1-1-1999

The Public Trust Doctrine: A Tragedy of the Common Law

James R. Rasband
BYU Law

The Public Trust Doctrine: A Tragedy of the Common Law

OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY. By Bonnie J. McCay.[†] Tucson: The University of Arizona Press, 1998. Pp. xxxi, 246. $45.00.[‡]

Reviewed by James R. Rasband*

I. Introduction

During the last thirty years, few issues in natural resources law have received more scholarly attention than the public trust doctrine, the doctrine that a state legislature has a trust obligation to the public at large which prohibits it from permanently privatizing certain natural resources.[1] The reasons for this interest are not particularly mysterious. For reform-minded scholars disenchanted with the historical eagerness of state legislatures to exploit and consume natural resources, the public trust doctrine symbolizes something of a legal holy grail: an extra-constitutional, counter-majoritarian check on the natural resource allocation decisions of misguided

---

† Professor of Anthropology, Rutgers University. Associate Director, Rutgers Ecopolicy Center.

‡ Hereinafter cited by page number only.

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A. 1986, Brigham Young University; J.D. 1989, Harvard Law School. I am grateful to Patrick Malone, Steven Loertscher, and Scott Brown for their able research assistance.

1. This definition of the public trust doctrine is dramatically simplified. A slightly more detailed but still truncated account of the doctrine is that it describes the state's fiduciary responsibilities with respect to land under navigable water and, more recently, other associated natural resources. *See generally* 4 WATERS AND WATER RIGHTS § 30.02(a), at 39-40 (Robert E. Beck ed., 1996) (providing a historical overview of the public trust doctrine); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. COLO. L. REV. 331, 379 (1998) (describing how the category of resources to be held in trust by the state has expanded to include water appropriated from navigable watercourses, as well as recreational and ecological values associated with navigable waters). The state's fiduciary responsibility manifests itself in two interpretive approaches to limitations on the privatization of so-called "trust resourees." Some courts have suggested that the trust obligation altogether prohibits a state from granting away trust resources; other courts have said that the state may make such grants but that they are necessarily subject to revocation. *See id.* at 358-60 (discussing this distinction between grants that are void *ab initio* and those that are merely voidable). Certain grants of trust resources are neither void nor voidable. *See infra* text accompanying note 39.

legislative majorities.[2] On another side of the debate—the side on which I find myself—the public trust doctrine is viewed as more akin to the Sirens' song of Greek mythology: the promise of reversing previous resource misallocations is alluring but the price of that satisfaction is too steep. Application of the doctrine can result not only in a dangerous usurpation of legislative authority[3] but also in a potential violation of the Fifth and Fourteenth Amendments when a prior grant of trust resources is revoked or modified without payment of just compensation.[4]

Unsurprisingly, the competing perceptions of the promise or peril of the public trust doctrine have spawned a wide variety of law review articles.[5] Dr. Bonnie McCay's *Oyster Wars and the Public Trust* addresses an area neglected in the legal literature: the key role that nineteenth-century New Jersey oyster disputes played in the development of the public trust doctrine. To those unfamiliar with the origins of the doctrine, this focus may seem odd. Why New Jersey? Why oysters? In fact, the focus is quite logical and creates some of the book's value. It is logical because the two seminal decisions that ultimately gave birth to the

---

2. The two most prominent cases in public trust jurisprudence illustrate the potential value of the public trust doctrine to natural resource protection. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 463-64 (1892), the United States Supreme Court held that the public trust doctrine allowed the Illinois legislature to revoke without payment of compensation a prior grant to the Illinois Central Railroad of approximately 1000 acres of submerged lands in Chicago harbor. Similarly, in *National Audubon Society v. Superior Court*, 658 P.2d 709, 723, 732 (Cal. 1983), the California Supreme Court ruled that California could, without paying any compensation, reduce Los Angeles's previously granted water right to withdraw water from Mono Lake.

3. It is worth noting that the judiciary does not always act in a countermajoritarian fashion when it applies the public trust doctrine. In some instances, as was the case in *Illinois Central R.R.*, a court is only validating a subsequent legislative revocation of a prior legislative grant. The countermajoritarian concern arises when the court revokes or limits a prior grant of trust resources without reference to a legislative determination, as was the case in *National Audubon Society*. *See supra* note 2 (briefly setting forth the facts of both *Illinois Central Railroad* and *National Audubon Society*).

4. The Fifth Amendment's just compensation requirement has been applied to the states via the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amends. V, XIV; Chicago, Burlington, & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (incorporating the just compensation requirement into the Due Process Clause of the Fourteenth Amendment and applying it to takings by states).

5. *See, e.g.*, Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1 (1985); George A. Gould, *The Public Trust Doctrine and Water Rights*, 34 ROCKY MTN. MIN. L. INST. 25-1 (1988); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986); *see also* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, 19 ENVTL. L. 425 (1989); *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181 (1980).

modern public trust doctrine—*Arnold v. Mundy*[6] and *Martin v. Waddell's Lessee*[7]—both grew out of nineteenth-century New Jersey oyster disputes. The focus on the oyster industry adds value because public access to the oyster resource presents an ideal case study for application of public trust principles.

The core proposition of the public trust doctrine is that the state must hold land under navigable water (originally defined as those waters which ebbed and flowed with the tide[8]) in trust for the people, so that the people may use those lands for purposes of navigation, commerce, and fishery.[9] Oysters, which are physically tied to land under navigable water,[10] and are part of the ocean fishery, are thus the prototypical public trust resource. Yet because oysters are attached to land, just like timber and minerals, they are also ideal candidates for privatization. Thus, from its beginnings, the oyster industry was a flash point for public trust disputes. What early oyster disputes reveal about the origins and evolution of the public trust doctrine will be the focus of this review.

The review discusses two contributions that *Oyster Wars* makes to the public trust literature. The first is a function of McCay's approach to tracing the development of the public trust doctrine. Rather than focusing solely on the "major court cases for both their content and their contributions to an evolving common law,"[11] McCay also takes what she terms a "more anthropological" approach: namely, she explores "the events, issues, and people behind the cases and decisions and how they might be connected with one another."[12] This contextualized exploration

---

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

7. 41 U.S. (16 Pet.) 367 (1842).

8. At common law in England, the term "navigable waters" had application almost exclusively to the waters that ebbed and flowed with the tide. *See* Barney v. City of Keokuk, 94 U.S. 324, 337 (1876) (noting that "the only waters recognized as navigable in England were tide-waters"). In the United States, by contrast, navigable waters have been expanded to include all bodies of water that are navigable in fact. *See* Packer v. Bird, 137 U.S. 661, 667 (1891); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457 (1851) (both holding that admiralty jurisdiction in the United States is not confined to the ebb and flow of the tide, but extends to all navigable waters).

9. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). This core understanding of the public trust doctrine has now been expanded beyond land under navigable water to include other resources. *See supra* note 1; *infra* note 40.

10. *See* WILLIAM K. BROOKS, THE OYSTER: A POPULAR SUMMARY OF A SCIENTIFIC STUDY 82-85 (2d ed. rev. 1905) (describing how oysters grow attached to tidelands in large conglomerations known as beds).

11. Pp. xxviii-xxix.

12. P. xxix. McCay, a self-described "ecological anthropologist" who is not law trained, denigrates the case analysis as "little more than a law review exercise," p. xxix, and seems to regard her "anthropological" approach as foreign to legal analysis, which she perceives as "simply identify[ing] and follow[ing] links between holdings, dicta, and so on, from one court opinion to the next." P. xxix. The notion that there is a significant difference between a legal approach, which she implies is rather mechanical and pedestrian, and an anthropological approach, which is contextualized and wide-ranging,

of the foundational cases of the public trust doctrine is valuable because it provides new insights into those cases. The second contribution of *Oyster Wars* is simply its focus on the oyster industry. As discussed above, the laws, customs, and practices of the industry provide an ideal case study into early legal, political, and social understandings about the state's authority to privatize a core trust resource.

Although the focus of this review will be on the contributions of *Oyster Wars* to the public trust debate, this is not necessarily McCay's focus. McCay is clear that her interest in the public trust doctrine is only incidental to her research on common property regimes.[13] Thus, McCay uses her anthropological approach not simply to contextualize and broaden understanding of the development of the public trust doctrine, but also to provide "access to larger or crosscutting domains of social structure or culture norms in conflict and consensus."[14] The particular social structure and cultural norm in which McCay has the most interest is the allocation of natural resources. Specifically, she uses the oyster industry and the development of the public trust doctrine to dispute one of the basic axioms of natural resource policy: Garrett Hardin's famous tragedy of the commons thesis that open access to a natural resource leads inevitably to overexploitation of the resource.[15]

The review briefly addresses McCay's criticism of Hardin. It turns out that McCay's dispute with Hardin is less about his theory and more about his language, or what McCay refers to as the "narrative" of the tragedy of the commons.[16] McCay would like us to think less in terms of a commons as a necessary "tragedy" and more in terms of a commons having great social value if managed correctly. Her concern is that the narrative of commons as tragedy inexorably gives impetus to an anti-commons solution, namely privatization. And privatization of natural resources is McCay's real enemy. Thus, McCay suggests that the instances of overexploitation in the New Jersey oyster fishery were generally a result of a "mismanaged commons"[17] that resulted in a "tragedy of the commoners"[18] rather than a tragedy of the commons. McCay seems to believe that altering this vocabulary (or, as she might say, promoting an alternative narrative) may stem the privatization tide and

---

is belied by a perusal of almost any law review. That fact, however, does not detract from the value of McCay's thorough exploration of the context of the early public trust cases.

13. *See* p. xxiii.

14. P. xxix.

15. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968).

16. P. xxiii (describing the tragedy of the commons as "less a formal model than a powerful story . . . about property relations").

17. P. 189.

18. P. 195.

make natural resource policymakers more inclined to look at alternative solutions. This Review, however, concludes that it is the theory behind Hardin's thesis and not his language that ultimately drives natural resource policy. And McCay's research on the New Jersey oyster industry does nothing to diminish the theory's validity.

II. The Oyster Industry and the Public Trust Doctrine

A. The Debate Over the Origins of the Public Trust Doctrine

To those engaged in the public trust debate, McCay's contextual exploration of the development of the public trust doctrine will be of particular interest with respect to one prominent issue in that debate: the dispute over the doctrine's origins. Recognizing that judicial review and invalidation of legislative action generally require a constitutional basis, some supporters of the public trust doctrine have worked to locate the public trust doctrine in a constitution,[19] or if not in a constitution, then in a long-established line of common-law cases. The theory behind this latter strategy is that any countermajoritarian criticism is at least muted if the legislature can be said to have impliedly understood—by virtue of that established precedent—that its grant of a trust resource would be subject to revocation. Locating the doctrine in long-established precedent also attempts to respond to the doctrine's critics who have suggested that exercise of the doctrine to revoke a prior grant of a trust resource may be a taking.[20] If the doctrine is long-standing, a private grantee is arguably on notice of the state's right of revocation. Thus, when the state actually revokes a prior grant, it is merely exercising an option to which the

---

19. For an argument that the public trust doctrine is grounded in the federal Constitution, see Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 458-59 (1989) (locating authority for the public trust doctrine in the Commerce Clause). For an argument grounding the doctrine in state constitutions, see Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 576-77 (1989). For a brief critique of both arguments, see Michael C. Blumm, Harrison C. Dunning, & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461, 490-92, 496-503 (1997); Rasband, *supra* note 1, at 337-38 & n.26, 365-66; and James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 65 n.243, 74 n.271 (1997).

20. Several commentators have argued that an uncompensated revocation of a grant of overflowed lands or associated resources can constitute a taking. *See, e.g.*, Gould, *supra* note 5, § 25.05, at 25-49; James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987). *See generally* Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423 (1995) (discussing the implications of the Supreme Court's takings jurisprudence for state and judicial action pursuant to the public trust doctrine).

grantee's property right was always subject.[21] Others of us view the public trust doctrine as a judicial invention of more recent vintage.[22] If this view is correct, the legitimacy of the doctrine's countermajoritarian content and its uncompensated taking of property rights is undermined.[23]

The debate over the antiquity of the public trust doctrine has given rise to competing historical narratives that need some description if McCay's contributions to the debate are to be evaluated. Advocates of the doctrine generally trace the public trust doctrine all the way back to Roman law and *The Institutes* of Justinian, which provided that "'all of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea.'"[24] They then track this idea that the shores of the sea were not capable of private ownership from Roman law into English common law. They suggest that the crown owned all the foreshore[25] in England but was prohibited from alienating it to private owners because the crown was obligated to hold it in trust for the people.[26] This understanding, they contend, made its way into American law in two nineteenth-century American cases, both of which involved oyster disputes.

The first of those cases was a New Jersey Supreme Court decision in 1821—*Arnold v. Mundy*.[27] In that case, Arnold contended that Mundy had trespassed on his oyster bed and stolen oysters which he had planted there.[28] Arnold claimed title to the oyster bed by virtue of mesne conveyances dating back to a seventeenth-century royal charter from Charles

---

21. *See, e.g.*, National Audubon Soc'y v. Superior Court, 658 P.2d 709, 723 & n.22 (Cal. 1983) (asserting that a public trust servitude was necessarily imposed on any grant and thus the exercise of that servitude takes nothing from the grantee).

22. For examples of articles contending that the public trust doctrine is a more recent invention, see generally Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976); Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975); Rasband, *supra* note 1; and Rasband, *supra* note 19.

23. For a discussion of this conclusion, see *infra* note 105.

24. Deveney, *supra* note 22, at 23 (quoting *The Institutes* of Justinian). For examples of cases and commentators tracing the public trust doctrine back to Roman law, see *State v. Central Vermont Railway.*, 571 A.2d 1128, 1130 (Vt. 1989) and *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987). *See also* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Trust in Western Water*, 37 ARIZ. L. REV. 701, 713 (1995); Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541, 544-45 (1995).

25. The "foreshore" is the land between the high and low water marks of the tide. Discussing the foreshore in English common law is analogous to discussing land under navigable waters in the United States, because in England, the term "navigable waters" had application almost exclusively to those waters that ebbed and flowed with the tide. *See supra* note 8 (discussing the meaning of the term "navigable water" at common law in England).

26. For examples of this historical narrative, see Koehler, *supra* note 24, at 544-45 and Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 195-200 (1980).

27. 6 N.J.L. 1 (1821).

28. *Id.* at 65.

II, King of England, to his brother, the Duke of York.[29] Ruling in favor of Mundy, Justice Kirkpatrick held that Arnold's title was invalid, because the English crown never had the authority to convey submerged lands. The crown, said Kirkpatrick, was obligated to hold such lands "as a trustee to support the title for the common use."[30] In dicta, Kirkpatrick added that New Jersey was under the same obligation as the crown: to hold land under navigable water in trust for the people.[31]

The next stop in the narrative of most public trust proponents is *Martin v. Waddell's Lessee*.[32] There, the United States Supreme Court, in another oyster dispute, interpreted the same crown conveyance at issue in *Arnold v. Mundy*.[33] Closely following Justice Kirkpatrick's language, Justice Taney suggested that at least "since Magna Carta" the crown was under a duty to hold land under navigable water in trust for the people and could not alienate it.[34]

From *Martin*, the narrative proceeds to *Illinois Central Railroad v. Illinois*,[35] an 1892 United States Supreme Court decision. Whereas *Arnold* and *Martin* had each focused on the crown's power to alienate land under navigable water, *Illinois Central* presented the question whether a state could do so. In 1869, the Illinois legislature granted to the Illinois Central Railroad more than one thousand acres of submerged lands extending out one mile under Lake Michigan from Chicago's waterfront.[36] In 1873, however, the legislature repealed the grant.[37] Writing for a 4-3 majority, Justice Field held that Illinois, like the crown, had an obligation to hold land under navigable water in trust for the people, and thus, that the 1869 grant was voidable without compensation.[38] Justice Field did, however, admit exceptions to this trust responsibility, suggesting that grants of parcels "for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining" were not violative of the state's trust responsibility.[39]

---

29. *Id.* at 66, 77.
30. *Id.* at 77.
31. *Id.* at 78. Specifically, Judge Kirkpatrick commented that:
> The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

Id.
32. 41 U.S. (16 Pet.) 367 (1842).
33. *Id.* at 407-08.
34. *Id.* at 410-11.
35. 146 U.S. 387 (1892).
36. *Id.* at 433, 439, 454.
37. *Id.* at 449.
38. *Id.* at 454-55.
39. *Id.* at 452.

In sum, the public trust doctrine's proponents generally view the evolution of the doctrine as a logical march from Roman law, through English common law, to *Arnold* and *Martin*, and finally to *Illinois Central*. Indeed, these days, most courts and commentators simply begin with *Illinois Central* and then address whether the doctrine should be expanded beyond land under navigable water to the water flowing over that land and to other associated public amenities.[40]

Others of us believe the history tells quite a different story. To begin with, detailed research into Roman law shows that the sovereign made a variety of private grants of land under navigable water and perceived no restraints on its power to do so.[41] The same was true in England. British barrister Stuart Moore's exhaustively researched 1888 treatise entitled *A History of the Foreshore* indicates that the crown actually granted away most of England's foreshore and that private fisheries were the rule rather than the exception.[42] During the reign of Queen Elizabeth, however, one of her courtiers, a lawyer named Thomas Digges, developed an argument for crown ownership of the foreshore. That argument, however, had nothing to do with fulfilling a public trust and everything to do with augmenting the purse of the Exchequer. Digges published a tract claiming that the foreshore was part of the royal prerogative, and thus, that no man could hold title to any part of the foreshore absent a clear and specific grant by the crown.[43] Even though Digges's theory reasserted crown ownership over previously granted lands, it was different than the modern public trust doctrine. Digges never argued that the crown was bound to hold such lands. Indeed, his theory expressly provided that the crown could grant such lands as long as it did so clearly and explicitly.[44] Digges hoped that by establishing prima facie crown ownership, the crown would be able to

---

40. *See* 4 WATERS AND WATER RIGHTS, *supra* note 1, § 30.02(b)(1) n.140 (listing the cases citing to *Illinois Central* as the seminal public trust decision); Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 719-20 & nn.38-40 (1996) (noting that as of Sept. 25, 1996, 218 state court cases had cited *Illinois Central*). For a discussion of the expanding reach of the public trust doctrine, see Lazarus, *supra* note 5, at 649-50 and Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 116-21 (1986).

41. *See* Deveney, *supra* note 22, at 32-33; *see also id.* at 29 ("In actuality, *the sea and the seashore were 'common to all' only insofar as they were not yet appropriated to the use of anyone or allocated by the state.*" (emphasis in original)).

42. *See* STUART A. MOORE, A HISTORY OF THE FORESHORE 24, 27, 28, 33, 108, 169 (3d ed. 1888) (discussing crown grants of the foreshore); *id.* at 908, 908-15 (listing a vast number of private fisheries and concluding that "[t]he true fact is, as can be shewn from the records, that all, or almost all, tidal rivers and estuaries were in ancient times, and where the right still remains valuable still are, covered by several fisheries in the hands of the subject"); Rasband, *supra* note 19, at 9-10 (discussing this history, as related by Moore).

43. *See* MOORE, *supra* note 42, at 185-211 (reprinting Digges's tract); *see also id.* at 180-84, 212-24 (discussing Digges's tract). *See generally* Rasband, *supra* note 19, at 12 (discussing the development of Digges's prima facie theory).

44. *See* Rasband, *supra* note 19, at 12 n.33 (setting forth the relevant portions of Digges's tract).

challenge previous grants as insufficiently clear, recover portions of the foreshore, and then regrant them at a handsome profit.[45]

This "prima facie theory" of crown ownership was given the cold shoulder in England for over one hundred years. In 1786, however, it took root in England's common law when Lord Chief Justice Hale incorporated it uncritically into his famous treatise *De Jure Maris et Brachiorum Ejusdem* (Concerning the Law of the Sea and Its Arms).[46] The theory was then incorporated into America's early common law when influential commentators and courts relied on Hale's treatise.[47] Crown or (post-Revolution) state ownership was presumed but a clear and explicit grant of the foreshore or a fishery could rebut that presumption.[48]

This background shows just how inventive and aggressive Justice Kirkpatrick and Justice Taney were in *Arnold* and *Martin* when they, respectively, ruled and suggested[49] that the crown could never have granted the disputed lands because it had a duty to hold those lands in trust for the people. Their reasoning did not spring from the common law. To the contrary, it ignored the fact that the crown had actually alienated most of the foreshore. And, it ignored the prima facie theory, which held that even though crown ownership was presumed, the crown still had power to grant the foreshore as long as it did so plainly and unequivocally. Kirkpatrick's and Taney's decisions thus did not ferret out a long-extant principle of sovereign obligation to maintain navigable waters as a public common. Rather, the decisions were an inventive effort to clear New Jersey's title to its foreshore (by holding invalid the crown's pre-Revolution conveyances).[50]

---

45. *See* MOORE, *supra* note 42, at 180-84, 212-24 (discussing Digges's efforts to regain for the crown foreshore, reclaimed land, and salt marsh); *see also* MacGrady, *supra* note 22, at 559-60 (describing the manner in which title hunters, including Digges, were compensated for challenging titles on behalf of the crown).

46. *See* Rasband, *supra* note 19, at 12-14 (discussing Hale's adoption of Digges's prima facie theory).

47. *See id.* at 14-17 (discussing the acceptance of Hale's treatise, and thereby the prima facie theory, by Chancellor Kent, Joseph Angell, and a broad array of state courts).

48. *See, e.g.*, Peck v. Lockwood, 5 Day 22, 27 (Conn. 1811) ("[A] man may have an exclusive privilege of fishing in an arm of the sea; but such right is not to be presumed; it must be proved . . . ."); Brink v. Richtmyer, 14 Johns. 255, 258 (N.Y. 1817) (applying the prima facie theory to conclude that the grant at issue did not show "an intention in the government to grant any fishery"); McKenzie v. Hulet, 4 N.C. 578, 579 (1817). The court in *Hulet* noted:

> The right of taking fish in the sea . . . belongs to every one as a common of Piscary; but even this may be restrained, where an individual hath gained exclusive property. And this may be acquired by grant or prescription[;] but it being considered as a royalty, it would not pass without special and express words.

Id. (citations omitted). *See generally* Rasband, *supra* note 19, at 17 (discussing the application of the prima facie theory in early American common law).

49. *See infra* note 51 (discussing how Justice Taney's opinion did not specifically reach this issue).

50. *See* Deveney, *supra* note 22, at 55-56 ("As a policy decision to reclaim for the people the coastal area of the state which would otherwise have been *entirely* in private hands, *Arnold v. Mundy* is an impressive display of judicial dexterity; as history it is nonsense." (emphasis in original)); Michael

Inventing a trust obligation for a monarch in order to clear a new state's title is not what critics of public trust doctrine find most disturbing about the two opinions. The greater concern is that the opinions set the stage for *Illinois Central*'s application of the same trust responsibility to a democratically elected state government. This is particularly true of the opinion of Justice Kirkpatrick, which opined that *no* sovereign could "make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."[51] Equating the crown and a state legislature was flawed in two senses. First, as a historical matter, it ignored the distinction between crown and parliament. Whatever the power of the crown to convey the foreshore, it had always been clear at common law that parliament had the power to grant the foreshore.[52] And the states, of course, inherited the sovereign attributes of both crown and parliament. Second, equating the need for limiting the crown's power to divest the citizens of their common right with a need for imposing a like limitation on state legislatures ignores the basic political principle that in a democracy the citizens themselves are sovereign.[53]

B. Oyster Wars' *Contribution to the Debate on the Origins of the Public Trust Doctrine*

1. Contextualizing the Foundational Public Trust Cases.—With these competing historical narratives in place, it is possible to discuss McCay's contribution to the public trust literature.[54] That contribution is two-fold.

L. Rosen, *Public and Private Ownership Rights in Lands under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 571 n.67 (1982) (calling Kirkpatrick's conclusion a "wholly fabricated statement of law").

51. Arnold v. Mundy, 6 N.J.L. 1, 78 (1821). Taney was more careful in *Martin*. Although he liberally adopted Kirkpatrick's reasoning, he concluded that the Court need not reach the issue of the crown's power to grant land under navigable water because the particular conveyance to the Duke of York did not intend to convey private property. *See* Martin v. Waddell Lessee, 41 U.S. (16 Pet.) 367, 410-12 (1842); *see also* Rasband, *supra* note 19, at 26-27 (discussing Taney's reasoning). Moreover, Taney appeared to disagree with Kirkpatrick that the trust responsibility would apply to state legislatures:

> [W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation.

Martin, 41 U.S. (16 Pet.) at 410-11.

52. *See* Rasband, *supra* note 19, at 16 n.48, 24 n.80 (citing a variety of commentators and cases for this proposition, including later New Jersey cases).

53. *See supra* note 51 (Justice Taney's statement).

54. It is worth noting that McCay's purpose does not appear to be advocacy of a particular normative view of the public trust doctrine. On the one hand, McCay essentially agrees with the historical

First, as advertised, McCay's anthropological approach to the major court cases like *Arnold* and *Martin* does bring to light a number of facts that broaden and enhance understanding of the foundational public trust cases. For example, one of the common criticisms of *Arnold* is that the decision's author, Justice Kirkpatrick, was "an obscure and unprepared state court judge," not up to resolving the case's legal complexities.[55] This suggestion derives from Kirkpatrick's comment in *Arnold* that he had not been able to perform as much research as he would have liked.[56] But McCay shows that Kirkpatrick was neither obscure nor unprepared. He was one of the most eminent real estate lawyers of the time,[57] and he had already authored another key opinion on public rights in the fishery.[58] Another historical nugget McCay digs up is the fact that in 1824 the New Jersey assembly declined to reappoint Kirkpatrick to the state supreme court.[59] McCay speculates on whether "broader-based dissatisfaction with his ruling in *Arnold v. Mundy* . . . played a role in his dismissal."[60]

McCay's work on the historical connection between *Arnold* and *Martin* is another example of how her contextual approach provides useful insights into the origins of the public trust doctrine. McCay relates how soon after *Arnold* the Board of General Proprietors of East New Jersey, which before *Arnold* had claimed title to most of New Jersey's shorelands,[61] began to plot another legal challenge.[62] Their first move was to commission a tract arguing their case for title from the crown. Among the authors were Peter Jay, Elias Van Arsdale, and James Kent, chancellor of New York's equity courts and author of the most influential legal treatise of the nineteenth

---

approach of the doctrine's critics, briefly recapitulating the legal history from Roman law to Digges to Kirkpatrick and Taney, and calling it "a story of doctrinal invention, and reinvention, and invention again." P. 69. On the other hand, McCay argues that it is "misleading to criticize Taney and Kirkpatrick for misreading English common law. They gave the appearance of continuity with English common law in their decisions despite profound change in their interpretations partly because this is what good common law judges did." P. 76.

55. MacGrady, *supra* note 22, at 590-91. I have made that criticism myself. *See* Rasband, *supra* note 19, at 23-25.

56. *Arnold*, 6 N.J.L. at 69-70.

57. Pp. 48, 74.

58. Pp. 30-34 (discussing Kirkpatrick's opinion in *Shepard v. Leverson*, 2 N.J.L. 391 (1808)); *see also infra* notes 72-77 and accompanying text (discussing the *Shepard* case).

59. Pp. 56-57.

60. P. 57.

61. Proprietorships were one of the means by which the English crown planted and developed colonies. In the case of New Jersey, Charles II granted a vast area to his brother James who in turn granted the proprietorship over New Jersey to John, Lord Berkeley and Sir George Carteret. They, and their successors in interest, became the proprietors of New Jersey, divided into East and West Jersey. The proprietors were granted enormous governmental powers. *See* JOHN E. POMFRET, THE NEW JERSEY PROPRIETORS AND THEIR LANDS at ix (1964). They also thought they had been granted the right of the soil, until Kirkpatrick and Taney opined to the contrary. *See supra* notes 27-34, 51 and accompanying text (discussing their respective opinions in *Arnold* and *Martin*).

62. P. 60.

century.[63] McCay reveals that the advice of these scholars was to get a test case to the federal courts on diversity grounds. Thus, it was "no accident that ten years later [in *Martin*] the person who claimed title through the Proprietors and challenged the leases held by New Jersey oystermen . . . was a New Yorker."[64] McCay's uncovering of the close linkage between *Arnold* and *Martin* suggests that Taney's tracking of Kirkpatrick's reasoning in *Arnold* may have had as much to do with principles of repose as with the persuasive nature of Kirkpatrick's argument.[65]

2. Using the Oyster Industry as a Case Study for Public Trust Principles.—McCay's second contribution to the literature on the public trust doctrine's development is her focus on the oyster industry. As discussed above, the laws, customs, and practices of the industry provide an ideal case study for the public trust doctrine because oysters are part of the fishery yet are easily susceptible to private ownership. Studying the oyster fishery thus provides insight into early legal, political, and social understandings about the state's authority to privatize a resource at the very core of the public trust doctrine. McCay's exploration of New Jersey's laws and customs is a useful step in that direction, but only a step. *Oyster Wars* expends little effort exploring the laws and customs of the oyster fishery in other states and thus misses an opportunity for adding another layer of context to its review of the development of the public trust doctrine.[66]

a. The dispute between oyster tongers and oyster planters.—To understand the relationship between the laws governing the oyster industry and the public trust doctrine, it is first necessary to understand something about the oyster fishery. McCay thus appropriately begins by describing oystering in New Jersey, noting that in the nineteenth century it was not at all a parochial or unobserved industry, but a "multi-million-dollar" one.[67]

---

63. P. 60.

64. P. 61.

65. This conclusion seems particularly plausible in light of Taney's disagreement with Kirkpatrick on whether the states had the same public trust obligations as the crown. *See supra* note 57.

66. To be fair, McCay is not particularly concerned with the historical development of the trust doctrine per se, but with its implications for resource allocation. P. xxiii; *see also supra* Part III (discussing McCay's critique of the tragedy of the commons). Thus, her choice not to explore beyond New Jersey is not necessarily a failing.

67. P. 7. Without this historical perspective, one might guess that oystering was of concern to few and thus unlikely to yield significant insights into nineteenth-century natural resources policy. In fact, in the mid-nineteenth century, oystering was a significant part of the economy. Thus, an 1853 article in the New York Herald relates that over 50,000 people were employed in the oyster industry in the vicinity of New York and observes that the industry was one in which "almost every person feels an interest . . . ." *The Oyster Trade of New York*, N.Y. HERALD, Mar. 12, 1853, at 7. And the discovery of a new oyster bed in New York waters made the front page of the New York Times in 1859. *See The Great Oyster Bed*, N.Y. TIMES, Oct. 3, 1859, at 1.

Originally, most oystermen produced oysters for market just as any other fisherman: they "fished" for oysters by taking them from the large natural oyster reefs or banks that formed along the coast.[68] These oyster fishermen were often known as "tongers" because of the tongs they used to grab the oysters.[69] As the natural beds began to decline from harvest pressure and as markets expanded, other oystermen, generally known as planters, began transplanting some of the oysters they collected from the natural beds onto other areas of the bottom.[70] This transplanting practice made the oysters more marketable by allowing them to further grow and fatten; the practice also guaranteed the planter a supply for the market.[71] In theory, no particular tension arises between planters and tongers. In practice, however, disputes were common, as tongers made frequent raids of the planted beds. The resulting battles between planters and tongers, both literal and legal, are what gives *Oyster Wars* its title.

One of the earliest such oyster wars resulted in the New Jersey Supreme Court's opinion in *Shepard v. Leverson*.[72] Shepard and other tongers had taken oysters that Leverson had planted on barren ground in a river that otherwise produced numerous oysters.[73] Like other tongers of the time, Shepard justified the raid by arguing that the entire ocean was a public fishery and attempts to stake off a planted area were illegitimate. As he and other tongers saw it, no one was entitled to privatize any portion of the commons.[74] Leverson made the Lockean argument that he was entitled to exclusive rights to the oysters he had labored to plant.[75] The court had to decide whether Shepard was a pirate or merely a lucky fisherman.

Two of the three justices concluded that Leverson could indeed appropriate an area of submerged lands for private use as long as the lands

---

68. *See* PAUL DEBROCHA, ON THE OYSTER-INDUSTRIES OF THE UNITED STATES 297 (1876) (defining a natural oyster bed). For thorough explorations of the nineteenth-century oyster industry, see BROOKS, *supra* note 10; DEBROCHA, *supra*; ERNEST INGERSOLL, THE OYSTER, SCALLOP, CLAM, MUSSEL AND ABALONE INDUSTRIES (1887) [hereinafter INGERSOLL, OYSTER, SCALLOP, CLAM]; ERNEST INGERSOLL, THE HISTORY AND PRESENT CONDITION OF THE OYSTER INDUSTRY (1881); and H.F. MOORE, OYSTERS AND METHODS OF OYSTER CULTURE (1900).

69. *See* pp. 15-18, 128.

70. *See* pp. 10-11, 51.

71. *See* pp. 10-11. In addition to planting, oystermen worked to start oyster crops from scratch by "cultching." Cultching included a variety of methods designed to catch floating shellfish larvae, the most common of which was to spread out on tidelands empty oyster shells or shell fragments on which the floating oyster larvae could catch and begin to grow. *See generally* MOORE, *supra* note 68, at 296-97, 305 ("By these terms [cultch, collectors, stool] is understood any firm and clean body placed in the water for the purpose of affording attachment to the spat or young oyster. A great variety of objects bave been suggested and used for this purpose, both here and abroad.").

72. 2 N.J.L. 369 (1808).

73. *Id.* at 369-70.

74. *Id.* at 370.

75. *Id.* at 370-71; *see also* p. 31 (discussing Leverson's argument).

were barren of oysters.[76] Interestingly, Justice Kirkpatrick disagreed. He recognized that the "business of planting oysters in these waters has been carried on to great extent" and expressed the "wish" that "it could have been supported and rendered permanent," but concluded that "in a common fishery, . . . no man can appropriate to himself any particular shoal, bed, or spot, to the exclusion of others."[77] Although Kirkpatrick did not say that New Jersey could not authorize such appropriations, his strong view that the fishery must remain open to the public certainly foreshadowed his invention of the public trust doctrine in *Arnold v. Mundy*.

As it turned out, the courts did not take Kirkpatrick's view and instead adopted the approach that planters were protected as long as they had planted their oysters in a spot where oysters did not grow naturally.[78] Private property could be created out of the commons, but "only where the commons [were] barren."[79] Planters, however, could take only some comfort in the creation of this common-law principle. Constant vigilance of their submerged beds was difficult, and tongers often took planted oysters on the pretense that the oysters had been planted on a natural bed.[80]

b. State oyster leasing.—Given the general decline in the natural beds and the market advantages of planted oysters, New Jersey began to see an advantage to affording greater legal recognition to the planters' oyster beds. Thus, in 1820, it passed a law allowing exclusive rights in planted oysters.[81] This law was reflective of a general trend in the first half of the nineteenth century as a number of states passed laws protecting planted oyster beds.[82] New Jersey's statutory solution, as reflected in the

---

76. *Id.* at 373-74 (opinions of Rossell & Pennington, JJ.). Leverson had planted the oysters in a spot where they did not previously grow. To Justice Rossell, this constituted an appropriation of submerged lands barren of oysters, and thus he would have ruled for Leverson. Justice Pennington took a different view of whether the spot where Leverson had planted was sufficiently barren to warrant privatization. To Pennington, the submerged lands were not truly barren because Leverson had failed to demonstrate that oysters would never grow naturally in that location. Presumably, if Leverson could have demonstrated that the planted area would remain barren of natural oysters, Justice Pennington would have recognized his claim. *Id.* at 374-75 (opinions of Rossell & Pennington, JJ.); *see also* p. 32.

77. *Shepard*, 2 N.J.L. at 373.

78. *See* pp. 35-36.

79. P. 32.

80. *See* pp. 36-39.

81. *See* An Act for the Preservation of Clams and Oysters, §§ 9, 12, 13, 1820 N.J. Laws 162, 164-65; p. 59.

82. *See, e.g.*, An Act Concerning Fish, Oysters, and Game, ch. 569, § 7, 1851 Del. Laws 582, 583; An Act Concerning the Planting of Oysters, ch. 152, § 1, 1848 Mass. Acts 685, 685; An Act to Encourage and Protect the Planting of Oysters, ch. 142, 1849 Me. Laws 124; An Act Concerning Oysters and Terrapins and the Penalties in Regard to Them, ch. 86, § 14, 1847 Va. Acts 71, 74 (all allowing oystermen to stake off and plant oysters in certain tidelands, but forbidding them to enclose natural oyster beds).

1820 Act, essentially tracked the common law.[83] Oystermen were permitted to stake off, and plant oysters on, submerged lands as long as those lands did not contain a natural oyster bed.[84] As McCay tells it, whether as a matter of common law or statute, this was the one sacred and inviolate rule of the oyster industry: the natural beds of oysters were to remain open to the public.[85]

c. Public access to the natural beds and its implications for the public trust doctrine.—If McCay's description of the law is correct, what does that say about early conceptions of the state's public trust responsibilities? Allowing individuals to claim private rights in submerged lands may initially appear contrary to the notion that the crown or state must hold land under navigable water in trust for the people. In fact, however, it fits quite well within *Illinois Central*'s exception for grants that promote the public's interest in navigation, commerce, or fishing, or that do not substantially impair the public's interest in the lands and waters remaining.[86] Allowing oyster planting on barren ground does not interfere with navigation,[87] and it actually promotes commerce and the fishery. Thus, leasing private planting grounds would not be a violation of public trust principles as long as McCay is correct that the state allowed only barren lands, and not natural beds, to be privatized.

Of course, to say that New Jersey did not violate public trust principles by leasing barren grounds for planting is not the same as saying that New Jersey was abiding by the public trust doctrine. Although one could argue that New Jersey left open its natural beds because it believed it was bound to do so by the public trust doctrine, that is only one potential explanation for the state's refusal to grant private rights in natural oyster beds. Another possibility, and a much less speculative one, is that New Jersey's legislature, as the democratically elected representative of the people, believed it could do with the oysters whatever it thought best for the public, and that it simply decided the beds should remain open.

---

83. *See* pp. 59-60; *see also* An Act for the Protection of Persons Who Have Planted Oysters in the Navigable Waters of this State, § 1, 1821 N.J. Laws 20, 20-21 (extending the geographic scope of protection).

84. *See* pp. 59-60; *see also supra* note 82 (citing exemplary statutes).

85. *See* pp. 6, 32, 38.

86. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453, 455-56 (1892); *see also supra* text accompanying note 39 (discussing these exceptions to the general prohibition on state grants of trust resources).

87. In theory, the stakes used to mark the planting beds could disrupt navigation. But most states allowed or required the beds to be marked in another fashion when the stakes did threaten to interfere with navigation. *See, e.g.*, An Act for the Preservation of Oysters and Other Shell Fish within this State, § 10, 1844 R.I. Pub. Laws 88, 92 (requiring the marking of planted oyster beds with "stakes or buoys").

McCay identifies these possibilities as two of the "major meanings" of the public trust doctrine that have long been in competition with one another: "The first emphasizes common use rights, the second supports the notion of state ownership and a weakened sense of the inalienability of public rights."[88] This conclusion, however, too quickly imports modern public trust notions into the nineteenth century. In fact, prior to *Illinois Central* there is very little support, other than Kirkpatrick's *Arnold v. Mundy* dicta, for the idea that state legislatures were legally bound to hold land under navigable water or the fishery in trust for the public.[89]

Moreover, McCay's discussion of New Jersey's law indicates that, despite the fishery being a core trust resource, the legislature always understood that it had the power to create a private fishery. This understanding is plain because New Jersey did so on a number of occasions. McCay, for example, notes that "[c]ommercial and subsistence seine fisheries for shad and other [migratory] species were almost completely privatized" and were "[r]ecognized and supported by acts of the legislature."[90] Likewise McCay tells the story of an oyster war that precipitated the 1874 case of *Wooley v. Campbell*.[91] There, the New Jersey Supreme Court upheld a verdict against Wooley for taking naturally occurring oysters from Campbell's leased bed.[92] The court decided that even if the lease covered a portion of what had been the common fishery, the state had the power to alienate it.[93]

Another indication of the common understanding that the state was not obligated to hold the oyster fishery in trust for all the people are the instances McCay finds of state legislation granting power to local associations and townships to control the oyster fishery.[94] New Jersey was not alone in this practice; other states also granted control over shellfish beds to local towns.[95] Moreover, starting in 1864, the New Jersey legislature

---

88. P. xxxi. McCay argues that a third meaning of the doctrine arose with "the rise of public advocacy and environmental law, pioneered by Joseph Sax." P. xxxi (citations omitted). This, however, is less a third meaning and more a harking back to the first meaning. McCay's division of the public trust is an echo of Carol Rose's conclusion that the public trust

> has gravitated between two different versions of the public: one is the "public" that is constituted as a governmental authority, whose ability to manage and dispose of trust property is plenary. But the other is the public at large, which despite its unorganized state seems to have some property-like rights in the lands held in trust for it—rights that may be asserted against the public's own representatives. . . .

CAROL M. ROSE, PROPERTY AND PERSUASION 121-22 (1994).

89. *See supra* notes 41-48 and accompanying text.

90. P. 84; *see also* pp. 84-91 (discussing court rulings affirming private shad fisheries).

91. 37 N.J.L. 163 (1874).

92. *Id.* at 169; *see* pp. 106-07.

93. *Wooley*, 37 N.J.L. at 169; *see* p. 107.

94. Pp. xviii, 105-06, 198.

95. *See, e.g.*, An Act for Encouraging and Regulating Fisheries, ch. 1, § 1, 1838 Conn. Pub. Acts 269, 269; An Act in Addition to an Act, Entitled "An Act to Prevent the Destruction of Oysters, and

appointed a series of riparian commissions to survey and sell tidewater lands.[96] The bulk of the commissions' tideland grants were to riparians for economic development—filling, wharfing out, etc.—but on a number of occasions the commissions also granted away natural oyster beds.[97] McCay tells the story of how these grants of natural beds precipitated a series of violent oyster wars around the turn of the century in which the courts upheld the grantees' rights.[98] Even though in 1906 the legislature specifically ordered the riparian commission to stop granting riparian tracts in shellfish bearing grounds, it did so not to conform to a public trust mandate but in response to public outcry—a classic democratic response to resource misallocation.[99]

McCay suggests that *Wooley*, and presumably these other instances of privatization, show a "policy shift from a view of the state as a trustee or public-minded sovereign expounded by Kirkpatrick and Taney, to a very different interpretation of sovereignty, where the state legislature functions just as the Proprietors did, able to grant lands with little concern about public claims."[100] In fact, however, what *Wooley* and these other examples show is that Kirkpatrick's *Arnold* decision (and not Taney's decision in *Martin* which actually advocated state sovereignty over its submerged lands[101]) was an isolated departure from a broad-based understanding that the state was free to alienate land under navigable water and the fishery as long as it did so explicitly.

McCay's own research thus indicates that the "sacred" rule that the public should always have access to the natural beds of oysters was not as sacred as she initially suggests. Further evidence for this point comes from other states. Although McCay does not address this issue, at least two states during the nineteenth century went further than New Jersey and passed laws providing for widespread grants of private rights in natural

---

Other Shell Fish in this Commonwealth," ch. 129, § 1, 1828 Mass. Acts 209, 209-10 (both delegating authority to the inhabitants of coastal towns to grant permits to take oysters from the town's beds); An Act to Prevent the Destruction of Oysters and Other Shell Fish, Throughout This Commonwealth, ch. 76, 1795 Mass. Acts 348 ("Whereas oysters and other shell fish have long been considered the property of the towns wherein their beds are situated respectively . . . ."); An Act for the Preservation of Certain Fish, ch. 179, § 2, 1821 Me. Laws 891, 891. New Jersey and other states also exhibited an understanding that they owned their tidelands by passing laws excluding nonresidents of the state from taking any shellfish from state bedlands. *See, e.g.*, An Act for the Preservation of Certain Shell Fisheries Within This State, ch. 209, § 1, 4 Del. Laws 568, 568 (1812); An Act for the Preservation of Oysters, § 5, 1798 N.J. Laws 263, 263. Such acts were found to be constitutional under the Commerce Clause in *McCready v. Virginia*, 94 U.S. 391, 394-97 (1876).

96. *See* pp. 99-100.

97. *See* pp. 91, 98-104.

98. *See* pp. 116-46 (describing violent disputes in Delaware Bay and on the Mullica River).

99. *See* pp. 141, 145.

100. P. 106.

101. *See supra* note 51 (discussing Taney's opinion).

oyster beds.[102] This evidence of privatization of natural beds is an important point with respect to the origins of the public trust doctrine. If New Jersey and other states in the nineteenth century were granting away natural beds—a fishery at the core of the traditional public trust doctrine—it seems unlikely that the doctrine was well-recognized when Kirkpatrick, Taney, and Field wrote their foundational opinions. If the public trust doctrine were firmly embedded in the common law, such grants of private fisheries would have been routinely voided by the courts rather than merely protested by oystermen.

Although McCay may not have set out to accomplish this mission, *Oyster Wars*' review of New Jersey's shellfish industry creates even greater skepticism about the antiquity of the public trust doctrine and its status as a venerable legal principle.[103] What *Oyster Wars* shows is that in the

---

102. *See* An Act in Amendment of Chapter 97, Title XVI of the Revised Statutes, "Of Private and Several Oyster Fisheries," ch. 513, § 3, 1864 R.I. Acts & Resolves 161, 162 (allowing, again, the leasing of natural beds); An Act for the Preservation of Oysters and Other Shell Fish Within This State, § 2, 1852 R.I. Acts & Resolves 36, 37 (repealing 1844 Act); State v. Cozzens, 2 R.I. 561 (1850) (affirming Rhode Island's legislation allowing privatization of natural beds); An Act in Amendment of an Act Entitled "An Act for the Preservation of Oysters and Other Shell Fish Within This State," §§ 9-10, 1844 R.I. Pub. Laws 88, 91-92 (allowing state shellfish commissioners to "lease to such person or persons, for a term not less than five, nor more than ten years in duration, *any* piece of land covered by the public waters of this State . . . as a private or several oyster ground or oyster fishery, for the planting of oysters" but encouraging them not to lease oyster beds which, in their judgment were better left as part of the common fishery (emphasis added)); *see also* An Act to Amend an Act Entitled "An Act to Encourage the Cultivation of Oysters," § 5, 1879 Laws of Wash. T. 118, 119-20 (allowing citizens to claim exclusive rights to natural oyster beds); United States v. Washington, 873 F. Supp. 1422, 1440 (W.D. Wash. 1994) (discussing laws Washington passed in 1895 to allow the "private purchase of tidelands, even when those tidelands contained natural shellfish beds"); Sequim Bay Canning Co. v. Bugge, 94 P. 922 (Wash. 1908) (holding that the owner of the tidelands owned the clams embedded within the soil).

103. The light *Oyster Wars* sheds on the public trust doctrine's origins is not the only instance in which McCay's research may have an impact on a legal debate. Her work also has application to a case recently decided by the Ninth Circuit, the resolution of which turned in part on whether, during the first half of the nineteenth century, eastern coastal states allowed natural beds to be privatized. The issue arose in connection with the interpretation of a series of treaties negotiated in 1853 by the United States with the Indian tribes who dwelled in the Puget Sound region of what is now the State of Washington. Under the treaties, the Indians relinquished most of their territory and were moved onto reservations. The treaties, however, provided the Indians with certain off-reservation fishing rights: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, . . . : *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens . . . ." United States v. Washington, 157 F.3d 630 (9th Cir. 1998) (emphasis in original). In 1979, the Supreme Court interpreted this treaty provision to mean that the tribes were entitled to a "fair share" (up to 50%) of the salmon and steelhead runs in Washington, and not simply to an equal opportunity to fish as the State of Washington had argued. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979).

In 1989, the tribes filed litigation seeking a declaration of a similar right to take shellfish. *See* United States v. Washington, 873 F. Supp. 1422, 1427-28 (W.D. Wash. 1994), *aff'd in significant part*, 135 F.3d 618 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3437 (U.S. Dec. 22, 1998) (No. 98-1052). Because Washington had privatized a good portion of its tidelands and natural shellfish

lead up to *Illinois Central* and even in its immediate aftermath, New Jersey understood that its democratically elected legislature was free to alienate a resource at the very core of the public trust doctrine, namely, shellfish embedded in land under navigable water. Indeed, if McCay had looked beyond New Jersey, this point would have been even clearer, because some other states were even more aggressive than New Jersey in privatizing the oyster resource.[104] Why is this important? Again, because if the antiquity of the public trust doctrine is a mirage, the legitimacy of both its countermajoritarian content and its power to circumvent the Constitution's taking protections is undermined.[105]

III. The Oyster Industry and the Tragedy of the Commons

Although written as a tract against uncontrolled population growth, Garrett Hardin's *The Tragedy of the Commons* has become one of the most frequently cited articles in natural resource law scholarship.[106] Its thesis is straightforward: Because any unconsumed portion of a common resource is open to others, individuals who wish to maximize their gain have no incentive to preserve the resource. Thus, any resource—for example, a fishery, a pasture, a national park, or a watercourse—which remains open

---

beds in the late nineteenth and early twentieth centuries, the tribes' request was vigorously opposed by the property owners and shellfish farmers who owned tidelands containing shellfish beds. I represented, and continue to represent, the group of shellfish farmers who intervened as defendants in the litigation. Stated simplistically, the position of the shellfish farmers was that the tribes had no right to take shellfish from the farmers' property because their beds were staked and cultivated and the treaty language specifically prohibited Indians from taking "shellfish from any beds staked or cultivated by citizens." The tribes argued, however, that in 1853 when the treaties were negotiated no state allowed natural oyster beds to be staked or cultivated because oysters were part of the common fishery. The tribes thus asserted that the "beds staked or cultivated" treaty language only protected oyster farmers who staked or cultivated their oysters on barren tidelands.

Without belaboring a number of arguments against this interpretation, suffice it to say that it was largely accepted by both the district court and the Ninth Circuit. *See Washington*, 873 F. Supp. at 1422; *Washington*, 135 F.3d at 618. Although McCay nominally supports the tribes in her assertion that the sacred rule of the oyster fishery was that natural beds were to remain open, the on-the-ground reality she describes does not. *See supra* notes 90-99 and accompanying text.

104. *See supra* note 102 and accompanying text (noting that Rhode Island and Washington Territory passed laws providing for the widespread grants of private rights in natural oyster beds).

105. *See supra* text accompanying notes 19-23. The legitimacy of the doctrine's countermajoritarian power is diminished because if the doctrine were not around at the close of the eighteenth century, it is difficult to locate it in the federal Constitution. For additional discussion of why the public trust doctrine cannot be located in the federal Constitution, see Rasband, *supra* note 1, at 337-38 n.26, 365-66 and Rasband, *supra* note 19, at 65, 74 n.271. If the doctrine is of recent vintage, it is also more difficult for a court invalidating a grant of trust resources to suggest that the granting legislature was aware of the limits on its granting power. Moreover, from the grantee's perspective, if she had no notice of a putative public trust easement, revocation of the grant is more likely an unconstitutional taking.

106. My review of the limited Westlaw database titled "Journals and Law Reviews Combined" found 278 articles citing Hardin's *The Tragedy of the Commons*. The more limited Lexis "LAWREV; ALLREV" database found 217 citations.

to the entire public will eventually be overexploited.[107] Unfortunately, whether it is the depletion of ocean fisheries,[108] the overgrazing of western rangelands,[109] the overcrowding of Yosemite National Park,[110] or myriad other such situations, experience with natural resources has borne out Hardin's theory rather remorselessly.

Despite this history, McCay suggests that the tragedy of the commons theory can be "misleading if not harmful," and that this conclusion is exhibited by the oyster industry.[111] The history of the nineteenth-century oyster fishery, however, is replete with examples of open access leading to the depletion and destruction of natural oyster beds.[112] McCay herself discusses several such examples in New Jersey.[113] Indeed, in 1891, William Brooks, who was one of the leading experts on the oyster industry in the latter half of the nineteenth century wrote:

> I know of many destroyed oyster fisheries, and I know of a few that have been rebuilt, and I find one cause common to all failures and as common to all successes. In the first instance, the fishery has been common property, its preservation everybody's business—that is nobody's—and consequently it has not been preserved.[114]

It is also no coincidence that so many of the laws passed with respect to the

---

107. *See* Hardin, *supra* note 15, at 1244. The tragedy of the commons, of course, can take a significant period of time to occur because demand may be minimal. Eventually, however, when the demand for a particular resource becomes great enough, open access to that resource will result in its complete consumption. *See id.*

108. *See generally* Ronald J. Rychlak, *Ocean Aquaculture*, 8 FORDHAM ENVTL. L.J. 497, 497-500 (1997) (arguing that "[a]lmost everyone now agrees that depletion of the world's fisheries is one of the most pressing environmental issues of our time").

109. *See generally* George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 3-40 (1982) (discussing the history of managing the western range as a commons).

110. *See* John Ritter, *Visitors Crowd Out Yosemite Sights*, DET. NEWS, Aug. 16, 1998, at A2 (noting plans to alleviate the burdens placed on Yosemite's infrastructure by vehicular traffic); Joby Warrick, *Strict Limits on Cars Set for 3 National Parks*, WASH. POST, Nov. 26, 1997, at A14 (discussing the implementation of rail and bus systems to ease traffic jams at Yosemite, Grand Canyon, and Zion national parks).

111. P. 189.

112. *See* INGERSOLL, OYSTER, SCALLOP, CLAM, *supra* note 68, at 512-20 (discussing examples of declines in the oyster resource in all of the eastern coastal states); *id.* at 514 ("[O]ysters growing naturally along the upper coast of Massachusetts were all valuable to the early settlers, who quickly exhausted them, not only through use as food, but by digging up the shells to be burned into lime."); *id.* at 516 (noting that certain oysters in Long Island Sound "are no longer . . . manifestly through over-raking, in defiance of law").

113. *See, e.g.*, p. 124; pp. 131-32 (both describing a rush of oystermen who completely depleted a newly opened oyster bed within a couple of weeks); p. 16 (noting the general decline in the oyster fishery due to over-fishing).

114. BROOKS, *supra* note 10, at 166-67; *see also id.* at 164-65 (describing the decline of the oyster industry in Maryland's Chesapeake Bay because "demand has outgrown the natural supply"); *id.* at 173 ("Everyone knows that our beds have deteriorated because they have been excessively fished . . . .").

oyster fishery were titled acts "for the preservation" of oysters.[115] Many of the laws were passed in direct response to overexploitation. Indeed, McCay discusses several examples: laws limiting the open season for taking oysters,[116] laws requiring oystermen to cull from their catch small seed oysters and to return them to the oyster bed,[117] and Luddite laws limiting harvesters to rakes and tongs and prohibiting more efficient dredges.[118]

A. McCay's Criticism of the Tragedy of the Commons As Incomplete

If Hardin's tragedy of the commons thesis so clearly fits the history of the oyster industry, why does McCay insist that Hardin's theory is "misleading"? Although I have some trepidation about neatly disentangling McCay's argument,[119] she appears to advance two reasons, neither of which justifies the "misleading" label. First, McCay seems to argue that the tragedy of the commons thesis is misleading because it is incomplete. It fails to consider a variety of other explanations for diminishment of natural resources.[120] McCay thus asserts that "[o]ne of the goals" of *Oyster Wars* "is to raise questions about things we take for granted, like the idea that open access is the cause of overexploitation."[121] But Hardin's theory is not that open access is *the cause* of overexploitation. The idea of the tragedy of the commons is that open access *will cause*

---

115. *See, e.g.*, An Act for the Preservation of Clams and Oysters, 1820 N.J. Laws 162; An Act to Prevent the Destruction of Rockfish and Oysters, ch. 620, 8 Pa. Laws 10 (1771); An Act for the Preservation of Oysters Within This State, 1822 R.I. Pub. Laws 508.

116. Pp. 8-9, 121; *see, e.g.*, An Act for the Preservation of Clams and Oysters, § 1, 1820 N.J. Laws 162, 162-63.

117. P. 121, 121-25 (discussing New Jersey's cull laws that required "tongers or dredgers to cull their catch while on the natural beds, returning undersized and dead oysters, empty shells, and other 'refuse' back to the grounds to provide cultch [a stable platform to which oyster larvae can attach and grow]"); *see also* An Act Supplementary to the Act Entitled "An Act for the Preservation of Certain Shell Fisheries Within This State," ch. 343, § 2, 8 Del. Laws 383, 383-84 (1835) (Delaware cull law); An Act in Amendment of Chapter 96 of Title XVI of the Revised Statutes, "Of Free and Common Oyster Fisheries," ch. 633, § 3, 1866 R.I. Pub. Laws 245, 246 (Rhode Island cull law).

118. Pp. 17-19; *see, e.g.*, An Act for the Preservation of Clams and Oysters, chs. 162-63, § 2, 1820 N.J. Laws 162, 163 (prohibiting raking with a dredge); An Act for the Preservation of Oysters Within This State, § 1, 1822 R.I. Pub. Laws 508, 508 (prohibiting the use of any instrument that has the tendency to destroy the oyster beds); An Act to Reduce into One the Acts Now in Foree, to Prevent the Destruction of Oysters Within this Commonwealth, ch. 255, § 2, 1819 Va. Acts 314, 314 (prohibiting the use of any instrument other than a tong to drag, scoop, or rake oysters).

119. One of the frustrations of *Oyster Wars* is that McCay's critique of the tragedy of the commons must be picked up in insights scattered throughout its approximately 230 pages. She never attempts a point-by-point criticism of Hardin or an explication of her own theory.

120. *See* p. 153 ("Constructs such as 'the public' or 'open access' or the bio-economic and other models represented by the phrase 'tragedy of the commons' may be too broad or misleading to be useful in understanding and explaining particular situations and events.").

121. P. 198.

overexploitation if nothing is done to limit that access.[122] In other words, open access is *a potential cause* of resource abuse. Hardin never claimed that overexploitation is impossible, or even improbable, where access is closed or limited.

Nevertheless, McCay is critical of the tragedy of the commons because, she says, it fails to account for other causes of resource decline. McCay argues that much of the decline in the New Jersey oyster resource was caused not by overharvest but by industrial development and pollution.[123] McCay also writes that "[i]n the history I have sketched, the issue was less open access to the shellfisheries than it was mismanagement by local and state governments—the tragedy of a mismanaged commons."[124] If only New Jersey had managed the oyster resource better—through more effective leasing programs or culling rules, through better regulation of pollution, or perhaps through devolution of control of the oyster resource to local communities—the resource decline could have been averted.

Perhaps McCay's point is contextual: one cannot understand the decline in New Jersey's oyster fishery by simply saying that open access to oysters led to overexploitation of the resource. The real explanation for the decline is more nuanced. To the extent McCay is suggesting that policymakers be more specific when discussing the problem of resource decline rather than misleadingly casting those problems at the doorstep of the tragedy of the commons,[125] her point is hard to dispute, but it posits a misapplication of Hardin's theory. Hardin never claimed that the tragedy of the commons explained all resource decline.

McCay thus meets her goal of debunking the notion that "open access is the cause of overexploitation,"[126] but only because it is a straw man. The fact that government management of the oyster commons either contributed to, or was unable to avert, the decline of the oyster fishery does not mean that it is "misleading" to say that in the absence of any management

---

122. *See* Hardin, *supra* note 15, at 1247-48.

123. *See* p. 155 (noting that Northern New Jersey's oyster industry declined primarily because "this was the region of heaviest shipping, industrialization, and population growth in the nation"). Pollution, of course, is really just a different use of the oyster commons. Open access to the sea as a receptacle of industrial waste simply results in overexploitation of the oyster resource by a different means.

124. P. 189.

125. McCay makes this point a little more directly in a prior article:

> We should at least try to be more specific when talking about environmental problems. Are they tragedies of the commons, or of ineffective or incomplete communal management? Or tragedies of open-access and laissez-faire management? Are they tragedies of government mismanagement . . . and inadequate science . . . ? Or tragedies of the noncommons—of privatization?

Bonnie J. McCay, *Common and Private Concerns*, 4 ADVANCES IN HUM. ECOLOGY 89, 111 (1995).

126. P. 198.

the decline was inevitable. In fact, policymakers would be misled if they did not understand that the success or failure of a particular management regime matters precisely because of the underlying theoretical truth that uncontrolled, open access will lead to overexploitation of a resource. Hardin's theory easily escapes McCay's first criticism unscathed.

B. *McCay's Criticism of the Tragedy of the Commons as Misleading Narrative*

McCay's second criticism of Hardin's tragedy of the commons thesis as "misleading" takes a different tack. Picking up on Carol Rose's work, McCay argues that the tragedy of the commons "is less a formal model than a powerful story," a "vivid narrative" designed to persuade others about the nature of property relations.[127] Building on this notion, McCay drops her inadequate critique of Hardin's *model* as misleading in favor of an argument that the tragedy of the commons *narrative* is misleading.

McCay argues that the tragedy of the commons narrative is misleading because it "tends to ignore and in practice often thereby weakens communal systems of using and managing common resources."[128] The narrative, she asserts, creates "astounding" "blinders"[129] that "can draw attention from potentials [sic] for effective management of the commons by the commoners."[130] McCay's concern, however, is not just that the tragedy of the commons narrative points away from communal management, but also that the narrative "supports policies that privatize some or all aspects of the use of natural resources."[131] She suggests that "[t]he open-access explanation of problems of the commons,"[132] leads inexorably to familiar privatization solutions like "proposed sales of public lands, the creation of tradable permits for emission of pollutants, and carving up fisheries and forestry quotas into individual, transferable units."[133] This conclusion is at odds with Hardin, who specifically

---

127. P. xxiii. Carol Rose has long talked about property law as a form of storytelling. *See generally* ROSE, *supra* note 88; Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990); Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) [hereinafter Rose, *The Comedy of the Commons*].

128. P. xxiv. McCay has made this point in her other writing. *See* McCay, *supra* note 125, at 90 (arguing that tragedy of the commons models have "undermined or destroyed the option of communal management of common property and generated tragedies of both the commons and the commoners").

129. P. 189.

130. P. 197.

131. P. x; *see also* pp. xxvi-vii. In another article, McCay argued that the tragedy of the commons idea tends to emphasize either a privatization solution or strong, centralized government control of the resource. *See* McCay, *supra* note 125, at 90.

132. P. x.

133. P. x.

suggested government regulation as a potential remedy to the tragedy of the commons.[134] Moreover, McCay never offers a clear explanation for why or how the tragedy of the commons narrative necessarily leads to such privatization solutions.

McCay's proposed alternatives do, however, provide some insight into her thinking. She suggests that a more appropriate narrative than the tragedy of the commons would be a "tragedy of the commoners"[135] or a "tragedy of a mismanaged commons."[136] Although the reader is generally left to guess why these alternative narratives would be less likely to lead to a privatization solution, McCay seems to be driving at the same point Carol Rose made when she sought to change the narrative from the *tragedy* of the commons to the *comedy* of the commons.[137] McCay appears concerned that, by thinking in terms of the commons as a tragic situation, we are more inclined to adopt the most anticommons solution, namely privatization. If this is McCay's reasoning, it is not without merit, although it is still a long way from showing that Hardin's underlying theory is "misleading."[138]

Undoubtedly, the language we use to describe natural resource dilemmas has the potential to influence the solutions we propose. But McCay goes too far if she means to suggest that policymakers have adopted privatization solutions simply because they are held in the grip of the mesmerizing metaphor of the tragedy of the commons. Ultimately, it is

---

134. *See* Hardin, *supra* note 15, at 1245. For a thought-provoking essay on the different management strategies for common resources, see Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1 (identifying four management paradigms that she calls "Do-Nothing," "Keepout," "Rightway," and "Property").

135. P. 195.

136. P. 189.

137. Rose contended that the commons need not be perceived as tragic in all contexts but could profitably be viewed as

> comedic, in the classical sense of a story with a happy outcome. And customary doctrines suggest that commerce might be thought a "comedy of the commons" not only because it may infinitely expand our wealth, but also, at least in part, because it has been thought to enhance the sociability of the members of an otherwise atomized society.

Rose, *The Comedy of the Commons*, *supra* note 127, at 723. Rose's praise of the commons as sometimes comedic lends support to the view of so-called neocommunitarians who have argued in favor of common property regimes. *See infra* notes 141-42 and accompanying text (discussing the neocommunitarian position). As discussed below, McCay considers herself a member of that group. P. xxiv.

138. Harking back to her first criticism of the tragedy of the commons thesis as misleading, McCay appears to assert that her alternative narratives would not only lead away from privatization but would also be more accurate descriptions of New Jersey's oyster fishery. The "tragedy of a mismanaged commons" would better describe the history of New Jersey's oyster fishery that suffered a decline not simply because of overharvest but because of failures in local and state management of the resource. And the "tragedy of the commoners" would better reflect that, when the oyster commons was overexploited, those who suffered most were not the planters but the common oystermen who relied on the natural beds.

theory and not slogan that is the primary driver of natural resource policy. And without attempting a thorough explanation in this review, it is certainly true that a variety of legitimate policy concerns underlie the various privatization strategies for managing the commons.[139]

Again, McCay's concern is not just that the tragedy of the commons narrative points toward privatization, but that it points away from communal ownership solutions to resource decline.[140] Her concerns echo those of other "neocommunitarians,"[141] whose views are encapsulated by Alison Rieser:

> Their reading of the Hardin metaphor is that the true commons were not tragic at all. The tragedy only came about when forces of the market economy destroyed the communal property regime and its system of self-governance. These commentators argue for a "return" to communal ownership rather than the more radical development of private individual ownership . . . .[142]

To the extent McCay advances this neocommunitarian critique—that the market, not open-access to the commons, causes overexploitation—she directly challenges Hardin's theory. Yet, to her credit, McCay is not willing to go that far. She recognizes that whole-hearted acceptance of this neocommunitarian critique would amount to "romancing the commons" because the "long history of open-access fishing" in New Jersey and elsewhere shows that communal property regimes and local systems of self-governance were not able to halt the decline of the fishery.[143] McCay's critique of Hardin's thesis as misleading is certainly weakened by this admission.[144] But even if McCay were correct that open access did not

---

139. For examples of arguments pointing out the benefits of privatizing common resources, see ELMER A. KEEN, OWNERSHIP AND PRODUCTIVITY OF MARINE FISHERY RESOURCES 1 (1988); Richard J. Agnello & Lawrence P. Donnelley, *Property Rights and Efficiency in the Oyster Industry*, 18 J.L. & ECON. 521 (1975); James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241 (1994); and Elzbieta M. Zechenter, *The Socio-economic Transformation of Poland: Privatization and the Future of Environmental Protection*, 6 GEO. INT'L ENVTL. L. REV. 99 (1993).

140. McCay points to several communal arrangements that occurred in New Jersey as potential approaches to management of common pool resources. Pp. 197-98. One such arrangement was the state laws that gave local towns and committees control of their oyster fishery. *See supra* notes 94-95 (citing McCay's discussion of such laws in New Jersey and statutes from other states).

141. P. xxiv (describing herself as being among a group of "neocommunitarian" scholars).

142. Alison Rieser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 ECOLOGY L.Q. 813, 816 (1997); *see also* Susan J.B. Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49, 50 (1985) (arguing that the decline of the commons in medieval and post-medieval England was caused not by unlimited access, but rather by the Industrial Revolution, agrarian reform, and improvements in agricultural practices). Carol Rose's view of the commons as comedic also partakes of this neocommunitarian viewpoint. *See supra* note 137 (discussing Rose's thesis).

143. P. xxiv.

144. If it is true that McCay's admission of the danger of romancing the commons weakens her critique, it is also true that the admission strengthens the integrity of her project. If McCay's objective

result in overexploitation because of communal arrangements, it does not deny the validity of Hardin's theory. Such communal arrangements only show that communities themselves recognized the truth undergirding the tragedy of the commons narrative and took steps to order and limit exploitation of the commons.[145]

IV. Conclusion

To the reader of more traditional law review literature, *Oyster Wars* may prove a bit frustrating. McCay's anthropological approach eschews a linear argument that drives toward a well-defined normative position on the public trust doctrine or the tragedy of the commons in favor of a pastiche of events, anecdotes, and insights on both issues. Yet it is precisely McCay's contextual approach that gives *Oyster Wars* its value. By thoroughly exploring the laws, customs, and events of New Jersey's oyster industry, *Oyster Wars*, though perhaps not intentionally, illuminates the dubious origins of the public trust doctrine. And even though McCay does not succeed in showing the tragedy of the commons to be misleading, her exploration of the oyster industry illuminates a range of possible reasons for resource decline and a range of possible management solutions for policymakers to consider as they struggle to address the tragedy of the commons.

---

is to "raise questions about things we take for granted," p. 198, and to encourage policymakers to consider a range of possible reasons for resource decline and a range of possible management solutions, such admissions are much more likely to be persuasive than bold criticisms of the tragedy of the commons as misleading.

145. A neocommunitarian might argue that certain communal arrangements do indeed counter Hardin's thesis by avoiding overexploitation of the commons without the need for coereion. Coercion (whether by government enforcement of private property rights or of management regulations) was, of course, an essential component of Hardin's remedy to the tragedy of the commons. *See* Hardin, *supra* note 15, at 1245, 1247-48. It seems, however, implausible that coercion historically played no role in maintaining so-called communal relationships. To the extent coercion did not exist, the most likely explanation is an absence of pressure on the resource.