professor Richard Epstein.² Ever the insightful, thematic, Don Quixote, Professor Epstein only directs his effort at deriving what I characterize as *the public trust doctrine that ought to be*. Professor Epstein's analysis rests on the necessary conjoining of: (1) the desirability; and (2) the dangers, of permitting the reclassification of property from one category to another. He posits the public trust doctrine as a constraint on those reclassifications that permit them to occur while minimizing their dangers. The remainder of this section is an explication of the prior, all too cryptic, sentence.

It is useful to think of the different sets of rights that can and do exist with respect to property as bounded by a triad, in which any particular property right must be some variation on a theme defined by the three endpoints. Those endpoints are: (1) private property—property with respect to which a single person has the right to exclude, use, and alienate, e.g., my apple; (2) communal property—property which everyone has an identical right to use and from which no one has the right to exclude or alienate, e.g., the air we breathe; and (3) collective property—property with regard to which some political body has the right to alienate, exclude, and define the set of permitted uses and terms of access, those uses and terms may be as limited and quasi-private as those with respect to the space shuttle Atlantis or as broad and quasi-communal as state forests.

Legal rights to all valuable property, out of logical necessity, must be either communal, private, collective, or some variation on one or more of those themes. That is, rights to exclude must be either private, collective, or non-existent; permitted uses must be determined either collectively, or privately (subject to collective constraints); and rights to alienate must be either private, collective, or non-existent. Every political system and its defenders recognize some of each category of property. They differ merely as to proportion and detail, which is more than enough to drive men to the barricades. Nonetheless, with the exception of a few anarchists, everyone recognizes the propriety of assigning some property to each of these categories.

When a particular assignment of a piece or class of property into one of the categories—private, communal, or collective—with its corresponding set of rights and attributes works reasonably well, that assignment will appear to those who live subject to it to have the moral force of natural law or God's will. If, however, changes in technology, tastes, market forces, or some other factor cause that assignment to become significantly less efficient than an alternative, the moral justification of the formerly "natural" law will collapse. Generally, when this occurs the legal categorization of that piece

2. Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987).

of property eventually changes, as legal rights follow the lead of moral intuition which has itself been transformed by economic efficiency.³

Examples of this transformation in fundamental property law as a function of economic efficiency are infrequent, but dramatic when they occur. The Labrador Indians provide a striking illustration.⁴ Prior to the arrival of the white man, the Indians operated under what we would describe as a system of communal rights to their hunting grounds. Each Indian was free to hunt and trap when and where he wished and to as large an extent as he desired. After the arrival of a relative handful of French fur traders the Indians abandoned this communal system in favor of one resting on greater private rights to hunting territories.⁵ Why?

The immediate answer is that the Indians realized that communal rights to hunting grounds lead to the inefficiency of overtrapping. But, such an answer proves too much. Communal property rights in hunting and trapping grounds *always* lead to overtrapping. So, if the old communal system was inefficient after the French came, then why was it not inefficient before? The facile answer resting on the threat of overexploitation of a communal resource can only be partly right.

The threat of overtrapping did indeed lead to the privatization of trapping grounds, but to appreciate how, one must recognize that all systems of property have their characteristic costs, and those costs will wax and wane in prominence depending on circumstance. The characteristic cost of communal property is inefficient over-utilization of the property. While the characteristic costs of private property are a subset of monitoring, negotiation, and enforcement costs, as well as increased uncertainty as to individual income. Prior to the arrival of the white man the Indians had a very limited market for their furs,⁶ and so the efficiency loss due to overtrapping was modest and more than outweighed by the gains of not having to determine and police private property boundary lines and not suffering the risks of highly variable hunting seasons generated by exclusive rights to discrete pieces of land. The advent of the fur trade both increased the demand for fur-bearing animals and changed its elasticity from close to zero to close to infinity. As a result, communal property rights in land led to much more significant and costly overtrapping than before. A move to an institution of private property became social wealth increasing because it internalized the externality of overtrapping. The changes in relative costs and benefits meant that everyone would be *ex ante* better off if the community moved to a

3. I have argued elsewhere that our intuitive moral sense of where rights lie is intimately tied to social wealth maximization; that is, we demand of a broad class of moral law that it serve or *ex ante* self-interest. See Lloyd R. Cohen, *A Justification of Social Wealth Maximization as a Rights-Based Ethical Theory*, 10 HARV. J.L. & PUB. POL'Y 411 (1987).

4. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMER. ECON. REV. 347, 351 (1967).

5. See *id.* at 352.

6. See *id.* at 351.

system of private property rights in land. This change in the outcome of the *ex ante* self-interest calculus stripped communal property rights of its moral justification.⁷

A failure to recognize the necessity for change, or to permit it will condemn the community to an inefficient and wasteful property rights structure. One of the very first public trust cases in this country was arguably guilty of just such blindness and rigidity. The New Jersey Supreme Court held in *Arnold v. Mundy*⁸ that no one could "own" shellfishing beds in navigable rivers. Mr. Robert Arnold owned property bordering a navigable river. Both he and prior owners had sowed oyster beds in staked off plots of riverbottom bordering his dry land. These oyster beds did not interfere with navigation on the river. Mr. Arnold claimed title to the river bottom on which the oyster beds lay based on deeds stretching back to the original grant from Charles II to the Duke of York. Mr. Benajah Mundy reaped what he did not sow, namely the oysters from Mr. Arnold's beds. Arnold sued in trespass. The court distinguished navigable from non-navigable streambeds and held that while title to the latter could be conveyed to private parties, title to former, because it was held by the sovereign only in trust, could not be conveyed. Deeds which purported to do so were invalid to that extent. Therefore Mr. Arnold had no more right to harvest "his" oyster beds than anyone else. These oyster beds were communal; no one, including Mr. Arnold, had the right to exclude anyone else from them. From an historical perspective, in establishing such a bar to the privatization of river beds, the court was following the formal contours of the English doctrine of the public trust. From a normative perspective however the New Jersey judges seem decidedly less sensitive to the problem of overutilization of a communal resource than were the Labrador Indians. That which belongs to everyone is in no one's interest to preserve. Privatizing such erstwhile communal property as shellfishing beds is likely the best means of preserving the beds and thereby increasing the wealth of the community.

7. Arguably such a transformation of a moral and legal right is in process with respect to the human cadaver. As long as a dead body was merely a nuisance for the rest of the community, specification of property rights in the body was relatively unimportant. All anyone, including the next of kin and the decedent himself cared about was dignified disposal, and so the next of kin were given the limited right to choose the means of disposal. Medical technology has advanced in recent years to the point where many valuable uses now exist for our all too mortal flesh. In this brave new world the existing quasi-private, quasi-collective property regime fails miserably in moving those precious cadaveric organs to their most valuable use. It seems likely that the old regime will lose its moral force and we will be driven to redefine property rights in cadavers. It is still not clear whether the law will move towards a more private or alternatively a more collective form of property rights in human cadavers. See Lloyd R. Cohen, *Increasing The Supply of Transplant Organs: The Virtues of A Futures Market*, 58 GEO. WASH. L. REV. 1 (1989).

8. 6 N.J.L. 1 (1821).

So, just as it is necessary that a property owner, Amos, be able to sell his property to Betty in order that it be moved to its most valuable use,⁹ so too it is necessary that the very classification of property into categories of communal, private, or collective must be able to change from time to time in order that property be put to its most valuable use. The government plays a central role in this process. Unlike a transfer from Amos to Betty which can be a private affair, any change in the very structure of property rights, must be carried out through the agency of the collective, i.e., the government. Whether it is communal property that is to become private, or private property that is to be communal, it is the government that must be the agency and vehicle of that transformation.

Note also that such a transformation requires more than a mere announcement of a general principle. It requires in addition a decision as to: (1) *whose* private property will become communal, (2) *who* will acquire private property rights in formerly communal property, and (3) *which* collective property will change its use from communal to private and vice versa.

The power of government to reclassify and reassign property, though perhaps necessary for any reasonably efficient system of property law, is fraught with substantial dangers. The government is by nature an all too powerful institution. Its ability to force property reclassifications presents a multilayered danger. First, the government can force such reclassifications and transfers even when the change in property form and ownership is not social wealth increasing. Second, all reclassifications whether social wealth increasing, or not, have the potential for transferring large amounts of wealth *to or from* specific individuals, in the former case causing great but isolated suffering and in the latter case creating an opportunity for rent-seeking and the distortions in public choice that comes in its wake.

Richard Epstein addresses half of this problem in his book *Takings: Private Property and the Power of Eminent Domain*.¹⁰ Epstein argues that the Takings Clause, properly understood and implemented, effectively limits the dangers of unjustified and selectively burdensome government transfers of private property to the government. The requirement of just compensation for government takings: (1) protects property holders from unexpected massive declines in wealth occasioned by the government's perhaps justified change in the property rights structure; and (2) substantially reduces the likelihood that the government will transfer private property to public or

9. In some theoretical sense alienability is not strictly necessary. It is possible for ownership to remain unchanged but for the use of property to change. However, given the high transaction costs that would obtain if farmer Amos whose property was now best suited to be a suburban shopping mall were to retain ownership of the land and try to build and operate a mall, it is undoubtedly more efficient for developer Betty purchase the land and then build and operate the mall.

10. (1985).

communal use unless such transfer does in fact increase social wealth.¹¹ Because, the individual must be compensated for his loss, the use of the power of eminent domain is subject to financial constraints that are likely to blossom into political constraints that will limit such takings to those that are socially wealth increasing.¹² The public trust doctrine, or, more accurately, Professor Epstein's idealized version of it, can be seen as a mirror image of the takings doctrine, i.e., a means of protecting communal property from unwarranted transfer to private (and perhaps collective) ownership and use.¹³ For Epstein, the takings doctrine, explicitly, and the public trust doctrine, implicitly, both recognize the value of permitting occasional reclassification and reassignment of property. If property is to be held in its most valuable form, whether that be private, communal or collective, and the most valuable form changes over time and circumstance, a mechanism must exist to effectuate that reclassification and transfer when time and circumstance warrant it. And, as it is government which is the agency that determines and enforces the classification of any piece of property, it is government that must have that power.

But, as with the power of eminent domain to extinguish private property rights, so too with the government's power to privatize collective property, the very power of government can be a source of much mischief. If the mechanism of government reclassification is thoroughly unconstrained,

11. *Id.*, ch. 1.

12. In describing the virtues of the just compensation provision of the Takings Clause I have neglected the justification of the clause itself. The difficulties that the just compensation provision responds to can be avoided entirely if the government were to simply purchase the property it sought in arms length market transactions. Why is this not a suitable means of the government acquiring property?

The only economically sensible answer centers on the twin problems of free-riders and holdouts. Frequently a particular optimal investment requires the transfer of a very large number of separately owned pieces of property. For example building a shopping mall may require obtaining property from a dozen separate landowners. If the property could only be obtained by voluntary transactions, each one of these people would want to be the "last" to sell and thereby be able to extract an enormous monopoly rent for their property. With each landowner trying to be last no deal could be concluded at all.

The fact that the optimal uses of property will change over time and that some of the new uses may require, for efficient use, obtaining property from a multitude of property owners implies that a holdout problem may arise in acquisitions generally. Should this problem be more severe with respect to government acquisitions? Perhaps. To provide such communal goods as highways, national parks, etc. the government may need to acquire particularly large tracts of property owned by a multitude of people. In fact it is the large optimal size of the highway and the park which in part gives rise to or exacerbates the cost of excluding people from them were they provided privately. That is, it is precisely an aspect of its large optimal size that makes the park an appropriate piece of collective rather than private property.

The Takings Clause, by permitting the government to acquire multiple properties for a single project by simply taking that property without negotiation with the prior owner is a solution, albeit a problematic one, to the holdout problem. Although private parties have no similar *general* power to take their neighbors' property, such power is legislatively granted to private parties in special cases and in particular corners of the law. For example in corporate mergers the holders of a majority of the shares can force the minority to surrender their shares subject to a judicially enforced just compensation provision as determined in an appraisal procedure. See Lloyd Cohen, *Holdouts And Free Riders*, 20 J. LEGAL STUD. 351 (1991).

13. See Epstein, *supra* note 2; Rose, *supra* note 1.

valuable communal property rights may be sacrificed: (1) when the sacrifice of communal rights is not warranted by any commensurate benefit to be reaped by any private parties; and (2) without the general population being compensated for its loss. So, in order to protect the public and limit the number of social wealth decreasing transfers that occur some legal constraint is required on the power of government to effect such reclassifications. We may designate that optimal constraint on the government as *the public trust doctrine that ought to be*. What are the contours of that optimal doctrine?

Epstein, analogizing to the takings doctrine, imagines something like a constitutional provision that requires adequate compensation by the private person or public agency to the state as a representative of the collective interests of the population in the communal rights being disposed of. Before discussing the strengths and shortcoming of such a just compensation scheme, I will address Professor Epstein's positive law claim that this principal in fact underlay the jurisprudence of the public trust doctrine in the nineteenth century.

Professor Epstein argues that the landmark public trust case, *Illinois Central Railroad v. Illinois*¹⁴ is grounded on precisely the principle of just compensation. *Illinois Central* involved a grant, and its subsequent revocation, by the Illinois legislature to the Illinois Central Railway of about 1,000 acres of lake Michigan along the Chicago shoreline. Illinois Central sought compensation from the State of Illinois for the revocation of the grant claiming that such revocation was a taking. In a 4 to 3 decision Justice Field found that no compensation by the state was required because there was no taking. The Court held the original grant invalid on the basis of the Public Trust Doctrine.

Epstein admits that neither the majority nor the dissent ever suggests that the adequacy of the consideration to be paid by Illinois Central under the original grant is informative, to say nothing of dispositive, in determining the outcome of the case.¹⁵ Professor Epstein, however, believes that implicitly it was the inadequacy of the compensation that drove the majority's decision. If Professor Epstein is normatively correct that a just compensation clause would be a central provision of *the public trust doctrine that ought to be* and he is also correct that was the implicit standard employed by the Court in *Illinois Central*, then perhaps we should all take heart that even without positive law to guide it the *Illinois Central* Court was able to find its way to the right result and for the right reason.

Even if on some conscious or unconscious level Justice Field and his colleagues decided the case on the basis of the inadequacy of the compensation the state was to receive from Illinois Central for the communal rights it was sacrificing, the very fact that the Court was either unaware of, or felt unfree to give voice to, the Epsteinian calculus that motivated its decision

14. 146 U.S. 387 (1892).

15. Epstein, *supra* note 10, at 424.

seems reason enough to reject Epstein's effort to employ the public trust doctrine as the match of the requirement of the just compensation clause in the takings doctrine. The Court's unwillingness or inability to articulate a compensation justification for its decision means that there is definitively no Epsteinian public trust doctrine worthy of that name. For if a legal principle is to deserve the title "doctrine" it must be *expressly* recognized both by courts and practitioners.

But regardless of whether there ever existed in this country anything like the public trust doctrine envisioned by Professor Epstein it is worth exploring what the optimal constraint on the power of government to reclassify and transfer communal property to private ownership would be, i.e., what is the optimal public trust doctrine? Perhaps more pointedly, what public trust doctrine would maximize social wealth? For Professor Epstein the Public Trust Doctrine is the mate of the Takings Clause; the latter serves as a social wealth maximizing constraint on government appropriation of private property while the former is intended as a social wealth maximizing constraint on government disposal of collective and communal property. In that spirit, Professor Epstein imagines the public trust doctrine incorporating something like the just compensation requirement of the Takings Clause.

The great virtue of a just compensation provision is that it employs a metric. Why is that a virtue? Because, sometimes property should be moved from the communal category to the private, and sometimes not. But, when? and when not? It should when the value of the property in private use is greater than its value in communal use. On a theoretical level at least, a just compensation provision directly forces this result. If, and only if, the private party who is to receive the property is compelled to pay at least the value of the communal rights in the property can we be assured that this is a wealth increasing reclassification and transfer. Thus, a just compensation requirement would seem to be a central component of an optimal public trust doctrine.

But, the just compensation requirement of the Epsteinian public trust doctrine is not a perfect match for the just compensation clause of the Takings Clause. The parallel breaks down in two serious, but probably not fatal, ways. The first is in terms of ease of measurement. In both the takings and the public trust cases the court must examine only half of the transaction. In the takings case the court need not determine whether the government taking is justified in the sense that the planned governmental use of the property is worth more than the private use of the property, only that the private party is being adequately compensated for his loss. In the public trust case the parallel question is whether the state as representative of the public's communal interest is being adequately compensated for its loss. In neither case need the court inquire whether the party receiving the property has a use for it that is more valuable than the alternative being sacrificed, only that the price paid is at least equal to the value to the former owner. But the public trust case measurement problems are of an order of magnitude greater than those present in the takings case.

Consider the following paired examples: case (1)—the government, through its power of eminent domain, acquires a parking lot and turns it into an urban park; case (2)—the government sells an urban park to a private party who will turn it into a parking lot. In principle the calculations involved in the takings case are simple. Private property is by definition alienable, and much of it is in fact alienated from time to time. In other words there is a market in private property. Thus in order to determine whether adequate monetary compensation is being paid for the parking lot one need only look to the price at which a similarly situated parking lot has sold. Yet, despite their apparent theoretical simplicity, in practice takings cases present difficult enough calculations. No two parking lots are identical, and none need have sold recently. Takings cases will frequently require adjudication precisely because of a disagreement over the market value of a piece of property that was not itself sold on a market.

But the difficulties of calculating the market value of the parking lot in a takings case would be dwarfed by the difficulties of calculating the market value of the communal right of enjoyment of an urban park in a public trust case. Communal rights are by definition not privately alienable. Thus, as a general matter there is no private market in the right being sacrificed or, most importantly, in anything much like that right. The calculation of such values by creatively looking to private markets that parallel the communal one in question is the stuff of Ph.D. dissertations and government cost benefit analysis—a highly unreliable business at best. Is it really sensible to ask state trial courts to determine whether adequate compensation was paid by the private party for the park, where adequate compensation is the sum of the dollar denominated marginal values of the park to all its users, and when those users: (1) are largely unidentified and unenumerated; (2) may include those who merely enjoy its sight from a distance or the knowledge that it is there; and most significantly (3) where there is no market measure and test of their marginal valuation? I do not know the answer to that question, and I do not mean to imply that it is obviously in the negative, or that I have in mind a clearly superior institutional alternative to the courts. But, I do wish to share with the reader my concerns about whether the theoretically attractive Epsteinian calculus can be operationalized with an acceptable risk of error.

The second related problem with Professor Epstein's optimal public trust doctrine is that he requires too little in compensation for the communal right. Professor Epstein would merely compel the private party to pay the government at least the value of the communal property right, but if that is all that is paid and the value of the private use of this property is substantially greater than the communal right being sacrificed both an equity and an efficiency problem will be created.

Let me illustrate: why, when as a potential parking lot the land is worth \$300,000, should Smith rather than Jones get the right to buy the park for \$100,000, if that is its value as a park? And, leaving fairness aside, if the game ends with Smith (or Jones) getting the right to purchase a \$300,000

property for \$100,000 is it reasonable to imagine that this was a costless game? Isn't it more than likely that a substantial rent-seeking process will lie behind all final allocations. Smith, Jones, and a hundred others will all expend resources, (some of which end up in the pockets of government decision makers), in the effort to capture the \$200,000 "windfall."

Perhaps, this suggests that the optimal public trust doctrine must incorporate some sort of process requirement to govern the manner in which communal property is sold to private individuals. The required process might be a competitive bidding regime so as to assure that the difference between the private use of the property and its communal use accrues to the public, rather than result in a windfall profit to the fortunate, or what is worse, is dissipated in rent-seeking.

But these criticisms of Professor Epstein's model are not fatal. The law and its institutions are broadswords and shields not scalpels and casts. As tools of social regulation, they are incapable of either perfection or precision; subtlety and delicacy are not their virtues. Professor Epstein uncovered a deeper, more comprehensive and universal theme and offered an enlightening analysis of the salient issues underlying the transfer of property from communal use to private, and suggested a plausible if perhaps flawed solution to the problem. But, what relationship if any do these musings on *the optimal public trust doctrine* bear to the positive law we have inherited and transformed that bears the same name?

III. THE ORIGINS OF THE PUBLIC TRUST DOCTRINE

Although, in our secular juridical system, the last Supreme Court pronouncement is treated as the most authoritative statement of the law, deep in our souls lies something akin to the ecclesiastical view that the older the law the better—it is somehow closer to the source. Thus ancient and noble lineage functions as a touchstone for the legitimacy of much modern law. Those who favor a modern application of the public trust doctrine, in order to imbue the doctrine with more formidable authority, are wont to trace its roots deep into the bowels of legal history. But neither the vintage nor identity of the public trust doctrine are as noble or as constant as its advocates imply. What follows is a short rehearsal of the history of the doctrine in order to suggest: (1) its dubious lineage; (2) the lack of constancy to its meaning; and (3) the unsuitability of American soil to accept and nurture the English roots of this transplant.

A. *A Digression on the Romans*

The public trust doctrine comes to us from English common law that was at least tangentially related to earlier Roman law. The Roman origin or at least a Roman analog to English law can be found in the *Institutes of*

Justinian. "By the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea. . ."¹⁶

Professor Joseph Sax, the founder of the modern public trust doctrine, makes reference to this ancient root and asserts that the Romans believed that such things as "rivers, the seashore and the air were held by the government in trusteeship for the free and unimpeded use of the general public."¹⁷ Some scholars, however, believe that the Justinian idea of communal rights to shorelines was aspirational rather than descriptive.¹⁸

While we are certainly not bound by Roman understanding of the proper scope of communal versus private property, it is worth noting that the advocates of the public trust doctrine have perhaps an exaggerated notion of the extent of communal rights in Roman law and practice, and its applicability to the modern scene. As discussed in the preceding section it is no source of a great wonder or surprise that the Romans recognized some communal rights in property such as air and water. Both communal and private property will be present and approved of in all societies. The crucial questions for any society will be precisely which property, and what set of rights with respect to that property, will be assigned to each category. And, from the legal and historical fragments at our disposal it is less than certain how those questions were answered by the Romans.

The Roman understanding of public property emphasized a distinction which is not so sharply present in modern Civil or Common Law, that between things which cannot be owned (*res communes*) and things which can be conditionally owned through appropriation (*res nullius*).¹⁹ Roman law placed watercourses and seas in the category of *res communes*. Thus watercourses could not be owned by anyone in particular, and their use was available to all. Water classified as "living" water however would have been classified as *res nullius*. This category includes natural precipitation. Under this classification, rainwater belonged to no one in particular, but could be temporarily owned by means of actual possession. "The significant feature of the Roman view of water (other than private lakes, ponds, and springs) as *res communes* or *res nullius* is that the users had only possessory rights."²⁰ In addition, Roman law held that riparian land (riverbanks and beds) could be subject to ownership. Under Roman law, the riparian owner could not affect the natural flow of the water and could not exclude others from its use.²¹

16. J. Inst. 2.1.1.

17. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 163 (1970).

18. Lazarus, *supra* note 1, at 634.

19. Heather Winett, *Contemporary Water Pollution Cases and Roman Law*, 3 TEMP. ENVTL. L. & TECH. J. 31 (1984); *see also* H.F. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 49 (1950).

20. Winnet, *supra* note 19, at 32.

21. *Id.*

American water rights law is not explicitly based on Roman law. It does however partake of a similar understanding of proprietary interest in watercourses. Both Roman and American law accept the principle that the banks of navigable streams may be owned, but that the flowing water in those streams cannot be privately owned. Unlike the Roman regime, however, American law does not permit ownership of water beds of navigable streams. Each of the two conflicting American doctrines, the Riparian and the Prior Appropriation, have their roots in Roman law in that both doctrines recognize a limited private proprietary interest in running water.

B. The English Common Law Origin of the Doctrine

But, regardless of how far the Roman concept of communal property rights stretched, the authority of Roman law rests exclusively on its noble vintage rather than on any legal constraint that it imposes on 20th century Americans. Late 18th century English Common Law is a different matter. The Common Law of England holds authority not only from its antiquity, but as the positive law of the various states unless repealed or amended by a constitutional, statutory, or judicial pronouncement.

The origins of the public trust doctrine in English law are somewhat murky. It may have begun, and at least first prominently surfaced, as a claim, probably of a sixteenth century English royalist, that tidal lands belonged to the crown.²² This assertion ran contrary to the common practice of many centuries that such land was held privately. The notion of royal ownership was far from immediately accepted as good law. Indeed it was not until the publication of Mathew Hale's treatise in the latter half of the 18th century that the doctrine began to take hold, and even then only in an attenuated form. According to Hale, tidal lands were only presumed to belong to the crown in the absence of evidence to the contrary, and that such land was to be held in trust for the benefit of the public's communal uses in the form of fishing and commerce.²³

The role and purpose of the public trust doctrine of sixteenth through eighteenth century England cannot be understood absent some appreciation of the form of government at that time and place. I am suggesting something more than the general proposition that any law should be understood in terms of the people and times to which it is to apply. Specifically, the public trust doctrine is a constraint on acts of the sovereign and so its nature and purpose

22. See Rose, *supra* note 1, at 728; Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 41-42 (1976); Glenn J. 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, 554, 559 (1975).

23. Mathew Hale, *De Jure Maris*, reprinted in Stuart Moore, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO* 370, 374 (3d ed. 1888).

critically depends on the nature of that sovereign, i.e., on the form and power of government.

In 16th century England much of the power of the government of England was embodied in the person of the King, and the King *qua* King, was *normatively* understood not to be a mere representative of the people, but a person with private property and private interests that he might serve in his position as King. From ancient times to the present the King has held title to much real property.²⁴ Some of this property was intended for the King's private benefit and some was for the public's benefit. And so, not only was it necessary as it is for us that the law distinguish private property from government property, but it is also necessary that it distinguish property held by the government for the benefit of the people from property held for the benefit of the King.

The public trust doctrine is a principle of law, the primary function of which is to distinguish tidelands from much other real property held by the King. The doctrine placed tidelands within the category of lands legally owned by the King but not held for his private benefit. The doctrine asserts that the King held legal title in trust, on behalf of, and for the benefit of, the public. Because of the restricted nature of his title, the King could not dispose of this property for his personal benefit.

This original motivation of the doctrine seems completely inapposite to our modern republican form of government. Our government, though embodied in particular people, serves at the pleasure of the governed and is expected to represent their interests. There is therefore no need in our law to distinguish between property held by the government for the benefit of the governed and that held for the benefit of the governors. The latter category is a null set.

In support of this interpretation it is noteworthy that in English law the public trust doctrine applied only to the King, and not to the Parliament. Parliament was free to dispose of submerged lands as it saw fit.²⁵ If the concern that motivated the Public Trust doctrine was a species of the public choice dilemma, it was a limited one. That the doctrine limits the prerogatives of the King and not the Parliament indicates that it is the King's peculiar status as both chief of state and sovereign lord that is its concern. The law did not similarly constrain Parliament, because Parliament was, in theory, the people's representative.

One question that arises with respect to the roots of the public trust doctrine is that, if the doctrine has its origins in a general concern with the disposal of communal property, why was it directed exclusively at such a narrow category of property as submerged tidal lands? Was that the only presumptively communal property held in trust by the state?

24. Queen Elizabeth II is said to be the richest woman in the world, with a net worth of several billion pounds.

25. See generally Rose, *supra* note 1.

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Perhaps the answer is that an express doctrine had to be developed with respect to tidal lands out of a unique necessity. Tidelands are a sort of property the ownership of which would otherwise be subject to confusion.

Tidal lands are a species of real property, and most real property is best held privately. Even most collective real property will normally incorporate quasi-private rights of exclusion and limited use. Why? The productive use of real property almost always requires investment over time. Therefore, rights of exclusion and limited use are essential for optimal investment. Were the rights to property communal, then, as in the cases of the Labrador Indians and *Arnold v. Mundy*, this optimal investment would not be forthcoming. Thus in the absence of some circumstance, event, or action that marked a piece of real property as communal the reasonable presumption would be that it is private.

What sort of marker might distinguish a piece of real property as communal? Streets like tidelands are exceptions to the general rule that real property is best held privately. Because of the high transaction costs of excluding entry and the relative lack of rivalry in consumption, city streets, with few exceptions, are best held as collective property with associated communal rights. Then why is there no public trust doctrine with respect to streets?

Without such a doctrine how do we recognize that the land underlying city streets is collective property to which we have largely communal rights of use and no rights of exclusion? In the case of streets as in many other forms of communal property, the event that marks the property as collective/communal is some improvement to the property usually by the government, but sometimes by a private party, which in substantially raising its value *as communal*, marks it as such. Streets only become streets by the exercise of considerable effort and the expenditure of considerable resources. The very employment of that effort and the expenditure of those resources by the government marks the intended use as communal, and the legal owner as the government.

Submerged lands are different. Even in their unimproved state they are a valuable form of real property (useful both for commerce and fishing) that is best held communally. So, unlike farmland, houses, factories and most other real property which are best held privately, and unlike streets which are communal in use but only after substantial improvement, submerged land is perhaps to be presumed to be communal from the start and no affirmative act such as paving is necessary for its being put to valuable use as such, and to mark the time when it will be recognized as such.

I have summarized the English roots of the doctrine to convey the notion that the extremely limited 17th and 18th century public trust doctrine is probably both thoroughly inapplicable to the current American scene, and is in any case of such narrow scope that were it limited to its original domain it would be both ineffective and relatively harmless, only tripping up a precious few individuals who in ignorance and innocence fell victim to it.

IV. THE MODERN PUBLIC TRUST DOCTRINE

A. *From Commercial Interests to Environmentalism*

For someone having chanced upon the history of the public trust doctrine for the first time in this essay it might come as a surprise to learn that this somewhat arcane historical legal rule has become the vehicle of a vigorous environmentalist assault on perceived depredations of our collective earthly patrimony. Perhaps the most obvious cause of surprise is that in its pre-20th century form the public trust doctrine was not only not an environmentalist principle, but more nearly its opposite. The communal interests sought to be protected by the English public trust doctrine were commercial rather than environmental; it was fishing and navigation that were favored rather than recreational, aesthetic, or symbolic pursuits.

The nail has been turned on its head by Professor Joseph Sax and those who have built on his work. Commercial use of erstwhile communal resources is now treated as the evil that the public trust doctrine is designed to attack. As fundamental as this turn of events may appear, it is radical only in appearance not in substance. A continuity of theme from the past to the present has been preserved in the modern applications and interpretations of the doctrine to protect environmental interests. How so?

If the underlying principle is that communal interests are to be protected from private and collective abuse, then as communal interests change, it is only fitting that the newer, now more important, communal interests receive legal protection. But, have the communal interests of the American public changed over the last two centuries? Specifically, has there been a relative rise in the demand for "environmental" goods? And, why are those environmental goods communal in nature?

As the United States has grown both in population and in economic size, wealth, and productivity, two economic forces have combined to bring about a change in our relative demand for "environmental" goods. First, increased population and development has left less and less of our physical world in its natural state. Therefore, given that we place some positive value on at least some parts of our environment remaining in its natural state, to the extent that there are fewer such places, the marginal value of that which remains increases. Second, our desire for such virgin land both for active recreational consumption and for purely cognitive consumption—in the sense of the pleasure in the mere knowledge that such virgin land exists—is almost certainly a superior good,²⁶ and therefore as we have grown wealthier our demand for such places has increased disproportionately.

To put this in plain English, as we get richer we are relatively more desirous of hiking in the woods, fishing, cross-country skiing, and in merely

26. I employ the expression "superior good" in its technical economic sense, to describe a good the demand for which increases at a faster rate than does income.

knowing that natural woodlands and streams exist. And, the very forces that have made us richer have also led to their being more of us and both our wealth and numbers have resulted in the paving over of more of the spaces where we might have chosen to go hiking. Thus, it is eminently sensible that our demand for the continuing existence and protection of such places has increased markedly over the last 200 years.

But this merely means that our demand for hiking trails and virgin woodlands should have increased. It does not necessarily mean that those goods should exist as communal property rights. Why is it that at least a sizeable portion of our environmental concerns are probably not well served by a private property regime that relies on market forces for their provision? The answer is that many of the environmental goods we desire are, in the language of economics "public goods." What is a public good?

The answer is best grasped by illustration. Consider the existence of wetlands for the nesting of migrating wildfowl. Some few of us get pleasure out of visiting the nesting grounds of migrating birds. More of us get pleasure out of seeing the birds soar above us in formation. Still more of us simply enjoy the knowledge that the species continues to prosper. Whatever the source and mechanism of our pleasure, we value and have an economic demand for the continued existence of wildfowl and consequently the wetlands that support them. At the same time, preserving a piece of real property as a wetland may represent a substantial opportunity cost to the property owner. Indeed, the cost to the property owner is also a cost to society in that it represents lost production of some agricultural or commercial good. But that is as it is with all economic goods; choosing to do one thing precludes the doing of something else.

In a well functioning market economy, property will usually be put to its most valuable use because that is what is most profitable to the property owner. So why isn't the answer to the preservation of the wetland problem that if people value it sufficiently they will make their demand known in the marketplace; they will pay the farmer to maintain the wetland? Because, the general rule of an efficient outcome only holds if the public's taste and demand can *and must* make themselves felt on the market. If, however, our environmental interests are "public goods" the demand for them will not be fully, or even well, accounted for by the market.

Remember, that the majority of those who place a value on the preservation of the wetland do so because the wetland provides them with the sight of birds flying overhead and the mere knowledge of their continued existence. To the extent that a property owner sacrificed his own wealth, by not filling in a wetland could he then compel payment from those of us who are gratified by this result? Could he withhold the sight of the birds overflight, or the knowledge of their existence, or the knowledge of the wetland if they fail to pay him for his sacrifice? He could not. In the language of economics, the consumption of such goods entails no *rivalry* among consumers, and the *exclusion principle* does not operate. These are the constituent elements of a *public good*. Once more in plain English, the

pleasure I get out of the knowledge of the continuing existence of Canadian geese in no way diminishes your pleasure, and the producer of this good has no means of excluding either of us from this pleasure, or the knowledge that gives rise to it, if we fail to pay him a fee. Therefore, if the production of this good were left exclusively to a private property regime we would all seek to be free-riders on one another's efforts and there would be an underproduction of an environment conducive to the continuing existence of Canadian geese.

In the final analysis it is more than likely that the optimal allocation of resources for late 20th century Americans is very different than that for 17th century Englishmen, and specifically that the allocation between communal and private goods and within communal goods have changed with time and circumstance, and more specifically that there is a much increased demand for environmental goods that are best satisfied in the form of communal property. And so, although one can make much noise over the difference between the communal rights favored under the traditional English doctrine (commercial interests) and those favored under the modern American doctrine (environmentalist concerns), there is less to this change than meets the eye. Both the historical doctrine and the optimal doctrine are responses to the necessity of the government protecting communal interests, and under neither approach does it matter one whit what those communal interests are.

B. From Oceans to Mountains

Although I urge a tolerant and broad view of the communal interests to be served by the public trust doctrine, the law cannot vouchsafe such flexible interpretation of every aspect of the doctrine. One rather significant change in the doctrine over time has been its journey from the sea, up navigable streams, to unnavigable streams, its leap to inland ponds, and then like our amphibian ancestors its eventual emergence from the water and march across the land. This change in the doctrine is fundamental, radical, and illegitimate. Why?

1. Arguments by Analogy

The change in breadth cuts the public trust doctrine off from its primary normative root. The English doctrine held that certain specific real property, namely tidelands, could not be owned by private parties regardless of what deeds they held from the King because it was never the King's to convey. Whether historically accurate even as to tidelands, it is beyond prevarication that the English doctrine was specifically limited to that class of real property. Why is it illegitimate for the modern public trust doctrine to extend its range beyond tidelands? Why is the argument by analogy—that streams are like rivers, and rivers like tidelands—unpersuasive?

The legal justification of the ancient public trust doctrine is history not efficiency. The historical public trust doctrine is just that, an *historical*

doctrine. It speaks to what property rights were held by the King at a point in time and therefore what rights he, or anyone who took from him, could convey. The doctrine does not rest on the proposition that such lands *should* be held only in trust by the King, but rather that they *were* so held as an historical fact, and so the public trust doctrine *per se* cannot justify its own application to property beyond its original sphere.

2. Searching for an Efficiency Justification: Reducing the Costs of Uncertainty

Can a new justification based on economic efficiency bear its own weight? The efficiency justification would run as follows: because it is inevitable and sensible that certain real property be held by government and used communally by the public, a judicially created public trust doctrine declaring that land and those interests to be already held by the state would be a simple way to reach that result. The problem with this justification is that the public trust doctrine is then reduced to, at best, a superfluous *non sequitur*. (But indeed it is something far more pernicious than that.)

The drafters of the United States Constitution (as of the various state constitutions) recognized that it would serve the general interest that some property be held by the government. They anticipated that the property so held would change over time and therefore that some mechanism must exist to enable the transfer of private property to the public. Sure enough, they provided for precisely such a contingency in the Takings Clause of the United States Constitution.²⁷ And, so if the goal is to move property from the private sector to the public sector, the public trust doctrine is at best superfluous. The Takings Clause is more than sufficient for the task.

The problem this creates for fans of a broad application of the public trust doctrine to diverse forms of property is that the Takings Clause requires just compensation to the private party whose property is being taken; the public trust doctrine does not. Indeed such just compensation would be manifestly unjust if the historical public trust doctrine is applicable, since the private party never owned the property right in question.

The old doctrine was an assertion, whether correct or not, that a given set of communal property rights was generally known and accepted in English law. The new doctrine is something else entirely. It is the bald assertion that because a given set of communal interests are now recognized as a particularly valuable good though they were not so recognized in the past that private property owners whose property is implicated in this communal good shall have their private property rights diminished in respect of those communal rights, and that no compensation need be paid to those private property owners.

27. See my discussion of why the government could not simply rely on market purchases of the property, *supra* note 12 and accompanying text.

The old English doctrine was a constraint on the government's power to alienate. Its purpose, if we are to believe its champions, was not to make property rights more uncertain, cloudy, and contingent, but rather to specify with some clarity that some communal property rights existed and were not willy nilly disposed of by the sale or grant of some contiguous property. The new doctrine is quite different in spirit from the old. Rather than being a constraint on government it is closer to its opposite. It is, as advocated by Professor Sax, a means of enabling the government to extinguish private rights when to do so serves the public interest. As a result it makes private property rights highly contingent. The modern public trust doctrine, becomes then, within its ever expanding realm, the undoing of the Takings Clause, rather than a correlative constraint. What economic argument can be made in favor of this more expansive approach to the doctrine?

For Professor Sax the virtue of such a flexible open-textured modern public trust doctrine is that it "prevent[s] the destabilizing disappointment of expectations held in common. . . ." ²⁸ Professor Sax believes that the public has a reasonable expectation that all property will be allocated to, and among, communal, collective and private uses in a manner that reflects the public interest. And, because times change, government must have the power to reclassify property and redirect its use when that is justified by changes in the public interest.

Professor Sax has reiterated and expanded on this argument in a recent article.²⁹ He presents his view by reference to the 19th century case *Pennsylvania Coal Co. v. Sanderson*.³⁰ In that case a Mrs. Sanderson who lived downstream from Pennsylvania Coal complained that they were dumping their wastes in the river and thereby damaging her property interest in an unpolluted river. The court ruled against the good lady and said:

[W]e are of the opinion that mere private personal inconvenience . . . must yield to the necessities of a great public industry, which . . . subserves a great public interest to encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.³¹

Professor Sax comments *approvingly* that,

the court recognized that property rights satisfactory in a pre-industrial era must cede to the demands of the public interest of the time. When the public interest was developmental, traditional property rights in water—long standing property rights to natural flow—yielded, just as they had before and have since in many other instances.³²

28. Sax, *supra* note 1, 14 U.C. DAVIS L. REV. at 186-94.

29. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

30. 6 A. 453 (Pa. 1886).

31. *Id.* at 459.

32. Sax, *supra* note 29, at 477.

Sax has donned the cloak of neutrality. He is apparently indifferent whether the times call for pollution or environmentalism. Whatever the zeitgeist or economics of an era require, the private property owner's right to her property must be sacrificed to that societal mandate.

Professor Sax's justification for an expansive public trust doctrine—the need to vindicate reasonable expectations—sounds astonishingly like the justification of the secure private property rights the modern doctrine would destroy. And, both have a powerful intuitive appeal. As members of the community we wish to be secure from private parties destroying our earthly patrimony for their personal gain, and as property owners we wish to be secure that an arbitrary and all powerful state will not rob us of our property.

In Professor Sax' formulation the community's and the individual's interests in relative certainty seem to be in inexorable conflict. But that seeming conflict is the result of his conjoining and confounding two distinct questions: (1) will the property owner or the state have the final say as to how his property will be used; and (2) if the state does have the final say on the use of the property who will bear the cost.

Should the property owner or the community have the final say on the disposition of his property? All but the most extreme private property enthusiast need have no quarrel with giving the nod to the community on the question of whether it should have the power to take private property for a road, a harbor, a military base, or a wetland. To not permit the government to compel such forced transfers would likely impose great and disproportionate costs on the entire community. The contingency of the permitted uses of a piece of property is probably a sound economic principle. But this question can, and should be kept entirely separate from the question of who shall bear the cost of that decision.

Professor Sax is mistaken if he concurs with the *Sanderson* Court in the belief that when it decides whether Mrs. Sanderson has a property right in a clean river, it is also deciding whether the river will run polluted or clean. As the Coase theorem makes clear, unless there is a transactions cost problem, the answer to the question of whether it is Mrs. Sanderson or the coal company who has the property right in the purity of the river, or lack thereof, is likely immaterial to whether the river will be polluted.³³ The question for the Court is solely who will bear the costs of the uncertainty of changing cost and benefit functions. Shall it be the individual property owner who finds that not only has she lost a clean flowing river but that she has also lost the right to compensation for that loss, or shall it be the coal company directly, and through market forces the society at large?

What if there is a transactions cost problem in *Sanderson* resulting from a large number of riparian owners in the same position as Mrs. Sanderson, such that granting each of them an injunction would result in an intolerable

33. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

situation of a multitude of holdouts?³⁴ As Callabrese and Melamed first explained³⁵ and *Boomer v. Atlantic Cement Co.*³⁶ illustrates, such a problem can be sidestepped by vindicating the property owners' rights by a liability rule rather than a property rule. In other words the court need only have awarded Mrs. Sanderson damages not an injunction.

Had they done so, and had polluting the river been more valuable than the damage that was caused, the coal company would have continued to pollute and been forced to internalize the cost they were imposing on Mrs. Sanderson and all other riparian owners. And, if in a 1992 reenactment of the case the costs of preventing pollution has fallen and the monetary value of the damages that pollution causes has risen, such that the latter is now larger than the former, then the coal company will refrain from polluting rather than pay the higher costs of damages to Mrs. Sanderson's great granddaughter.

Thus the salient point is that as a general matter being willing or unwilling to recognize the sharply defined character of property rights makes not one whit of difference in terms of whether the river will be polluted or not. It only affects the wealth of the parties involved in the dispute. We can all agree that if it was sensible that the river be polluted in the 1890s then let it be so, and if it is equally sensible that it run clear in the 1990s then let that be so. We need not confound the questions of who shall make the decisions on how property shall be used, and what those uses shall be, with the entirely separate question of who shall bear the costs of those decisions.

So, on to the question of whether there is any sound reason for society at large rather than the private property owner bearing the costs of these decisions. Is there either an equity or an efficiency argument in favor of society rather than the private property owner bearing the costs its decision? First to a simple equity argument. At first blush it would seem that taking a man's property without compensation is manifestly unjust. But perhaps that initial reaction is overly hasty. If it is universally understood that the government has the power (or right(?)) to compel farmers to dedicate a portion of their property as a wetland, then the *ex ante* risk of that eventuality, like the risk of all other natural and manmade disasters, would be incorporated into the price of the land. And, it would then be decidedly unjust to compensate the owner for a taking that he believed was non-compensable when he purchased his property. So, to the extent that there is a generally recognized right of the sovereign to create communal rights in private property without compensating the property owner, property owners are not justified in being surprised by uncompensated takings. Of course, given that much land has remained in the ownership of the same family from

34. A fuller discussion of the meaning of the term holdout and its economic consequences is provided in Lloyd Cohen, *Holdouts and Free Riders* 20 J. LEGAL STUD. 351 (1991).

35. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

36. 257 N.E.2d 870 (N.Y. 1970).

a time when there was no such generally recognized right of the sovereign it does in fact seem more than a little unfair to change the rules of the game midstream.

But the more powerful argument for compensating the private party rests on efficiency, specifically, that social wealth is increased by placing the burden of the financial loss of public trust type takings on the community at large rather than the private property owner. At first blush, the added uncertainty of uncompensated takings seems a trifling burden. The ownership of private property is already burdened with the uncertainties generated by the forces of nature, human tastes, and human ingenuity. So, from one perspective the additional uncertainty of government taking through a bastardized public trust doctrine is only a minor inconvenience.

But this misses the point of private property. Some observers would characterize the increase and decrease in wealth to which property owners are subjected by the market and nature as "windfall" profits and losses. But in this characterization there is the vanity of ignorance and limited foresight. What to the loser and the outsider is another's windfall profit is to the winner often the result of careful planning and shrewd guesswork. That the gains and losses created by market and natural uncertainties fall squarely on the shoulders of the property owner creates an incentive for him to anticipate the market and nature, and to use his property in the most productive fashion. And, in that anticipation he is serving the community at large. For example, if the year is 1939 a shrewd investor might have anticipated that: (1) the United States was going to shortly find itself involved in a world war; (2) that this would involve massive investment in wartime production; (3) that this would drive interest rates up sharply; (4) that this would discourage investment in the production of long-lived durables such as housing; (5) that this would drive up the price of housing; and that therefore (6) it would be personally profitable to build housing now. In doing so the investor would not only be serving himself but the community as well. The high price that he will be able to charge for his housing is a direct measure of its value to the community.³⁷ And so the uncertainties of the market and the natural world lead property owners to serve the general interest by finding the optimal use of their property.

The uncertainties that attach to property because of public trust/takings actions by the government are quite a different matter. It does not call forth any productive response on the part of the property owner that increases societal wealth. Its economic effect on the property owner is twofold, and both are pernicious. First, its general effect is merely to make property ownership more risky and thereby diminish the value of investing in property in ways that increase its value. Second, to the extent that the threat of uncompensated government takings by means of the public trust doctrine can

37. Of course, if he was really prescient the investor would have anticipated rent controls and put his money elsewhere.

be anticipated the property owner's incentive is to seek to use the political or judicial process to either protect his own property from being taken or to take a communal right in someone else's. This phenomena goes by the economists' name of rent-seeking. The hiring of lawyers and lobbyists to protect your property and to take others when the public trust/takings door is opened is little different from buying locks and guns to protect your property when a hundred burglars are imported into your community. It is an essentially socially wasteful activity, that would not exist but for the threat of the doctrine. Thus the risk created by such a use of the public trust doctrine leads the property owner to do less of a productive nature, and perhaps much that is of negative productivity.

But I think the greatest efficiency loss of placing the burden on the individual rather than the community can be appreciated when we view the problem through the lens of government. When employed by a democratic government representing majoritarian interests, the uncompensated creation of communal rights in private property will lead to a poor and biased weighing of gains against losses. Those who will gain from the appropriation of an individual's property right and its distribution to the multitude—as for example by forcing him to keep land as a wetland rather than as farmland—will naturally always outnumber that lonely injured individual. And so in a democracy it is all too likely that if the majority is permitted to take the minority's property without compensation once they determine that the community's use of the property is in the general interest, they will make that determination by a show of hands.

But the will of the majority is, from a social wealth perspective, quite different from the general interest. In order to properly gauge the general interests one must give weight to the magnitudes of each person's gain and loss, not merely count hands. Making the majority pay for what it takes from the minority helps assure that the gains indeed outweigh the losses and that the supposed public interest is not merely a subterfuge for redistributing wealth to a large but nonetheless "special" interest.³⁸

Perhaps this greatest cost of a public trust doctrine that permits uncompensated creations of communal rights in private property, the unwarranted and excessive creation of such rights, is, for the fans of the doctrine, actually its greatest virtue. When the public trust doctrine is employed to create communal rights most of us not directly involved in the fight are, from the narrow self-interest perspective, either unaffected or mildly benefited. Thus the advocates can achieve their results while the community at large ignores the matter. The advocates of more environmental/communal rights perhaps fear that to the extent that the public has to pay for environmentalist goods, they will mistakenly(?) decide that those goods are not worth their price.

38. See Lloyd Cohen, *Of Special Interest*, 39 THE FREEMAN 192 (1989).

3. Analogies to Other Communal Rights

Those who favor an expansive use of the Public Trust doctrine believe that a great deal of property that is both publicly, and more importantly privately owned is bundled with an extensive set of pre-existing communal rights. The pre-existing commercial-communal rights in tidelands of the ancient Public Trust doctrine were not and are not the only communal rights in erstwhile private property that are generally recognized. Therefore, some would argue, it is not a radical leap, but only a small step to recognize environmentalist communal rights as pre-existing in property more generally. Is there virtue to such an approach?

It is true that an entire set of communal rights in private property are already implicitly recognized and doubtless more would be if disputes came to court. For example, while it is generally trespass for me to cause the physical invasion of your property, and injunctive relief would be available to prevent me from throwing my garbage on your property, no court would issue such an injunction if you complained that when I lit a match on my property the photons of light from the match entered your property. But why not? Make no mistake about it, in its metaphysical character a photon is no different than a pile of garbage; they are both forms of matter which I for my convenience might dump on your property. The answer rests not on physics or metaphysics, but on economics. The law implicitly recognizes that the reciprocal incursions of photon invasions are so mutually beneficial that it would be absurdly costly to label them and treat them as trespass, and so we are in effect all granted communal rights in one another's property to the extent of such invasions.³⁹

But to note that there are a set of legally recognized communal rights in private property that go far beyond the Public Trust doctrine is not to sanction the judicial creation of new communal rights merely because such would be in the public interest. Permitting photon invasions is an example of recognizing a communal right that is mutually beneficial, reciprocal, and symmetrical in magnitude. It requires no great stretch of the imagination to believe that each of us is more than compensated for the creation/recognition of the communal rights with respect to our property by the simultaneous creation of similar rights for us with respect to everyone else's property. There is a world of difference between that and discovering previously unspecified rights which an unfortunate property owner learns he is specifically subject to by the assertion of a modern public trust doctrine that sanctions the discovery of new communal rights when that serves the general interest.

39. I borrow this clever example from DAVID D. FRIEDMAN, *THE MACHINERY OF FREEDOM*, ch. 41 (2d ed. 1989)

C. *Widening The Scope: Derogation and Diversion*

The public trust doctrine has widened its scope in contemporary America in another sense. It is now applied not merely to the set of straightforward cases in which the government alienates some collective property that was serving a communal use,⁴⁰ but to two other categories of cases. First, there is a relatively small group of derogation cases in which trust assets are not transferred, but are injured by either government or private use of neighboring property.⁴¹ Second, there is—judging from the amount and substance of litigation—the largest category of disputes, the so-called diversion cases. These are instances in which the government had and continues to have ownership of the property, but the use of the property changes over time. The government either permits or requires the diversion of a collective property from a former communal use to another collective use that may be communal.⁴²

All three categories of cases have in common that they petition the courts to employ the public trust doctrine to maintain and preserve certain communal interests in property, but beyond that they differ markedly. The economic justification for constraining, regulating, or prohibiting the various activities, i.e., alienation, diversion, or derogation have little in common, and therefore the bases for, and substance of, the appropriate legal doctrines should differ as well.

Virtually all of this essay has thusfar discussed the underlying normative theory that speaks to the alienation cases, i.e., the proper set of constraints on government disposal of collective property. We shall now turn our attention to the derogation and diversion cases.

1. The Derogation Cases

The derogation cases (actual and potential) fall into two related theoretical categories. The first we can designate as the nonfeasance case in which a private property owner is using his property in a fashion that causes damage to neighboring government property and the agency empowered to vindicate the government's interest either through bringing a tort action or contracting with the neighbor fails to do so.⁴³ The second category is an assertion of tort-like claims against a neighboring private property owner

40. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Arnold v. Mundy, 6 N.J.L. 1 (1821).

41. *See, e.g.*, Sierra Club v. Dept. of the Interior 376 F. Supp. 90 (N.D. Cal. 1974); 398 F. Supp. 284 (N.D. Cal. 1975) (alleging failure on the part of the Department of the Interior to perform its statutory duty of contracting with neighboring loggers to prevent injury to Redwood National Forest).

42. *E.g.*, Paepke v. Building Comm'n, 263 N.E.2d 11 (Ill. 1970) (involving the conversion of the public park to a public school).

43. *See e.g.*, Sierra Club, 276 F. Supp. at 90, 398 F. Supp. at 284.

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when no such tort-like rights would exist if the plaintiff were also a private property owner.

It is unclear whether the category of potential nonfeasance-type claims is large, that is, whether there are a substantial number of cases in which government agencies fail to assert legal rights or to perform legal duties to protect and preserve collective property. If it is large, one obvious question is why. Is there some systemic reason why government officials fail to vindicate public rights and interests in public properties?

Government officials are, in an economic and legal sense, agents. The principals of government agents are the people. All agents are expected, indeed required, to serve the interests of their principals. Despite their legal and moral obligation, they often fail to serve their principals faithfully. Economists explain this failure via the concept of "agency costs."⁴⁴ Agency costs are all the costs that arise where the agent acts, and the principal expects him to act, out of the agent's self-interest in the secure knowledge that: (1) the principal cannot be fully aware of everything that the agent does and fails to do; and (2) that the principal cannot make the agent pay the full cost of his failure to faithfully serve the principal. The central and most prominent agency cost is shirking, i.e., merely not being as attentive to one's task as one would if one were serving one's own interests rather than the principal's.

It is more than likely that the agency cost problem is considerably more severe in the public sector than in the private sector. The agent's incentive to perform as the principal would desire will be smaller: (1) the further removed the agent is from the principal; (2) the smaller the stake of the principal in the performance of the agent; and (3) the less the agent's income depends on his performance. Because government agents generally, and those who administer public property in particular, are more insulated from monitoring on the part of their principals than are most agents, it is highly probable that there is a substantial agency problem in the administration of public property. Depredations that government officials would never permit to their own property they will permit to public property if it is too personally burdensome to monitor and correct them.

The two-part lesson of this phenomena, well known by modern property rights economists, is: (1) property that belongs to everyone is protected by no one; and (2) people do not suddenly become endowed with the virtue and selfless devotion of Mother Theresa when they take on the mantle of public officials. Thus, it is a false illusion to suppose that transferring control of property to our collective political institutions will ensure that the property is managed and preserved in our collective interests. It will not.

This insight can of course generate a powerful case in favor of keeping fewer resources in the public sector. But given that it is sensible that certain

44. See generally Michael C. Jensen & William H. Meckling, *The Theory of The Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

communal resources be held by the government and that others resources, whether sensibly or not, are so held, the insufficient incentive of government agents to protect collective rights in property from neighboring owners, suggests the merit of a procedural remedy that allows or even encourages private persons to assert collective rights. We might view this as something analogous to a shareholder's derivative suit in which the individual shareholder brings suit on behalf of and for the benefit of the corporation. I emphasize that this problem, to the extent that there is one, calls for a procedural, rather than a substantive remedy. It merely confuses the matter to call this remedy an exercise of so parochial a thing as the public trust doctrine. Such general assertions of a private right of action to legally compel government officials to protect public property deserves a more secure and general legal basis than that.

As for the substance of the collective right being asserted, it should be neither more nor less than an individual would have at common law to protect his own property from his neighbors. If the claim being asserted against neighboring private property owners could not survive adjudication under traditional tort principles, then it seems that the claim against the neighboring property owner, if enforced, is in the nature of a taking disguised in the clothing a public trust claim. Such a use of the public trust doctrine is the undoing of efficient and just property law and not its realization.

2. The Diversion Cases

I have saved the best—or at least the biggest—for last. The diversion cases have in this century become the most numerous and prominent set of public trust cases. They are also the most difficult to decipher, and the most elusive to capture in any traditional legal/economic category.

Some of them, probably a tiny minority, are alienation cases in disguise, in which the government is transferring some important property rights (though less than a fee simple) to private individuals. But that is not the core case. The vast majority are instances in which government bodies chose to change the use of a given piece of property from one collective purpose to another. The three cases I will examine are *Gould v. Greylock Reservation Commission*,⁴⁵ *Paepke v. Building Commission*,⁴⁶ and *National Audobon Society v. Superior Court (Mono Lake)*.⁴⁷

45. 215 N.E.2d 114 (Mass. 1986).

46. 263 N.E.2d 11 (Ill. 1970).

47. 658 P.2d 709 (Cal. 1983).

a. *Gould v Greylock*. Professor Sax in the seminal article on the modern public trust doctrine⁴⁸ is particularly approving of the Supreme Judicial Court of Massachusetts, and their decision in *Gould v. Greylock Reservation Commission*.⁴⁹ In that case the court struck down the attempt by a state commission to erect a tramway on public parklands.⁵⁰

The case is illustrative of the differences between modern diversion cases and traditional alienation cases in that the two central questions of traditional public trust doctrine are absent. There is no dispute over either title or whether communal uses are to give way to private ones. In *Gould v. Greylock* it was understood by all concerned that the lands were held by the state for the benefit of the people. Title to the *Greylock* lands was acquired by the state in the years following 1888 in response to the urging of a group of citizens seeking preservation of the land as a park. In *Greylock*—as in the proto-typical modern diversion case—we do not have a choice between a private exclusive use of the property and a communal use, but rather a dispute over rival communal uses of a piece of property that will be retained by the state. The dispute arose when the state commission wished to turn a portion of the park into a ski resort, while the plaintiffs desired that the state maintain the entire park in a more pristine state. So we have a conflict between wilderness hiking and downhill skiing, neither of which was prized under the English doctrine. It is difficult to see how the public trust doctrine applies to clarify the property rights with respect to this piece of land. The dispute seems entirely tangential to both the historical and optimal public trust doctrines discussed earlier.

The other peculiar aspect of the case and of Professor Sax's adoption of it as the new standard of public trust jurisprudence is the remedy that it provides. The court held that the lease of the land to a private party for the introduction of a tramway and development of a ski resort was invalid because it was *in excess of the statutory grant of authority*.⁵¹ In other words the Massachusetts legislature was apparently perfectly free to determine whether and how the property would be developed, but could not delegate broad discretion on that question to an administrative agency. Thus, it turns out that in Massachusetts the public trust doctrine—at least in diversion cases—has become a species of administrative law.

Professor Sax says in defense of such an interpretation of the public trust doctrine:

48. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-502 (1970).

49. 215 N.E.2d 114 (Mass. 1986).

50. The case is illustrative of the broadening of the geographical scope of the modern doctrine in that the property in question, the Greylock Reservation, is situated in Massachusetts "mountains," far removed from tidelands or navigable streams.

51. See 214 N.E.2d at 124-25.

Although such a rule may seem to be an elaborate example of judicial indirection, it is in fact directly responsive to the central problem of public trust controversies. There must be some means by which a court can keep a check on legislative grants of public lands while ensuring that historical uses may be modified to accommodate contemporary public needs and that the power to make such modifications resides in a branch of government which is responsive to public demands. . . .⁵²

But what are the costs of *Greylock*? All that *Greylock* requires is a clear legislative decision to change the use of the property. That clear decision is more likely to result in a closer look at the question. What churlish sort could possibly be against a closer look?

Legislatures cannot take a close look at all questions. Every close look requires time, effort, and expertise, resources that all must be diverted from other uses. And if a close look is good, why not a still closer one? And how about just one a little bit closer? Further, from the perspective of achieving unbiased social wealth maximizing results, there may be much to be gained from delegating authority to an administrative body. There is no general theory that can tell us whether the process of delegation will exacerbate or mitigate the power of special interests to have their way.⁵³

Sax may be right that some sort of judicial review of the power of legislatures to delegate authority to agencies to dispose of and otherwise reclassify public lands is a good thing, and I will address that question after summarizing the two other diversion cases. But, from a more limited legal perspective I feel compelled to ask the question, from whence cometh the authority of courts to simply create such administrative law? It is difficult to see any connection between the historical public trust doctrine and this modern administrative law twist. And so, it is difficult to see how it is valid law.

b. *Paepke v. Building Commission. Greylord*, is a relatively conservative application of the public trust doctrine. In Wisconsin, Illinois, Pennsylvania and various other states the public trust doctrine has a more radical, in the sense of substantive as contrasted to procedural, flavor to it. In those states the reviewing court is free, indeed obligated, to inquire into the merits of the proposed change in public trust uses. In *Paepke v. Public Building Commission of Chicago*⁵⁴ a group of homeowners whose land abutted a public park brought suit to enjoin the use of a portion of the park

52. Sax *supra*, note 48, at 495.

53. While serving on the staff of the vice-chairman of the United States International Trade Commission I often heard the argument that we should scrupulously enforce the social wealth decreasing statutes we were assigned to administer, for to fail to do so would only encourage plaintiffs to go to Congress for even more pernicious protectionist legislation. See Lloyd R. Cohen, *Deregulation at the U.S. International Trade Commission*, in *REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY AND THE PUBLIC INTEREST* 166, 173 (Roger E. Meiners & Bruce Yandle eds., 1989).

54. 263 N.E.2d 11 (Ill. 1970).

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as the site for a public school. Thus the dispute was over whether one collective use might be substituted for another. The Illinois Supreme Court denied the injunction but only after noting with approval the five-part substantive test enunciated by the Wisconsin Supreme Court in *City of Madison v. State*⁵⁵ and *State v. Public Service Commission*.⁵⁶ That test turned on whether:

(1) . . . public bodies would control use of the area in question, (2) . . . the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area, (4) . . . none of the public uses of the original area would be destroyed or greatly impaired and (5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility.⁵⁷

The *Paepke* approach is not only more substantive than *Greyford* it is also far less clear. Like many multi-part balancing tests it could do with an accompanying instruction booklet. How is a court to apply it? Are some parts of the test necessary, are others sufficient, either alone or in combination? Do the different parts carry different weights? And how are the weights to be measured? We may hope the last part of the *Paepke* test, which calls for a weighing of the benefits against the costs, is decisive. If so, there is no major substantive error in the test. But how is a court to apply it? How should it determine whether the former users of the property are more or less inconvenienced than the new users are benefited?

The conduct of government is not a costless procedure. The more hurdles that must be leapt, the more costly is the process of legislative and administrative action. Unless there is some systematic bias in the legislative or administrative process—a question we shall address shortly—it seems difficult to justify the additional layer of calculation entailed in requiring a court to attempt precisely the same calculations that an administrative agency or legislature should have done, and is likely better equipped to do.

c. *National Audobon Society v. Superior Court (Mono Lake)*.⁵⁸ *Mono Lake* is the most prominent public trust case since *Illinois Central*. The dispute centered on the use of water resources. The city of Los Angeles draws a large proportion of its water from four fresh water streams that drain much of the snowmelt from the western face of the Sierra Nevadas. Some fifty years ago the Department of Water and Power of the city of Los Angeles (DWP) was granted a right to the water by the Division of Water Resources of the state of California. Prior to being diverted by the DWP the

55. 83 N.W. 2d 674 (Wis. 1957).

56. 81 N.W. 2d 71 (Wis. 1957).

57. *Paepke*, 263 N.E.2d at 19.

58. 658 P.2d 709 (Cal. 1983).

streams drained into and formed Mono Lake. At the time of the suit the diversion had caused, and was continuing to cause, a drop in the level of the lake. The lake, which was quite saline before the diversion, became even more so, threatening the resident brine shrimp and fly populations, and indirectly the California Gulls that fed on the shrimp. Perhaps the most environmentally significant consequence of the drop in water level was that certain islands in the lake had been transformed into peninsulas. These islands had been nesting grounds for three-fourths of the California gull population. The drop in water level allowed predators to reach the former islands and lay waste to the gull population.⁵⁹ The National Audubon Society and other environmentalists brought suit seeking to enjoin the further diversion of the streams from Mono Lake until the water level had been restored.

The California Supreme Court addressed the public trust aspects of the case in response to a federal district court's request for clarification. The court stated that:

[t]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. . . . The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, as far as feasible, to avoid or minimize any harm to those interests.⁶⁰

It is the broad outline of the doctrine in this case rather than the detail of the opinion that is of most interest from an economic perspective. And so, I will merely note and not explore in detail some of the many puzzling aspects of this most opaque of diversion cases. One puzzle that stands out like the Emperor's new clothes is the court's failure to specify what public trust interests are at stake in this litigation. Is it the birds, the shrimp, the water level, or the scenery?

That lack of specificity is emblematic of, and reinforces, the central fault of *Mono Lake*: it makes property law, and individual holdings in property

59. *Id.* at 711.

60. *Id.* at 712.

more uncertain.⁶¹ Uncertainty with respect to property law and property rights is not bad as an analytical *a priori* matter. Its evil rests on its consequences. So let us examine more closely the uncertainties created by this opinion and their consequences. First, we note that the court did not bar nor did it sanction, the diversion of the feeder streams from the Mono Lake to Los Angeles. It held instead that: (1) a permanent transfer of water rights implicated in public trust interests is absolutely barred and only a usufructuary grant may be permitted; and (2) courts or agencies that pass on whether a usufructuary right shall be terminated or limited must weigh the public trust interests.

Weigh the public trust interests! On hearing such a fine legalistic phrase one is tempted to nod one's head and pretend to understand what it means. But the truth is, that neither procedurally nor substantively, does that lofty phrase direct an agency or court to its task. Given the disparate nature of the two interests being weighed, not just in this case (water for Los Angeles versus California gulls) but in all cases of this sort, how is one to weigh those interests, and, what sort of substantive review could such asserted weighing be subjected to? So as an initial matter we have a great deal of uncertainty as to what procedurally and substantively a court or agency is expected to weigh and how they are expected to weigh it.

But, that uncertainty is really small potatoes. The grand uncertainty is created by the fact that the court declares that the state may *never* permanently dispose of property rights implicated in public trust interests; no one can acquire fee rights with respect to anything implicated in the trust. The astute reader might respond that this does not create uncertainty it merely limits the options of potential users of property. In a market for private property one can rent or buy. In effect what the court is saying is that in the market for property implicated in the trust one may only rent; no permanent purchases will be considered valid.

But this is no mere limiting of options. Limitations of this sort create a great deal of uncertainty. If one rents private property, one suffers the uncertainty of not knowing under what terms one may renew one's lease. When faced with a potentially opportunistic landlord, one would be wise not to invest in painting and papering the walls; when the returns to investment become less certain investment decreases. When that uncertainty is caused by natural forces that cannot be eliminated by human action, such as earthquakes and floods, such reduced investment is all to the good. In *Mono Lake* the added uncertainty is purely an artifact of the legal/administrative/political system. It means that social wealth increasing investment will be reduced because of uncertainty as to its security.

The California Supreme Court has robbed the legislature of a very valuable asset. States are powerful bodies that often pose the potential threat

61. As this was a "diversion" rather than an "alienation" case, the court did not distinguish the two and presumably would assert the same legal standards with respect to the latter as the former.

of opportunistically renegeing on prior implied or express understandings. This threat, if it looms large enough, will dissuade private parties from investing in the state. By granting rights in fee the legislature can tie its own hands and deny itself the power of uncompensated takings. But because rights in trust implicated property will never vest, investments in those rights remain hostage forever.⁶²

Am I too much of a Jeremiah? After all, once substantial private and public investments have been made on the assumption that Los Angeles has a secure supply of cheap water is it conceivable that when push comes to shove Los Angeles will be left high and dry? Surely southern California has enough political clout to prevent such a dire event. But if, as a practical matter that cannot occur then what is the point of the opinion? Perhaps *Mono Lake* is misleading in that the stakes are so large. The doctrine it creates will have a more pernicious effect when the party who thought he had fee rights and is forced to suffer an uncompensated taking of those rights by way of the public trust doctrine is a smaller governmental entity or a private party. Then the political forces that would bar a draconian outcome will not be present.

d. The Rationale of the Diversion Cases. What do these diversion cases have in common? They all involve the substitution of one collective use for another and frequently one communal-like use for another; they all involve some sort of judicial review of an administrative or legislative decision; and, they all tip the scales in favor of the prior use of the property. They differ in the amount by which they would tip the scales in favor of the prior use. In *Greylock* it is a mere procedural requirement of a hard-look, while in *Paepke* it is a substantive inquiry into the tradeoffs, and in *Mono lake* it is both a substantive inquiry, and a bar against a permanent vested transfer of a property right free of the public trust in question (whatever that may have been).

These cases are all battles between rival collective interests. The interests sought to be protected in public trust litigation are environmentalist. The plaintiffs in such cases frequently wish to keep some piece of property in a more natural state than is contemplated by the legislature or administrative agency. What are the interests on the other side? In *Greylock* we have a tramway for skiers and tourists, in *Paepke* we have a school, while in *Mono Lake* we have water for southern California.

Is there a rationale in diversion cases for tipping the balance in favor of "environmental" collective uses as contrasted to other collective uses? Is

62. Indian reservations suffer a much more severe form of the same problem. Their small and economic size means that their sovereignty poses a great threat to private parties. What would be a small investment in relation to the state of New York would be huge in relation to the Mohawk reservation. Hence the investor cannot rely on the sovereign's concern with its reputation. The Mohawks may find it in their interest to tax away all the returns of any successful investment. See David D. Haddock & Thomas D. Hall, *The Impact Of Making Rights Inalienable*, 2 SUP. C. ECON. REV. 1 (1983).

there some systematic bias in the legislative or administrative process that can be cured or ameliorated by a judicial procedure? Unless we are to believe that certain collective interests are systematically better represented in the legislative and administrative process than others, there seems little reason to create a special judicial right or procedure to challenge those legislative and administrative determinations.

In many areas of economic life it is easy to contrive a theory of why a particular market failure or political failure will result. However, if one is clever enough, one can also contrive a theory of precisely why the opposite failure is likely to occur. Each can seem, in isolation, a persuasive explanation. If supported by empirical evidence it can appear as ordained truth. In that spirit I note that it is not difficult to imagine that there is some sound economic reason, having to do with collective action problems, that environmentalist interests are systematically under-represented in either the administrative or legislative process and that therefore a judicially administered public trust doctrine would at least partially redress this imbalance. And, it surely must have seemed that was the state of the world to Joseph Sax and other environmentalists in the late 1960s. There were some very powerful environmental concerns and a dearth of legislative and administrative response.

With the benefit of hindsight, however, the hypothesis seems to have suffered empirical refutation. In the last two decades there has been no shortage of environmental legislation. Consider the following sampling: Clean Air Act (42 U.S.C.A. 7521) (enacted 1970); National Environmental Policy Act (42 U.S.C.A. 4321) (enacted 1970); Clean Water Act (33 U.S.C.A. 1251) (enacted 1977); Resource Conservation Recovery Act (42 U.S.C.A. 6901) (enacted 1976); and Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. 9601) (enacted 1980).

Does this avalanche of legislation over the last two decades—an avalanche that has created the entire category of environmental law, replete with courses, casebooks and journals—*prove* that there is not an anti-environmental bias in the legislative process? No. It is possible that the optimal amount of environmental regulation is substantially more than what currently exists. But, at the very least the avalanche of legislation certainly does not support the hypothesis of anti-environmental bias, and it does demonstrate that the halls of Congress are open to significant environmentalist influence and pressure. So, as a first order matter there is no obvious reason for the judicial system to place its finger on the scale in favor of environmental interests.

The modern diversion sub-species of the public trust seems to be a less offensive but probably more costly form of the beast than the alienation cases. It is less offensive because it is not quite such a bully. It does not presume to divest a private party of his erstwhile property. It is perhaps more costly because there is such a wealth of government held trust property. Responsible government is constantly changing the allocation of such

property and with every change there is a potential public trust cause of action—for what and subject to what rules I cannot determine.

V. SUMMARY AND CONCLUSION

I have adopted what I would regard as the obvious proposition that the public trust doctrine is at bottom a species of property law, albeit one with overlays of administrative, trust, and constitutional law. As property law it must be evaluated on the basis of whether, and how well, it facilitates the efficient use and disposition of property; that is, whether it leads to the enhancement of social wealth.

The central virtue of an efficient system of property law is certainty and neutrality with respect to property rights. Secure property rights encourage long term investment. And, such investment yields a positive return, by intention to the individual undertaking it, and usually inadvertently but nonetheless necessarily to the rest of society. Very little long term investment would take place if property rights were insecure. And so, a grant of property should be as little subject to political abrogation as possible. That said, as I recognized at the beginning of this essay it is from time to time necessary for the government to reclassify property. So the obvious solution is to permit it to do so but not at the expense of the particular private party whose property is at issue, but instead at the expense of the more general public.

Was the historical doctrine an efficient piece of property law? Historians differ in their view of the authenticity of the doctrine, and that is what most of the question of its efficiency turns on. I suspect that in fact the public trust doctrine was never clear and accepted law. But assuming *arguendo* that it was an authentic doctrine, then it did no violence to an efficient law of real property. It implicitly recognized the various categories of property, and specified that the King held a very limited class of property in trust for the public to use communally. The doctrine perhaps did somewhat less well on a subsidiary efficiency test. It apparently did not allow for the use and therefore the ownership of the property to change with changing circumstances. The King was not permitted to dispose of the property, and so, under the doctrine, the communal character of the property could not be extinguished. Parliament however was permitted to dispose of the property and extinguish those rights, and so the public trust doctrine was not an absolute bar to the transfer of property. Thus, the historical public trust doctrine could occupy a legitimate, albeit limited, place in an efficient property law regime.

But the historical doctrine is not our primary concern. It is a dead letter, and it does the modern public trust doctrine too much honor to link it to its historical antecedent. When we consider the entire body of property law in this country, a body: (1) that recognizes the existence of private, communal, and collective property; (2) that provides for voluntary transactions that transfer ownership among parties; (3) that grants the power of eminent domain to solve holdout problems in government acquisitions; and (4) that

provides for just compensation to the party whose property is taken by eminent domain,—when we consider all of that—we have to ask what separate, neglected role does the public trust doctrine play. I can find none.

The great virtue of the efficient system of property law embodied in the just compensation provision of the Takings Clause was not, I repeat, *not*, that all property or even as much as possible would be private, but rather that all property rights would be certain at any given point in time and fixed to the extent that compensation would be required to transfer that property to an alternative classification, ownership, and use.

The spirit of much modern public trust commentary and case law expresses a directly contrary theme. It is the bold assertion that a communal property right always lies dormant inside some erstwhile private property right, only waiting for a court to discover and vindicate it. Whatever appeal such a flexible reading of property law might have, its great shortcoming is that it causes the public trust doctrine to fail miserably the single most important economic test of any doctrine of property law; it undercuts rather than supports secure and predictable rights in property.

Any body of law will be fuzzy around the edges; that ca not be helped. But the notion of an evolving unbounded set of communal rights—whether they are constitutional or common law, procedural or substantive, in all public and private property strips clarity, certainty, and predictability from the very core of the public trust doctrine. The modern American public trust doctrine, resting on its narrow and inapposite English precedential bed, has become little more than a convenient hook on which those who would create and preserve certain communal interests in real property have hung their litigious hats.⁶³

I cannot emphasize too strongly that my brief against the public trust doctrine turns not at all on the issue of environmentalism. To the extent that the environmentalist call is to be heeded because the benefits of doing so outweigh the costs then let it be so. But, neither justice nor economic efficiency will be served by heeding that call by creating a destabilizing legal subterfuge that allows us to extinguish the property rights of others without legal compensation.

I agree with Professor Epstein that some sort of wealth enhancing constraint on the power of government to dispose of communal property would be a good thing. Whether such a constraint comes in the form of a judicial doctrine, a statute, or an amendment is of secondary importance. One could imagine, as does Professor Epstein, some judicial doctrine that is the match of the Takings Clause, that regulates and conditions the disposal of public property to private parties. But, as far as I can tell such a public trust doctrine lives only in the facile mind of Professor Epstein and not in the law of the United States. I find myself unable to see how there is much to

63. See James L. Huffman, *Avoiding The Takings Clause Through The Myth of Public Rights: The Public Trust and Reserved Rights Doctrine At Work*, 3 J. LAND USE & ENVTL. L. 171 (1987).

gain by trying to erect a wealth enhancing constraint on government disposal of communal property on anything called the public trust doctrine.

The resurrection and transformation of the ancient English public trust doctrine into a device to abrogate private property rights is a piece of disingenuous gimmickry which does its champions no honor. The public trust doctrine has been retrieved from the grave, and like some vampire, transformed into an obscure and pernicious force that it was not in life. It, and we, would best be served by reintering it following a stake to the heart.