In the early 1900s, a company known as Waiahole Water constructed an elaborately engineered ditch and tunnel system across the Hawaiian island of O'ahu. Its purpose was to channel stream water from the island's windward, rainy side to sugar plantations on its drier side. By the 1990s, the ditch was delivering stream water to sugar plantations.
an average of twenty-seven million gallons a day to leeward O'ahu, usurping water that had once been used by small taro farms on the windward side. The so-called Waiahole Ditch left these traditional farmers high and dry.

In 1993, Amfac, the island's last big sugar producer, ceased operations, and a legal battle over the water ensued. Native groups, represented by the environmental law firm Earthjustice, fought to restore the streams and their traditional uses, while suburban developers and their lawyers fought to keep the water flowing through the Waiahole Ditch for use on golf courses, and for condominiums and new hotels. The state’s Commission on Water Resources held seven months of hearings in the mid-'90s, then ruled that twenty percent of the flow diverted via the ditch would be restored to the eastern streams. The rest, they said, could be used for commercial purposes on the west side of the island.

This ruling was a minor victory, as millions of gallons of water were restored to the original watercourse and some small farms returned to production. However, Earthjustice appealed the decision to the state Supreme Court, which in August of 2000 ruled in favor of the Native Hawaiians. The court ordered the cancellation of all permits the commission had issued to developers for water withdrawals, citing a little-known legal principle called the Public Trust Doctrine, which says that common resources such as water are to be held in trust by the state for the use and enjoyment of the general public, rather than private interests.

This idea of the public trust has a long and venerable history. It was codified back in 528 AD, when the Roman Emperor Justinian decided to gather and condense all the unpublished rules and edicts handed down by his predecessors into a unified, coherent code of imperial law. To the task he appointed a commission of ten legal experts, who delivered the Codex Justinianus in 529 and a year later its attendant textbook, known as the Institutes of Justinian, to which the emperor added a few words of his own. Among them were the following: "By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea."

"By the law of nature these things are common to all mankind; the air, running water, the sea and consequently the shores of the sea."
During its first millennium and a half, this edict was used almost exclusively to protect the public's interest in one very vital aspect of the commons: water, and sometimes land covered by water. As Justinian had ruled, navigable water, whether in the sea or flowing to it, was, along with the shorelines, beaches, and river bottoms, the common property of a nation's citizens, owned by everyone and no one at once, an unwritten public easement protected by their steward -- the state.

It's a critical time for the concept of the public trust, because the commons is being enclosed in ways that were never before possible. These enclosures are crossing new boundaries, invading areas so intangible that they are rarely even recognized as part of the commons -- from gene pools to the farthest reaches of outer space. The expansion of intellectual property rights into the rainforest, the patenting of life forms, the placement of weapons in space, the giveaway of broadcast spectra, the commodification of news and information, the commercial invasion of childhood, and the temptation to privatize almost anything are just a few of the many new threats to the commons.

Through the wonders of biotechnology the enclosers have moved inside our very beings. DNA is being privatized, along with individual genes. So are our minds, since it is almost impossible for human eyes and ears to escape the hydra of infinite advertising. About the only aspect of human existence that has not come under threat of enclosure is the spoken word, and that is only because no one has figured out how to copyright it.

Given all these many invasions, and potential invasions, there are reasons to believe that the Public Trust Doctrine may have an increasingly important role to play in defending those aspects of our environment that rightfully belong to all of us.

Over the course of its fifteen-hundred-year history, use of the Public Trust Doctrine has waxed and waned, depending on political climates and attitudes toward the commons. Justinian's original
Code and Institutes remained the law of the Roman Empire until it collapsed in ruin and decadence. In the wake of that long and gradual demise, the kings and feudal lords of Europe ruled their domains by fiat, dispensing public lands, streams, and beaches to loyal baronage. But when serfs and commoners grew discontented with the regimes that deprived them of food and firewood, liberal noblemen began to examine and consider the Justinian Code. Thus the doctrine of public trust re-emerged and spread in various forms into the common law of nations that had once been part of Roman and Byzantine political geography.

By the eleventh century a French law had been decreed which said that "the public highways and byways, running water and springs, meadows and pastures, forests, heaths and rocks are not to be held by Lords; nor are they to be maintained in any other ways than that their people may always be able to use them." Two centuries later King Alfonzo X of Spain followed suit and added harbors to the list of public domains established by the French.

In England, the Justinian doctrine was recodified in the Magna Carta and forced upon King John in 1225 after his defeat at the battle of Runnymede. The treaty stipulated that neither he nor any future king could grant private hunting and fishing rights to favored earls and dukes, thereby cutting off the commons from people who relied upon them for their livelihood.

As the Public Trust Doctrine was eventually interpreted in England, the king actually owned public lands, but held them in trust for the public. Thus the notion of "sovereign" property was born, and with sovereignty under the Public Trust Doctrine came the inescapable duty of state stewardship, a concept that survives today in all manifestations of the doctrine. The Colonial Ordinance of 1647 stipulated that government could not relinquish its public trust obligations to a private party or a popular vote -- an interpretation of the doctrine that was recently invoked in several states by trappers seeking constitutional protection from referenda prohibiting leg-hold traps.

As new colonies were created in North and Meso-America by English, French, and Spanish kings, "the doctrine of the public trust," as it was then known, was adopted without argument as common law. When new states joined the original thirteen American colonies under the rule of equal footing, they too were bound by a doctrine that granted state governments sovereign rights to common land and sovereign responsibility for its care. The idea of the public trust was synonymous with America's promise of freedom, and several states eventually wrote some form of the ancient code directly into their constitutions. These interpretations were based on English, French, or Spanish common law, depending on the nationality of the colonists.
Take for instance Article 1, section 27 of the Pennsylvania state constitution:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources the Commonwealth shall conserve and maintain them for the benefit of all the people.

Sound familiar?

During the early nineteenth century, the impoverished children of New Jersey commoners began appearing at council meetings in towns and cities along the state’s coast and waterways. After patiently awaiting their turn to speak, they testified that the livelihood of their families was being threatened by wealthy oyster planters who had persuaded local courts to uphold the privatization of coastal and estuarial oyster beds from which the children’s parents had freely gathered food. Their plight aroused the compassion of town councilmen, and led to America’s first major test of the Public Trust Doctrine.

Should oyster beds, thriving in the estuaries and inlets of the Atlantic Coast long before hominids evolved on the planet, be common holdings or private property? That was the question that river-bed oystermen took to the New Jersey Supreme Court in 1821.

To the surprise of both parties, in the landmark case of Arnold v. Mundy, a court of patrician men of wealth ruled for the commoners, and in so doing upheld the ancient principle of public trust. Twenty one years later, in Martin v. Waddell, the United States Supreme Court affirmed the New Jersey court’s interpretation of the public trust -- another landmark case, because the public trust is not a federal doctrine.

A decade later came Eddy v. Simpson, where the California Supreme Court ruled that a property right in water "consists not so
much of the fluid itself as the advantage of its use." The "usufructuary" rule, first used to outlaw wasteful practices such as hydraulic gold mining and later to control the use of pesticides or heavy metals that found their way into streams and aquifers, is now widely interpreted to mean that all users of water are subject to a "beneficial use doctrine," which prohibits unreasonable use or waste. This concept could conceivably be expanded to other elements of the commons, such as soil and public forests.

Then in 1892 came the granddaddy of them all. In Illinois Central Railroad v. Illinois, the U.S. Supreme Court held that a state legislature could not grant ownership of land under navigable waters to a private party, in this case the railroad, which had in effect been handed, fee simple, one thousand acres of Lake Michigan shoreline and underwater land -- at the time, the entire waterfront of Chicago. In Illinois Central the court acknowledged a state's right to sell non-public trust properties. But water and the ground beneath it "is a title held in trust for the people of the state, that they may enjoy the navigation of waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties."

It was a fitting finish for the nineteenth century. But as the Industrial Revolution accelerated and private property continued its ascendancy in the early twentieth, things slowed down for the concept of public trust. Courts looked the other way as state legislators granted and sold public properties, including shorelines, tidal flats, and wetlands, to residential developers, landfill operators, and industrial parks. If considered at all, the Public Trust Doctrine was used only against obstacles to commerce and navigation. Manufacturers with no reason to invest in costly toxic disposal dumped their waste into public waters, while courts enamored of free enterprise ignored the pleas of fishermen, swimmers, and other downstream water users. Gradually the public began to realize that relinquishing the public trust to corporate polluters was a bad deal.

In 1970 two things happened that placed the Public Trust Doctrine in a whole new light. Legal scholar Joseph Sax published a landmark article in the Michigan Law Review titled "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention." In the article Sax opined that the Public Trust Doctrine could be used for more than protection of navigation and commerce. The doctrine should, he wrote, be expanded far beyond navigable water to protect the soil, air, and other species -- things "so particularly the gifts of nature's bounty that they ought to be preserved for the whole of the populace."

And in April of that year, twenty million people came out to celebrate the first Earth Day. President Richard Nixon took notice that American voters were getting serious about the notion of having
government protect the nation's land, air, and water from deadly pollutants, and, with minor reluctance, signed into law the National Environmental Protection Act (NEPA) and later the Clean Water Act, Clean Air Act, Coastal Zone Management Act, Endangered Species Act, and legislation creating the Environmental Protection Agency.

As the environmental movement grew in strength and numbers, and its ability to mandate enforcement of the new federal laws improved, the green bar did rely on existing legislation and eschewed public trust litigation, until the legendary 1983 Mono Lake case -- Audubon Society v. the Los Angeles Department of Water and Power -- in which ecological preservation was held to justify a potentially major change in vested private property rights. The Department of Water and Power was drawing a substantial amount of water from the feeder streams supplying Mono Lake, causing the lake to recede at a rate that threatened the entire surrounding ecosystem.

The California Supreme Court, invoking the Public Trust Doctrine, ruled against Los Angeles and for the lake, extending the state's public trust authority to the control of water diversions from non-navigable tributaries of a navigable lake. The decision asserted that common interest in some resources take precedence over long-term private use and invoked the principle of jus publicum -- that certain resources are of so common a nature they defy private ownership. It was a triumphant expansion of existing case law, building on the 1971 California state Supreme Court case of Marks v. Whitney, which determined that public trust values included not only tidelands, lakes, rivers, and riverbeds, but also wildlife habitat, recreational value, and the sheer beauty of place.

The Department of Water and Power appealed to the U.S. Supreme Court, which refused to hear the case. The Mono Lake decision, later described by historian John Hart as "a judicial earthquake," sent shock waves through the civil bar, which truly believed that water rights had been established as the functional equivalent of private property. The decision also signaled that the emerging science of ecology was beginning to impact the American judiciary, as well as public policy and the practice of environmental law. And it elevated the value of the general commons above the mundane interests of commerce and navigation.

Is federal law really as useful as it has been in the past for protecting the environment or defending the commons?
However, Chief Justice Rose Bird and her colleagues who ruled for Mono Lake soon disappeared from the bench, voted out of power in one of the most vicious recall elections in California history. And today, every level of the judiciary, both state and federal, seems to be occupied by jurists who either remember the fate of Rose Bird or have forgotten the principles of public trust. So this may not be a good time to take any doctrine of the commons to court, particularly not the Supreme Court. The public trust should probably be reserved, as it was during previous periods of disfavor, for what environmental lawyer James Wheaton describes as "carefully selected, bite-sized victories."

Although the Hudson River valley would hardly be described as a bite-sized ecosystem by the determined activists who toiled for years to reclaim its waters and shorelines from industrial polluters, in a sense it is. For it is one small corner of a badly polluted nation; one of thousands of Superfund sites existing in every state of the union. That said, the recent Hudson-Raritan initiative is a major triumph for more than three hundred river communities nationwide fighting to keep their water clean enough to swim and fish in.

The main weapon of the initiative was the Public Trust Doctrine and its ability to override prior legal claims. By applying the doctrine, water rights that were demonstrably harmful to the river and its estuaries could be confiscated, regardless of how old the claims were. Thus the rights claimed by corporate giants like General Electric, which for decades dumped millions of tons of polychlorinated biphenyls (PCBs), dioxins, and other toxic wastes into the Hudson River, were superseded by public trust case law, which asserts that tidal waterfront resources and wetlands held by the states in trust for the people include lands that are privately owned. Even when a state exercises its legal right to lease or sell such lands to private interests, as public trustee it may never relinquish the public's rights in those lands, and it is duly bound by the Public Trust Doctrine to protect those rights.

This is undoubtedly a turn of good fortune for the idea of the
commons. However, it should be noted that the doctrine of public trust can potentially be used to ill effect. Animal-rights advocates were certainly appalled by the aforementioned leg-trap cases. In the state of Washington in 1998, the jet ski industry argued that a county ban on personalized water craft on all marine waters and one lake was in violation of the Public Trust Doctrine. The Weeden v. San Juan County case went all the way to the state Supreme Court, which ruled for the county. And when a Texas-based oil exploration company was recently denied a permit to drill for crude in California, the company sought a reversal, arguing that domestic oil was, now more than ever, as vital to the public as water, and that it therefore deserved protection through the state's exercising the Public Trust Doctrine. The case is pending.

As much as the idea of the commons may seem an integral part of the democracy Americans so proudly defend, it is a concept often ignored by environmental lawyers and frequently attacked by their opponents. Many steps have been taken over the past two hundred years to affirm and advance the Public Trust Doctrine as a tool for protecting pieces of our country where the public interest should prevail. But the long intervals between triumphant cases illuminate the glacial advance of any legal strategy that is up against the enormous forces of industrial expansion, urban sprawl, and the overwhelming judicial preference for private property.

There have been periods in every civilization when the Public Trust Doctrine was close to sacred, followed by periods when it was derided, ignored, or unknown. At this moment in America it appears to be somewhere between derided and ignored. But thankfully, there is still sentiment expressed in respectable law journals for enforcing a stricter doctrine and expanding the public trust to cover ecological resources in general. And attempts are being made to revive and reinvigorate it in the courtroom and law school, where judges and teachers alike are rediscovering the standards that have protected public interests for fifteen centuries.

*Over those centuries* the boundary of public trust has gradually crept from the shorelines of the Roman Empire onto the beaches of Europe, up the rivers and riverbeds of America, onto the lakes, and into the tributaries of our water supplies, touching riparian banks, aquifers, marshes, feeder creeks, and springs. A district court on Long Island once declared that "the entire ecological system supporting the waterways is an integral part of them and must necessarily be included within the purview of the [public] trust." A few courts have even accepted dry land, natural beauty, cultural artifacts, wildlife, a historic battlefield, and a downtown area as public trusts. Louisiana’s constitution, like others, prohibits alienation of navigable river beds, but the state's interpretation of public trust also includes, alongside air, sea, and river water, solar heat.
But if the doctrine is to cover higher ground, shouldn't ecological integrity be established as a public trust right in all states, as it was in California by the Mono Lake decision? And can a doctrine that acknowledges the public's right to possession of real property also support the public's claim to electromagnetic spectra or intellectual property, and protect its interest in all aspects of the sometimes invisible larger commons?

Despite the fact that almost daily the Bush administration further relinquishes its responsibility to protect the environment, some well-meaning lawyers continue to believe that federal laws obviate the need for such a doctrine. But I wonder, is federal law or the federal government really as useful as it has been in the past for protecting the environment or defending the commons? Is the Endangered Species Act as powerful a tool as it was ten years ago? Can the Clean Water and Clean Air acts be wielded with the same force they have in the past? Is the Superfund succeeding? Not really.

It is of course difficult to argue a case for the commons against a federal government that develops energy policy in secret White House meetings, removes wilderness protection for millions of acres, allows snowmobiles back in national parks, and aggressively grants public-land exploration rights to private resource reapers. And although the powers of enforcement are implied in most interpretations of the doctrine, there is really no police force to defend the public trust -- especially when public servants are not acting in the public's best interest. The doctrine must therefore be wielded as a legal weapon by all who seek to protect the commons, a common tool for common folk.

After all, the nineteenth-century oyster wars were not won in the courtroom alone, nor was the shoreline of Chicago, Mono Lake, or the Waiahole Ditch. They were all preceded by the public protest of "commoners" demanding that government exercise its public trust mandate. It's important to realize that public trust litigation is unlikely to succeed in the absence of community activism and public education. As public trust legal scholar Michael Warburton notes, "The Doctrine is too valuable a public resource to leave with the legal profession, particularly at a time when so few of my colleagues are defending public interests and resources are being privatized on a truly massive scale."

And why shouldn't a broad spectrum of protestors come out to protest the rampant enclosure of the commons that is unfolding today? It seems to me that this doctrine, and the whole notion of an expanded commons, should be able to transcend the traditional right-left, public-private divisions that have long plagued debate over property and the commons. We're talking here about things that people of any and all political persuasions must value -- air, water, privacy, silence, knowledge, sunlight, soil, and the essential
inviolability of childhood.

In this regard it would be wise to view the Public Trust Doctrine as more than a legal construct, for it is also a philosophy, a way of thinking that sees the public good as an ideal to be pursued. Does not the fate of humanity lie, as it always has, in our care of the commons?

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