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The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention

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

*Joseph L. Sax**

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]

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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]

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), *revd.*, 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-

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

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

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

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]

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-

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

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

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

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 29, 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

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]

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. Underscoring 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:

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*, 264 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,

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]

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 513 (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, *affd.*, 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

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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> . . . .
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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-

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

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

extent that they involved land subject to public trust use, and valid to the extent that they covered lands worthless except by reclamation. But it was held that when the grant was part of a legislative program for public purposes, historic or potential public uses could validly be subordinated to such public schemes. Unfortunately, the scope of the state's power to further a public project affecting trust lands was not articulated in these early cases, for they involved such obviously legitimate uses of trust lands as the development of major harbors 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, 330, 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

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 be 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.
>
> . . .
>
> [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

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 water-borne 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

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

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.

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

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

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

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.), *affd.*, 278 F.2d 252 (D.C. Cir. 1958), *cert. denied*, 364 U.S. 835 (1960); Pauling v. McNamera, 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-

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

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.