Conservation and the Public Trust Doctrine

A Roundtable Discussion

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The public trust doctrine has been evolving since Roman times, when Justinian set out a list of things common to everyone by the law of nature – the air, running water, the sea, and consequently the shores of the sea. Later, the public trust doctrine came to be regarded as the common right to pass through navigable waters; in other words, a protection of commercial activities. Today, there is great pressure for the expansion of the public trust doctrine, applying (at least in court if not in law) to such things as recreational access to the shore and to waterways, salmon migrations, and even viewsheds.

Nevertheless, the aim of public trust doctrine today is still simply defined as preserving and protecting submerged and submersible lands for public use in navigation and fishing. It also implies that the state, as trustee for the people, bears the responsibility ensuring public access for those purposes. Determining just what activities and amenities those purposes encompass, however, is not a simple task, and there has been much debate in recent years over how far the public trust should be extended and what sort of access is reasonable. Unfortunately, little attention has been paid to the effects of this expansion on the very resources the public trust doctrine has been tasked to protect.

Proponents of these most recent expansions of the public trust often do so in the name of improving environmental quality. But in light of some very successful private conservation initiatives, there is some question of whether exerting common rights at the expense of private ones actually results in a net benefit to the environment. Thus, as part of its efforts to consider the viability of private approaches to solving environmental problems, on September 9, 1998 the Center for Private Conservation hosted a roundtable discussion on the effects of the public trust doctrine on conservation. The panel of experts gathered included Jim Burling of the Pacific Legal Foundation, Dean Jim Huffman of the Lewis & Clark Law School, Professor Bonnie McCay of Rutgers University, and Bill Snape of Defenders of Wildlife.

Citing case law along with anecdotal evidence, the lively discussion looked at how the public trust doctrine has evolved over time and what effects it has had on conservation, both public or private, and how, if it has created problems, might things be improved. Or in other words, tried to answer the question "To what extent does the application of the public trust doctrine in certain contexts encourage, discourage, allow or disallow, conservation and protection?"

PROF. KRAUSS: Welcome everyone and thanks to the Center for inviting me. I'm glad to be here again. Let me introduce, for the record, our four speakers in alphabetical order –Jim Burling, Jim Huffman, Bonnie McCay, and Bill Snape – and ask them again, in that order, to take the mike for five minutes each to outline their views before we open things up. Jim?

MR. BURLING: Thanks. For those of you who don't know me, I'm an attorney who deals with issues like private property rights and the public trust "on the ground," as a practitioner. We can have some of the ethereal theories and histories written, but I'm the sort of person that actually has to put the legal theories to practice in the courts. Let me give you some examples.

Back a few years ago, the Supreme Court, in *Lucas v. South Carolina Coastal Commission*,[1] said that when we are trying to define whether or not there is a taking of property, we have to look at whether or not the background principles of property law would allow the owners of the property to develop or not develop their property. And that seemed like a victory at the beginning, but since that time we have had an increasing move for what I would call "redefinition of property rights." Let me give you a couple examples quickly.

The Hawaiian court said that "We are not going to be governed by western notions of property law."

Out of the State of Hawaii, there is a growing movement to recognize indigenous rights, based on the Hawaiian system of law that was in existence during the time of King Kamehameha and before, and this has culminated in a case called *Nansay Hawaii v. Public Access Shoreline Hawaii*.[2] In that case, an owner of undeveloped land found that anybody with Hawaiian blood had a right, according to the Hawaiian Supreme Court, to gather native materials such as fish, shrimp, or other vegetables or fruits, on private property, and the development of that property had to take that into account. And this gathering right was not based on the common law; it was based on the law of custom, based on traditional Hawaiian law. In fact, the Hawaiian court said that "We are not going to be governed by western notions of property law."

That has led to another case that we're involved in right now, called Nene Omalaki. People are very concerned about the demise of the nene bird, which is a Hawaiian native goose. With the Hawaiian native goose's demise, people have decided that they want to purchase property and set it aside for a preserve for the nene. In order to run the preserve, they need to put in a building and electricity, but there are native Hawaiians claiming that under native Hawaiian tradition they have a right to use this property for a burial grounds and to hold burial ceremonies on the property, which would be disturbed by anything that the people who wish to preserve the goose would like to do. That issue is now at the administrative level in Hawaii, and it shows part of the conflict between traditional property rights, new found rights, and the idea of using traditional property rights for preservation.

We have a case out of Washington that has been boiling for a while that's gone to the Ninth Circuit, dealing with shell fishing grounds, where the Native Americans claim, through treaty rights, the right to access and use shell fish beds. That has come as somewhat of a surprise to riparian landowners and to the owners of the shell fish beds.[3] This controversy is not over. There have been some decisions

[1] *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992).
[2] *Nansay Hawaii v. Public Access Shoreline Hawaii*, 903 P.2d 1246 (Haw. 1995) cert. denied 116 S.Ct.1559 (1996).
[3] *United States v. State of Washington*, 135 F. 3d 618 (1998).

that have tried to cut a middle ground and say that yes, the native Americans do have a right to the shell fish beds, but that the property rights of individuals also are important and cannot be violated. And, as a practical matter, it leaves things remaining in a muddle.

In California, our public trust doctrine has expanded to include recreational values.

In California, we have our public trust doctrine, which was best articulated by Joseph Sax in his article in 1970,[4] and that was quickly followed in California by a case called *Marks v. Whitney,*[5] which expanded the public trust to include recreational values.

The basic theme to these cases is that courts are finding new impediments and new limitations on private property rights that we did not know existed before, and some of these seem to be created out of whole cloth. Some of them appear not to be based on common law tradition but rather novel or variant readings of that tradition, and I think Bonnie McCay can talk about a little bit of that from her book. She goes into the origins of the public trust doctrine and shows the evolving nature of the law. Like it or not, judges do not necessarily see the law as something that's written in stone, and property rights are subject to this kind of evolution.

I am an attorney that tries to go to court and argue for a more traditional view of property rights, unencumbered by growing notions of the public trust, growing notions of the law of custom, a growing notion of traditional, native American, or native Hawaiian laws. This is difficult sometimes, because judges see it as "the right thing to do" – to protect the public trust – and they may not realize the adverse consequences that these permutations or growths in the common law can have, and that's why I like some of the work that the Competitive Enterprise Institute is doing.

But, more to the point, I hope to learn a lot from this seminar about where we can go and how I, as a practitioner, can deal with these issues, when I actually find myself in court arguing about the public trust doctrine, or the law of custom, or native Hawaiian rights.

Courts are finding new impediments and new limitations on private property rights that we did not know existed before.

PROF. KRAUSS: Thanks. Before I get to Jim Huffman, let me just say that unless somebody else does this before we get back to you, at some point I'm going to ask you to summarize the Sax theory of public trust.

PROF. HUFFMAN: Much of what's been written on the public trust, beginning with Sax and much, much more since then, has really taken the position that the public trust doctrine has to do with a lot of things other than property. There's a whole array of different theories about the foundation of the public trust doctrine and its proper legal categorization.

Although I focused a lot of energy on arguing that public trust is a property law doctrine, specifically an easement on private or public property, I'm not sure that debate is all that critical because, ultimately, what we're talking about is the institutional arrangements that are used for allocating scarce resources.

[4] Joseph L. Sax " The Public Trust Doctrine in Natural Resource Law: Effective Judicial Interpretation," 68 *Mich. L. Rev.* 471 (1970).
[5] 6 Cal. 3d 251 (1971).

I think that's what the Center for Private Conservation is interested in and, specifically, what role private institutions can reasonably play in pursuing conservation and environmental objectives. So, saying that it has nothing to do with property, if one chooses to, doesn't change the underlying issue, which is what are the institutional arrangements we should use to allocate whatever the scarce resource we're talking about.

I still take the position that the public trust doctrine is best viewed as an aspect of property law, that is that it is part of the definition of the boundaries of property, both public and private, and that it is well understood as an easement of a particular type. The easement is held by the public in common and, thus, generates, the possibility of the tragedy of the commons, particularly if applied in a very broad context, which many people have argued that it should be.

Historically the doctrine was reasonably clearly defined as to geographic scope and as to uses. It was a very narrow doctrine compared to the ambitions that people have had for it since Sax wrote his piece. I have problems with that, thinking in resource allocation terms, because of the uncertainties that the rapid, modern, evolution of the doctrine have introduced into the lives of public and private resource managers.

Ultimately, what we're talking about is the institutional arrangements that are used for allocating scarce resources.

While I accept that the law does and must evolve, I'm a believer in the rule of law. It's one thing to argue that the common law evolves; it's another thing to endorse its evolution pell mell, over the course of a few years or even a decade or two. Those changes that have taken place in public trust law have disrupted the reasonable expectations that Sax himself wrote about.

Much of the modern effort to alter the traditional doctrine is part of a broader communitarian view of property. Under this view, property can still play a resource allocation function and yet be subject to fairly frequent change, either legislatively, judicially, or administratively to achieve public purposes. I don't reject that as a plausible system, but I would contend that it is not a very good one from either a resource allocation or a wealth distribution perspective.

For example, I can imagine a system which says that you, own a piece of property, subject to the state's ability to change the conditions and limits of your ownership. And I can imagine you buying a piece of property on those terms, although I can't imagine you paying very much for it under those terms. That is a plausible system, but a lousy one, if we're interested in wise use of resources. Modern public trust doctrine has moved property law in this unfortunate direction.

The historical foundations of the public trust doctrine are based on an effort to constrain the crown's abuse of its ownership or claimed ownership of resources. And, as Richard Epstein has pointed out, it's perverse, at best, that you take a doctrine that was designed to constrain the crown and use it to constrain liberty, which is precisely what it seems to me that we've done.[6]

[6] Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1989).

I've written about this and the reserved rights doctrine as doctrines that have been used to avoid or to evade the takings clause, and I think the public trust doctrine is particularly good for that purpose because, notwithstanding that the proponents argue that it can be changed over time, by definition it is a right which predates any of the private rights claims and, therefore, there can be no taking. It is often argued that there is not a single case in which a court has held that the imposition of the public trust doctrine has constituted a taking. That's right, because, by definition, it is not a taking. Hence, the expansion of the doctrine and the even more dramatic ways it's been proposed to be expanded, will eventually destroy the concept of private property with respect to those resources where the public trust doctrine applies.

It's perverse, at best, to take a doctrine that was designed to constrain the crown and use it to constrain liberty.

The bottom line for me is that there are circumstances, including those where the narrowly defined common law public trust doctrine applied, where some sort of common ownership or public control might make some sense. But, I believe, as a general rule, you'll find that environmental and conservation objectives will be better achieved with private systems, and I think we have much, much more sophistication, today, to create those private systems than we had when the public trust doctrine came into existence or than we had when Sax wrote his article, due to changes in technology, changes in understanding of resources, and so forth.

PROF. KRAUSS: Thanks, Jim. Bonnie?

PROF. McCAY: I come to this as an anthropologist, who had been studying people who live in fishing communities. I wrote a book called *Oyster Wars and the Public Trust*,[7] which I call a footnote that got away. I was looking for information about the history of fisheries in the state where I work, New Jersey. One doesn't think of fisheries in New Jersey. Maybe fisheries in Massachusetts or Newfoundland, where I'd done work before, but not New Jersey. And I couldn't find much. Finally, I had an anthropology student who had been to law school and thus knew how to use a law library. He found a large number of fishery cases in the law library at Rutgers School of Law in Newark. They led me to *Arnold v. Mundy*,[8] and the *Martin v. Waddell*[9] which helped to define public trust in state and federal law in the United States.

The expansion of the public trust doctrine is, by definition, not a taking.

My book is about the intersection of these court cases and the conflicts that were occurring on the water and on the waterfront in New Jersey. As an anthropologist, I'm less interested in the law as a principle, either carved in stone or molded by some people "out there," than as I am in the law as a cultural construct, as something that is a result of the interaction of people with each other and their environments. It is constantly being tested, and reshaped, and reinterpreted. Sometimes we like to, and we prefer to, treat law as tradition. For example, some of the public trust cases show reliance on the Magna Carta as a way of giving the stamp of authenticity and tradition to whatever argument is being made, even conflicting arguments.

[7] Bonnie McCay, *Oyster Wars and the Public Trust* (Tucson: University of Arizona Press, 1998).
[8] *Arnold v. Mundy*, 6 N.J.L. 1 (1821).
[9] *Martin v. Waddell*, 41 U.S. [16 Pet.] 367 (1842).

Let me contextualize this a little bit more. I briefly explained how I stumbled into the public trust domain. But, the reasons I'm interested in it go back to my work with fisheries, and my current work on marine fisheries policy in the United States and internationally. That is one trajectory. Another is the fact that my original research in fisheries was, from the outset, focused on the problem of the commons and the so-called "tragedy of the commons," and also what I love come to call "the comedy of the commons" and "the romance of the commons."

And, I am currently president of a professional organization called the International Association for the Study of Common Property. I believe that members of that group were here for a previous roundtable. It is a very large network that has some interests in common with the Center for Private Conservation, in that many of the people in the group are looking at community-based resource management and community-based environmental protection, as distinct from top-down, government-controlled efforts.

Now, in the fisheries, there are several policy issues that relate to the concerns of this roundtable. One is the movement toward so-called "co-management" in marine fisheries policy, attempts in Canada, the United States, and other countries to bring the resource users much more centrally into the decision-making process, even so far as carrying out research. New Zealand is one model for that, where some groups of fishermen are carrying out their own research, taking that role away from the government. This is in the context of privatized fishing rights.

Under the public trust doctrine, particularly the rights to fish and navigation, we have to question how justifiable it is to privatize rights to fish.

In other countries there's a movement toward giving more control to resource users, groups of fishermen usually or perhaps, and this is more relative to communities, defined geographically. This is an emerging policy direction. It's very contentious. There's a lot of concern about the implications of the radical democratization of fisheries policy, which is very much dependent on science. The question of who controls science, who controls knowledge, is very critical to this.

But the public trust is also in the center of these policy issues. For example, how can you allocate rights to control public resources to smaller communities? Devolution also leads to direct clashes with other elements of U.S. law, such as the commerce clause. Consequently, I see a set of problems surrounding the attempt to get more co-management or more local level management in fisheries that have to do with public trust and other aspects of our law, as well as our traditional ways of thinking about resource management.

Another area is privatization of fisheries rights. My book is about attempts to privatize the oyster beds. As you may know, in the Chesapeake Bay, the Delaware Bay, up and down the coast, there are very few places where natural oyster beds and natural shellfish beds are privatized. The public trust in the U.S. doctrine actually emerges from resistance to privatization.

What's happening now in marine policy is examination of the potentials of privatizing access rights to fish stocks. The individual transferable quota system is very popular. It was first implemented in the mid-Atlantic area in 1990, for surf clams and ocean quahogs. Then, by 1995, it was implemented in

Alaska for halibut and sablefish. We now have this privatized system of fishing rights, but Congress has imposed a moratorium on these rights because there's a lot of concern about their social implications, coming mostly out of Alaska and New England.

The question is "How do we think about these rights and what advice can we give to Congress concerning them?" If we brush off the public trust doctrine and we look at the notion of the essential inalienability of certain public trust-related things, particularly the rights to fish and navigation – those are the traditional, narrowly-defined, rights – we then have to raise questions about how justifiable it is to privatize rights to fish, as well as how that relates to the government's continuing duties of supervision and stewardship.

Under the public trust doctrine, particularly the rights to fish and navigation, we have to question how justifiable it is to privatize rights to fish.

The public trust doctrine strengthens the principle that the federal government has adopted so far in its implementation of these systems, that if you do assign exclusive rights to individuals, they can be modified or changed by the government without compensation to holders. In other words, these are defined as privileges, not as rights, and therefore no takings claims can be created.

For the most part, the public trust doctrine is a state–level doctrine.

Less clear is the question of whether, if you do confer exclusive use rights, there should be compensation to the public. Many other issues concerning takings and property rights are talking about compensating the private owners. Here we raise the question of compensating the public. So, I'll stop here. These are some of the areas that I would love to talk to you about.

PROF. KRAUSS: Bill?

MR. SNAPE: Okay. Well, this will be an interesting session, I can tell already. I wore this eagle tie for all of your benefit. The eagle, of course, is not really subject to any formal public trust doctrine, but it's a good metaphor for the philosophic discussion that I think is going to ensue about the public trust versus private rights and the nature of protecting natural resources.

I will not get into, at present, a history of the public trust doctrine and a discussion of the assets, the trustee, the beneficiary and so on. I think that some of the black – letter law stuff is very important, but I will not recite it immediately. It's probably worth stating from the outset, primarily because Defenders of WildLife does have a state biodiversity program, that for the most part, the public trust doctrine is a state – level doctrine. There was, at some point, a federal common law notion of the public trust, and perhaps you could creatively think of, or at least I could think of, ways in which the federal government was said to have public trust responsibilities for certain natural resources today. But, for the most part, we're talking about a state doctrine.

And our analysis, over the course of the last five years, has indicated that almost all fifty states recognize the public trust doctrine in one form or another. And, in fact, of the six states that do not yet formally recognize it, those states just haven't really addressed the issue. So, for the most part, all 50 states to some extent or another recognize the public trust doctrine. And again, remember, we're traditionally talking about navigable water and the riparian areas associated with navigable water. So, we're talking

about a fairly narrow area of the public trust that, at least as it has historically been interpreted, and I think for the reasons Bonnie just alluded to, protects things that the public at least has an interest in, whether you agree with the public trust doctrine and how it's interpreted or not.

Just recently, in fact, Defenders, with the Arizona Center for Law in the Public Interest, filed a lawsuit challenging an Arizona legislative decision to give away what we think are public trust rights in six Arizona streams, and we contend that the legislature is granting or enabling private parties to block public access to these rivers.[10] I think, whether you agree with the suit or not, it very clearly sets up the conflict, the dilemma if you will, between private rights and public rights.

We're talking about a pretty narrow set of natural resources water, navigable water, and associated lands.

And, assuming that I agree that the public trust doctrine was created exclusively to check the power of the crown (and I'm not sure I do agree with that), we must remember that life is dynamic. I think the situation we're in now is that many environmentalists have a problem with certain industry or capital-based influences over various natural resources important to the general public.

Again, let me be clear about what we're debating. We're talking about a pretty narrow set of natural resources. I am for private property rights! Every time R.J. Smith is in the room, I feel I have to reiterate that point. And, while I would have novel legal theories as to how to expand the public trust doctrine, we're talking about water, navigable water, and associated lands. In another sense, this debate between the private and the public, or the crown versus the public, to put it in American constitutional terms, is actually a debate about the tension between liberty and equality, and there is no easy balance. We're talking about the liberty of individuals to pursue profits, to pursue their life, and we're talking about the equal opportunity of all Americans to pursue that liberty, and you can certainly think of situations where an excess amount of liberty for some will harm the equitable opportunities of others to pursue that same liberty. I think that's what the public trust doctrine is ultimately getting at. The tension in many ways is a microcosm of modern environmentalism.

The public trust tension in many ways is a microcosm of modern environmentalism.

I look forward to some spirited back and forth with Jim, particularly on some of the issues he's raised. I will point out, to get the ball rolling here, that I'm not so sure Jim's complaints with some of the public trust cases he was mentioning had as much to do with the theory of the public trust as it does to specific language and specific implementations of that doctrine. Let's get specific.

How about the future? I think the Convention on Biological Diversity very clearly raises the specter of a public trust with regard to indigenous knowledge. Both Article 8j and 10c of that convention talk about that, I'll read article 8j: "The Biodiversity Convention requires parties, as far as possible and as appropriate, to take measures to respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use." This is somewhat similar to the Hawaii example we heard about.

[10] *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991)

I would assume that none of us in the room would have problems with that language, per se, though interpretation would vary. But my point in raising this is as we talk about the public trust doctrine, and the legal theory behind it, is that I think one of the greatest battles in the 21st century is going to be over intellectual property rights and over who owns what and who gets what. In the agricultural area, the questions are how we plant seeds and where we get seeds from, but the examples are proliferating in almost all sectors of international commerce. I predict that in 10 or 20 years, if we have a similar roundtable, that we will, indeed, be talking about these issues.

The American English colonies essentially adopted the English common law version of the public trust doctrine.

PROF. KRAUSS: I actually want to keep you on the hook for a few minutes, because, although we may all know about this, readers of what is eventually going to be published don't necessarily. So, since you opened the door to it, why don't you give us a two or three minute concise history of the public trust?

MR. SNAPE: The public trust doctrine has its origins in Roman law. It was adopted in English common law, probably at the time of the Magna Carta, maybe shortly afterward.

The American English colonies essentially adopted the English common law version of the public trust doctrine. And, we're talking, basically, about three basic components of the public trust. We're talking about the actual asset itself, which I've already described to be navigable waters and associated lands. We're talking about the trustee of that asset, which for all intents and purposes is the government. The legislature, I guess, formally, has the power. They often delegate it to a state agency, and the enforcement of that usually occurs with the state attorney general, and is interpreted by the courts, so you have all three branches of government acting sort of in unison as the trustee. And the beneficiary is the public. And it seems to me that the discussion of the beneficiary goes to the very heart of the debate I think we're going to have today, which is, "Is the public most benefited by having the government act as trustee in certain instances. Or is private enterprise the best way to collectively protect the public?"

The Mono Lake case is as far as the doctrine has been pushed.

We've already mentioned *Arnold v. Mundy*, which is where the first state supreme court, New Jersey, dealt with the public trust doctrine. The first U.S. Supreme Court decision, which applied Illinois law, was the *Illinois Central* case, in the late 1800s.[11] I think the *Mono Lake* case[12] is probably, from at least an environmental advocate point of view, about as far as the doctrine has been pushed before any state supreme court, and perhaps we can talk about the Mono Lake case later.

PROF. KRAUSS: Thanks. Well, I suspect that we have several issues joined. I certainly perceived a conflict between some of what Jim Burling was saying and some of what Bill Snape was saying about the narrowness or lack of narrowness of the public trust doctrine, as invoked today. But, there are

[11] *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892)

[12] *National Audubon Society v. Superior Court (Mono Lake*), 658 P.2d 709, 732 (Cal.), cert. denied, 464 U.S. 977 (1983).

probably other issues that we want to get involved in as well. So, why don't you just make a sign and I will put you all on a queue. Jim Huffman?

PROF. HUFFMAN: Picking up on the description which Bill has just given us of the doctrine, I think it's not helpful to think about it in trust terms. I would ask, Who is the grantor of this trust which you've just described?"

But that's a technical problem. A more pragmatic and real world problem, I think, is that if the public is the beneficiary, how is it that the doctrine operates to constrain the public's democratic acts, which it does? That is, what is it about legislation like that adopted by the legislature of Illinois in the late 1800s, that made it an inappropriate expression of the public's will, if the public is, indeed, the beneficiary of this trust?

MR. SNAPE: The grantor is the public, which of course is the grantee (or beneficiary) also. This makes it a true Lockean state creation and is perfectly legal under analogous modern trust law. We do need to talk about the public trust doctrine in trust terms.

The courts are deciding for the people what is in the public trust, and taking these decisions away from the legislature.

Now in the Illinois case, the state legislature was conveying to Illinois Central Railroad some land associated with a riverbed that was going to be near or through where the railroad wanted to build its line. And, to me, what's most interesting about that Illinois case is that the legislature reversed itself several years after the fact, when there was media attention, probably after filing of the lawsuit. Maybe there was a massive change in the representatives or something like that, but I suspect, that it was because they did the original deal in darkness, and once people figured out what was going on – that they were conveying something so important to the public to a railroad – the public was outraged and demanded reversal of the original deal.

PROF. HUFFMAN: Well, I think the correct understanding of the Supreme Court's decision is that the first act by the Illinois legislature was a violation of the public trust, which is why they weren't entitled to compensation when the legislature took the land back.

MR. SNAPE: Right.

PROF. HUFFMAN: The legislature never had authority to give it away in the first place. You can say they were acting behind closed doors and, therefore, not acting democratically, but that suggests another danger of the broad proposition that these resources are public and ought to be managed publicly. What is there to assure that we won't always have special interests controlling the legislature?

MR. SNAPE: I guess the way I would throw it back at you is the conclusion you draw to the somewhat leading questions you're asking me. The conclusion is that the courts are, basically, deciding for the people what is in the public trust, and taking these very foolish, short-term decisions away from the legislature; this is one of the historic rules of courts of justice.

PROF. HUFFMAN: Well, I suppose there's a sort of a counter-majority difficulty. For our immediate purposes, what I conclude is that if you treat these as property rights, then there are certain

results that follow. That is, you compensate people. If you change the terms of that allocation of private property, compensation is due.

I was interested in Bonnie's observation about the community-based resource management idea that there should be no compensation when privileges are granted and subsequently taken back, but that there should be compensation to the public, by the individual, for the initial assignment of that privilege. I find it mind boggling that you would charge someone for a privilege of indefinite duration and not compensate them when that privilege is revoked. Even accepting that that's a system we could implement, it's a system that will have catastrophic results for resource management, because it removes the incentives that are critical to wise resource management.

PROF. MCCAY: A couple of things. First, back to the discussion of the public responsibilities in management. We have to remember that the public trust doctrine specifies certain rights as inalienable rights. The common rights of fishing and navigation were the narrowly defined ones, and then bathing on the beach and some others, arguably, added on later. Those are very clearly specified and, to my understanding, that creates a limitation upon what the public can do.

Could the legislature take away my right to fish in the Chesapeake Bay? Yes!

The public became the sovereign and hence owners of the public trust lands after the American revolution, according to *Arnold v. Mundy* and according to Taney's decision in the 1842 case of *Martin v. Waddell*. But the sovereign holds these things in a very limited capacity. It cannot alienate them, at least without keeping in mind that these very public rights should remain public forever and ever. That's one of the readings of the public trust. There are other readings of it.

PROF. HUFFMAN: Well, to me, if the populace is sovereign, then they are sovereign, and there are no constraints except those imposed by the people's constitution, which is why I would argue that you should view this as an easement held in common by you and everybody else. Now, when the sovereign democracy acts to limit that, they owe you and me compensation for what they've taken.

PROF. MCCAY: One of the peculiar things about public trust is that it imposes constraints, as you said earlier, upon the sovereign. It's property the sovereign holds, but as a trust. The sovereign cannot do whatever the sovereign wants with this property. And that's what is the trust-like nature of it.

PROF. KRAUSS: Bonnie, let me bring this down to a practical level. You raised the example of the Chesapeake Bay. Am I understanding you correctly to say that, for example, there's an inalienable right of any citizen, fish in the Chesapeake Bay and, therefore, the government could not create any kind of property rights in fisheries?

PROF. MCCAY: There is this inalienable right, but the legislature can make decisions about managing it, improving it, and so on and so forth, and the cases go into great detail on what might be allowed. Kirkpatrick, for example, in *Arnold v. Mundy*, said that a state legislature could do all kinds of things to "improve" the waterfronts, fisheries, and oyster beds, as long as this did not infringe on common rights of fishing and navigation.

PROF. KRAUSS: Could the legislature take away my right to fish in the Chesapeake Bay?

PROF. MCCAY: Yes, it could. But it would have to provide a very strong justification. Illinois Central underscored that if you're going to do it, you've got to show that this is going to be for the public good.

MR. BURLING: And I think that's important, because a lot of people look at the public trust doctrine and they think that means it is completely inalienable, and that the commons is owned, forever and ever, by the individuals. But, no, the state can do things like that, for management, if it is in the public's interest; if it serves the purposes behind the public trust.

PROF. MCCAY: Right.

MR. BURLING: If you look at what the Center for Private Conservation is trying to do, I think that is the focus that you have to have if you're trying to have private conservation. You must allow for the creation of private rights. You have to do that in a way that takes into account the purposes behind the public trust, and that isn't contrary to them.

Now, we're going to argue, in any particular proposed system, "Does this follow principles of public trust or does it not?" When we're in the courts arguing this, we need to show that this alternative system can work, work better than the "tragedy of the commons" system that we may have in place with certain resources now. We have to show that it has its origins, if you will, in the old public trust doctrine of common law, English common law, or Roman law, if, indeed, the public trust doctrine has its origins from that. I would suggest its historical underpinnings are somewhat more doubtful than Bill has suggested they are, but, be that as it may, I think that we have to recognize that, like everything else, it's malleable. I mean, just as property rights have been found to be malleable by the public trust doctrines, in ways that we did not know up until 20 years ago, I think the public trust doctrine, if you have clever attorneys arguing it, can be malleable as well.

Just as property rights have been found to be malleable by the public trust doctrines, the public trust doctrine can be malleable as well.

MR. SNAPE: If I can interject, I actually agree with much of what Jim said, and that may be the last time I'm able to say that this morning. I agree with the malleability of the public trust doctrine and the way you've discussed it. And, just as a footnote, because I'm not sure any of us have explicitly mentioned it, the major reason why there is really not a federal public trust doctrine – and we could debate whether there is or not – but we would all agree that, if there is one, it's a fairly narrow public trust. That's because we have a federal statutory framework for many of these same resources that are at issue at the state level.

And, I would argue that our discussions at the federal level about, for instance, private land incentives under the Endangered Species Act, is really a public trust discussion. We don't talk about the public trust doctrine, but essentially we are talking about these same tensions that we've already talked about and will continue to debate. So, I agree, there are ways in which you can, either in the courtroom or before a legislature, "let the excess air out of the tires," on some of these issues.

PROF. KRAUSS: Are you saying that there's a public trust access to owls in the West that would justify prohibiting cutting down trees that harbor these owls?

MR. SNAPE: I'm not quite that explicit, although if you press me I would probably agree with that statement. I'm saying something much more basic, which is that wildlife is another example of an entity that is not ownable, and at both the state and federal level the Supreme Court precedent clearly backs that up.

Because you get into a situation where wildlife has that type of property basis – it's not like water, which was explicitly associated with the public trust, but it's still not really ownable. You get into a situation where both federal and state governments deal with the regulation of wildlife for the public benefit. And I would argue, essentially, that's what the Endangered Species Act is doing. And, of course, we can disagree over that Act, but what I think we all agree that in the public trust context, we do need better mechanisms to deal with getting the most out of private enterprise. That's where Jonathan Adler and I agree; we're not even beginning to reach the potential there. We don't agree as to what the final picture looks like, but we agree there are certainly tools that could be better utilized right now that are not being utilized. And I would assume, if we thought creatively, that would be true in a public trust context.

The difference from the public trust context is we're talking mostly about a judicial doctrine at this point. So you're really only talking about the public trust doctrine in a somewhat adversarial setting. That's the issue, or at least one of the differences.

I would argue that wildlife will be much better managed if it is privately owned

PROF. HUFFMAN: What do you mean when you say "Wildlife is not ownable?"

MR. SNAPE: Well, who owns wildlife?

PROF. HUFFMAN: That's a question which elicits a descriptive answer. You say that it cannot be owned, or is not ownable. I'm asking "Why not? Why can't it be owned?" Indeed, as a descriptive matter, wildlife is owned in a lot of different contexts.

MR. SNAPE: In what context is wildlife owned?

PROF. HUFFMAN: People have private African wildlife ranges where they sell hunting rights...

MR. SNAPE: I would argue that that's not really wildlife. It's certainly not native wildlife.

PROF. HUFFMAN: Well, I would argue that wildlife will be much better managed if it is privately owned, and you've stated as an arguable proposition that it can't be owned, and if it is owned it's not wildlife.

MR. SNAPE: Heretofore, in the 200-some years of American history, wildlife has not been owned and that has been confirmed by the US Supreme Court, with a few zigs and zags historically. You basically have the state and federal governments, acting as a trustee, if you will, for the managing and protection of wildlife. So, we can disagree about whether that's a good idea –

PROF. HUFFMAN: But that's not an accurate account of what the law is. I own wildlife when I reduce it to capture, right?

MR. SNAPE: Yes. With a state permit.

PROF. HUFFMAN: But I'm suggesting that wildlife can be owned, even where the law may not provide for it to be owned.

MR. SNAPE: Theoretically. I should have said "As the law now stands, wildlife is not ownable."

"As the law now stands, wildlife is not ownable."

PROF. HUFFMAN: Oh, I see. You were making a proposition about what the law says.

MR. SNAPE: Yes, though I happen to agree with the philosophic statement I made, as well.

MR. BURLING: And that leads us to a particular problem in application of the ownership of wildlife in the *Boise Cascade* case.[13] It's a taking case that is back in the Oregon Court of Appeals, where the Portland Audubon Society and some of their friends from around Washington, D.C. are making the argument that because wildlife is owned by the sovereign and because it is necessary to have habitat for that wildlife, anybody who owns wildlife habitat finds that the property is subject to some kind of public trust to preserve that habitat.

Therefore, Boise Cascade cannot be compensated when it is not allowed to cut down its trees, because to cut down its trees would destroy that habitat, which would harm property owned by the sovereign. And that's where this theory of "nobody owns the wildlife" can lead. If nobody owns the wildlife, does that mean, also, that nobody really owns the habitat that the wildlife lives in, so on and so forth? If we get back down to Boise Cascade, as a practical matter, what does it care about taking care of its trees and protecting any habitat if it doesn't own it? Why doesn't it walk away and invest in something else?

PROF. KRAUSS: Let me hone in on what I think is a clear disagreement. Bill, you said on a couple of occasions that the public trust doctrine is actually very narrow; it deals with navigable waters and the land immediately adjoining those waters.

But, I thought I heard you say that it really extends analytically to wildlife, for example, and now I hear Jim Burling saying "Well, if it extends to wildlife, then it would extend, just as logically, to the land that this wildlife uses and needs." Now, if that's right, then this doesn't seem quite as narrow as I thought you were saying that it was.

If nobody owns the wildlife, does that mean, also, that nobody really owns the habitat that the wildlife lives in, so on and so forth?

MR. SNAPE: The doctrine does not extend to wildlife explicitly per se – at present. What I was saying was that the policy tensions inherent in the doctrine are exceedingly similar to the policy tensions with regard to wildlife, both at the state and federal level. At the federal level, we have almost a purely statutory framework. We have a statutory framework at most state levels as well, with regard to at least imperiled wildlife.

[13] *Boise Cascade Corp v. Board of Forestry*, 935 P.2d 411 (Ore. 1997).

So the same tensions, liberty, equality, private enterprise, public assets, are all on the table, and Jim's right again. That is the $64,000 question. With regard to wildlife, it is part of the doctrine with regard to navigable waters – that's sort of what Mono Lake was about. But, I would argue that the issue, clearly, with regard to wildlife is, habitat. For the most part, we don't fight about directed takes of species any more.

We're talking about habitat and what does a private landowner get if he or she has endangered wildlife habitat on his or her property, and what does the public get if that same individual has habitat for imperiled wildlife? That is a huge issue.

PROF. KRAUSS: I think that is a path we should go down. Let me just mention that another path that I think we've inched down, and we might want to go down a little bit further. A couple of you have said, on different occasions, that the public trust doctrine is malleable, it evolves over time.

In California, we saw that the public trust doctrine expanded to recreation; then it went up beyond navigability and beyond the tides to tributaries.

But, in your introductory remarks, a couple of you also said, a couple of the lawyers present, said "Well, there's something very troubling about the rule of law, when malleable means discoverable out of whole cloth, something that nobody thought existed beforehand but now the contemporary context makes it appropriate for us to declare that it has existed forever and ever, because that will imperil market transactions that will make the bundle of rights that one purchases when one buys property insecure and worth much less as a result." So, I think, we should also address malleability versus stability.

MR. BURLING: If the public trust doctrine is narrow and we're going to confine it to navigable waterways and just riparian areas, I wouldn't have quite the amount of heartburn that I have about it. In California, we saw that the public trust doctrine expanded to recreation; then it went up beyond navigability and beyond the tides to tributaries, in the Mono Lake decision.

And my concern is – what keeps me awake at night – is the amphibious nature of the public trust doctrine, at least the way some people are arguing it. Look at Joseph Sax, who is the granddaddy of public trust theory with his 1970s article. Look what he's writing lately. He talks about transforming our notions of property rights into some kind of economy of nature, meaning that there must be some sort of natural right or natural trust put on the use of all property, where government can decide, but no individuals, on an individual action.

I find that very disturbing. So, it's nice to talk about the public trust doctrine as it was, versus the public trust doctrine as it is today, but we have to look at where the public trust doctrine is going as well, if the ideas of the Center for Private Conservation are going to have any force or import at all. And my goal, as an attorney, is to take the public trust doctrine and confine it to where it was, and keep it from getting out of the box.

MR. SNAPE: As a litigator, you have no choice but to do that. I mean, let me just be clear because, again, I'm agreeing with at least the way you're framing the question. If you're going to be in court, you can have all the novel legal theories you want, but, 99 times out of a hundred, you're going to have

your lunch handed to you if you present kooky public trust theories. I mean, that's just the way the law works in a court of law. But we can all dream.

And this gets to another point I have, which is I don't think we're talking about some sort of revolution going on right now. There are a couple of interesting public trust cases and we can talk about them, but I've seen no empirical evidence that our whole notion of private property rights is about to go down the tube because of some expanded interpretation of the public trust doctrine.

PROF. HUFFMAN: Well, take the Montana case, where they took what was a doctrine that applied to navigable waters, by an understood definition of navigability, and applied it to, essentially, 2,000 more miles of waterways that were usable for recreation.[14] Now that, to me, is a revolutionary expansion. It doesn't take it outside of water, but it takes it from a very limited amount of water, probably the Missouri and Yellowstone and a few of the tributaries, and extended it, basically, to every piece of water in the state. Now, if you're a property owner in Montana, that is a revolution.

MR. SNAPE: I would assume we are talking about the tributaries to these main stem rivers that are just as ecologically significant in many instances as the rivers themselves.

PROF. HUFFMAN: Recreation was the justification.

MR. SNAPE: Recreation is a form of navigability.

MR. BURLING: If you could float a tube down it, it's navigable and subject to the public trust, meaning ranchers can no longer manage the land like they could before. They couldn't block it off, they couldn't fence for their cattle the way they had before, and it has significant substantial impacts on the way they could manage the land.

I've seen no evidence that our whole notion of private property rights is about to go down the tube because of some expanded interpretation of the public trust doctrine.

MR. SNAPE: Well, again, that's an issue of navigability, which I think is obviously key to the doctrine. But this gets back to your question of who's the grantor. I think the ultimate grantor is the legislature for the people. This is the song and dance we're doing in Arizona, where the courts and the legislature are engaged in this back and forth. And the legislature in Arizona, which is somewhat similar to the legislature in Montana, has had no qualms with giving its own opinion as to how far the public trust goes.

MR. SMITH: R.J. Smith with the Center for Private Conservation. I think one of the interesting negative aspects of that case in Montana is that applying the public trust doctrine to those blue ribbon trout streams that were on private property may end up destroying the very resource that many proponents of the public trust said they wanted to protect. Essentially, it turned private, well-protected property into another candidate for the tragedy of the commons.

[14] See *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984), and *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984).

Before this case, landowners and ranchers had a very valuable resource. Fly fishermen were willing to pay good money to come and fish on those streams, on their ranches, and so they went out of their way to protect the quality of the streams – fencing their own cattle off from those streams, for example. Then suddenly, with a stroke of the pen or a decision by a judge, the private property interest was eliminated and some landowners started viewing these people who were now granted free access as trespassers, and they lost some of their motivation to keep up the quality of those trout streams.

PROF. HUFFMAN: Let me go back to something you said earlier about liberty versus equality. I think that is an interesting observation because it suggests that the point of calling these "public resources" – and one issue we might explore is "How do we know which ones are properly public and which are not?"

In Montana applying the public trust doctrine to trout streams turned private, well-protected property into another candidate for the tragedy of the commons.

MR. SNAPE: Right.

PROF. HUFFMAN: But, assuming we agree that navigable waterways are appropriately public, we shift from a private exercise of liberty, where a private right exists, to a situation where the entire public has equal access. But, of course, you and I know that we can't allow the whole, entire, public to have equal access. We don't really mean equality, because there's going to be an allocation system. It's either going to be the private system or it's going to be some kind of public management, in one form or another.

But, whatever that public management is, it's going to lead to the assignment of something that's very much like a property right, whether we call it that or not. It's going to assign a fishing license to somebody or it's going to give them a permit to enter into an area, like the Grand Canyon, so that we don't have it flooded with people. Ultimately, when resources get used, whether it's consumptively or aesthetically, given the populations that we have, we're going to have to assign rights to individuals. Some are going to be excluded. Because that's what gives the resource value.

MR. SNAPE: Well, the only gripe I have with what you just said is that there is a temporal aspect to what you're saying, which is that not all 260 million people in the United States want to go see the Grand Canyon. And when they want to go see the Grand Canyon, presumably they don't want to do it all at the same time and, of course, you have, just into the future, inter-generational issues. But, beyond my temporally based and technical gripe, my response to you is "so what?"

PROF. HUFFMAN: So, we're picking and choosing among institutional arrangements to assign rights of use to people. You could say somebody has a private right to raft the Colorado River, or they go to the Forest Service or National Park Service and apply for a permit to raft it, but it's just a different form of private property.

MR. SNAPE: But the difference is that you, in the public context, have a right, at some time or another, to do your rafting trip down the Colorado River. As a private landowner, as you know, you could say forever, "I don't want anyone, ever, to come onto my river."

MR. SMITH: But we do that with wilderness areas. Very few people actually are able to use wilderness areas. Someone in good condition and health can get out and hike all over. But lots of people can't physically do that.

MR. SNAPE: Well, that's the whole point of wilderness. Again, I'm not sure what the problem of that is.

MR. SMITH: Yes, but that's part of liberty versus equality. Should there be equality of access to a wilderness area?

Ultimately, when resources get used, whether it's consumptively or aesthetically, some people are going to be excluded.

MR. SNAPE: Well, philosophic discussions about equality are a fascinating topic. But, again, because someone is in a wheelchair, that person, presumably, won't be able to enjoy wilderness. That's life in wilderness. There are some limitations in life, just like there are some blocks of nature that we leave essentially human free. I wouldn't have my two-year-old son apply for a wilderness permit.

PROF. KRAUSS: Bill, isn't your disagreement with what Jim Huffman just said deeper than that, though? Maybe I misheard, but I thought the subtext was that even if the public, even if the sovereign, allocates access to the river or to the Grand Canyon, the important thing is that the public owns it, that one feels better about it because it's owned by the public?

MR. SNAPE: I am partly saying that, but I think the issue of equality we're talking about is what Jefferson was talking about; it's not that everyone is equal and you all get to do the same, exact, thing.

PROF. KRAUSS: And we all own the St. Lawrence River.

MR. SNAPE: But that isn't really what I'm saying. What I'm saying is that in terms of Yellowstone or the Grand Canyon, for the most part, any American can go see those places pretty much almost any time they want. And, yeah, there are some restrictions and we could argue about whether those restrictions are fair or not, but for the most part I think there is equal access. And I think that's good. And that is not the case with regard to a parcel of land, let's say, in Oregon that is privately owned. Someone could very easily restrict anyone's access to that land.

PROF. KRAUSS: Bonnie?

In what way is public access to a private park any different from a river?

PROF. MCCAY: Yes, I do think equality is an essential part of the public trust. Going back to navigability and fisheries – that was the point. When Cornelius Vanderbilt got his monopoly on running a steamboat on the Hudson River, that was declared illegal, finally, and the laws were changed. Now, over time, as conditions deteriorate because of these open access conditions, there are changes. There are more limitations. The boundaries within which this equality takes place get narrower and narrower.

But one of the things that I don't think we want to give up if we are thinking about public trust situations is the public's right and responsibility to make decisions about it. Full privatization pretty much takes

that away. So, even where you have to assign private rights in order to protect that resource, you still must retain public management.

PROF. KRAUSS: Let me ask everybody in this room to emulate R.J. if they would like, and intervene. While you're thinking about things that you would like to say, I want to wonder about, again, a non-navigable area. Just across the river in Virginia, we have Natural Bridge – a very historic, gorgeous, piece of land. It's a park. It's totally privately owned, and it's a park. They get to set the admission fee, and they do all sorts of tourist publicity. And I'm wondering in what way Natural Bridge is in any way different from a river. Why can't I just go there if I feel like it? How dare these people set their prices and decide what the hours would be?

I take it that the important thing is that the government sets the prices and decides what hours the parks will be open. Here we have a private park. Is there any particular reason why a public trust doctrine couldn't be applied to Natural Bridge?

Anyone who thinks that the public trust doctrine has been a severe limitation on riparian ownership hasn't been to the shoreline lately.

PROF. HUFFMAN: Let me add to that and say "Well, why not eagles, why not coal deposits, why not … " what makes water, or navigable waters, or Natural Bridge, different from anything else that you and I, or somebody else, values? Isn't there a public interest in all of it?

MR. KEHOE: Kerry Kehoe, counsel for the Coastal States Organization. I think the answer is apparent in the decision of Illinois Central. In that decision, the court recognized that the public trust rights were fundamental rights. The traditional rights of fishing, navigation, and commerce were inherent to a free society. If you didn't have those rights, you could not have a free society.

What the court found so objectionable in that transfer of the lakebed of Lake Michigan to Illinois Central was that Illinois Central was in the position to control both the commerce coming into the port and the commerce going out of the port. It was in the era of the railroad barons, which all of those justices were familiar with. I think it was easy to see that they also had the ability to control authority at the governmental level.

You made the point earlier about "Well, this is a democracy and shouldn't the legislature be entitled to make these decisions?" Yes, it's a democracy but it's a particular form of democracy. It's a republic. It's a representative democracy, and the legislature, rather than a collective gathering and agreement of the people, is a battleground of interest. And when you have one entity in a state which is so powerful that they can control the commerce of the state, what you end up with is the ability of that entity to control the legislature through corruption. And what *Illinois Central* comes down to is that the court is not going to turn a blind eye to this alienation of fundamental rights.

PROF. HUFFMAN: I would agree with that reading of it, but that does not get us to recreation or sunbathing or a whole lot of other things the doctrine has been extended to. Nor does it explain why we don't include Microsoft, for example, if we're talking about commerce.

MR. KEOGH: Anyone who thinks that the public trust doctrine has been a severe limitation on riparian ownership hasn't been to the shoreline lately and tried to walk along the shoreline. In fact, it's just the opposite. The reinvigoration of the public trust doctrine is the result of the privatization of the shore over the last twenty years. That's what has gotten people really interested in what the public rights to the shore are and trying to find a balance between riparian rights and public rights.

This idea of expansion of the public trust doctrine is not a new idea. We saw this early on. It was mentioned that as this law descended from England, through English common law, it only applied to tidal waters. This didn't apply to the Great Lakes or any of the freshwater rivers. And it was only in, I believe, the 1840s that the Supreme Court recognized that, yes, in order for it to have a practical application in this country we do have to expand it. And the expansion of this doctrine to freshwater, navigable, waters was much greater than any of the expansions that we're talking now, in terms of its overall effect.

PROF. KRAUSS: The interest, though, in the privately owned shoreline that you're alluding to, is not a commercial interest, is it? It's an aesthetic, tourist, recreational interest. Today, the current interest in publicizing the privatized shoreline is not because it's vital to commerce.

The current interest in publicizing the privatized shoreline is not because it's vital to commerce.

MR. KEHOE: Certainly things have changed in terms of how those traditional uses play into the balance in terms of navigation and sustenance to fisheries. But I don't think we're ready to give them up because they've changed.

PROF. MCCAY: New Jersey's beaches are good cases of what you're talking about, because in most places you cannot get access to the shore unless you go through a municipality which controls access, and you have to have a "beach badge." In some cases it's almost fully privatized and in other places it's close to that.

The dissenting judge in the old English case of *Blundell v. Catterall* had the notion that some things are unique and irreplaceable resources.[15] Where there's high demand for them, privatizing would not improve them; they would be common and open to all. A sandy beach was at issue here. This was a case where some people wanted to pull a bathing apparatus over a private landowner's property to get to the beach, if I remember correctly. The sandy beach "is useful only as a boundary and approach to the sea," he says, "and therefore ever has been and ever should continue common to all who have occasion to resort to the sea."

"The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors."[16] This was taken up and used in Matthews v. Bayhead Improvement Association, a New Jersey Supreme Court case.[17] There is a notion here of responding

[15] *Blundell v. Catterall*, 106 Eng. Rep. 1190, 1193 (Kings Bench 1821).
[16] *Id.*
[17] *Matthews v. Bayhead Improvement Association*, 95 N.J. 306, 471 A. 2.d. 355 (1987)

to what Jim was asking about, "What things would be covered by this?" And there is a theory here about what would be covered by it.

MR. SMITH: Well, an interesting twist on that is the point you brought up earlier about Natural Bridge.[18] Should this belong to everybody? For almost 250 years, Natural Bridge was considered one of the seven natural wonders of the world, and Europeans visited so often that it was second only to Niagara Falls as a natural attraction. And it's interesting that Thomas Jefferson, who perhaps had a slightly different view on property rights and the extent to which one could trust the state, specifically purchased it from King George III because he thought it should be and must be common and open to all. He believed that the only way to ensure this was to have private owners who would be caring stewards, rather than to trust it to the vagaries of the state.

The idea that we can suddenly say that all private owners, because some can't be trusted, can never be trusted, makes as much sense as saying that because government in some cases can't be trusted, then it can never be trusted.

MR. SNAPE: Again, let's assume R.J. is right, which I think that he is, but we are now devolving a little bit into anecdotal comparisons, which is useful; it's the only way you can have theory make any sense. But, it is not saying we want equality at the expense of liberty, and it's not saying that there are no private landowners who would not do a good job protecting the public trust. That's certainly not what I am arguing. But for every one of these landowners at Natural Bridge, there's a Charles Hurwitz, just around the corner. So, I mean, there are landowners and then there are landowners.

And I think, generally speaking, what the law attempts to do, is to set rational rules for how we're going to deal with, in this instance, vital natural resources – vital commercially and vital for the reasons that Bonnie just mentioned, for other public welfare, aesthetic, types of reasons. Anecdotes must be put in context.

MR. SMITH: Of course, Hurwitz did not cut those trees.

MR. SNAPE: Not yet, he'll cut some and has been paid an exorbitant amount not to cut others.

MR. BURLING: If Hurwitz cannot cut his trees, then who makes a decision to cut them? Are we going to purchase the property from Hurwitz so he doesn't cut it? Are we going to regulate it? Some kind of public trust is being argued in this *Boise Cascade* case, based on the incredibly important habitat for the spotted owl, something that everybody thinks is up there with God, motherhood, and apple pie.

Where do we decide what is so important that the public has to own it or control it, versus when private individuals can own it? We can point to anecdotes all day that some private owners do a better job than others, and other people could point all day to anecdotes about the lousy job government does in some areas, versus other areas where government does a less lousy job. But the idea that we can suddenly say that all private owners, because some can't be trusted, can never be trusted, makes as much sense as saying that because government in some cases can't be trusted, then it can never be trusted.

[18] See Robert J. Smith, *Natural Bridge of Virginia* (Washington, DC: Center for Private Conservation, June 1998) (available at *www.cei.org/cpc/*).

So, when we talk about the public trust, again, my focus is always to confine it, to keep it narrow, and let the public choices play out. With Natural Bridge, if the people think it's that important that they own it, let them buy it and see what happens. I think that would be a mistake and I would certainly argue in a public democracy that it should not be bought. But it certainly should never be seen to be a public trust, owned by the public, so that it can be acquired for anything less than its full, fair, market value.

PROF. KRAUSS: I have Jonathan Adler on deck, but let me encourage the folks around the table to weave the Fifth Amendment into this, in the coming minutes.

MR. ADLER: Jonathan Adler, Director of Environmental Studies at the Competitive Enterprise Institute. I want to add to what Jim said, because I think the issue that makes the Center for Private Conservation interested in this is "To what extent does a rule to apply the public trust doctrine in certain contexts encourage, discourage, allow or disallow, conservation and protection?"

To relate this to some other things we've discussed, we talked about the rationale of the Illinois case and the need for the government to control private behavior in a way that protects everyone's right to commerce. Well, we know that in other contexts, for example, antitrust laws, that unknowingly and unintentionally, those laws have had a negative effect on conservation because they have prevented collective arrangements to protect resources. They have prevented, for example, shrimping groups getting together and saying, "You know what? If we all act in our own self interest, we're going to destroy the fishery, so let's get together and control access." That's a per se antitrust violation.

Applying the public trust will unsettle private groups now that purchase rights to ensure that there is water in stream for salmon.

Certain types of rules, whether we like them or not, are, on net, going to have either a positive or a negative effect on conservation, and I think that's one of the things we need to look at or begin to focus on in this discussion. To bring it home to a specific area where this is being debated, out West we are seeing an evolution of water rights to expand the definition of what constitutes "beneficial use" of water, so that you don't have to use water just to irrigate crops or divert a stream; you can now, at least in some contexts, own or reallocate in-stream rights. And there are private groups now, like Oregon Water Trust, that go out and purchase rights from willing sellers to ensure that there is water in stream for salmon.[19]

There are others who are arguing that, no, instead of this, we should assert a public trust in this water, on behalf of the salmon, and put that at the top of the queue before the rights that the farmers have, and the ranchers have, and so on. These two approaches are fundamentally in conflict, because the ability of the Oregon Water Trust to go out and purchase rights and to be able to work with farmers in that context is dependent upon these rights being relatively stable and certain so that their value is known. Applying the public trust doctrine in that context, unsettles that.

[19] See Erin Sciller, *The Oregon Water Trust* (Washington, DC: Center for Private Conservation, November 1998). (available at www.cei.org/cpc/).

So I guess the question I have is if we look at these types of concrete instances, what can we say about whether or not the public trust doctrine is going to facilitate conservation or hamper it? And is Jim's approach of saying "Let's keep the public trust doctrine in the box" going to allow more Oregon Water Trusts and allow more protection for salmon, or is Bill's idea of "Well, let's, little by little, case by case, inch by inch, expand the public trust doctrine each time we can, because it suits what seems to be a pressing environmental need at the time," is that going to give us more conservation? And I think the Montana case and others, while just anecdotal, suggest that relying on public trust doctrine to give us conservation may not be getting us where we want to go.

MR. SNAPE: That's a good point and a good question and, again, we each sometimes wear several hats. I have two hats that I'm wearing today. I'm wearing the hat of a lawyer, and of a policy advocate. I'm a Defender of Wildlife. So, yes, of course, I'm going to be constantly looking for ways, and ways I think are appropriate, to defend wildlife and advance that cause. So, when I talk about "inching forward," I'm talking as a policy advocate. But that's not going to happen overnight with existing law. That's going to happen with me before a state legislature or having a grassroots campaign.

How important is it, that private agencies have to pay for all this public good and the government doesn't?

As a litigator, you are only going to have a public trust issue in the context of a court case. Even in California, which probably has the best case law for purposes of the public trust, from my point of view, and worst, perhaps, from your point of view, we're not talking about anybody being able to go in and litigate public trust successfully across the board. You're still going to lose many cases with the public trust as it now stands.

So, I guess what I'm saying to Jonathan is that you are correctly laying out the philosophic tensions. Everything you've said is generally accurate. But, in terms of what that means for action on the ground, it just isn't going to happen, because that's a pipe dream in Oregon. I can tell you right now, those that think that they're going to get salmon immediately put to the top of the list using the public trust doctrine may be successful, and I hope they are successful, but they're not always going to be successful all the time by any stretch of the imagination.

MR. ADLER: But, if they were, would that be good for salmon? I think that's the fundamental question, right? With everything the Oregon Water Trust and groups like it have accomplished, in Montana for example, would that all disappear?

MR. SNAPE: I hate to be a lawyer, but it depends. I mean, it really depends.

MR. ADLER: And, if we're in a world where 75 percent of species rely on private land for their habitat, and a similar percentage of wetlands are owned privately and are going to be owned privately, and I would guess, although I don't know, a similar percentage of critical riparian zones are going to be owned privately, is that type of expansion of public trust doctrine going to be more steps backward than steps forward, in the long run, for conservation?

MR. SNAPE: It depends. That's my answer.

PROF. KRAUSS: Let me bring this back to on-land activities as opposed to water activities. We

have the Nature Conservancy and – well, I guess as far as water is concerned, Ducks Unlimited and Trout Unlimited – who currently, of course, have to buy their land from a willing seller. I suppose they could, ultimately, decide to change tactics, and instead maybe try to get their land for free or try to get, at least, an easement by invoking some kind of public trust. After all, all these folks claim to be doing is implementing, really, some public good, which is the conservation and welfare of the wildlife that inhabits these lands and waters.

So, again, I'm trying to push us towards this Fifth Amendment: What these folks do is pay market value. What the invocation of the public trust doctrine doesn't do is pay market value. How important is it, that private agencies have to pay for all this public good and the government doesn't?

PROF. HUFFMAN: This is a fundamental philosophical problem. Many advocates of an expanded public trust doctrine take the view that this stuff really ought not to be able to be owned. It's just wrong. It's like people owning a right to pollute; it's wrong. And I think that's an interesting and, in some ways, emotionally appealing philosophical proposition, but I think it's one that leads nowhere, in terms of the ends that you want to accomplish.

Ultimately, by putting a price on this property as a private entity, we can better allocate our resources.

So, where I come down on the Fifth Amendment is to do what Jim's trying to do, keep the doctrine in its boundaries. Because the public owns those rights. That was clear. Everybody understood that. If the public wants to expand it by 2,000 miles of streams in Montana, they can buy it. And if they really value it, then they should be able to make that decision to pay for it, unless they take the position that they already own it, which is to say they're taking a much broader view of the public trust doctrine to begin with.

And you can say it is only confined to navigability, but there are a lot of people in the defending wildlife business who say that the habitat of bald eagles cannot be owned because the eagles have a right to exist. And that is a philosophical assertion, if not a legal assertion, of the public trust idea.

MR. BURLING: If Ducks Unlimited and other owners of private wildlife reserves were to suddenly decide that the public trust doctrine is the best way to achieve these goals of protecting broad areas of riparian habitat, they would have to think very hard about how loud they would want to advocate that, because their control of their property would suddenly devolve, or gradually devolve at any rate, to the public entities, to the democratic forces. They would have to ask themselves, "Is this going to be best for the resource or not?" You can look at examples. We hear, time and time again, of where public control of resources has not turned out particularly well for the resources. I think Bonnie can speak to that question, looking at her book, of how public control or public access to the resources of the oyster beds worked out for the oyster fishermen, in the end.

I think, ultimately, by putting a price on this property as a private entity, we can better allocate our resources. If we decide that some areas are so valuable that they have to be protected, the public buys it. And then if the public management messes up, we've learned, perhaps, for the next time we want to buy a public resource. It may lead to another way of public management, which could very well involve some sort of privatization. We have that dynamic where it can change back and forth. But who

is going to be the better manager, in the end, the public entity or the private entity? By putting a price on the resource, I think we can begin to answer that question.

PROF. KRAUSS: Bonnie, would you like to talk about the oysters?

PROF. MCCAY: Oystering in this region is a situation where you have both public and private management. So, it provides some pretty good test cases. But I think the outcome is that it doesn't really make much difference, that the forces of industrialization and development and nature, in the form of disease, are what really made the difference. There isn't any good evidence, although people have been arguing for years that privatization was the way it should be managed. Those questions are beside the point.

If you create private rights in red snapper in the Gulf of Mexico, then the recreational community might buy out the commercial community.

I think that's important to keep in mind that property rights are not always the only thing that matter, and they can be a red herring, pardon the expression. Certainly privatizing the rights to fish, which gets at the core of the traditional public trust doctrine, has some appeal for conservation, a lot of appeal. It's been argued in that light. As you've mentioned for other domains, if rights are privatized then some group could buy up those rights, if they want to reduce the amount of fishing that's going on. They can buy those rights and retire them. Whenever this is mentioned, people involved in fisheries go ballistic. This is one of the reasons that some people are fighting the creation of privatized fishing quotas.

For example, if you create private rights in red snapper quota in the Gulf of Mexico, then the recreational community might buy out the commercial community and people who are dependent on the commercial fishery will find themselves "up a creek without a paddle," et cetera. Atlantic salmon provide another good case. The fact that rights for fishing are privatized in Denmark's principality of Greenland has made it possible for the North Atlantic Salmon Fund to buy out those rights, at least temporarily, so that they could stop the fishery at a critical point, the spawning area of the salmon. Now, they've also been able to stop salmon fishing by just pressuring governments to change their rules. So, compensating private rights holders wasn't a necessary step but it certainly made it easier.

MR. SMITH: On the issue of looking at whether some wildlife is ownable, there's a very interesting book by Thomas Lund, American Wildlife Law, in which he goes back and looks at the origin of American wildlife law and how we've compared with what had previously existed in Britain.[20] And he pointed out that in Britain there had been a long tradition of landowners owning the wildlife that occur on their land, especially game animals, grouse in particular

The grouse in England, the red grouse, which is the common grouse, is a wild bird. Landowners owned the grouse on their land, could manage them as they want, essentially set seasons or bag limits as they wanted, and once the grouse had been shot they could do anything they wanted with them. They could sell them to restaurants and markets – have market hunting – and it has worked extremely well. It's working to this day; the grouse are still up there, they're still thriving, they're still an extremely valuable resource. People will pay so much to hunt on those estates up there that they have been able to hold

[20] Thomas Lund, *American Wildlife Law* (Berkeley: University of California Press, 1980).

off the forces of industrialization, to avoid turning to alternative uses of their land. They still maintain the kind of habitat the grouse use, and on the "glorious 12th" of August, when the grouse season opens, to this day restaurants in London vie to be the first to offer fresh Scottish grouse shot that day and flown down. And the grouse are thriving.

As Lund points out, when we created wildlife law in America, because we didn't like the English land tenure system, we threw the baby out with the bathwater by saying that wildlife did not belong to landowners in America, it belonged to everyone. As he pointed out, the result of this was that, initially at least, American wildlife fell as if hit by a plague. We have lost almost all of our grassland grouse. They vanished because they were unowned, because they were treated as a commons or belonging to the state, to everybody.

The first grouse species that was lost was the heath hen, which was the prairie chicken – like bird that lived on the East Coast. The greater prairie chicken is on the verge of extinction across Texas. They're about to list the lesser prairie chicken in the short grass plains, and we're continuing to see one species after another disappear, because some people say it's not possible to own it. I mean, it might be possible to find ways for landowners to own and manage these things, patterning it after England. I think we can find good examples that give us a template or a guideline as to how we might own at least non-migratory species.

When we created wildlife law in America, because we didn't like the English land tenure system, we threw the baby out with the bathwater.

PROF. HUFFMAN: But even for migratory species there's a model which actually exists in some areas which is analogous to pooling and unitization in oil and gas, where surface ownership is pooled and both the management costs and revenues are pooled. So, even migratory species are not out of the question.

MR. SMITH: Well, I didn't want to be the most radical person here.

MR. SNAPE: Let me see if I can try to wear that mantle, RJ! I have my rebuttal to the specific grouse argument, but let me take it even a step beyond. The thing with England is, they don't really have a lot of wide-ranging species or any wilderness to speak of. They don't have a grizzly bear. They don't have the wolf. They don't have the lynx. We're doing some lynx research at Defenders, for example. And this is not the grizzly bear which, of course, has a much wider home range, for males. The largest of home ranges for lynx, which as you know is a species proposed to be listed under the Endangered Species Act, is as high, in some cases, as 60,000 acres and, on average, somewhere in the 20,000 to 25,000 acre range. This is the home range for the male lynx, covering one or more national forests and, probably some private land in-holdings. The fact of the matter is, in those instances, there will not be one landowner who will be able to help lynx.

What makes it even more difficult with the lynx is that it needs what scientists call a mosaic of forest habitat, which means it needs some early successional, some mid successional, and some very late, old growth, successional forests. So, you have not only different land owners but you also have to manage those lands with some degree of coordination for the lynx to survive in the northern United States. I would argue that, by definition, the type of model you're talking about would not work for the lynx, and I don't think even your pooled resource idea would work for the lynx. I think there are some species

of wildlife that just do not lend themselves to a market-oriented approach. And that leads me to my sort of overall, philosophical disposition on this whole question.

I think we do all need to sometimes take off our advocate hats and realize there aren't any blacks and whites here. We are talking about shades of gray. And I think the point is that there are going to be some instances where purchase is appropriate, some instances where regulation is appropriate. Regulation is basically what we're talking about with the public trust, and you just have to sort of mix and match; there aren't any easy answers. What about air? What if we had the technology to actually have air be fungible? I can guarantee you, I could find someone like who'd want to own air and start a market in owning air – in fact we already do so with some air pollution. And, I don't think that's a very good idea, myself.

The lynx, for example, needs as much as 60,000 acres of what scientists call a forest mosaic . . . there are some species of wildlife that just do not lend themselves to a market-oriented approach.

Just to bring this down to a very serious issue, in the context of the Endangered Species Act, if there's one thing that we all probably agree on, it's that we'd at least like to see some financial incentives for private landowners. My point in bringing this up is that, at least in the endangered species context, we haven't even really begun to see what these shades of gray look like. For all the bluster by this Congress on tax incentives for instance, not one Republican ESA tax proposal was "scored" in the 105th Congress, which means none were ever going to pass into the present budget system.

MR. ADLER: But haven't we seen in practice, if not in name, the application of the public trust doctrine? No one calls it that, but I think Jim Huffman pointed out, and Jim Burling pointed out, that in practice what we are seeing is effectively the analogue, and we have seen those results. And I think it is fair to say, certainly, the anecdotal results are less than positive. There are several academic papers that will soon be published, doing broader, more systematic, studies of, for example, forest management, that show that the anecdotes are not isolated and are, in fact, fairly systemic in terms of acceleration of cutting rates and so on.

This application of a public trust type of model to habitat has, on net, done a lot of harm, and probably more harm than good, for some species at least. So, if we were going to talk about applying it to things like the lynx, we seem to be in a situation where either we're going to have to find a system where we're relying on working with landowners or, as much as we all say we don't want to do it, move to a system where, rather than trying to use a public trust doctrine to restraint landowner choices, we take those choices away from landowners completely and don't rely on them any more.

Because this middle ground seems to be producing the worst results for conservation and, I would argue, for larger landowners in particular. Applying public trust doctrine to folks like Lee Poole, who owns Moonlight Basin in Montana, which is essentially in the middle of the Jack Metcalf Wilderness, would destroy his efforts to conserve 90 percent of it, at the expense of developing 10 percent, when the Nature Conservancy would have developed half of it to save half of it. It would destroy the ability of landowners like that to do anything good for it. I don't think it's lynx in this case, but it is mountain lion, it is deer, it is elk, it is moose. And, we're going to have to choose one or the other, public

protection or private protection, but trying to apply public trust models doesn't seem to be getting what we want.

PROF. KRAUSS: We have a few minutes left and I'd like us to explore an issue that's bubbled up a couple of times but that hasn't boiled yet here, around the table, sort of a secondary issue about whether, even if private property owners should never have had a given right, but they thought they had it and now it's being taken away from them by incremental expansions of public trust, even if those incremental expansions were stipulated to be appropriate, should they, nonetheless, be compensated?

And I want to raise this because I was actually involved in what I hope to convince you in a minute is an analogous issue, before I came to George Mason, when I was a law professor up in Quebec. The City of Montreal decided that it had to do something about taxi permits. There were just not enough of them, people couldn't get a cab when they wanted them, there were black market problems and all the rest that we're familiar with. Now, this is an area where I believe there should never have been state regulation in the first place, but there was. There had been a limited number of permits and all sorts of folks, often very poor immigrants from Italy and Portugal, had paid a lot of money to get one of these permits and operate legally. And, of course, if we were to just open the market up these permits would be worthless and these folks would feel cheated out of the property that they had legally acquired, that they thought they legally owned.

I ended up proposing that the City of Montreal triple the number of permits by giving two additional permits to every current permit holder, who could then sell those permits on the market and, therefore, in some way, reap the benefits. And I thought this was a somewhat equitable way of dealing with a property right that I believe never should have existed, but that did exist, and these folks had relied on the law as it had been previously interpreted.

This middle ground seems to be producing the worst results for conservation.

Well, Jim – both Jims – have discussed these expansions of the public trust doctrine beyond the bounds that many folks had thought they were in. And I want to sort of, again, raise this Fifth Amendment issue. Even if the public trust has been appropriately expanded, isn't there a good case for Fifth Amendment compensation?

MR. BURLING: The Supreme Court, on at least one occasion, in a concurring opinion, danced around the idea of a "judicial taking."[21] That is, when the judiciary redefines property so completely it isn't recognizable as what it was before, perhaps that should lead to some sort of compensation. And that's about as far as the court has gone.

I came across this quote a few years ago, from a case called West River Bridge, from 1848, where the court talks about the idea that once you create a property right you can't take it away. Let me read you a brief section from that. "Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such way or exerted in such way as the community or State may have thought proper to ordain. . . . It is owing to

[21] *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (Stewart, J. concurring); see also *Chicago, Burlington, & Quincy Railroad v. City of Chicago*, 166 U.S. 226, 233-34 (1897).

these characteristics only . . . that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State . . . and the grantee; and both parties thereto are bound in good faith to fulfill it."[22]

The government, once it creates a property right, can think that it's a mistake. Maybe there should be a public trust in wildlife habitat, but we know this does not exist under any conceivable understanding of the law, at least 20 years ago. And if we are going to create it, the government needs to pay for it to make sure that it is really worth creating.

MR. KAZMAN: Sam Kazman, general counsel at the Competitive Enterprise Institute. That case was several decades before the Emancipation Proclamation. I wonder what is the applicability of that reasoning to the Emancipation Proclamation.

MR. BURLING: Joseph Sax talks about the idea that we had notions that individuals were property, women were property of their husbands and slaves were property of their owners. But what I say has changed is not the nature of our understanding of property; it's the understanding of humanity. And I don't mean to be too coy about that. We understand now, but didn't before, that women and former slaves are equal members of the human community, and they cannot be owned, under *any* understanding.

If private property owners should never have had a given right, should they be compensated?

Now, if you look at the Dred Scott decision, there is language in there about slaves being property, and that it would be wrong for the government to declare that slaves could not be owned by individuals. And, you're right, there is an instance where understandings have changed. But, again, I would suggest it's understandings of who are members of the human race, and the equality of members of the human race, that has changed, rather than understandings of property. It may be a fine point, but that's the best way I can explain it.

MR. KAZMAN: The reason I ask about that is because one thing that concerns me is the notion of taking what you have just said, how our understanding of what constitutes humans has changed, and expanding it to how our understanding of what constitutes the biological community, the true living community, Gaia, et cetera, and taking that further to flora, fauna, what have you.

MR. BURLING: Yes. And certainly people are making those arguments, but I fundamentally have to disagree. You have to draw the line somewhere, and I think drawing the line at the human species is an appropriate place for it, for a variety of moral, philosophical, and religious reasons. But the idea, the hypothesis, that all animals and all creatures, whether a gnat or a human being, are equal, is something that I philosophically cannot accept, and that is a fundamental tenet of where I'm coming from in this discussion. If you can't accept that, then you're right, there is no limitation to the way we have to redefine property.

PROF. KRAUSS: This is good. Actually, I have about three or four people on the queue. You've said something that's been of great interest. Jim?

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[22] *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532 (1848).

PROF. HUFFMAN: Well, here is where I may have to part with Jim and maybe this is a radical position to take, but I think that the danger of saying, as I think you've implied, that there should be no compensation to owners of slaves is that you go down precisely the path that Sam suggests you might go down, which is changing conceptions of who counts, so to speak.

My understanding of the history, and I haven't studied it in depth, is that compensation was seriously considered at the time of the Emancipation Proclamation and that, as with most discussions of compensation, it was decided against because it was going to cost a hell of a lot of money. I have asked many of my environmental friends, "Why not compensation?" they say "Well, we just can't afford to," to which I say, "Well, then you must not care enough about it to accomplish what you want to do." So, my answer to your question, Michael, is I think when you have fully established property rights, and I think any lawyer, putting away their ideological perspective on life, will basically agree, with some disagreements around the margins, about what the property rights are at a given point in time. We do our title searches, we go out and look at this, and we all agree, basically. And if that is changed, in more than a marginal way, it seems to me compensation is the right answer, because it puts a price on it and tells the public what the costs of their policy objectives are, and because it is what makes the machinery of our economy run, and without which we cannot afford any of these environmental amenities that we've been investing in for the last 30 years.

The law of property is a contract between the State . . . and the grantee; and both parties thereto are bound in good faith to fulfill it.

MR. KEHOE: Public trust doctrine is, in essence, a balance of interests. You cannot talk about public trust doctrine just talking about public rights and ensuring them without also talking about how those rights intersect riparian rights on the shore, and how you strike a balance, and that's the whole crux of the matter in terms of what legislatures are trying to do in fulfilling their responsibilities.

There are no absolute rights, on either side of the equation, in terms of the public's or the riparian rights. In doing our survey of public trust rights among the states and looking at riparian rights, we came to the conclusion that riparian rights have been greatly mis-characterized as rights. They are rights to a certain extent but it's a more accurate characterization to call them privileges of the shore, the privilege to wharf out, to dock, to reach the navigable waters. That's more a privilege than it is a right.

I think the case that that best illustrates that whole theory is the *Brusco Tow boat*[23] decision that originated in Oregon, where they found that once you've exercised that right to wharf out, then you do have a vested, compensable, interest. But, prior to your exercising that right, your right to wharf out is merely a privilege to wharf out, and I think that's where the modern theory is going in terms of all private rights, as balanced with public rights.

PROF. MCCAY: Yes, my book has a chapter on wharfing out rights and privileges in New Jersey. But, in terms of public trust and what we consider important, the changing conceptions of who counts and so forth, it seems to me that the notion of trust is really important. One of the values of maintaining public trust, if not a rule of law, at least as a principle for judgment, is that it provides a notion of inter-

[23] *Brusco Towboat Co. v. State Land Board*, 284 Ore. 627, 589 P.2d 712 (1978).

generational interest. In a sense, the grand tour is one generation granting to another. I think you can at least bring that idea into the public trust discussion and it's appropriate to do so now.

In addition the public trust doctrine does express the concern or a suspicion that some things, some processes, are not appropriate to commodification, to privatization. And now I'm going to go back to fisheries, where there's a real concern about creating market-based systems of regulation for ecological systems that are patently uncertain, highly dynamic, very complex, about which we know very little. Markets do not necessarily work well under those situations. I'm posing these as ways of thinking, that give us reason to hold onto public trust as one of the ways that we do think about environmental relations.

MR. SNAPE: Underlying this discussion, I think that there's a substantive disagreement just on the ecological limits of human behavior in society. I am not talking about humans versus gnats, I'm not talking about Gaia, I'm talking about the fact that what is different today than a hundred years ago or 200 years ago is population growth and related natural resource use. And I would argue that this directly relates to human welfare, both in terms of human economics and standard of living; the whole concept that we do want healthy fisheries in riparian areas, that I do want my son to see an elephant in the wild, that we want areas without the hustle and bustle of human life. To take Jim Burling's discussion of Dred Scott to its ecological conclusion, I believe our species needs a different conception of nature.

There are no absolute rights, on either side of the equation, in terms of the public's or the riparian rights.

And that leads me, again, back to this balancing act between liberty and equality, between the market and regulation, however you want to phrase this dichotomy, I think the Fifth Amendment, of the U.S. Constitution, as interpreted, has been very reasonable. I think the balancing test has worked. The fundamental problem is not a judicial problem, it is a legislative problem. We have not been able to talk about targeted financial tax incentives. The problem that we have on this side, the environmental side, is we don't want to create an entitlement, which I don't think anyone in this room wants to do, but that's the problem. The problem on the "other side" is that you want too much too quickly.

It isn't that it costs too much, although it probably would cost a lot; it is that if you don't do it right, it's going to be subject to abuse. There are smart people out there, smart lawyers, who know how to work a system, and you don't want to set up a compensation system, if you will, that is ripe to abuse and ends up draining the very pool of money that is limited for what we all claim to want. To repeat my main point, I believe there are limits as to what our species can do to the natural ecology of our planet and, as a result of that, I conclude that in some instances I want there to be a strong public trust concept. And, in other instances, in the Nature Conservancy instance, in the instance of good land stewards, with the Natural Bridge situation, I think private ownership is the answer. So, I'm looking for gray. I'm looking for new tools in the box. That's my conclusion.

PROF. KRAUSS: The last word, R.J.?

MR. SMITH: Jim Burling started by talking about, among other things, the endangered nene goose in Hawaii and that there were some problems with the public trust doctrine maybe threatening the survival of the nene. I think it might be instructive to conclude that one of the things that has really helped the nene recover has been private conservation. The nene was on the down slope for a long

time – it was a semi-flightless goose, and it was a source of good tasting food in Hawaii. It was shot by everybody. Early Polynesians brought rats, and pigs, and dogs that affected it, and the federal government put it on the Endangered Species list, which did little more add it on a piece of paper.

On the other side, most of the nene that have been reintroduced back into their native habitats in Hawaii have come from Sir Peter Scott, a Brit who he bought all kinds of wetlands there and created the world's Noah's Ark for waterfowl. He's breeding in captivity every species of duck, goose, and swan in the world, and learning all their life histories, and it's producing enough that if any of these become endangered anywhere in the world, he has the stock to reintroduce them back into the wild, which, I think, says something about what private conservation can do.

PROF. KRAUSS: Let me just say that I think this discussion has raised enough issues that we all could continue talking about them for several hours. And I want to thank all four of you and the folks around the room for your interesting comments.

The transcript of this discussion has been edited by the participants for clarity.

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CENTER FOR PRIVATE CONSERVATION PUBLICATIONS

Conservation and the Public Trust Doctrine
A Roundtable Discussion
The public trust doctrine has been evolving since Roman times, when Justinian set out a list of things common to everyone by the law of nature – the air, running water, the sea, and consequently the shores of the sea. Later, the public trust doctrine came to be regarded as the common right to pass through navigable waters; in other words, a protection of commercial activities. Today, there is great pressure for the expansion of the public trust doctrine, applying (at least in court if not in law) to such things as recreational access to the shore and to waterways, salmon migrations, and even viewsheds.
March 1998

Conservation Through Commerce
A Roundtable Discussion
Conservationists who have experimented with and used in tandem both conservation and commerce have been involved in some of the most heartening conservation success stories in recent years. And so, in the spring of 1998, in the shadow of Earth Day, an exploration of just how one might achieve conservation through commerce was a natural topic for a forum on "The Promise of Private Conservation," hosted by the Center for Private Conservation and held at the National Press Club in Washington, DC. The forum was one of a series of events hosted by the Center for Private Conservation to focus attention on the role of private institutions and markets in encouraging and supporting conservation efforts.
January 1999 $6.00

Common and Private Property Rights
A Roundtable Discussion
Property rights theorists and others who consider various conservation regimes often differentiate between common and private property rights institutions, yet the lines between these regimes are often muddled. The experts gathered for this forum use a host of examples to illustrate the wide variety of private (individual and communal) approaches to conservation.
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Conservation Easements and Private Land Stewardship
by Steven J. Eagle
Many landowners pride themselves on their careful stewardship of their lands. They often want to ensure that their love for the environment is respected by succeeding family generations and others who eventually might own their lands. The conservation easement is a device that attempts to deal with all of these problems, and this paper deals with both the evaluation and effectiveness of these easements.
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A Roundtable Discussion
The Cuyahoga River may not catch fire anymore, but pollution problems persist. For centuries, these problems were addressed by the common law, inherited from Britain by both Canada and the United States. The effectiveness of the common law, and its potential applicability to contemporary environmental concerns is the subject of academic dispute.
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What Makes for a Good Land Trust? A Roundtable Discussion
The land trust movement in the United States has grown by leaps and bounds. While few would deny the important role that land trusts play in conservation, some believe that the movement has strayed from its private conservation roots. This paper is a transcript of the Center for Private Conservation roundtable discussion on private land trusts.
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by Bruce Yandle
People have long been aware that unbridled access to natural resources could result in ruin for all. Whether by custom, kinship, or ownership, people found ways to assign limited rights for the sharing of pastures, streams, and hunting grounds. Yet modern antitrust law is hostile to such a mangements, making it more difficult to protect the commons.
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