Had I talked with you rather than doing my own drafting on that particular legislation, it might more appropriately reflect the success that you have had with this particular piece of legislation. In any event, I am privileged to welcome you on behalf of the committee and to receive your statement and comments.

STATEMENT OF JOSEPH L. SAX, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

Professor SAX. Thank you very much, Mr. Chairman.

Congressman Goodling, Congressman Karth, like those who preceded me, I would like to express our thanks to you for coming here to hold hearings on these bills.

Despite the impression that a casual reader of news reports may have, the struggle for the right to a decent environment has not yet been won. One indispensable step toward that goal is the enactment of legislation by the Congress guaranteeing to every person the right to come into court and claim the right to a decent environment with the same status and dignity allowed to claims of private property rights.

For this reason, bills such as those on which you are holding hearings today (H.R. 5076, H.R. 49) and the companion Senate bill introduced by Senators Hart and McGovern (S. 1032) are essential elements of every legislative program for the environment. I know that the many thousands of people who worked for and achieved the enactment of similar legislation in Michigan are grateful to the members of your committee and to others in the Congress who are supporting the enactment of such a law on the Federal level.

Because you have come to Michigan to hold these hearings, I would like to refer to some Michigan examples of Federal problems to suggest the need for an enlarged right of citizens to litigate environmental cases in the courts.

As you know, one matter that has been of considerable concern to citizen groups has been the management of the national forests by the U.S. Forest Service. Although Congress has expressed its concern about environmental protection of the forests in the Multiple Use-Sustained Yield Act, and more recently in the Wilderness Act, there has been increasing evidence that the Forest Service is overcommitted to the use of the forests for commercial timber harvesting and for intensive recreation uses. In a recent case involving the Tongass National Forest in Alaska, for example, it was revealed that of the commercially harvestable timber in the forest only six-tenths of 1 percent of the forest was reserved from commercial lumbering, and 99.6 percent of that land was available for timber harvesting. I might add, in connection with the frequently enunciated arguments about timber shortages for housing in the United States, that the lumber in that case was to be sold for export to Japan. Just a year ago, a task force of the Forest Service itself issued a report criticizing timber practices and expressing concern about the negative impact of certain intensive recreational facilities on the proper balance of recreational opportunities in the national forests.

The point is that Forest Service practices could plainly benefit from added scrutiny, and some of that scrutiny must come in the form of detailed examination of practices in particular cases. The enunciation

of broad policies by the Congress, while essential, is only the beginning of the task. Citizen-initiated inquiries in the courtroom are a vital supplement to assure compliance with the broad mandates of the Congress.

What now happens when a citizen comes to court in such circumstances? A recent decision in a Michigan Federal court exemplifies the problem. In a case entitled *Gandt v. Hardin*, in the Federal District Court for the Western District of Michigan, citizen plaintiffs challenged a Forest Service recreation management plan for the Sylvania Tract of the Ottawa National Forest.

Whether the plaintiffs should have won the case I do not know. The opinion indicates that the case was a weak one. The importance of the decision as a legal matter, however, lies in the narrowness with which the judge viewed his function under the existing Federal law.

For the plaintiffs to have won, he said:

> It must appear that the action of the agency was in effect malicious and illegal . . . The burden of proof in connection with an action such as this is completely upon the plaintiffs. They can only prevail if they can establish by clear and convincing proof that the action of the defendants is arbitrary and capricious * * *

The judge went on to note that the Forest Service had—

> sought the advice and counsel of many people—

and he concluded that the plaintiffs had not proven a—

> failure on the part of the defendants to consider all of the factors.

Of course, it will be a rare case indeed where one is able to prove that a Federal agency's action has been "malicious" or "capricious"; and it hardly bodes well for environmental quality if this is what one must prove to challenge successfully a governmental program.

Notably, this is not the test for other areas of legal rights. Imagine the situation one would be in if he had to prove that his contract rights were breached maliciously in order to prevail. Or if a person could not recover compensation for a governmental taking of his property, or for injury to his person in an accident, unless he could demonstrate that the defendant's action was capricious.

Nor would it satisfy one who was seeking to assert his rights in a commercial transaction, or a property settlement, if the other party simply demonstrated that he had "considered" the claim of the plaintiff and had consulted many people—but was unwilling to meet the plaintiff on the merits of his claim.

It is in this respect that environmental rights must still be viewed, under Federal law, as second-class rights, inferior even to the most rudimentary rights granted by the law of contracts, property or commercial dealings. And it is to redress this injustice that legislation such as that now before you should be enacted.

To amplify the point I have been making, let me turn to another Michigan example where the merits of the controversy are much less in doubt—the case of hard pesticides.

In the autumn of 1967, the Environmental Defense Fund (EDF) initiated cases in both State and Federal courts in Michigan to enjoin certain uses of DDT and dieldrin. These were pioneering courtroom efforts, taken at a time when public consciousness was still at a low level about the hazards of pesticides. The legal basis for such suits was shaky. In the State court EDF's suit was dismissed. And while a com-

promise was reached with the defendants in the Federal court case, the judge intimated quite clearly that if he had been compelled to rule on the legal questions before him, he would have felt compelled to dismiss that case too.

While these suits were in some practical senses successful, having increased public consciousness about the pesticide problem, and leading to the withdrawal of a recommendation by the extension service of Michigan State University that DDT be used for the control of Dutch elm disease, the difficulty in pursuing the pesticide issue in the Federal courts has delayed resolution of this highly important issue. If a law like that in the bills before you had been on the books, progress in controlling unwarranted pesticide use could have been considerably expedited.

As you know, the Federal Government still refuses to suspend the use of DDT, and the matter is now before the U.S. Court of Appeals in the District of Columbia. Although that court has been fairly generous in reading its mandate under the existing law, it still is confined to protecting the public against only the narrow test of administrative "arbitrariness."

The consequence of this is an undue emphasis on court supervision of agency procedures (that is, for example, to assure that the agency has articulated its standards, held required hearings, given reasons for its decisions, et cetera). Concomitantly there has been a reluctance on the part of the court to scrutinize the evidence on the merits of the environmental issues for the purpose of assuring that agency decisions are environmentally supportable.

As a result, decisions on such important issues as DDT are unnecessarily delayed, with repeated remands by the courts to administrative agencies to improve their procedures, and repeated appeals back to the courts to obtain some decisive resolution of the controversy. The DDT case is now before the court for the third time, having twice been remanded to the agency for additional proceedings.

Such dailliance with important issues does not serve the public interest. What is needed is a plain declaration by the Congress recognizing the right of every member of the public to a decent environment, and granting authority for that right to be asserted in the courtroom on a plane with the right of privacy, the right to be free of unlawful business practices that unreasonably restrain trade, and other such conventional legal rights.

Let me now turn briefly to a discussion of the provisions for citizen initiated lawsuits that appear in some administration sponsored legislation, such as S. 1014, the water pollution bill. I limit my comments on this important question, for the issue was discussed at length in hearings on S. 1032 before the Subcommittee on Environment of the Senate Committee on April 15, 1971. It is necessary to speak of this provision (and the similar though less narrow, provision in section 304 of the clean air amendments of 1970) because you will undoubtedly be told that such sections of enacted and pending legislation make unnecessary the enactment of bills such as those which are now before you.

This is not the case at all; those provisions are in no sense an adequate substitute for bills like those before your committee. They are, frankly, high in rhetoric and low in substance. They are mere shadows

of substantial citizen suit legislation. The failures of these provisions are as follows:

1. They prohibit a citizen from challenging in court any administrative decision that is "discretionary with the administrator."

It is precisely in the area of administrative discretion, however, that the need for citizen scrutiny and intervention is the greatest. Witness the discretion of the Department of the Interior exercised at Santa Barbara on oil drilling; the discretion exercised by the same Department on the Alaska oil pipeline; the judgment of the Corps of Engineers in pressing forward with the Cross Florida Barge Canal; and that exercised by the Department of Transportation in any one of a dozen dubious highway projects, to say nothing of the SST.

It is not all clear that the proposed citizen suit provision in the water pollution bill adds anything at all to the right of judicial review available right now under Federal court interpretations of the Administration Procedure Act (APA). Indeed, because the APA even now allows one to challenge an "abuse" of discretion, the administration proposals may actually reduce the rights citizens already have.

2. Moreover, the bill appears to leave within administrative discretion the most important and troublesome issues that arise in environmental regulation—the very ones that are likely to need the greatest scrutiny by citizens if regulatory officials are not to be left wholly to their own determination of the requirements of the public interest.

For example, S. 1014 (the administration's water pollution bill) leaves it to the administrator to decide whether water quality treatment can be reduced because available control measures are not "practicable."

Similarly the administration is left to decide whether to extend the time available for compliance by polluters on the basis of a judgment as to the "practicability" of compliance.

If these determinations are viewed as within the administrator's discretion, and thus beyond citizen challenge, the "right" of citizens to bring the administrator to court is deprived of its central meaning and purpose. What is called a right of citizens to sue is reduced to a shadow. For everyone who is familiar with pollution control knows that the heart of the regulatory process is negotiation with polluters over the "practicability" of compliance. If that process is beyond challenge, the right to sue loses much of its essential meaning.

3. Ironically, the administration water pollution bill is far more generous with polluters. For it now provides—as I understand it—that when a court is asked to enforce one of the administrator's orders, the court may take into account the impracticability of compliance if that question is raised by the polluter.

Thus, while an environmentally concerned citizen could not go to court to challenge the administrator for being too lenient in determining practicability, a polluted may challenge the administrator in court for being too tough.

If this is what the bill means—and that is how I read it—it is an outrage against the public interest.

4. Finally, the administration water pollution bill is faulty in that it forbids a citizen from suing at all if the administrator is "diligently enforcing" the law. Such a provision is simply an invitation to lawyers

to tie up citizen-initiated cases for endless periods of time arguing about whether the administrator is, or is not, being "diligent."

Since provisions are unnecessary; they simply delay getting to the real issues in the case. They are an imposition on the court's energies. In the time that will be spent arguing over the meaning of diligency, three such cases could be tried on their environmental merits.

Another point that needs to be emphasized is that while the administration now enunciates the rhetoric of support for citizen-initiated environmental lawsuits, Federal attorneys still—even in the spring of 1971—seek to have suits brought by environmental organizations thrown out of court on the theory that such organizations have no standing to protect the public interest. This was the position of the Federal Government in the case of *West Virginia Highlands Conservancy* v. *Island Creek Coal Co. and the U.S. Forest Service*, decided only a month ago by the U.S. Court of Appeals for the fourth circuit. It was their position in *Sierra Club* v. *The Department of Agriculture*, decided on March 25 in the district court of Alaska. In *Environmental Defense Fund* v. *Corps of Engineers*, decided on February 19 in the district court of Arkansas, the Government not only argued that the plaintiffs had no standing, but even interposed the discredited defense of sovereign immunity. And they are fighting citizen standing still in the *Mineral King* case before the U.S. Supreme Court.

Moreover, in almost all the cases in which these defenses have been asserted, the Government has lost; so there is certainly no legal compulsion that it continue to be interposed. Yet the Federal Government's lawyers pull every legal technicality out of their bag to avoid meeting citizens on the merits of the environmental controversies.

I know one matter in which you are interested is the progress of cases under the new Michigan Environmental Protection Act, which became effective on October 1, 1970. I have appended to my prepared statement a copy of testimony I gave recently in Texas on a bill modeled after our Michigan bill. It cites the various cases which have been filed, and describes briefly their status.

I will be very glad to try to answer any particular questions you have about progress under the Michigan bill. In brief, however, let me note these few points. First, the Michigan courts have not been flooded with cases, and they have certainly not been flooded with crank cases. Indeed, about a third of the cases filed in Michigan were initiated by public environmental agencies—indicating that regulatory agencies can and should view the bill as a tool to add to their arsenal of anti-pollution weapons, rather than as a threat to them.

Second, although the cases have not gone to completion, my observation is that the courts are able to cope with the matters that have been brought before them. This is to be expected, since our bill is designed to add a common law, equity court approach to environmental regulation, and courts are fully experienced in the evolutionary approach of the common law and in the fashioning of equitable remedies.

Third, and perhaps most important, while the Michigan law is still in its developmental stages, it is already notable and gratifying that ordinary citizens now feel that they have a remedy available to them to bring judicial and public attention to bear on environmental matters about which they feel very strongly—strongly enough to go to court.

In this respect, it should never be forgotten that there is a central human element in these environmental controversies. Whether they ultimately prevail or not, citizens want, and need, an opportunity to have their day in court; rather than the back-of-the-hand, or public relations approach they have all too often received at the hand of the bureaucrats. One need only recall as a poignant example the history of the Santa Barbara oil fiasco that I cite in my book, "Defending the Environment", where the Interior Department advised—at the time oil leases were being considered—against "stirring up the natives." It was this event, you will recall, that Stewart Udall later described as "a conservation Bay of Pigs."

I now turn to some specific comments on the two bills you have before you, H.R. 49 and H.R. 5076.

H.R. 5076 most closely resembles the law that was enacted here in Michigan last year, and the Senate bill (S. 1032), and I shall comment first on it. My comments follow the order of the bill and are not set out in order of importance.

1. Page 2, line 2: It is unwise to title the bill "Class Actions." The text itself indicates that the bill is not limited to class actions. In section 302(a), p. 3, lines 9–10, it is provided that one may sue "in his own behalf" as well as "in behalf of a class of persons similarly situated". The latter category describes a class action, but the former does not.

This appears inconsistent, and it should be made clear that suits do not have to be brought as class actions. There will certainly be environmental cases which legally need not be brought as actions on behalf of a large class, and such suits should be permitted under the bill.

Moreover, a class representative bears a heavy burden of representation and cost which should not automatically be imposed on a plaintiff or plaintiffs who have a controversy with the defendant on their own behalf.

The existing rules of civil procedure make it possible to join other parties who ought to be brought into such a suit, and both those rules and this bill provides for intervention.

This bill should be left flexible enough to accommodate both class action cases and those cases which need not, and should not, be brought as class actions.

2. Page 2, lines 11–16: The phrase "harmful effects" seems to identify only the very limited kind of personal or property interests which have been the subject of traditional nuisance law. This phrase is too restrictive in its connotation.

Moreover, by describing protection for "persons and various groups of persons" the bill seems to require personal and individual harm as its sole subject. It is important to recognize that a bill of this kind is meant to implement, to a substantial extent, the "private attorney general" concept, whereby individuals and groups are allowed to bring suit to protect important public rights in which their interest is that of members of the public, rather than a purely personal interest.

So long as such individuals or groups have a genuine interest in an environmental issue, such as the protection of the national parks, plaintiff should not have to demonstrate personal injury any more than the Attorney General does when he brings a suit to protect a public resource.

This has been a matter of some concern in recent litigation like the *Mineral King* case where organizations such as the Sierra Club have been denied standing; the bill should not follow this narrow view, but should adopt the more expansive "private attorney general" position of such courts as the U.S. Court of Appeals in the Second and District of Columbia Circuits.

For this reason, I would suggest that on page 2, following the word "protect" in line 10, the words "persons and various groups of persons" be deleted and that there be substituted the words "the air, water, land, and public trust of the United States."

As to "harmful effects", I would suggest that language be added to make clear that the bill also protects against uncertainties which pose unwarranted risk of harmful effects of pollution and environmental degradation.

For these reasons, may I suggest the following substitute for the language of section 301(b), at page 2, lines 9–16: (b) The Congress further finds and declares (1) that existing provisions of Federal law are insufficient to protect the air, water, land, and public trust of the United States from the harmful effects, and the unwarranted risk of harmful effects, of pollution and environmental degradation and (2) that civil actions initiated by individual persons, groups, or classes of persons can be an effective and useful means for protection against these risks and harmful effects.

3. Page 2, lines 17–25: I do not think it wise to base the need for this statute upon the inadequacy of State remedies. While it is true that most States do not now have adequate remedies to deal with the problems with which this bill is concerned, even those States which have adopted similar legislation have a need for a Federal remedy of this kind. The reasons are several.

Even where there is a broad State law, it may not be able to reach Federal defendants or Federal projects. Second, even where a State court remedy might be able to reach part of the problem, many environmental problems cross State lines. In such circumstances, it might be desirable to have a means for consolidating controversies from several States in a single Federal court. This can best be done within a single judicial system, such as that of the Federal courts. We have some experience with this in the context of complex and multi-State cases, as in the antitrust area, and suggestions have been made by some Federal judges that a similar technique would be useful for environmental controversies.

In addition, there is no reason to take an all-or-nothing position. It is useful to have a variety of forums available to deal with serious legal problems. For example, conduct that violates the Federal Refuse Act might also constitute a nuisance under State law. Conduct that is a common law tort under State law might also violate the Federal civil rights law. I think it is clear that we benefit by making both Federal and State remedies available in such situations. And, of course, the judiciary has well developed administrative techniques available for assuring that cases are not duplicatively litigated.

Beyond this, for reasons stated above as to class actions, I would not advise basing this bill merely on the presence or absence of remedies for many people each having a small claim.

Finally, the phrase "adversely affected" in line 25 of page 2 is troublesome. This is a phrase which has become a legal term of art from its widespread traditional use. Though its interpretation in the Federal judicial system has recently undergone much liberalization, it has a history of rather restrictive use on the question of legal standing to sue. As indicated above, it would be most undesirable for a plaintiff under this bill to have to show that he is specially adversely affected by the challenged conduct, for one important purpose of the bill is to allow plaintiffs to act as private attorneys general raising issues of importance to the public as a whole.

I would recommend the deletion of section 310(c) in its entirety.

4. Page 3, line 22: Change the phrase "in appropriate cases" to "in any such action." Courts already spend too much time litigating such technical questions as to what is an "appropriate" case. The bill does not identify what "appropriate" means and time should not be wasted trying to plumb the meaning of this word. I see no harm in requiring affidavits in every case; or indeed requiring them in none of the cases. But whatever the rule, it should be uniform for all cases, so that courts can spend their precious time concerning themselves with resolution of the questions that truly divide the parties.

5. Page 4, lines 14, 18, and 19: There seems to be a typographical error here. The bill would be clarified by inserting the number "(2)" between the words "and" and "that" in line 14; deleting the number "(2)" in line 18; and inserting the number "(3)" between the words "and" and "that" in line 19.

6. Page 5, lines 15–19: I find all of subsection (f) troublesome. It seems very harsh on the defendant to say that plaintiff is entitled to judgment if the defendant violates any State or Federal law or regulation. I have no trouble with a statement that says, in effect, that defendant can be compelled to comply with any Federal *statute*. I should think that is obvious enough; and I think any person who is in the protected class ought to be able to enforce the Federal law.

I do not, however, think this proposed Federal statute ought to adopt in advance all State laws and regulations on the environment as conclusive parts of the Federal law.

Similarly, I do not think that every regulation adopted by a Federal administrator ought to be adopted as conclusive in advance by the Congress.

While one understands the temptation to believe that not many State laws, or State and Federal regulations, will be too harsh on polluters, it is, after all, a possibility. The Congress ought not blindly to impose these unknown and in some instances nonexistent standards on all defendants.

I would recommend the following: Violation of State law, State regulation, or Federal regulations shall be persuasive, but not conclusive, evidence in behalf of the plaintiffs in cases brought under this title.

So long as the bill addresses itself to this general subject, it probably ought to say something about compliance by the defendant with State law, and State and Federal regulations. Certainly compliance with such provisions ought not to be a defense. For it should not be the law that a defendant is in a better position in the State that has the weakest environmental regulation. As to Federal regulation, com-

pliance also ought not to be a defense, for—as I indicated in my testimony earlier—one major reason for enacting a bill such as this is the recognition that at times Federal administrative officials do not regulate environmental quality as vigorously or as fully as they should. The committee might consider the following:

(1) Compliance with State laws or regulations, or with Federal regulations, shall not be a defense; but (2) compliance with State laws or regulations, or with Federal regulations, shall be admissible as some evidence that there is no feasible and prudent alternative to the activity at issue.

8. Page 6, lines 23–25, page 7, lines 1–2: Allowance of attorneys' fees is always a two-edged sword. While it is certainly true that many potential plaintiffs in cases such as that contemplated by this bill will operate under severe financial disadvantages, the threat that plaintiffs might have awarded against them substantial attorney fees to compensate the defendants' lawyers could be a severe impediment to the initiation of meritorious suits.

The word "appropriate" does not, in my judgment, adequately deal with this problem. This problem is much like the bond problem dealt with in section 303(c). I would recommend the following:

(1) On page 7, lines 1–2, delete everything following "(fees);" insert then:

No award of attorney fees shall be made against either party where the court determines that the prospect of an award of attorneys fees would unreasonably hinder either the maintenance or the defense of any action brought under this title, or would tend to prevent a full and fair hearing on the activities complained of,

9. Page 7, lines 6–7: I would delete entirely lines 6 and 7 on page 7. This is a conventional sort of phrasing which leads to confusion and unnecessary legal disputation. In fact, the bill could very well impinge upon State laws which were environmentally inadequate, and the bill should be understood in that respect. I do not think it is accurate to say that the bill will have no effect on existing laws. It is an additional remedy provided, and one which will have to be interpreted in ways that conform other laws to its statement of congressional purpose. Again, I would note the coexistence of the Refuse Act and other Federal water pollution laws as an appropriate analogy.

Because I have already noted many of the central issues in my analysis of H.R. 5076, I will confine myself to a few general comments about H.R. 49.

In general, I consider H.R. 5076 a more desirable bill, for the following reasons:

1. H.R. 49 is limited to air, water, and noise problems. I see no reason to eliminate problems involving land use, particularly in a Federal bill, considering the enormous quantity of land owned and managed by the Federal Government. Also, while most hazards are transmitted through either land or water, the bill leaves ambiguous its relationship to such problems as pesticides and radiological hazards.

2. The bill contains no provision like that in section 303(a) of H.R. 5076 putting the burden of establishing alternatives, feasibility, and compatibility with the public welfare on the defendant. I view this as a serious omission.

3. The bill does not try to cope with the problem created by the presence of administrative remedies, as does section 305 of H.R. 5076. The provision in section 304 of H.R. 49 is not adequate in this respect.

4. The bill contains no provision about bonds, a provision of considerable importance in any bill that deals with preliminary injunctive relief.

5. Because the bill provides for money damages, it creates a number of questions not raised by H.R. 5076, the Senate bill—S. 1032—or the new Michigan Environmental Protection Act, P.A. 127 of 1970. Since provision for damages and injunctive relief is confined to the same section of H.R. 49, section 302, a question is raised about the differing treatment of completed harms, for which damages are appropriate, and potential hazards, where only injunctive relief is sought. If the bill deals only with completed harms, the coverage of problems for which injunctions may be sought is plainly incomplete. If damages are available only for such conventional harms as are covered by traditional public nuisance cases, the bill does not face up to some of the intensely difficult problems of trying to devise a workable damage remedy for the very pervasive and diffuse harm caused by environmental pollution.

I strongly feel that we must begin to work out the problems of damages to large classes of people in environmental cases, but the problems of managing such litigation is quite complex. I don't think all the difficulties have been taken into account in this bill.

6. The bill does not make clear whether agencies and instrumentalities of the United States may be sued, as does section 302(b) of H.R. 5076. It is clear that suit should be allowed against Federal agencies in any bill authorizing privately initiated suits to protect the environment, and H.R. 49 ought to grant that authority in no uncertain terms.

For these reasons, I would urge the committee to focus its attention on H.R. 5076.

(The information follows:)

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4. West Virginia Highlands Conservancy v. Island Creek Coal Co., No. 15,028. U.S. Court of Appeals, 4th Cir., April 6, 1971
5. Environmental Defense Fund v. Corps of Engineers, No. LR-70-C-203. U.S. District Court, E.D. Arkansas, February 19, 1971, 2 ERC 1260.
6. Michigan Environmental Protection Act of 1970, P.A. 127 of 1970, M.C.L.A. 691.1201-1207.
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11. Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).
12. Management practices on the Bitterrott National Forest, A Task Force Appraisal, May, 1969-April, 1970 (Forest Service, U.S. Department of Agriculture, 1970).

(Appendix to Testimony on H.R. 49 & H.R. 5076)

TESTIMONY OF JOSEPH L. SAX, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN, ANN ARBOR, MICHIGAN, ON HOUSE BILL 56—ENVIRONMENTAL PROTECTION ACT, MARCH 15, 1971

Mr. Chairman, members of the State Affairs Committee, I am grateful for the opportunity to appear before you tonight to discuss our effort in Michigan to bring the citizen back into the process of environmental defense, and to return the common sense of the common law to our environmental problems. We feel that we have taken a significant step in this direction by enacting a bill very similar to the Environmental Protection Act, House Bill 56, which is now before you.

I think you will see, as I discuss our experience so far, why we thing we are on the right track; and I hope that I can anticipate some of the questions you may have by referring directly, and concretely, to the controversies that have arisen under our law thus far. To the best of my knowledge, nine cases have been filed thus far under the new Michigan law.

Half of these cases have been filed by public agencies as plaintiffs; I begin with these cases because the affirmative use of the act by public regulatory agencies is a significant and gratifying fact. Too many people believed that this new act would be a source of harassment of our regulatory agencies. Instead, happily, it has been seen by some of them as an additional and useful tool.

Three cases were initiated by the Wayne County (Detroit area) Air Pollution Control Commission against the Chrysler Corporation, McLouth Steel Company, and Edward Levy Co. Each had long standing enforcement problems, according to the Commission. Chrysler installed pollution control equipment, but continued to operate when the equipment broke down; McLouth has been uncooperative in agreeing to a schedule for enforcement of control equipment; and the Levy Company created uncontrolled dust problem by open storage of slag.

The Commission decided to initiate these cases because its traditional enforcement machinery, a criminal misdemeanor charge was limited to a fine of $100, and the possibility—which was not practically available—of a 90 day jail sentence.

According to the Commission's attorney, the new law is "a significant additional tool for us; in effect it presses industries to talk to us under a much greater sense of urgency than had previously been the case under our very limited misdemeanor jurisdiction." He also says, "fears of agencies like ours being swamped by suits as defendants, or with unwarranted complaints by citizens, have not materialized. We are finding industries have a much more serious frame of mind about pollution control since we have had the new act as a tool."

The Commission is now engaged in settlement negotiations with each of the companies. At this point the court has not had to pass on the defendant's replies to the complaints.

Our Michigan Attorney General has also invoked the new Act. He is using it to intervene in a proceeding before the Public Service Commission in which the gas company had asked the Commission to establish priority categories for natural gas uses. Under the company's proposal, of the seven categories of priority, air and water pollution abatement stood next to the bottom. The Attorney General asked the Commission to order the gas company "to amend and reorder its proposed categories and priorities in a manner that protects the air, water and other natural resources and the public trust therein from pollution, impairment and destruction" or order the company "to demonstrate that there is no feasible and prudent alternative to its proposed categories which are consistent with reasonable requirements of public health, safety and welfare." This proceeding was filed January 11, 1971 and is pending.

The Attorney General was a strong supporter of the new law, and of its underlying concepts. Shortly after the new act became effective, relying upon his traditional broad common law powers, he filed a public trust suit against the National Gypsum Company, which had dammed a public stream running through state land, the effect of which was alleged to be prevention of the migration of fish upstream to the detriment of fishermen. An injunction was sought to protect "the public trust (in) . . . a valuable resource of the State . . ." The suit is being settled by stipulation that the dam be removed.

The special significance of the public trust approach to environmental quality control is that it draws upon the best tradition we have in the law for the recognition of public rights; of the government's *duty* to implement those rights, as contrasted with a discretion to implement public rights if it feels so inclined; and of its duty to do so with the same vigor and scrupulousness which a conventional trustee of one's money or property brings to his fiduciary obligations.

Thus the public trust doctrine draws on a tradition which can bring meaning and direction to the present demand for the recognition of the public's rights to a decent environment; it properly recognizes that the beneficiary of the trust has a right to take the initative in seeing that the trustee properly serves his interest. And it puts the right of the public in environmental quality on a plane with the rights of private property, giving them the same high status at law which private rights have long had.

The privately initiated suits have been moving along in an equally heartening fashion. One of the first cases filed challenged a small local government which was piping inadequately treated sewage more than a mile and dumping it into a watercourse just above the plaintiff town and property owners' land. A preliminary injunction was sought—and granted by the judge—against a proposed enlargement of this facility. The judge also granted a preliminary injunction prohibiting additional businesses and dwellings from tapping into the present system and increasing the sewage load until the problem of treatment and disposal was settled. A provision was made for accommodating true hardship cases.

This case is a most instructive one for several reasons. First, it suggests the usefulness of the new law in providing a means for coping with a common and troublesome problem of a kind which has too often been put to the side when the entire power of initiative was left to public administrative agencies.

Indeed, the response of the local circuit judge in this rural county was most heartening to those who had worked for enactment of the new law. The defendants asked the judge to remand the case to the water pollution agency, urging that he was required to do so by traditional law prior to the new statute. But the judge firmly rejected this view, and held in a formal ruling that he was not required to remand where there was a need for the invocation of his equity powers to prevent a pollution problem from worsening. Moreover, he made clear his view that the state pollution agency had only begun to take an interest in the problem as a result of the new law and of the present lawsuit—where private citizens had taken the initiative.

It is also notable that once the judge recognized the fundamental purpose of the law—to permit the invocation of the common sense of the equity courts—he felt free to enter an order responsive to the genuine problem with which he was faced; the problem of residential and industrial growth outstripping the ability of the community to provide needed public services. He saw the new law as allowing him to take steps designed to bring those two matters into phase.

I say this is heartening because the judge in this case recognized—and responded—to the legislature's effort to bring back to environmental regulation the plain common sense approach of the common law; and to follow the tradition upon which we have built the law of privacy, fraud, assault and each of the great rights upon which the foundations of the common law rests. The problem is recognized in a straightforward manner and those who are adversely affected are authorized to bring their complaint to a court for investigation of the facts and an equitable resolution.

We have not needed hundred-page-long statutory mazes to protect our fundamental rights, whether in privacy or assault and battery or in the law of fraud. Nor have we taken this approach in bill of rights in our Constitution, or in the basic antitrust law enacted by the Congress eighty years ago. The Sherman Antitrust law spoke in just such plain language as this bill presents to you, and it too opened the right of action to the private citizen, rather than forcing him to rely upon layer after layer of bureaucratic middlemen.

This bill does not attempt to codify in advance the precise details of every matter which may be brought to a court's attention, any more than the law of privacy or antitrust or fraud does. It does not, because it cannot; and this, of course, is the great beauty and vitality of the common law system: That it provides an openness, flexibility and receptivity to cope with novel problems as they arise. Particularly is this essential in a new and rapidly developing field such as environmental law.

In this regard, let me call to your attention the following notable commentary made by a leading air pollution expert several years ago:

"Air pollution control measures might better be those which are more general rather than more specific. In the move from control based on law against nuisance to statutory regulation of specific pollutants we may have moved to control measures inappropriate to the problem and the scientific evidence. * * * Determining feasibility and technological capability, although difficult, is vastly easier than determining the level in the atmosphere at which a pollutant may be safe or unsafe * * * . Those requirements are met, I believe, by the control of emissions to the greatest extent feasible, employing the maximum technological capability. (Eric Cassell. 'The Health Effects of Air Pollution,' 33 Law & Contemporary Problems 197, 215 [1968])."

Indeed Texas courts themselves have begun to recognize this fundamental fact about environmental regulation. During the last year, in the case of *Houston Compressed Steel v. Texas*, the Court of Civil Appeals said:

"The science of air pollution control is new and inexact, and these standards are difficult to devise, but if they are to be effective they must be broad. If they are too precise, they will provide easy escape for those who wish to circumvent the law."

We have seen the significance of this approach on the federal level during the last year when the mercury pollution issue broke into public attention, and when it was clear that prompt and effective action was required. Where did federal officials turn? Not to the elaborate and elephantine "modern" water pollution laws and regulations, but back to the old plain-speaking Refuse Act of 1899, which prohibits pollution in no uncertain terms and provides for a quick judicial remedy.

The need for flexible and workable remedies, in my judgment, is the most important single issue in environmental law today, and House bill 56 is an essential step in this direction.

Once one recognizes the appropriateness and usefulness of the common sense, common law approach, many cavils can be put in proper perspective. For example, I have often been asked whether the openness of bills such as this doesn't mean that one could sue his neighbor for dropping a cigarette butt on his lawn, or for the noise created by a lawnmower next door. This is no great legal puzzle, but a question answered by common sense, to which the old common law has long been given us a satisfactory answer.

The answer is known to every beginning law student. The law cannot formally define away the ultimate minimal case, but in practice the law does not concern itself with trifles. Thus, while in theory the slightest unpermitted touching of another person, such as a tap on the shoulder, may be a violation of the law of battery, the courts have not been troubled by this theoretical problem for hundreds of years because they apply the law with common sense. The ordinary and traditional equity powers of the court would prevent an injunction from issuing in any environmental case of such trivial proportions, and it is clear that environmentally concerned citizens do not use their limited resources to bring cases of such unimportance.

Another interesting private suit of a different kind was also begun in the early days following the law's enactment. A citizen sued the Secretary of State, the State Highway Department and the State to challenge their alleged inertia in developing a standard for coping with automobile air pollution. The purpose of the suit is to require the defendants to begin tackling this problem and to use the court's power to enjoin enlargement of road building activities as prod to get the auto exhaust problem more urgently on the state's agenda. Note that this is not a suit designed to abolish the auto or to end auto traffic until the pollution problem is solved, but to bring judicial power to bear in order to create some pressures to get steps towards alleviation of the problem under way.

Counsel for the plaintiffs, in oral arguments, brought to the court's attention a most interesting analogy which makes clear the central issue in cases such as this. After the defendant's lawyer had complained about the absence of any explicit authorization to develop the standards plaintiffs were seeking, the plaintiff noted that state officials had taken initiative under their broad general powers on many other issues that they deemed important. The question was, shouldn't they be prodded to begin considering air pollution as at least equally important, and to be encouraged out of their lethargy. As the plaintiff noted:

"The State Highway Department imposes a number of other conditions on the use of the highway, inhibits the use of vehicles of more than a prescribed num-

ber of axles, vehicles having excessive weight, vehicles incapable of maintaining proper speeds, and so forth * * *.

"It can deny highway use to an unsafe vehicle * * *. And we contend similarly * * * this court has the power to order the State Highway Department to impose standards and regulations suppressing or limiting pollution * * * under the Environmental Protection Act.

"The State restrains building permits until sewers are adequate to prevent pollution of the water. The defendant is granting licenses to pollute the same as it would be if it permitted a chemical plant to put poisonous fumes into the air."

Lamentably, the State's lawyers sought to have the case dismissed on the ground that the State could not be sued (a matter clearly settled against them by the new law) and on the surprising ground that they had no authority to set standards for auto pollution. The court denied both these motions of the defendant, and the motion for injunctive relief is under advisement.

Another privately initiated case, still pending, challenges the approach of the state water pollution agency to the use of streams and lakes for waste water assimilation. The issues in this case have not yet been fully defined, but the court has denied the defendant's motion for summary judgment. I might note that the rather restrictive view of our water pollution agency toward their powers—a view that tends to require a rather heavy burden of showing injury as a prerequisite to control over discharges—has been a controversial issue in the state for some time and is the subject of a long awaited and long delayed Attorney General's opinion. This question may well get a needed airing in the context of this suit.

Still at an early stage is a case seeking to enjoin the sale of detergents containing more than a specified amount of phosphates. The defendant has filed an answer but the case has not yet come on for hearing. This suit, as I understand it, essentially seeks relief similar to that which has been sought by ordinance and statutes in some places, including the city of Detroit where such an ordinance has been enacted but has not yet become effective.

A suit was brought under the act last fall, with a state representative as a plaintiff, to challenge the procedures by which the state was leasing oil and gas lands. The issue got considerable public attention and the state agencies with responsibility in this area have been reconsidering many of their past practices. Apparently in recognition of this, the suit was voluntarily dismissed by the plaintiff at an early stage. The last case reminds me to note that it is already clear that the mere presence of the law, and the possibility of private initiatives, has helped to prod a number of state agencies to be more vigilant.

Of course this phenomenon, which is not easily documented in a precise way, was one of the important hoped-for benefits of the new law. Everyone understood that every important environmental issue could not be litigated by private citizens, and that the potential for a citizen challenge would help to catalyze the agencies, thus providing a leverage effect. I have heard a number of reports that our agencies have indicated to recalcitrant polluters that they had better become more reasonable, or they might have to face their local neighbors in the harsh atmosphere of a courtroom.

In this regard, I call to your attention a letter I have received from an attorney in my own town of Ann Arbor:

"[Citizens] complained about this sewage plant location prior to its construction by the State in 1963–64. After the State sold it to the * * * township, they complained to the Water Resources Commission. Nothing ever came of their complaints until the new statute was passed. Now * * * the State's administrative agencies have stopped dragging their feet * * *. One of the most salutary effects of the new law, I believe, is not in what action it permits, but in what it says. Because of this, existing administrative machinery is getting tough and industry is beginning to take antpollution measures without waiting for the process server."

I have tried, in these brief comments, to give you a picture of our experience in Michigan under the new law thus far.

We have not had a flood of litigation; indeed, citizens have been quite cautious in bringing cases to the courts. Our public agencies have not been buried under a mountain of complaints; quite to the contrary, they have found the law a useful tool for their own duties. We have not had crank plaintiffs or crank lawyers asking for the impossible, but rather a number of quite carefully constructed cases seeking out the reasonable powers of the courts of equity. We have not been brought to disaster by the broadly stated, flexible terminology

of the law, but have found both its substance and its procedural structure one which our competent, but ordinary, judges of the circuit courts have been able to cope with. In short, I can say to you without hesitation that we have had a successful and encouraging first half year. And we have begun to take action on some important and long neglected environmental problems.

I hope you will see the merit of trying to adopt our experience to your own situation here in Texas. I thank you very much for your courtesy, in extending me the opportunity to make this presentation, and I stand ready to answer whatever question you may have.

APPENDIX

SUITS FILED UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT P.A. 227 OF 1970 M.C.L.A. 691.1201–691.1207

1. Wayne County Department of Health v. Edward C. Levy Company, C.A. 166224, Circuit Court, Wayne County, Michigan.
2. Wayne County Department of Health v. Chrysler Corporation, C.A. 166223, Circuit Court, Wayne County, Michigan.
3. Wayne County Department of Health v. McLough Steel Corporation, C.A. 166222, Circuit Court, Wayne County Michigan.
4. In the matter of Michigan Consolidated Gas Company, Docket No. U-3802 Public Service Commission of Michigan (intervention of Attorney General).
5. Lakeland Property Owners Association and Township of Hamburg v. Township of Northfield, C.A. 1453, Circuit Court, Livingston County, Michigan.
6. Roberts v. State of Michigan, Secretary of State and Director of State Department of Highways, C.A. 12428-C, Circuit Court, Ingham County, Michigan.
7. Marble Chain of Lakes Improvement Association v. Michigan Department of Natural Resources and Michigan Water Resources Commission, File Number 235-70, Circuit Court, Branch County, Michigan.
8. Davis v. State of Michigan, Department of Natural Resources, No. 482, Circuit Court, Otsego County, Michigan.
9. Brown v. Lever Bros. Co., C.A. 161228, Circuit Court, Wayne County, Michigan.

CASES FILED AFTER TESTIMONY WAS COMPILED

10. Intervention in case no. 2, above by Joseph C. Nosal and 327 other citizens, granted Friday, March 30, 1971.
11. Leelanau Co. Bd. of Commissioners v. State of Michigan, No. 510, Circuit Court, Leelanau County, Michigan, filed March 1, 1971 (to restrain state from giving state park land to federal government, pending determination of effect of grantor's reverter clause; and to determine whether transfer to federal government would impair state's public trust obligation).
12. West Michigan Environmental Action Council v. Betz Foundry, Inc. and Michigan Air Pollution Control Commission, No. 11,409, Circuit Court, Kent County, Michigan, filed March 12, 1971 (to require compliance with air pollution regulations and to get Commission to enforce air pollution regulations as to foundry defendant).

Professor SAX. Congressman Dingell, let me just say a few brief words about some of the things that have arisen in your conversations with earlier witnesses.

The case that was mentioned to you a few minutes ago as having been dismissed was, in fact, the case, as Mr. Carr noted near the end of his statement, that was settled by stipulation between the two parties to the satisfaction of both parties and was voluntarily withdrawn as a settled case (*Davis* v. *State*).

I would also like to say a word or two—this is the first time I have had a chance to do it in public—about the article of Mr. Thibodeau that appeared in the Congressional Record during the discussions on the floor of the Senate on the Clean Air Act Amendments.

Mr. Thibodeau is a former adviser to the Governor, a status which he obtained shortly after that article appeared in the Congressional

Record. I say that to make clear to you that the views expressed there are not the views of the Governor, who was, it should be made clear, a strong supporter of the bill as it was enacted.

I think one must say that Mr. Thibodeau was somewhat unhappy that some of his own personal views were not adopted by the legislature and here——

Mr. DINGELL. And by the Governor.

Professor SAX. And by the Governor.

Mr. DINGELL. The Governor endorsed H.B. 3055 and not long after that——

Professor SAX. One notices a certain petulance in Thibodeau's statement. He begins by describing the bill as an April fool's joke. It was introduced on the first of April in 1969 and he refers to some of its supporters as "boobus Americanus," which was naturally not appreciated.

In any event, the real issue is the question of reasonableness and unreasonableness, and I would like to call to your attention that it is clear this is not a problem as far as Federal jurisprudence is concerned.

The issue arose many years ago when the validity of the Sherman Antitrust Act was before the Supreme Court in the *Appalachian Coals* case: a statute which, as you know, speaks of contracts, combinations, and conspiracies in restraint of trade. It does not use the word "unreasonable" and the court upheld that statute as to questions of improper vagueness by saying that when important problems of this kind come before the Congress, it is sometimes necessary and, when necessary, appropriate for the Congress to speak in terms of breadth of concern similar to the expressions of breadth of concern which one finds in the Constitution. I suppose there are those who would say that the constitutional provision relating to due process of law is itself so vague as to deny due process, but I only make this comment to suggest to you that as far as the Federal courts are concerned, we are over this hurdle. I share the view of others that it would be undesirable to maintain the word "unreasonable" because it does suggest to many people that one wants to get only after conduct which is conventionally negligent conduct and surely any bill of this kind wants to get beyond that.

You have already heard the view of many people on that question.

Let me now turn to the main thing I would like to say to you, and that is to comment on the reasons why, in my judgment, legislation of this kind is so badly needed on the Federal level.

As some of the earlier commentary has suggested, the question sometime arises whether one is choosing between the courts and putting on's trust in the courts or choosing the administrative agencies and putting one's faith in them.

This is not the choice that is being made and we must not make such a choice. To turn a phrase that Dr. MacMullan used, one that I would like to associate myself with, too, the bill is the shotgun behind the door or, as I sometimes think of it, the hand, gentle or not, on the shoulder of the administrative agency.

Essentially, what we are talking about in legislation like this is giving to private citizens and citizen groups a tool whereby they may call to the attention of administrative agencies which are not doing all that they should for the environmental protection that there is a recourse beyond the discretion of those agencies.

I think our own history on the Federal level in the last few years, where the doors of the Federal courts have opened just a small crack, has already suggested how important this kind of recourse can be. Indeed, much of the publicized activity of the Federal Government in regard to environmental activity has itself followed strong actions taken by citizen groups and often action taken in the courtroom. Let me mention a few of these well-known examples to you to suggest how important some degree of citizen access to the court has been.

The Alaska pipeline controversy, probably the largest in magnitude of any environmental controversy, was going merrily along with what even the U.S. Geological Survey's memos had made clear was inadequate planning for the building of this unique pipeline, the first ever to run hot oil through the permafrost, until citizen groups went into the U.S. District Court and obtained an injunction under the National Environmental Policy Act. It was only then that agencies of the Federal Government, such as the Interior Department, began to express a serious concern about the pipeline, and I can remember, that prior to that lawsuit the interest expressed by the National Academy in doing some scientific studies of the pipeline problem were pooh-poohed by the responsible administrative officials in the Federal establishment. They didn't get religious about this until after an injunction was issued.

The same thing, you may recall, happened with the Cross Florida Barge Canal project of the U.S. Corps of Engineers where the President's much-welcomed stoppage of the work by the Corps on this long-established project came about only after citizens had gone into court and won a preliminary injunction against the Corps.

The same thing is true with a matter that has appeared in the newspapers only in the last week, the Reserve Mining case, where taconite tailings are being dumped into Lake Superior. While one welcomes the activities of the Environmental Protection Agency, it is well to recall that that conduct has been going on since the middle 1950's; that there was a Federal Enforcement Conference called a number of years ago, 3 or 4 years ago, which had not gotten anywhere; and it was citizen groups who brought suit in the Minnesota courts and finally got an order out of the Supreme Court of Minnesota that galvanized the official action which is now taking place.

I mention these examples only to suggest to you that there is an important, I would say an indispensable, interplay between the zeal and conscientiousness of many of our agencies and the ability of citizens to do some prodding in the courtroom.

The Federal courts have done a good deal, as the cases I have already adverted to suggest, but they are very far from being able to do the job that needs to be done.

I said earlier that the door has opened only a crack, and that is certainly true.

A case was brought in Federal court here in Michigan just a year or two ago, a case that I mentioned in my prepared statement, and may or may not have been a strong case on the merits; I do not know. The judge, however, said, and it is the legal question that is an important one here, that he could only find for the plaintiffs if the action of the agencies, was, in effect, malicious and illegal. The burden of proof in connection with such an action is completely upon the plaintiff.

They can only prevail if they can establish by clear and convincing proof that the action of the defendants is arbitrary and capricious.

Now, that extraordinarily difficult task cannot be met by plaintiffs in any ordinary environmental case, and it is important to understand that the purpose of environmental litigation is not to have administrators consigned to a lunatic asylum, to prove that they are acting totally irrationally, but to try to suggest, by a preponderance of evidence, that the environmental balance has been wrongfully struck; that is the door that needs to be opened.

Fortunately the courts have been reading the procedural requirements of the National Environmental Policy Act broadly enough that it has been possible to put some kinds of restraint on some of these projects, but thus far the courts, by and large, have viewed the Environmental Policy Act as only an environmental full-disclosure law; and Congress has, by no means, made clear that it intends the courts to go beyond that. We are in a traditional period, and when the procedural requirements of the Environmental Policy Act have been exhausted, we will have to fall back on this exceedingly difficult task of arbitrariness, caprice, and abuse of discretion.

That brings me to the question of how well some of our Federal agencies are doing in defending the environment. It is necessary to call to your attention in this regard a very unfortunate posture taken by the United States Department of Justice which is the principal agency involved in citizen litigation.

It continues to be the case today, May 1971, that when citizen groups go into court to raise questions about environmental misconduct, the U.S. Department of Justice argues in every case, to the best of my knowledge, that such citizen groups have no standing to sue, that the private Attorney General notion that would give them standing ought not to be viewed as a part of the Federal law. They continue in some cases even to interpose the old and discredited theory of sovereign immunity. I list in my testimony four or five cases in which they have interposed such procedural, technical defense to get people thrown out of court so they cannot even raise the environmental questions on the merits. So the Federal establishment, on that side of the ledger, is not being at all responsive and they need a mandate from the Congress to make eminently clear to them, with underlining and exclamation points, that citizens and citizen groups have a right to come into court and that the Justice Department must stop interposing these procedural road blocks. Only the passage of legislation such as that which you have before you can bring this change about.

This is a very serious matter. Indeed, the Justice Department is acting in a way that is inconsistent even with the recommendations of the President's Council on Environmental Quality, which is saying something.

Another question that came up earlier was the question of the ability of courts and the responsiveness of courts to matters of this kind. In regard to this, I would like to take a minute or two to tell you about an interesting experience I had just this week.

I have just returned from the annual meeting of the Judicial Conference of the fifth circuit. I went there to speak to the meeting of Federal judges on developments and prospects for environmental law. It is interesting that of all the matters on the agenda for their 4-day

meeting, the only substantive issue on the program of the Federal judges was the issue of environmental law. Everything else on their program dealt with procedural and administrative-type matters in the Federal courts.

The judges are deeply concerned about environmental problems. They are, I think in almost every case, quite willing to take these cases and give them the scrutiny that the Congress will permit them to give.

Mr. DINGELL. Doctor, you mentioned your comments to the fifth circuit..

Professor SAX. Yes, sir.

Mr. DINGELL. I believe those comments would be helpful. Would you, as a kindness, submit them to this committee for inclusion in the record?

Professor SAX. I will send you a copy of my speech to the fifth circuit judges.

(The information follows:)

REMARKS OF JOSEPH L. SAX, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN AT THE 28TH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURTS OF THE FIFTH JUDICIAL CIRCUIT

The rapid decline in the traditional doctrine of standing-to-sue has, in a very short time, brought before the courts a considerable number of unfamiliar plaintiffs with unfamiliar complaints. Nowhere has this development been more marked or dramatic than in the emerging field of environmental law. My own first awareness of this area came in 1962 when the Sierra Club, the National Parks Association and several other conservation groups sued the Bureau of Reclamation claiming that inadequate provision had been for the protection of the Rainbow Bridge National Monument in the planning for Glen Canyon dam.

The case was presented to Judge Holtzoff who expressed what can only be called astonishment that a bunch of conservationists should purport to tell the Bureau of Reclamation how to go about its business; and, what's more, that they should expect him to help them do it.

As I recall, though that case now seems a part of the very distant past, the hearing lasted only about five minutes. It was only about two years later that the Court of Appeals for the Second Circuit issued its now-famous standing decision in the *Scenic Hudson* case, permitting citizen organizations to challenge Consolidated Edison's plans to build a pumped storage hydropower plant on the Hudson River; and with that decision the current era of environmental law began.

Were only the technical questions of standing, or sovereign immunity, at issue, the problem with which many courts now find themselves confronted would not be so thorny. But these doctrines are only the first manifestations of a far more profound development that is being introduced into litigation in both the state and federal courts.

For, having said that groups such as the Sierra Club or the Wilderness Society have standing to sue, the next obvious question is what substantive legal right they have standing to assert; and it is in the untangling of that question that courts are beginning to be presented with some unfamiliar issues. For the plaintiffs in these cases are asserting what may be called public rights, that is, legally enforceable obligations which are said to run from government agencies to them simply as members of the public concerned about the problems being raised.

Plainly these are not merely class actions for nuisance—suits on behalf of many people whose homes have been damaged by air pollution, or groups of commercial fishermen who join to attack the discharge into a stream of toxic substances.

Rather, they are plaintiffs asserting that as members of the public they are entitled to protection of national parks and forests, the oceans and the Great Lakes, from environmental degradation. They assert the right to environmentally acceptable highway and airport planning, and to the control of widely diffused substances such as pesticides and radiological contaminants.

Where do such substantive rights arise? For it must be emphasized that there are now being claimed rights that go beyond the request that statutorily required hearings be held, studies undertaken or reports filed. At heart they are cases of substance in much the same sense that one claims a substantive right to be free of unfair business competition or invasion of privacy.

They are coming from statutes enacted and being enacted by the Congress. To a degree that has not yet been fully recognized, Congress has begun to narrow the traditionally sweeping discretion given to federal agencies and to substitute explicit, if broad, legal standards *for the express purpose* of imposing greater, and legally enforceable, restraints on those agencies.

Where it was once conventional for the Congress to say simply, as in the statutes governing pesticides, that (7 U.S.C. § 147(a)):

The Secretary of Agriculture * * * is authorized to carry out operations or measures to eradicate, suppress, control, or retard the spread of insect pests * * * And in so doing to use "such facilities and means as in the discretion of the Secretary" he "may deem necessary", now the Congress is coming to draft laws relating to environmental protection in quite a different way. The Highway Act, for example, now says (23 U.S.C. § 138):

The Secretary shall not approve any program or project which requires the use of any * * * park, recreation area, or wildlife and waterfowl refuge * * * unless there is no feasible and prudent alternative to the use of such land and such programs includes all possible planning to minimize harm to such [areas].

The implications of this legislative transformation are very far reaching. Where once the potential for the assertion of legal rights by members of the public against federal agencies was averted by the congressional grant of exceedingly broad discretion, the Congress has now begun to say that the balance (between highways and parks, for example) is not simply to be set by the unchallengeable determination of a highway administrator.

The essential point here, as far as the federal courts are concerned, is an emerging congressional desire to reduce the scope of administrative discretion and to subject the environmental decisions of administrative agencies to greater scrutiny than had previously been the case.

Plainly the Congress cannot perform this function itself except in the most general way. Nor is it possible for Congress to draw statutes of general application that will explicitly strike the desired environmental balance in each particular situation.

Thus, the direction being marked out is a sort of environmental performance standard that the agency must meet to bring itself into compliance with the policy set down by the legislature as a matter of law. What had been left to essentially untrammelled administrative discretion is now being articulated—as the Supreme Court observed in the recent *Overton Park* case—as a question of law.

It is at this point that the judge's dilemma begins. If judicial scrutiny is to be limited to the traditional inquiry—is the administrator's decision so lacking in support as to be essentially arbitrary and capricious, an abuse of his discretion—then nothing will have changed from the situation as it was when the Congress gave to the administrator enormously broad ranging discretion to implement the public interest as he saw it.

For the administrator will ordinarily come in with a record that shows his choice as being somewhat less costly, and in accord with conventional engineering practices. And he will be prepared to document his position with a substantial record consisting of conventional reports and studies.

Nothing in such a record will ordinarily substantiate a determination that the administrator has been arbitrary and abusive. Indeed, it will be a record of highway building, forest management, or airport planning business-as-usual. But that, of course, is precisely why the plaintiffs have come to court—to assert that the business-as-usual, least cost, standard-engineering-practice approach to environmental problems is no longer acceptable.

It is not to demonstrate that federal officials should be consigned to jail or to a lunatic asylum that environmental litigation is begun, but to seek to demonstrate that the conventional balance being struck is no longer environmentally acceptable.

And, most importantly, it is asserted, it is precisely to open *this* question to inquiry that the Congress has begun to articulate environmental protection provisions in the statutes governing federal agencies. The essence of such provisions in the statutes is that the breadth of traditional administrative discretion is to be constrained and what had been previously treated as a virtually

impregnable matter of administrative discretion is to be recast as a question of administrative compliance with a legal standard.

Thus the question is not one of judges being asked to act as superadministrators, or substituting their judgment for that of administrators, but of judges examining the evidence put before them to determine whether the administrator has made a determination that accords with the balance of policy that Congress has struck as a matter of law. And, of course, this is a different and more far reaching question than merely whether the administrator has exercised a very broad discretion to implement the public interest in an arbitrary or abusive fashion.

I emphasize this point because it is essential to recognize what is happening in the Congress to understand the directions in which environmental litigation is moving. For the direction of environmental litigation as the Congress is approaching that subject can only be appreciated in the context of a changing attitude in the Congress toward federal administrative agencies.

If one had to select a single event that has affected congressional attitudes, it would, I suppose be the Santa Barbara oil spill of three years ago. There the combination of administrative failure, unheeded public doubts, and a dramatic disenchantment with the old ideas of leave-it-to-the experts, has had a profound effect on legislative attitudes. To be sure, Santa Barbara was only one of the best known and starkest examples to come to public attention. The stubborn unwillingness of the Department of Agriculture to face up to the problem of hard pesticides until the issue was harshly thrust upon them in the courtroom by environmental organizations has also had a powerful impact on the Congress; as was the Interior Department's acquiesence in the slovenly planning of those who intend to engage in such monumental enterprises as the development of Alaska's North Slope oil, until the problem was pressed upon them through the attainment of a preliminary injunction obtained by private environmental groups in the federal district court.

The significance of these events has had a powerful influence on the attitudes of the Congress as to the propriety of citizen initiatives in the courtroom, and as to the scope of judicial inquiry into administrative action. The old deference, the old concept of "those who know best" what is in the public interest, the traditional obeisance to administrative expertise, is diminishing very rapidly.

Thus far, the changing congressional attitude has left the federal courts in a peculiar dilemma. Environmental policies and standards are issuing forth from the Congress to a considerable degree. The Highway Act, and the new Airport and Airway Facilities law, exemplify one technique. The National Environmental Policy Act, with its quite sweeping requirements, is another.

Understandably, the courts are not quite sure where the Congress is taking them. Is the Environmental Policy Act, which requires among other things, a detailed statement from each federal agency on "adverse environmental effects which cannot be avoided" a substantive law, requiring that avoidable alternatives be implemented? Or is it merely, as a district judge in Arkansas noted in the recent Gilham Dam case, merely an environmental full disclosure law?

The question is not an easy one to answer under the present statutes. There is now pending before the Court of Appeals in the D.C. Circuit for the third time the question whether certain uses of DDT should be suspended under that provision of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 135c) that authorizes suspension when "necessary to prevent an imminent hazard to the public." The Court has already twice sent the case back to the administrator for a fuller explanation of the reasons for his decision. And the law does not make clear the extent to which the Court is to probe the propriety of the conclusion he has drawn.

In general the courts are faced with an increasing congressional desire to restrain the administrative agencies and to bring a legal standard to bear upon them; and at the same time with the quite limiting phraseology of the Administrative Procedure Act, with its language of arbitrariness and caprice.

The tension is a strong one and the perplexity of the courts necessarily considerable. Perhaps the most recent example of the dilemma is the Supreme Court decision in the *Overton Park* case, which I mentioned a few minutes ago. Finding that there was "law to apply" to the question whether the Secretary of Transportation had met the "feasible and prudent alternative" test, the Court returned the case to the district court of Memphis for further proceedings.

Its instructions, however, do not make one envy the District Judge. He is told to make a "thorough, probing, in-depth review" with a "searching and careful" inquiry into the facts, for Congress has specified "only a small range of

choices that the Secretary can make." The case is remanded for a plenary review in which the court may take additional testimony. Yet it says the ultimate standard of judicial reviews is itself a narrow one.

The standard for the District Court to follow, the Supreme Court says, is that of § 706(2)(A) of the Administrative Procedure Act, the provision which speaks of arbitrariness, caprice and abuse of discretion. But it translates this into the question "whether there has been a clear error of judgment."

Perhaps you, who are accustomed to working with such mandates, find this one clear and obvious. I must say I do not. For I think that while the Supreme Court tried valiantly to cope with the case, they found themselves in the middle of a congressional transition from the period of very great deference to administrative agencies (as articulated in the Administrative Procedure Act) and the developing period in which Congress is opting for much more ample scrutiny of the merits of administrative decisions.

One need only look to some of the legislation now receiving considerable attention in the Congress to get a sense of the direction in which the law is about to move. It is a direction of increased willingness and desire to have citizen group initiatives in the courtroom explored on the environmental merits.

For example, both Houses of Congress have before them now a number of versions of a bill introduced by Senators Hart and McGovern (S. 1032) that allows any person to bring suit in the federal courts against either federal agencies or private defendants to challenge conduct that is alleged unreasonably to result in environmental pollution.

The bill does not require the plaintiff to demonstrate arbitrariness of caprice by the defendant in order to prevail; nor is it merely a bill to assure that administrative procedures are carried out. It creates a substantive cause of action for environmental protection, and it imposes upon the defendant the burden of demonstrating that no feasible or prudent alternative exists.

The Senate has already twice held hearings on this bill, and later this week Congressman John Dingell will hold hearings on similar House bills. The prospects for such legislation in the Congress are good. Indeed, such legislation has already been enacted in the State of Michigan, and within the last few weeks like legislation has passed both houses of the legislature and been sent to the Governors of Connecticut and Indiana. A similar bill has been introduced here in Texas, where it was the subject of widely publicized and heavily attended public hearings in March; and the Governor has given it his endorsement. Such bills are now pending in various stages in about twenty other states.

The implications of these developments for the courts are profound. Many long held and deeply felt judicial attitudes about the relationship between the courts and administrative agencies are being challenged. Let me comment briefly on a few of the more common concerns, for they are issues to which I am sure both federal and state courts will increasingly have to address themselves in the next few years.

First is the question of technical difficulty. There is no doubt that environmental cases at times present issues on which the testimony of sophisticated experts must be heard. Yet it is hardly a novel problem for the judiciary. There is, after all, a long tradition in areas such as industrial accidents, medical malpractice, personal injury cases involving drugs, and intricate commercial matters where courts have had to cope with technical experts, and where they could not, and have not had to, fall back on the view that one party must prevail unless the other could show his views to have been arbitrary and capricious.

Indeed, the very matters that are likely to arise in the sort of environmental cases that I believe are over the horizon can already be put before courts today, depending on the context in which they arise. If, for example, there were an accident at a nuclear power plant, or an oil spill, or a pesticide disaster, a court would be called upon to determine whether—taken retrospectively—the defendants acted at the time they initiated their conduct in the fashion of a reasonably prudent person.

Indeed, some of the difficult questions of environmental law are already required to be adjudicated under statutes on the books. For example, in *Parker* v. *United States* (309 F. Supp. 593), Judge Doyle in the federal district court in Colorado was called upon to decide whether a particular area possessed the qualities of a wilderness under 16 U.S.C. § 1131(c), which the statute defined as:

"An area where the earth and its community of life are untrammeled by man . . . Federal land retaining its primeval character and influence, without permanent improvements or human habitation [and] . . . has outstanding opportunities for solitude or a primitive and unconfined type of recreation."

He made that determination, during a fascinating three and half day trial which I was privileged to have the opportunity to attend. And he held the area met the test of wilderness despite the contrary assertion and testimony of the Forest Service, following testimony by witnesses of both the plaintiffs and the defendant Forest Service.

Similarly, the present federal water pollution law, 33 U.S.C. § 1160(h) provides that in a suit brought to abate water pollution, the court shall receive in evidence a transcript of the administrative record and "such further evidence as the court in its discretion deems proper", and shall enter a judgment "giving due consideration to the practicability and the physical and economic feasibility of securing abatement of any pollution proved."

It is from examples such as this—and there are many—that I am led to conclude that concerns about the ability of courts to handle the issues sought to be raised in environmental cases are less troublesome, and less unique, than has sometimes been thought.

There is, however, a distinction to be drawn between the examples I gave of litigating accidents that have already occurred and many of the cases of environmental litigation that are likely to arise in the future. It is the difference between looking retrospectively at conduct already completed and looking prospectively at conduct sought to be undertaken, such as a proposed highway or power plant.

I have had some conversation with Judge Stephens about this question, and he makes a most interesting observation from the judicial perspective. As I understand his point, it is that in a retrospective case it is possible to focus attention closely on a particular matter, such as whether a contractor has used improper or inferior materials. Conversely, in a prospective case, the issues tend to be more diffuse, and a court may in some sense be called upon to estimate the potential of harm that has not yet happened. This seems to be a much less tightly constructed sort of problem, almost in the nature of an advisory judicial opinion, he suggests.

There is no doubt that this is a genuine difference, although my own view—having observed dozens of environmental controversies in the courts—is that skillful and tough minded judges are able to perform wonders in forcing the parties before them to hone their cases down a few central and clear-cut issues. In this regard, I would call your attention to a most instructive and impressive state court case that I have discussed at length in my book, *Defending the Environment*—the New Jersey case of *Texas Eastern Transmission Corp.* v. *Wildlife Preserves, Inc.*, in the trial court.

The basic comment I would like to make, however, is this. I concede that any matter is more easily adjudicated retrospectively. At the same time, I implore you to consider that the essence of the problem of environmental law is to bring under control the risk of incompletely known and ill considered hazards to man before irreparable and irreversible damage is done.

This is not the view that lawyers and judges have traditionally had of their role, to be sure. We have always thought of ourselves principally as people whose job it is to remedy harms already done. But I suggest to you that the great challenge of the next decade in the law is a re-evaluation of that role to the end of learning to bring under control the potential for grave unintended consequence of human activity. It is short, going to be our central task to learn how to cope with the problem of uncertainty in what is proposed, far more than to redress the harm that has occurred.

I am not who who trades in dire predictions of disaster. But even the most restrained student of environmental problem must feel a sense of great urgency about the proliferation of biologic and chemical hazards whose potential for harm is great, whose consequences are not fully known, and yet whose dissemination is going forward with great rapidity.

The global diffusion of pesticides into the furthest reaches of the Arctic; the dramatic reduction of wetlands, the most productive biological communities we have; the large scale disposal of toxic substances into the oceans and lakes—living systems that are at the very focus of our survival; are matters that must imbue every institution in the society, and preeminently our legal system, with a sense of the deepest possible concern.

With stakes of this magnitude, I have no hesitation in urging our judicial system to reach out, carefully but with determination, to help bring large scale environmentally disruptive activities under increased scrutiny. I think we must learn to deal with uncertainties as legally cognizable matters. I think that the frontier issues persented by environmental hazards deserve a prominent posi-

tion on even the most crowded dockets; and that those issues emphasize the powerful need to get less pressing and more routine public issues out of the courts.

The exacting attention, extraordinary skills and energies that the judicial system preeminently can bring to controversial matters is, after all, one of our most precious resources. We must turn those energies to the central questions that will determine our destiny as a people.

Professor SAX. Of course, one thing I told them was that they better get ready because the Congress is going to pass some far-reaching legislation; and now, I am telling you if you pass some far-reaching legislation, the judges are ready for it. I hope that at some point these two things can be put together.

I would like to take a minute to cite to you very briefly two examples of recent Federal environmental cases from the fifth circuit that should indicate to you that the courts themselves are ready to follow a mandate that the Members of the Congress might give them.

One is a case from the U.S. District Court for the Southern District of Texas in Corpus Christi last September, in which the court indicates that it feels compelled to throw the plaintiffs out of court because of technical barriers to suit which have not been resolved by the Congress. This was a suit to inquire into the Shell dredging practices in gulf, and the court says, near the end of its opinion:

If injury is to be the general public and no individual sustains special injury, only governmental entities will have standing to sue the polluters. The injuries which the plaintiffs assert is not peculiar to it but is shared by the public in general and all of those whose lands border on the bays in question. Since the plantiff in this cause have no standing to sue, conservationists should seek a legislative enactment which would authorize any citizen of the State to bring suit against any polluter, private or public, to protect water resources.

This is a statement which could be drawn almost exactly from the legislation you have before you.

In another case, decided just last month, the judge also felt compelled to throw the plaintiffs out of court. This was a suit by private citizens, challenging the procedures of the Corps of Engineers in regard to the Refuse Act with which you are all very familiar. It was an effort to bring the Refuse Act constraints to bear in a suit initiated by private people where the U.S. attorney did not act, and the question was: Could private citizens do that?

Judge Seals held, as I think the law indicates, no, they couldn't. There is no provision in the Federal law that authorizes private people to make sure that the constraints of the Refuse Act are followed. This is a Federal criminal matter and only the U.S. attorney can initiate suit. If he doesn't want to do anything about it, there is nothing any private citizen can do.

I talked to Judge Seals, who was at the conference, about this case and he expressed great concern about the matter before him and he said—

I had to throw them out. I felt there was nothing else I could do under the statute but—

he said—

You notice I said everything I could in my first paragraph to indicate that I do feel deeply concerned about this and I felt it was just a matter of compulsion that I had to throw them out.

Mr. DINGELL. Have you read the language of that first paragraph, Professor Sax?

Professor SAX. I have, indeed. I am about to read it to you, if I may.

Mr. DINGELL. No, I was wondering if you had read it into the record. I would be delighted to have you put it into the record.

Professor SAX. I would like to put it in the record.

(The matter referred to follows:)

OPENING PARAGRAPH OF JUDGE SEALS' REMARKS

With the rarest of exceptions, the progress of man has been tarnished by the gradual degradation of his ecological environment. Our surroundings have been subjected to a continuous effluence of pollutants. Scenic and recreational resources have been blighted and despoiled, in many instances obliterated. Species have been ignominiously driven into extinction while a growing number of other endangered species await the same fate. Only recently has man begun to appreciate the extent of the damage he has wrought by his irresponsible tampering with that interdependent complex of climatic, edaphic and biotic processes that act upon all organisms and ultimately determine their norm and survival. There is a growing realization that the ecological scales are in danger of being so uncontrollably tipped, if they have not already been so disturbed, that all life forms, including man, the architect of this destruction will perish. This environmental crisis has generated popular demand that the accelerating trend of environmental degradation be abated and, where feasible, reversed. The efforts of most private citizens concerned with the preservation of environmental quality have been directed towards the legislative and executive branches, but many environmentalists dissatisfied with the efforts of these government bodies have sought judicial relief. Such is the nature of the present suit.

Now, I read this to you because if you didn't know where it came from, you would think that this was a Sierra Club publication. This is the U.S. district judge in the Southern District of Texas, sitting in San Antonio, which is not exactly a hotbed of radical activity, judicial or otherwise. I read this to you to suggest that one thing you ought to have no fear about is giving a clear mandate to the Federal courts to take on scrutiny of this kind of case. They are waiting for the cases. They are willing to take these cases. They are concerned as you are and as we are about these problems; they recognize that there is a problem and that there is a problem that can be dealt with in a substantial way in the context of the Federal courts, if only the Congress will make the tool available to them.

I know you have many witnesses today, and I would like to say just two more brief things.

One, I want to speak to you briefly about the provisions being advanced by the administration in regard to the question of citizen suits.

Mr. DINGELL. Excuse me. Professor, are you alluding to testimony of Mr. Atkeson before you?

Professor SAX. I am alluding to that and I am alluding to the administration water pollution bill, S. 1014.

Mr. DINGELL. Your comments on both would be very helpful to this committee.

Professor SAX. A year ago, when the first version of this kind of legislation was set down for hearings before Senate Commerce Committee, the Hart-McGovern bill, S. 3575 in the 91st Congress, the Assistant Attorney General for the Justice Department in the Division of Lands and Natural Resources, a Mr. Kashiwa testified that legislation of this kind wasn't needed. In essence he said—this is not a direct quotation—citizens should keep their nose out of this business: we'll take care of it. Of course, some things have happened since then that have softened the administration's views.

Mr. Atkeson, who testified before the Commerce Committee this year, said that the administration had undergone an evaluation as to the right of citizens to sue, and I followed him in testimony and I said I thought evolution was the right word; that is to say, it was a process of change so gradual as to be invisible to the eye.

Let me tell you why I say that. If you look at S. 1014 which represents the administration's position on environmental suits, you will find the following things: No suit may be brought in any situation where a discretionary act of the administrator is involved. The bill goes on to say that all questions of practicability as to the time schedules and as to the nature of control devices in water pollution are to be left to the administrator to determine whether or not he thinks it is practicable.

Well, anyone who has worked in the area of environmental controls knows very well that the question whether a control program is practicable is the key question where softness comes in; that is, if there is a problem with the administrative agency, it is in that kind of judgment that the problem arises because, of course, everyone is willing to set up large environmental principles on a rhetorical basis. It is when you get down to the question, are you going to clean up this year, next year, 10 years from now——

Mr. DINGELL. Or ever.

Professor SAX. Or ever, yes, that the tough problems arise.

Now, what this means is that if practicability is within the discretion of the administrator, and I take it that it is under the bill, and if discretion is not challengeable, in essence, the most important situation where citizen intervention and prodding is needed is barred from suit.

Now, this, frankly, is not an advance. Indeed, it is not an advance over what is already available by and large under the provisions of the Federal Administrative Procedure Act. That much, you can do already. That is to say, you can go to court today and challenge an abuse of discretion under section 706(e)(3) of the Administrative Procedure Act.

In addition to that, the bill provides that no suit may be brought in any situation where the administrator is diligently enforcing the law. Now, you know what is going to happen under a provision like that. A suit will be filed and the defendants' lawyers will say, oh, well, the administrator is diligently enforcing the law, and you are going to have litigation extending out over Lord knows how many days or weeks over the question of: Is the administrator or isn't the administrator being diligent?

My view is that if you are going to take up judicial time, you ought to take up the court's time talking about the environmental issues and not making a judgment as to whether the administrator has been diligent, because you know very well that if you come into court and the administrator is being diligent, the judge is going to say, "You don't need an order out of me. Why, this fellow is doing everything he can do."

Most troublesome, however, is that the bill S. 1014, representing the administration position, indicates that where a polluter comes in to challenge an administrative order in the courtroom the judge can determine the question whether the order is practicable.

On the other hand, if a citizen comes in to challenge the order on the grounds it doesn't go far enough, the bill provides he may not raise

that kind of question because that, I take it, would be viewed as a discretionary question.

Well, not to put too fine a point on it, what it means is that a polluter can get into court to challenge the administrator for being too tough, but a citizen under the bill cannot get into court to challenge the administrator for being too lenient. Now, this is just scandalous, and I hope, to say it as strongly as I can, that the Congress does not let a bill like that go through. But that is the position of the administration, and I would like to say I don't view this as a Republican administration position versus a Democratic administration position. I think, frankly, it would be likely to be the position of any administration which, understandably but not justifiable, is fearful about citizens coming in and bringing to the attention of the courts that they are not doing their business adequately. We saw the same problems in Federal agencies, the same kind of defenses being raised when the other party was in the White House, so this is a problem of coping with the people who sit in the positions of power in any administration, and are strongly inclined to take this view: Leave it to the experts.

That is what we have done for a long time and that is why we are where we are.

Let me just say one last thing on the question of the breadth of a bill like this which does not set out quantitative, numerical, precise standards. I have already spoken to this in one sense by calling your attention to the Sherman Act and the Supreme Court's response to this, but I think it is also important to understand that it is necessary to have a more rich mixture of legal tools. You need administrative agencies. I would be the last person to suggest that they ought to be abolished or to suggest that legislation like this is going to abolish them. Those agencies will have to deal with detailed, technical questions. They will have to set out comprehensive standards. There is also an important need to have a generally available tool when a problem arises of the kind that Dr. MacMullan referred to this morning, where you need to get in quickly and get something done before irreparable injury occurs, that you have a simple, clear and clean-cut tool where you can zero in on the problem.

You will recall that this is exactly what happened when the mercury problem arose a year or so ago. The lead-footed processes under the Federal Water Pollution Control Act simply were not capable of coping immediately with this problem and there was a need to do something about it, and so we discovered the Refuse Act. After some prodding by Members of the Congress, the Department of Justice modified its guidelines and they did let U.S. attorneys bring some Refuse Acts suits under its very broad provisions. We need some provisions of that kind.

You know, the old and the new sometimes come together in a helpful fashion.

I want to conclude by calling to your attention something that the attorney general of Ohio recently said about the official power of attorneys general under the old public nuisance law. This kind of a bill is simply a modern-day somewhat expanded equivalent of the concept of the public nuisance law—the plain, simple opportunity to get into court and get an environmental job done that needs to be done.

The Ohio Attorney General, William J. Brown, (said the Christian Science Monitor last week) says a ninety-year old Public Nuisance Law is a better weapon than modern pollution laws.

"It's very fast," Mr. Brown says of the law.

"As a public nuisance, we had a judgement and a vehicle in twenty-three days."

Brown filed suit under the law March 31st to stop the International Salt Company from dumping 26 tons of salt daily into the Cuyahoga River near Cleveland.

"I don't think we need any new legislation," says he.

"We have got the good old Public Nuisance Law."

Well, I will put it to you that that's right, and that everybody who has gotten involved in the business of environmental control knows that a refurbishing of the concepts, an enlargement of the standing, and dealing with the sovereign immunity problems under bills like that which you have before you will prove to be one of the most valuable and I would say indispensable tools in dealing with the environmental problem.

I thank you.

Mr. DINGELL. Doctor, the committee is grateful to you for your splendid testimony and we certainly are going to try to take into consideration very carefully the suggestions and advice which you have so kindly given this committee.

Mr. Goodling?

Mr. GOODLING. Thank you, Mr. Chairman.

Professor Sax, I have no legal training so I am not going to embarrass myself by asking you any legal questions, but I would like to take you to a short trip and a very hurried trip to the Commonwealth of Pennsylvania, to my own congressional district, and I just happened to think of this as you were talking.

I have, a short distance from my home, a papermill and, incidentally, I see that the Izaak Walton League, the Indiana Division, is going to be represented here this afternoon. I happen to be a member of the largest chapter in Pennsylvania.

Several years ago, a great furor arose over this papermill in my district. Members of my own chapter, the Izaak Walton League, would have closed this mill. Now, this is what I know about this mill and I am going to ask you a legal question later. This mill has done every—well, first of all, I need not tell you that it is very difficult for any papermill to avoid polluting both air and water, but I happen to know that this particular mill has spent millions and millions of dollars to avoid pollution of both air and water. They have been cooperating with both our State and Federal governments. They have used every bit of available scientific information and they still haven't corrected the problem completely, but they are trying, and I respect people who are trying.

In your opinion, under this bill, could an individual or the Izaak Walton League of York, Pa., bring suit against the Gladfelter Paper Co., for polluting both air and water?

Professor SAX. Well, as one of my law professors said, you can always sue. The question is: Can you win? Sure, they could bring a suit under a bill like this and let me try to respond to what I think are the issues that trouble you.

I think it's fair to say, Congressman Goodling, that rare, indeed, is the Federal judge who is going to close down an industry that is

at the heart of the economic life of the community in which it lives and, of course, built into legislation of this kind are the ancient traditions of the equity power of the courts and the equity powers of the courts is to do such justice as the situation requires. So the first question the judge is going to ask himself is: Is there any alternative to closing this mill down and putting these people out of business? In most instances that I know of—I am not familiar with your particular example—we find, when we press the question some, it always helps to have people up on the stand to get out some of this information: frequently not everything has been done that could be done and ought to be done, and so that is the first question.

Well, let's say you get to the extreme and they say, "We've done everything that modern technology knows about. There simply is nothing else that can be done and still we are in trouble."

Now, my own knowledge of the pulp and paper situations that I have seen is that the plants that seem to be in trouble of the kind you are talking about tend, by and large, to be very old plants and at some point I think it is clear the question arises whether a company that has been limping along with an extremely old facility—we had one here——

Mr. DINGELL. Scott.

Professor SAX (continuing). In Detroit, Scott Paper Co., a similar kind of problem—should at some point be put under the pressure either to expend the money necessary to modernize the plant. These are not only problems of putting on control equipment; sometimes the question may be putting in a facility with a more modern process. Where you are dealing with a large national or international company, you can sometimes put some of those kinds of pressures on them.

In the extreme case, the company doesn't have the money, people in the community are depending on their jobs, and the pollution problem is a very serious one, the judge is presented with a very tough situation.

All I can say to you is that it is very rare—I don't know of a single instance—I know of some instances where some plants have been closed down under fairly extreme circumstances; I don't know of a single instance where a judge has closed down a plant that was genuinely, after all the evidence had come out, the economic lifeblood of the community and where there were no realistic alternatives, but I would like to emphasize just as strongly as I can that once you get these matters into litigation, you begin to find that sometimes there are alternatives that nobody has thought about. Sometimes we can say, well, all right, can you begin to push a little bit here and can you begin to get a program of control underway there, and can we stretch things out a little bit for you or can you move some of the most troublesome work off some place else on a temporary basis and subcontract out some of these things?

All I can say to you is at some point, as you, sitting in the Congress well know, sometimes there are just some damnably tough problems where there is no happy solution. I think the judges in the Federal courts are as sensitive to these problems, the human probelms and the fundamental economic problems, as the Members of the Congress are.

Mr. GOODLING. This particular company is modernizing all the time.

Professor SAX. Yes.

Mr. GOODLING. I know of another case—this is not in my district—where a plant just closed recently and that community has become a ghost community.

Professor SAX. Yes.

Mr. GOODLING. And they probably fall under the category that you spoke about, where they have not modernized.

Professor SAX. Yes. I am sure you have had the experience when you talk to pollution control officials in the various States that sometimes a company is ready to close down a plant but is reluctant to do so for labor relations reasons and is more than happy to seize upon what would appear to be pollution control reasons to get out from under a difficult situation, so one has to look, peel off a few layers to find out what's really going on in these cases.

Mr. GOODLING. Well, I believe you will agree with me that in every environmental case, we must weigh the good against the bad before we reach a final decision.

Professor SAX. Absolutely.

Mr. GOODLING. Thank you, professor.

Professor SAX. Thank you.

Mr. DINGELL. Thank you, Mr. Goodling.

Mr. Karth?

Mr. KARTH. Mr. Chairman, I know the hour is getting late and I just have two very brief questions.

First of all, professor, I think in April of this year Mr. Atkeson, General Counsel for the Council on Environmental Quality, appeared before the Senate and testified on a bill if not identical, at least similar to those that we are discussing today, and raised some seven or eight legal objections to the bill or to that legislation.

I would like to have counsel provide you with those questions and have you respond to those for the record, if you will.

Professor SAX. I will be glad to do that.

(The information follows:)

MAY 12, 1971.

Prof. JOSEPH SAX,
Law School,
The University of Michigan,
Ann Arbor, Mich.

DEAR PROFESSOR SAX: On behalf of the Committee I wish to express to you our collective thanks for your fine testimony. If we are able to move this legislation this year (and I believe we will) it will be in no small part due to your generous and expert assistance.

In the course of the hearings you most kindly offered to prepare an analysis of the objections raised by the Counsel on Environmental Quality to the legislation.

It occurred to me that if this were acceptable, I might give a copy of this analysis to the Counsel prior to their testimony and ask them to respond to the points you make.

At a later time I would then hear testimony from public witnesses and would be able to consider additional testimony or written submissions, at which point we would be able to put into the record such comments as you might care to make on the "second generation" response to the Counsel.

It is my feeling that this procedure would compel a more complete and adequate dialogue and would not allow evasion of important points raised by yourself and other witnesses on the legislation before us.

We would be able to analyze it to see whether the objections raised by CEQ and the Administration are meritorious, a matter which I very much doubt, but

I do feel that they would have weight with Members of the Committee and it is for this reason that I ask your assistance.

With warm good wishes.

Sincerely,

JOHN D. DINGELL,
Member of Congress.

MAY 13, 1971.

Prof. JOSEPH L. SAX,
Law School,
University of Michigan,
Ann Arbor, Mich.

DEAR PROFESSOR SAX: In the course of our hearings on May 7, dealing with the various bills designed to permit citizens access to courts on environmental issues, a number of issues arose which the pressure of time did not permit to be fully explored. It would be helpful to the Committee if we could have your reaction to these, so that the record of our consideration of these measures may be complete.

I suspect that the most controversial of the amendments which you suggested may deal with the addition or inclusion of the word, "unreasonable" from the phrase, "unreasonable pollution, impairment or destruction" of the environment. While I accept the principle that the courts would most likely adopt a form of the "Rule of Reason" to which you indirectly alluded in your testimony, I do feel that it would be helpful to have your specific reactions to the meaning that this word might have if it were left in the bill. Also, I note that this issue never even arose in the course of the hearings in the Senate on similar legislation last year, and was wondering the reason for this omission.

The question arose in the course of the hearings as to whether or not the bill might violate applicable principles of constitutional law. Has any question on this issue arisen in the Michigan cases to date (if you can conveniently discover this), and, if so, what has been the outcome?

With every good wish,

Sincerely yours,

JOHN D. DINGELL,
Member of Congress.

THE UNIVERSITY OF MICHIGAN LAW SCHOOL,
LEGAL RESEARCH BUILDING,
Ann Arbor, Mich., May 18, 1971.

Hon. JOHN DINGELL,
Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN DINGELL: Thanks very much for your letters of May 12th and 13th, asking me to supply some further information on the subject of the hearings you held in Ann Arbor on the 7th of May.

First, you asked me to comment on the objections raised by Timothy Atkeson, of the President's Council on Environmental Quality, to the provisions of S. 1032, a bill similar to those on which you held hearings on May 7th. Mr. Atkeson's seven objections, or questions, appear in the prepared statement which he submitted to the Senate Committee on Commerce, Subcommittee on the Environment, on April 15, 1971, in hearings on S. 1032.

1. Are the Courts institutionally equipped to handle the questions that will arise under the substantive right to environmental quality created by S. 1032 and similar bills?

My answer is yes, for several reasons. Courts have long had to deal with questions that involved the taking of testimony on matters involving technical expertise. Nothing in an environmental case is more remote from a judge's competence than the issues that arise every day in medical malpractice, industrial accident, or complex financial cases. Of course a judge need not be a scientific expert to handle adequately cases involving scientific expertise.

Indeed, the very questions that would arise in cases under S. 1032 can, and do, come before courts today, only at a later point in time. If there were an accident

at a nuclear plant, or a pesticide disaster causing personal injury, a court would have to decide retrospectively whether the defendant had acted in a prudent fashion at the time he engaged in the challenged act. This is precisely the kind of question which would be raised, in the context of licensing or permit granting, under legislation like S. 1032.

Moreover, courts today decide precisely such questions in common law and public nuisance cases. Indeed, the very case Mr. Atkeson cites, *Ohio v. Wyandotte Chemicals*, 39 U.S.L.W. 4323, was said by the Supreme Court to be a nuisance case and it was sent back to a state court to be tried. All the Court *held* in that case was that it should not be tried as an original jurisdiction case in the Supreme Court. It will undoubtedly be tried in the state courts.

In addition, some of the issues and language to which Mr. Atkeson objects are put before the courts right now under existing congressional legislation. For example, the present federal water pollution law, 33 U.S.C. § 1160(h) says that a court shall enter a judgment: "giving due consideration to the practicability and feasibility of securing abatement of any pollution proved."

Are the courts institutionally equipped to make *this* judgment in Mr. Atkeson's view? They are required to do it now, and one wonders how such questions differ in respect to the court's competence from the questions raised under S. 1032. Indeed, the current water pollution bill that the Administration is supporting also contains a requirement that the court "take into account the practicability of compliance" and "the seriousness of the violation." [sec. 10(k)(1)(B)].

Mr. Atkeson also raises questions about the phrase"public health, safety and welfare" in S. 1032. But, again, S. 1014 provides in section 10(d)(7) that water quality standards shall "be such as to protect the public health and welfare." If the court is to look at the practicability of standards and at the seriousness of the violation, I assume it will have to refer at some point to the question of public health and welfare upon which the standards have been based.

Moreover, we have instances already under the law in which courts have had to look at environmental questions of the kind that Mr. Atkeson questions as beyond the courts' competence. For example in the Rulison case (*Crowther v. Seaborg*, Civil No. C-1702, U.S. Dist. Ct., Colo.), Judge Arraj had to decide whether the AEC radiation standards were "reasonably adequate to protect life, health and property." His remarkable, scholarly opinion in that case is itself a powerful answer to Mr. Atkeson's questions. Moreover, in *Parker v. United States*, 309 F. supp. 594 (D. Colo. 1970), Judge Doyle had before him, and decided, the question whether a particular area possessed the qualities of a wilderness under 16 U.S.C. § 1131(c), a decision he made after hearing testimony by both the Forest Service and the plaintiffs on both sides of that question.

2. What is encompassed by the phrase "public trust" in S. 1032?

I am enclosing a copy of a very lengthy article I published last year on the public trust concept in American law. You have my permission to enter it in the hearing record if you so desire.

Plainly no one paragraph definition can be given of this very deep rooted doctrine which goes all the way back to Roman Law. Perhaps the most detailed explication of the doctrine in the American case law is found in the *Illinois Central* case [146 U.S. 387 (1892)]. The trust doctrine can no more be defined, in the statutory sense, than can such fundamental notions as that of due process of law. It is a concept designed to identify the fundamental responsibility of government to manage and deal with public resources for the benefit of the public rather than for any private advantage.

Mr. Atkeson asks whether it imposes court determined restrictions on the freedom of federal and state governments to use public lands. The answer to this is certainly yes; indeed, that is precisely what the *Illinois Central* case was all about. There a state had attempted to deed away a large part of the submerged land under Lake Michigan to a private railroad company, and the Supreme Court held that public resources of this kind could not be thus taken out of the public domain. Plainly the same thing would apply to dry land in the public domain, though, as the Court made clear, the trust doctrine does not by any means prohibit all sales of public land.

The trust doctrine does also apply to private lands. In my article, I discuss this issue in the context of a number of California cases, where the question has been raised to what extent the public is to be viewed as maintaining a trust right in lands that have been given over to private owners. And, of course, this too was the question in the *Illinois Central* case, for there the owners claimed that they were the owners of a full private property right in the lands in question.

Plainly the trust doctrine is one with which courts can, and do, work. On April 23, 1971, the Court of Common Pleas of Cuyahoga County, Ohio, issued a judgment in a case where the State brought suit against discharges into the Cuyahoga River. The Court held that "the State of Ohio has title to the Cuyahoga River which it holds in trust for the people of Ohio and that the Attorney General of the State of Ohio has standing to seek an injunction against this defendant" for conduct in violation of that trust. *State v. International Salt Co.*, Case No. 893,451.

Mr. Atkeson asks whether the trust doctrine implies that public easements may be impressed on private lands. As I indicated earlier, the trust doctrine has already been interpreted to the effect that grants of land to private parties are impressed with a public responsibility at least to the extent that fundamental and unique public resources are to be protected for the common good. I am confident that courts would not permit the government to deed away Lake Michigan or San Francisco Bay to be used as a garbage dump or a parking lot, and it is in this larger sense that the doctrine is applied as a residual protection of the public interest. Indeed, the old legal saw that the state cannot grant away its police power is a version of the trust idea, and of course that doctrine too indicates that privately held land is subject to the governmental obligation to govern for the public benefit.

3. Does the bill supercede existing federal and state air and water quality and land use legislation?

The bill *is* a federal law and the substantive standards it sets *are* the federal legislative standards. Of course it supplements preexisting laws affecting environmental quality just as the Congress has often done in the past. The Fish and Wildlife Coordination Act, for example, added an environmental dimension to previous federal legislative standards; and the same is true of the National Environmental Policy Act. As with NEPA, this law would require all federal agencies to change their practices and standards to the extent necessary to bring their activities into compliance with the current law. We have already seen examples under the NEPA where courts are requiring agencies to adjust their traditional way of doing business to bring themselves into compliance with the current federal policy as stated by the Congress.

In those instances where a court might find a conflict between the new law and some earlier law, it will follow the traditional judicial practice of attempting to identify the result that is in compliance with legislative policy at the time the case comes before it.

It must, of course, be understood that the Congress is passing a law, not a constitutional provision. It can supplement and supercede inconsistent previous laws; and the new law can, in turn, be superceded if the Congress desires to supercede it at some later date. Naturally, where the court has before it a specific legislative environmental standard, set out with particularity by the Congress, it will look to that for guidance in that particular case as the position of Congress on the environmental standard that Congress wanted to implement, and it will read a bill like S. 1032 in conformity with any specifically expressed standard.

It is most important, however, to distinguish congressionally expressed environmental criteria from those criteria adopted by federal agencies. For an important purpose of bills like S. 1032 is to assure that administrative agencies are subject to judicial scrutiny so that their interpretation of the will of Congress can be examined, and not merely taken on faith. The recent Supreme Court decision in the *Overton Park* case indicates the usefulness of judicial inquiry into administrative decisions about the implementation of environmental standards, and makes clear that it is possible to permit greater judicial scrutiny of agency determinations than had traditionally been the case.

4. Does the bill tell courts to "disregard" administrative and regulatory procedures?

It does not. It authorizes the courts to scrutinize administrative conduct to help assure that administrative decisions are environmentally justifiable. Courts are certainly not told to disregard what administrative agencies have done. Rather they are told that they need not take on faith the *ipse dixit* of administrators that they have dealt with all environmental issues.

One need only point to some of the administrative failures that have already been brought to judicial attention to see the need for greater judicial inquiry. The Alaska Pipeline case is a prominent example; and the assurances given by the Interior Department prior to the Santa Barbara oil spill would certainly have benefited from some judicial examination of the administrators' assurances that they had everything under control.

Mr. Atkeson speaks of administrative sluggishness. But sluggishness is by no means the only problem. Sometimes administrators work very rapidly indeed, and what is needed is some time, and a forum, in which to take a more careful look at their action. The *Parker* case, to which I referred earlier, is an example of this problem. There it was found that the Forest Service was moving very rapidly to commit timber to commercial lumbering in violation of the Wilderness Act. No rule against sluggishness would have solved that problem.

The assumption of Mr. Atkeson is that the only problem is one of outmoded procedures. But at times the problem is not simply a procedural failing, but a decision—fully made with every required procedure—that is alleged to be erroneous, if only the substantive questions could be brought into the full light of judicial scrutiny. We already have the NEPA reporting requirements to help get agencies to make full studies and disclosure. Having done that, are we to let them do anything they wish simply because they have made a record of their decision, and, possibly, of their folly? Plainly neither the Congress nor the CEQ itself is in a position to scrutinize the merits of every environmental statement that is submitted. And if citizens are not permitted to raise questions in court about the merits of the decisions made on the basis of those studies and reports, NEPA will degenerate into a formalistic reporting requirement.

5. Will all factual determinations by agencies be remade *de novo* on judicial review?

No and the bill does not provide for this. It merely permits the courts to take additional testimony where required to obtain information needed to make a fully informed decision. Notably, the present federal water quality law, referred to earlier, permits the courts to receive in evidence a transcript of the administrative record and "such further evidence as the court in its discretion deems proper." In the *Overton Park* case, the Supreme Court authorized the trial court to take additional testimony, also.

Nothing in the bill requires or assumes that there will be what Mr. Atkeson calls "duplication."

Mr. Atkeson speaks of judicial review within the framework of "accepted doctrine." But the accepted doctrine is that agency determinations are to be accepted unless they are arbitrary or capricious. This extreme deference to the agencies is precisely what this bill is designed to change, and, indeed, the Congress itself has indicated that it needs to reduce the very open-ended discretion agencies traditionally had in such areas as highway planning. The provision of the law that arose in the *Overton Park case*, requiring a search for a feasible and prudent alternative, is itself indicative of a congressional desire to reduce free swinging agency discretion.

It creates serious problems, however, if such a provision is to be treated as subject to judicial scrutiny only to see if it is arbitrary or capricious. The understandable floundering of the Supreme Court, in trying to set out a mandate for the trial court in the *Overton Park* case, is indicative of the problem. The district judge is told to make a "thorough, probing, in-depth review" with a "searching and careful" inquiry into the facts, for Congress has specified "only a small range of choices that the Secretary can make." The case is remanded for a plenary review in which the court may take additional testimony. Yet the Supreme Court says the ultimate standard of judicial review is a narrow one; for the court is compelled to use the old arbitrariness and capriciousness test of judicial review. It finally tells the district court to determine "whether there has been a clear error of judgment."

I think it eminently clear that any district judge receiving such a mandate is going to be mightily confused. The reason is that "accepted doctrine" of judicial review is not sufficient to permit the court to take a good look at an administrator's decisions, in the context of a congressional order to protect environmental quality, as in the highway act. Bills like S. 1032 are designed to abate the confusion over judicial review that now faces the courts.

I do not know what Mr. Atkeson means when he speaks of a confusion of the factfinding and the appellate roles. S. 1032 is meant only to give to courts authority to determine whether an agency decision meets the environmental goals of the Congress. This is neither an administrative factfinding, nor an appellate role. The bill creates a new cause of action in which the court will have to find facts and make conclusions of law. It is hardly novel for the Congress to create a judicial cause of action. It would be doing that as to environmental matters, just as it did that as to antitrust law. There is nothing revolutionary in making a government agency a defendant in a case, and asking the question whether they met the legal criterion set out by the Congress. That is what S. 1032 does.

For some reason, Mr. Atkeson seems to think that enlarged participation by the public in hearings before agencies is a substitute for a legal right of action. Having observed scores of environmental controversies, I can assert without hesitation that there is a world of difference between being a participant in an agency hearing or proceeding, and being a plaintiff in a court suit in which the agency is a defendant. I hope very much that agencies will be affected by greater public participation in their procedures. But at some point it may become necessary to claim that the agency has not fulfilled the legal requirement for protection of the environment. Obviously that is a claim that is not best directed to the agency itself whose conduct is being challenged.

To the extent we now have judicial review of agency action, we already recognize that participation in the agency proceeding is no substitute for the judicial inquiry. That is why, for example, even the present air and water pollution laws permit the people being regulated to go to court.

The question is not a choice between intervention in the agency action, and a judicial forum for challenge of the agency. Rather it is a question of the scope of judicial inquiry into agency action. Some of my previous comments indicate why I think we need an enlarged scope of judicial inquiry.

6. Would a bill like this bring federal courts into areas more appropriate for state action?

I am at some loss to respond to this point. For many years, it was argued that the federal government should not get into the water pollution business, for that was a matter for state government. Indeed, I believe this was a major issue in 1948 when the early federal water quality law was proposed. I had thought we were beyond that point in federal regulation of environmental matters.

It has been demonstrated over the years that the extreme deference of the federal government to the states in water quality regulation has failed to produce adequate results. Each subsequent revision has enlarged the federal role, and that is true of the position of the present Administration on pending water quality legislation.

S. 1014 now covers all interstate and navigable waters, ground water and all tributaries whether or not they reach such waters. This is certainly far reaching federal coverage.

Moreover, the government has not been bashful about using the broad commerce powers of the United States to reach a number of other issues thought to be important, particularly in the area of criminal law. I find it most discouraging that the Administration should suddenly become deeply concerned about states rights when it comes to environmental controls.

I also find it odd that the CEQ, which is so sophisticated about the extraordinary widespread diffusion of environmental contaminants, should be speaking about local nuisance and land use cases as if problems stopped at the landowner's property line. I suppose nothing has more dramatically affected the thinking of those who work in the environmental area than a recognition of the way in which pollutants are carried across state, national and international boundaries. One would have expected the evidence about pesticides, for example, to have ended this sort of thinking. I am sure the CEQ recognizes the widespread effects of environmental degradation; and one must hope that this is nothing more than a make-weight argument not expected to be taken very seriously.

7. The last question relates to the 11th Amendment. I am in the process of investigating this question. My own view had been that this bill, like any piece of legislation, is obviously subject to the constitutional constraints of the 11th amendment, as it is to all other provisions of the Federal Constitution. This bill neither enlarges nor narrows existing constitutional constraints, and the courts will, naturally, read the bill in conformity with the Constitution.

It is my understanding that states may be held to have waived their 11th amendment immunity, and this is a question that has been before the courts in a number of cases. See, for example, *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); and *Briggs* v. *Sagers*, 424 F.2d 130 (10 Cir., 1970).

I have not explored this question fully as yet; I had assumed that the issue would be worked out in the context of judicial interpretation. But it is possible that some amendatory language would be useful, and I will be in touch with you about that.

I hope these comments are helpful, and that you will let me know if you wish further information.

I am enclosing a copy of my public trust article, plus a copy of the talk I gave at the 1971 conference of the Fifth Judicial Circuit, that you requested at the hearing.

With best regards,

Yours,

JOSEPH L. SAX,
Professor of Law.

Enclosures(2).

P.S. You also asked me about the word "unreasonable" in the bill. As you know there was great controversy over this question during debates on the Michigan bill.

The word unreasonable did not appear in my original draft, and it does not appear in the enacted bill, or in the very similar bill now enacted in the State of Connecticut with an effective date of October 1, 1971.

There are several reasons why I believe the word unreasonable ought not to appear in the bill. First, it is important to avoid the implication that the bill only deals with negligent conduct. This is very important and should be made eminently clear in the legislative history if the word unreasonable remains in the bill.

Also the phrase "unreasonable pollution" seemed to me awkward and misleading. In common understanding, pollution is a use of water which is an unreasonable defilement, that is, a degradation beyond what is thought acceptable under conventional water law. Certainly we did not want to give the impression that this bill gave less rights against pollution of water than the conventional law of riparian rights.

Further, in fashioning the original Michigan bill, one analogy to which I looked to was the Sherman Antitrust Act, a broad substantive rights bill created by the Congress to deal comprehensively with what was at that time a central public policy issue. The Sherman Act does not speak of "unreasonable" restraints of trade; Congress considered it sufficient to say "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal."

Subsequently the courts worked out for themselves as a matter of judicial interpretation the "rule of reason." I think it wise to let the interpretation of this law evolve in a similar manner, rather than freighting it with legislative adjectives.

May I call to your attention, in this regard, the famous statement of the U.S. Supreme Court interpreting the broad language of the Sherman Act; for one common criticism of the citizen suit bills is that they do not set out precise standards, or exacting criteria for the courts to apply. In *Appalachian Coals v. United States*, 288 U.S. 344, 259–360, Chief Justice Hughes said:

"As a charter of freedom, the Act has a generality and an adaptability comparable to that found to be desirable in Constitutional provisions. It does not go into detailed definitions which might either work injury to the legitimate enterprise, or through particularization defeat its purpose by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, sets up the essential standard of reasonableness . . . In Applying this test a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment."

THE UNIVERSITY OF MICHIGAN LAW SCHOOL,
LEGAL RESEARCH BUILDING,
Ann Arbor, Mich., June 21, 1971.

Re Hearings on Environmental Class Actions, June 9–10, 1971.

Hon. JOHN DINGELL,
Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN DINGELL: When Timothy Atkeson of the President's Environmental Quality Council testified on June 9th, the suggestion was made that I provide a response to his comments, amplifying my earlier testimony given in Ann Arbor on May 7th. I also have a letter from Mr. Atkeson dated June 16, 1971 urging me to comment on his testimony.

Mr. Atkeson's testimony before your committee was, understandably very similar to that which he gave before the Senate Commerce Committee, Subcommittee on the Environment, on April 15, 1971, in hearings on S. 1032. My testimony to the Senate Committee followed his, and most of what I have to say about CEQ's views on citizen lawsuit legislation appears there. At your request, I also sent you a letter, dated May 18, 1971, further commenting on the views of Mr. Atkeson. I am enclosing, in addition, a brief article I wrote, published in the New Republic for June 19, 1971, that you may add to the hearing record if you wish.

Because my views have been expressed at length in the documents I have just noted, I will not repeat them here.

You might, however, wish to add to the hearing record the following comments on Mr. Atkeson's testimony of June 9th.

Perhaps the matter that ought to trouble the Committee most in Mr. Atkeson's testimony is an implicit inconsistency: I think this inconsistency goes to the heart of the Administration's views on the legislation now before you.

When asked about the structure and form of such legislation, Mr. Atkeson suggests that it imposes upon the courts duties that they are not institutionally equipped to handle. He points, in this regard, to the generality of the bill's standards, its enlargement of the scope of judicial review, its asserted potential for fragmentary court rulings inconsistent with any national or comprehensive plan, and other such matters.

Conversely, when asked about the need for court intervention to meet the kind of problems the bills are designed to remedy, Mr. Atkeson suggests that federal courts are *already* engaging in many of the tasks that such legislation would authorize, thus implying that new legislation is unnecessary. In this regard, he notes several times the remarkable growth in judicial activity in the environmental area. I call your attention particularly to pages 416–21 of the typescript of the June 9th hearing, in which Mr. Atkeson comments on the Gillam Dam case, *Environmental Defense Fund v. Corps of Engineers*, No. LR–70–C–203 in the federal district court in Arkansas, (Feb. 19, 1971).

I put it to you that the Council, and Mr. Atkeson, cannot have it both ways. They cannot suggest that such legislation is unneeded because the federal courts are already evolving toward doing what the bills before you would explicitly authorize, and at the same time tell you that the job now being begun by the federal courts is beyond their competence and is inappropriate for the judiciary.

If you re-read the colloquy between and Mr. Atkeson on the Gillam Dam case (pp. 416–21) you will see the dilemma the Administration has created for itself. Mr. Atkeson suggests that the National Environmental Policy Act is being interpreted judicially to give adequate recourse to citizens on the problems to which the pending bills are addressed. When you, Congressman Dingell, pin him down and ask whether NEPA does not merely require a federal agency to go through the procedural steps of studies and reports, but does not touch the substantive question of the defensibility of the agency's decision (p. 416), Mr. Atkeson denies that the courts are engaged only in "a procedural analysis." He says:

"It is so extensive and requires the agency to come up with so much in justification of its proposed action that unless you get a really tricky solid record . . . there is a great probability that the Court injunction will stick. (p. 419) [the] agency cannot say I filed my 102 statement. Forget it. They have got to face the fact that Courts are going to say, very well, you have filed your 102 statement. Now citizens, tell me what you have got to say about it. Now, agency, tell me what underlying statements you have behind your 102 . . . By the time that is over, I just really ask what further a reasonable man would want to look at."

I must say that in these excerpts Mr. Atkeson's description of what *is* going on in the federal courts sounds very much like my testimony to the Committee stating what *should* be going on in the courts. It is in essence a statement that the courts should look behind the procedures followed by the agency and require the agency to justify its decision on the environmental merits.

If judicial involvement to the extent described by Mr. Atkeson at pages 417–21 is thought acceptable by the Council, then all their earlier statements about vagueness of standards, the scope of judicial review and the institutional inability of the courts to handle such matters must fall. This is what I mean when I speak of the inconsistency of the Atkeson testimony.

For what congressional standards are there in NEPA that are more explicit than those in the sort of legislation I have been proposing? Against what specific standards in NEPA would a court, to use Mr. Atkeson's language "require . . .

agency . . . justification of its proposed action" (p. 419); and, if it found no justification, let the court injunction stand? Is it the question whether the agency plan fails to "fulfill the responsibility of each generation as trustee of the environment for succeeding generations"; or that its plan fails to "maintain . . . an environment which supports diversity and variety of individual choice." [NEPA, section 101(b)(1), (4)].

If the court can make an agency justify its plan on the basis of these broad standards, with Council praise, the Council should certainly not find the Hart-McGovern bill (S. 1032) or the bills before your committee wanting in standards.

If this is not what Mr. Atkeson is approving, must not he agree with you, Congressman Dingell, that NEPA goes only to the procedural question whether the agency has done the required studies and filed the required reports—and that it provides no protection for citizens when an agency engages in environmentally unjustifiable conduct, so long as it has filled out the necessary papers?

All the abstract legal arguments made against the bills before you fall in light of the simple fact that without legislative authority for the courts to inquire into the environmental merits of the controversy, upon broadly stated congressional policies for environmental protection, there is no substantial protection for citizens against federal agency, and private, faltering in the environmental area.

The fact of the matter is that the judge in the Gilham Dam case took a very narrow, procedural view of NEPA, just as you, Congressman Dingell, implied in questioning Mr. Atkeson. It is not Mr. Atkeson's description of the case, but the judge's own language, that must be examined to determine where the federal courts really stand. I call to your attention the following brief excerpts from the judge's opinion:

"The Act appears to reflect a compromise which . . . falls short of creating the type of 'substantive rights' claimed by the plaintiffs . . . The sponsors [in Congress] could obtain agreement only upon an Act which declared the national environmental policy . . . The Act required the government to improve and coordinate the federal plans . . . but it does not purport to vest in the plaintiffs or anyone else a right to the type of environment envisioned therein.

"In the instant case it is clear that the damming of the Cossatot will reduce 'diversity and variety of individual choice.' It is apparently plaintiffs' view that upon the basis of such a finding the Court would have the power, and duty, ultimately and finally to prohibit . . . construction. No reasonable interpretation of the Act would permit this conclusion. If Congress had intended to leave it to the courts to determine such matters . . . it certainly would have used explicit language to accomplish such a far reaching objective. *In view of this interpretation of NEPA by the Court, the plaintiffs are relegated to the "procedural" requirements of the Act.*

"The record should be complete. Then, if the decisionmakers choose to ignore such factors, they will be doing so with their eyes wide open." [emphasis added]

Congressman Dingell, in my opinion we cannot, and should not, permit "the decisionmakers," the federal agencies, to ignore the environmental facts of proposed projects, whether they have done so knowingly, "with their eyes wide open," or ignorantly. I think the judge's opinion in the Gilham Dam case demonstrates, as eloquently as any evidence that could be brought to your attention, why citizen suit legislation of the kind I, and others, have recommended to you, is needed.

I would like to comment briefly on two other matters. The first also relates to the Gilham Dam case. Note that Mr. Atkeson emphasizes strongly the need for comprehensive legislation dealing with environmental matters, and for specific congressional standards; rather than for the broad language of the bills you are now considering. I ask you, can Congress possibly enact a statute that will explicitly determine whether or not the Gilham Dam should be built, or in what way it should be built? Plainly the answer is that it cannot. I emphasize again that whatever national policies Congress may wish to state, it will always and inevitably be necessary for there to be particularized consideration of this, or that, particular dam or highway. All the abstract statements about comprehensive planning and national policy cannot conceal this central, and practical, fact. Unless we are to deal with the environment as an abstraction, and let highway and dam building agencies do whatever they want in particular cases, we have got to have legislation like that before you.

One further practical observation may be appropriate. There is always a powerful tendency in the legislative hearing process to focus on abstractions and legalistic quibbles. This tends to divert attention from the practical usefulness

or dangers of a proposed law. In practical fact, our Michigan Environmental Protection Act is having a powerful affirmative effect on environmental decisionmaking. Cases that have dragged on for years are being pressed toward desirable settlements under judicial scrutiny. That is what your Committee should focus its attention on.

I enclose for the record an article from the Detroit Free Press of June 19, 1971 that makes this point quite forcefully. This article demonstrates the Michigan law in action, working—practically, and powerfully—to get the job of environmental protection done. It should be compared with the enclosed Free Press article on the same subject dated November 22, 1970. I hope you will insert both these articles in the hearing record.

I will, of course, be happy to respond to any other particular matters brought up by Mr. Atkeson, but in general I think my views are fully expressed in previous testimony and materials I have submitted to your committee and to Senator Hart's committee in regard to S. 1032.

With best regards.

Yours,

JOSEPH L. SAX.
Professor of law.

Enclosures: (1) The New Republic, June 19, 1971; (2) Free Press, June 19, 1971; (3) Free Press, November 22, 1970.

[From the Detroit Free Press, Nov. 22, 1970]

THE HUBER AVENUE STORY: WHAT POLLUTION HAS COST A COMMUNITY; A FOUR-YEAR RECORD OF A 'CLEAN' FOUNDRY

(By Julie Morris)

Most of the dirty gray and black buildings of the Chrysler Corp.'s immense east side Lynch Road complex stand well away from the homes that border that sprawling factory-scape. One building doesn't—the progressively designed, nationally honored, four-year-old Huber Avenue Foundry.

The foundry is right across the street from forty-three homes, within view of 300 more. Its foundation was built on Chrysler promises that the foundry's proximity would make no difference to living conditions in the modest neighborhood around it. The foundry, Chrysler men vowed, would be a clean machine. It hasn't been.

Foundry operations are dirty by nature. The Huber Avenue plant, designed to change the nature of foundries, has been dirty by accident and by mishap for much of its four-year history. But the reason it is dirty is of little meaning to the neighbors. What is important to them is what they say he foundry has done to them—to their neighborhood, their property, their health and their lives.

About 3,000 people work at the Huber Foundry making four major engine parts for Chrysler Corp. cars and trucks. When Chrysler built the foundry, it spent $2 million to install elaborate, advanced air and noise pollution control systems based on a "Venturi high energy wet scrubber system" designed to filter out 98 to 99 percent of the pollutants in the smoke and gas produced by the foundry's two steel-melting furnaces, called cupolas.

Ideally, the pollution control system would cleanse factory emissions of pollutants so well that the only thing rising from the foundry rooftop would be a plume of white vapor. But the system has never worked properly. It has broken down at least 55 times in the last four years, and each time it has broken down, the people in the neighborhood have been subjected to a rain of dust, dirt and grit and to odors and smoke that sometimes choke them.

Because of the frequent breakdowns, the foundry was never issued an operating permit by the Wayne County Air Pollution Control Division, and it has operated for four years in technical violation of the Wayne County Air Pollution Code, which requires the permit.

Since the foundry opened, the air pollution control office has received 440 telephone calls and written citizen complaints about the foundry's pollution. The neighborhood has deteriorated sharply. Homes worth $12,000 are selling for $8,000 and $9,000. On one block 20 percent of the homes are for sale. People don't want to live there anymore.

This is what happened:

July 20, 1966: The foundry's two 50-ton-per-hour metal-melting furnaces were fired and the first crankshaft, cast of metal, was tapped from the furnace.

Fifteen days later, neighbors started phoning the Wayne County Air Pollution Control Division, complaining that "roaring, wailing, moaning noises" from the foundry kept them awake until 2 a.m. Within a month, residents of the area were also complaining about an "odorous orange smoke, a thick chocking smoke" that poured from the foundry stacks at intervals every day.

One housewife reported that black dirt settled on her porch and that she found tiny chunks of grit, bits of metal and sooty material on window sills, furniture, in uncovered food and on her children's clothing.

Just 70 days after the foundry opened, as complaints from neighbors mounted, inspectors from the air pollution control division noted the first of 81 times in the next four years that the foundry would operate in violation of the county air pollution code. In the majority of those 81 cases, the violation would be linked to a breakdown of the foundry's elaborate, expensive air pollution control equipment.

Conrad and Lorraine Krusinski, who lived at 7241 Marjorie, four doors from the Huber foundry, celebrated their daughter Darlene's first birthday a month after the foundry opened. Blond-haired, blue-eyed Darlene, the couple's first baby, was a chubby, red-checked child with a pixie haircut. She had never had health problems.

But sometimes near the end of August, 1966, Darlene developed an eye infection. A pediatrician found that it was caused by a tiny piece of black soot lodged in the corner of the baby's eye. The family thinks the soot dropped into Darlene's eye as she lays on the porch swing, across the street from the Huber foundry.

A month or two after the eye infection cleared up, Darlene began to have coughing fits and difficulty breathing.

The attacks got worse and in April, 1968, when she was two and a half, Darlene was hospitalized for nine days at Bi-County Community Hospital in Warren. She lived in an oxygen tent for four days.

Doctors ran about 200 allergy tests and finally diagnosed the illness as a severe asthma-like lung condition.

Later a specialist at Detroit Children's Hospital confirmed that diagnosis. The specialist told the Krusinskis that "everything pointed right to" the pollution in their neighborhood as the cause of Darlene's asthma.

Shortly after Darlene was released from the hospital, the Krusinskis hired attorney Charles J. Barr. In August, 1968, Barr filed a $120,000 lawsuit against Chrysler Corp. on Krusinski's behalf, claiming that pollution from the Huber Foundry and Chrysler's Winfield foundry a block away in the same complex, caused permanent eye and lung damage to the child.

Barr said: "I'm convinced that there is a casual connection" between the child's lung problems and pollution from the two foundries. He said the family went ahead with the suit despite pressure from Chrysler representatives who offered to air-condition their home and pay some medical bills if they would sign a general release not to take legal action.

Darlene has spent the past two years living part-time with relatives in the suburbs. In September the family moved to East Detroit. The suit is still pending.

February 21, 1967: An inspector from the air pollution control division, checking on citizen complaints that heavy smoke and dirt were blanketing the neighborhood, noted that the foundry was again operating in violation of the air pollution code.

The next day, Edward J. Weiss, then plant engineer at the foundry, spoke in Lansing at a conference on industrial ventilation. He told his audience that pollution control equipment at the Huber Foundry was so effective that it limited the amount of dust blown into the air from the plant to .05 grains of microscopic material per cubic foot. Weiss did not mention the frequent breakdowns of the equipment.

In late winter and early spring of 1967, Chrysler began negotiating with individual citizens to settle damage claims against the company. Complaints of property damages caused by the company's pollution were channeled through the county pollution control office.

Some of the settlements were as small as $50. Others amounted to several hundred dollars. The settlements stopped when some citizens filed a lawsuit. Chrysler refuses to say how much they paid to how many citizens, or why they stopped, because of a company policy against discussing out-of-court settlements.

May 17, 1967: The Huber Foundry was cited by Factory Magazine, a business

trade magazine with a circulation of 95,000, as one of the top 10 new plants in the country. Three Chrysler executives received the award and citation at a banquet in New York City. The magazine praised the foundry for its controls on air pollution, citing especially the sound and dust pollution controls.

In midsummer, Chrysler paid its half-yearly Detroit city and school real and property taxes of $5.3 million. Shortly after that, the Huber foundry neighbors petitioned Common Council for a hearing or some action on the foundry pollution. Council passed the petition on to the city health department and mailed the neighbors a copy of the explanation the health department sent Council. No other action was taken.

Your feet make prints in the dust, and grit crunches unpleasantly under your heels when you walk across the porch at Glennis and Ruth Jones' two-bedroom house at 7227 Roland, a block-and-a-half from the foundry. Mrs. Jones says she doesn't sweep up the dirt because it is a hopeless battle—it has settled on the porch every morning since the Huber Foundry opened.

The dirt also clings to the Jones' white aluminum siding. They were making their 49th payment of $33.73 for the siding in August, 1967, when they noticed that it needed scrubbing. The family marshalled itself one afternoon, got buckets, water and soap and scrubbed the entire outside of the house.

As they worked, Mrs. Jones said, they noticed "little needle-like pits all over the siding." When they finished the job, the siding was white again. Two days later it was dirty gray. Mrs. Jones says the dust from the foundry caused the color to change. "You scrub it and it's a waste of time and effort," she said.

The Joneses paid off the siding, which cost a total of $2,600, in the summer of 1968. By that time, it didn't matter, Mrs. Jones said. "It was ruined before we ever had it paid up."

September 25, 1967: The foundry's neighbors began to lose patience with the company's breakdowns, and they continued to call the air pollution division and the foundry itself with complaints. At one point, a woman reported that people were "unable to see across the street because of the smoke." Another said: "Emissions are so bad right now you can't see the cars parked at the curb." Another neighbor complained that his trailer was "pitted by iron oxide."

Inspectors for the air pollution division noted eight violations of the air pollution code by the foundry during August and September. In the light of that, Morton Sterling and three of his staffers met with eight Chrysler representatives to talk about the problem.

In his written report on the meeting, Sterling said Chrysler people told him the smoke was escaping because one of the fans in the cleaning system was in Chicago for repairs.

"It was also noted," Sterling wrote, "that the spare fan which was originally provided in the preliminary design for this facility . . . was removed from the final project because of a $50,000 to $60,000 estimated cost, and the fact that they were running way over their budget at that time."

Four days later Sterling wrote to then Common Councilman Ed Carey that Chrysler is "working diligently in an effort to repair defective items" and eliminate the smoke and noise problems.

Fifty-three-year-old Viola Slusher had been living at 7378 Grinnell, two blocks from the foundry, for about a year when in late 1967 she started having breathing when she got up in the morning. "I was wheezing and coughing. My lungs seemed to fill up something. I'd never had any trouble like that before," she said.

It had been 12 years since Mrs. Slusher stopped smoking. She had been living in Bagdad, Cal., where she ran two cafes on Route 66 in the Mojave Desert.

A year after her condition developed, her husband died, and Mrs. Slusher's chest problem got worse. In April, 1970 Dr. M. Z. Greenberg of the Van Dyke Clinic diagnosed the problem as asthmatic bronchitis.

Mrs. Slusher was taking medication for the asthma when she started having headaches. "I'd get up with a headache, go to bed with a headache, feel woozy in the head and then all of a sudden have blood coming out of my nose," she said. "I have blown my nose and what came out would be as dark as my black slacks here."

Dr. Greenberg put Mrs. Slusher in North Detroit General Hospital for four days last month. The headaches and hemorrhaging were caused by sinus problems, he said. He says Mrs. Slusher now has upper and lower respiratory problems, and he has advised her to avoid smoke.

Dr. Greenberg cannot say if the Chrysler pollution caused Mrs. Slusher's respiratory problems, but he did say that "air irritants of all kinds" will cause and irritate ailments like hers.

Mrs. Slusher is convinced that the Chrysler pollution brought on her problems. She spends much of her time now staying at her daughter's home in Warren, and she thinks the cleaner air there has helped her condition.

June, 1968: One of the foundry neighbors, a student in a night real estate class at Macomb County Community College, asked his teacher, Harper Woods attorney L. Edwin Wenger, if he could help the neighbors fight Chrysler. Wenger met with the Harper-Van Dyke Property Owners Assn. and on July 8 filed a suit against Chrysler, asking restitution for property damage claims for 70 citizens. Chrysler settled the case out of court at Christmas, paying claims that averaged $550 a family and totaled $45,000 including court costs.

The shortness of breath and dizziness that came on every time Reva Pearson walked up a flight of steps, bent over or exerted herself didn't worry Mrs. Pearson until she started losing weight in the summer of 1968.

Mrs. Pearson, 40, kept house for her mailman husband and three teenage children at 7309 Grinnel. She was reluctant to see a doctor. By January, 1969, however, her weight had dropped from 130 to 98 pounds and her five-foot-five frame looked emaciated. She checked into Sinai Hospital of Detroit for a month of tests.

"First they thought my sugar was causing it because I have diabetes, then they thought it was TB. For a while they thought it was cancer," Mrs. Pearson said.

In an exploratory operation, doctors found that Mrs. Pearson's right lung was dotted with nodules, as they had suspected from X-rays. A set of X-rays taken of her lung in 1967 had shown no nodules.

In a sample of her lung removed for analysis, doctors found general tissue damage. Her lung tissue was spotted with carbon pigment and red brown granules.

Doctors called Mrs. Pearson's condition a "bad disease of the lung" and said they were unable to determine what caused it.

Mrs. Pearson contends that the pollution from the Huber foundry caused her illness.

She bases her belief on the fact that since she and her family moved from the Huber neighborhood to Warren she has gained back all her lost weight, gone to work as a cashier in the Yankee Department store in Sterling Heights and feels better. The last X-rays of her chest, taken eight months ago, showed the blackness clearing up. Mrs. Pearson is not seeing a doctor now because the bills got too large. She is convinced that the move to Warren saved her health.

July 29, 1968: The air pollution control office began a two-month sampling of the air in the Huber Foundry neighborhood. When completed, the sample showed that when the wind blew smoke from the foundry stacks toward the neighbors' homes the people living there were breathing air that was slightly more than twice as polluted as the neighborhood air normally was.

On the same day the air sampling began, Sterling mailed a letter to an aide in the mayor's office saying in part: "The cupola (furnace) operations have been substantially improved within the last several months . . . we feel that the last several months' operations have proved capable of fairly sustained and acceptable performance."

Sterling did not tell the mayor's office that in the four months prior to his letter, inspectors had noted six violations of the air pollution code, most of them linked to equipment breakdowns.

Then, just three days after he wrote the letter, inspectors issued a written violation notice to the foundry management for "permitting the escape of fumes, offensive odors and industrial dusts" in violation of the county code.

The air pollution control office often uses written violation notices as a sort of get-tough device. A company is given a specified length of time to correct the violation after the notice is issued. If the company doesn't correct the problem it can be taken to court and fined. Sterling's office would issue a total of six written violation notices to the Huber foundry between July, 1967, and June 1970, but the company was never taken to court on the notices.

Warren and Jennie Linder moved into the house at 7246 Sheehan in 1937. They raised their two sons and two daughters there and when Linder retired from the Detroit Fire Department in 1952 they expected to stay there.

Then Chrysler opened the Huber Foundry. The Linders put up with smoke, dirt, dust, noise, litter from the foundry workers and dank air that burned their

throats until last July when they sold the house and moved to Sandusky, Mich.

"We wanted to stay there. We have a daughter and a son who live in Detroit and we wanted to spend the rest of our lives there," Mrs. Linder said. "When we lived there we just couldn't keep the house clean and we were so nervous with the noise.

"The grandchildren couldn't go out into the yard without changing their clothes after they came in because they'd be covered with dirt. If you left your bed unmade, your sheet would be covered with black stuff."

Mrs. Linder said that Chrysler "promised us three years ago that it would be so clean we could go out and kiss the ground. . . . I think Chrysler pays too much in taxes to the city, so the city is not going to do anything about the pollution."

November 1, 1968: J. M. Bruce, then manager of the Huber Foundry, sent Sterling an informational letter about the foundry. He said: "Huber Ave. foundry is the sole casting source for all eight-cylinder heads, six-cylinder blocks and crankshafts for all Chrysler Corp. automotive production. Interruption of supply from the Huber Ave. foundry would result in intermination of automotive production."

Barbara Fedorko, 68, is a member of the board of the Harper-Van Dyke Property Owners Association and has become a sort of one-woman gripe central for neighbors since the Huber Foundry opened. She has a wall phone in her kitchen and an extension in her bedroom, takes complaints from other neighbors and passes them on to the air pollution control office. In four months of 1969, Mrs. Fedorko called the air pollution office 18 times. In the first nine months of this year she called the office 36 times.

Mrs. Fedorko and her husband, John, 69, who runs a small meat market and grocery store, have lived at 7203 Marjorie for 34 years. When they bought the house, Mrs. Fedorko says, the land the Huber Foundry now stands on was an athletic field where, once a summer, Chrysler Corp. would host the neighborhood kids for hot dogs and ice cream.

In January, 1968, at Sterling's suggestion, Mrs. Fedorko started a log of pollution from the foundry. From the first week on, the log is a revealing document of frustration. Six days after she made the first entry Mrs. Fedorko wrote:

"Sat. Jan. 18, 9:30 a.m. Smoke. Called Mr. Del 2 p.m. about smoke. Del returns call, states quite a breakdown. Also says they are to be back in operation 5 pm. 5:30 p.m. Still see fire from cupolas and smoke until 7 p.m.

June 24, 1969: Louis Brewczynski, then vice-president of the Harper-Van Dyke Property Owners Association, wrote to Detroit's Common Council to ask why the Brewczynski mentioned that the group first petitioned the Council in the fall of neighbors hadn't been granted a hearing on the Huber foundry pollution. 1967 and repeated the request a year later.

In the letter, Brewczynski also said: "A committee from our organization appeared before Mr. Sterling and requested some close-down action against this foundry during these malfunction periods. Mr. Sterling informed us that due to the economic position of the Chrysler Corp. that he had no intention whatsoever of closing down this foundry or any portion of its operations. We are very sure the Chrysler Corp. is fully aware of his position, and they will take full advantage of it."

Within a month of Brewczynski's letter, Council summoned Sterling to a private appearance and then scheduled a public hearing on the foundry on July 30.

About 100 neighbors testified at the hearing that they were constantly irritated and upset by the foundry operation. Sterling was booed by the neighbors when he spoke.

Chrysler representatives Edward Williams and James Del presented a prepared five-page statement explaining the pollution control equipment at the foundry and then noting breakdowns which they called unavoidable.

Chrysler also said it had spent a great deal of money and worked hard to perfect the equipment. The statement said the company spent over $847,000 in 1968-69 to buy stand-by equipment or to rebuild and modify existing equipment in the system.

Chrysler also outlined the economic importance of the foundry and told the councilmen that the air pollution control system had experienced "excellent performance and reliability" in the previous seven months.

The hearing ended, was reported by the news media and was recorded in the Council minutes. Brewczynski says that was the last the neighbors ever heard from the Council. The Council took no action and made no recommendations to Chrysler or to Sterling's office, Brewczynski, said.

Dec. 12, 1969: Attorney Wenger filed a second damage suit against Chrysler. The suit, a class action involving 367 families, asks for restitution for damage to property and health and for a court order to clean up the Chrysler pollution.

March 4, 1970: A. J. Sutherland, an inspector for the air pollution control office whose job it was to deal with the Huber Foundry problems on a day-to-day basis, wrote his superiors a memo saying: "Generally speaking, it is my opinion that conditions (at the foundry) are generally good. Chrysler Corp. has tried to be very cooperative and is trying to expedite these problems as rapidly as possible. However, the regrettable fact remains that this plant is located much too close to a residential area without a buffer zone."

At the time Sutherland wrote his memo, it had been five months since inspectors noted any violations or breakdowns of the foundry's pollution control equipment. At the same time, the foundry had made considerable progress toward eliminating the noise pollution.

But the good conditions didn't last. It was only six weeks later that the pollution control offices issued the third written violation notice to the foundry for violating the air pollution code. Then in May, the office wrote the foundry two more notices.

It was also in May, 1970, that Chrysler released a booklet on the corporation's efforts to combat pollution, titled, "Toward A Cleaner Environment." In the booklet Chrysler described itself as a ". . . good example of a corporation that has worked consistently over the years to solve the pollution problem." The booklet devotes three-quarters of a page to the pollution control equipment at Huber Foundry saying:

"In 1964 Chrysler built Huber Foundry, the first large industrial facility built by a major manufacturer within Detroit's corporate limits in more than 12 years. This foundry presented Chrysler engineers with major pollution problems at a time when pollution codes were just being written. These engineers, using the pollution abatement guidelines then available and relying on the guidance of government officials, obtained the most advanced equipment which would meet present and anticipated future needs. The program was successful."

The booklet does not mention the number of times their pollution control office had noted violations of the code at the foundry, the number of times the control equipment had broken down, the violation notices that had been written on the foundry or the massive number of citizen complaints.

"Toward A Cleaner Environment" also fails to note that the foundry never had been issued and continued to operate without an operating permit from the Wayne County Air Pollution Control Division. The permits are issued when the pollution control office is convinced that a plant's operations meet the county air pollution code. Theoretically the penalty for operating a plant without a permit is a $100 fine for every day of operation without it, if the air pollution control office takes the plant to court.

"I never gave them an operating permit because I didn't want it to be put on an operating basis with a clean bill of health when citizens were claiming all these problems," Sterling said.

He said he continued to defer issuing the permit because he was "in the course of working out an arrangement designed to improve known deficiencies in their air pollution control equipment. They couldn't shut down the plant until it was fixed, that just wasn't possible. So it was just one of the practicalities of life that they continued to operate without a permit."

June, 1970: The longest, most massive and most approving breakdown of the Huber Foundry air pollution control equipment started in the first week of June. Mrs. Fedorko reported in her log that flames four feet high leapt from the furnace openings and that brown smoke pouring from the foundry was the worst she had seen.

Inside the foundry, a 1,750-horsepower motor used to drive a huge fan that blew filtered and cleaned gases from the furnace into the air had burned out, making the entire cleaning system for that furnace completely useless. Chrysler did not have a spare motor to put to work because their order for one had been delayed by the General Electric strike. So the foundry was forced to send the furnace residue into the air uncleaned.

Chrysler told Sterling that it would take 20 days to repair the motor and that it was economically impossible to stop production during that time because the parts being produced by the foundry were in very short supply—in some cases there was only a five-day supply of parts. So the furnace continued to operate.

In an effort to satisfy some citizen complaints, Sterling called the plant twice in five days and asked plant manager Paul F. Moore to restrict some of his operation.

Finally on June 15 the air pollution control office wrote a violation on the foundry, citing Chrysler for "permitting the escape of soot, cinders, noxious acids, flyash, fumes and odor from the No. 2 cupola."

Sept. 1970: Sterling spoke at a meeting of the Purchasing Management Association of Detroit and said in reference to the current popularity of pollution crusades:

"The situation has reached the point now where agencies such as ours find it quite difficult to maintain a sense of credibility with the public and assure them that we have adopted a sufficiently firm and aggressive program designed to bring about improvement."

October 1, 1970: Sterling and Dr. George Pickett, then city-county public health director, announced at a press conference that they had filed a suit against Chrysler asking for a court order to stop pollution at the Huber Foundry. Chrysler was one of three companies the pollution control office filed suit against under a brand new and unique state law, Public Act 127, that allows any citizen to file suit to get a court order to stop pollution by a company.

Chrysler filed an answer to the suit on Oct. 21, denying the county's claim that the foundry pollutes the air. Chrysler also challenged Public Act 127 on the grounds that it is unconstitutionally vague and indefinite and violates due process of law because it doesn't set up any standards to judge how much pollution is too much.

Since the county filed suit, Chrysler has not had any dealings with the air pollution control office about the Huber Foundry. When the Free Press asked Chrysler for an interview to discuss the foundry, the company public relations office responded with a one-page statement, that was basically a condensation of its reply to the lawsuit, and a copy of the year-old statement the company had made at the Common Council hearing. The one-page statement read in part:

"Chrysler Corp. operates its Huber Avenue Foundry well within the emission levels established by the Wayne County Air Pollution Control regulations. Chrysler's ability to operate its foundry in such a manner is the direct result of the expenditure of substantial sums of money to acquire for its foundry the most advanced air pollution control system available through modern technology. The Huber Avenue Foundry is the most efficient foundry of its type, from an air pollution control standpoint, anywhere in North America and probably the world."

The Huber Foundry pollution grown out of it are years from solutions. Attorneys expect it will be two or three years before county and private suits against Chrysler, are settled.

The foundry's pollution control equipment has apparently operated without major breakdowns since last June. Citizen complaints have dropped off and the daily irritation they experienced has lessened, but it has not disappeared.

One day last week, parts of the neighborhood were permeated with a painfully familiar odor neighbors described as "like burning leather." And, based on the control system's past record of 55 failures in four years, future breakdowns can't be ruled out, and the system can't be considered perfected until there is a longer period of trouble-free operation.

The history of the Huber Foundry pollution problem is the history of a company whose intentions were better than its equipment, whose publicity releases far outran its performance.

And it is the story of government agencies which, by the weakness of laws and the strength of economic realities, could not or would not respond as forcefully as the citizens who live with the pollution wanted them to.

Most of all, perhaps, it is the story of helpless people, ordinary ones, trapped by forces beyond their ability to control or even to influence in any important way.

Morton Sterling says now: "We did not expect to have these problems. If we had been able to foresee the effects of this foundry on the public, we never would have issued Chrysler an installation permit to build those cupolas."

All the hindsight in the world, however, will not cure Darlene Krusinski's lung problem. It won't restore Glennis Jones' aluminum siding. And it won't make up for the anguish of the people who have lived next door to the Huber Foundry since July 20, 1966.

[From the Detroit Free Press, June 19, 1971]

CHRYSLER BOWS TO POLLUTION PLAN

(By Julie Morris)

Chrysler Corp. agreed in court Friday to a 41-day trial program that would control and prevent pollution at its Huber Ave. foundry on Detroit's east side.

The major point of the program, set down in a temporary court order requires Chrysler to cut back or shut down its two 50-ton-per-hour steel melting furnaces if pollution control equipment on the furnaces fails anytime in the future.

Breakdowns of the furnaces' pollution-control system, a $2 million Venturi high-energy wet scrubber system, was the main cause of air pollution from the foundry from 1966, when it opened, until last June. The equipment broke down a total of 55 times in that period.

Morton Sterling, director of the Wayne County Air Pollution Control Division which asked for court action against Chrysler last October, said the agreement to shut down the furnaces "was the main thing I wanted all along."

The temporary court order was signed by Wayne County Circuit Judge Joseph G. Rashid with agreement from attorneys for Chrysler, Wayne County, 328 citizens who intervened in the case and Attorney General Frank Kelley, who also joined in the case.

The order does not include a statement indicating the foundry has ever polluted. The absence of that means the document cannot be used to hold Chrysler liable for any property or health damage caused by pollution from the foundry.

L. Edwin Wenger, attorney for the citizens who are foundry neighbors, had insisted he would not agree to any court order on the matter unless Chrysler admitted it had polluted.

But Wenger said Friday that he agreed to the order because of the possibility that homeowners in the area would be denied FHA mortgage insurance unless pollution in the neighoborhood was controlled.

The Detroit FHA office has refused to insure two homes in the neighborhood because of environmental problems traced to the foundry.

Sterling said he met with FHA officials Monday and they agreed to reconsider those cases if the temporary court order on the Huber Foundry was entered and works.

Rashid ordered Sterling's office and Chrysler to send him weekly written progress reports on the foundry operation until July 30, the date of a pre-trial hearing on the case.

If the trial pollution-control program satisfies all parties in the suit, it may become the basis for a permanent court order to be drawn up after the pre-trail hearing.

The order's provision on the cutback or shutdown of the Huber furnaces states that Chrysler must immediately notify Sterling's office if pollution control equipment on one or both furnaces breaks down. Repairs on the equipment must begin immediately, the order states.

The operation of a furnace with malfunctioning pollution-control equipment is to be cut back if repairs can be made in less time than it would take to shut down the furnace by draining the melted metal inside.

The furnace is to be shut down completely if repairs will take longer than the shutdown operation.

The time limit on a complete shutdown appeared to be a compromise.

Sterling, who said it takes two to three hours to shut down a steel furnace, admitted that a mere cutback of furnace operations in the event of a pollution control equipment malfunction would not eliminate pollution.

But he said the pollution would be greatly cut. And he said in some cases it would be impractical for Chrysler to shut down a huge furnace to make a small repair.

A Chrysler spokesman said it takes only 45 minutes to shut down a steel furnace. Chrysler attorney Walter B. Maher indicated he is not completely happy with the order's provision on the furnaces.

[From the New Republic]

THE PEOPLE, NO—ENVIRONMENT AND THE BUREAUCRACY

Just over a year ago, Senators Philip Hart and George McGovern introduced a little-noted bill entitled the Environmental Protection Act. Similar legislation has

been introduced in the House by Congressmen John Dingell of Michigan, Morris Udall of Arizona and others. While the general public is almost wholly unaware of the bill's existence, it has been the subject of intense interest among a small but powerful group of federal officials who are determined that it not become law. The government's chief environmental lawyer, Assistant Attorney General Shiro Kashiwa, testified at length against it. Then the President's prestigious Council on Environmental Quality added its powerful opposition, despite a recommendation favoring the bill issued by the Council's own legal advisory committee—a citizen group of environmental law experts. At a time when public officials are climbing all over each other to support almost anything that can be called environmental legislation, it is natural to be curious about a bill that has engendered such vigorous opposition from leading members of the Administration's environmental quality team.

The Hart-McGovern bill is an uncharacteristically brief and plain speaking piece of legislation. In essence it authorizes any person to bring suit against a private person, corporation or governmental agency, claiming that the defendant's conduct will result in "unreasonable pollution, impairment, or destruction of the air, water, land or public trust of the United States." If the plaintiff can establish such an effect, the court is authorized to enter a cease and desist order, unless the defendant can prove that there is no feasible and prudent alternative less likely to harm the environment and, in addition, that the challenged activity is consistent with the public health, safety and welfare.

If enacted, the bill would modify traditional law in three vital respects. It would permit initiative in law enforcement to be taken by private citizens, thus ending the virtual monopoly now held by government regulatory agencies over the determination of the public interest. It would permit suits to be brought against government agencies themselves, abolishing the ancient defense of sovereign immunity—a quaint legal fiction embodying the premise that "the King can do no wrong." And it would establish an effective remedy against environmental wrongs by allowing citizens to obtain a court order prohibiting activity that adversely affects the environment; no citizen today has such an enforceable right to environmental justice.

Had such a law been on the books at the time of the notorious Santa Barbara oil spill of 1968, local citizens—who were very dubious about the oil leasing project—would have been able to obtain detailed judicial scrutiny of the proposal prior to the spill. Instead they were compelled to accept Interior Department publicity-release assurances saying, as one Santa Barbara resident later recalled, that the oil companies "had perfected shutoff devices that were foolproof even in such disasters as a ship running into the platform, or an earthquake." No legal action could have been taken at Santa Barbara in 1968; not only would the Interior Department have asserted that it was "immune" from citizen challenge, but it would have noted as well that neither it nor the oil companies had violated any existing law or regulation.

The government's answer to proposals like the Hart-McGovern bill is deceptively simple. If Congress sees an environmental problem, they say, it should legislate explicit standards covering that situation; then private and administrative agency conduct can be tested against a specific statutory standard, rather than against the broad mandate of the Hart-McGovern bill.

The difficulty is that except in a relatively few situations, environmental control cannot be reduced to some statutory formula that automatically covers all situations. Government agencies, for example, must pass each year on thousands of timber cutting, dredging, oil, and highway projects. Each situation presents its own special problems. Unless the Congress were totally to bar timber cutting in the national forests, or all oil drilling on submerged lands (an unlikely eventuality), a judgment must be made in each case as to whether the environmental risks are serious, the available alternatives that are less destructive, and the costs of adopting an alternative solution.

These judgments are not made, and cannot be made, by the President or the Congress. They are made, day in and day out, by relatively low level officials in some regional office of the Forest Service or the Bureau of Public Roads. It is the cumulative effect of these decisions that determines our environmental status, and not the high-sounding rhetoric that flows out of Cabinet offices in Washington. Santa Barbara was the product of such decision-making; so are the present pesticide situation, the high-way behemoth and the wretched condition of our nation's air and water.

So long as such discretionary decisions of governmental agencies are immunized from citizen challenge in the courtroom, government officials will retain

their practical monopoly over the business of implementing the public interest. No matter how many laws Congress enacts dealing with environmental problems, there will always remain the question of implementation in the particular case. The Hart-McGovern bill is a direct response to *this* problem; and it is in this respect that officialdom views the bill as a dangerous innovation.

As a defensive tactics, the Administration has now devised its own "citizen lawsuit" proposal. The differences between it and the Hart-McGovern bill indicate how sharply the issue is drawn. In the pending water pollution bill supported by the Administration (S. 1014), citizens may bring suit against the federal administrator—but they are prohibited from challenging any decision that is "discretionary." The administrator's "discretion," however, appears to cover all questions as to whether the levels of treatment or the time set for compliance is "practicable." Everyone who has any experience with the regulatory process knows that it is in negotiation over the practicability of compliance with the law that the greatest danger of administrative faltering lies. It is not the formal standards that are ordinarily challenged, but the rigor with which they should be applied in a particular case.

The Administration's proposal thus lets citizens challenge everything but what counts. The administrator remains the boss; members of the public are viewed as officious meddlers in the government's business.

It is extraordinary for government to take the position that citizens—who have the most direct stake—should have no significant role to play in the determination of their environmental destiny. Is pursuit of the public interest to be the exclusive preserve of a professional bureaucracy? This is the question raised by the Hart-McGovern bill; and it is one to which the Administration gives a resounding positive answer.

To be sure, the official testimony against the bill is not stated in these terms. It is said that a bill phrased in such broad terms is unworkable. Yet the entire common law tradition is built upon just such concepts as those that underlie the Hart-McGovern bill. The law of privacy, of accidents, of unfair trade, is based upon no explicit code of rules, but evolves from judicial determinations of prudence and reasonableness as applied to the situation before the court.

Indeed, one of the most significant federal laws ever enacted, the Sherman Antitrust Law, simply says: "Every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." The Sherman Act was subjected to the same criticism that is leveled against the Hart-McGovern bill. But in upholding it, Chief Justice Hughes of the Supreme Court said, in language that ought to be taken to heart by the Administration: "As a charter of freedom, the Act has a generality and an adaptability comparable to that found to be desirable in Constitutional provisions. It does not go into detailed definitions which might either work injury to the legitimate enterprise or through particularization defeat its purpose by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, sets up the essential standard of reasonableness. . . . In applying this test a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment."

It is also said that courts are not competent to deal with the complex and technical matters that so often arise in environmental controversies. Yet there come before courts every day issues of medical malpractice, industrial accidents and intricate commercial dealing. A judge need not be a physician to try a malpractice case or a Thalidomide case; nor need he be an engineer to try an auto defect case. Cases are decided by the presentation of expert testimony, on both sides, which the court must hear and evaluate. Nothing in any environmental case is more complex or exotic than those matters which comprise the judiciary's daily workload.

As a matter of fact, complex environmental questions already come before the courts under particular statutes. In a recent case in the Colorado federal court a judge had to decide whether a certain area in the national forest possessed the qualities of a "wilderness." The present federal water pollution law authorizes the courts to determine "the practicability and feasibility" of abating pollution if the polluter challenges a clean-up order on grounds it's too burdensome.

Nothing in the Hart-McGovern Bill would impose more difficult duties than these on the courts. Ironically, while a polluter can now come into court and challenge the administrator of the water quality laws for being too tough, no citizen may come into court and challenge him for being too lenient. The Hart-

McGovern bill would permit judicial power to be made available to those who want more, rather than fewer, environmental controls. Such legislation is already on the books in Michigan and Connecticut.

As to whether it's needed, perhaps the last word is best left to former Interior Department Secretary Stewart Udall, reflecting on the events at Santa Barbara: "I have to say . . . that at the time we made the Santa Barbara decision there was no dissent in the department . . . The Budget Bureau was hungry for revenue . . . This was a sort of conservation 'Bay of Pigs,' you might say . . ."

JOSEPH L. SAX.

(Mr. Sax, professor of law at the University of Michigan, is the author of Defending the Environment, A Strategy for Citizen Action).

[From the National Journal]

ENVIRONMENT REPORT/BILLS TO AUTHORIZE CLASS ACTIONS RECOGNIZE "RIGHT" TO CLEAN ENVIRONMENT

(by James R. Wagner)

Conservation-minded Members of Congress are developing a new weapon for the citizens war against all forms of pollution: a statutory right for individuals to sue public agencies and private parties for general damage to the environment.

Proposals for federal legislation permitting environmental class-action lawsuits face difficult political and legal tests; but, if they are enacted, their impact could be great.

The proposals now starting the long route through Congress could dramatically affect government agencies at all levels, as well as industries, businesses and individuals which might become defendants in pollution suits. They also could increase the caseload and expand the functions of the federal courts.

Environmental lawsuits up to now—such as those that have blocked the trans-Alaska oil pipeline, power projects, land development and highway construction—have been based on procedural errors by public agencies and violations of pollution law by private companies or individuals. The bills now before Congress would encourage citizen suits to challenge the substance of government decisions and to stop public and private actions that damage the environment.

The attempt to convert this concept into federal law is certain to be controversial. Supporters at the moment include a rising number of Representatives and Senators, the loosely organized but influential conservation lobby, and public-interest lawyers.

Opponents of the present proposals include the Nixon Administration (through the President's Council on Environmental Quality), some representatives of states and industries, and a notable segment of the legal profession.

Environmental class action is not yet a popular cause; even its backers are reluctant to predict when it may become a part of federal law. But the concept has gained attention and support since it was introduced in Congress last year, and many observers see it as a coming issue.

Since last summer, four states have passed some form of legislation permitting environmental citizen suits.

Rep. John D. Dingell, D-Mich., an effective fighter for environmental legislation, has just reopened hearings on a series of class-action bills and intends to continue spotlighting the issue into September.

"This is an idea whose time is here," Dingell told National Journal. "The problems is that Congress is not aware of it. Members will be as the hearings go along."

PURPOSES, PROBLEMS

The notion that a citizen should be able to sue the source of pollution or the government agency that fails to control it—even though the pollution does not affect him any more than it affects other citizens—has gained popularity in the past year through the consumer and conservation movements.

Public trust

It goes far beyond the common practice of filing civil suits to collect damages for specific losses resulting from particular incidents of pollution—such as recovering the cost of crops that were accidentally ruined by the untimely spraying of some chemical.

The present idea, which has antecedents in Roman law, is that environmental quality is a public trust that the law must protect for the common good. Thus, any citizen might sue to halt environmental degradation.

The leading proponent of the right to a healthy environment is Professor Joseph L. Sax, of the University of Michigan Law School, author of Defending the Environment (Knopf, 1971). Sax has an enthusiastic following among young activist environmental lawyers.

Sax has a following also in Congress, where he has helped draft class-action bills. Among his supporters there is Sen. Philip A. Hart, D-Mich.

Hart, together with Sen. George McGovern, D-S.D., introduced a Sax-inspired bill last year and reintroduced it in the 92nd Congress (S. 1032). Chairman of the Commerce Committee's Subcommittee on Environment, Hart held four days of hearings on the proposal in 1970 and two days this year. He says he is optimistic about getting it passed.

Already, Hart said, the bill represents "a significant advance . . ., a realization on the part of people who almost despair of influencing the forces that affect their lives, by God, they can."

Breaking barriers

The Hart-McGovern bill, which is similar to proposals Dingell is now pushing in the House, would give individuals considerably more encouragement to file environmental lawsuits against government agencies and private parties.

Agencies.—To satisfy the judicial requirement of standing to sue a public agency, a citizen would have to show only that he had some personal stake and interest as a member of the general public; he would not have to demonstrate any distinct personal loss.

In the case of federal agencies, the claim of sovereign immunity would be waived in environmental cases.

Courts would have authority to overturn agency decisions if they found the substance of the decisions to be wrong; they would no longer have to rely upon procedural violations.

Private parties.—A more expansive concept of standing to sue also would apply to citizens wishing to attack environmental degradation by corporations and other private parties. The bill would recognize a substantive right to a clean environment; thus, a citizen would not have to show damages beyond those suffered by the general public.

Bills

In the Senate, the Sax idea is embodied only in the Hart-McGovern Environmental Protection Act of 1971 (S. 1032).

Four environmental class-action bills have been introduced in the House. Although they differ in detail, they are all similar in substance to the Senate bill, which is modeled on a Michigan law—also inspired by Sax—that was enacted last year.

Three of the House proposals are now before Dingell's Merchant Marine and Fisheries Subcommittee on Fisheries and Wildlife Conservation: HR 49, introduced by Dingell at the beginning of the session; HR 5075, introduced by Rep. Morris K. Udall, D-Ariz.; and HR 8331, introduced by Rep. Joseph E. Karth, D-Minn., and cosponsored by Dingell.

The last of the three—written to include suggestions the Dingell subcommittee was given at hearings May 7 in Ann Arbor, Mich.—is probably the best starting point for "working out a good piece of legislation," according to Dingell.

The Fourth House bill (HR 2288) was introduced Jan. 26 by House Republican Leader Gerald R. Ford, of Michigan, and was referred to the Judiciary Committee, where no action is scheduled. Dingell's staff is hoping for Ford's support if their bill reaches the House floor.

Definition problems

The present bill do not provide a clear definition of the "environment" that the class actions would defend. In trying to write that definition, supporters of the legislation may run into difficulty.

Should the litigation be limited to standard environmental matters, such as air, water and solid waste pollution? Or should the legislation be open-ended?

For the moment, Dingell would like to leave it open. In a mid-May statement on citizen lawsuits, he asked, "Where is legislation that would protect factory

workers against excessive noise, or inner city residents against highway engineers?"

William T. Lake, a staff member for the Council on Environmental Quality, said the present bills "could go all the way down to suing your neighbor for having his incinerator too close to the fence."

Hart recognizes the political difficulties of trying to cover too much.

"In my own mind," Hart told National Journal, "I'm sure that we could define 'environment' to include things that few people even think of while they're talking about the environment. . . . Politically, we cannot expand that definition to include one and all."

LEGISLATIVE ACTION

Environmental class-action proposals have yet to generate mass enthusiasm, even among conservation groups, but House and Senate sponsors are pushing ahead with their bills. Dingell's theory is that the issue will pick up momentum through the summer.

Dingell's leadership

The most active leadership on environmental class actions is coming from the House, specifically from Dingell, who places class-action legislation right below ocean-dumping legislation on his list of priorities.

Conservation groups who support the proposal are pleased that it is in Dingell's subcommittee. Last year, an environmental class-action bill introduced by Morris Udall was referred to the House Judiciary Committeee, which dropped the issue after only one day of hearings. (Udall rewrote his bill this year so that it would go to Dingell's panel.)

"Dingell has a knack of getting legislation out," said Ted Pankowski, Jr., of the Izaak Walton League of America.

Hearings.—The May 7 hearings in Ann Arbor featured more than a dozen witnesses, including state officials who told of their experiences with the Michigan law. Sax also testified.

Dingell's subcommittee resumed hearings June 9 and 10 in Washington, with witnesses from the Council on Environmental Quality and the Environmnetal Protection Agency. Dingell said he expects to give careful attention to the Administration's suggestions.

"We'll have fairly prolonged hearings before we can get a consensus in committee and line up support needed to pass legislation," Dingell said.

He plans to continue hearings this month and in July, and into September after the summer recess. Future witnesses in support of environmental class actions, Dingell said, will include former Interior Secretary (1961–69) Stewart L. Udall, and representatives of Common Cause, several conservation groups, the United Auto Workers and other labor unions.

June 1 meeting.—On June 1, Dingell called together potential supporters of the bills: representatives of the Wilderness Society, Izaak Walton League, National Wildlife Federation, Wildlife Management Institute, Citizens' Committee on Natural Resources, Humane Society and the League of Women Voters.

The purpose of the meeting, Dingell said, was "to get the groups together, get consensus and get marching orders out."

Those attending the meeting all promised support for class-action proposals, but they did not reach agreement on a specific bill or a definite course of action.

Pankowski, who attended the June 1 meeting, said the proposal "has a good chance, but there's a question of timing."

"I really consider this bill just critical as hell," he said. "If we (conservationists) can't get together, it's only because of requirements of time and manpower. . . . People who feel strongly will have to let the committee members know."

Another guest at Dingell's meeting was Cynthia Hannum, action chairman of the League of Women Voters.

"I think it's an idea that's coming," Mrs. Hannum said, "but to get it through this year will take a lot of work on the part of the people who were there."

Congressional support.—Dingell said support from other Representatives is "moving along very nicely."

Udall's bill has about 20 sponsors, and Dingell predicted that the final House version will have about 100 sponsors.

Hart's hearings

Hart has only McGovern as a cosponsor for his bill, but he, too, is scheduling more hearings. Last's year's record filled 169 pages; it included testimony and written statements from industry representatives as well as from conservationists, environmental lawyers and federal officials.

Hart's hearings this year, on April 15 and 16, featured Sax and CEQ General Counsel Timothy B. Atkeson in indirect debate. The subcommittee also heard testimony from the Environmental Defense Fund, Natural Resources Defense Council, Wilderness Society, Izaak Walton League, and National Wildlife Federation. The National Association of Manufacturers and the Chamber of Commerce submitted written statements.

Hart plans only one more set of hearings this year. He has not set a date nor announced witnesses.

Although the Hart-McGovern bill would not have to be voted out of the Environment Subcommittee in order to reach the full Commerce Committee, Hart's staff said he will take it up first with the subcommittee. Subcommittee member Sen. Howard H. Baker Jr., R-Tenn., among others, does not favor the bill.

CONFLICTS

While congressional supporters of environmental class action are rounding up backers, they are keeping an eye out for opponents as well. The proposal is controversial for a number of reasons, and opponents will insist on being heard. Some have voiced their complaints already.

Essentially, the opposition comes from three sources: government agencies at federal and state levels which could expect citizen suits challenging their regulation of pollution; members of the legal profession who say that the legislation could overwhelm the courts with technical or frivolous cases; and industries and other companies that could be taken to court on accusations that they are causing general pollution.

Administration opposition

The Nixon Administration, through the Counil on Environmental Quality, has opposed the present bills on several grounds.

CEQ.—Atkeson, the Administration's usual spokesman on the issue, does not object to the principle of citizen suits to enforce antipollution laws.

In fact, the Clean Air Act of 1970 (84 Stat 1676) included—with Administration support—a provision for citizen suits. And water pollution legislation, now being marked up by the Senate Public Works Committee, also contains Administration-supported provisions for citizen suits.

William Lake, of CEQ, said the Administration would limit citizen suits to enforcement of specific environmental statutes—such as the Clean Air Act—for two reasons:

It would restrict litigation in federal courts to actions taken under specific federal laws—the National Environmental Policy Act of 1969 (83 Stat 852), for example, and air and water quality laws.

It would limit the courts to handling situations for which Congress, EPA or another federal agency has set precise standards. The courts have no technical standards to guide their decisions in other cases, Lake said.

Other agencies.—Other Administration spokesmen may take up the issue as hearings progress, but up to now CEQ has carried the load.

The Justice Department was asked to testify before Dingell's subcommittee, but it deferred to CEQ. Martin Green, head of the Pollution Control Section in the Land and Natural Resources Division at Justice, told National Journal: "I can hardly conceive of our taking a position different from CEQ on this—or taking any position, for that matter."

Advisory committee.—Last year, CEQ's Legal Advisory Committee, a citizens group with no power over the council's policies, came out in favor of environmental class action. On Sept. 14, 1970, the committee recommended the general proposal by a 10–2 vote. Sax, a member of the committee, said he was not surprised that CEQ failed to accept that recommendation.

Agencies as targets

Government pollution-control agencies at federal, state and local levels would be among the chief targets of the class-action bills.

Complaints.—Conservationists have complained long and loudly that federal agencies are not responsive to public dismay over administrative actions.

Douglas W. Scott, of the Wilderness Society, testifying before Hart's subcommittee April 16, explained why he favors the legislation.

"Too many of the things that are wrong about our environmental actions are the result of little decisions, little routines, and the good old way we've always done things.

"We need the means by which grass-roots citizens can have an effect on these piecemeal, local impacts. The resort to a court to argue the merits of the decision offers a logical, rational, and wholesome answer."

Proceeding from the premise that environmental quality is a public trust, Hart said, the proposed legislation would "permit the beneficiary of that trust to go to court himself and question whether an agency is not only arbitrary or in violation of the law, but also stupid."

The states.—The Hart-McGovern bill would allow class-action suits against agencies of state and local government as well as federal agencies. It also would leave the states free to establish class-action suits in their own courts.

R. Deane Conrad, special assistant in Washington for the Council of State Governments, said the bill is "very definitely a matter of concern to the Governors and legislators." He said his contacts with state officials indicate that "the general reaction of most professionals is negative."

Conrad acknowledged, however, that even without federal legislation many states will endorse class actions with their own "Sax bills." Michigan was first, but others are following.

With a grant from the Council on Law-Related Studies, Sax is monitoring Michigan's new law and the progress of similar bills in other states. Three other states—Connecticut, Minnesota and Indiana—have passed citizen-suit laws to protect the environment.

"I suspect that there will be a few more states this year that will pass some form of the bill," Sax said in a telephone interview. States closest to passage, he said, are New Jersey, California and Massachusetts. He said about 25 states are considering environmental class-action legislation.

The courts

One of the strongest arguments against class actions is that they could have an adverse effect on the courts, many of which already have huge backlogs of cases.

Critics say that the legislation could clog the courts with frivolous cases, send local matters to federal courts, interfere with administrative procedures authorized by law, and present the court with political and technical issues that judges are not qualified to deal with.

Caseload.—Chief Justice Warren E. Burger, in a "State of the Judiciary" address to the American Bar Association (and a national television audience) on Aug. 10, 1970, spoke of "our tendency to meet new and legitimate demands with new laws which are passed without adequate consideration of the consequences in terms of caseloads."

When Hart opened hearings on his bill this year, he cited Burger's speech and responded: "It may be that our judicial system would have to be expanded to provide for the increased caseload. Or . . . we may have to adjust the priorities within that system. The time is now for us to take major action to compel that adjustment."

William A. Butler, Washington attorney for the Environmental Defense Fund, dismissed an argument related to Burger's—that under environmental class-action legislation the courts might be clogged with suits of little consequence or frivolous cases brought by cranks.

Butler said: "The courts are big boys. They know a frivolous case when they see one. They throw them out all the time."

Further, the legislative proposals would authorize only injunctive relief—not awards of money damages. Thus, financial incentives for lawyers to prosecute frivolous suits are missing from the formula.

Sax provided a statistical rebuttal to the court-clogging argument, based on Michigan's experience with its environmental class-actions law. Since that law took effect last October, Sax said, only a dozen suits have been filed.

Court expertise.—Hart rejects the argument that courts would not be competent to decide highly technical environment lawsuits.

"For a long time," Hart said, "courts have been assigned and have handled competently very complex issues. Look at patent law. Look at malpractice suits.

ABA review.—The American Bar Association is in the midst of a review of the subject.

Members of a committee on environmental quality in the ABA's Natural Resources Section are being polled on environmental class actions. By July they may have a recommendation for their section, but any official ABA position on the issue is far in the future.

Polluters: Polluters—whether they be huge factories, small business or individuals who burn barbage—all could be taken to court if Congress passes a class-action bill, As yet, however, the potential defendants appear not to be worried about the consequences.

A few industry representatives have presented statements, but they have not yet been active in hearings this year. The staffs of the Dingell and Hart subcommittees say opponents of the legislation may testify if they want to, but they will not be sought.

Dingell said the views of industry will be considered as the legislation moves through the House—"possibly to make compromises and possibly to beat them, depending upon how it works out."

Sax acknowledged that environmental class-action laws create uncertainty for all polluters, actual or potential.

"The point is that it takes some uncertainty to keep these people on their toes," Sax said.

NAM statement.—One industry group that has responded this year is the National Association of Manufacturers. In a moderately toned statement filed with the Hart subcommittee May 7, NAM is critical of the Hart-McGovern bill.

"In our view," the statement says, "not only is such a scheme of court review unworkable through its lack of specificity, but it is unreasonable on its face since it would inject the judiciary directly into a framework of administrative regulation established by Congress."

Chamber of Commerce.—In a letter to Hart in mid-April the Chamber of Commerce of the U.S. opposed the principle of defining pollution on a case-by-case basis in the courts, and said there is a need for reliable standards.

"I think we're generally opposed to the whole premise on which the bill rests," John J. Coffey Jr., the chamber's senior associate for natural resources and environmental quality, told National Journal.

When asked about Michigan's experience to date with a similar law, Coffey said, "I don't think the Michigan law turned out as badly as some people thought, but there have been some weird suits."

Hart maintains that the mere threat of class-action suits would be enough to deter polluters and to spur public agencies into enforcing antipollution laws. That, he says, has been the case in Michigan.

FUTURE

Congressional action on the legislation will depend upon whether Hart, McGovern, Dingell, Udall, Karth and their allies can capture the public imagination and the sympathy of their colleagues.

Backers

Sponsors of the bills may be ahead of the conservation movement in recognizing the significance of class actions to protect the environment.

Conservationists.—"There isn't a great deal of preparation for this," Mrs. Hannum said after the June 1 meeting with Dingell. She said conservation groups and other organizations sympathetic to a class-action law are burdened with potential causes and are having difficulty setting priorities. Pankowski, of the Izaak Walton League, agreed.

Frank M. Potter Jr., of the Dingell subcommittee staff, a former conservation activist for the Environmental Clearing House, said the class-action proposal is the "most important" environment issue now before Congress. But Potter wondered how many conservation groups will be able to give it active support.

Spencer Smith, executive secretary of the Citizens Committee on Natural Resources, agreed that the bills are important. But he said the legislation "could fail for not coming high enough on someone's shopping list."

"The first few months of the 92nd Congress have been almost impossible to keep up with," Smith said. "I've got a catalog on almost 3,000 bills related to environment. . . . The (class-action) bill has no particular problems, but it is getting swamped and not sorted out."

William J. Duddleson, director of policy studies for the Conservation Foundation, suggested that the issue might take hold once it is publicized by hearings. Duddleson recalled that "nobody thought originally that the SST would be much of a cause."

Detractors: Support for the legislation may develop, but so will opposition

Administration.—The Nixon Administration presents the most formidable opposition. While debate over the class-action proposal remains "a very live issue," according to Lake, the Administration evidently will continue to resist sweeping legislation and will endorse citizen-suit provisions in specific pollution-control laws.

Atkeson made this quite clear on April 15: "We are unable to support S. 1032 and instead favor specific legislation in the various environmental problem areas—water quality, air quality, oil spills, ocean dumping, pesticides, toxic materials, noise, land use policy, strip mining, power plant siting, and so forth—rather than throwing these problems into the courts to set standards."

Smith said some conservationists are afraid that, if Congress does pass an environmental class-action bill, President Nixon might veto it. That is at least a possibility, but it would create a difficult political position for the President, who has tried hard to project the image of a guardian of the environment.

Courts.—Opposition could come from the legal profession and from the courts themselves. Specifically, environmental class-action laws could be declared unconstitutional.

Sax said current suits under the Michigan law almost certainly will confront challenges to the law's constitutionality—essentially on grounds that the state statute is too broad.

First, the challengers will say that the law is too vague and does not specify what can or cannot be done. Second, the question of separation of powers will arise, the challengers arguing that the law gives to the courts both legislative and administrative powers.

Sax said similar complaints about "broadness" were made against the Sherman Antitrust Act, but the U.S. Supreme Court upheld that law as having "a charter of generality."

"Unless you know in advance exactly what you want people to do, you've got to pass a broad statute," Sax said. "My own view is that at the heart of this approach has got to be a broad-based recognition of environmental rights."

Sax said acceptance of a broad approach to legislation would be "probably a less consequential problem in Congress than in the states." But Butler, of the Environmental Defense Fund, disagreed.

"If this (Michigan) law is declared unconstitutional, the Hart-McGovern bill doesn't stand a chance," Butler said.

Lake said that CEQ has never argued that the proposals in Congress are unconstitutional. But the Administration does feel that they delegate too much power to the courts.

Tactics

Dingell and Hart are working on tactics. One obstacle may be the definition of "environment" for purposes of the legislation.

Hart, who would like someday to include problems of the urban environment in citizen litigation, acknowledges that a broad definition "makes it difficult and complicated to get 51 votes." Dingell said he plainly does not know "which way we will go on this."

Potter, Dingell's staff aide, said that legislation with an open-ended definition would have greater effect.

After hearing Atkeson's testimony on June 9, Potter said: "If we're going to move this bill we have to develop a series of examples of what we can do with the law and what we cannot do without it. It's so hard to talk about in the abstract. Everybody forgets what it would do. We'll be asking the conservation groups to give us some examples."

Somewhat to the surprise of his staff, Hart has told reporters he thinks the bill's chances in the Senate are good.

His optimism may be based on the experience of a consumer class-action bill last year. The legislation was reported favorably by the Commerce and Judiciary Committees, though it failed to reach a vote on the floor. (*For a report on the consumer class-action bill, see Vol. 2, No. 19, p. 983.*)

Dingell is unable to predict how far it may go.

"I've always tried to move things as fast as I can," Dingell said. "In this conservation movement I've always been surprised by what goes fast and what goes slow. This could go either way."

Prospects

The present class-action bills could change considerably before the end of the year, and perhaps none of them will get through Congress this session. But support for this approach to environmental protection appears to be growing.

"It will be passed piecemeal, if not of a whole cloth," said Deane Conrad, referring to the movement toward environmental class action in state legislatures.

Lake said he believes that Congress will have determined by the end of the year how citizens will become involved in environmental litigation—either through the broad class-action method or through citizen suits on specific anti-pollution laws. After that, Lake said, it will be a matter of cases and court decisions.

ENVIRONMENT SUITS: THREE APPROACHES

The chief purpose of the environmental class-action bills introduced in Congress this year is to facilitate suits by private citizens against government agencies, institutions or persons for environmental degradation.

If enacted, the law probably would not generate new targets for environmental lawsuits; the aim of litigation still would be to block actions that might harm the environment. But there would be more suits.

It would be easier to get into court with cases such as the Center for Law and Social Policy's suit against the Trans-Alaska pipeline and the Sierra Club's suit against the Mineral King land development plan in California. (*For background on "public interest" suits, see Vol. 2, No. 47, p. 2545.*)

The bills differ from consumer class-action legislation in that they would not authorize suits for payment of damages. Instead, the courts would be asked to order reduction of pollution, reversal of an agency decision or termination of some project—all on behalf of the general public.

PRESENT PRACTICE

When private citizens or citizen groups go to court now to protect the environment, they must first establish their standing to sue—on a case-by-case basis. Courts are sometimes reluctant to make the threshold ruling that a plaintiff has standing.

(For example, in the Mineral King case, the 9th Circuit Court of Appeals ruled that the Sierra Club did not have standing because it did not have an economic interest in the land. Economic interest is a traditional test for standing.)

Suits against government actions also must be based generally on some procedural matter rather than the substance of the decision.

For example, significant environmental cases have gone to court because an agency did not give adequate public notice, failed to hold proper hearings, neglected to file environmental impact statements, or slighted some requirement of a law related to its activities.

This approach sometimes succeeds in delaying implementation of a decision, as with the trans-Alaska pipeline suit. (*See No. 16, p. 837.*)

But it does not reach the essential question of whether a particular action is in the public interest.

ADMINISTRATION APPROACH

The Nixon Administration proposes to open this process somewhat, one law at a time. In the Clean Air Act of 1970 (84 Stat. 1676), and in other antipollution bills now under consideration, the Administration supports citizen suits to enforce the standards of each particular law.

A citizen could sue an offender—a factory violating pollution regulations, for example—but he could not sue the federal agency unless it failed to enforce the act or to comply with all procedures.

Under this approach, if a citizen is dissatisfied with standards required by the Act and promulgated by an agency, he can challenge them only indirectly—as by testing the agency's procedures against federal laws regulating rule making

SAX METHOD

Michigan law professor Joseph L. Sax would go much further.

Legislation now in Congress, based on Sax' concepts, would enable any citizen to sue agencies, corporations or persons—as a member of the public affected by pollution.

The proposed legislation would allow suits against agencies based on the substantive grounds that their actions would reduce environmental quality. A citizen could question a policy—not just its enforcement or its procedural genesis.

This could vastly increase citizen involvement in the work of administrative agencies. It would give private individuals a voice in agency rule making and adjudication, as well as enforcement.

An environmental class-action law would apply to all federal actions affecting the environment, not just to particular laws on air or water pollution. It very likely would encourage citizen suits against goverment-approved construction and land-use projects.

Sax: Environment as Public Trust

Joseph L. Sax, professor of law at the University of Michigan, is perhaps the nation's foremost advocate of establishing a new substantive right to a clean environment.

Sax is the author of a statute creating such a right, the Michigan Environmental Protection Act of 1970, and he has helped draft some of the environmental class-action bills now before Congress.

In his book, Defending the Environment (Alfred A. Knopf, 1971), Sax explains his theory of the environment as a public trust, the concept upon which the new legislation rests. Following are excerpts from the book:

"If an individual comes into court to protest the government-approved construction or operation of a factory on the ground that it will degrade the ambient air to an unreasonable degree and asserts that he is entitled to protection against such degradation as a matter of legal right—the same right he would have to enforce against a neighbor keeping pigs in the backyard—he could turn to no body of law that would support such a claim. He does not have a legal right . . . whereby he may get a court to consider the harm to him as a member of the public and hear evidence of the reasonable alternatives which would accommodate both his asserted right to environmental quality in clean air and the factory's asserted interest in producing its product. . . .

"There is no good reason why we should hesitate to adopt a theory of public rights to environmental quality, enforceable at law, nor is there any reason to think we cannot adjudicate the reasonable accommodations needed to protect against unnecessary threats to the environment.

"If the courts viewed the public interest in the Alaskan environment or the Hudson River as they do private property, they could go straight to the merits of the claims which citizens want to make. The same questions asked in private cases apply to public complaints: Is the activity necessary? Is there enough information to support the allegations that it can be carried on without undue harm to the environment? Are there better alternatives, or is there a reason to delay until we know more or have done better experimental work?"

Executive Office of the President,
Council on Environmental Quality,
Washington, D.C., June 19, 1971.

Hon. John D. Dingell,
U.S. House of Representatives,
Washington, D.C.

Dear Mr. Dingell: I have copies of the letters to you from Professor Joseph Sax, dated May 18 and June 21, 1971, in which he responds to the positions taken by the Council on Environmental Quality with respect to the citizen suit bills now before your subcommittee and a similar bill in the Senate, S.1032. I am happy to comply with your suggestion that I comment briefly on what Professor Sax has said.

In his letter of May 18, Professor Sax discusses seven reservations raised by the Council to S.1032 and its House counterparts.

1. The first, and most basic, is our doubt that the most effective method of environmental management is to entrust the ultimate substantive decisions to the courts under a statute that gives the courts no specific standards for making those decisions. We believe that the legislative and executive branches possess institutional advantages—including responsiveness to the value preferences of the electorate, broad information-gathering capacity, specialized expertise, and

capacity for sustained follow-through—that make them generally better equipped to make and implement basic policy decisions in this area than is the judiciary. The law has traditionally recognized these advantages by assigning the courts a limited role in the review of decisions made by agencies under legislative mandates from the Congress. That role is a very important one—the courts do not countenance administrative disregard of congressional policy or arbitrary fact-finding—but it is distinct from the primary responsibility resting on the other two branches of Government.

Professor Sax expresses confidence that the courts could effectively perform a larger standard-setting role in the environmental area, and he cites examples of other areas in which the courts decide complex technical questions or apply general "reasonableness" tests. There is reason to doubt whether the courts' experience in "medical malpractice, industrial accident, or complex financial cases" establishes that the courts would be the most effective decisionmakers on environmental issues. Dissatisfaction with case-by-case adjudication under "reasonableness" standards has led in several of these areas to the adoption of statutes, such as the workmen's-compensation laws, that provide for administrative handling of claims and do away with reasonableness or negligence standards. Experimentation is under way with a similar shift in the handling of personal-injury claims arising from automobile accidents. In other areas—including many bankruptcy and patent cases—the courts have had to rely heavily on masters or referees to perform technical factfinding for which the courts were poorly suited. In the area of nuisance law, a recent study has concluded that the courts have been unsuccessful in devising standards to govern pollution-related nuisance cases, and that the way to cure this difficulty is for the courts to adopt anti-pollution standards as the measure of conduct amounting to an nuisance. See Note, *Water Quality Standards in Private Nuisance Actions*, 79 Yale L.J. 102 (1969). On another front, a major thrust of the Public Land Law Review Commission's recent report was the Commission's conclusion that *more explicit legislative standards* are needed for the administration of the public lands—a need that can be satisfied not by adoption of a "reasonableness" standard but by comprehensive reform of the public land laws, soon to be proposed by the Administration.

The courts themselves are perhaps best situater to judge the efficacy of entrusting them with environmental standard-setting authority. Their pronouncements—in such cases as *Ohio* v. *Wyandotte Chemical Corp.*, 39 U.S.L.W. 4323 (U.S. 1971), and *Boomer* v. *Atlantic Cement Co.*, 1 ERC 1175 (Ct. App. N.Y. 1970)—indicate a realistic recognition of their institutional disadvantages *vis-à-vis* the other branches of Government. Professor Sax cites examples of very successful Federal judicial handling of environmental controversies—and I have cited several more in my testimony. It should be noted that these took place under existing law, not H.R. 8331. Far from establishing the need for H.R. 8331, the recent court decisions suggest both that the courts are now being quite effective and that they would not welcome the expanded role H.R. 8331 would give them.

Professor Sax refers to a provision of the present Federal Water Pollution Control Act, 33 U.S.C. § 1160(h), and to the citizen suit provision of the Administration's proposed amendment to that Act, H.R. 5966, as showing that the courts now have authority of the type H.R. 8331 would give them. Because § 1160(h) has been before the courts only once, there is little upon which to base a judgment about its construction or its effectiveness. As to the Administration's proposal, Professor Sax's reading of the citizen suit provision is based upon an ambiguity that has been clarified. I attach a copy of my recent letter to Senator Hart explaining the intended meaning of that provision.

2. The second reservation expressed by the Council concerns the uncertain effect of including the phrase "public trust" in H.R. 8331 and similar bills. Professor Sax concedes that the history of the concept gives little guidance about its effect on the law governing both public and private lands. He refers to the *Illinois Central* case in 1892 as "the most detailed explication" of the concept in American law. Yet that case raises more questions than it answers:

It was decided before the Supreme Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), established that the only general common law in this country is State law, and the *Illinois Central* opinion refers to no Federal authority, either statutory or constitutional, for its holding. There has been no line of subsequent cases to indicate to what extent the holding of the case was determined by its special facts—that, after disposing of its land under questionable circumstances, the State promptly changed its mind and itself demanded that the transaction be undone. That single Federal case provides a dim beacon to guide the complex

decisions that must be made in the management and disposition of Federal lands. It is unrealistic to think that a two-word phrase can make such complex matters simple. We believe that the land-management agencies need and desire more guidance in their activities, and the legislation that will follow the Public Land Law Review Commission's report should provide that guidance.

3. Professor Sax's observations concerning our third reservation only heighten our concern about the impact of H.R. 8331's general wording on the existing environmental regulatory statutes. He describes H.R. 8331 as similar to NEPA in requiring all Federal agencies to "change their practices and standards to the extent necessary to bring their activities into compliance with the current law." But he is perhaps unaware of the care taken by the Congress during debate on NEPA to preserve the standards under the more precise regulatory statutes, such as the Clean Air Act and the Federal Water Pollution Control Act, from being supplanted by NEPA's more general provisions. Cf. NEPA, § 104. Those regulatory statutes have been developed over many years to deal specifically with particular environmental problems, and they are regularly reexamined and improved by the Congress. Federal and State agencies have been developed to implement them. To "supersede" the provisions of these laws with a more general directive appears no wiser now than it was when NEPA was enacted.

Supersession of the standards under more specific legislation is not, as Professor Sax implies, necessary "to assure that administrative agencies are subject to judicial scrutiny so that their interpretation of the will of Congress can be examined, and not merely taken on faith." Agencies interpretations of congressional enactments are already subject to judicial review, and H.R. 8331 would not change this. The question is which substantive enactments are to guide agencies and courts—the existing regulatory statutes or the general provisions of H.R. 8331.

4. I find it difficult to understand Professor Sax's denial that the bills under consideration would direct the courts to disregard administrative and regulatory procedures they find inadequate. The bills say this in express terms (see H.R. 8331, § 305, 3d proviso). The desirability of such a directive is an entirely separate question from the scope of subsequent judicial review, to which Professor Sax has directed his response.

Whether the problem be administrative sluggishness or excess administrative speed, agency procedures often can be improved. Unless we do away with agencies altogether it seems clearly preferable to remedy defective procedures rather than simply permitting them to be bypassed if a court finds them "inadequate." The latter course would leave the agency with inadequate procedures to govern cases not taken to court. And to permit an end run around the agency because its procedures were outmoded would probably make it *less* responsive, rather than more, by diminishing its authority and responsibility to deal with environmental factors.

If agencies are asked to do a job, they should be given good administrative machinery and some assurance that the integrity of that machinery will be respected. Inadequate machinery should be replaced, even if this requires major institutional surgery such as that recommended for the independent regulatory agencies by the President's Advisory Council on Executive Organization (*A New Regulatory Framework*, GPO, Jan. 1971).

5. The scope of judicial review of agencies' factual determinations under the Michigan-type bills is a question that persistently remains unanswered. Professor Sax's letter appears to say that the bill does not call for *de novo* fact-finding by the reviewing courts. Yet neither his remarks nor the bills themselves (see H.R. 8331, § 305, provisos 4, 5) tell the courts what standard of review they are to apply.

Existing law certainly allows courts to receive evidence necessary to decide questions properly before them for decision. For example, extensive evidence was received in the *Gillham Dam* case (325 F. Supp. 728, 749 (E.D. Ark. 1971)) and the *Mirex* case (325 F. Supp. 1401 (D.D.C. 1971)) to show whether the agencies had complied adequately with Section 102(2)(C) of NEPA. Similarly, in *Overton Park* (401 U.S. 402 (1971)) the Supreme Court told the district court to consider evidence being on compliance with Section 4(f) of the Department of Transportation Act. On the other hand, when formal agency proceedings are reviewed, principles of efficient decision-making may limit the introduction of evidence that was not presented to the agency. The Supreme Court in *Overton Park* did not, as Professor Sax apparently does, perceive any inconsistency between these practices and the standards for judicial review prescribed by the Administrative Procedure Act.

The "confusion of the factfinding and the appellate roles" that Professor Sax fails to perceive is evident in his statement "[t]he bill creates a new cause of action in which the court will have to find facts and make conclusions of law." That statement accurately describes how the bill would operate in a suit to enjoin private conduct where no agency action was involved. The court would act as initial factfinder. But where agency action is challenged the court generally has a limited, appellate function with respect to factual questions that the agency has decided, just as an appellate court does in reviewing a trial court's decision. The standard of review defines this function. If a bill were enacted telling the courts to approach the factual issues as though no one had previously determined them, it would transform an appellate to a factfinding role. Agency and court would be finding duplicative facts—an inefficient arrangement not necessary to permit courts to review whether the agency "met the legal criterion set out by the Congress."

All this is evident in *Overton Park*, where the district court's appellate role in reviewing the basic, objective facts found by the Secretary of Transportation will not prevent its determining for itself whether those facts satisfy the legal standard of Section 4(f).

I have not said that public participation in agency proceedings is a substitute for judicial review of agency action. I am sure Professor Sax agrees that both are important. Together they ensure the agency an opportunity to make a fully informed decision and the court an opportunity to correct misinterpretations of congressional policy. Both purposes can be served without disregarding the different roles of agencies and reviewing courts.

6. Professor Sax apparently makes the leap from recognizing the pervasiveness of many forms of environmental degradation to concluding that Federal law should govern every activity possibly harmful to the environment. The Congress has refrained from making that leap. Rather, in moving into each new area, the Congress has carefully studied the nature of the problem, the most effective solutions, and the appropriate extent of Federal involvement. For example, this process is now underway on the Administration's proposed National Land Use Policy Act.

The Michigan-type bills would instead, in one sweep, make the governing law Federal for all activities affecting the environment. They would do this without individual consideration of the areas affected. And they would move the courts into those areas without the guidance of congressional standards or policy, other than a general proscription of whatever is "unreasonable".

The Council recognizes the need for strong Federal action on the environmental front, and has assisted the President in preparing the broadest program of environmental legislation ever transmitted to the Congress. Our differences with Professor Sax concerns the most effective means of Federal environmental management.

7. Professor Sax acnowledges the possibility that the bills as written might run afoul of the Eleventh Amendment. We will be interested in his forthcoming proposal to avoid that problem.

In his letter of June 21, Professor Sax made a number of comments on my testimony before your subcommittee on June 9. They require a brief additional response.

8. Professor Sax believes there is an inconsistency between my stress on the importance of the courts' current role under NEPA and similar statutes and my skepticism about the desirability of the role the courts would play under bills such as H.R. 8331. However, I believe the portions of the hearing record that he cites make clear that you understood the distinction he apparently fails to grasp.

NEPA is, as you said, "a superb tool for dissemination [of environmental information] among the public, and having all the alternatives before the decisionmaker." It enables citizens to go to court to ensure that the analytical procedures and other basic reforms of the decisionmaking process accomplished by NEPA are fully performed by the agency. The detailed requirements of Section 102 compel the agency to prepare a solid record underlying its decision—and the courts are enforcing this requirement. But where a court finds this requirement satisfied, as in the *Mirex* case, it does not go on to remake the agency's decision. It reviews it as an appellate body, to ensure that congressional policies have been followed and that the agency's determination meets the appropriate standard of review.

Professor Sax is distressed that in performing this role the courts do not provide any absolute assurance against erroneous decisions. Unfortunately,

until men become infallible the assurance he seeks will not be forthcoming from either courts or agencies. A similar problem exists in appellate review of decisions by trial courts. An appelate court cannot be positive that the trial court has accurately found the facts—but the problem would not be solved by having each successive appellate court redetermine the facts for itself. Such duplication would not guarantee that the last appellate tribunal had found the facts as they truly were. Therefore, the factfinding role is assigned to the trial courts, and appellate courts sit to ensure that they perform their role conscientiously and apply the law correctly.

This appellate function, whether the courts are reviewing agency or lower-court decisions, is important in vitalizing our decisionmaking processes. I see no inconsistency in welcoming the courts' performance of this function without urging that they remake decisions properly within the scope of the initial decisionmaker's judgment.

9. Professor Sax expresses doubt that Congress is capable of legislating with sufficient particularity to obviate the need for the open-ended language of H.R. 8331. The proper degree of particularity will, of course, differ in different areas. He is clearly wrong in stating that Congress cannot "possibly enact a statute that will explicitly determine whether or not the Gillham Dam should be built, or in what way it should be built." Congress specifically passed an authorization for the Gillham Dam in 1958, after reviewing Corps of Engineers documents describing the project. Similar specific authorization is required for each of the Corps' major water resource projects. Under NEPA, Congress now receives not only the project specifications but also an environmental impact statement before authorizing each project. If it wished, Congress could now deauthorize the Gillham Dam.

10. Finally, I would like to assure the subcommittee that the Council does not view the issues addressed in my June 9 testimony as "abstractions and legalistic quibbles." We are concerned with the practical effects of Congress' choice of tools to protect the environment. For the reasons I have expressed, we believe more effective protection can be secured through congressional attention to each of the major problem areas than through the broad-brush approach of bills such as H.R. 8331 currently before your subcommittee.

Sincerely,

TIMOTHY ATKESON, *General Counsel.*

Senator PHILIP A. HART,
Chairman, Subcommittee on the Environment, Senate Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR SENATOR HART: At the close of my testimony before your subcommittee on S. 1032, the "Environmental Protection Act of 1971", I offered to submit for the record a clarification of the meaning of the citizen suit provision in the Administration's proposed water-quality bill, S. 1014. The ambiguity in that provision was under discussion by the staffs of the Council on Environmental Quality and the Environmental Protection Agency, and at the time of my testimony efforts were underway to devise clarifying language.

The ambiguity relates to the breadth of the court's inquiry in a citizen enforcement action brought under Section 10(k) of S. 1014. The intent of the provision was that, where the EPA Administrator had already issued an order requiring compliance with a water-quality standard or limitation within a fixed period of time, the court would enforce that order. It would not redetermine either the standard to be applied or the timing of compliance.

Similarly, where no administrative order had been issued, the court would enforce the applicable standard or limitation. However, the court might have to determine for itself the time period for compliance, since it would lack a prior administrative order dealing with that question (in some situations the standards themselves might include a compliance schedule that would answer the timing question). Where the court had to set a deadline, it was to consider certain factors listed in Section 10(k), including the "practicability of compliance" within the deadline. The court was not intended to reexamine the appropriateness of the standard or limitation previously fixed by EPA. Rather, in the language of Section 10(k), the court was to "enforce such standard or limitation."

EPA has devised language to make clearer the intent of the provision in this regard. That language has been transmitted by EPA to the staffs of the Senate and House Public Works subcommittees considering S. 1014 and its

counterpart, H.R. 5966. For your reference I attach the proposed clarifying language, which would replace the last paragraph of Section 10(k)(1) of the bill.

Sincerely,

TIMOTHY ATKESON, *General Counsel.*

CLARIFYING LANGUAGE FOR SECTION 10 (K) (1) OF S. 1014

(New language is italicized)

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, taking into *account the record of any hearing held or order issued pursuant to this section. In cases where no order has been issued, the Court shall determine the time for compliance with such standard or limitation, taking into* account the practicability of compliance *within such time;* any applicable compliance schedule which is a part of either the applicable standards or a permit issued under section 407 of title 33 of the United States Code; the requirements of subsection (1) hereof; the seriousness of the violation; and any good faith efforts to comply with water quality standards, requirements of subsection (1) hereof, or such permit."

Mr. KARTH. And then one I would like to have you respond to at this point. He raised one constitutional question and let me read from the testimony, what he said, and then I want to invite your comment on it. I am quoting now.

A final point to which I wish to draw your attention is a characteristically lawyer's question and that is the 11th Amendment which, you recall, provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state and I am informed by judicial construction that that also prevents the federal government authorizing suits by citizens of a state against their own state, so that this would certainly be a legal problem for some of the implications of this bill. I question the present unqualified authorization in Section 3(a) of citizens' suits against states of their agencies or instrumentalities.

Would you address yourself to that legal question?

Professor SAX. Yes. This is a problem. We did not deal with this in working on the drafting of S. 1032, which is the bill he is discussing.

My own feeling was that the 11th amendment problem, like all the constitutional problems, are there and what you are saying, in essence, is, to the extent permitted by the 11th amendment, such suits may go forward and, as you probably know, there are some bills before the Congress now which have provisions of that kind in there explicitly.

It is clear that the Congress cannot pass a law repealing the 11th amendment, and it is true that 11th-amendment problems do operate to limit the suits that can be brought against States in the Federal court.

So my comment is twofold: One, of course, the constraints of the 11th amendment, like the constraints of the 5th amendment or any other, are a part of the bill. They will limit the suits that can be brought and there is nothing you can do about that, one way or the other. If you would like to put a provision in the bill that says "To the extent permitted by the 11th amendment," it would seem to me that there is certainly no reason to object to that.

There is one further alternative which has not been explored, to my knowledge. It has been raised, and that is whether one wants to

encourage the States to waive their rights under the 11th amendment, which can possibly be done. I have not fully explored this question myself, but it is possible, I believe, to try to put something into the bill that would authorize the State to waive their rights under the 11th amendment. I'm not sure——

Mr. KARTH. I think the committee, Professor, would appreciate it if you would like to elaborate on your answer to that question for the record.

Professor SAX. I would be very glad to do that.

Mr. KARTH. We may find it very helpful.

Professor SAX. I will, indeed.

(The information follows:)

WAIVER OF THE AMENDMENT IMMUNITY

It is my understanding that states may be held to have waived their 11th amendment immunity, and this is a question that has been before the courts in a number of cases. See, for example, *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *Maryland v. Wirtz*, 392 U.S. 183 (1968); and *Briggs v. Sagers*, 424 F.2d 130 (10 Cir., 1970).

Mr. DINGELL. If the gentleman would yield, would you also suggest to us some appropriate amendatory language, please?

Professor SAX. I certainly well, relating to the 11th amendment problem.

Mr. DINGELL. Relating to the 11th amendment problem we are discussing.

Professor SAX. I will, indeed.

Mr. DINGELL. Also, any other amendatory language you might deem appropriate to either of the bills before us.

Professor SAX. I certainly will.

(The information follows:)

11TH AMENDMENT PROBLEM

The 11th amendment problem is by no means obvious. The leading case, *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964) indicates that the states' immunity to suit under the 11th amendment is subject to the right of Congress to regulate interstate commerce. While this does not mean, apparently, that Congress can waive the 11th amendment immunity of the states, it does appear to mean that the Congress, in exercising the commerce power, can put the states in a position where they must choose between engaging in interstate commerce and holding on to their 11th amendment immunity.

Thus, in the *Parden* case, the Court held that since the state undertook to engage in interstate commerce after Congress had passed a law making all such entities engaging in commerce subject to suit in the federal courts, the state must be deemed to have waived its immunity. In that particular case, the State of Alabama operated a railroad and thus subjected itself to suit under the Federal Employers Liability Act.

Thus, if Congress wants a state to be subject to suit by citizens in the federal courts, it should pass a law explicitly subjecting the states to suit. It is then likely that the states will be held to have waived their 11th amendment immunity if they engage in conduct that subjects themselves to the law.

While the Supreme Court has not yet determined the question, there is a case in the Court of Appeals for the Tenth Circuit (*Briggs v. Sagers*, 424 F.2d 130 (1970)) that says the immunity will be deemed to be waived regardless of the "governmental" nature of the state activity, and regardless whether it was engaged in before the congressional law became effective, or simply continued thereafter.

I would therefore suggest language to the following effect:

"This title is enacted in the full exercise of the authority of Congress to regulate commerce among the several states, and it is the express intention of the Congress

that the cause of action created hereby shall be maintainable in the federal courts by citizens against States, and State instrumentalities engaging in conduct that affects interstate commerce, to the same extent that such actions are maintainable against private persons and departments, agencies and instrumentalities of the United States. Submission to the provisions of this title is an express condition of engaging in conduct that affects interstate commerce."

Mr. KARTH. Mr. Chairman, just one other quick question, if I may.

Professor, what is your interpretation of the legal effects of the words "public trust" and if you would like to elaborate on that for the record and not answer it at this point, in the interest of time, please feel free to do so. But this, again, is a rather sticky question that we are faced with, as you know, and I would like to have your professional opinion.

Professor SAX. It is, indeed.

I am afraid it is not possible to give a pre-lunch answer to that question. I will——

Mr. KARTH. Could you give a post-lunch answer for the record, please?

Professor SAX. I will submit to you some material that I have written on this very question and, of course, I would be very glad to forward that.

Mr. KARTH. Fine. I would appreciate it if, in particular, you would address yourself to the question, for example: Does it restrict the use to which private citizens can put their lands, as one?

Professor SAX. Yes, right.

Mr. KARTH. And does it restrict use of public lands by State or local units of government, as a second one?

Professor SAX. Right. I know these are questions that Tim Atkinson raised in his testimony and I will try my best to respond as specifically as I can to both of those.

(The information follows:)

WHAT IS ENCOMPASSED BY THE PHRASE "PUBLIC TRUST" IN S. 1032?

I am enclosing a copy of a very lengthy article I published last year on the public trust concept in American law. You have my permission to enter it in the hearing record if you so desire.

Plainly no one paragraph definition can be given of this very deep rooted doctrine which goes all the way back to Roman Law. Perhaps the most detailed explication of the doctrine in the American case law is found in the *Illinois Central* case [146 U.S. 387 (1892)]. The trust doctrine can no more be defined, in the statutory sense, that can such fundamental notions as that of due process of law. It is a concept designed to identify the fundamental responsibility of

government to manage and deal with public resources for the benefit of the public rather than for any private advantage.

Mr. Atkinson asks whether it imposes court determined restrictions on the freedom of federal and state governments to use public lands. The answer to this is certainly yes; indeed, that is precisely what the *Illinois Central* case was all about. There a state had attempted to deed away a large part of the submerged land under Lake Michigan to a private railroad company, and the Supreme Court held that public resources of this kind could not be thus taken out of the public domain. Plainly the same thing would apply to dry land in the public domain, though, as the Court made clear, the trust doctrine does not by any means prohibit all sales of public land.

The trust doctrine does also apply to private lands. In my article, I discuss this issue in the context of a number of California cases, where the question has been raised to what extent the public is to be viewed as maintaining a trust right in lands that have been given over to private owners. And, of course, this too was the question in the *Illinois Central* case, for there the owners claimed that they were the owners of a full private property right in the lands in question.

Plainly the trust doctrine is one with which courts can, and do, work. On April 23, 1971, the Court of Common Pleas of Cuyahoga County, Ohio, issued a judgment in a case where the State brought suit against discharges into the Cuyahoga River. The Court held that "the State of Ohio has title to the Cuyahoga River which it holds in trust for the people of Ohio and that the Attorney General of the State of Ohio has standing to seek an injunction against this defendant" for conduct in violation of that trust. *State v. International Salt Co.*, Case No. 893, 451.

Mr. Atkeson asks whether the trust doctrine implies that public easements may be impressed on private lands. As I indicated earlier, the trust doctrine has already been interpreted to the effect that grants of land to private parties are impressed with a public responsibility at least to the extent that fundamental and unique public resources are to be protected for the common good. I am confident that courts would not permit the government to deed away Lake Michigan or San Francisco Bay to be used as a garbage dump or a parking lot, and it is in this larger sense that the doctrine is applied as a residual protection of the public interest. Indeed, the old legal saw that the state cannot grant away its police power is a version of the trust idea, and of course that doctrine too indicates that privately held land is subject to the governmental obligation to govern for the public benefit.

THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCE LAW: EFFECTIVE JUDICIAL INTERVENTION

*Joseph L. Sax**

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PUBLIC concern about environmental quality is beginning to be felt in the courtroom. Private citizens, no longer willing to accede to the efforts of administrative agencies to protect the public interest, have begun to take the initiative themselves. One dramatic result is a proliferation of lawsuits in which citizens, demanding judicial recognition of their rights as members of the public, sue the very governmental agencies which are supposed to be protecting the public interest. While this Article was being written, several dozen such suits were initiated—to enforce air and water pollution laws in states where public agencies have been created for that purpose;[1] to challenge decisions of the Forest Service about the use of public land under its control;[2] to question the Secretary of the Interior's regulation of federal offshore oil leases;[3] and, in a myriad of cases against state and local officials, to examine airport extensions,[4] highway locations,[5] the destruction of parklands,[6] dredging and filling,[7] oil dumping,[8] and innumerable other governmental decisions dealing with resource use and management.[9]

* Professor of Law, University of Michigan. A.B. 1957, Harvard University; J.D. 1959, University of Chicago.—Ed. This Article is part of a larger study I am making of citizen efforts to use the law in environmental-quality controversies. My research has been made possible by a grant from the Ford Foundation; Resources for the Future, Inc., Washington, D.C., has provided office space and related facilities for the term of my grant. To both I am very grateful.

1. Environmental Defense Fund v. Hoerner Waldorf Corp., Civil No. 1694 (D. Mont., filed Nov. 13, 1968) (air pollution); Sklar v. Park Dist. of Highland Park, No. 69H164 (Cir. Ct., 19th Jud. Cir., Lake County, Ill., filed Aug. 11, 1969) (water pollution); Sierra Club v. Minnesota Pollution Control Agency, No. 662,008 (Dist. Ct., 4th Jud. Dist., Minn. Sept. 19, 1969) (water pollution; writ of mandamus issued). The citations in notes 2-9 *infra* are meant to be exemplary, rather than comprehensive.

2. Sierra Club v. Hickel, Civil No. 51,464 (N.D. Cal., filed June 5, 1969); Parker v. United States, Civil No. C-1368 (D. Colo., filed Jan. 7, 1969).

3. Weingand v. Hickel, No. 69-1317-EC (S.D. Cal., filed July 10, 1969).

4. Abbot v. Osborn, No. 1465 (Super. Ct., Dukes County, Mass., filed March 28, 1969); Kelly v. Kennedy, Civil No. 69-812-G (D. Mass., filed July 29, 1969).

5. Citizens Comm. for the Hudson Valley v. Volpe, 297 F. Supp. 804 (S.D.N.Y.), *aff'd.*, (2d Cir. 1969), 297 F. Supp. 809 (S.D.N.Y. 1969), 302 F. Supp. 1083 (S.D.N.Y. 1969); Citizens Comm. for the Hudson Valley v. McCabe, No. 2872/68 (Sup. Ct., Rockland County, N.Y., filed Oct. 1, 1968).

6. Robbins v. Department of Pub. Works, 244 N.E.2d 577 (Mass. 1969).

7. Fairfax County Fedn. of Citizens Assns. v. Hunting Towers Operating Co., Civil No. 4963A (E.D. Va., filed Oct. 1, 1968); Citizens Comm. for the Columbia River v. Resor, No. 69-498 (D. Ore., filed Sept. 4, 1969).

8. Ottinger v. Penn Cent. Co., No. 68 Civil 2638 (S.D.N.Y., filed June 28, 1969).

9. Defenders of Florissant, Inc. v. Park Land Co., No. C-1539 (D. Colo., filed July

The cases present legal theories which are as diverse as lawyers' imaginations are fertile; they range from grandiose constitutional claims of the right to a decent environment[10] to simple assertions that an administrator committed a procedural error.[11] This diversity is not merely the product of variant legal skills and attitudes; it is largely attributable to the enormous disparity in legal standards which govern different resource problems. Our legal system tends to provide specific and limited responses to particular problems. The notorious oil spill at Santa Barbara, for example, led to the adoption of extensive federal regulations on the responsibilities of federal lessees,[12] but a hundred other environmental problems will remain untouched until some dramatic event mobilizes public opinion and leads to legislative and administrative action.

Inconsistency in legislative response and administrative action is one reason why private citizens have felt compelled to go to court and to devise such a pastiche of legal claims. But even more important, that inconsistency has promoted a search for some broad legal approach which would make the opportunity to obtain effective judicial intervention more likely. That search is the subject of this Article.

Of all the concepts known to American law, only the public trust doctrine[13] seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems. If that doctrine is to provide a satisfactory tool, it must meet three criteria. It must contain some concept of a legal right in the general public; it must be enforceable against the government;[14] and it must be capable of an interpretation consistent with contemporary concerns for environmental quality.

3, 1969) (moratorium pending legislative action on creation of National Monument); Colorado Open Space Coordinating Council v. Austral Oil Co., No. C-1712 (D. Colo., filed Aug. 25, 1969) (to enjoin nuclear blast); Environmental Defense Fund v. Corps of Engineers, Civil No. 2655-69 (D.D.C., filed Sept. 16, 1969) (to enjoin Corps construction project).

10. *See* Environmental Defense Fund v. Hoerner Waldorf Corp., Civil No. 1694 (D. Mont., filed Nov. 13, 1968).

11. D.C. Fedn. of Civic Assns., Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968) (failure to hold public hearings).

12. 30 C.F.R. § 250 (1969).

13. The basic content of the doctrine is discussed at text accompanying notes 46-58 *infra*.

14. In some cases a governmental agency or official is not sued directly. Instead, the defendant may be a private party whom the government has inadequately regulated. Furthermore, in many traditional public trust cases, the state was the plaintiff, and the defendant was a private landowner, a local government, or a public agency. Such cases

I. The Nature of the Public Trust Doctrine

A. *The Historical Background*

The source of modern public trust law is found in a concept that received much attention in Roman and English law—the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature,[15] and need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties—such as the seashore, highways, and running water—"perpetual use was dedicated to the public,"[16] it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government. It has been said of the elaborate categories of common properties in Roman law that

> [a]ll this is very confused. . . . As to the seashore, there is no reason in the nature of things why it should not be owned by private persons. . . . Indeed, there are texts which say that one may become owner of a portion of the shore by building on it, remaining owner, however, only so long as the building stands. But in general the shore was not owned by individuals. One text suggests that it was the property of the Roman people. More often it is regarded as owned by no one, the public having undefined rights of use and enjoyment.[17]

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are essential to understanding judicial approaches to the public trust, but the implication should not be drawn that there will be equal judicial hospitality to a privately initiated suit.

15. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); W. Buckland, A Textbook of Roman Law from Augustus to Justinian 182-85 (2d ed. 1932); 1 H. Farnham, Waters and Water Rights § 36, at 165-75 (1904); M. Frankel, Law of Seashore, Waters and Water Courses, Maine and Massachusetts (1969); R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm (2d ed. 1875); W. Hunter, Roman Law 309-14 (4th ed. 1903); Justinian, Institutes, Lib. II, ch. 1, §§ 1-5, at 67-68 (3d ed. T. Cooper 1852); R. Lee, The Elements of Roman Law 109-10 (4th ed. 1956); Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 Minn. L. Rev. 313, 429 (1918); Stone, *Public Rights in Water Use and Private Rights in Land Adjacent to Water*, in 1 Waters and Water Rights ch. 3 (R. Clark ed. 1967).

16. W. Hunter, *supra* note 15, at 311.

17. R. Lee, *supra* note 15, at 109.

In England, the history of public uses is closely involved with a struggle between the Crown and Parliament. As a result,

> [t]here was a time when the Crown could grant away to the subject the royal demesnes and landed possessions at pleasure; but now, by statute law, such royal grants are prohibited, and the Crown lands cannot be so aliened. So much, therefore, of the seashore as has not actually been aliened by grant, and bestowed on lords of manors and other subjects, remains vested in the Crown, incapable of alienation.[18]

But it is important to realize that the inability of the Sovereign to alienate Crown lands was not a restriction upon government generally, but only upon the King:

> The ownership of the shore, as between the public and the King, has been settled in favor of the King; but, as before observed, this ownership is, and had been immemorially, liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed and used by his subjects. *These rights are variously modified, promoted, or restrained by the common law, and by numerous acts of parliament, relating to the fisheries, the revenues and the public safety* . . . .[19]

Thus, whatever restraints the law might have imposed upon the King, it was nonetheless within the authority of Parliament, exercising what we would call the police power, to enlarge or diminish the public rights for some legitimate public purpose.

As carried over to American law,[20] this history has produced great confusion. Our system has adopted a dual approach to public property which reflects both the Roman and the English notion that certain public uses ought to be specially protected.[21] Thus, for example, it has been understood that the seashore between high and low tide may not be routinely granted to private owners as was the general public domain under the Homestead Act and similar laws.[22] It has rather been a general rule that land titles from the federal government run down only to the high water mark, with title seaward of that point remaining in the states, which, upon their admission to the Union, took such shorelands in "trusteeship" for the public.[23]

Whether and to what extent that trusteeship constrains the states

18. R. HALL, *supra* note 15, at 106.

19. *Id.* at 108 (emphasis added).

20. The American history is recounted at length in Shively v. Bowlby, 152 U.S. 1 (1894).

21. *E.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842); Nedtweg v. Wallace, 237 Mich. 14, 20-21, 208 N.W. 51, 54, *reh.*, 237 Mich. 37, 211 N.W. 647 (1927).

22. *See generally* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

23. Shively v. Bowlby, 152 U.S. 1, 57-58 (1894).

in their dealings with such lands has, however, been a subject of much controversy. If the trusteeship puts such lands wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right is quite an extraordinary one, restraining government in ways that neither Roman nor English law seems to have contemplated. Conversely, if the trust in American law implies nothing more than that state authority must be exercised consistent with the general police power, then the trust imposes no restraint on government beyond that which is implicit in all judicial review of state action—the challenged conduct, to be valid, must be exercised for a public purpose and must not merely be a gift of public property for a strictly private purpose.[24]

The question, then, is whether the public trust concept has some meaning between the two poles; whether there is, in the name of the public trust, any judicially enforceable right which restrains governmental activities dealing with particular interests such as shorelands or parklands, and which is more stringent than are the restraints applicable to governmental dealings generally.

Three types of restrictions on governmental authority are often thought to be imposed by the public trust:[25] first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses peculiar to that resource. As an example of the latter view, San Francisco Bay might be said to have a trust imposed upon it so that it may be used for only water-related commercial or amenity uses. A dock or marina might be an appropriate use, but it would be inappropriate to fill the bay for trash disposal or for a housing project.[26]

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24. Light v. United States, 220 U.S. 523, 536 (1911) ("The United States do not and cannot hold property as a monarch may, for private or personal purposes."); Roe v. Kervick, 42 N.J. 191, 234, 199 A.2d 834, 858-59 (1964).

25. This sort of threefold formulation is suggested by broad language which commonly appears in public trust cases:

> This title is held in trust for the people for the purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically, it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people.

Hayes v. Bowman, 91 S.2d 795, 799 (Fla. 1957).

26. The controversy over San Francisco Bay is discussed at length at text accompanying notes 183-90 *infra*.

These three arguments have been at the center of the controversy and confusion that have swirled around the public trust doctrine in American law. Confusion has arisen from the failure of many courts to distinguish between the government's general obligation to act for the public benefit, and the special, and more demanding, obligation which it may have as a trustee of certain public resources.

B. *The Public Trust as a Public Right*

One cannot evaluate the public trust concept without understanding the reasons advanced for imposing upon governmental activities dealing with certain resources a standard which is more rigorous than that applicable to governmental activity generally.[27]

1. *The Concept of Property Owned by the Citizens*

The most common theory advanced in support of a special trust obligation is a property notion; historically, it is said, certain resources were granted by government to the general public in the same sense that a tract of public land may be granted to a specific individual. If that were the case, the government's subsequent effort to withdraw the right would confront the same barrier that the government faces when it condemns private property. The test is no longer whether the government is acting for a public purpose within the legitimate scope of regulatory powers, but rather whether it is taking property.

There are several serious problems with such a formulation. It is seldom true that a government conveys anything to the general public in the sense that it grants a property deed to a private owner.[28]

27. To some extent special obligations toward particular resources are imposed by statutory or constitutional provisions, rather than by judicially developed theory. *See* text accompanying notes 37-38 *infra*. The laws, however, are subject to great judicial manipulation, and the case is very rare in which a court feels compelled to adopt a standard more rigorous than that which it desires to impose.

28. *See* City of Coronado v. San Diego Unified Port Dist., 227 Cal. App. 2d 455, 470-76, 38 Cal. Rptr. 834, 842-45 (1964), *appeal dismissed*, 380 U.S. 125 (1965). Sometimes, however, there are actual conveyances, such as those from the federal government to a state for particular public uses; in such cases it clearly can be said that if the state changes the use, it is acting contrary to the grant. *See, e.g.*, United States v. Harrison County, Miss., 399 F.2d 485 (5th Cir. 1968) (federal funds for construction of a beach conditioned on state's assuring perpetual public ownership of the beach). *See also* Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 128, 242 A.2d 165, 167, *cert. denied*, 393 U.S. 935 (1968) ("The above described land shall be used for public purposes, and if at any time said land ceases to be so used the estate hereby conveyed shall immediately revert to . . . the United States."); Stockton v. Baltimore & N.Y.R.R., 32 F. 9, 20 (D.N.J. 1887) (state cannot obtain compensation for the use of its submerged land by railroad since such land is not private property in the constitutional sense). This problem is discussed at length in the context of the California cases in which state grants of submerged lands to cities are chal-

At most, the government may resolve that certain resources will be used for specific purposes—for instance, that land is to be set aside as a park. But it is reasonable to assume that such decisions imply that the specified uses shall be available only until the legislature decides to devote the land to some other public purpose. Obviously it would not be fruitful to try to show whether, as a matter of legal analysis, a statute creating a park has the latter meaning or is tantamount to a deed.

There is another, more abstract, difficulty in analogizing a rededication of public land to a new use with a taking of private property by the government. That difficulty becomes apparent from an analysis of the rationale which supports the constitutional provision that "private property [shall not] be taken for public use without just compensation."[29] The rationale is that economic benefits are to be protected against certain kinds of public acquisitiveness lest the cost of public progress be unfairly thrust upon certain individuals or groups instead of upon the general community which benefits from public enterprises.[30] Thus, it is thought that although an individual may have an automobile which the police department would find useful, the cost of supporting law enforcement should not be borne more heavily by him than by his neighbors; if the police department wants the car, it must pay for it and thereby spread the cost among all taxpayers. Any attempt to apply this concept to property assertedly owned by the whole public is plainly incongruous. It makes economic sense to prevent the government from taking the property of an individual owner, but it is difficult to understand why the government should be prevented from taking property which is owned by the public as a whole. Whether or not

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lenged. *See* text accompanying notes 183-90 *infra*. *See* N.Y. Times, March 10, 1968, at 80, col. 1:

> Conservationists attending a convention of the national Wildlife Federation voted to help sponsor a legal test—they say the first since Magna Carta—over the right of Federal authority to kill deer . . . even if done on Federal land . . . . They say the nonmigratory Wildlife belongs to the people and not to Federal authority.

See also New Mexico State Game Commn. v. Udall, 281 F. Supp. 627 (D.N.M. 1968), *rev'd.*, 410 F.2d 1197 (10th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3208 (U.S. Dec. 8, 1969).

Sometimes one state agency takes land which has been granted to another agency for a specific purpose; in such cases it has been held that compensation must be paid and that the proceeds must be used to maintain the value of the specific trust. *See* notes 35, 233 *infra*. But such cases involve specific grants or dedications by a third party, and the courts are merely enforcing the explicit desires of the grantor. Such cases are not, therefore, authority for the proposition that land carved out of the public domain and devoted to one use by the sovereign may not later be freely reallocated to another use.

29. U.S. CONST. amend V.

30. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

the people and the government should theoretically be recognized as distinct, it is clear that the concept underlying the constitutional protection against taking does not accommodate itself very easily to situations in which the public as a whole claims to be a property owner.

What really seems to be at stake, then, is the question whether the government can or should be viewed as having made any irrevocable commitments about the use of particular governmental resources. The question is usefully illustrated by asking oneself whether there are any circumstances under which it would be forbidden for the United States to abolish a National Park and change its use, or to sell the land to private parties. Of course, it makes some difference whether it would take the act of a particular administrative official, a statute, a presidential proclamation, a constitutional amendment, or a popular referendum to achieve that result; but the essential question is whether *any* such formal acts could accomplish the result.

Apparently, that question has never been adjudicated, although it has been raised in several recent cases. In one of those cases the Audubon Society, suing on behalf of the public, sought to enjoin the U.S. Army Corps of Engineers from continuing a canal-building project on the ground that it would both divert needed fresh water from the Everglades National Park and promote detrimental salt water incursions.[31] It was alleged in the complaint that to permit

31. National Audubon Socy. v. Resor, No. 67-271, CIV-TC (S.D. Fla., filed March 15, 1967). *See also* Environmental Defense Fund v. Hoerner Waldorf Corp., Civil No. 1694 (D. Mont., filed Nov. 13, 1968), in which declaratory and injunctive relief was sought on the ground that "continued emission of noxious sulfur compounds by the Defendant violates the rights of the Plaintiff guaranteed under the Ninth Amendment of the Constitution of the United States and the due process and equal protection clauses of the Fifth and Fourteenth Amendments." Complaint ¶ 3(c). Application for temporary injunction was withdrawn after pretrial conference; the case had not yet gone to trial as of December 1969. *Cf.* Feliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969).

A more limited and more tenable claim asserts that the public has a constitutional right to procedural due process in such cases. In essence, the claim is that the public has a sufficient interest in public resource allocation decisions that it is entitled to notice, access to data, and at least some form of participation in the administrative process. It is alleged that interested segments of the public are entitled, at the very least, to as much due process as is given private entrepreneurs who have an economic stake in the decision. *See* Weingand v. Hickel, No. 69-1317-EC (C.D. Cal., filed July 10, 1969), in which an action was brought to enjoin the Secretary of the Interior from approving recommendations regarding continued oil operations of federal lessees in the Santa Barbara channel "without first according . . . the members of the public . . . a full and fair hearing, after adequate notice, and without, prior thereto, according the . . . public access to the data upon which . . . recommendations were based." Complaint ¶ XVI, at 11. This principle has already obtained considerable acceptance in cases involving public participation in established administratve proceedings [Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384

the "destruction" of the park, which had been dedicated to the use of the people of the United States, would constitute a taking of property in violation of the fifth amendment to the United States Constitution.[32] After the case was filed, however, it was settled, at least temporarily, and so the court took no action on the Society's allegation. In another case, the state of New Hampshire brought an action against the Atomic Energy Commission to enjoin the grant of a license to build a nuclear power plant. The plant allegedly presented dangers of thermal pollution to the Connecticut River. The state claimed that it held that river in trust for the use of its citizens, that the issuance of the license would subvert the state's obligation to maintain the river free from pollution, and that issuing the license would thereby constitute an unconstitutional taking of property.[33] The case was fully litigated, but the court decided against the state on the ground that the Atomic Energy Commission was not authorized by statute to condition its licenses upon considerations of pollution.[34] It did not address the constitutional claim.

U.S. 941 (1966); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)], and in cases involving standing to challenge the lawfulness of administrative decisions [Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967)]. *See also* Smith v. Skagit County, 75 Wash. 2d 729, 752-55, 453 P.2d 832, 846-48 (1969) (after public hearing on rezoning, commission went into executive session in which it heard proponents but not opponents; held illegal spot zoning). But there are two significant differences between these cases and the claim in *Weingand v. Hickel*. In these cases the public's legal rights are recognized as having been created by statute, not by constitutional necessity; and in each case the public sought to intervene in, or to initiate, a conventional format for adjudication, rather than to claim that some such format must be made available as a matter of constitutional law. While *Weingand* is thus a more difficult case, it is by no means frivolous. Once it is accepted that the general public has a legally cognizable interest—a view which is beginning to be recognized [*see* Sax, *Public Rights in Public Resources: The Citizen's Role in Conservation and Development*, in 1969 PROC., UNIV. OF TEXAS LAW SCHOOL WATER LAW CONFERENCE (forthcoming)]—it may become much more likely that courts will grant to the holders of that right the rudiments of due process.

There is also a clear distinction between such constitutional claims of procedural rights and those claims which would impose constitutional restraints on the government's authority to make resource reallocations.

32. Complaint ¶ 41. The property claim is sometimes presented as an assertion that a disposition for less than market value denies the plaintiffs, as representatives of the public, "their property rights in the subject property without due process of law because the sum realized . . . will be substantially less than would have been realized had the land been put up for public sale . . . ." Fairfax County Fedn. of Citizens Assns. v. Hunting Towers Operating Co., Civil No. 4963A (E.D. Va., filed Oct. 1, 1968). The claim that government is engaging in a "giveaway" and is letting public property be used for private purposes must be distinguished from the blunter claim that once public property has been dedicated to a particular use, it cannot be rededicated to a different use. Only the latter is so rigid as to prevent a redistribution of public wealth for a legitimate public purpose.

33. New Hampshire v. AEC, 406 F.2d 170, 176 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969).

34. 406 F.2d at 175-76.

To accept such claims of property rights would be to prohibit the government from ever accommodating new public needs by reallocating resources. Certainly any such notion strikes at the very essence of governmental power, and acceptance of such a theory by a court would be as unwise as it is unlikely. It is important to recognize that the assertion of a taking is not a mere claim to compensation, for the objectors do not want cash; rather, it is a claim that when a resource is dedicated to public use, that dedication is irrevocable.[35] However strongly one might feel about the present imbalance in resource allocation, it hardly seems sensible to ask for a freezing of any future specific configuration of policy judgments, for that result would seriously hamper the government's attempts to cope with the problems caused by changes in the needs and desires of the citizenry.

Although it would be inappropriate for a court to declare that governmental resource allocations are irreversible,[36] the government may certainly make less binding commitments which discourage cer-

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35. Thus the claim is likely to be one for injunctive relief; *see* notes 31-33 *supra*. In some cases, however, a monetary recovery is desired; it is argued that the cash equivalent of the land sought to be diverted must be posted and put in a trust fund to purchase, for example, substitute park land. This technique has been used in cases involving the diversion of land which had been given for park purposes by private donors. Town of Winchester v. Cox, 129 Conn. 106, 26 A.2d 592 (1942); Union County Bd. of Freeholders v. Union County Park Commn., 41 N.J. 333, 196 A.2d 781 (1964); State v. Cooper, 24 N.J. 261, 131 A.2d 756, *cert. denied*, 355 U.S. 829 (1957); State v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960). Courts will sometimes indicate that the legislature may never authorize any use other than that specified in the dedication, but the decisions do not expressly hold that compensation used to acquire substitute property would be an impermissible alternative. City of Jacksonville v. Jacksonville Ry., 67 Ill. 540 (1873); Cummings v. City of St. Louis, 90 Mo. 259, 2 S.W. 130 (1886).

36. In a theoretical sense, no decision is utterly irreversible. For example, if a court were to hold that decision to create a park was irreversible because the park belonged to the public, the public itself could reverse that decision by constitutional amendment. But such a reversal is hardly practicable in the vast majority of cases. A judicial holding of constitutional dimension, restraining the legislature, is ordinarily the end of the matter.

Cases in which a court holds that resource allocation decisions are irreversible should be distinguished from those in which a court holds that a determination originally made by the public through referendum or constitutional amendment cannot be reversed by legislative action, but must be returned to the public if a change in policy is to be made. Decisions of the latter type, if supported by the facts, are unobjectionable.

Occasionally, a case contains dicta suggesting that even a constitutional amendment would be insufficient to change a policy, but it is hardly likely that any such principle would survive a direct test in court. Colorado Anti-Discrimination Commn. v. Case, 151 Colo. 235, 244, 380 P.2d 34, 39-40 (1963). In one recent instance a suit was filed by the Governor of New Jersey in order to prevent putting on the ballot a proposed constitutional amendment which would have let the voters decide to "give away" the state's tidelands to private interests. Hughes v. Blair, No. C-1528-68 (Super. Ct., Ch., Mercer County, N.J., filed Feb. 19, 1969). But the action was terminated after the existence of the lawsuit was successfully used in negotiations with the legislature and the proposed amendment was taken off the ballot.

tain reallocations. An example of such commitments is found in the "forever wild" clause in the New York constitution,[37] which reserves the Adirondack forest as a wilderness—a dedication to public uses which cannot be abrogated without a constitutional amendment repealing that clause. Similarly, many statutory dedications, such as those creating public parks, will be interpreted as immune from changes without specific statutory authorization.[38]

There are also a few situations in which public authority is restrained by nonstatutory limitations. The most common situation is that in which the government has acquired possession of land under a deed restricting the uses to which the land may be put.[39] In that case, the classic notion of a trust is most accurate, for the government actually serves in the capacity of a trustee to carry out the wishes of the donor. As a practical matter, the government's choices are to conform to the wishes of the donor or to lose the property through reversion.[40]

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37. N.Y. CONST. art. XIV, § 1; *In re* Oneida County Forest Preserve Council, 309 N.Y. 152, 128 N.E.2d 282 (1955); Association for the Protection of the Adirondacks v. McDonald, 253 N.Y. 234, 170 N.E. 902 (1930). An amendment to the Oregon Constitution, proposed and defeated in 1968, provided that:

> Fee title to ocean beach lands now owned or hereafter acquired by the State of Oregon shall not be sold or conveyed, and all lands shall be forever preserved and maintained for public use. No interest less than fee title and no rights or privileges in the lands now owned or hereafter acquired by the state shall be conveyed or granted by deed, lease, license, permit, or otherwise, except as provided by law.

Proposed Article XI-H, § 6. *See* AUDUBON MAGAZINE, Jan. 1969, at 106.

38. *E.g.*, N.J. STAT. ANN. § 40:37-133 (1967): "All real estate . . . held . . . for the purpose of public parks shall be forever kept open and maintained as such." *But see* N.J. STAT. ANN. § 40:37-146.1 (1967). *See* James Drago v. Hudson County Park Commn., No. L-31694-68 P.W. (Super. Ct., L. Div., Hudson County, N.J. July 14, 1969) (opinion of Judge Lynch). *See also* the cases discussed at text accompanying notes 78-92 *infra*.

39. *E.g.*, Archbold v. McLaughlin, 181 F. Supp. 175, 180 (D.D.C. 1960) (citing many decisions); Gould v. Greylock Reservation Commn., 350 Mass. 410, 215 N.E.2d 114 (1966). *See also* United States v. Harrison County, Miss., 399 F.2d 485 (5th Cir. 1968) (federal funds granted for construction of beach on the condition that the state ensure perpetual public ownership of the beach); Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 128, 242 A.2d 165, 167, *cert. denied*, 393 U.S. 935 (1968). But when a deed is absolute in form, courts will sometimes look beyond the document to protect the donor's intent. Anderson v. Mayor & Council of Wilmington, Civil No. 885 (Ch., New Castle County, Del. Jan. 9, 1958); Baker v. City of Norwalk, No. 6269 (Super. Ct., Fairfield County at Stamford, Conn. Dec. 4, 1963); Annot., *Nature of Estate Conveyed by Deed for Park or Playground Purposes*, 15 A.L.R.2d 975 (1951). *See* cases cited at notes 230, 233 *infra*.

40. City of Barnesville v. Stafford, 161 Ga. 588, 131 S.E. 487 (1926); Howe v. City of Lowell, 171 Mass. 575, 51 N.E. 536 (1898); Carpenter v. City of New Brunswick, 135 N.J. Eq. 397, 39 A.2d 40 (1944); Craig v. City of Toledo, 60 Ohio App. 474, 21 N.E.2d 1003 (1938).

Sometimes a court will enforce the duty to conform to the donor's specific intent. Nikols v. Commissioners of Middlesex County, 341 Mass. 13, 166 N.E.2d 911 (1960); Village of Riverside v. Maclean, 210 Ill. 308, 71 N.E. 408 (1904). In other cases, a court will hold that such lands may be taken for other purposes, but that if they are, a cash

2. *The Conceptual Support for the Public Trust Doctrine*

Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well-conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection. Rather, there is a mixture of ideas which have floated rather freely in and out of American public trust law. The ideas are of several kinds, and they have received inconsistent treatment in the law.

The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.[41] It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. The historic public rights of fishery and navigation reflect this feeling; and while the particular English experience which gave rise to the controversy over those interests was not duplicated in America, the underlying concept was readily adopted. Thus, American law courts held it "inconceivable" that any person should claim a private property interest in the navigable waters of the United States.[42] It was from the same concept that some of the language of the Northwest Ordinance was taken:

> [T]he navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States . . . without any tax, impost, or duty therefor.[43]

An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. From this concept came the laws of early New England reserving "great ponds" of any consequence for general use and assuring everyone free and equal access.[44] Later this

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amount equal to the value of the property must be set aside for similar purposes or for the acquisition of substitute lands. *See* cases cited *supra* note 35 and *infra* note 233. The legal problems which arise when land is received by the public from private donors are discussed in R. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND (1967) (Conservation & Research Foundation, Box 1445, Conn. College, New London, Conn. 06320). *See also* C. LITTLE, CHALLENGE OF THE LAND (1968) (Open Space Action Institute, 145 E. 52nd St., N.Y. 10022).

41. *See* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842).

42. United States v. Chandler-Dunbar Co., 229 U.S. 53, 69 (1913).

43. Act of July 13, 1787, art. IV, 1 Stat. 51.

44. MASS. GEN. LAWS ANN. ch. 91 (1967), ch. 131 (Supp. 1968), ch. 140, §§ 194-96

same principle led to the creation of national parks built around unique natural wonders and set aside as natural national museums.

Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only an usufruct—an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.

Of all existing legal doctrines, none comes as close as does the public trust concept[45] to providing a point of intersection for the three important interests noted above. Certainly the phrase "public trust" does not contain any magic such that special obligations can be said to arise merely from its incantation; and only the most manipulative of historical readers could extract much binding precedent from what happened a few centuries ago in England. But that the doctrine contains the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine might usefully promote needed legal development, can hardly be doubted.

C. *An Outline of Public Trust Doctrine*

One who searches through the reported cases will find many general statements which seem to imply that a government may never alienate trust property by conveying it to a private owner and that it may not effect changes in the use to which that property has

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(1965). The purpose was to state "a great principle of public right, to abolish the forest laws, the game laws . . . and to make them all free." Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 68 (1851). *See* Smith, *The Great Pond Ordinance—Collectivism in Northern New England*, 30 B.U. L. Rev. 178 (1950).

"The great ponds of this Commonwealth are among its most cherished natural resources. Since early times they have received special protection. See Whittlesey, Law of the Seashore, Tidewaters and Great Ponds in Massachusetts and Maine. (Under the Colony Ordinance of 1641-1647)." Sacco v. Department of Pub. Works, 352 Mass. 670, 671, 227 N.E.2d 478, 479 (1967).

45. Public nuisance law is the only likely doctrinal competitor. That approach, however, is encrusted with the rule that permits lawsuits to be initiated only by the state attorney general, and not by private citizens. It also has an unfortunate historical association with abatement of brothels, gambling dens, and similar institutions, and the case law is therefore not easily transferable to natural resource problems. Consequently, while nuisance law should not be ignored, public trust law is more promising.

been devoted. In one relatively old case, for example, the Supreme Court of Ohio said that

> [t]he state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.
>
> If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had.
>
> An individual may abandon his private property, but a public trustee cannot abandon public property.[46]

Similarly, the Supreme Court of Florida said:

> The trust in which the title to the lands under navigable waters is held is governmental in its nature and cannot be wholly alienated by the States. For the purpose of enhancing the rights and interests of the whole people, the States may by appropriate means, grant to individuals limited privileges in the lands under navigable waters, but not so as to divert them or the waters thereon from their proper uses for the public welfare. . . .[47]

But a careful examination of the cases will show that the excerpts just quoted, and almost all other such statements, are dicta and do not determine the limits of the state's legitimate authority in dealing with trust lands. Unfortunately, the case law has not developed in any way that permits confident assertions about the outer limits of state power. Nonetheless, by examining the diverse and often loosely written opinions dealing with public lands, one may obtain a reasonably good picture of judicial attitudes.

The first point that must be clearly understood is that there is no general prohibition against the disposition of trust properties, even on a large scale. A state may, for example, recognize private ownership in tidelands and submerged lands below the high water mark; indeed, some states have done so and have received judicial approval.[48] Still, courts do not look kindly upon such grants and usually interpret them quite restrictively,[49] and apply a more rigorous standard than is used to analyze conveyances by private parties.[50] In this connection, courts have held that since the state has an obliga-

46. State v. Cleveland & Pittsburgh R.R., 94 Ohio St. 61, 80, 113 N.E. 677, 682 (1916).

47. Brickell v. Trammel, 77 Fla. 544, 559, 82 S. 221, 226 (1919).

48. *See* Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS ch. 3, at 193-202. (R. Clark ed. 1967).

49. *Id.*

50. *E.g.*, People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

tion as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it.[51] It is at this point that confusion sets in, for the principle, while appealing, simply states a conclusory rule as to the very matter that is in question—what, exactly, are the limitations which must be read into such grants? In attempting to answer that question, one can do no more than cite some illustrations which suggest the content of the principle as courts have come to understand it.

In the old Massachusetts case of *Commonwealth v. Alger*,[52] the court examined the validity of state grants to private persons of tidelands below the high water mark. The court recognized that such grants were lawful even though they permitted grantees to fill or to build in the submerged lands and thereby to terminate the public's free right of passage across those areas. A question was raised, however, as to the limits of the principle which had been expressed in an earlier Massachusetts case, that "the riparian proprietor has an absolute right under the colony law, so to build to low water mark and exclude all mankind."[53] It was apparently argued in *Alger* that the implication of that rule, if sustained, would permit a holder of such riparian rights to thwart all navigation or, through his economic power, to bend navigation to his will. The court made clear that no such meaning could, or should, be read into the language of the earlier case:

> No qualification . . . to the general rule was expressed . . . not even the condition not to hinder the passage of boats and vessels. . . . This judgment must be construed according to the subject matter, which was, the right to flats then in controversy, belonging to land adjoining the Charles River . . . where the river was broad, and where the channel or deep part of the river was quite wide, and afforded abundant room for any boats or vessels to pass along the river and to other men's houses and lands. Had the court been giving an opinion in regard to flats differently situated, there is no reason to doubt that they would have qualified it by stating the proper conditions and limitations.[54]

A similar concern, and limitation, was noted by the Ohio Supreme Court in *State v. Cleveland and Pittsburgh Railway*.[55] In that case a railroad which owned riparian upland on Lake Erie

51. Stone, *supra* note 48.

52. 61 Mass. (7 Cush.) 53, 74-5 (1851).

53. 61 Mass. at 75 [quoting Austin v. Carter, 1 Mass. 231 (1804)].

54. 61 Mass. at 75.

55. 94 Ohio St. 61, 113 N.E. 677 (1916).

successfully tested its right to build a wharf upon submerged lands that were said to belong to the state of Ohio; no grant had been made, and the state itself was the plaintiff. The court found that a wharf could be built, without regard to the title question, out to an area where ships could come. But as in the Massachusetts case, the extreme implications of the case were suggested by counsel,[56] and the court made it clear that wharves which interfered with navigation would not be allowed and that no rights which would permit that result were obtainable. The state's trusteeship existed

> to secure the rights of the public and prevent interference with navigation . . . . It must be remembered that [the littoral owner's] right . . . is one that can be exercised only in aid of navigation and commerce, and for no other purpose. What he does is therefore in furtherance of the object of the trust, and is permitted solely on that account.[57]

As these cases make clear, the courts have permitted the transfer of some element of the public trust into private ownership and control, even though that transfer may exclude or impair certain public uses. In both of the cases just cited, private entrepreneurs were permitted to enhance their own rights by excluding the public from a part of the trust property which was formerly open to all. Thus, what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use. The Wisconsin court put the point succinctly when it permitted a segment of Milwaukee harbor land on Lake Michigan to be granted to a large steel company for the building of navigation facilities:

> It is not the law, as we view it, that the state, represented by its legislature, must forever be quiescent in the administration of the trust doctrine, to the extent of leaving the shore of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin.[58]

These traditional cases suggest the extremes of the legal constraints upon the states: no grant may be made to a private party if that grant is of such amplitude that the state will effectively have

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56. [I]t is contended [the court replied] that piers and wharves may be extended into the harbor in such a manner and may be constructed and used in such a way as to occupy all the space to practically destroy the harbor . . . and thereby hinder and interfere with navigation itself.
94 Ohio St. at 78, 113 N.E. at 681.

57. 94 Ohio St. at 79, 113 N.E. at 681.

58. City of Milwaukee v. State, 193 Wis. 423, 451-52, 214 N.W. 820, 830 (1927).

given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses.

D. *The Lodestar in American Public Trust Law: Illinois Central Railroad Company v. Illinois*

The most celebrated public trust case in American law is the decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois*.[59] In 1869 the Illinois legislature made an extensive grant of submerged lands, in fee simple, to the Illinois Central Railroad. That grant included all the land underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along the central business district of Chicago—more than one thousand acres of incalculable value, comprising virtually the whole commercial waterfront of the city. By 1873 the legislature had repented of its excessive generosity, and it repealed the 1869 grant; it then brought an action to have the original grant declared invalid.

The Supreme Court upheld the state's claim and wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature. It is that result which has made the decision such a favorite of litigants.[60] But the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a state may not do, the Court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation.

But the mere granting of property to a private owner does not ipso facto prevent the exercise of the police power, for states routinely exercise a great deal of regulatory authority over privately owned land. The Court's decision makes sense only because the Court determined that the states have special regulatory obligations over shorelands, obligations which are inconsistent with large-scale private ownership. The Court stated that the title under which Illinois held the navigable waters of Lake Michigan is

> different in character from that which the state holds in lands intended for sale . . . . It is a title held in trust for the people of the

59. 146 U.S. 387 (1892).

60. *E.g.*, Town of Ashwaubenon v. Public Serv. Commn., 22 Wis. 2d 38, 125 N.W.2d 647 (1963).

> state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties.[61]

With this language, the Court articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

The Court in *Illinois Central* did not specify its reasons for adopting the position which it took, but the attitude implicit in the decision is fairly obvious. In general, governments operate in order to provide widely available public services, such as schools, police protection, libraries, and parks. While there may be good reasons to use governmental resources to benefit some group smaller than the whole citizenry, there is usually some relatively obvious reason for the subsidy, such as a need to assist the farmer or the urban poor. In addition, there is ordinarily some plainly rational basis for the reallocative structure of any such program—whether it be taxing the more affluent to support the poor or using the tax base of a large community to sustain programs in a smaller unit of government. Although courts are disinclined to examine these issues through a rigorous economic analysis, it seems fair to say that the foregoing observations are consistent with a general view of the function of government. Accordingly, the court's suspicions are naturally aroused when they are faced with a program which seems quite at odds with such a view of government.

In *Illinois Central,* for example, everything seems to have been backwards. There appears to have been no good reason for taxing the general public in order to support a substantial private enterprise in obtaining control of the waterfront. There was no reason to believe that private ownership would have provided incentives for needed developments, as might have been the case with land grants in remote areas of the country; and if the resource was to be maintained for traditional uses, it was unlikely that private management would have produced more efficient or attractive services to the public. Indeed, the public benefits that could have been achieved by private ownership are not easy to identify.

Although the facts of *Illinois Central* were highly unusual—and the grant in that case was particularly egregious[62]—the case

61. 146 U.S. at 452.

62. The facts in the *Illinois Central* case were not as unique as one might hope.

remains an important precedent. The model for judicial skepticism that it built poses a set of relevant standards for current, less dramatic instances of dubious governmental conduct. For instance, a court should look skeptically at programs which infringe broad public uses in favor of narrower ones. Similarly, there should be a special burden of justification on government when such results are brought into question. But *Illinois Central* also raises more far-reaching issues. For example, what are the implications for the workings of the democratic process when such programs, although ultimately found to be unjustifiable, are nonetheless promulgated through democratic institutions? Furthermore, what does the existence of those seeming imperfections in the democratic process imply about the role of the courts, which, *Illinois Central* notwithstanding, are generally reluctant to hold invalid the acts of co-equal branches of government?

II. The Contemporary Doctrine of the Public Trust: An Instrument for Democratization

A. *The Massachusetts Approach*

The *Illinois Central* problem has had its most significant modern exegesis in Massachusetts. In that state, the Supreme Judicial Court has shown a clear recognition of the potential for abuse which exists

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California's early dealings with its tidelands and submerged lands are all too similar to the *Illinois Central* situation.

> By the time 152 prominent Californians met in Sacramento on September 28, 1878, to draft a new state constitution . . . people . . . had become aware . . . of a great many abuses growing out of the sale of tidelands . . . the Central Pacific Railroad had bought up all the frontage on the bay, so that no other company could erect a wharf without its consent . . . unscrupulous speculators had purchased tide lots and then tried to force owners of the abutting dry lands to pay extortionate prices for mud flats, in order to attain access to the bay.
>
> "If there is any one abuse greater than another that I think the people of the State of California has suffered at the hands of their law-making power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State," [a delegate] told the constitutional convention. Swamp lands, tidelands, and marsh and overflowed lands had been taken in such vast quantities, he said, that "now the people are hedged off entirely from reaching tide water, navigable water, or salt water."

M. Scott, The Future of San Francisco Bay 9 (Institute of Govtl. Studies, Univ. of Cal., Berkeley, Sept. 1963) [quoting Debates and Proceedings of the Constitutional Convention of the State of California 1038 (Sacramento, 1881)].

The Spring 1968 issue of Cry California, a journal published by California Tomorrow, San Francisco, reported that

> the Alameda Conservation Association is challenging in court the recent land "swap" made by the State Lands Commission with Leslie Salt Company, involving some 2,000 acres of San Francisco Bay tideland. Under the agreement, Leslie gets title to several acres of land. Conservationists . . . have called the settlement a giveaway of public property.

Id. at 39.

See also Marba Sea Bay Corp. v. Clinton St. Realty Corp., 272 N.Y. 292, 5 N.E.2d 824 (1936); *In re* Long Sault Dev. Co. v. Kennedy, 212 N.Y. 1, 105 N.E. 849 (1914); Coxe v State, 144 N.Y. 396, 39 N.E. 400 (1895).

whenever power over public lands is given to a body which is not directly responsive to the electorate. To counteract the influence which private interest groups may have with administrative agencies and to encourage policy decisions to be made openly at the legislative level, the Massachusetts court has developed a rule that a change in the use of public lands is impermissible without a clear showing of legislative approval.

1. *Gould v. Greylock Reservation Commission*

In *Gould v. Greylock Reservation Commission*,[63] the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. Because *Gould* is such an important case in the development of the public trust doctrine, and because the implications of the case are so far-reaching, it is important to have a clear understanding of both the facts of the case and the court's decision.

Mount Greylock, about which the controversy centered, is the highest summit of an isolated range which is surrounded by lands of considerably lower elevation. In 1888 a group of citizens, interested in preserving the mountain as an unspoiled natural forest, promoted the creation of an association for the purpose of laying out a public park on it. The state ultimately acquired about 9,000 acres, and the legislature enacted a statute creating the Greylock Reservation Commission and giving it certain of the powers of a park commission.[64] By 1953 the reservation contained a camp ground, a few ski trails, a small lodge, a memorial tower, some TV and radio facilities, and a parking area and garage. In that year, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an aerial tramway and certain other facilities,[65] and it authorized the original Commission to lease to the Authority "any portion of the Mount Greylock Reservation."[66]

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63. 350 Mass. 410, 215 N.E.2d 114 (1966).

64. 350 Mass. at 412, 215 N.E.2d at 117.

65. 350 Mass. at 413-14, 215 N.E.2d at 118-19. The other facilities whose construction the statute authorized included

> approach roads to the . . . base of the tramway; parking facilities . . . ski facilities, stores, including gift, souvenir and ski or equipment shops; dining and refreshment facilities; lounges, comfort stations, warming huts and such other accommodations for the convenience . . . of the public; and such other facilities and services as are reasonably necessary for the public purposes of the authority.

350 Mass. at 414 n.6, 215 N.E.2d at 118 n.6. The Authority was also empowered to make contracts necessary or incidental to its duties, "to lease or grant the right to exercise such powers" and to do all "things necessary or convenient to carry out the powers expressly granted." 350 Mass. at 414 n.6, 215 N.E.2d at 118 n.6.

66. 350 Mass. at 415, 215 N.E.2d at 119.

For some time the Authority was unable to obtain the financing necessary to go forward with its desire to build a ski development, but eventually it made an arrangement for the underwriting of revenue bonds. Under that arrangement the underwriters, organized as a joint venture corporation called American Resort Services, were to lease 4,000 acres of the reservation from the Commission. On that land, the management corporation was to build and manage an elaborate ski development, for which it was to receive forty per cent of the net operations revenue of the enterprise. The underwriters required these complex and extensive arrangements so that the enterprise would be attractive for potential purchasers of bonds.

After the arrangements had been made, but before the project went forward, five citizens of the county in which the reservation is located brought an action against both the Greylock Reservation Commission and the Tramway Authority. The plaintiffs brought the suit as beneficiaries of the public trust under which the reservation was said to be held, and they asked that the court declare invalid both the lease of the 4,000 acres of reservation land and the agreement between the Authority and the management corporation. They asked the court to examine the statutes authorizing the project, and to interpret them narrowly to prevent both the extensive development contemplated and the transfer of supervisory powers into the hands of a profit-making corporation. The case seemed an exceedingly difficult one for the plaintiffs, both because the statutes creating the Authority were phrased in extremely general terms,[67] and because legislative grants of power to administrative agencies are usually read quite broadly. Certainly, in light of the statute, it could not be said that the legislature desired Mount Greylock to be preserved in its natural state, nor could the legislature be said to have prohibited leasing agreements with a management agency. Nonetheless, the court held both the lease and the management agreement invalid on the ground that they were in excess of the statutory grant of authority.[68]

Gould cannot be considered merely a conventional exercise in legislative interpretation. It is, rather, a judicial response to a situa-

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67. *See* note 65 *supra*. The court held that, despite these broad mandates, the Commission was empowered to lease only those portions of Mount Greylock which might prove reasonably related to a project of permitted scope. Thus, the court found, the lease from the Commission to the Authority covered an excessive area and consequently was not authorized by the statutes permitting the leasing of Mount Greylock. It also held that there was no authority for the plan to build "four chairlifts of a total length of 14,825 feet and eleven ski trails of a total length of 56,600 feet." 350 Mass. at 419-23, 215 N.E.2d at 121-24.

68. For a fuller explanation of the basis for the court's decision, see text accompanying note 70 *infra*.

tion in which public powers were being used to achieve a most peculiar purpose.[69] Thus, the critical passage in the decision is that in which the court stated:

> The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit.[70]

In coming to this recognition, the court took note of the unusual developments which led to the project. What had begun as authorization to a public agency to construct a tramway had developed into a proposal for an elaborate ski area. Since ski resorts are popular and profitable private enterprises, it seems slightly odd in itself that a state would undertake such a development. Furthermore, the public authority had gradually turned over most of its supervisory powers to a private consortium and had been compelled by economic circumstances to agree to a bargain which heavily favored the private investment house.

It hardly seems surprising, then, that the court questioned why a state should subordinate a public park, serving a useful purpose as relatively undeveloped land, to the demands of private investors for building such a commercial facility. The court, faced with such a situation, could hardly have been expected to have treated the case as if it involved nothing but formal legal issues concerning the state's authority to change the use of a certain tract of land.

Yet the court was unwilling to invalidate an act of the legislature on the sole ground that it involved a modification of the use of public trust land. Instead, the court devised a legal rule which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses. Such a rule would not require a court to perform the odious and judicially dangerous act of telling a legislature that it is not acting in the public interest, but rather would utilize the court's interpretive powers in

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69. For a confirmation that the "feel" of a case is critical to its decision, the *Gould* case should be compared with People *ex rel.* Kucharski v. McGovern, 42 Ill. 2d 119, 245 N.E.2d 472 (1969). In the latter case, the court upheld recreational developments in a forest preserve, despite a limited statute of authorization, apparently because the public action seemed reasonable and it was the posture of the objector which gave rise to suspicion.

70. 350 Mass. at 426, 215 N.E.2d at 126. *Cf.* Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 413-14, 326 P.2d 957, 961 (1958).

accordance with an assumption that the legislature is acting to maintain broad public uses. Under the Massachusetts court's rule, that assumption is to guide interpretations, and is to be altered only if the legislature clearly indicates that it has a different view of the public interest than that which the court would attribute to it.

Although such a rule may seem to be an elaborate example of judicial indirection, it is in fact directly responsive to the central problem of public trust controversies. There must be some means by which a court can keep a check on legislative grants of public lands while ensuring that historical uses may be modified to accommodate contemporary public needs and that the power to make such modifications resides in a branch of government which is responsive to public demands. Similarly, while there ought to be available some mechanism by which corrupt legislative acts can be remedied, it will be the rare case in which the impropriety is so patent that, as in the *Illinois Central* case, a court would find it to be outside the broad boundaries of legitimacy. It is to these concerns that the Massachusetts court so artfully addressed itself.

While it will seldom be true that a particular governmental act can be termed corrupt, it will often be the case that the whole of the public interest has not been adequately considered by the legislative or administrative officials whose conduct has been brought into question. In those cases, which are at the center of concern with the public trust, there is a strong, if not demonstrable, implication that the acts in question represent a response to limited and self-interested proponents of public action. It is not difficult to perceive the reason for the legislative and administrative actions which give rise to such cases, for public officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises. The concessions desired by those interests are often of limited visibility to the general public so that public sentiment is not aroused; but the importance of the grants to those who seek them may lead to extraordinarily vigorous and persistent efforts. It is in these situations that public trust lands are likely to be put in jeopardy and that legislative watchfulness is likely to be at the lowest levels.[71] To send such a case back for

71. An examination of such situations, and their implications for judicial intervention, constitutes a significant part of the author's larger study of which this Article is a part. For an example of one such controversy, see *Permit for Landfill in Hunting Creek, Va., Hearings Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 2d Sess. (1968), pt. 2 (1969); THE PERMIT FOR LANDFILL IN HUNTING CREEK: A DEBACLE FOR CONSERVATION, H.R. REP. No. 91-113, 91st Cong., 1st Sess. (1969). *See* note 32 *supra* and text following note 99 *infra*.

express legislative authority is to create through the courts an openness and visibility which is the public's principal protection against overreaching, but which is often absent in the routine political process. Thus, the court should intervene to provide the most appropriate climate for democratic policy making.

Gould v. Greylock Reservation Commission is an important case for two reasons. First, it provides a useful illustration that it is possible for rather dubious projects to clear all the legislative and administrative hurdles which have been set up to protect the public interest. Second, and more significantly, the technique which the court used to confront the basic issues suggests a fruitful mode for carrying on such litigation. Moreover, *Gould* is not unique; it is one of a line of exceedingly important cases in which the Massachusetts court has produced a remarkable body of modern public trust interpretation by using the technique which it developed in that case.[72]

2. *The Development of the Massachusetts Response to the Problem of Low-Visibility Policy Decisions*

Gould, like *Illinois Central,* was concerned with the most overt sort of imposition on the public interest: commercial interests had obtained advantages which infringed directly on public uses and promoted private profits. But the Massachusetts court has also confronted a more pervasive, if more subtle, problem—that concerning projects which clearly have *some* public justification. Such cases arise when, for example, a highway department seeks to take a piece of parkland or to fill a wetland. It is clear that the appropriate agencies hear and attend to the voices which call for getting the job of road building done as quickly and cheaply as possible.[73] But there are also individuals who put a high premium on the maintenance of parks, wetlands, and open space. Are their voices adequately heard and their claims adequately taken into account in the decisional process?

There is no single answer to that question. Sometimes, to be sure, the objectors in a community are alert and highly organized and make their views known very clearly.[74] In other situations, a

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72. *See* cases cited in notes 81-88 *infra.*

73. The politics of highway building and the travails of those who challenge the program have been widely discussed of late. *See generally* A. MOWBRAY, ROAD TO RUIN (1969); Whalen, *The American Highway: Do We Know Where We're Going?,* SATURDAY EVENING POST, Dec. 14, 1968, at 22.

74. The recent battles to obtain a Redwoods National Park and to prevent dam-

project will go forward quietly and will approach the point of irreversibility before those who would question it can initiate their questioning.[75] Such situations are hardly consonant with a democratic view of government and are undesirable even when they are the result of mere inadvertence on the part of public agencies. But it often appears that there is a conscious effort to minimize public awareness and participation.[76] Situations of that sort arise almost

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building in the Grand Canyon are the most notable examples. Clearly citizen political activity is most likely to be efficacious on highly visible, national issues, such as concern for "the last Redwood." The diligence of an aroused citizenry, both inside and outside the courtroom, is illustrated by cases like Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967); D.C. Fedn. of Civic Assns., Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968). The controversy in *Airis* is far from ended. *See* N.Y. Times, Aug. 24, 1969, at 66, col. 1; Wash. Eve. Star, Oct. 17, 1969, at 1, col. 1.

75. One of the uncertainties in this area is the extent to which effective political activity by objecting citizens is made feasible by litigation. *See* Tague, *The Rise and Evaporation of the Mount Greylock Tramway*, 3 BERKSHIRE REV. (Williams College, Mass.) No. 1 (Summer 1967). Citizen lawsuits have been lost on the ground that the objection has come too late because commitments to the project are too far advanced to be restrained. *E.g.*, Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967); Iowa Natural Resources Council v. Mapes, 164 N.W.2d 177 (Iowa 1969). Some courts seem peculiarly insensitive to the fact that the very derelictions in procedure which are being challenged have prevented earlier citizen intervention. Moreover, attorneys for the government are skillful in utilizing the arguments that it is either too early or too late for review. *See* Memorandum of Law in Support of Cross-Motion To Dismiss upon Objection in Point of Law, Oct. 29, 1968, filed by the State of New York in Citizens Comm. for the Hudson Valley v. McCabe, No. 2872/68 (Sup. Ct., Rockland County, N.Y., filed Oct. 1, 1968). Still, sometimes a court does refuse to "knuckle under" to a *fait accompli*. *See* Bach v. Sarich, 74 Wash. 2d 580, 445 P.2d 648 (1968) (developer ordered to remove fill even though between $100,000 and $250,000 had already been expended).

76. Cases of this nature are numerous. One was brought to light recently after the massive oil leakage off the Santa Barbara coast. *See generally Hearings Before the Subcomm. on Air and Water Pollution, Senate Comm. on Public Works, Water Pollution—1969*, pts. 2, 3, 4, 91st Cong., 1st Sess. (1969). In that instance, the governmental agency charged with protecting the public interest decided against holding public hearings prior to granting approval for a project because the agency "preferred not to stir the natives up any more than possible [sic]" Interoffice Memo. from Eugene W. Standley, Staff Engineer, U.S. Dept. of the Interior, Feb. 15, 1968. When questions were raised, the agency publicly responded by saying, "we feel maximum provision has been made for the local environment and that further delay in lease sale would not be consistent with the national interest." N.Y. Times, March 25, 1969, at 30, col. 6 (quoting from a letter from the Undersecretary of the Interior to the chairman of the board of supervisors of Santa Barbara County). But the agency privately indicated that "the 'heat' has not died down but we can keep trying to alleviate the fears of the people," *id.* at col. 3, and noted that pressures were being applied by the oil companies whose equipment "costing millions of dollars" was being held "in anticipation," *id.* at col. 5.

There are a variety of other ways in which agencies minimize public participation in their deliberations. For example, the duty to hold a public hearing may technically be satisfied by holding a hearing which is "announced" to the public by posting a notice on an obscure bulletin board in a post office. Nashville I-40 Steering Comm. v.

daily in the thousands of resource development and conservation matters that come before state and federal agencies. Often the picture is not a pretty one. Yet many courts respond to objections simply by asserting that protection of the public interest has been vested in some public agency,[77] and that it is not appropriate for citizens or the courts to involve themselves with second guessing the official vindicators of the public interest.

As a result of *Gould* and the cases which followed it, the situation is considerably better in Massachusetts. That state's supreme judicial court has penetrated one of the very difficult problems of American government—inequality of access to, and influence over, administrative agencies. It has struck directly at low-visibility decision making, which is the most pervasive manifestation of the problem. By a simple but ingenious flick of the doctrinal wrist, the court has forced agencies to bear the burden of obtaining specific, overt approval of efforts to invade the public trust.

The court has accomplished that result by extending the application of a well-established rule designed to mitigate traditional conflicts between public agencies arising when one agency seeks to condemn land held by another. Under that established rule, one agency cannot take land vested in another agency without explicit authorizing legislation; otherwise the two agencies "might successively try to take and retake the property *ad infinitum*."[78] Clearly, that principle evolved as a judicial means of avoiding conflict between agencies. The Massachusetts court has turned it into an affirmative tool for private citizens to use against governmental agencies which are assertedly acting contrary to the public interest.[79] Thus, the legal doctrine did not formally change, but an extremely

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Ellington, 387 F.2d 179, 183 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968). Alternatively, a statutory hearing requirement may simply be ignored, and the argument later made that despite the omission no citizen has legal standing to challenge the agency's action. *See* D.C. Fedn. of Civic Assns., Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968).

77. *E.g.*, Harrison-Halsted Community Group v. Housing & Home Fin. Agency, 310 F.2d 99, 105 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963): "The legislature, through its lawfully created agencies, rather than 'interested' citizens, is the guardian of the public needs to be served by social legislation."

78. Commonwealth v. Massachusetts Turnpike Authority, 346 Mass. 250, 255, 191 N.E.2d 481, 484 (1963).

79. The court has made this shift knowingly and explicitly: "That decision [Commonwealth v. Massachusetts Turnpike Authority, 346 Mass. 250, 191 N.E.2d 481 (1963)] does not rest, as the defendant argues, on our inability to determine which of two state agencies was intended by the legislature to have paramount authority over the land in question." Sacco v. Department of Pub. Works, 352 Mass. 670, 672, 227 N.E.2d 478, 480 (1967).

important modification was made in its application. It now operates to overrule the doctrine that citizens must acquiesce in discretionary administrative actions which are not plainly in contravention of law. The administrative agencies now have the burden of establishing an affirmative case before the legislature in the full light of public attention.

Having set the stage in cases involving conflict between public agencies, the Massachusetts court took the important step of intervention on behalf of private citizens in *Gould*.[80] The next year, that court further emphasized its views in *Sacco v. Department of Public Works*.[81] In that case, residents of the town of Arlington sought to enjoin the Department of Public Works from filling a great pond as part of its plan to relocate part of a state highway. The department thought it had all the legislative authority it needed, for it was operating under two particularly broad statutes.[82] The court not

80. *See* note 63 *supra* and accompanying text. The Massachusetts court had been progressing in this direction for at least a decade, during which it had seen in many contexts that public agencies paid very little regard to the maintenance of important natural resources. In 1960, the court acted at the behest of local citizens and residents to enjoin the county commissioners from commercializing Walden Pond, which was held in trust under a private gift. Nikols v. Commissioners of Middlesex County, 341 Mass. 13, 166 N.E.2d 911 (1960). *See also* City of Wilmington v. Department of Pub. Util., 340 Mass. 432, 165 N.E.2d 99 (1960); Town of Hamilton v. Department of Pub. Util., 346 Mass. 130, 190 N.E.2d 545 (1963); Jacobson v. Parks & Recreation Commn. of Boston, 345 Mass. 641, 189 N.E.2d 199 (1963). The reluctance of both public agencies and private utilities to include amenities among their planning considerations was forcefully demonstrated in a controversy involving utility line undergrounding, which came to the court three times. Sudbury v. Department of Pub. Util., 343 Mass. 428, 179 N.E.2d 263 (1962), 351 Mass. 214, 218 N.E.2d 415 (1966); Boston Edison Co. v. Board of Selectmen of Concord, 242 N.E.2d 868 (Mass. 1968).

Fortunately, the court was not the only institution concerned; Massachusetts had enacted a good deal of important resource legislation, and the Department of Natural Resources was enforcing it vigorously. *See* Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965); Massachusetts Dept. of Natural Resources, Order Under Gen. Laws ch. 130, § 105, No. 768-1-68 (regulating coastal wetlands in Ipswich). Indeed, the willingness and ability of the Massachusetts court to move so rapidly in resource cases is undoubtedly abetted by the presence of "ringing" legislation, which strengthens the court's assertion that in order to enforce the assumed legislative policy, impairment of trust properties will not be presumed to be permissible absent explicit statutory authority. This situation is but another example of the degree to which effective government results from intensive interplay among the branches; it contrasts with the traditional view that each branch has its own functions to perform and should be immune from intervention by the other branches of government. *See* note 86 *infra*.

81. 352 Mass. 670, 227 N.E.2d 478 (1967).

82. The first statute permitted the Department to take "such public lands, parks, playgrounds, reservations, cemeteries, highways or parkways . . . as it may deem necessary for carrying out the provisions of this act." 352 Mass. at 672 n.4, 227 N.E.2d at 480 n.4. The second statute which the Department cited stated that "the Department shall . . . have charge of the lands . . . belonging to the commonwealth, and shall . . . ascertain what portions of such land may be . . . improved with benefit to the commonwealth." 352 Mass. at 673 n.5, 227 N.E.2d at 480 n.5.

only found the statutory power inadequate, but actually used it against the Department. As to the first statute, the court noted that it had previously decided that it did not regard " 'general reference to unspecified "public land" as a conferring . . . of a blanket power to take . . . any land of the Commonwealth which the Authority chooses.' "[83] The court's response to the second statute was even more vehement and clearly reveals the court's feeling about these cases. With scarcely disguised irritation, the court said:

> . . . the improvement of public lands contemplated by this section does not include the widening of a State highway. It seems rather that the improvement of public lands which the legislature provided for . . . is to preserve such lands so that they may be enjoyed by the people for recreational purposes.[84]

The court then noted that the legislature had recently passed a law directing the department to "provide for the protection of water resources, fish and wildlife and recreational values,"[85] and stated that it did not believe that the new law "represented an abrupt change in legislative policy," but rather "an abiding legislative concern for the preservation of our great ponds"—a concern which the court obviously did not think the Department of Public Works shared.[86]

Despite the strong and explicit language of the court, the De-

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83. 352 Mass. at 672, 227 N.E.2d at 480 [citing Commonwealth v. Massachusetts Turnpike Authority, 346 Mass. 250, 253, 191 N.E.2d 481 (1963)].

84. 352 Mass. at 673, 227 N.E.2d at 480.

85. 352 Mass. at 673, 227 N.E.2d at 480.

86. 352 Mass. at 674, 227 N.E.2d at 480. The ultimate result of such litigation is usually a honing down of developers' demands or a modification of their methods. Thus, in *Sacco*, counsel for the plaintiffs reported that, "after the decision the legislature enacted a bill granting the D.P.W. authority to take 4.7 acres of Spy Pond for the highway. The Department had wanted a much broader bill, but it was hoist [*sic*] by its own petard in that it had insisted throughout the litigation that all it needed was 4.7 acres." Letter from Robert J. Muldoon to the author, July 21, 1969. *See* note 80 *supra*. In Robbins v. Department of Pub. Works, 244 N.E.2d 577 (Mass. 1969), counsel for the objectors wrote the following as to the outcome of litigation:

> [A]fter a Herculean effort, the House of Representatives in Massachusetts voted 130-92 to authorize a feasibility study of a westerly route, such as we have been working for. However, our local Public Works Department brought out its troops, in the form of at least six men who spent most of the week in the State House and, after reconsideration, obtained a bill for an opposite route by the narrow score of 109-105. The Senate concurred after removing some amendments and the Governor signed the bill. However, the whole subject of super highway construction through the Metropolitan region has been put into the hands of a seven-man commission which is to report whether or not any new highways are needed. It seems to us that they will quite surely urge that this road be built (we have not objected to the need of such a road) but, in the meantime, the Governor has stated in public and written us that he will not permit the transfer of the requisite parkland.

Letter from Stuart Debard to the author, Sept. 5, 1969.

partment of Public Works continued to march to its own tune. A year later it was back in court, this time in *Robbins v. Department of Public Works*,[87] a case involving the acquisition of some wetlands for its highway program. The suit was instituted by private citizens to protect Fowl Meadows, a "wetlands of considerable natural beauty . . . often used for nature study and recreation."[88] The meadows were owned and administered by the Metropolitan District Commission, a state parklands agency, which had agreed with the Department of Public Works to transfer the meadows to it for highway use.[89] The case is of particular significance because the agency whose specific function it was to protect parklands for the public was named as a co-defendant with the highway agency. Moreover, the applicable statute required that the transfer receive the approval of both the governor and the state council, and such approval had been given. The court's willingness to entertain a citizens' suit against all these guardians of the citizenry is a measure of the Massachusetts court's skepticism about administrative discretion in dealings with public resources.

The statute at issue in *Robbins* was considerably more explicit than that which was at issue in *Sacco*; the *Robbins* court itself noted that "admittedly there are significant differences . . . . For example, [the statute in *Robbins*] is not an eminent domain statute; it concerns only 'land of the commonwealth'; it requires that the transfer have the approval of the Governor and Council; and it restricts the new use to the 'laying out or relocation of any highway'."[90]

Even with these differences, the court held, the statute failed to "state with the requisite degree of explicitness a legislative intention to effect the diversion of use which the DPW seeks to accomplish."[91] The court then set out the standard which must be met if there is to

87. Robbins v. Department of Pub. Works, 244 N.E.2d 577 (Mass. 1969). *Robbins* was the most recent case of this type in the Supreme Judicial Court as of August 1969; as of the same date, the most recent development in Massachusetts was a suit by residents of Martha's Vineyard to enjoin the Dukes County Commissioners from clearing state forest land for an airport extension. A preliminary injunction was granted on June 2, 1969. Abbot v. Osborn, No. 1465 (Super. Ct., Dukes County, Mass.). A collateral federal action, Kelly v. Kennedy, Civil No. 69-812-G (D. Mass., filed July 20, 1969), seeks to enjoin the disbursement of federal funds for the airport extension on the ground that the applicable federal standards have not been met. *See* 49 U.S.C. § 1108(d)(1) (1964), §§ 1651(2), 1753(f) (Supp. IV 1965-1968). The Federal Aviation Administration decided these issues adversely to the objecting citizens. *In re* Application of Dukes County (FAA July 25, 1969).

88. 244 N.E.2d at 578.

89. 244 N.E.2d at 578.

90. 244 N.E.2d at 579-80.

91. 244 N.E.2d at 580. *See also* James Drago v. Hudson County Park Comm., No. L-31694-68 P.W. (Super. Ct., L. Div., Hudson County, N.J. July 14, 1969).

be adequate evidence of legislative intent. That standard is patently designed to thrust such matters before the public, by requiring that the legislature specify the reallocative policy being undertaken; a court could not be more explicit in its effort to make the legislative and administrative processes more responsive to the will of the general public and less susceptible to the tendency to make decisions which, as a result of inequalities of access, do not fully reflect the general will:

> We think it is essential to the expression of plain and explicit authority to divert parklands, Great Ponds, reservations and kindred areas to new and inconsistent public uses that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use.[92]

Finding the statute in question clearly inadequate under this test, the court ordered the issuance of a writ of mandamus commanding that the lands not be transferred to the Department of Public Works until legislation authorizing such transfer was duly enacted.

Thus, in the cases which followed *Gould*, the Massachusetts court has clearly demonstrated both an awareness of the problems which are central to public trust litigation and a willingness to ensure that those problems are not ignored by decision-making bodies. The court has not attempted to make policy decisions concerning the proper use of public trust lands, but has instead developed a means for ensuring that those who do make the decisions do so in a publicly visible manner. The court has served notice to all concerned that it will view with skepticism any dispositions of trust lands and will not allow them unless it is perfectly clear that the dispositions have been fully considered by the legislature.

3. *A Tentative Application of the Massachusetts Approach: Public Trust Problems in Maryland and Virginia*

The Massachusetts court has been discreet enough to refrain from detailing the reasons which led to its skepticism of administrative conduct, but those reasons appear frequently in the pages of the major metropolitan newspapers.

In June of 1969, for example, newspaper stories revealed that the

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92. 244 N.E.2d at 580. For a sharply contrasting judicial approach to the problem of the *Robbins* case, see State v. Christopher, 170 N.W.2d 95 (Minn. 1969), *petition for cert. filed sub nom.* Minneapolis Park Bd. v. Minnesota, 38 U.S.L.W. 3154 (U.S. Oct. 20, 1969).

Maryland State Board of Public Works, an agency composed of the governor, the state controller, and the state treasurer, had deeded to a private real estate developer approximately 176 acres of state-owned submerged land in the vicinity of Ocean City, a popular summer resort.[93] The developer, who already owned the adjacent uplands, wanted the additional area to fill, subdivide, and sell—a process which has become quite common in populous areas near shorelines, since available residential land on or near the water is both increasingly scarce and highly prized. When land is no longer available for development, pressures build to "make" new land. It is not uncommon for states to convey submerged lands to private owners; states have traditionally deeded adjacent tidelands to upland owners so that the lands might be filled for wharfage and similar purposes. But grants of that nature were historically made only when the adjacent lands were of small value, and when the general public obtained no significant benefit from public ownership of the lands.[94] Thus, although there is ample precedent to support the right of the state to grant such lands to private parties, the case providing that support all dealt with lands of very limited public value. It is essential to an understanding of the cases which uphold grants of trust lands to private parties that one be aware of the historical setting in which such grants have been made.

The recent Maryland grant does not fit into the pattern of the historical cases. The consideration exacted by the Board for the land granted was a mere 100 dollars per acre plus ten cents per ton for state-owned sand that was dredged from the bottom and used for fill. It was reported that the land so filled was subdivided into house lots of a fraction of an acre each, which were sold at a price between 5,000 dollars and 7,300 dollars per lot.[95]

Suit has been filed objecting to the Maryland wetlands disposition.[96] In a suit of that nature, an alert court could hardly refrain

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93. N.Y. Times, June 4, 1969, at 26, col. 1; *id.*, June 7, 1969, at 32, col. 2.

94. There are large tracts of salt marsh lands, of which the land in suit is an example, which are covered and uncovered by the flow and ebb of the neap tides, and therefore belong to the State by virtue of her sovereignty, which are of no possible use for the purpose of navigation, but may be valuable for agricultural or other purposes if reclaimed from the tides. Such lands the State may undoubtedly grant in private ownership for the purposes of reclamation and use, for by such a course no right of the public to their use for the purposes of navigation would be prejudiced.

Ward v. Mulford, 32 Cal. 365, 373 (1867). *See* Commonwealth v. Alger, 61 Mass. (7 Cush.), 53, 72 (1851).

95. N.Y. Times, July 13, 1969, at 37, col. 1.

96. Kerpelman v. Mandel, Equity No. 78A, p. 142, Case No. 426-86-A (Cir. Ct. No. 2, Baltimore, Md., filed June 25, 1969); *see* Wash. Eve. Star, Nov. 11, 1969, at B-3, col. 1.

from asking the questions which troubled the Massachusetts Court in the *Gould* litigation. Why should a state agency, invested with the obligation to act as trustee for the general public, grant away tidelands in exchange for a sum of money which, at best, is only a fraction of the market value of the lands? Why, in any event, should a resource which has a significant value to the public at large be reallocated to the benefit of the relatively few vacationers with the means to acquire waterfront residences? Is it conceivable that the public trust in an aquatic resource is meant to be implemented by the provision of additional space for housing which could undoubtedly be built elsewhere at only a modest inconvenience? Is the public trust obligation of the state, in a context "strongly suggesting a commercial enterprise,"[97] to be viewed as including "power to permit use of public lands . . . for what seems, in part at least, a commercial venture for private profit,"[98] when the quid pro quo, measured either in money for the general fund or in public advantage, is so elusive? And, finally, what weight is to be given to the decisions of the state agencies which have an interest in such matters; that is, how important is it that the Board of Natural Resources, the Department of Inland Game and Fish, the Department of Water Resources, and the staff of the Board of Public Works all filed objections to the plan for development of the tidelands that were ultimately granted?

In defense of the grant, it has been said that the development will produce a projected multimillion dollar increase in the taxable property base of Ocean City and the local county. But this explanation proves too much; any grant of governmental property to a private enterprise would produce the potential for additional taxes. That statement is as true of the White House and Washington Monument grounds or of Yellowstone Park as it is of a tract of submerged land on the Maryland coastline. To accept the defense would be to remove all restrictions on the power of government to grant public lands to private parties.

If the reported facts are accurate, the Maryland situation seems to be an easy one to bring within the ambit of *Illinois Central* and *Gould*. The absence of any substantial consideration for the grant, as well as the other circumstances surrounding the grant, give the controversy the same aura of disregard for the broad public interest that so permeated the two earlier cases. Moreover, because the grant was made by a state administrative agency, and not by a direct

97. Gould v. Greylock Reservation Commn., 350 Mass. 410, 426, 215 N.E.2d 114, 126 (1966).

98. 350 Mass. at 426, 215 N.E.2d at 126.

statutory command of the legislature, it would be possible for the court to use the limited technique established in Massachusetts. Reference could be made to the general authorizing statute; and since that statute contains nothing which expressly authorizes either the specific grant in question or grants of the same type, the court could find that there is insufficient legislative authorization. In that manner, the court could thrust the project back to the legislature where the project's proponents would have to contend with wide public knowledge and concern in trying to persuade a majority of the elected representatives of the people to assert publicly their willingness to enter into the contract.

Not all contemporary cases, however, are readily adaptable to a judicial decision which requires that the legislature itself examine a particular administrative action. Sometimes a court has much less opportunity to cast doubt upon a legislative authorization without directly repudiating it. An instructive example of the variant form in which such cases can arise is presented by a recent landfill project in Alexandria, Virginia.

The basic facts in the Virginia situation are quite similar to those which occurred in Maryland,[99] but there is one important difference. In the Virginia situation, a deed was not granted by a state agency; instead, a bill was presented to the legislature authorizing the governor to convey the desired land to a private interest for the sum of 60,000 dollars.[100] Details of the maneuvers which were used to obtain the passage of the bill are not easily obtainable, but cer-

99. In the Virginia case, a private housing developer owning fast lands on the shore of the Potomac sought to fill adjacent submerged lands and to erect three high-rise apartment buildings with the much sought-after features of proximity to, and a view of, the water. For a more thorough discussion, see works cited at note 71 *supra*.

100. Except for a technical legal description of land to be conveyed, the Act read as follows:

Whereas Francis T. Murtha, Trustee, and Hunting Towers Operating Co., Incorporated, are owners in fee of certain fast land along the perimeter of Hunting Creek in the City of Alexandria; and Whereas, each claim riparian rights to contiguous acreage within such area; and

Whereas, such owners wish to bulkhead most of the area within the riparian claim areas, and fill same with earth so that productive use may be made thereof; and Whereas, as the situation now exists, a health hazard is present, since such waters as remain are stagnant and will not support marine life, nor as same navigable to any extent; now, therefore,

Be it enacted by the General Assembly of Virginia:

1. § 1. The Governor and the Attorney General are hereby authorized in consideration of the premises, and the payment into the General Fund of the Commonwealth of a sum to be fixed by the Governor, not less than [sixty] thousand dollars, to execute . . . a proper deed of conveyance . . . conveying . . . all of the Commonwealth's right, title and interest in and to the following described property:

[Then there follows the legal description of the land to be conveyed, totalling slightly over 36 acres].

Act of March 31, 1964, ch. 546, [1964] Va. Acts 825.

tain features of the legislative process have been made public and they suggest a familiar pattern. On February 14, 1964, a bill was reported out of the Virginia House Committee on the Chesapeake and its Tributaries.[101] The bill passed the House unanimously on February 28—a day on which a total of 100 bills were considered by the Virginia House. Two weeks later, the bill unanimously passed the Senate, on a day on which there were 59 other bills before that body.[102] There is no indication that any debate or controversy over the bill took place in either house of the legislature, nor does it appear that the matter was brought to public attention.[103]

That lack of attention is not surprising, for the bill, which became law on March 31, 1964, was written in such restrictive language that even the most alert legislator would probably not have realized the extent of the private benefit that the legislature was bestowing.[104] Indeed, legislation of this kind is not an easy target for even the most skeptical court. The statute in question not only removes the opportunity to cast doubt upon the legislature's desire to convey the particular tract of land, but purports not to be a grant of the public domain at all. It speaks of existing private claims of riparian right to the tract and appears as if it is nothing more than authority for a quitclaim conveyance to clear up a technically troublesome title problem, rather than a disposition of public trust land.

It is true that there was some question as to the ownership of the land in the Virginia situation, for there had been a good deal of siltation along the low water mark. Thus, the private parties involved had at least a colorable legal claim of ownership by accretion of some of the tract authorized to be conveyed under the Act. But the mere existence of their claim should not allay concern with the legislation, for one would think it routine practice in a case of this kind to obtain a legal opinion from the state attorney general. If he found that ownership by accretion had accrued to the upland owner, the state could be expected to recognize that owner's right without any substantial charge. Conversely, if the state found that the area in question was a part of its public trust, a question would necessarily be raised by the legislature's willingness to convey it for private

101. Fairfax County (Va.) Journal Standard, Sept. 12, 1968, at 1, col. 5.

102. *Id.*

103. One local state legislator replied to newspaper inquiries about the passage of the legislation, by saying that she voted for the bill because "as far as I was aware or informed there was no objection in any quarter to the proposal." Later she regretted her vote for the bill which was explained to her at the time, she said, as a measure that would permit productive use to be made of a useless tract of waste land. *Id.*

104. *See* note 100 *supra.*

commercial purposes. In either event, it is difficult to understand why a minimum price of 60,000 dollars—about 1,600 dollars per acre—was found acceptable by the legislature since upland tracts adjacent to the disputed land were sold for high rise apartment developments at a cost of 144,000 dollars per acre.[105]

It is possible to argue that 60,000 dollars was a proper price for the land, for it may be that the submerged lands would not be available for development unless permits were obtained from certain governmental agencies, such as the Corps of Engineers. If permits are necessary, the argument runs, uncertainty about obtaining such permits must be reflected in the price of the land. But that argument is no more than a variant of the claim made in *Gould* that the Authority's conduct was justified because there were pressures imposed by investment bankers. That a property is, or may be, ill-suited to private development should enhance the government's doubts about removing the land from public trust uses and should not encourage disposal by the state at a very low price. That conclusion is valid especially when there is uncertainty about obtaining a federal permit, since one may assume that any reservations about the granting of a permit would be predicated upon the view that the proposed development is inconsistent with the public interest.

However one analyzes the situation, the state's posture is unenviable, for there are only three possible conclusions that might be drawn and none of them justifies the legislation. First, it might be concluded that the state has clear ownership of the land, and there may be no real problem with obtaining a permit; in that case the legislation provides for an unreasonably low price for the disposition of trust land. Second, one might arrive at the conclusion that 60,000 dollars is a proper price in light of anticipated difficulties in obtaining a permit; but in that situation, the state is promoting a development which probably does not conform with the public interest. Finally, it might be determined that the state does not own the land and that it is merely recognizing existing private rights; but then the state must be regarded as exacting a large price for the validation of a right which a citizen already holds.

Moreover, as with the Maryland situation, there are a variety of factors which cast doubts on the state's sensitivity to its obligations as a trustee. For example, there were no studies made by state agen-

105. THE PERMIT FOR LANDFILL IN HUNTING CREEK: A DEBACLE IN CONSERVATION, H. REP. NO. 91-113, 91st Cong., 1st Sess. 9 (1969); Ann Arbor News, March 16, 1969, at 52, col. 1.

cies inquiring into the value of the land in question for public use. Similarly, the state did not attempt to satisfy itself as to the status of the riparian claims prior to enacting a law authorizing the grant. Finally, it is hard to determine why the governor, who had final authority to make or deny the grant, was unmoved by studies which led the Fish and Wildlife Service of the United States Department of the Interior to recommend against approval of a federal permit for residential development. Indeed, not only was the governor unmoved, but he took the odd position that "an honorable commitment has been made and . . . I could hardly refuse to exercise the authority granted me by the General Assembly . . . ."[106]

Because the legislation in question is quite specific, the question arises as to the potential for judicial intervention of the type which has developed in Massachusetts. It appears that there is room for such intervention, for the law did not itself operate to transfer the land; it simply authorized the governor and the attorney general to convey the tract and recognized the existence of private claims to riparian rights. It therefore seems perfectly appropriate to read the legislative intent as having imposed upon the governor and the attorney general the duty to examine those riparian claims and then to make the conveyance, but only if those individuals are satisfied both that the riparian claims are valid and that recognizing them will not operate to impair the state's public trust obligation. Such a reading would be consistent with the principle that legislation involving trust lands is to be read, if possible, in conformity with the high sense of duty which the state has toward the administration of its trust lands. Furthermore, because the statute sets only a lower limit on the conveyance price, it could be read to mean that if the land is sold, the price must reflect the full market value of that land. Under this interpretation, the 60,000 dollar minimum price was established so that the public could not be economically disadvantaged by the transfer. Finally, the legislation might be read as authorizing the grant only if the governor satisfies himself that those state agencies upon whom the duty rests to manage public trust lands have examined the potential conveyance and have not raised substantial doubts as to its propriety.[107]

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106. Fairfax County (Va.) Journal Standard, Aug. 29, 1968, at 1, col. 1.

107. There is only one provision of the Act which indicates that there is a public benefit to be derived from the grant of the lands. That provision is the legislative finding that "a health hazard is present, since such waters as remain are stagnant and will not support marine life, nor are same navigable to any extent." Act of March 31, 1964, ch. 546, [1964] Va. Acts 825. But that finding does not preclude reading the Act in one of the three ways suggested in the text for it merely suggests that the present conditions

Thus, there is a great deal of ingenuity which courts can use in dealing with factual contexts such as those in Maryland and Virginia. A recognition of that potential is important, not because it demonstrates the scope of judicial cleverness, but because it indicates that public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process. The public trust approach which has been developed in Massachusetts and the exercise in applying that approach to existing situations in Maryland and Virginia demonstrate that the public trust concept is, more than anything else, a medium for democratization. To test that proposition further, it is useful to look at developments in those states which have the most amply developed case law in the public trust area—Wisconsin and California. Moreover, to indicate the breadth of the acceptance of responsibility by the courts for guarding public lands, public trust developments in other states will be examined.

B. *The Public Trust in Wisconsin*

1. *The Early Developments*

The Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state. The earliest case of importance in that jurisdiction is *Priewe v. Wisconsin State Land and Improvement Company*,[108] which, like so much early litigation, contains the strong implication of legislative corruption. That case involved a promoter who apparently asserted title to the land underlying Muskego Lake, and who obtained passage of a law which permitted him to drain it;[109] the basis for the law was a statutory finding that the drainage was required for the preservation of public health. Suit was filed to

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are not satisfactory. If the land is retained by the state, the governor may always promote corrective or reconstructive work by state agencies in order to restore the area for traditional public uses as part of the recreational public domain.

108. 93 Wis. 534, 67 N.W. 918 (1896).

109. The ownership situation is not an unusual one under state water law. A private party may own submerged land in a lake or stream, with the overlying water held in trust by the state for public use. Thus, a fisherman may be entitled to float over the riparian's land, but not have the right to get out and walk over the bottom. *See* Annot., 57 A.L.R.2d 569 (1958); Reis, *Policy and Planning for Recreational Use of Inland Waters*, 40 TEMP. L.Q. 155, 157 (1967). It is in light of this peculiar legal rule that granting an owner of bottomland the authority to drain the overlying body of water can be viewed as a divestment of the state's trusteeship obligation.

enjoin the drainage scheme, and the defense made the conventional claim that a legislative determination of public purpose is conclusive on the judiciary. The Supreme Court of Wisconsin rejected that claim, holding that the final determination of whether a particular act is for a public or a private purpose must be made by the judiciary. Accordingly, the court examined the statute and found it to be invalid because it was for "private purposes and for the sole benefit of private parties."[110] The court was struck by the recognition that

> if the state had power . . . to convey and relinquish . . . all its right, title, and interest in and to all lands lying within the limits of Muskego Lake, then it may, in a similar manner, convey and relinquish to private persons or corporations all such right, title, and interest in and to every one of the 1,240 lakes in Wisconsin.[111]

Such an extension, the court concluded, simply could not be viewed as a lawful exercise of legislative power by a sovereign which held such resources in trust for the public. The direct holding of *Priewe* is of limited utility, for few cases arise in such blatant form as to justify a finding of fraudulent legislative purpose and a total absence of public benefit. The case is, however, more extensive than *Illinois Central*, for the Wisconsin court directly overruled a clear statutory declaration to which the legislature adhered. More important, the court recognized, albeit sketchily, that the evaluation of resource policy cannot be adequately effectuated by viewing each disposition or development in isolation from the other public resources in the state or region. That need to view the total resource context has become increasingly important in contemporary controversies over wetlands policy[112] and over large systems such as San Francisco Bay.[113]

The next two cases to come before the Wisconsin court also involved proposals to drain wetlands for agricultural reclamation, although in neither case was the setting as extreme as that in *Priewe*. In both cases, applications were made to drain low lying swamp lands along the Mississippi River. The major purpose was to make the lands available for productive agriculture, but there was also a desire to straighten channels in order to improve navigation. An inquiry into the proposals was made by a state commission as is

110. 93 Wis. at 552, 67 N.W. at 922.

111. 93 Wis. at 551, 67 N.W. at 922.

112. *See Permit for Landfill in Hunting Creek, Va., Hearings, supra* note 71, at 67-8; *Estuarine Areas, Hearings Before the Subcommittee on Fisheries Wildlife Conservation, House Comm. on Merchant Marine & Fisheries*, 90th Cong., 1st Sess. (1967). *See* notes 139, 185 *infra*.

113. *See* text accompanying notes 183-90 *infra*.

required in Wisconsin, and the report of the commission was brought before the court for confirmation.

In the first case,[114] the court found that the drainage scheme was within the appropriate bounds of legislative activity and therefore valid, but the court demonstrated that it was concerned with the adverse impact that the scheme would have on fishing and hunting. The decision, unfortunately, is bereft of factual analysis and the opinion is comprised of conclusory language:

> Can it be said . . . that the state in authorizing this drainage scheme . . . has infringed on the public rights of fishing and hunting in violation of the trust . . . ? To constitute such an infringement . . . it must appear . . . that there is an unauthorized impairment . . . . True, fishing and hunting will be somewhat impaired . . . but not to an extent amounting to a substantial infringement of the right when considered in connection with the regulation and guarding of the other public interests here involved.[115]

Although the opinion itself is only a medley of conclusions, the decision implicitly takes a most important step, for it recognizes a judicial responsibility to examine legislative authority not only for its general conformity to the scope of regulatory power, but also for its consonance with the state's special obligation to maintain the public trust.

The significance of the majority opinion in this respect is revealed by the concurring opinion, in which two justices expressed impatience with the very thought that the court might take it upon itself to balance the public right in fishing or hunting against a governmental determination which is within the bounds of legislative authority.[116] To those judges, judicial intervention in maintaining any particular balance of uses was unwarranted. They argued that since the state has an unquestioned right to improve navigation by straightening channels,

> it cannot be restrained in the exercise of that right by the mere fact the fishing will be substantially damaged. The right of the state

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114. *In re* Trempealeau Drainage District: Merwin v. Houghton, 146 Wis. 398, 131 N.W. 838 (1911).

115. 146 Wis. at 410, 131 N.W. at 841-42.

116. It is significant that the court was not being asked to pass upon a specific legislative determination, but only upon the exercise by an administrative commission of a broad legislative authority. Thus, had the court been alert to the sort of technique which the Massachusetts court utilized in dealing with agency action, it might not have put the issue in such stark terms. Nonetheless, both the majority and the concurring opinions did view the case as one in which the court was being asked to pass upon a legislative decision, and for purposes of analysis it is their perception of the case which is critical.

> to better its navigable waterways is supreme. If there be a resulting impairment of the quality of the fishing in the navigable stream as improved, even to the point of practical extinction, this is a loss which the public must endure without complaint.[117]

It was the unwillingness of the majority to acquiesce in this attempt to eliminate judicial scrutiny of legislative decisions that laid the groundwork for modern public trust litigation in Wisconsin. Unfortunately, the approach which the court took caused it to ignore one very interesting element of the case, an element that has taken on great importance in more recent public trust litigation.[118] The question which the court failed to answer was whether it made any difference that the proposal under consideration was meant to reclaim swamp land for agricultural purposes rather than for a traditional water-related use such as navigation improvement. Although the commission's report suggested that agricultural reclamation was really the purpose of the plan, the decision focused upon navigation. That focus may indicate at least that the court was more comfortable with a transference from one water-related use to another than it would be with a change to a nontraditional use.

The second case arose in 1924 and involved a proposed levee project to reclaim wetland that had been used for fishing and hunting.[119] The opinion in this case shows no greater judicial inclination for factual analysis than that in the previous case; but the court did appear quite anxious to protect the public trust, and the opinion is reminiscent of the Massachusetts cases[120] in that there is a clear disenchantment with administrative agencies. The state commission which had recommended the drainage proposal reported that "public rights of trapping, hunting, fishing, and navigation will, by no means, be wholly destroyed."[121] The court seized upon that statement to reach a conclusion contrary to that of the commission. Understoring the commission's use of the word "wholly," the court said that the report thus implied "that there will be substantial destruction of these rights. It [the commission] sought to justify it by stating that the compensatory public benefits may largely exceed the actual damage suffered by such other public rights."[122] The court then found that justification to be unacceptable:

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117. 146 Wis. at 411, 131 N.W. at 842.

118. *See* notes 134-39, 211-20 *infra* and accompanying text.

119. *In re* Crawford County Levee & Drainage Dist. No. 1, 182 Wis. 404, 196 N.W. 874, *cert. denied*, 264 U.S. 598 (1924).

120. *See* text accompanying notes 73-92 *supra*.

121. 182 Wis. at 406, 196 N.W. at 875.

122. 182 Wis. at 415, 196 N.W. at 878.

> By compensatory public benefits must be meant the benefit accruing to the public by having this land reduced to an agricultural state, for there is no serious claim or showing that the present condition of the district is injurious or dangerous to public health. But, as has already been pointed out, it does not lie within the power of the railroad commission or of this court or of the state to change navigable waters into agricultural fields, no matter how great the public benefits might be in favor of the latter.[123]

The language which the court used is certainly too strong to stand as an absolute rule against every possible contingency which a legislature might face.[124] But as the concept has subsequently been used by the court, it has become a most interesting and sophisticated judicial effort to grapple with legislative and administrative imperfections. The Wisconsin court has thus been able to combat the tendency of the legislature and of administrative agencies to subordinate diffuse public advantages to pressing private interests.

If the Wisconsin approach is to be properly appraised, it is essential to understand the disadvantages under which courts have traditionally labored when dealing with cases such as those involving public trust lands. Those disadvantages arise because courts are accustomed to dealing with the meaning of statutory and constitutional language rather than with data which help to identify and compare the benefits and costs at stake in the cases before them. Therefore, the courts have had to fashion for themselves guidelines

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123. 182 Wis. at 415, 196 N.W. at 878. Some courts have taken a very narrow view of their trust responsibility. For example, in Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930), it was held that "real and substantial relation to a paramount trust purpose" must be shown before the state may enjoin encroachments in navigable waters by riparian owners. 252 Mich. at 225, 233 N.W. at 168. Even Michigan, however, seems to be retreating from the restrictive view announced in *Hilt*. Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 15 Mich. App. 556, 566, 167 N.W.2d 311, 316 (1969).

124. The court's enthusiasm for the trust was unbounded. Turning to the language of the Northwest Ordinance of 1787 (the governing document of the territory from which Wisconsin was carved), and its mandate that navigable waters remain "as common highways and forever free," the court said, "[f]rom our acceptance of the provisions . . . of the Ordinance of 1787 it follows that it is not a question of state policy as to whether or not we shall preserve inviolate our navigable waters. We are by organic law compelled to do so . . . . And this trust we cannot diminish or abrogate by any act of our own." 182 Wis. at 409, 196 N.W. at 876. *See* Wis. Const. art. IX, § 1, incorporating the language of the Northwest Ordinance.

The Northwest Ordinance provision is part of the organic law of a number of states, but it has elsewhere been much more narrowly interpreted as being intended to "prohibit only the imposition of duties for the use of navigation and any discrimination denying to citizens or other states the equal right to such use." Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 10 (1888). *See* Nedtweg v. Wallace, 237 Mich. 14, 20, 208 N.W. 51, 53-4 (1927). *Cf.* Witke v. State Conservation Commn., 244 Iowa 261, 56 N.W.2d 582 (1953) (holding invalid a law requiring payment of a fee to operate a water taxi on a lake which the state had not improved; the court found that no fee may be required for the exercise of the public right of navigation).

which will permit the court either to filter out cases in which there is a rather clear loss to the public interest or to thrust back upon administrative agencies or legislatures the responsibility to adduce persuasive evidence that the public interest is not being neglected. Sometimes courts will require that a record be made and data collected in order to satisfy the court directly that every important interest is adequately considered. A court may also, as was seen in the Massachusetts litigation,[125] adopt an approach which requires that there be an open and explicit legislative decision, so that a proposal will be tested against the wishes of an informed public. Finally, a court may serve notice that the public benefits from certain kinds of projects are so inherently unclear that such projects should not be advanced unless it can be shown that they are in fact necessary or desirable from the perspective of the public interest.

In the three early cases just discussed, the Wisconsin Supreme Court adopted the last of these approaches. Its opinions, sensitively read, can be taken as a form of notice to the legislature and the agencies that when the public interest of a project is unclear, its proponents will have the burden of justifying the project and will not be allowed to rely on traditional presumptions of legislative propriety or administrative discretion. In adopting this position, the court does not seek a confrontation with the legislature nor does it attempt to substitute itself as an ultimate judge of the public good. Rather, it tries to identify and correct those situations in which it is most likely that there has been an inequality of access to, and influence with, decision makers so that there is a grave danger that the democratic processes are not working effectively. To safeguard against such danger, the court has warned the other branches of government that they must be prepared to justify their position. The Wisconsin court will require that such a showing of justification be made whenever resources which are generally available to the public without cost are, in any significant way, subordinated to a more limited set of private interests.

2. *Refining the Basic Concept*

When the Wisconsin court first developed the concept that public trust lands can be devoted to private uses only if there is a clear justification for the change, it adopted a rather blunt approach. The nature of that approach is clearly demonstrated by the 1924 case discussed above, *In re Crawford County Levee and Drainage District*

125. *See* text accompanying notes 77-92 *supra*.

No. 1.[126] In that case, the Wisconsin court took the position that navigable waters available to the whole public could never be converted to private farmland. Such an approach was far too inflexible.

The court began that process of refinement in 1927 when the city of Milwaukee made an exchange of land with a private steel company in order to obtain shoreland for development of the city's harbor. The attorney general sought to have the exchange enjoined on the ground that public trust land could not be granted to a private corporation. This case, *City of Milwaukee v. State*,[127] presented an excellent opportunity for the court to modify the position it had taken three years earlier, for the exchange was economically fair and the goal of developing a public harbor was of considerable benefit to the whole of the affected public. Moreover, as the court pointed out, the loss of swimming and fishing in the area to be given the steel company was extremely modest and those activities could easily be engaged in at nearby areas which would not be filled.[128] The project would not restrict public navigation but would actually promote it. It was therefore proper that the court eschewed such narrow considerations as whether any particular acre would be lost to public recreation, but rather examined the broad impact of the transaction upon public uses in general. The court first noted that the case did, after all, involve Lake Michigan, so the filling of a relatively few acres would not have a substantial impact on local public uses.[129] Then the court turned to the extreme language of *Crawford County*,[130] and drew a distinction between that case and the one before the court. By drawing that distinction, the court indicated the means by which it would thereafter identify projects unlikely to be in accord with the public interest. "There," the court said, "a considerable area would have lost its original character"[131]

126. 182 Wis. 404, 196 N.W. 874, *cert. denied*, 261 U.S. 598 (1924). *See* text accompanying notes 119-23 *supra*.

127. 193 Wis. 423, 214 N.W. 820 (1927).

128. 193 Wis. at 432, 447, 214 N.W. at 823, 829.

129. A wharf or pier extended out into one of our inland lakes for a distance of 1,500 feet could not be held to serve the purposes of promoting navigation; on the contrary, it would be considered an obstruction thereto. On the other hand, when we consider the vastness of the area of these Great Lakes, such as Lake Michigan, and the primary purpose which they serve, such a projection cannot be held an obstruction to navigation, but an aid thereto. For the state to attempt to cede to an individual or corporation a stretch of land under water adjoining the uplands of an inland navigable lake would on its face clearly violate our constitutional provision; but when it comes to Lake Michigan, and when we consider the main purpose of this large body of water, such a cession, when made in the interests of navigation, presents an entirely different aspect.
193 Wis. at 447, 214 N.W. at 829.

130. *See* text accompanying note 123 *supra*.

131. 193 Wis. at 449, 214 N.W. at 830.

as a public resource, and much of what had been freely available to the public would be set aside for private uses. In *Crawford County*, as in the earlier *Priewe* case, "consummation of the scheme would have materially affected the rights of the public to the navigable waters of the lakes, considering their size, depth, and the purposes for which they were primarily adapted."[132]

Thus, the court implied that it will be hesitant to approve any transaction in which broad public rights are set aside in favor of more limited, or private, rights. And approval will certainly not be forthcoming if there is no persuasive justification for the transaction. The court did not, however, indicate that it will substitute judicial policy making for legislative action, or that it intends to interfere with legislative freedom to adapt public policy to a changing world. To make that fact clear, the court concluded its analysis with the following observation:

> The trust reposed in the state is not a passive trust; it is governmental, active and administrative. Representing the state in its legislative capacity, the legislature is fully vested with the power of control and regulation. The equitable title to those submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it. As has heretofore been shown, the condition confronting the legislature was not a theory but a fact. This condition required positive action, and the legislature wisely and well discharged its duties . . . .[133]

The principle which the court established in *Milwaukee* has served it well in subsequent cases. The approach developed there has since been further refined, but has not been significantly modified.

The Wisconsin court was not faced with another important trust case until 1957, when the case of *State v. Public Service Commission*[134] arose. In that case, the City of Madison, which owned a park fronting a recreational lake with connecting lagoons, wanted to

> fill part of a lagoon, to remove an existing bridge, to fill a portion of the lake bed and use it for parking of cars, enlargement of the beach area, and relocation of highways, to open a new waterway between the lake and the lagoon, and to build a new bridge.[135]

The city's plan had been approved by the state administrative

132. 193 Wis. at 449, 214 N.W. at 830.
133. 193 Wis. at 449, 214 N.W. at 830.
134. 275 Wis. 112, 81 N.W.2d 71 (1957).
135. 275 Wis. at 114, 81 N.W.2d at 72.

agency, but suit was brought by the attorney general who claimed that because the fill would destroy navigation *pro tanto*, the project violated the trust doctrine.

The court's findings, however, led it to reject the doctrinaire position that the attorney general had advocated. The court found that the project would provide a more substantial bathing beach and better park facilities for the convenience of park users. The court further found that only 1 to 1¼ per cent of the lake area was to be filled, and that, although fish production would be reduced by some 200 pounds per year and navigation would be destroyed in the four acres actually filled, navigation in general would be promoted by the new connection to be built. Citing *Priewe*, *Crawford County*, and *Milwaukee*, the court then said that while the trust doctrine prevented a grant for a purely private purpose, and "even for a public purpose, the state could not change an entire lake into dry land nor alter it so as to destroy its character as a lake,"[136] nonetheless "the trust doctrine does not prevent minor alterations of the natural boundaries between water and land."[137] Accordingly, the court held that Madison's plan did not violate the trust doctrine. In reaching that conclusion the court relied upon five factors, the statement of which comes as close as judicial statement has to a specific enumeration of a set of rules for implementation of the public trust doctrine:

1. Public bodies will control the use of the area.
2. The area will be devoted to public purposes and open to the public.
3. The diminution of lake area will be very small when compared with the whole of Lake Wingra.
4. No one of the public uses of the lake as a lake will be destroyed or greatly impaired.
5. The disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.[138]

It is important to note that the comparison which the court made in the third factor is not with the whole of the state's lake resources,

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136. 275 Wis. at 118, 81 N.W.2d at 74.

137. 275 Wis. at 118, 81 N.W.2d at 74. *See* Ocean Beach Realty Co. v. Miami Beach, 106 Fla. 392, 143 S. 301 (1932), *noted in* 12 ORE. L. REV. 166 (1932), in which it was held permissible to widen a road by taking part of a beach area, since the activity would improve access to the area; King v. City of Dallas, 374 S.W.2d 707 (Tex. Ct. Civ. App. 1964), in which widening a road and bridge was allowed since the state would thereby develop the park to its fullest extent.

138. 275 Wis. at 118, 81 N.W.2d at 73.

but with the particular resource at issue. Thus, the court implicitly recognized the problem which would be raised by a test that required demonstrable infringement of recreational water uses in the state as a whole,[139] and it was unwilling to adopt an approach which would require it to examine the effects of a particular change on the entire resources of the state. There is, however, every reason to believe that if the appropriate agency can present a persuasive regional plan for development, the court will not block the plan merely because its nature is regional.

The five factors set out by the court comprise a useful approach to the relationship between the court and administrative agencies. Rather than blindly accepting agency decisions as an appropriate exercise of discretion, or forcing the agency to demonstrate its correctness in every case, the court announced certain guidelines. The court is willing to accept the expertise of administrative agencies within a broad range of decision making. But the court clearly indicated that when agencies transgress those limits, the court will demand something more than administrative *ipse dixit*. The result of this judicial technique is to force the agency to show, from time to time, that it does indeed have the qualifications—the expertise and the concern for the public interest—which it claims to possess. Moreover, agencies and legislatures are given an incentive to develop state and regional plans and to seek out information to identify, evaluate, and compare the elements which determine the optimum public interest.[140]

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139. *See* note 112 *supra*, note 185 *infra*. The problem was explicitly recognized in a recent Wisconsin case:

> There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once they are gone, they disappear forever.

Hixon v. Public Serv. Commn., 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966).

140. Such an incentive was the result of the court's holding in Town of Ashwaubenon v. Public Serv. Commn., 22 Wis. 2d 38, 125 N.W.2d 647, *reh. denied*, 22 Wis. 2d 55, 126 N.W.2d 567 (1964), which required that a commission re-evaluate its refusal to approve a bulkhead line for a town. The court's unwillingness to adopt a doctrinaire position is indicated by the majority opinion, in which the court noted that while "the proposed Ashwaubenon bulkhead line constitutes a greater intervention than has previously been approved by earlier decisions of this court in its evaluation of the trust doctrine," nevertheless the court was not willing, without further evidence, to hold as a matter of law that permission to fill some 137 acres in the Fox River was a violation of the trust. 22 Wis. 2d at 50, 125 N.W.2d at 653. The court has had some difficulty in deciding the point at which to call upon administrative agencies for further evidence; the Ashwaubenon case was decided 4-3, with the minority willing to uphold the commission on the ground that the proposal involved a "relatively gross invasion of the bed of the river." 22 Wis. 2d at 54, 125 N.W.2d at 656. In Hixon v. Public Serv. Commn., 32 Wis. 2d 608, 146 N.W.2d 577 (1966), the balance in the court

If the cases are seen in this light—and a careful reading of the cases as a whole supports such an interpretation—rather than as instances of rigid and unbending judicial doctrine, then it can be concluded that the Wisconsin courts will not adhere unyieldingly to a particular set of constraints. But in order for a court to change those constraints, it must be persuaded that the points at which it would otherwise become skeptical are inappropriate ones at which to test the public interest. Thus, if the commission should respond to cases like *State v. Public Service Commission* by showing the court that any or all of its five tests are not useful guidelines, but that public interest problems are more usefully examined by reference to other factors, the court would undoubtedly modify its position.

Indeed, the next case that came before the Wisconsin Supreme Court, *City of Madison v. State*,[141] indicates that it is seeking to develop a workable test of agency misconduct or heedlessness, rather than some rigidly doctrinaire formula. In that case, the court's previous formulation of the "uses of the lake as a lake" and "character as a lake" standards were put to a more difficult test. The city sought to fill about six acres of submerged shoreland in Lake Monona to build an auditorium and civic center building. The project was held to have been authorized by state legislation and the court was therefore squarely faced with the question whether such a project was constitutional under the public trust doctrine.

The auditorium, as planned, was to include a theater, an exhibition hall, a food service area, and boating facilities. The setting was at a point on the shore adjacent to a steep embankment where public access had been extremely limited, and it was found that the project

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had shifted and the court upheld, on a very slender record, the commission's denial to a littoral owner of permission to maintain a breakwater reaching 75 feet into the lake. However, a little uncertainty as to the position of the court does no great harm; at worst it encourages the agencies to build records for their own protection. As the courts are presented with more ample administrative findings and evidence, they will be better able to identify genuine problem cases. *See* Town of Hamilton v. Department of Pub. Util., 346 Mass. 130, 137, 190 N.E.2d 545, 550 (1963) ("The department's right to utilize its 'technical competence and specialized knowledge in the evaluation of the evidence' may be reflected . . . in the specific findings; it does not make specific findings unnecessary.").

Florida has one of the most elaborate statutory schemes for regulating city actions which set bulkhead lines. Not only do the trustees of the Internal Improvement Fund, an administrative agency, have authority to approve or reject such lines, but the Board of Conservation may require "a biological survey and ecological study and hydrographic survey" of the proposed bulkhead line. FLA. STAT. ANN. § 253.122 (Supp. 1969). "Any person, natural or artificial, aggrieved" by any such decision is granted a right of review by the circuit court on petition of certiorari. *See* text accompanying notes 236-42 *infra*.

141. 1 Wis. 2d 252, 83 N.W.2d 674 (1957).

would not materially interfere with boating on the lake. Although the court did find the project to be permissible, it did not rest its conclusion on these considerations. Similarly, the court was not satisfied, as the trial court had been, with the assertion that "the state's trust in respect to land under navigable waters may be administered not only for the purpose of improving navigation but also for other public purposes so long as public rights of navigation therein are not substantially interfered with."[142] The court recognized that to approve the project simply because it fulfilled a public purpose would be to deny that the state has any special obligation with respect to trust property. It saw also that to limit its inquiry to whether there would be substantial interference with navigation would open the way to enormous changes in the use of the lake, and would be inconsistent with the general trend of the trust law which the court had been developing.

In light of these considerations, the court's handling of the facts was imaginative and was considerate of the state's trust obligations. The court began with the authorizing statute, which granted the city the right "to construct and maintain on, in or over said Lake Monona . . . parks, playgrounds, bathing beaches, municipal boathouses, piers, wharves, public buildings, highways, streets, pleasure drives, and boulevards."[143] If the statute were read narrowly, as the state argued it should be read, the authority for "public buildings" would be limited to uses of buildings which were related in some degree to the improvement of the use and enjoyment of Lake Monona.[144] According to that view, a boathouse or locker facility for swimmers would be acceptable, but an auditorium or museum would not be. If, on the other hand, the statute were read broadly, the term "public building" would be very expansive and would include a "municipal office building, fire or police station."[145] The court chose to steer between those two poles. It first found that the legislation was meant to authorize a public building of the type proposed. It then held that such a building "is not so unrelated to the use and enjoyment of the lake as to be outside the scope of the term 'public buildings' as used in"[146] the statute, and that the relationship between the proposed building and the uses of the lake was sufficient to validate such an authorization under the public

142. 1 Wis. 2d at 256, 83 N.W.2d at 677.
143. 1 Wis. 2d at 258, 83 N.W.2d at 677.
144. 1 Wis. 2d at 258, 83 N.W.2d at 677.
145. 1 Wis. 2d at 258, 83 N.W.2d at 678.
146. 1 Wis. 2d at 258, 83 N.W.2d at 678.

trust doctrine. The court found that, because the building was to be set at the bottom of a steep grade where there were already railroad tracks, the appeal of the area, when viewed from the lake, would probably be improved. Moreover, the purposes of the building were themselves recreational and would accord with recreational uses of the lake, including provision of a vantage point from which the beauties of the lake could be enjoyed. Since the facilities would therefore enhance each other, the court found "no conflict between the purposes for which the proposed building [would] be used and the purposes of the other facilities . . . ."[147]

With this formulation, the court sophisticated its earlier concept that the lake must be used as a lake. Rather than restricting its view solely to water-oriented uses, it looked to conflict or compatibility among the various uses. This approach maintains for the court the opportunity to focus upon the specific facts of a case.

In its own way, and with its own doctrinal development, the Wisconsin court accomplished essentially the same goal that was achieved, through different legal mechanisms, by the Massachusetts court.[148] Thus, the doctrine which a court adopts is not very important; rather, the court's attitudes and outlook are critical. The "public trust" has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process. If, in the Monona Lake case, the Wisconsin court had found that the civic center proposal was not legitimately attuned to the public interests, it could have adopted the Massachusetts technique and decided the case by finding that the statute authorizing "public buildings" was not to be interpreted to allow a civic center unless there was a specific new law to that effect. In that way, the court would effectively have sent the case back for reconsideration by the legislature in light of increased public attention, and thus bolstered the political position of the objectors.

The Wisconsin court has also developed another method for safeguarding public trust lands. Under this approach, the court does not rest upon the public trust doctrine, but instead expresses its concern for the public interest by holding that the governmental body whose decisions are at stake was not adequately representative of the public interest. Thus, for example, a questionable municipal act may be invalidated on the legal ground that the subject matter

147. 1 Wis. 2d at 259, 83 N.W.2d at 678.

148. *See* text accompanying notes 63-92 *supra*.

at stake is of statewide concern and can therefore be implemented only by the state legislature.

There are two significant Wisconsin cases in which this technique has been adopted. In *City of Madison v. Tolzmann*,[149] the substance of the litigation was rather minor, but the principle and the judicial technique are important. The city had imposed a requirement that every boat owner obtain a municipal license and pay an annual license fee. The court held that requirement unconstitutional on the ground that the use of navigable waters was a matter of statewide concern and could be legislated upon only by the state. The effect of the case is to withhold from local governments the opportunity to affect the use of trust properties in such a manner as to favor excessively localized interests.[150]

The other case in which the same technique was adopted has a much more significant factual setting and is more complex in its doctrine. This case, *Muench v. Public Service Commission*,[151] involved an application by a private power company to build a dam on the Namekagon River. The case arose upon an appeal from the decision of the commission to permit the project. The commission had made no findings on, and had not considered, the effect that the proposed project would have on public rights to hunting, fishing, and scenic beauty. The commission had not considered those issues because the power company had obtained the approval of the county board in the county where the dam was to be located, and under a Wisconsin statute, such approval precluded the commission's consideration of the effect of the dam on public recreational rights.[152]

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149. 7 Wis. 2d 570, 97 N.W.2d 518 (1959).

150. Wisconsin subsequently enacted a boating regulation law by which the state attempted, without much success, to produce statewide control. *See* Cutler, *Chaos or Uniformity in Boating Regulations? The State as Trustee of Navigable Waters*, 1965 WIS. L. REV. 311. For a more effective law, see MICH. COMP. LAWS ANN. §§ 281.1001-.1199 (Supp. 1969). For other examples of this approach, see Anderson v. Mayor & Council of Wilmington, Civil No. 885 (Ch., New Castle County, Del. Jan. 9, 1958); Baker v. City of Norwalk, No. 6269 (Super. Ct., Fairfield County at Stamford, Conn. Dec. 4, 1963); City of Torrington v. Coles, No. 16,984 (Super. Ct., Litchfield County, Conn. Nov. 30, 1964) (cities holding parkland donated by citizens may not dispose of it without state legislation authorizing such disposition).

151. 261 Wis. 492, 53 N.W.2d 514, *reh.*, 261 Wis. 515c, 55 N.W.2d 40 (1952).

152. The statute provided that:

> [I]n case of a dam or flowage located outside the boundaries of a state park or state forest no permit shall be denied on the ground that the construction of such proposed dam will violate the public right to the enjoyment of fishing, hunting, or natural scenic beauty if the county board . . . of the county . . . in which the proposed dam[s] . . . are located by a two-thirds vote approve the construction of such dam.

261 Wis. at 514, 53 N.W.2d at 524.

On appeal, the project's opponents claimed that the statute was unconstitutional in that it delegated to local county boards control over the public trust of the whole state. They argued that since the public trust is a matter of statewide concern, authority over it could not be so delegated. The court agreed, held the statute unconstitutional, and remanded the case for reconsideration of all the relevant issues.

The court in *Muench* clearly went beyond its *Tolzmann* decision, for by holding unconstitutional a delegation by the legislature, the court took the position that it must protect the legislature from itself and from its temptation to succumb to pressures of purely local interests. The court required the legislature to respond to a statewide constituency—another form of judicially imposed democratization. But to hold the delegation of power unconstitutional is not to hold that the legislature, acting on its own, could not approve the dam despite its potential adverse consequences for scenic or recreational uses. Thus, using another of the flexible tools at its command, the court goes no farther than to thrust the burden of direct and publicly visible action on the lawmakers.[153]

Thus, the Wisconsin court has developed two useful approaches through which it safeguards the public interest in trust lands. First, it has specified criteria by which state dealings with such lands may be judged.[154] Those criteria provide useful guidelines, and yet they are sufficiently flexible that courts may permit deviations in particular instances. Second, the court has recognized that trust lands are of statewide concern and that authority to deal with them cannot be delegated by the state legislature to any group which is less broadly based.[155] In this manner, the court has fulfilled its function as an ensurer of the efficacy of the democratic process. When the court sees potential abuses, it can easily require a more extensive examination; but it retains sufficient flexibility that it can permit projects which do not unduly interfere with the public's interest in the lands that are held in public trust.[156]

153. It is instructive to note that this particular controversy was ultimately resolved by an even more broadly based agency than the state legislature; application for a license was filed by the company with the Federal Power Commission. The FPC denied the license on precisely the grounds which had been urged by objectors, but which had not been considered in the original state hearing before the state Public Service Commission—the "unique recreational values of the river." Namekagon Hydro Co., 12 F.P.C. 203, 206, *aff'd.*, 216 F.2d 509 (7th Cir. 1954).

154. *See* text accompanying note 138 *supra.*

155. *See* text accompanying notes 141-47 *supra.*

156. Some of the more recent cases are discussed in note 140 *supra. See generally* Cutler, *supra* note 150; Waite, *Public Rights To Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335.

C. *The Public Trust in California*

For over a hundred years, there have been efforts to utilize California's valuable shoreline resources along the Pacific coast and within San Francisco Bay. Those efforts have given rise to a large body of judicial decisions, legislative acts, and constitutional amendments dealing with the public trust.[157] Because California originally chose to convey certain of its trust lands to private interests and municipalities,[158] its public trust law has evolved in a way that is quite distinct from the Wisconsin developments.

Legal questions about the trust in California have arisen in a variety of separable contexts. The courts have examined the obligations of private grantees and lessees of trust lands, the obligations of municipal grantees who were invested with legal title and to whom were delegated the state's duties as trustee, and the public trust obligations of the state itself. To understand the California situation, it is necessary to consider each of these elements of the trust doctrine independently. It should, however, be kept in mind that there is a degree of interdependence among these elements: the obligations imposed upon the state will have an important bearing on the obligations to be imposed on the state's grantees.

1. *The Obligations of Private Grantees*

The earliest phase of California trust law, the period of state grants of trust lands to private citizens, began in 1855 and ended with the adoption of the 1879 Constitution. That Constitution marked the beginning of the era of express legislative concern for

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157. For the history regarding California's dealings with its trust lands and a discussion of the legal problems which that history raises, see M. SCOTT, THE FUTURE OF SAN FRANCISCO BAY (Inst. of Govtl. Studies, Univ. of Cal., Berkeley, Sept. 1963); San Francisco Bay Conservation & Development Commn., San Francisco Bay Plan Supplement 411-48 (January 1969) [hereinafter B.C.D.C. Supp.]; Comment, *San Francisco Bay: Regional Regulation for Its Protection and Development*, 55 CALIF. L. REV. 728 (1967). *See also* JOINT COMM. ON TIDELANDS, CALIFORNIA'S TIDELAND TRUSTS, A REPORT TO THE LEGISLATURE (4 vols. 1965).

158. Except for conveyances made by early Spanish or Mexican grants, all California land was ceded to the United States by the Treaty of Guadalupe Hidalgo in 1848. Submerged lands and tidelands were held by the United States subject to the public trust, and when California became a state in 1850, that trust passed to the state. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845); LeRoy v. Dunkerly, 54 Cal. 452, 455 (1880). Also in 1850, the United States transferred swamplands in the public domain to certain states, including California. *See* note 164 *infra*. California began selling these lands for $1 an acre in 1855.

At present 22% of the San Francisco Bay has been sold to private interests and 23% to local governments; 5% is owned by the federal government. The remaining 50% is held by the state. B.C.D.C. Supp., *supra* note 157, at 413-14.

the trust.[159] The deeds issued under laws enacted prior to 1879[160] took the form of conveyances of the fullest private property interest, the fee simple absolute.[161] The grants made under these laws were numerous and sometimes very extensive, running at times far into deep water in San Francisco Bay. Not surprisingly, the question was soon raised whether and to what extent the recipients of such titles had the right to extinguish the historic public right of navigation and fishery.

In 1864 the California Supreme Court handed down the first of a series of decisions which have the familiar ring of the Massachusetts and Wisconsin cases. The court was aware of the extent to which public officials could—particularly in those free-wheeling days—be prevailed upon to deal with the public domain in a rather cavalier fashion;[162] and accordingly the court adopted the approach of a skeptically narrow reading of legislative intent.

Despite the seeming absoluteness of both the statutes authorizing the grants and the deeds themselves, the court found several grounds upon which to invalidate or hold voidable conveyances of tidelands

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159. The 1879 Constitution provided that "all tidelands within two miles of any incorporated city or town, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private parties, partnerships, or corporations." Art. XV, § 3. Some sales of tidelands beyond the two-mile limit were made after 1880, but in 1909 the legislature passed a general statute preventing all tideland sales to private parties. CAL. PUB. RES. CODE § 7991 (West 1956).

The term "tidelands" is often used generically to cover all the state trust lands in and fronting on the ocean or the bay; but in California, where statutes distinguished various kinds of lands for purposes of disposition, it is useful to separate submerged lands—which are those always covered by water, even at low tide—from tidelands—those covered and uncovered by daily tides, that is, the lands lying between mean high-tide and mean low-tide—and from swamp and overflowed lands—those which are above mean high-tide, but subject to extreme high tides so that marsh grasses grow on them; they are commonly called marshlands.

160. *See* B.C.D.C. Supp., *supra* note 157, at 429.

161. *E.g.*, Marks v. Whitney, 276 Cal. App. 2d 72, 80 Cal. Rptr. 606 (1969), *petition for reh. granted*, Civil No. 24,883 (Ct. App. Oct. 7, 1969) (Plaintiff's exh. 3).

162. M. SCOTT, *supra* note 157, at 4, 9:

> It is reported, for example, that "county surveyors . . . unblushingly certified as lands 'above low tide' thousands of acres that lay six to eighteen feet below the waters of San Francisco Bay. . . . But these patents were no more astonishing than others under which cattle barons and speculators acquired vast tracts of dry land in the Sacramento and San Joaquin Valley as 'swamp land'."
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> A delegate to the state Constitutional Convention in 1879 said: "If there is any one abuse greater than another that I think the people of the State of California has suffered at the hands of their law-making power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State." Swamp lands, tidelands, and overflowed lands had been taken in such vast quantities, he said, that "now the people are hedged off entirely from reaching tide water, navigable water, or salt water."

which were valuable for public navigation and fishery. The real purpose of the disposition statutes, the court found, was not to grant away tidelands which had such public utility, but simply to permit the reclamation of those shore and swampy lands which, having no recognized values, could be made productive only if they were filled and put to agricultural use.[163] Reading the statutes narrowly not only maintained a compatibility with the statutory history,[164] but even more essential, it enabled the court to avoid the question whether the disposition laws were consistent with the trusteeship in which the state held publicly useful tidelands. Since a clear legislative purpose to grant such lands to private owners would bring into question the legitimacy of the legislation, it was only natural that the court interpret the legislative intent to avoid such questions. Thus, the court said that it would not permit the conveyance of valuable lands for purposes other than agricultural reclamation unless such a conveyance was given unmistakable legislative approval.

The court reiterated that view a few years later in interpreting an important 1868 statute which contained quite a broad view of the power of the state to sell public lands.[165] Neither that statute nor the many controversial land titles issued under it referred to the public trust or expressly reserved any right in the public. In inter-

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163. Whatever the legislative intent, it would be exceedingly difficult, with respect to San Francisco Bay, to distinguish between lands useful only for agricultural reclamation and those valuable as water resources, because the bay is very shallow throughout much of its area. B.C.D.C. Supp., *supra* note 157, at 120.

That distinction, however, is made in other states. For example, in State *ex rel.* Buford v. City of Tampa, 88 Fla. 196, 102 S. 336 (1924), the court, in holding that a grant to a city for reclamation and development for residential purposes did not violate the trust, emphasized that the grant involved mud flats having no value for purposes of commerce and navigation.

164. Shoreland disposition in California began with, and arose out of, the federal grant to the state of swamplands which were to be sold for reclamation for agricultural purposes. *See* Act of Sept. 28, 1850, 9 Stat. 519.

165. Act of March 28, 1868, ch. 415, §§ 28-29 [1867] Cal. Stats. 514. That statute provided, in pertinent part, that:

> The swamp and overflowed, salt marsh and tidelands belonging to the state shall be sold at the rate of one dollar per acre in gold coin . . . Whenever any resident of this state desires to purchase any portion of the swamp and overflowed lands . . . or any portion of the tidelands belonging to the state above low tide, he shall make affidavit [that he is a citizen and resident, and of lawful age, etc.] . . . provided, that applicants for salt marsh or tidelands which shall be less than twenty chains in width . . . shall in addition to the above, set forth in said affidavit that he or she is the owner or occupant of the uplands lying immediately back of and adjoining said lands sought to be purchased; provided, that the owner or occupant of any such upland shall not be a preferred purchaser for more than one-fourth of a mile front on any bay or navigable stream . . . .

The B.C.D.C. Supp., *supra* note 157, at 427-34, contains a concise history of California's disposition of tide-, swamp-, and submerged lands, and includes a table, at 429, summarizing the relevant statutes.

preting the 1868 Act, the court stated: "Nothing short of a very explicit provision . . . would justify us in holding that the legislature intended to permit the shore of the ocean, between high and low water mark, to be converted into private ownership."[166]

Following this interpretation, the early decisions either invalidated grants of tidelands which were useful for public trust purposes or read into any such grants the trust obligation that private ownership "would not authorize him [the private owner] to change the water-front or obstruct navigation."[167] But those cases did not prohibit the *state* from impairing historic public rights in shorelands by changing their use to another *public* purpose. The cases stand for the more limited proposition that the state cannot give to private parties such title that those private interests will be empowered to delimit or modify public uses. Thus, these cases—and there are many of them[168]—are perfectly consonant with the *Illinois Central* decision insofar as it dealt with the divestment of regulatory power which had been used to favor private citizens or businesses.[169] Similarly, they are compatible with the *Milwaukee* case[170] insofar as it held that the state may, in pursuance of a specific and explicit state policy to promote legitimate navigational uses of public waters, restrict historic uses and make grants to private parties.

These early cases draw a sharp distinction between direct grants which were outside the scope of any legislative program and grants made as part of a public program for legitimate purposes, such as the improvement of a harbor.[171] The former were held invalid to the

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166. Kimball v. MacPherson, 46 Cal. 104, 108 (1873).

167. Taylor v. Underhill, 40 Cal. 471, 473 (1871). *See also* Ward v. Mulford, 32 Cal. 365 (1867); People *ex rel.* Pierce v. Morrill, 26 Cal. 336 (1864); People v. Cowell, 60 Cal. 400 (1882); Rondell v. Fay, 32 Cal. 354 (1867). Not only did the court give a limited scope to the original statute authorizing the grants, but, after some hesitation [Upham v. Hosking, 62 Cal. 250 (1882)], it even held that a later validation statute, apparently designed to reverse decisions holding early titles void, "was merely intended to validate applications for land subject to sale" under the original laws. Klauber v. Higgins, 117 Cal. 451, 464 (1897).

168. Ward v. Mulford, 32 Cal. 365, 373-74 (1867); Shirley v. Benicia, 118 Cal. 344, 346, 50 P. 404, 405 (1897); City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 183-85, 50 P. 277, 285 (1897); People v. California Fish Co., 166 Cal. 576, 585-86, 138 P. 79, 84 (1913).

169. It has been said, indeed, the motivation for constitutional reform of shoreland law, which came in 1879, was the product of "difficulties in navigation and fishing . . . when private owners controlled so much of the access to the shore." B.C.D.C. Supp., *supra* note 157, at 433. *See* note 162 *supra*.

170. *See* text accompanying note 127 *supra*.

171. *See, e.g.*, City of Oakland v. Oakland Waterfront Co., 118 Cal. 160, 183, 50 P. 277, 285 (1897): "[N]o grant . . . can be made which will impair the power of a subsequent legislature to regulate the enjoyment of the public right. . . . But . . . the state might alienate irrevocably parcels of its submerged lands of reasonable extent for

:xtent that they involved land subject to public trust use, and valid o the extent that they covered lands worthless except by reclamaion. But it was held that when the grant was part of a legislative)rogram for public purposes, historic or potential public uses could 'alidly be subordinated to such public schemes. Unfortunately, the cope of the state's power to further a public project affecting trust ands was not articulated in these early cases, for they involved such)bviously legitimate uses of trust lands as the development of major iarbors and waterways.[172]

While the general principle of the early cases—that the public trust may not be conveyed to private parties—has never been brought into question, the original application of that principle has been modified by later cases. Although the early cases had held such grants wholly invalid, the court subsequently decided to validate the grants, but to find that they were impressed with the public trust which required the owners to use their land in a manner consistent with the right of the public. As the court stated in the landmark case of *People v. California Fish Company*,[173] the grantee of such lands will not obtain the absolute ownership, but will take "the title to the soil . . . subject to the public right of navigation . . . ."[174]

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the erection of docks, piers, and other aids to commerce." *See also* Shirley v. Benicia, 118 Cal. 344, 50 P. 404 (1897):

> [I]t is a legislative declaration that these lands [between the harbor line and the uplands] may pass into private ownership without interference with the public rights of navigation and fishery. They may then be reclaimed . . . and devoted to any one of the infinity of uses to which uplands are put, or, if suitably located, and there be no restriction in the grant, they may . . . be covered with wharves, docks and like structures.

118 Cal. at 346, 50 P. at 405.

172. *See, e.g.*, Eldridge v. Cowell, 4 Cal. 80 (1854).

173. 166 Cal. 576, 138 P. 79 (1913).

174. 166 Cal. at 588, 138 P. at 87-88. It has been suggested that some early grants were so blatantly fraudulent, so inconsistent with the authorizing statute, or so imperfectly consummated, that they may be subject to invalidation even at this late date. *See* B.C.D.C. Supp., *supra* note 157, at 435-38. The issue is being raised again. In California v. County of San Mateo, No. 144,257 (Super. Ct., San Mateo County, filed April 2, 1969), the state has taken the position that it "had no statutory authority . . . to convey any submerged lands to private claimants . . . In the alternative, should the court find that the state could have conveyed the subject submerged lands, . . . said submerged lands are subject to the . . . public trust . . . ." Complaint ¶¶ 12(D)(i), (v). Regarding the distinct meaning of the term "submerged lands," *see* note 159 *supra*.

It may make little practical difference whether such titles are held invalid or whether they are held valid but impressed with a public trust obligation that justifies far-reaching restrictive regulation. Only if regulation goes so far as to present the constitutional problem of a taking of property is the question of ownership likely to become significant. But it is said that adequate regulation could be imposed without raising a constitutional right to compensation. *See* B.C.D.C. Supp., *supra* note 157, at 460-64.

Precisely where this rule leaves the private owners of such tideland grants is not certain. It is clear that so long as the land or water overlying it is still physically suitable for public use, the owner may not exclude the public—he may not fence his land or eject the public as trespassers.[175] It is similarly clear that a private owner may alter the land in a manner that impairs public uses if the alterations are consistent with a public decision authorizing them; such a situation arises when, for example, a harbor line or bulkhead line is set by the state and private owners are permitted to build behind that line.[176] But the acts of private owners in such situations are the product of, and are in harmony with, a larger public plan for the advancement of navigation and commerce. It is a much more difficult question whether a private owner, on his own initiative and for entirely personal purposes, may alter the land in a manner that impairs public uses.[177]

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175. Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912); *cf.* Bohn v. Albertson, 107 Cal. App. 2d 738 (1st Dist. 1951).

176. In Forestier v. Johnson, 164 Cal. 24, 36, 127 P. 156, 161 (1912), the court said: "The state can probably sell the land and authorize the purchaser to extend the water front so as to enable him to build upon this land; but it must be done in the interest of commerce, and that must first be determined by the Legislature." It seems to follow that in the absence of a legislative determination, a private owner cannot make such a decision. Thus, whatever title a private owner might formally hold, his rights under that title would be limited to making only those uses of the land which do not interfere with public uses, unless he has legislative authorization for more extensive use, such as filling and building a dock. *See also* City of Oakland v. Williams, 206 Cal. 315, 350, 274 P. 328, 334 (1929): "Public property in the control of a private party may, nevertheless, serve a public purpose as an aid to, or a part of, a general plan . . . . It is but a unit of a comprehensive plan."

177. Although there is uncertainty about the scope of lawful uses of tideland and submerged land to which private parties held deeds and patents, a wide variety of uses have nonetheless been made of such lands. *See* B.C.D.C. Supp., *supra* note 157, at 424-26. Part of the reason for that variety is that a good deal of questionable activity has not been litigated; and, as might be expected, shoreland titles and rights are in a state of great confusion and uncertainty. *Id.* at 434-43. As an example of the degree of uncertainty, the B.C.D.C. report notes that one owner "entered into a lease with the State Lands Commission for dredging of oyster shells on lands it claims to own. And the State Legislature in 1943 granted to the City and County of San Francisco several thousand acres at the International Airport which San Francisco had previously 'bought' from private 'owners.'" B.C.D.C. Supp., *supra* note 157, at 436. In an informal opinion prepared in response to a B.C.D.C. inquiry as to the limitations imposed by the trust on the rights of private owners to fill their lands, the California Attorney General said:

> The owner of lands subject to the public trust may use the property as he sees fit, subject to the power of the State to abate (prevent or remove) any nuisance or illegal obstruction he may create thereon, and to reoccupy the lands in the event such occupation becomes necessary for trust purposes. Such owner may be restrained from interfering with any existing navigational improvement or from filling such lands, if a properly authorized State agency determines that such filling will obstruct the free navigation of a bay, harbor, estuary or other navigable waterway. Whether or not a particular filling project by the private owner constitutes a nuisance or an illegal obstruction depends upon the navigability in

That question was raised in *Marks v. Whitney*,[178] in which the owner of a tidelands grant brought an action in a California state court to quiet his title before he made any attempt at building or filling. The position taken by those who opposed the private tidelands owner was that he did not have the right to take any action on his own initiative in derogation of public rights in the tidelands; rather, they said, any such action could be taken only upon the determination of the state as the repository of the trust. In support of that view, it was pointed out that the previous California cases allowing infringement of public uses were based on situations in which a legislative determination to authorize changes had been present. Moreover, those who wanted to limit the power of the private owner found support in the state constitution of 1879 which indicates clearly that the public has a right to the use of the state's navigable waters.[179] The court of appeals, however, wrote a very strong opinion rejecting the trust claims and holding that the landowner's patent vested in him an unrestricted title, free of any public

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fact of the waterway in question, or the effect of flow therefrom upon other navigable waterways.

B.C.D.C. Supp., *supra* note 157, at 442. The Attorney General may be correct, but there is no authoritative litigation or legislation to support his view that private owners have broad initiative powers, subject only to regulatory or subsequent restraints. Thus, it may be the case that private owners may not infringe the trust except in response to, or with the prior approval of, a statewide authority, and that no infringement is justified unless it is part of, or consistent with, a statewide plan for development and maintenance of the bay.

178. 276 Cal. App. 2d 72, 80 Cal. Rptr. 606 (1969), *petition for reh. granted*, Civil No. 24,883 (Ct. App. Oct. 7, 1969); Colby v. Marks, No. 48,336 (Super. Ct., Marin County, Cal., filed May 15, 1967).

179. Art. 15, § 2:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always obtainable for the people thereof.

See also CAL. CONST. art. XV, § 3, which provides that: "All tidelands within two miles of any incorporated city, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations." CAL. CONST. art. I, § 25, enacted in 1910, provided in relevant part that ". . . no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon."

Of course, many private grants were made prior to the enactment of any of these constitutional provisions, and the provisions cannot retroactively withdraw property rights already granted. But to the extent that the constitutional provisions would be viewed as merely reiterating and confirming a principle already a part of the law—namely, the presence of the trust as a servitude on all grants made—the language of the constitution would be relevant as evidence of the limited scope of preconstitutional grants. Such a theory has been judicially recognized in another context. *See* Broder v. Natoma W. & M. Co., 101 U.S. 274, 276 (1879).

trust for purposes of navigation and commerce; but that decision is not final, for a petition for rehearing has been granted.[180]

But whatever the eventual outcome of the objections raised in *Marks*, there is a compelling reason to accept the position that a public determination must precede any derogation of the public interest in trust lands. Any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter; such actions should not be taken in some fragmentary and publicly invisible way. Only with such a safeguard can there by any assurance that the public interest will get adequate public attention. This principle is essentially the same as that which has been adopted by the Massachusetts and Wisconsin courts in their requirements for specific legislative authorization and for statewide rather than merely local authorization.[181] Consistency with this principle would require that decisions likely to inhibit public uses be made in a public forum. It would also require that such decisions be made as a part of a general public program, which, at the very least, would require that there be a permit system applicable to the private use of public lands.[182]

2. *The Obligations of Municipal Grantees*

a. *The need to restrain localism.* The need for a coordination of the uses which are made of trust lands has been clearly recognized in California. While cases involving private grantees, such as the *Marks* case, are not rare, the trust issue has been raised most frequently in cases involving the duty of municipal grantees to deal with trust lands in a manner consistent with the public interest of the whole state.

A number of those cases have involved the McAteer-Petris Act,[183] which was the single most important response to the need for statewide coordination of trust land usage. That Act sought to deal with the need for coordination by creating a Bay Conservation and Development Commission to prepare "a comprehensive and enforceable plan for the conservation of the water of the bay and

180. Marks v. Whitney, 276 Cal. App. 2d 72, 80 Cal. Rptr. 606 (1969), *petition for reh. granted*, Civil No. 24,883 (Ct. App. Oct. 7, 1969). The court relied upon Alameda Conservation Assn. v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1968), *cert. denied*, 394 U.S. 906 (1969), a case involving a municipal grant. *See* text following note 183 *infra*.

181. *See* notes 63-92, 108-56 *supra* and accompanying text.

182. For a discussion of the possible claim that such restraints might infringe private property rights, see notes 174 *supra*, 236, 265 *infra*.

183. CAL. GOVT. CODE §§ 66600-49, -53 (West 1966), §§ 66650-51 (West Supp. 1968).

the development of its shoreline."[184] To effectuate that mandate, the law imposed a two-year moratorium on filling in San Francisco Bay and provided an exception for only those instances in which the Commission issued a permit. The introductory language of the statute clearly identifies the nature of the public interest and the need for public control:

> The Legislature hereby finds and declares that the public interest in the San Francisco Bay is in its beneficial use for a variety of purposes; that the public has an interest in the bay as the most valuable single natural resource of an entire region, a resource that gives special character to the bay area; that the bay is a single body of water that can be used for many purposes, from conservation to planned development; and that the bay operates as a delicate physical mechanism in which changes that affect one part of the bay may also affect all other parts. It is therefore declared to be in the public interest to create a politically-responsible, democratic process by which the San Francisco Bay and its shoreline can be analyzed, planned, and regulated as a unit. . . . [T]he present uncoordinated, haphazard manner in which the San Francisco Bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents . . . further piecemeal filling of the bay may place serious restrictions on navigation in the bay, may destroy the irreplaceable feeding and breeding grounds of fish and wildlife in the bay . . . and would therefore be harmful to the needs of the present and future population of the bay region.[185]

Although the statute has given rise to several cases involving the efforts of cities bordering San Francisco Bay to go forward with local bay fill projects, it is useful to focus attention upon only one of those cases to illustrate the need for restrictions to be placed upon municipal grantees. In *People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville*,[186] the

184. CAL. GOVT. CODE § 66603 (West 1966).

185. CAL. GOVT. CODE §§ 66600-01 (West 1966). The principle has been forcefully restated in the report of the San Francisco Bay Conservation and Development Commission, San Francisco Bay Plan (Jan. 1969):

> [T]he Bay is a single body of water, in which changes affecting one part may also affect other parts, and that only on a regional basis can the Bay be protected and enhanced . . . . The Bay should no longer be treated as ordinary real estate, available to be filled with sand or dirt to create new land. Rather, the Bay should be regarded as the most valuable natural asset of the entire Bay region, a body of water that benefits not only the residents of the Bay area but of all California and indeed the nation.

Id. at 1.

In August 1969 the California legislature enacted a statute implementing in a significant way the work of the B.C.D.C. The statute imposes a bay-wide regulatory scheme governing all development. *See* ch. 713, [1969] Cal. Stats. 552 (Deering Supp. Aug. 1969); N.Y. Times, Aug. 10, 1969, at 60, col. 1.

186. 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968). *See also* Save San Francisco Bay Assn. v. City of Albany, No. 383,480 (Super. Ct., Alameda County, Cal., filed

Commission brought an action to enjoin fill operations being conducted by the town without the permit required under the Act. The defense was that under the statute's "grandfather" clause, no permit was required for "any project . . . commenced prior to the effective date" of the Act.[187] The court found that while there had been a project "commenced" before the statute became effective, the town had substantially changed the purpose of the project after the enactment. The court held that the grandfather clause did not protect substitute projects, and it therefore ordered that the town be enjoined from proceeding with further diking and filling until it had obtained a permit.

The particular statutory interpretation made in *Emeryville* is of little interest to the present inquiry; what is significant is the nature of the Emeryville operation and the nature of the attack which was made upon it. Originally, the town's waterfront proposal contemplated the filling of about 145 acres, of which more than 75 per cent was to be used for residential development for an anticipated population of 15,700 persons. As early as 1965 the town obtained an opinion from the attorney general of the state casting serious doubt on the consistency of Emeryville's plan with the terms of the tidelands grant from the state.[188] Nonetheless, the town proceeded with its plan, and the State Lands Commission challenged its legality. In response, Emeryville modified its plan by reducing the anticipated population density to 6,000 persons and by reducing the area to be set aside for residential development to about one-third of the land to be filled. But the Lands Commission refused to accept this modification, since it was made during the pendency of litigation between the town and the commission. Indeed, at the same time that Emeryville was modifying its plan, the legislature itself had foreclosed the possibility of any private residential use by deleting residential purposes from among the uses to which Emeryville could put its tidelands.[189] Despite all these factors, the town persisted in its efforts to complete the fill.

Oct. 1, 1968). In the latter case, suit was filed by two nonprofit conservation organizations and eleven citizens of the San Francisco Bay area, some of whom were citizens and taxpayers in the defendant city; they sought to enjoin a bay fill project by the defendant city, principally on the ground that it was "being conducted pursuant to no specific plans of any sort for the use of the baylands being filled." Complaint ¶ XXI. The absence of a plan, it was alleged, violated the obligation that trustlands be used for purposes in which there was a general statewide interest. At the time of this writing, the case was pending in the Superior Court.

187. CAL. GOVT. CODE § 66632.1 (West 1966).

188. 69 Cal. 2d at 542 n.3, 446 P.2d 796 n.3, 72 Cal. Rptr. 796 n.3.

189. Ch. 415, [1968] Cal. Stats. 856.

The case is an unusual one, for it is not often that the forces of a legislature, a regulatory agency, the attorney general, and the courts are all brought to bear against a project that will affect trust lands. In a slightly different setting, or at an earlier point in time, there might well have been only a judicial barrier to the completion of the town's project. The case is thus an illustration of the growing recognition that effectuation of the public interest may require a body with a statewide constituency to examine any particular proposal, and that the usual political processes may not adequately provide the opportunity for such an examination to proceed effectively unless judicial intervention is available.

The San Francisco Bay experiences indicate that local public interests may interfere with the public trust in the same manner as private profit-oriented interests; many aspects of local self-interest are as inconsonant with the broad public interest as are the projects of private enterprises. In both situations one may observe behavior which is rational from the atomistic perspective of the actor, but which, from the perspective of the larger community, is highly disadvantageous. A typical example is that of citizens using a common pasture for grazing their animals. Although overgrazing is recognized as a problem, it is profitable for each individual to put one more animal out to graze; each such individual decision, however, brings closer the day when the common pasture will be useless to all.[190] The *Emeryville* case clearly exemplifies that sort of problem and suggests the need to adjust traditional decision-making mechanisms for resources like the bay in light of the potential disjunction between the perceived benefit to the local entity and the total impact of such local choices on the community of users as a whole.

b. *General statutory limitations on municipal grantees.* A considerable body of statutory public trust law is found in the grants of tidelands made by the state to various California cities.[191] Those grants set out rather specifically the limitations legislatively imposed upon the uses which the cities may make of the tidelands, consistent with the public trust. While the grants made to cities vary con-

190. Hardin, *The Tragedy of the Commons*, 162 SCIENCE No. 3859, Dec. 13, 1968, at 1243.

191. Many of the grants were made originally between 1911 and 1915, when a shipping boom was expected to result from completion of the Panama Canal. Each of the grants was effected by a separate statute, but there are certain features common to most of them. Sales of granted lands are generally prohibited, but long-term leases are permitted. The grants specify that the lands are to be held in trust for all the people of the state and are to be used for the purposes which the grants specify. The grants are also subject to public rights of commerce, navigation, and fishing. In addition, the state may revoke a grant, but it is not clear what effect such revocation would have on lessees or franchisees of granted lands. *See generally* B.C.D.C. Supp., *supra* note 157, at 420-22, which includes a map of these grants.

siderably, the legislature, in making those grants, has generally taken a rather broad view of what uses of granted tidelands are appropriate. It is perfectly clear that ordinary harbor improvements, such as docks, wharves, quays, and the like, are appropriate; but the typical statute goes far beyond authorizations for purely navigational aids. The older grants typically provide that:

> said lands shall be used by said city . . . only for . . . a harbor, and . . . wharves, docks, piers, slips, quays and other utilities . . . necessary or convenient for the promotion and accommodation of commerce and navigation . . . provided, that said city . . . may lease lands . . . for the purposes consistent with the trusts . . . .[192]

Recent grants, however, have been considerably more far-ranging, as is indicated by a 1961 grant of tidelands to the City of Albany. The statute conveying the lands begins by providing that the tidelands "shall be used by said city and its successors for purposes in which there is a general statewide interest."[193] In defining those purposes, however, the statute not only includes the usual reference to wharves, docks, and the like, but adds airport and heliport facilities and their appurtenances; highways; power lines; public buildings; parks; playgrounds; convention centers; public recreation facilities such as public golf courses, small boat harbors, marinas, and aquatic playgrounds; and structures and appliances incidental, necessary, or convenient for the promotion and accommodation of any of such uses, including, but not limited to, snackbars, cafes, restaurants, motels, hotels, apartments, residences, launching ramps, and hoists.

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192. Ch. 517, [1919] Cal. Stats. 1089 (City of Berkeley). *See also* ch. 676, [1911] Cal. Stats. 1304 (Long Beach); ch. 656, [1911] Cal. Stats. 1256 (Los Angeles); chs. 654, 657, [1911] Cal. Stats. 1254, 1258 (Oakland). The grant to the city of Berkeley is perhaps the most restrictive form that the grants took. The grant to Oakland authorized the city to make leases for "any and all purposes which shall not interfere with navigation or commerce." Ch. 654, [1911] Cal. Stats. 1255. Similarly, the grant to Los Angeles allowed the city to make leases "for any and all purposes which shall not interfere with the trusts upon which said lands are held by the State of California." Ch. 651, [1929] Cal. Stats. 1086.

193. Ch. 1763, [1961] Cal. Stats. 3767-70. *See also* ch. 921, [1959] Cal. Stats. 2952 (Emeryville). Amendments to the city of Oakland's grant have been similarly broad; they have permitted that city to use the granted lands for:

> an airport or aviation facilities and for the construction . . . of terminal buildings, runways, roadways, aprons, taxiways, parking areas and other utilities . . . necessary or convenient for the promotion and accommodation of commerce and navigation by air as well as by water, and for the construction, maintenance and operation thereon of public buildings and public works and playgrounds, and for public recreational purposes.
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> . . .
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> [including] public multipurpose recreation centers, stadiums for football, baseball, basketball and all other sports . . . meeting places, parking facilities and all other facilities for public recreation and the public exhibition of events, fairs and other public activities.

Ch. 1028, [1961] Cal. Stats. 1936; ch. 709, [1957] Cal. Stats. 1902; ch. 15, [1960] Cal. Stats., 1st Ex. Sess., 319.

At first glance such a statutory menu for development seems so inclusive as to suggest that the California legislature has imposed no limitations whatsoever. But a closer examination of the text of the Albany law indicates that it is not nearly so broad as it seems. Authorized uses are essentially limited to those which are directly water-related, including both the traditional projects, such as wharves, docks, and piers, and some nontraditional projects, such as "small boat harbors, marinas, aquatic playgrounds and similar recreational facilities." The permission for the building of snackbars, cafes, restaurants, motels, hotels, apartments and residences does *not* stand alone; the statute authorizes such buildings only if they can be justified as "incidental, necessary or convenient for the promotion and accommodation of" the directly water-related uses. The limitation is a significant one, because it suggests a legislative intent that one test of the appropriateness of a tidelands development is that it be related to, and in furtherance of, use of the bay as a water resource. Certainly, the statute is loosely drafted, for it contains vague terms like "similar" recreational facilities and allows appurtenant facilities which are "convenient," as well as those which are "necessary," to promote the water-related uses authorized. But it can hardly be doubted that the legislature put considerable emphasis on the use of the bay as a water resource, in much the same sense that the Wisconsin Court required that lands retain their "original character" and that use be made "of the lake as a lake."[194]

The second important characteristic of the Albany grant is that the permissible uses which are not water-related—such as airports, highways, bridges, utility lines, parks, playgrounds, and golf courses —are all essentially public uses, in the sense either of public ownership or of availability to the general public.[195] Indeed, the word

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194. *See* text accompanying notes 138-56 *supra*. This principle provides one fundamental pillar of the report of the San Francisco Bay Conservation and Development Commission. San Francisco Bay Plan (Jan. 1969). That report sets out as one of its three major conclusions and policies that "[t]he most important uses of the Bay are those providing substantial public benefits and treating the Bay as a body of water, not real estate." *Id.* at 1. *See* note 185 *supra*.

195. To suggest that such facilities are lawful under the trust doctrine does not imply that they are always wise, nor, indeed, does it imply that there is not a substantial conflict between "treating the Bay as a body of water" (*see* note 194 *supra*) and the wide range of public uses noted in the text. The Bay Plan, *supra* note 194, wisely seeks, as a matter of policy, to accommodate these concerns by suggesting, for example, that power lines should be undergrounded when that is feasible, and that highways should be placed on bridge-like structures rather than on fill. San Francisco Bay Plan, *supra* note 194, at 28-29. Similarly, the plan suggests that "where possible, parks should provide some camping facilities accessible only by boat" and that "recreational facilities that do not need a waterfront location, such as golf courses and playing fields, should generally be placed inland, but may be permitted in shoreline areas if

"public" is used in the statute six times to modify the authorization of features such as buildings, recreation facilities, and meeting places. In light of the traditional concern with the public trust doctrine as a device for ensuring that valuable governmentally controlled resources are not diverted to the benefit of private profit-seekers, that limitation is particularly notable; indeed, it echoes developments in Massachusetts and Wisconsin. While those individuals who use public golf courses may differ from those who use public fishing facilities, the similarities between the groups are, for purposes of the public trust doctrine, significantly more important than the differences. Any requirement that the facilities be public necessarily diminishes the potential for questionable or corrupt overreaching by private interests and ensures that the benefits will be relatively widely distributed among the citizenry.

The safeguards found in the Albany law are not airtight.[196] The

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they are part of a park complex that is primarily devoted to water-oriented uses." *Id.* at 23-24.

While one should not confuse policy suggestions with legal constraints, it should be emphasized that when a proposal is viewed either as inconsistent with over-all state policy or as inadequately considered, a court may have a tendency to read statutory authorizations narrowly. Thus, for example, if a proposal involves facilities such as utility lines or highways a court may infer restrictions on such a project from the statute, so long as the statute does not contain a provision which expressly eliminates all restrictions. Such restrictions might include a standard of "no feasible inland alternative," or one of permissibility "only under circumstances which will not infringe water-oriented uses."

196. California's laws of general application relating to tidelands are in most respects consistent with this analysis. For example, CAL. GOVT. CODE § 37385 (West 1968) and most of § 37386 refer to leases for the improvement of harbor facilities. Section 37387 authorizes leases for "park, recreational, residential, or education purposes, under conditions not inconsistent with the trust imposed upon the tidelands by the Constitution." The authorization for residential housing leases is apparently conditioned to impose on such leases the requirement that they be public or nonprofit generating. Section 37388 states that "a city may lease property . . . to any non-profit corporation for a housing development on the property." *See also* CAL. GOVT. CODE § 37389 (West 1968) (airport uses); CAL. CIV. CODE § 718 (West Supp. 1968). The one apparent inconsistency on the face of the statutes is that part of § 37386 which allows leases for "industrial uses." But since that provision is placed between the harbor authorizations of § 37385 and the rest of § 37386, which deals with harbor uses, and since it is entitled, "Industrial and other uses consistent with commerce and navigation," it seems appropriate to read the authorization as applying to only those industrial uses which are necessary for, or appurtenant to, the uses of the shorelands for navigation and waterborne commerce. Thus, while warehouses needed to store water-borne commodities might be allowed [City of Oakland v. Williams, 206 Cal. 315, 274 P. 328 (1929)], general manufacturing plants not dependent upon navigation would not be within the statute. The wording of the statute does not compel this interpretation, but the context of the provision and the general approach of the legislature strongly suggest it. In a legal memorandum on this question, the City Attorney of Berkeley pointed out that the grant to Berkeley speaks of those industrial uses which are "necessary or convenient for the promotion of commerce and navigation," and thus concluded that the authority is limited to "industries directly related to navigation, shipping, fishing or the industries usually found in a harbor area." Robert T. Anderson, City Attorney, Berkeley, Cal.,

mere requirement that a facility be public does not necessarily prevent commercial intrusions, as was seen in *Gould*.[197] Furthermore, the statute is not wholly consistent with itself, for it does authorize utility rights-of-way for private companies, as well as uses like small boat harbors which may accrue principally to the affluent. But the central purpose of the law is clear enough,[198] and it ought to serve adequately as a focus for judicial intervention if it appears that the powers given under the statute are being used to produce private windfalls or sharply redistributive patterns in tidelands leases.

The Albany statute, then, imposes two limitations on implementation of the trust: it restricts the uses that can be made of trust lands to either water-related activities or other activities which have a public nature. To the extent that the waters of the bay are themselves available to the general public, it may be said that the concept of water-related activity is no more than a particular implementation of the general notion of devotion to public use. In this sense, the statutory approach in California is in accord with historic patterns elsewhere, utilizing the public trust concept to constrain activities which significantly shift public values into private uses or uses which benefit some limited group.

3. *The Obligations of the State Itself*

There is no single source in California law which defines the limits on legislative conduct in dealing with public trust properties. The state constitution imposes some limitations, but they operate as restraints upon grants to private parties rather than as a constraint upon legislative policy.[199] Similarly, the Act admitting California to the Union does provide that all the navigable waters in the state shall be freely available to the public,[200] but California courts have

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Legal Aspects of Proposed Waterfront Development in the City of Berkeley and Recommendations for Amendment to the Statutory Grant of Tidelands, Feb. 27, 1961, at 19 (unpublished). *See* note 201 *infra* and accompanying text.

197. *See* note 63 *supra* and text following.

198. The statute also provides that the city may not alienate its tidelands to private interests and may lease them only "for wharves and other *public* uses and purposes . . . consistent with the trust." (Emphasis added.) It also reserves to the people of the state the right to fish in the waters on those lands and a right of convenient access. Both of these reservations are required by CAL. CONST. art. I, § 25. *See* note 179 *supra*.

199. CAL. CONST. art. XV, §§ 2-3. Section 3 does have a proviso that tidelands which are held by the state "solely for street purposes," and which the legislature finds are not needed for that purpose may be sold "subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest." *See also* CAL. CONST. art. I, § 25, reserving "in the people the absolute right to fish . . . ."

200. Act of Sept. 9, 1850, 9 Stat. 453, § 3: "All the navigable waters within the State shall be common highways and forever free, as well to inhabitants of such State

not found that provision a source of any particular constraints on the state.

It is thus to judicial interpretation that one must look for information about the limits of state power. Judicial developments may best be examined through the medium of an unusually comprehensive legal opinion, written in 1961 by the city attorney of Berkeley,[201] analyzing proposed plans for the use of San Francisco Bay tidelands which had been granted to the city.[202]

The city attorney began his analysis by noting legislative restrictions similar to those revealed by the foregoing examination of the Albany grant. He found that the legislature had recognized two sorts of obligations in dealing with tidelands and trust lands. First, those shorelands which are useful and available for public trust purposes such as navigation and fishery must be used to promote those purposes. Second, those lands which are not useful for such purposes may be freed of the particular trust obligation, but must nonetheless be utilized for "a use of general statewide interest."[203]

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as to citizens of the United States, without any tax, impost or duty therefor." This provision is similar to that in the Northwest Ordinance. *See* note 124 *supra*.

201. Robert T. Anderson, City Attorney, Berkeley, Cal., Legal Aspects of Proposed Waterfront Development in the City of Berkeley and Recommendations for Amendment to the Statutory Grant of Tidelands, Feb. 27, 1961 (unpublished). The document was written in response to a request for a legal opinion on proposed plans submitted by a consulting firm for the use of Berkeley's tidelands. The firm had submitted three plans, each of which proposed development of the following uses: industry, shopping center, convention center, airport-heliport, park, golf course, marina, junior college, and street and railroad use. In addition, one plan included university athletic facilities and married student housing, while another proposed residential and public school use.

202. The Berkeley grants are found at ch. 347, [1913] Cal. Stats. 705; ch. 534, [1915] Cal. Stats 901; ch. 596, [1917] Cal. Stats. 915; ch. 517, [1919] Cal. Stats. 1089. The operative portions of the grant read as follows:

> That said lands shall be used by said city . . . solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city . . . shall not, at any time, grant . . . said lands . . . to any individual firm or corporation, for any purposes whatever: *provided*, that said city . . . may grant franchises thereon for . . . in no event exceeding fifty years for wharves and other public uses and purposes, and may lease said lands . . . for the purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor . . . .
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> That said harbor . . . shall always remain a public harbor for all purposes of commerce and navigation . . . . There is hereby reserved, in the people of the State of California the absolute right to fish in all the waters of said harbor, with the right of convenient access to said waters over said land for said purpose.

203. *See* Anderson, *supra* note 201, at 8. The City Attorney arrived at this conclusion from an analysis of Mallon v. Long Beach, 44 Cal. 2d 199, 205, 282 P.2d 481, 487 (1955); Boone v. Kingsbury, 206 Cal. 148, 186, 273 P. 797, 815, *cert. denied*, 280 U.S. 517 (1929); Newport Beach v. Fager, 39 Cal. App. 2d 23, 29, 102 P.2d 438, 441 (1940); People v. California Fish Co., 166 Cal. 576, 585, 138 P. 79, 84 (1913); Board of Port Commrs. v. Williams, 9 Cal. 2d 381, 390, 70 P.2d 918, 922 (1937).

The first question to which the city attorney turned his attention was the validity of a proposal to build a small craft harbor on the Berkeley tidelands. While it is clear under California law that tidelands may be used to develop commercial ports and harbors, the question arose whether it was consistent with the trust obligation that tidelands be used to promote recreational uses, rather than the uses of commercial navigation. In *Miramar Company v. Santa Barbara*[204] the California Supreme Court had not been at all troubled by the recreational-commercial distinction, for it noted that "[t]he right of the public to use navigable waters . . . is not limited to any particular type of craft. Pleasure yachts and fishing boats are used for navigation and the state . . . can provide harborage for them as well as for merchant vessels and steamers."[205] Subsequently, however, when the court approved of recreational proposals it emphasized that the proposals at issue were not isolated from plans for a commercial harbor.[206]

It is extremely unlikely that the California court would today invalidate a recreational water development as inconsistent with the public trust. The matter is of interest only because of the court's apparent reluctance to come out flatly in favor of recreational developments, the benefits of which accrue principally to the affluent. One possible explanation is that the court is serving notice that a proposal which appears to be little more than a giveaway of valuable public facilities to certain private interests will be subject to judicial scrutiny and will not be permitted unless the nature of the development is truly public. In *Ventura Port District v. Taxpayers*,[207] for example, the court observed that a proposed small boat harbor is a less objectionable use of trust lands if it is part of a larger harbor project or if it is consistent with the future development of such a larger project than if it stands alone.[208] Such a view would not only be consistent with long-standing judicial attitudes about the public

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204. Miramar Co. v. City of Santa Barbara, 23 Cal. 2d 170, 143 P.2d 1 (1943).

205. 23 Cal. 2d at 175, 143 P.2d at 3.

206. Ventura Port Dist. v. Taxpayers & Property Owners of Ventura Port Dist., 53 Cal. 2d 227, 347 P.2d 305, 1 Cal. Rptr. 169 (1959); City of Redondo Beach v. Taxpayers & Property Owners of Redondo, 54 Cal. 2d 126, 352 P.2d 170, 5 Cal. Rptr. 10 (1960). The cases do not pass upon the underlying trust question, but rather interpret statutory provisions; thus the comments that follow must be understood as an effort to look between the lines, rather than as a comment upon the holdings of the decisions.

207. 53 Cal. 2d 227, 347 P.2d 305, 1 Cal. Rptr. 169 (1959).

208. ". . . while the basic character of the proposed development is recreational, consideration has been given to providing needed facilities as a harbor for refuge and for commercial purposes to the extent that such needs are now apparent, as well as to providing flexibility for expansion along such lines as future community needs, in correlation with statewide plans for shoreline development and improvement, may dictate." 53 Cal. 2d at 230, 347 P.2d at 308, 1 Cal. Rptr. 172.

trust obligation and with the approach of cases like *Gould v. Greylock Reservation Commission*,[209] but would imply a judicial concern for the income redistribution effects which trust land proposals so often have.

In this respect, as the Berkeley city attorney noted,[210] it may be important to distinguish between a project which is authorized by the state itself, either through the legislature or through one of its administrative agencies, and one which is initiated and advanced merely by a local government. The distinction does not suggest that a local project cannot be valid, but rather that local initiation invites a more substantial judicial scrutiny of the question whether the public interest—the "general statewide interest"—is being adequately advanced.

The next question to which the Berkeley memorandum turned was a proposal for facilities appurtenant to the harbor.[211] There is no doubt about the validity of launching ramps, hoists, and repair facilities, for they are inherently necessary to a harbor.[212] The difficulty arises with facilities such as restaurants, motels, and parking lots. The California cases evidence a rather expansive view as to the outer limits of appropriate appurtenances to a harbor. The broadest of the cases is probably *Martin v. Smith*,[213] a state court of appeals decision which upheld a lease of tidelands in Sausalito for construction of a restaurant, a bar, a motel, a swimming pool, some shops, and a parking area. The decision contains no real consideration of tidelands doctrine; rather, the court was content to assert that a lease for commercial purposes is "consistent with the trust upon which said lands were conveyed to the city, and with the requirements of commerce and navigation of said harbor."[214]

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209. *See* note 63 *supra* and accompanying text.

210. *See* note 201 *supra*.

211. *See* Anderson, *supra* note 201.

212. Ravettino v. City of San Diego, 70 Cal. App. 2d 37, 47, 160 P.2d 52, 57 (1945) ("the operation of a power crane is certainly one of the incidental functions in the operation of a port . . . .").

213. 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960).

214. 184 Cal. App. at 578, 7 Cal. Rptr. at 728. The San Francisco Bay Plan, *supra* note 194, approves the Sausalito development, on the ground that "commercial recreation and public assembly are desirable uses of the shoreline if they permit large numbers of persons to have direct and enjoyable access to the Bay. These uses can often be provided by private development at little or no direct cost to the public." *Id.* at 23. *See* diagram, *id.* at 25 & Map 11. The Plan also comments favorably on such developments as Ghirardelli Square-Fisherman's Wharf-Northern Waterfront Area in San Francisco, Jack London Square in Oakland, and the downtown waterfront at Tiburon.

There would be no objection to the opinion in *Martin* if the court made this distinction in arriving at its decision, instead of speaking so broadly of commercial purposes. Indeed, the propriety of commercial recreational uses as developed by the

In *Haggerty v. City of Oakland*[215] the court of appeals approved a plan under which a hall for exhibitions, conventions, and banquets would be built on port lands.[216] The justification given by the court was that the facilities were for uses "incidental to the development, promotion and operation of the port." Similarly, in *People v. City of Long Beach*,[217] the court of appeals upheld a statutorily authorized lease of tidelands for the construction of an armed services Y.M.C.A. The court said:

> We entertain no doubt that the specific purpose set forth in the 1935 statute to promote "the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor, and commerce, fishery, and navigation," is not only consistent with but in direct aid of the basic trust purpose to establish and maintain a harbor and necessary or convenient related facilities for the "promotion and accommodation of commerce and navigation." Personnel are as vital to these activities as the ships and other facilities used therein, and no distinction can properly be drawn between providing dormitories and other facilities for maritime personnel and docks for ships, warehouses for goods, or convention, exhibition, and banquet halls for use by trade, shipping, and commercial organizations.[218]

These cases are both puzzling and revealing. Certainly they must stand as a warning to lawyers that standards like "water-relatedness," or "incidental to the promotion of navigation and commerce" can be read with almost unlimited breadth by a court. More important, they indicate how very reluctant courts are to overturn an explicit legislative authorization, even if that authorization seems to go to the outer edge of legitimacy. In short, these cases provide as good an answer as can be found to the stark question whether there are any legal constraints which courts are likely to impose in the name of the public trust on explicit legislative acts which are within the broad boundaries of governmental legitimacy. The answer is "probably not," but there are two important provisos. First, the courts will act in those rare situations in which there is blatant evidence

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San Francisco Bay Plan, with its focus on public access, should probably be considered as another variant of the public use concept. It is important, however, to realize that the public element in such proposals is functional rather than legal and therefore includes uses such as a publicly owned park or a utility facility which by regulation is available to the whole public on a nondiscriminatory basis.

215. 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

216. Although tidelands were not involved, the grant of port land was similar in language to the tidelands grant statutes, and the case is therefore an appropriate precedent for trust and tidelands problems.

217. 51 Cal. 2d 875, 338 P.2d 177 (1959).

218. 51 Cal. 2d at 880, 338 P.2d at 179.

of corruption, such as that which existed in *Illinois Central*[219] and *Priewe*.[220] Second, and more significantly for those inclined to undertake litigation, the courts may be willing to intervene in a more restricted, but nonetheless effective, way when the state engages in conduct which cannot be held flatly impermissible but which does raise doubts. Thus, for example, the courts may be willing to require that a project obtain more specific legislative authorization or receive the approval of another and more broadly representative agency.

There is another useful role that the courts are willing to play, and it too is revealed by the California cases discussed above. That role is one in which the courts attempt to affect future cases; it is illustrated by their use of language which suggests to legislatures and administrative agencies that there are limits which courts may impose and that those limits were nearly, but not quite, reached in the particular case at bar. In this manner, the court suggests to other branches of government that they should be reluctant to adopt a more permissive view of the public trust. While such a technique is of little aid to the litigants in the case at bar, it is of considerable importance for public trust law developments generally. The avoidance of confrontation among the branches of government is not a one-way street; eager as the courts are to avoid collision, the legislatures are often equally eager not to push the courts too far. Thus, one should not underestimate the implicit lawmaking which occurs by the mere fact that a court accepts jurisdiction and sets out to define standards and to determine whether or not those standards have been met. Thus, the excerpt quoted above from *People v. City of Long Beach*[221] does serve as a restraining influence on legislatures even though the court ultimately upheld the conduct at issue.

The Sausalito, Oakland, and Long Beach decisions did not, after all, give the legislature carte blanche. In each case, the approved facilities maintained or provided for broad public access; even when they were not publicly owned, they were at least places of public accommodation, rather than wholly private and restrictive facilities such as high-rise apartment buildings. In addition, while the uses in the Oakland and Long Beach cases could hardly be said to have involved necessary incidents to the use of the water, there was at least some relationship to water-related activities, and the opinions clearly indicate that the courts were not flatly approving routine commercial or private uses.

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219. *See* note 59 *supra* and accompanying text.

220. *See* note 108 *supra* and accompanying text.

221. *See* notes 217-18 *supra*.

This analysis leaves uncertain the legality of tideland use for purposes like residential development. It does suggest, however, that such uses would be looked at by the courts with some skepticism. While the courts could not be expected to prohibit such uses flatly, significant pressures may be imposed on legislators and administrators by the prospect of judicial inquiry into present and potential demands for public shoreland uses, the need to maximize broad public use and access, the compatibility of the proposed use with other demands on the resource, and the return to the public from the disposition.[222] With these questions highlighted, and with efforts by lawyers both to encourage the use of the Massachusetts and Wisconsin techniques and to avoid pressing for direct confrontation between the court and the legislature, a considerable opportunity for fruitful judicial intervention can be created.

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222. Several California tidelands grants do specifically make provision for residential uses. Ch. 1013, [1949] Cal. Stats. 1859 (Coronado); ch. 921, [1959] Cal. Stats. 2952 (Emeryville). The Emeryville grant, however, authorizes use only for "residential purposes in which there is a general statewide interest"—a suggestive, but ambiguous, limitation. Moreover, the Coronado grant preceded the decision in Mallon v. City of Long Beach, 44 Cal. 2d 199, 282 P.2d 481 (1955), which held that revenues from oil and gas leasing on tidelands could not lawfully be freed from the public trust by a municipal grantee without producing a reversion to the state. *See* B.C.D.C. Supp. *supra* note 157, at 422. This result was deemed to be required by CAL. CONST. art. IV, § 31: "the legislature shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatsoever . . . ."

The implication of *Mallon* for uses such as residential housing would seem to be that only those residential uses in which there is a "general statewide interest" would be consistent with the trust obligations. Any other residential use, the case implies, would require that the tidelands be freed from the trust—a result which is within the power of the legislature if there is a reasonable legislative finding that the tidelands are not useful for trust purposes. But, according to *Mallon*, if there is such a freeing, the revenues received therefrom must (1) be sufficient to obviate any claim that a gift has been made of public property, and (2) be devoted to purposes in which there is a general statewide interest, rather than a merely local interest. Such a principle, enforceable by the courts, adds to the protection against those municipal uses of tidelands which result from the prospect of merely local benefits. The San Francisco Bay Plan takes the position that housing is an appropriate use of bay shorelands—a use which should be given a priority below that of water-oriented industry, marine terminals, water-related utilities, and water-oriented recreation, but above that of uses which do not require access to the bay. Any such shoreline residences should be so designed as to improve the appearance of the shores of the bay and to provide public access to the water. B.C.D.C. Supp., *supra* note 157, at 346-47. One unusual way in which the maximization of public benefit from shoreline housing could be achieved is by adoption of a policy that "high densities should be encouraged to provide the advantages of waterfront housing to larger numbers of people." San Francisco Bay Plan, *supra* note 194, at 28.

Development of tidelands for residential development has been upheld in other states. *E.g.*, Hayes v. Bowman, 91 S.2d 795 (Fla. 1957); Treuting v. Bridge & Park Commn. of City of Biloxi, 199 S.2d 627 (Miss. 1967). *Cf.* Jacobson v. Parks & Recreation Commn., 345 Mass. 641, 189 N.E.2d 199 (1963). In *Jacobson* the court held that parkland may be sold for apartment development but that proceeds must be used to acquire substitute parkland.

4. *Offshore Oil and Gas Development*

It would be inappropriate to leave the subject of California trust law without examining the special questions which arise with respect to the economically and ecologically important matter of oil and gas exploration in submerged lands.

It has been held specifically that tidelands may be used for the extraction of minerals, oil, gas, and other hydrocarbons if the extraction does not impede the use of the harbor.[223] The constraint was undoubtedly the result of concern with conventional navigation uses and the problem of physical interference. Years ago, little thought was given to potential conflicts between oil production and recreational uses. More recently, however, and particularly after the Santa Barbara oil spill of 1969,[224] that issue has become very prominent.

It would be difficult to point to any principle of California law which would prohibit the state from deciding, by duly deliberate legislative action, to subordinate traditional public trust uses to oil and gas development. And it is not at all clear that there should be any such rigid prohibition, for it seems far more appropriate to adopt a flexible approach to the task of assuring the maintenance of important public interests in public trust lands. Thus, for example, even though there is no rigid prohibition, a court, by interpreting the rule that mineral extractions must not "impede the use of the harbor," could construe that rule to require that any such exploitation be preceded by adequate inquiry into the safeguards taken to protect other uses of the waters and adjacent shores, and to impose standards designed to make certain that only those projects which minimize the possibilities of such infringements are allowed to proceed.[225] The legislature could still intervene and overrule judicially imposed safeguards, but such intervention would put a substantial onus on the legislature if unwanted consequences should arise. With the dangers pinpointed by judicial inquiry, and with public attention focused on the problems, the constraint on a legislative overruling of judicially imposed safeguards would seem substantial.

Alternatively, the legislative intent could be interpreted to impose upon those engaged in mineral extraction a financial obligation to provide against impairment of other public uses. Such

223. City of Long Beach v. Marshall, 11 Cal. 2d 609, 620, 82 P.2d 362, 367 (1938); *see* Mallon v. City of Long Beach, 44 Cal. 2d 199, 282 P.2d 481 (1955).

224. *See* note 76 *supra*.

225. *See* the discussion of *Weingand v. Hickel*, note 31 *supra*. *See also* Parker v. United States, Civil No. C.1368 (D. Colo., filed Jan. 7, 1969).

an approach was recently suggested, as an administrative solution, by the Secretary of the Interior after the oil leakage on the federally leased tidelands near Santa Barbara.[226] The same approach could be imposed judicially with respect to state lands on the theory that a legislative rule against impeding uses of the harbor implies an intent to impose the costs of any such impediments upon the proponents of the oil and gas project.[227] Such a theory is entirely consistent with the policy of using the public trust doctrine to promote broad public benefits from trust resources.[228] Furthermore, it is consistent with an approach expressly taken by the California courts with regard to mineral extraction on tidelands. As noted earlier,[229] the California Supreme Court has held that the general revenues from tidelands mineral extraction may not be devoted to any uses which are of less than a general statewide interest, and the state constitution prevents making those lands available as a gift. Those two limitations implement a principle that the direct income values of the tidelands must go to the general public. Insofar as unforeseen damages from the mineral extraction are an additional, though indirect, cost to the public, it would appear perfectly consistent both with the California court's holding and with the constitutional provision to hold that such indirect costs to the general public must likewise be compensated.

D. *Public Trust Developments Elsewhere*

The rather extended consideration which this Article has given to public trust law in Massachusetts, Wisconsin, and California suggests the recurring themes which underlie that seemingly amorphous doctrine. It would lengthen this Article to an unendurable extent to provide as intensive an analysis of public trust law developments in other states. For present purposes, it must suffice to say at this point that the major substantive and procedural themes have been examined. The section which follows is designed merely

226. A very broad proposed liability provision, 34 Fed. Reg. 7381 (1969) was vigorously opposed by the oil industry and has been supplanted by a much more modest provision, 34 Fed. Reg. 13,547 (1969).

227. *Cf.* Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928).

228. It is not suggested that this approach be adopted as a universally applicable rule, for the parties should always be allowed to demonstrate that some other resource allocation would better promote the public interest. Rather, it is suggested that a court begin with a presumption that the public interest is best served by preserving to the general public the beach and wildlife values threatened by oil and gas operations. The utilization of that presumption would thrust upon the proponents of a different allocation the burden of proof and persuasion. Such a shifting of burden would be a court's contribution to the equalization of political power which is apparently much needed in the federal leasing situation. *See* note 76 *supra*.

229. *See* note 222 *supra*.

to call attention to some interesting developments in other jurisdictions.

Most states have had, and regretted, experience with the disposition of public trust properties to private developers and the public agencies which work in collaboration with them. Indeed, it seems fair to describe the evolution of much public trust law in the United States as an effort to retreat from the excessive generosity of early legislatures and public land management agencies. The techniques adopted are by now very familiar: constitutional and statutory restraints have been placed on the disposition of trust properties;[230] it has been required that the public trust be reserved in any grants which are permitted;[231] restrictions have been placed on sales or leases in order to ensure that they are consistent with the public interest;[232] it has been stipulated that such dispositions may be made only for full market value and that revenues from them must be devoted to replacement of specific trust uses or to statewide public purposes;[233] and authorizing legislation has been narrowly read in order to limit the scope of governmental conveyances or the authority of administrative agencies to which the power of disposition has been granted.[234]

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230. *E.g.*, VA. CONST. art. 13, § 175; WASH. CONST. art. 15; N.C. GEN. STAT. § 146-3 (1964); S.C. CODE ANN. § 1-793 (1962); WASH. REV. CODE § 79.16.175 (1959). When an agency seeks to use the power of eminent domain in a case involving trust lands—for instance, when a highway department tries to use that power to take park land—the agency may have to show that its use is "more necessary" than the existing use. ARIZ. REV. STAT. § 12-1112 (1956); HAWAII REV. LAWS § 8-52 (1955); IDAHO CODE ANN. § 7-703 (1948); MONT. REV. CODES ANN. § 93-9904 (1964); NEV. REV. STAT. § 37-030 (1967); N.J. STAT. ANN. § 27:7-36 (1966); VT. STAT. ANN. tit. 19, § 222 (1968). *See also* State v. Union County Park Commn., 48 N.J. 246, 225 A.2d 122 (1966). *See generally*, Forer, *Preservation of America's Park Lands: The Inadequacy of Present Law*, 41 N.Y.U. L. REV. 1093 (1966); Tippy, *Review of Route Selections for the Federal-Aid Highway System*, 27 MONT. L. REV. 131 (1966); Comment, *Reconciling Competing Public Claims on Land*, 68 COLUM. L. REV. 155 (1968); Note, *Pressures in the Process of Administrative Decision: A Study of Highway Location*, 108 U. PA. L. REV. 534 (1960).

231. *E.g.*, People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

232. *E.g.*, FLA. STAT. ANN. § 253.12 (Supp. 1969); MISS. CODE ANN. § 6047-03 (Supp. 1968).

233. *E.g.*, S.C. CONST. art. 3, § 31; WASH. CONST. art. 16, § 1; *see* United States v. Certain Land in the Borough of Brooklyn, 346 F.2d 690 (2d Cir. 1965); Hilard v. Ives, 154 Conn. 683, 228 A.2d 502 (1967); Greenville Borough Petition, 11 D. & C. 2d 50 (Pa. C.P. 1957); Aquino v. Riegelman, 104 Misc. 228, 171 N.Y.S. 716 (Sup. Ct. 1918); CONN. GEN. STAT. ANN. § 7-131(j) (Supp. 1969); FLA. STAT. ANN. §§ 370.16 (1962, Supp. 1969); MINN. STAT. ANN. § 501.11 (Supp. 1969); N.J. STAT. ANN. § 40:60-27 (1967), § 13: 8A-13(b) (Supp. 1968); PA. STAT. ANN. tit. 20, § 1644 (1964); WASH. REV. CODE § 76.12.120 (1959); *cf.* United States v. South Dakota Game, Fish & Parks Dept., 329 F.2d 665 (8th Cir.), *cert. denied*, 379 U.S. 900 (1964); United States v. 111.2 Acres, 293 F. Supp. 1042 (E.D. Wash. 1968); Jacobson v. Parks & Recreation Commn. of Boston, 345 Mass. 641, 189 N.E.2d 199 (1963); State v. Cooper, 24 N.J. 261, 131 A.2d 756, *cert. denied*, 355 U.S. 829 (1957).

234. *See* the Massachusetts cases discussed in text accompanying notes 73-92 *supra*.

1. *The Statutory Response to Public Trust Doctrine*

While the general tendency in the United States has been toward prohibiting the sale of trust lands to private interests,[235] the practice of making such sales continues in some jurisdictions. Florida, for example, continues to allow trust lands to be sold despite some unfortunate experiences with public trust land disposition.[236] But

235. *E.g.*, Hughes v. State, 67 Wash. 2d 799, 803, 410 P.2d 20, 29 (1966), *revd. on other grounds*, 389 U.S. 290 (1967); N.C. GEN. STAT. § 146-3 (1964); ORE. REV. STAT. § 390.720 (1968); TEX. REV. CIV. STAT. ANN. art. 5415(e) (1962); VA. CODE ANN. § 41-811 (Supp. 1953), § 62.1-1 (Supp. 1968). *But see In re* Castaways Motel v. Schuyler, 24 N.Y.2d 120, 247 N.E.2d 124, 299 N.Y.S.2d 148 (1969).

236. For a detailed discussion of Florida law, see F. MALONEY, S. PLAGER & F. BALDWIN, WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE, ch. 12 (1968). *See* De Grove, *Administrative Problems in the Management of Florida's Tidal Lands* in BAYFILL AND BULKHEAD LINE PROBLEMS—ENGINEERING AND MANAGEMENT PROBLEMS 17, 20 (Studies in Pub. Admin. No. 18, 1959); *Estuarine Areas, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation, House Comm. on Merchant Marine & Fisheries*, 38-40, 67-68, 244-46, 90th Cong., 1st Sess. (1967). In the hearings, State Senator Griffin said: "Our files are bulging with testimony that the state has been indiscriminate in the sale of these lands," *id.* at 68. In State *ex rel.* Buford v. City of Tampa, 88 Fla. 196, 102 S. 336 (1924), the city, which was itself the recipient of trust lands from the state, granted an entire island from among those trust lands to a private developer in return for his promise to build a bridge to the island and to include parks in his proposed residential development. The state sought to prevent this action, but the court found that the state's grant to the city freed the property from the trust. Florida has the usual judicial rule that no grant of trust lands will be implied and that there must be an express legislative intent to divest trust lands. *See* State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 S. 353 (1908); Apalachicola Land & Dev. Co. v. McRae, 86 Fla. 383, 98 S. 505, *appeal dismissed*, 269 U.S. 531 (1923) (interpreting Spanish land grant).

But once a grant is found to be authorized, courts are often inclined to cease thinking in trust terms. Instead of following the lead of the California court, which held that granted lands carry with them a retained servitude (*see* text accompanying notes 165-74 *supra*), the courts frequently shift to more conventional private property concepts. This phenomenon has been particularly evident in Florida, where holders of leases or grants have thought themselves immune from the sort of restrictions on use which would arise from a view that their property is subject to some sort of servitude in favor of the public trust. For example, in Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969), *appeal docketed*, No. 27,555 (5th Cir. March 27, 1969), the district judge refused to give the Corps of Engineers the authority to deny a dredge-and-fill permit on the basis of potential adverse effects on wildlife resources. Although the decision was, strickly speaking, based on a very narrow reading of the Corps' statutory authority, the opinion is notable for its disdainful statement that the case involved a claim of authority by the Corps "denying . . . the right of private individuals to use property to which their ownership is not contested . . . ." 296 F. Supp. at 769. *See also* Coastal Petroleum Co. v. Department of the Army, Civil No. 68-951 (S.D. Fla., filed Aug. 12, 1968), in which the holder of a mineral lease in Lake Okeechobee challenged the Corps' authority to stipulate that the lessee must, as a prerequisite to obtaining a permit, obtain approval from the county authority and from the trustees of the Internal Improvement Fund. The lessee's argument, in somewhat simplified form, was that its property right in the lease exempted it from all regulation or restriction other than inquiry into potentional interference with navigation, but that if such an exemption were not recognized, the lessee must be compensated for a taking of its property. *See also* Zabel v. Pinellas County Water & Nav. Con. Authority, 171 S.2d 376 (Fla. 1965); Trustees of I.I.F. v. Venetian Isles Dev. Co., 166 S.2d 765 (Fla. App. 1964); Burns v. Wiseheart, 205 S.2d 708 (Fla. App. 1968).

A similar issue has been raised in a suit filed by federal oil lessees against the United States. Those lessees assert that the Secretary of the Interior "interfered" with

Florida has learned from experience; its legislature recently passed a statute to ensure that whenever such sales are made, full account will be taken of the public interest. Under that statute, the trustees of the Internal Improvement Trust Fund, in which power over state lands is vested, may make sales only by a vote of five of the seven trustees and must first require the State Board of Conservation to inspect the lands and to file a written report stating whether the development of such lands would be detrimental to established conservation practices.[237] The trustees are instructed to sell the lands only if the conveyance is

> not determined by the trustees to be contrary to the public interest, upon such prices, terms and conditions as they see fit; provided, however, that prior to consummating any such sale, they shall determine to what extent . . . ownership by private persons . . . would interfere with the conservation of fish, marine and wildlife or other natural resources . . . and if so, in what respect and to what extent, and they shall consider any other factors affecting the public interests.[238]

Moreover, before making any sale, the trustees must give public notice, and if objections are filed they must hold public hearings. If it appears that the sale "would interfere with conservation of fish, marine and wildlife or other natural resources, including beaches and shores, to such an extent as to be contrary to the public interest,"[239] the trustees must withdraw the lands from sale. Lands between the high water mark and any bulkhead line may be sold only to the upland riparian owner. In order to assist the trustees in making the determinations required by the statute, it is provided that they

> shall require that a biological survey and an ecological study of the area proposed to be sold . . . be made. . . . All such studies and surveys shall be made by or under the direction of the State Board of Conservation, which shall make a report of all such surveys and studies to the Trustees . . . together with its recommendations. The Trustees may adopt regulations requiring that the cost of making any such survey and report be paid by the applicant for the purchase of such lands . . . .[240]

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their oil-drilling operations during the Santa Barbara oil spill and that this "interference" constituted a taking of the leases for which compensation must be paid. Pauley Petroleum Inc. v. United States, No. 197-69 (Ct. Cl., filed April 9, 1969).

See generally the discussion of private property rights in California trust properties in the text accompanying notes 165-74 *supra*.

237. FLA. STAT. ANN. § 253.02(2) (Supp. 1969).

238. FLA. STAT. ANN. § 253.12 (Supp. 1969).

239. FLA. STAT. ANN. § 253.12 (Supp. 1969).

240. FLA. STAT. ANN. § 253.12(7) (Supp. 1969).

While even the most elaborate statutory precautions do not always prevent questionable decision making by administrative agencies,[241] the Florida law[242] encourages more adequate decision making in the administrative sphere and provides a more satisfactory opportunity for judicial review if and when administrative action is brought into question.

The statutory standards which have been developed in Florida have served other functions than ensuring the availability of a record for review and insulating agencies from pressures which might otherwise be placed upon them. The standards have also served the significant purpose of placing restraints on excessive localism in dealing with resources.[243] Other states similarly have recognized the need to avoid localism and to mitigate the potential for political pressures on administrative agencies; toward that end, they have adopted measures—though not always with successful results—requiring the governor to approve administrative action[244] or requiring another agency to approve it, sometimes in conjunction with the governor and a state council.[245]

Although there has been a great deal of legislative progress, a heavy burden continues to fall upon the courts. Not only are many statutes of quite recent origin and without effect on earlier grants, but legislative language inevitably demands judicial interpretation; and, lamentably, even strongly worded statutes often fail to have much effect at the lower end of the bureaucratic line, where critical decisions are made every day.

To note the continued importance of court action, even in the

241. Morgan v. Canaveral Port Authority, 202 S.2d 884 (Fla. App. 1967); Staplin v. Canal Authority, 208 S.2d 853 (Fla. App. 1968); Hayes v. Bowman, 91 S.2d 795 (Fla. 1957).

242. *See generally* FLA. CONST. art. III, § 7; FLA. STAT. ANN. § 253 (1962, Supp. 1969); FLA. STAT. ANN. §§ 370.02(9), 370.16 (Supp. 1969), §§ 377.33-34 (1960), § 377.35 (Supp. 1969).

243. Unfortunately the courts have not always been sympathetic to the legislative effort. Trustees of the I.I.F. v. Venetian Isles Dev. Co., 166 S.2d 765 (Fla. App. 1964); *see also* Trustees of the I.I.F. v. Claughton, 86 S.2d 775 (Fla. 1956); Duval Eng. & Constr. Co. v. Sales, 77 S.2d 431 (Fla. 1954); Burns v. Wiseheart, 205 S.2d 708 (Fla. App. 1967).

244. *E.g.*, VA. CODE ANN. § 62.1-4 (Supp. 1968) (leases by Marine Resources Commission in beds of state waters must be signed by the governor); S.C. CODE ANN. § 1-357.1 (Supp. 1968) (rights of way in marshland may be granted by Budget and Control Board but only with the approval of the governor).

245. *E.g.*, N.C. GEN. STAT. § 146-4 (1964) (the state may sell or lease mineral rights in state lands under water, but must first obtain the approval of the Department of Administration, the governor, and the state council); MASS. GEN. LAWS ANN. ch. 30, § 44A (1966) (a commissioner may transfer state land to another department for highway purposes, so long as he obtains the approval of the governor and the council). As was made clear in *Robbins v. Department of Public Works*, discussed in the text accompanying notes 87-92 *supra*, such precautions, however elaborate, present no insuperable obstacles to the persistent developer.

most progressive states, is by no means to detract from the essential role of legislation and administration. Indeed, nothing could be more mistaken than to conceive the problem as one in which it is necessary to choose a single branch of government to develop and administer the policies which will produce optimum results. This Article has been concerned largely with the judicial function only because it has been so widely believed that the task is essentially one for legislative and administrative action and that the scope for judicial action is limited to remedying blatant and express departures from specific statutory standards.

What has already been said in this Article should cast some doubt on that view, for the experience in states like Massachusetts, Wisconsin, and California suggests that the richness of interplay among the branches of government—indeed, the blurring of jurisdictional lines in policy making, interpretation, and political power adjustments—has itself been a powerful force for more informed and rational decision making.

2. *The Judicial Response: A Continued Reluctance To Recognize the Public Trust*

While the legislatures and courts of many states have recognized their obligation to safeguard the public trust, there are a number of courts which persistently adhere to the belief that courts are not an appropriate forum in which to examine issues concerning administrative actions dealing with public trust lands. The courts which accept that view usually follow the approach of *Rogers v. City of Mobile*,[246] a recent Alabama case in which taxpayers sought to challenge development of the port of Mobile on the ground that the leasing of dock facilities to private concerns was an illegal internal improvement. The court, finding that the agency in question had the constitutional power to lease such facilities, said that the exercise of discretion in implementing that power could not be reviewed in the absence of corruption, bad faith, abuse of discretion, or unfair dealing tantamount to fraud.[247]

246. 277 Ala. 261, 169 S.2d 282 (1964). *See also* Nelson v. Mobile Bay Seafood Union, 263 Ala. 195, 82 S.2d 181 (1955); Nelson & Robbins v. Mund, 273 Ala. 91, 134 S.2d 749 (1961). In both of these latter cases, suits to enjoin the dredging of seed oysters from a public oyster reef were dismissed on the ground that the discretion of the Conservation Department is unchallengeable absent a showing of fraud or bad faith in issuing the permit. *Cf.* Alabama v. Kelley, 214 F. Supp. 745, 750 (M.D. Ala. 1963), *aff'd.*, 339 F.2d 261 (5th Cir. 1964), in which a lease of state park land by the Department of Conservation was invalidated: "[the] consideration expressed in the lease in question is so grossly inadequate as to shock the conscience, and the inadequacy of consideration amounts, in itself, to decisive evidence of fraud."

247. 277 Ala. 261, 282, 169 S.2d 282, 302 (1964). The Florida cases exemplify the range of judicial rhetoric in reviewing administrative action—from giving it "con-

The leases challenged in *Rogers* may very well have been appropriate under any intelligent interpretation of trust theory, for in numerous situations such leases or sales of port facilities to private entrepreneurs have been upheld as consistent with the implementation of the trust. It would therefore be unwise to adopt a position directly opposite to *Rogers* and to prohibit an agency from making any such facilities available to private interests. But decisions such as *Rogers* are equally undesirable, for they demonstrate an unwillingness to confront and to elucidate, the considerations which distinguish appropriate dealings with trust lands from inappropriate ones. Since the California and Wisconsin courts have fruitfully engaged in precisely that process of discrimination, it can hardly be asserted that such a task is beyond the competence of the judiciary. Nor can it be said that the necessary inquiry can be fulfilled by such crude concepts as fraud or corruption. Indeed, if there is any lesson to be learned from the cases which have been examined in this Article, it is that a much more sophisticated examination into the manipulations of legislative and administrative processes is required if the public interest is to be promoted.

Nevertheless, it should not be thought that the blame for decisions such as that in *Rogers* lies wholly with the judges who write the opinions. Attorneys invite such decisions when they assert extreme and doctrinaire positions such as the claim that any project which involves a lease to private interests is thereby illegal. One must

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clusive" effect to the use of the "substantial evidence" standard or the standard of "fraud, bad faith, or a gross abuse of discretion." Watson v. Holland, 155 Fla. 342, 20 S.2d 388, *cert. denied*, 325 U.S. 839 (1944); Cortez Co. v. County of Mantee, 159 S.2d 871 (Fla.), *cert. denied*, 379 U.S. 816 (1964); Hayes v. Bowman, 91 S.2d 795, 802 (Fla. 1957); Morgan v. Canaveral Port Authority, 202 S.2d 884 (Fla. App. 1967); Staplin v. Canal Authority, 208 S.2d 853 (Fla. App. 1968); Gies v. Fischer, 146 S.2d 361 (Fla. 1962); Alliance for Conservation v. Furen, 110 S.2d 55 (Fla. App. 1959), *revd. on other grounds*, 118 S.2d 6 (Fla. 1960); Arvida Corp. v. City of Sarasota, 213 S.2d 756 (Fla. App. 1968); Sunset Islands v. City of Miami Beach, 210 S.2d 275 (Fla. App. 1968). The Florida cases are typical in that they indicate that courts are more willing to review administrative discretion when a property owner wants, but has been denied, administrative approval, than when the public seeks review of an administrative approval which has already been given. *Compare* cases cited above, *with* Zabel v. Pinellas County W. & N.C.A., 171 S.2d 376 (Fla. 1965); Burns v. Wiseheart, 205 S.2d 708 (Fla. App. 1968); Trustees of the I.I.F. v. Venetian Isles Dev. Co., 166 S.2d 765 (Fla. App. 1964). Occasionally a court will find a case of gross abuse of discretion and will overrule an agency on that ground. City of Miami v. Wolfe, 150 S.2d 489 (Fla. App. 1963).

A variant way for courts to defer to administrative action is provided when attorneys charge the agency with a common-law wrong; in that situation a reluctant court may find the administrative action to be within the agency's broad statutory mandate and find that it therefore cannot constitute the alleged common-law violation. Such a finding is especially likely if the agency is charged with creating or permitting a nuisance. Judd v. Bernard, 49 Wash. 2d 619, 304 P.2d 1046 (1956). *See also* Watson v. Holland, 155 Fla. 342, 20 S.2d 388, 394, *cert. denied*, 325 U.S. 839 (1944). Sometimes, however, a conventional legal theory will be effective. *See, e.g.*, Smith v. Skagit County, 75 Wash. 2d 729, 453 P.2d 832 (1969).

provide a court with room to maneuver. A litigation theory which begins with a sophisticated analysis of public trust principles—setting out alternatives for the achievement of a reasonable development of trust lands with minimal infringement of public use—is likely to obtain a far more sympathetic response from the bench than is one which takes a rigorous legal principle and squeezes it to death.[248]

3. *The Breadth of the Public Trust Doctrine*

Perhaps the most striking impression produced by a review of public trust cases in various jurisdictions is the sense of openness which the law provides; there is generally support for whatever decision a court might wish to adopt. Similar cases from Texas and Mississippi[249] illustrate the point. In both cases citizens challenged state authorization of private companies to dredge in public waters for oyster shells. In each case, the complainants sought to cast doubt on the validity of the particular authorization by arguing that there was a technical defect in the grant, or a limitation in the authorizing statute. The real concern, of course, was with the adverse impact of the dredging upon the general ecology of the areas in question, which served as feeding and breeding grounds for birds and aquatic life. The Texas case was summarily dismissed, but the Mississippi action was successful, even though the latter was susceptible to the same objections that were advanced in the former. In the Texas case, *Texas Oyster Growers Association v. Odom*,[250] the challenge was dismissed on the triply technical grounds that the lawsuit was an impermissible action against the state's sovereignty, that the order granting the authorization was within the administrative agency's unreviewable discretion, and that even though most of the plaintiffs were commercial fishermen, they had no vested property rights at stake and thus no litigable interest in the controversy.[251]

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248. An instructive example is found in Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969) (opinion of Judge Murphy), a case which was, in many respects, admirably litigated by plaintiffs. But the plaintiffs could hardly have expected to win a constitutional argument that the authority given to the highway commissioner in selecting his route was an unconstitutional delegation. Had the plaintiffs pursued the more limited nonconstitutional arguments made in the Massachusetts highway routing cases, discussed in text accompanying notes 80-92 *supra*, they would have been likely to get a more sympathetic judicial response on that issue. It may have been thought tactically important to make a constitutional claim in the federal court, but that consideration does not explain the failure to take the preferable tack in their state court suit. Citizens Comm. for the Hudson Valley v. McCabe, No. 2872/68 (Sup. Ct. Rockland County, N.Y., filed Oct. 1, 1968).

249. Texas Oyster Growers Assn. v. Odom, 385 S.W.2d 899 (Tex. Ct. Civ. App. 1965) *writ of error refused, n.r.e.*; Parks v. Simpson, 242 Miss. 894, 137 S.2d 136 (1962).

250. 385 S.W.2d 899 (Tex. Ct. Civ. App. 1965).

251. 385 S.W.2d at 901. Public trust doctrine has developed erratically in Texas litigation. The deference to administrative discretion in *Texas Oyster Growers* should

The Mississippi case, *Parks v. Simpson*,[252] was brought by a taxpayer against the Marine Conservation Commission to void a contract it had made to dredge for oyster shells. The court passed over the concerns which had led to dismissal of the Texas case, and looked instead at the commission's statutory authority to lease tidewater bottoms. The court construed that authority narrowly and found that oyster shells were a part of the public trust which the commission had not been expressly authorized to sell.

It is true that the cases can be distinguished, for the Texas statute specifically authorized shell-dredging leases, while the Mississippi law was ambiguously drafted. But those differences need not, and usually do not, deter courts. The Mississippi court might have avoided responsibility of the applicable statute by following the Alabama approach[253] and sustaining the commission's exercise of discretion since there was no fraud, corruption, or explicit violation of statute.[254] Conversely, the Texas court could have gone beyond the mere determination that shell dredging was generally legal and asked whether the particular leases in question were consistent with the public trust; it might thereby have followed the lead of those courts which read general grants of legislative authority as restricted

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be compared with State v. Jackson, 376 S.W.2d 341 (Tex. 1964), in which the court held that the Game and Fish Commission was without authority to enjoin the use of certain kinds of fishing nets because there was an express legislative prohibition on other kinds of nets, and because that prohibition constituted an implied statutory approval of all devices not specifically prohibited. Thus, the matter was held to be removed from administrative discretion.

While the Texas courts adhere to the conventional view that public trust lands "cannot be bartered away by . . . implication" but must be "expressly granted" [Galveston v. Mann, 135 Tex. 319, 332, 143 S.W.2d 1028, 1034 (1940)], the various interpretations of that protective theory are difficult to reconcile. *Compare* Humble Pipeline Co. v. State, 2 S.W.2d 1018 (Tex. Ct. Civ. App. 1928); State v. Arkansas Dock & Channel Co., 365 S.W.2d 220 (Tex. Ct. Civ. App. 1963); Galveston v. Menard, 23 Tex. 349 (1859), *with* Dincans v. Keeran, 192 S.W. 603 (Tex. Ct. Civ. App. 1917); State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065 (1932); Galveston v. Mann, 135 Tex. 319, 143 S.W.2d 1028 (1940); State v. Grubstake Inv. Assn., 117 Tex. 53, 297 S.W. 202 (1927); Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935); Wilemon v. Dallas Levee Improvement Dist., 264 S.W.2d 543 (Tex. Ct. Civ. App. 1953), *cert. denied*, 348 U.S. 829 (1954).

The most important recent case in Texas is Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Ct. Civ. App. 1964), which develops the so-called public dedication theory—the doctrine that trust property which has been granted away to private owners can be reclaimed for the public through long use. The case upheld an easement for the public beach on Galveston Island. *See* Dietz v. King, 1 Civil No. 25,607 (Ct. App., 1st Dist., Div. 1, Cal., filed Aug. 1, 1969); State *ex rel.* Thornton v. Hay (Sup. Ct. Ore. Dec. 19, 1969). *See Get Out of My Sand: Disputes Flare over Public Use of Beaches*, Wall St. J., Jan. 6, 1969, at 1, col. 4; Stone, *supra* note 15, at 227-30. *See also* O'Neill v. State Highway Dept., 50 N.J. 307, 235 A.2d 1 (1967).

252. 242 Miss. 894, 903-06, 137 S.2d 136, 138-40 (1962).

253. *See* notes 246-48 *supra* and accompanying text.

254. 242 Miss. at 897-900, 137 S.2d at 136-38. *See* notes 246-47 *supra* and accompanying text.

to authorizing action which is consistent with the obligations of the public trust.[255] Even as to the standing of fishermen to sue to enforce the public right of fishery, the Texas court was compelled only by its own desires to find that there was no legal right sufficient to support an action, for individuals with precisely such interests have been granted standing in a number of other states.[256]

In the *Parks* case, as in many other public trust cases throughout the country, the Mississippi court used a narrow statutory interpretation to declare, in effect, a moratorium on decisions which seem to raise serious dangers for important public resources and which seem to have been inadequately considered either by the legislature or by the administrative agency which was involved. The events which transpired after that case illustrate how much the actions of any one branch of government are intertwined with the total process of decision making and how important it may be that the various branches do not isolate and compartmentalize their functions. Subsequent to the decision in the case, the Mississippi legislature expressly granted to the State Marine Conservation Commission the authority to permit shell dredging, but only under sharply limited circumstances. A project must now be approved by a three-fifths vote of the entire membership of the commission, and the approval must include the vote of the commission's marine biologist member. There must, moreover, be a finding that "the dredging will not be deleterious to the aquatic life and harmful to the fishing industry," and that finding must be "spread full upon the minutes of the Commission."[257] In contrast to these salutary after-effects of *Parks*, the shell-dredging controversy in Texas has dragged on inconclusively in Congress, in the state legislature, in state administrative agencies, and in the Corps of Engineers.[258] Thus, the Mississippi experience indicates once again the importance of judicial intervention as a

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255. In Fransen v. Board of Natural Resources, 66 Wash. 2d 672, 404 P.2d 432 (1965), the defendant Board, which has general statutory authority to transfer state-owned land to cities, was restrained from conveying a particular tract which was devoted to an important public use. *See also* Williams Fishing Co. v. Savidge, 152 Wash. 165, 277 P. 459 (1929) (state enjoined from leasing Pacific shoreland despite general authority to do so, because such leasing would adversely affect public uses); State *ex rel.* Forks Shingle Co. v. Martin, 196 Wash. 494, 83 P.2d 755 (1938) (mandamus to compel sale of timber on school trust land denied despite general sale authority); State *ex rel.* Garber v. Savidge, 132 Wash. 631, 233 P. 946 (1925) (mandamus to compel leasing of state land for oil drilling denied despite general authority, because school trust land was involved). *See* the Massachusetts cases discussed in the text accompanying notes 63-92 *supra*.

256. Kemp v. Putnam, 47 Wash. 2d 530, 288 P.2d 837 (1955); Columbia River Fisherman's Protective Union v. City of St. Helens, 160 Ore. 654, 87 P.2d 195 (1939).

257. MISS. CODE ANN. § 6048-03 (Supp. 1968).

258. *See* AUDUBON MAGAZINE, May 1969, at 89.

technique to thrust a problem of significance upon a busy legislature's attention.[259]

III. Conclusion

A. *The Scope of the Public Trust*

It is clear that the historical scope of public trust law is quite narrow. Its coverage includes, with some variation among the states, that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence. Sometimes the coverage of the trust depends on a judicial definition of navigability, but that is a rather vague concept which may be so broad as to include all waters which are suitable for public recreation.[260] Traditional public trust law also embraces parklands, especially if they have been donated to the public for specific purposes; and, as a minimum, it operates to require that such lands not be used for nonpark purposes. But except for a few cases like *Gould v. Greylock Reservation Commission*,[261] it is uncommon to find decisions that constrain public authorities in the specific uses to which they may put parklands, unless the lands are reallocated to a very different use, such as a highway.[262]

If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the

259. While the Mississippi legislature did respond effectively to the particular problem by enacting a shell-dredging law, it did not undertake to deal generally with estuarial and shoreline problems; the courts, no doubt, will have to be called upon again to meet problems as they arise, and they, in turn, will have to call upon the legislature for needed statutory reforms.

260. Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937).

261. *See* text accompanying notes 63-72 *supra*.

262. *But see* Parker v. United States, No. C-1368 (D. Colo., filed Jan. 7, 1969); Sierra Club v. Hickel, No. 51,464 (N.D. Cal., filed June 5, 1969). *See also* the cases cited in notes 39-40 *supra*, enforcing statutory provisions or donor-required constraints in the use of parkland.

dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.

Certainly the principle of the public trust is broader than its traditional application indicates. It may eventually be necessary to confront the question whether certain restrictions, imposed either by courts or by other governmental agencies, constitute a taking of private property;[263] but a great deal of needed protection for the public can be provided long before that question is reached.[264] Thus, for example, a private action seeking more effective governmental action on pesticide use or more extensive enforcement of air pollution laws would rarely be likely to reach constitutional limits. In any event, the courts can limit their intervention to regulation which stops short of a compensable taking.[265]

Finally, it must be emphasized that the discussion contained in this Article applies with equal force to controversies over subjects other than natural resources. While resource controversies are often particularly dramatic examples of diffuse public interests and contain all their problems of equality in the political and administrative process, those problems frequently arise in issues affecting the poor and consumer groups.[266] Only time will reveal the appropriate limits of the public trust doctrine as a useful judicial instrument.

B. *The Role of the Courts in Developing Public Trust Law*

The principal purpose of this Article has been to explore the role of the courts in shaping public policy with respect to a wide spectrum of resource interests which have the quality of diffuse public uses. The attempt has not been to propose or to identify the particular allocative balance which is appropriate for a wise public policy as to any particular resource problem, but rather to examine

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263. *See* notes 174, 236 *supra* and accompanying text.

264. *E.g.*, Shorehaven Golf Club v. Water Reservation Commn., 146 Conn. 619, 153 A.2d 444 (1959); Gies v. Fischer, 146 S.2d 361 (Fla. 1962); Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 15 Mich. App. 556, 167 N.W.2d 311 (1969); Smith v. Skagit County, 75 Wash. 2d 729, 453 P.2d 832 (1969).

265. For a case in which a court missed the opportunity to examine the limits of regulatory authority short of taking, see Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 242 A.2d 165, *cert. denied*, 393 U.S. 935 (1968). In some instances a legislature will simply impose the desired regulation, leaving it to the landowner to seek compensation if he believes the regulation has gone so far as to comprise a taking. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 130, § 105 (Supp. 1968).

266. *See, e.g.*, Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (July 1969), citing considerable literature; Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); Powelton Civic Home Owners Assn. v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968).

an important and poorly understood institutional medium for better obtaining that wisdom which leads to intelligent public policy. Thus, as is usually the wont of lawyers, the author has attended essentially to problems of process rather than to problems of substance. It is hoped, however, that the Article makes clear the futility of any rigid separation between those two elements. It should be obvious that courts operate with an extraordinary degree of freedom and that the procedural devices they employ are very significantly determined by their attitudes about the propriety of the policies which are before them. It is virtually unheard of for a court to rule directly that a policy is illegal because it is unwise; the courts are both too sophisticated and too restrained to adopt such a procedure. Rather, they may effectively overrule a questionable policy decision by requiring that the appropriate agency provide further justification; alternatively, the courts may, in effect, remand the matter for additional consideration in the political sphere, thus manipulating the political burdens either to aid underrepresented and politically weak interests or to give final authority over the matter to a more adequately representative body.

The very fact that sensitive courts perceive a need to reorient administrative conduct in this fashion suggests how insulated such agencies may be from the relevant constituencies. A highway agency, for example, which has a professional bureaucracy, which performs its function within a large geographic area rather than within a particular community, and which is rarely the subject of attack in political campaigns, may feel quite free to hold perfunctory and essentially predetermined public hearings. In such circumstances, the decision-making process may be inadequate even though a proceeding called a public hearing has been held. These realities imply that there is a need for the more searching sort of judicial intervention described above.

Understandably, courts are reluctant to intervene in the processes of any given agency. Accordingly, they are inclined to achieve democratization through indirect means—either by requiring the intervention of other agencies which will serve to represent underrepresented interests or by calling upon the legislature to make an express and open policy decision on the matter in question.[267] The

267. A fascinating example of this problem is presented by the Hudson River Expressway litigation, Citizens Comm. for the Hudson Valley v. Volpe, 297 F. Supp. 804 (S.D.N.Y. 1969). The dispute had received a great deal of attention not only by the state authorities, but by the Hudson River Valley Commission and the United States Department of the Interior. Despite the formalities of public hearings and independent studies by outside agencies, the objectors alleged that there had not been a truly ob-

phenomenon of indirect intervention reveals a great deal about the role of the judiciary. The closer a court can come to thrusting decision making upon a truly representative body—such as by requiring a legislature to determine an issue openly and explicitly—the less a court will involve itself in the merits of a controversy. This relationship suggests that democratization is essentially the function which the courts perceive themselves as performing, and that even those courts which are the most active and interventionist in the public trust area are not interested in displacing legislative bodies as the final authorities in setting resource policies.

That self-perception is an appropriate one, for in theory there is no reason that the judiciary should be the ultimate guardian of the public weal. In the ideal world, legislatures are the most representative and responsive public agencies; and to the extent that judicial intervention moves legislatures toward that ideal, the citizenry is well served.[268] Certainly even the most representative legislature may act in highly unsatisfactory ways when dealing with minority rights, for then it confronts the problem of majority

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jective and open examination of the proposal. They sought to raise such issues as the unavailability of highway department maps, the inadequate manner in which the public hearing was conducted, and the incompleteness of the investigation made by the Department of the Interior. It was also argued that the project could not go forward in the absence of express congressional approval, since an old statute provides that it is unlawful to construct dikes in or over navigable waters without the consent of Congress. 297 F. Supp. at 807 n.1. After listening to intensive arguments over the definition of a dike, the court finally held that congressional consent was required and that the project could not go forward without such approval. It also held that under the same statute the approval of the Secretary of Transportation was required because causeways were a part of the project. Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969) (opinion by Judge Murphy). Judge Murphy's willingness to invoke the dike law and to enjoin the project pending congressional authorization may have resulted not only from traditional statutory interpretation, but also as the result of doubts about the adequacy of the attention which the defendant agency had given to the objectors' positions.

268. It should be emphasized that the judicial function is properly invoked principally to deal with issues which, while very important, tend to be made at low-visibility levels, even though they may be endorsed by very highly placed officials. Conversely, when there is high public visibility on an issue, when it is dealt with as a central matter of state or national policy, and when account has been taken of open and widespread public opinion from all quarters, the judiciary does not ordinarily have a role to play as a perfector of the political process. In such cases, the charge that judicial intervention would amount to displacement of the considered judgment of co-equal branches of the government has merit. The attempt to get courts to displace the congressional and presidential decision to engage in nuclear testing as a central component of defense policy exemplifies the sort of case in which judicial reticence is appropriate. The cases in which such attempts have been made, however, do contain much procedural language that is not to be commended. *See, e.g.*, Pauling v. McElroy, 164 F. Supp. 390 (D.D.C.), *aff'd.*, 278 F.2d 252 (D.C. Cir. 1958), *cert. denied*, 364 U.S. 835 (1960); Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964).

tyranny. But that problem is not the one which arises in public resource litigation. Indeed, it is the opposite problem that frequently arises in public trust cases—that is, a diffuse majority is made subject to the will of a concerted minority. For self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests. Thus, the function which the courts must perform, and have been performing, is to promote equality of political power for a disorganized and diffuse majority by remanding appropriate cases to the legislature after public opinion has been aroused. In that sense, the public interests with which this Article deals differ from the interests constitutionally protected by the Bill of Rights—the rights of permanent minorities. That realization, in turn, lends even greater support for the rejection of claims that public trust problems should be considered as constitutional issues which are ultimately to be resolved by courts even if there is a clear legislative determination.

Not all the situations which have been examined in this Article fit directly into the majority-minority analysis suggested above, but, if properly understood, they do meet the principle of that analysis. For example, in a dispute between advocates of parks and those who would take parkland for highways, it often cannot be said that one group constitutes a majority and the other a minority. It can, however, be said that one interest is at least adequately represented in its access to, and dealings with, legislative or administrative agencies while the other interest tends to face problems of diffuseness and thus tends to be underrepresented in the political process. In such cases, all that is asked of courts is that they try to even the political and administrative postures of the adversaries; if that equalization can be done judicially, the courts may properly withdraw and leave the ultimate decision to a democratized democratic process.

Frequently, judicial intervention takes the special form of moving decisional authority from one constituency to another. In taking such action, a court might hold, for example, that a matter is of state-wide interest and must be approved by the state legislature, rather than by a municipal or county agency. Obviously there are no very firm principles which identify *the* proper constituency for any given issue, and the debates about localism, statism, and federalism are as old as the nation. However, on the smaller scale in which those problems are presented in public trust litigation, the courts seem to have found a reasonably satisfactory solution. The pattern is not wholly clear, but in general the courts have pro-

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moted a broad consideration of all potential public interests by requiring that decisions be made by a body with a constituency broad enough to be responsive to the whole range of significant potential users.[269] Thus, to take the most obvious example, authority over the uses of San Francisco Bay is given to an agency that is responsive both to the constituency which has ready access to the resource and to the broader constituency that has an interest in the use of the bay as a whole.[270] While one may question whether the relevant decision-making authority should be bay-wide, statewide, federal, or international, it seems sufficient to ask the courts to choose an entity that is large enough to ensure some representation of all the significant interests which ought to be heard and to allow the courts to decide, on the basis of evidence presented, whether a particular entity does in fact represent all those interests in some reasonably ample way.

Having determined that the fundamental function of courts in the public trust area is one of democratization, the next subject for analysis is the means by which courts are to identify the problems which require judicial action. The first step in this process is the search for those situations in which political imbalance exists, and the signal for the existence of that problem is diffusion. Political imbalance is to be found wherever there are interests which have difficulties in organizing and financing effectively enough that they can deal with legislative and administrative agencies. When a claim is made on behalf of diffuse public uses, courts take the first step in the process by withdrawing the usual presumption that all relevant issues have been adequately considered and resolved by routine statutory and administrative processes. That first step is tantamount to a court's acceptance of jurisdiction.

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269. This general statement does not mean that the courts function only to enlarge constituencies, although that is the function they have generally performed in the cases discussed in this Article. It may well be that adequate consideration for all relevant interests will require granting to a small constituency a veto power or at least a right of consultation. While excessive localism is the most common problem, as the Wisconsin and California cases indicated (*see* text accompanying notes 108-56, 183-229 *supra*), a state or national agency may take inadequate account of important local considerations. For example, in a recent controversy over a proposed atomic plant, the state of Minnesota, at the behest of local citizens, adopted standards more stringent than those of the Atomic Energy Commission. Wall St. J., Aug. 28, 1969, at 8, col. 4. Unless it is determined that national standards are meant to pre-empt local interests [*see* First Iowa Hydro-Electric Co-op. v. FPC, 328 U.S. 152 (1946)], there is no reason for a court to avoid seeking that mixture of decision-making constituencies which most adequately represents all relevant interests, but does not produce destructive fragmentation of authority. *See* Colorado Anti-Discrimination Commn. v. Continental Airlines, Inc., 372 U.S. 714 (1963).

270. *See* text accompanying notes 183-85 *supra*.

The next critical step is to seek out the indicia which suggest that a particular case, on its own merits, possibly or probably has not been properly handled at the administrative or legislative level. That is the most difficult part of the process, and to cope with it the courts have developed four basic guidelines.

First, has public property been disposed of at less than market value under circumstances which indicate that there is no very obvious reason for the grant of a subsidy? That determination can be relatively simple if it appears that the grant serves a public purpose by aiding the poor, by promoting an important service or technological advance for which no private market has developed, by encouraging population resettlement, or by sustaining a faltering economy which appears unable to sustain itself. These are but a few of the easily verifiable grounds which would suggest to a court that objections are unworthy of further judicial attention. Conversely, if land is being given away to a developer of proposed luxury high-rise apartments, a court would be very much inclined to seek further explanation and to interpose a substantial dose of skepticism. Even in such a case it might be possible to satisfy a court that some rational public policy supports the conduct, but there will be a strong inclination to examine statutory authority with great care and to seek out substantial supporting evidence in order to ensure that all the issues have been made fully public.

Second, has the government granted to some private interest the authority to make resource-use decisions which may subordinate broad public resource uses to that private interest? In the extreme case, that question raises the problem of *Illinois Central*,[271] and a court might appropriately interpose a flat legal prohibition on the ground that the state has divested itself of its general regulatory power over a matter of great public importance. More often, the situation is one in which a court seeks to deal with the ramifications of a private property system in relation to resources which have the element of commonality. A resource like San Francisco Bay, for example, is of such a physical character that the exercise of ordinary private property rights may have very large direct effects on the whole public which has had the use of that bay. In such circumstances courts are inclined to scrutinize with great care claims that private property rights should be found to be su-

271. *See* text accompanying notes 59-62 *supra*.

perior to the claim of continued public regulatory authority. Indeed, it is unlikely that such rights will be allowed unless they are consistent with a general public plan for regulation of the resource. This issue has arisen in litigation in the San Francisco Bay cases[272] and in several Florida cases.[273]

In such situations, the courts generally purport to be merely interpreting and defining traditional property law rights, but implicit in their analyses is a hesitancy to recognize that any such expansive private rights could have been granted if due consideration had been given to the public interest. Thus, in order to make a retrospective "reformation" of earlier, imperfectly considered governmental decisions, courts may read into patents or grants implied conditions, such as a servitude in favor of the public trust. They would thereby force the private claimant to go before a contemporary administrative tribunal, whose conduct will itself be subject to judicial scrutiny, and there to establish the consistency of his project with the public interest.

Third, has there been an attempt to reallocate diffuse public uses either to private uses or to public uses which have less breadth? This is the most complex of the judicial bench marks. In one respect, it merely reflects judicial concern that any act infringing diffuse public uses is likely to have been made in the absence of adequate representation for the diffuse group, and accordingly the courts are willing to send such decisions back for reaffirmation or more explicit authorization. That procedure is exemplified by the developments in Massachusetts.[274]

In addition, although there is little specific supporting evidence, there seems to be implicit in the cases a feeling that there is something rather questionable about the use of governmental authority to restrict, rather than to spread, public benefits. At the extreme, that attitude is reflected in the judicial rule that government may not act for a purely private purpose. While cases involving such holdings are rare, there are many situations in which benefits are sufficiently narrow that it is difficult to determine what public purpose is meant to be achieved by a particular governmental act. That difficulty is emphasized when the price of providing any such narrow benefit is the withdrawal of a beneficial use which is available to a wide segment of the population.

272. *See* text accompanying notes 159-82 *supra*.

273. *See* notes 236-42 *supra* and accompanying text.

274. *See* notes 63-92 *supra* and accompanying text.

Such problems arise in many contexts. The proposed New Jersey constitutional amendment, which would have confirmed private title to shorelands that had been held as public beach is perhaps the most dramatic illustration of the issue.[275] *Gould v. Greylock Reservation Commission*,[276] in which a public park would have been converted to an apparently little-needed ski area, with great potential profit accruing to a private developer, is another. And the California court's uneasiness about making shoreland available for a private yacht club is a third.[277] The courts are not ready to hold such dispositions illegal per se; but they do want to know what public purpose justifies them, and they want to put legislatures and administrators on notice that such dispositions will be closely scrutinized and must be reasonably justifiable in terms of the public benefits to be achieved.

This judicial device serves to call attention to the inadequacies in conventional public techniques for evaluating resource decisions involving diffuse public uses. Rarely do the decision-making agencies attempt to make a careful benefit-cost analysis which would provide useful information about the effects of such decisions. What is lost, for example, when a local public beach is closed and the area filled for garbage disposal, highway development, or residential development? Governmental bodies have made little effort to answer such questions; yet they do make decisions that one sort of allocation or another advances the public interest. The courts properly evince reluctance to approve decisions based upon ignorance; and when that factor is joined with the courts' strong feeling that diffuse public uses are both poorly represented and, by their nature, difficult to measure, judicial wariness is inevitably enhanced.

One product of such judicial reluctance is an incentive for decision-making agencies to begin seeking careful and sophisticated measurements of the benefits and costs involved in resource reallocations. To the extent that judicial hesitancy cautions the agencies against making such reallocations without better information on the public record, the courts are deterring ventures into the unknown. And if the relevant facts are unknown, and yet legislatures and administrative agencies show eagerness to go forward, the courts are only reinforced in their over-all suspicion that they are dealing with

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275. *See* note 36 *supra* and accompanying text.

276. *See* notes 63-72 *supra* and accompanying text.

277. *See* notes 204-06 *supra* and accompanying text.

governmental responsiveness to pressures imposed by powerful but excessively narrow interests.

The fourth guideline that courts use in determining whether a case has been properly handled at the administrative or legislative level is to question whether the resource is being used for its natural purpose—whether, for example, a lake is being used "as a lake." This is perhaps the most specific of the guidelines the courts use, but, as is shown by the Wisconsin cases, it is seldom employed with rigor.[278] In fact it is little more than a variant of the previous guideline, under which courts question the reallocation of resources from broader to narrower uses, for it is very often the case with natural resources that they have their broadest uses when they are left essentially in their natural state. This result is in part a product of the physical fact of commonality, as with a lake, and in part a result of the extraordinary diversity of many natural systems, as with an estuarial area which may contain fishery resources, opportunities for swimming and boating, scenic views, and wildlife. To fill such an area and to build an apartment house on it would eliminate all those uses, which are enjoyed by a wide variety of people, in favor of a use that would benefit a small class of residents. Courts must be persuaded that any such transition promotes a significant public purpose.

Although this guideline could theoretically be subsumed within the third, there are advantages to maintaining it as a separate concept. It applies to particular water resources more clearly and more directly than does the third guideline and thus seems to be useful to the courts. Indeed, it might be helpful if such an approach were attempted with terrestrial resources.

IV. Postscript

This Article has been an extended effort to make the rather simple point that courts have an important and fruitful role to play in helping to promote rational management of our natural resources. Courts have been both misunderstood and underrated as a resource for dealing with resources. It is usually true that those who know the least about the judicial process are often the most ready to characterize the courts as doctrinaire and rigid, and the adversary process as a somewhat sinister game in which neither truth nor intelligent outcome are of importance to the participants. This Article

278. *See* notes 138-56 *supra* and accompanying text.

should help to dispel some of those beliefs, for it is demonstrable that the courts, in their own intuitive way—sometimes clumsy and cumbersome—have shown more insight and sensitivity to many of the fundamental problems of resource management than have any of the other branches of government. If lawyers and their clients are willing to ask for less than the impossible, the judiciary can be expected to play an increasingly important and fruitful role in safeguarding the public trust.

Mr. KARTH. Thank you, Mr. Chairman.

Mr. DINGELL. It would be helpful if you would see to it that we have for insertion in the record the statements and comments and the articles to which you have alluded on this point, if you please.

Professor SAX. I certainly will.

Mr. DINGELL. Mr. Rountree?

Mr. ROUNTREE. Thank you, Mr. Chairman.

I have two very brief questions.

First of all, I would like to ask, if I may, at this point—I have a series of questions. Some of them have already been alluded to and you have indicated that you would respond for the record on them, but I wonder if I could just present you with a list of questions that I have or some problems in my own mind and then ask you to respond in the record at an appropriate time.

Professor SAX. I would certainly be very glad to do that.

Mr. ROUNTREE. One point which you mentioned in your testimony on the Refuse Act of 1899 was that this does not provide or the provisions of such act do not provide for any type of a private citizen's suit. Now, I might be wrong—I know you are probably a more eminently qualified legal scholar than I am, but if I remember correctly, the Refuse Act does provide for a civil suit to collect a fine, penalty or forfeiture, a share of which the plaintiff is allowed to keep by the statute.

Professor SAX. Right.

Mr. ROUNTREE. Now, certainly the terminology of the language itself would be very confining in the regard of environmental class actions legislation. However, if you could direct your attention to an appropriate response for the record as to whether or not this particular right of action can be extended and how far.

Professor SAX. That is the very provision under which the suit that I mentioned was filed in Texas. There have now been, to the best of my knowledge, three cases that have been sought to raise this, and they have been thrown out in the Federal courts on the ground that while a private citizen who acts as an informer under the Refuse Act is allowed to collect half the fine, no private citizen may initiate the suit to collect the fine.

Mr. ROUNTREE. Because he doesn't have the required standing——

Professor SAX. That is right. The notion is that only the U.S. attorney can institute this provision.

Mr. ROUNTREE. One further question: I note that in section 303(a) of the bill, it provides that the transfer or the burden of proof and the burden of carrying on the case is transferred at a very early stage in the court proceedings from the plaintiff to the defendant, and I am wondering whether or not this is somewhat contrary to present or currently accepted legal doctrine and concepts or preceptive procedures, and if, by so doing in this provision of H.R. 5076, we don't somewhat upset the very delicate judicial balance that the courts have struck over the years in this regard, and, if so, certainly there must be a rationale behind this particular section, and if you could respond for the record or a brief comment at this point.

Professor SAX. I will try to do both. Let me just say a word about it briefly.

I view this provision involving the shifting of the burden of proof as an essential one, for some of the reasons that were mentioned to you earlier; that is, these are often cases that require a very considerable amount of technical evidence, and the economic burden on the plaintiffs of bringing all this forward is a very great one. It does not seem to me unfair to impose it on the defendant, because any defendant that is going forward, whether it is building a powerplant or housing development in a flood plain or whatever it may be, if he has done his homework, he ought to have this information. He ought to have examined the alternatives, and he ought to know which are the least destructive environmental alternatives. If the defendant is a governmental agency, of course, they should already have acquired this information, because it is required by section 102 of the National Environmental Policy Act.

So I think it is not unfair, and I think there is a need to relieve the plaintiffs of the burden of developing the record of all this technical information. Now, this is not as unusual a thing as it appears to be, because what we did ultimately in the Michigan law, as you know, is to treat some of this as an affirmative defense, and that is just another way of saying the same thing: that if the defendant wants to prevail, he must, as an affirmative defense, raise these things, and I am not sophisticated enough to understand all the nooks and crannies of the law of evidence, but I don't think we have done anything very different than that, or that you are doing anything very different than that, in section 303(a) here.

Mr. ROUNTREE. Thank you very much, sir.

I have no further questions.

Mr. DINGELL. Thank you.

Mr. Everett?

Mr. EVERETT. Just a couple of short questions of Professor Sax.

You mentioned in your suggested amendments a different subtitle for the bill other than "class action." I was wondering if, later, you could provide us with some suggested language for that. Also, in your rewriting of subsection (f) on page 5 of the bill, I note that you eliminated the words "Federal law" and retained the words "State law and regulations" but not "Federal law."

Professor SAX. Right.

Mr. EVERETT. Now, if you would, provide some explanation at a later time as to why you did that.

Professor SAX. Right.

(The information to be supplied follows:)

ALTERNATIVE DESCRIPTION AND TITLE FOR H.R. 5076

"To amend the National Environmental Policy Act of 1969 to establish the right of all persons to the protection, preservation and enhancement of the environment and to provide a civil action in the United States District Courts against persons responsible for creating certain environmental hazards."

Following Title III, on page 2, line 2 of H.R. 5076, substitute the following for the present substitle: "Civil Actions to Protect Environment."

You also asked me to explain why I would distinguish between federal statutes and state laws, state and federal regulations, in section 303(f) of H.R. 5076, at p. 5, lines 15-20.

My explanation, and suggested substitute language, follows:

It seems very harsh on the defendant to say that plaintiff is entitled to judgment if the defendant violates any state *or* federal law *or* regulation. I have

no trouble with a statement that says, in effect, that defendant can be compelled to comply with any federal *law*. I should think that is obvious enough; and I think any person who is in the protected class ought to be able to enforce the federal law against him.

I do not, however, think this proposed federal statute ought to adopt in advance all state laws and regulations on the environment as conclusive parts of the federal law.

Similarly, I do not think that every regulation adopted by a federal administrator ought to be adopted as conclusive in advance by the Congress.

While one understands the temptation to believe that not many state laws, or state and federal regulations, will be too harsh on polluters, that is, after all, a possibility. The Congress ought not blindly to impose these unknown and in some instances nonexistent standards on all defendants.

I would recommend the following: "Violation of state law, state regulation, or federal regulations shall be persuasive, but not conclusive, evidence in behalf of the plaintiffs in cases brought under this title."

So long as the bill addresses itself to this general subject, it probably ought to say something about compliance by the defendant with state law, and state and federal regulations. Certainly compliance with such provisions ought not to be a defense. For it should not be the law that a defendant is in a better position in the state that has the weakest environmental regulation. As to federal regulation, compliance also ought not to be a defense, for—as I indicated in my testimony earlier—one major reason for enacting a bill such as this is the recognition that at times federal administrative officials do not regulate environmental quality as vigorously or as fully as they should. The Committee might consider the following: "(1) Compliance with state laws or regulations, or with federal regulations, shall not be a defense; but (2) compliance with state laws or regulations, or with federal regulations, shall be admissible as some evidence that there is no feasible and prudent alternative to the activity at issue."

Mr. EVERETT. One other question. With respect to the Legal Advisory Committee, to the Council on Environmental Quality, I believe you are a member of that committee?

Professor SAX. Yes, but they don't take my advice very often.

Mr. EVERETT. There was some indication by Mr. Atkeson, I believe, that the Advisory Committee supported S. 1032, and I wondered if you could, at a later time, given us the benefit of your thoughts on this with respect to the Advisory Committee's actual recommendation.

Professor SAX. Yes. In fact, I would be happy to give you a copy of the Advisory Committee report.

Mr. EVERETT. That would be most helpful, Professor Sax.

Professor SAX. I certainly will do that.

(The information to be supplied follows:)

I am enclosing a copy of the resolution of the Legal Advisory Committee to the Council on Environmental Quality, adopted on September 14, 1970, on S. 3575, the identical predecessor of S. 1032 in the 92nd Congress.

I also enclose the report of the subcommittee of the Legal Advisory Committee, appointed to study and report on S. 3575.

The following members of the Legal Advisory Committee were present at the meeting of September 14, 1970 at which the following resolution was adopted: Whitney North Seymour, Jr., Chairman, Malcolm Baldwin, William T. Coleman, Jr., Christopher DeMuth, Frank P. Grad, Roger P. Hansen, Louis L. Jaffe, William F. Kennedy, Eugene Mooney, E. Lewis Reid, Nicholas Robinson, Ann L. Strong, Joseph L. Sax and David Sive, Members of the Committee.

Also present: Russell E. Train, Gordon J. F. MacDonald, Timothy Atkeson, and Members of the Staff of the Council on Environmental Quality.

Resolution Adopted by the Legal Advisory Committee

1. Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs.

2. Certain substantive and procedural impediments to the conduct of such litigation should be abolished, or substantially eased, including:

a. The defense of lack of standing;

b. The defense of sovereign immunity;

c. The extent to which environmental decisions by administrative agencies, particularly those involving conflicting values and proposed dispositions of natural resources, under the rules for review of administrative decisions, are required to be sustained unless arbitrary or capricious;

d. The absence of a clearly stated substantive right and right to proceed in Federal courts against unreasonable pollution, impairment or destruction of the environment resulting from an activity that affects interstate commerce; and

e. The imposition of bond requirements in preliminary injunction situations which in effect deny the standing of persons bringing environmental matters to the courts whose interests are not economic.

3. Insofar as the Hart-McGovern and Muskie Bills are designed to remove such impediments the Advisory Committee supports the bills, provided that:

a. The legislation adopted does not substantially alter the rules requiring exhaustion of administrative remedies prior to court action, where such rule may be applicable;

b. The legislation, in express terms if advisable, permits courts to remand or refer matters raised in suits brought before them to appropriate administrative agencies, whether or not such agencies have acted on such matters previously;

c. There is continuing study of the problem of the extent to which courts may review administrative environmental determinations.

4. This resolution shall not be deemed to represent an expression of the Committee that it regards private environmental litigation as the principal, sole, or sovereign remedy for enforcement of environmental standards, laws and rules.

Report and Recommendations of the Subcommittee on Private Litigation on S. 3575 and S. 3546

PRELIMINARY STATEMENT

The Subcommittee on Private Litigation (the "Subcommittee") of the Legal Advisory Committee (the "Committee") to the Council on Environmental Quality (the "Council") has been asked by the Chairman of the Committee to study and report to the Committee and make recommendations with respect to S. 3575 ("Hart-McGovern Bill") and S. 3546 (the "Muskie Bill").

This Report and Recommendations constitute an attempted summary and synthesis of the views expressed in writing by each of the members of the Subcommittee, in response to a written request by the Chairman of the Subcommittee, and of the views of the Chairman of the Subcommittee. Following the receipt by the Chairman of written comments from each of the members of the Subcommittee and on the evening of Sunday, September 13th, the Subcommittee met to consider and discuss the several matters involved in the two Bills. It was deemed unnecessary and unjustified to call an earlier and perhaps longer meeting, with the attendant heavy travel expense and problems of assembling the members of the Subcommittee in the summer months.

The meeting of the Subcommittee did, as anticipated, reduce and narrow the differences of view as expressed by the members of the Subcommittee in their written statements rendered to the Chairman. Some significant differences remain, reflecting in some cases differences between some of the members of the Subcommittee in their general views toward the function and importance of private litigation as an effective environmental protection instrument.

This Report and Recommendations does not attempt to reconcile remaining differences or to set forth a majority and minority report. It does set forth below a summary of the views of the members of the Subcommittee with respect to each of the several important features of the two Bills. A copy of each of the letters setting both the views of each member of the Subcommittee is annexed hereto.

It is assumed that each of the members of the Committee has studied and is familiar with the important provisions of the Hart-McGovern Bill and the Muskie Bill. Each of the members of the Committee has also received a copy

of the very helpful memorandum by William Lake to Mr. Atkeson, dated September 4, 1970 (the "Lake memorandum"). It is, accordingly, unnecessary to state herein any summary or outline of the several important features of the two Bills. There is set forth below an attempted summary and brief discussion of the views of the members of the Subcommittee with respect to each of the important features of the two Bills, under appropriate captions. To some extent, of course, the breakdown of the features of the two Bills deemed important reflects the analysis of the two Bills by the author of this Report, the Subcommittee Chairman, but it is believed that the subject matters do substantially embody all the important features of the two Bills.

THE VALUE OF PRIVATE LITIGATION AS AN ENVIRONMENTAL PROTECTION INSTRUMENT

A basic purpose and philosphy of the Hart-McGovern and Muskie Bills is the removal of several important substantive and procedural impediments to the bringing of private environmental suits. Four of the five members of the Subcommittee firmly believe that private suits have been and will continue to be a vital aspect of the environmental movement and an important instrument to advance the purposes and policies of the National Environmental Policy Act of 1969 (the "Act"). Only one member of the Subcommittee professes "a skeptical view of the value of litigation as the sovereign remedy for environmental ills."

THE BROADENING AND DEEPENING OF JUDICIAL REVIEW OF ADMINISTRATIVE ENVIRONMENTAL DETERMINATIONS

The greatest impediment to private environmental suits has been the breadth and depth of the power of the administrative agencies which govern most major natural resources. The views of two members of the Subcommittee on such powers are set forth in some detail in prior writings, those of Professor Sax in his forthcoming book, "Defending the Environment", and those of David Sive in an article in the May, 1970 issue of the Columbia Law Review.

Qualified somewhat with respect to one member of the Subcommittee, the attitudes of four of the five members may fairly be said to be clearly summarized in the following extract from the written reply of Professor Sax to the request of the Chairman of the Subcommittee for comment on the Hart-McGovern and Muskie Bills:

". . . Underlying my approach to private environmental litigation is the conviction that we have locked ourselves in to the regulatory agency approach as essentially our sole tool for dealing with enviornmental (and many other) problems. Like any single-minded apparatus for problem solving, the regulatory-agency model has inherent limitations. Most of these problems are well known and generally recognized. The agencies tend to develop a particular professional character (they are essentially engineers, or geologists, or lawyers, etc.); they develop because of their constant dealings with particular constituencies, an excessive closeness with the industries they regulate; they have needs and perspectives of their own (such as a program, a need for legislative appropriations, and good relations with particular key legislators and interest groups) which require them to (as one official put it to a congressional investigating committee) 'trade one achievement for another.' Finally, because they are ordinarily involved in one particular enterprise (building roads, managing forests, regulating pesticides) they tend to develop a narrowness of outlook which exalts that activity and slights others; this is similar to the attitude teachers develop about education and policemen about law enforcement. It is natural, and inevitable, but it does not represent the 'public interest' in its fullest sense."

One of the four Subcommittee members, in supporting the general purposes of the Bills, including what the Lake memorandum correctly describes by stating that the Hart-McGovern Bill "would shift the application and development of [the substantive law governing the permissibility or private or governmental activities that are deleterious to the environment] in some degree from Congress and the administrative agencies to the courts", (p. 6), nevertheless "would hesitate to modify present doctrines as to the scope of judicial review of administrative action", and would oppose court trials *de novo*. The fifth member of the Subcommittee believes that "the scope of judicial review of administrative determinations should remain limited" particularly where the administrative determination is arrived at in an adjudicatory proceeding. He raises the question as to whether the proponents of substantial broadening and deepening of

the scope of court review of administrative and environmental determinations believe such expanded review powers should govern in cases where the administrative determination is pro-environmentalist. The majority of the members of the Subcommittee who favor substantial change in the scope of review seek no different rule in the case of pro-environmentalist administrative determinations.

While the National Environmental Policy Act of 1969 (the "Act") does not expressly broaden or deepen the scope of court review of administrative environmental determinations, Section 102 of the Act represents a legal mandate to every Federal agency to curb any parochialism and the effect in the several short months since the effective date of the Act has been to broaden and deepen court review. See *Wilderness Society, et al.* v. *Hickel*, D.C., D.C., No. 928–70; *Zabel* v. *Tabb, et al.* (5th Cir. 27555, decision dated July 16, 1970) and other cases described in the memorandum of "Legal Actions Involving the National Environmental Policy Act", Exhibit F to the notice dated August 25, 1970 of the meeting of the Committee to be held on September 14, 1970.

THE STATUTORY GRANT OF STANDING

The members of the Subcommittee are in unanimous agreement that citizen groups and others who, responsibly and in good faith, seek to assert environmental rights and claims in federal courts or before federal administrative agencies, should have the standing to do so. While it may well be that recent court decisions, including *Citizens Committee* v. *Volpe*, 425, Fed. 97, render statutory grant of such standing unnecessary a majority of the members of the Subcommittee favor statutory grant, to put to rest any remaining doubts about the effect of recent court decisions.

The Committee has heretofore made known to the Council the Committee's view that continuance of the practice of most federal agencies of asserting lack of standing as a defense in citizens' environmental suits is unjustified and inconsistent with broad environmental policy declarations at the highest federal executive levels. The determination of the Solicitor General to abstain from raising the standing question in the petition to the Supreme Court for certiorari in *Citizens Committee* v. *Volpe*, may represent the acceptance by the administration of the recommendation of the Committee. The Subcommittee hopes that Mr. Atkeson or one of the members of the Council may comment upon this at the meeting of the full Committee which will consider this Report with Recommendations.

SOVEREIGN IMMUNITY

The Subcommittee unanimously believes that sovereign immunity should be abolished as a defense in environmental cases, by legislation, unless a clear policy determination to that effect is made at the highest executive level, with adequate enforcement of that policy determination at all lower levels.

THE CONCERN OVER MULTIPLICITY OF SUITS

A fundamental consideration with respect to the basic purposes and features of the Bills is that of the concern or lack of concern over a possible multiplicity of suits. A majority of the members of the Committee do not believe that either of the Bills will bring about any undue multiplicity. Two members of the Committee express fear of inundation of the federal courts with "strike" suits or other unjustified and unmeritorious actions.

The principal factors underlying the view of the majority of the members of the Subcommittee are: (1) the continuous lack of means of most citizens and citizens' groups to bring environmental suits, with no reason to believe that conditions will be substantially different in the future from those in the past; and (2) the powers of the federal courts to deal with and summarily dispose of suits which have no merit or which are brought in bad faith or for ulterior purposes. In this connection, the Subcommittee respectfully suggests that careful study be made of the question of the applicability of Rule 23 of the Federal Rules of Civil Procedure to environmental suits of the type of most of those brought to date. If they are class actions, Rule 23 provides a ready vehicle for disposition of such suits brought in bad faith or by persons who are inadequate representatives of the class, a class which may be as large as the general public of a whole region.

In this connection, the attention of the Committee is respectfully directed to the decision of the Second Circuit in *Citizens Committee* v. *Volpe* in which the court, per C. J. Moore, although significantly broadening the standing of citizens groups so as to hold that "the public interest in environmental resources," created by statutes in the *Citizens Committee* case is the "legally protected interest" referred to by the Supreme Court in *Jenkins* v. *McKeithen*, 395 U.S. 411, requires that the particular plaintiffs asserting such legally protected interest be "responsible representatives of the public." Whether or not "responsible representatives" means representatives who are "adequate" and meet the other requirements of Rule 23 and whether Rule 23 is directly applicable, it is the opinion of a majority of the members of the Subcommittee that federal courts have adequate tools to deal with unmeritorious suits in the environmental field, if and when such suits do multiply.

LIMITATION OF BOND REQUIREMENTS

Section 4(e) of the Hart-McGovern Bill would supervene certain provisions of Rule 56(c) of the Federal Rules of Civil Procedure with respect to bonds in connection with preliminary injunctions. The Lake memorandum summarizes Section 4(e) as follows:

"The court could not require a bond of the plaintiff except where the defendant showed that irreparable damage would result from the relief required, and then only if the imposition of bond would not unreasonably hinder the plaintiff's prosecution of his suit. The bill would require, however, that every complaint be supported by affidavits of two technically qualified persons to the effect that the defendant's conduct might damage the environment."

Two of the members of the Subcommittee regard the substance of the provisions of 4(e) as crucial. One member of the Subcommittee, with whom a fourth member of the Subcommittee is in substantial agreement, opposes "the blanket abolition of a bond in private environmental litigation", but favors amendment of Rule 65(c) of the Federal Rules of Civil Procedure, to ease the bond requirement, citing *Powelton Civic Home Owner's Association* v. *H. U. D.*, 284 F. Supp. 809, 839–40.

One member of the Subcommittee favors "a clarification of the Federal Rules to the effect that a bond in environmental cases is in the discretion of the court . . ." but believes "that constraints on that discretion of the kind included in the Hart-McGovern Bill are unsound."

DAMAGES

As pointed out in the Lake memorandum, neither of the Bills provides for damages actions. A majority of the members of the Subcommittee agree that such provision is either unwise or that consideration of it would raise several problems which require intensive study and would prejudice adoption of the major features of the two Bills of which they do approve.

One member of the Committee would add a provision to the Hart-McGovern Bill providing for damages, stating in his testimony before Senator Hart's Subcommittee:

"Experience has shown that in order for a law which regulates deleterious activities in interstate commerce to be effective, it should meet the following minimal standards:

"(1) It should clearly state that it was the intention of Congress to provide a private remedy giving rise to damages and injunctive relief;"

The views of the fifth member of the Subcommittee are set forth in the following extract from his letter to the Chairman of the Subcommittee:

". . . One of the greatest problems in encouraging private environmental litigation is that of finding anyone with a sufficient economic interest in the subject matter of the litigation to finance it. For that reason, attorneys' fees should be recoverable, and, if private rights are created against non-governmental entities, damages should be available in addition to equitable relief."

RECOMMENDATIONS

From the foregoing summary of views of members of the Subcommittee, it is clear that a majority of the Subcommittee support the principal features of the Hart-McGovern Bill and the Muskie Bill and that all of the members of the Subcommittee, with certain reservations and suggestions of changes in language,

support some of their features. Because of the limitations of the time in which the Subcommittee can meet and confer, no attempt has been made to refine the Subcommittee views to the point of suggestions of changes in language.

This Subcommittee Report is the first to be presented to and reviewed by the full Committee and in the full Committee's determination of the procedure for review of this Report it may consider general matters of procedure. Subject to the full Committee's determination of its general matters of procedure the Subcommittee recommends:

1. That the matters of substance reported on herein be fully discussed and considered by the full Committee.

2. That the views of the full Committee be recorded as to the several matters of substance involved in the Bills and discussed in this Report, and as to any other points which the full Committee deems relevant to its consideration of the Bills.

3. That Mr. Atkeson and the Chairman of the full Committee determine whether the substantive determinations of the Committee suffice, or whether the Committee should submit a more detailed report, considering, among other things, the precise wording of the two Bills.

4. That, if a more detailed report of the Committee is desired, the Chairman appoint a member of the Subcommittee to prepare such a report, consistent with all of the substantive determinations of the Committee, for approval by the Chairman and submission to the Council.

Respectfully submitted.

THE SUBCOMMITTEE,
By DAVID SIVE, *Chairman.*

Mr. DINGELL. Would you be able to tell us, Professor Sax, whether they have made any comments with regard to any of the legislation before this committee?

Professor SAX. I—not that I know of, but——

Mr. DINGELL. It would be helpful to us if it could be arranged.

Professor SAX. OK. Well, we can certainly get some advise from the advisory committee, from the council. I'm not in a position to make any guarantees.

Mr. EVERETT. One final question, Doctor. With respect to the bond that may have been required in each of the State cases, I was wondering if you could give us some idea as to the amounts of those bonds and if there were no bonds required, then also so indicate.

Thank you, sir.

Professor SAX. You are talking about bonds required under the Michigan law.

Mr. EVERETT. Under the Michigan law with respect to plaintiffs.

Professor SAX. Yes, I certainly will get you that information.

Mr. EVERETT. That is all, Mr. Chairman.

(The information to be supplied follows:)

BOND REQUIRED

You have asked me about the operation of the bond provision in the Michigan Environmental Protection Act. To the best of my knowledge, in only one case was a preliminary injunction issued by the court (and that was, I think, the only case in which such relief has been sought thus far). I believe I am correct in saying that no bond was required of the plaintiffs in that situation.

We have not, thus far, had much experience under the bond provision of the Michigan law.

Mr. DINGELL. Professor Sax, the committee is grateful, very grateful to you. I wish we had more time. I am sure every member of the committee has been disciplining himself rigorously because of the time limitations that we have. I certainly would like to ask you a goodly number, and we would hope that if I might inquire of you

by letter, that you would respond so that we would have your comments and counsel for the purposes of the record.

Professor SAX. I will, indeed. Thank you very much.

Mr. DINGELL. We are deeply grateful to you and we thank you for your presence.

The Chair notes that Mrs. James Houlihan of the East Michigan Environmental Action Council would like to give a statement.

STATEMENT OF MRS. JAMES HOULIHAN, EAST MICHIGAN ENVIRONMENTAL ACTION COUNCIL

Mrs. HOULIHAN. The East Michigan Environmental Action Council supports the passage of H.R. 5076. If our environment is to be protected throughout the Nation, citizens in other States must be given the opportunity available to Michigan residents to stop pollution through legal action.

Mr. DINGELL. The Chair notes that Mr. Paul Leach, executive director of the Michigan United Conservation Clubs, has informed the committee he wants to be heard, as he has a 1 o'clock speaking engagement.

STATEMENT OF PAUL J. LEACH, MICHIGAN UNITED CONSERVATION CLUBS

Mr. LEACH. The Michigan United Conservation Clubs is a private, nonprofit corporation, dedicated to the wise use of Michigan's natural resources and the protection and enhancement of the environment. The MUCC has 358 affiliated conservation and sportsman clubs around the State and has a total membership exceeding 130,000 members.

MUCC was actively involved in obtaining passage of act 127 of the public acts of 1970, the Thomas J. Anderson-Gordon Rockwell Environmental Protection Act.

Michigan citizens now have in hand the legal opportunity to bring suit in State courts against polluters. We hope that whatever is done with Federal legislation would in no way weaken that position.

With reference to the specific bills of concern today, we believe that H.R. 5076 contains some inconsistencies. The bill appropriately specifies in section 301 that our citizens are entitled to "enhancement" of air and water, and so forth, and that all citizens have the responsibility of "enhancement" thereof.

However, on page 3, line 12, and page 4, lines 11 and 19, pollution is actionable only if said pollution is "unreasonable." We do not see pollution as being "reasonable." It is difficult enough to obtain agreement on "what is pollution?" Let us not debate the unresolvable question of whose definition of "reasonableness" is actionable. We believe the Congress must make up its mind and insist that enhancement of the environment is an absolute necessity and then set about seeing that the will of Congress is achieved.

At this specific point in time, several Great Lakes carriers insist that it is perfectly reasonable not to obey Michigan law relative to sewage discharge in the Great Lakes. Michigan and MUCC disagree. We urge that H.R. 5076 make "pollution" of the air, water, and soil actionable and delete the word "unreasonable."