Denver Law Review

Volume 63
Issue 3 *Natural Resources Law Symposium*

Article 5

February 2021

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TRUSTING THE PUBLIC INTEREST TO JUDGES: A COMMENT ON THE PUBLIC TRUST WRITINGS OF PROFESSORS SAX, WILKINSON, DUNNING AND JOHNSON

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INTRODUCTION

After several decades of chugging along far more slowly than the Illinois Central Railroad,[1] the public trust doctrine has taken flight during the last decade. Courts from Massachusetts to California have increasingly relied upon the public trust doctrine to justify an assortment of decisions that have the purpose of protecting natural resources from degradation or destruction. Proponents of the public trust doctrine urge that it is time to realize that the continent has been conquered and that something must be done to save it from those who would unknowingly or selfishly destroy it.[2] Because legislators and administrators have been parties to rampant environmental destruction, proponents argue that we must look to the courts for our salvation and offer the public trust doctrine as an ideal remedy for the courts to prescribe. Unfortunately, the doctrine is a bit limited in its historic application,[3] but that

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1. The leading case in public trust law is Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). This case has been read to justify a wide range of judicially imposed limits on the powers of legislatures to transfer resource allocation decisions to private parties. As with any evolving legal doctrine, the substance of modern public trust law is far broader than the substance of the decision which forms its foundation.

Although the *Illinois Cent. R.R.* case has been interpreted as invalidating the Illinois Legislature's transfer of title to submerged lands to the Illinois Central Railroad, this interpretation is in error. The decision actually holds that the railroad may not object when the legislature revokes such a grant. In other words, the public trust does not preclude the legislature from authorizing a railroad to manage submerged lands. It does preclude an irrevocable grant of such authority in the form of fee simple title: "The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day." *Id.* at 460. To read the case any other way is to deny the legislature power to decide how the submerged lands will best serve the public interest, and to transfer that power to the courts. The 1869 grant to the railroad was valid, but "[a]ny grant of [this] kind is necessarily revocable, and the exercise of the trust by which the property was held . . . can be resumed at any time." *Id.* at 455.

2. "Americans have demonstrated almost no success with self-limitation, particularly in non-renewable resource consumption . . . . With a seemingly inexhaustible American land frontier, this waste posed no apparent difficulty. One could simply move on — over the next hill or across the river." R. APPLEGATE, PUBLIC TRUSTS: A NEW APPROACH TO ENVIRONMENTAL PROTECTION 12 (1976).

3. *See* Stevens, *The Public Trust: A Sovereign's Ancient Perogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195 (1980). "For reasons largely historical, this public

should be no problem for the creative judge. A good hard look will surely reveal that something needs to be done.[4]

The rebirth and dramatic growth of the public trust doctrine is in no small part the product of a classic article on the subject by Joseph Sax. Those who are troubled by the new public trust doctrine must therefore pay close attention to Sax's writing. Other legal scholars have come to Sax's aid in shouldering the burden of justifying and explaining the public trust doctrine. Their writings therefore also deserve attention. In this article, I will comment on the writings of Professors Joseph Sax, Charles Wilkinson,[5] Ralph Johnson,[6] and Harrison Dunning.[7]

The doctrine has been used by courts to invalidate a legislative grant of submerged lakeshore lands to the Illinois Central Railroad,[8] to invalidate an agreement between Massachusett's Greylock Tramway Authority and a private ski area developer,[9] to invalidate the issuance of a permit by the Wisconsin Public Service Commission for the construction of a dam on the Namekagon River,[10] and to allow the California Water Resources Board to reconsider water rights permits granted to the City

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trust has commonly been associated with the sovereign's ownership of the beds of navigable waters, and its purposes have been traditionally delineated as those of 'commerce, navigation and fisheries.' " *Id.* at 195-96.

4. Professor William Rodgers has suggested that the federal courts "hard look" doctrine is similar to the public trust doctrine. See discussion *infra* at note 57.

5. Joseph L. Sax is a Professor of Law at the University of Michigan. Sax has discussed the public trust doctrine in several writings, including: SAX, DEFENDING THE ENVIRONMENT: A HANDBOOK FOR CITIZEN ACTION (1971); SAX, THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT 9 (H. Dunning ed. 1981); Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976); Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980) [hereinafter cited as Sax, *Liberating the Public Trust Doctrine*]; Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983) [hereinafter cited as Sax, *Decline of Private Property*]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *The Public Trust Doctrine In Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter cited as Sax, *Judicial Intervention*]; Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974);

6. Charles F. Wilkinson is a Professor of Law at the University of Oregon School of Law. Wilkinson has authored numerous works, including: Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1 (1980); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269 (1980).

7. Ralph W. Johnson is a Professor of Law at the University of Washington School of Law. His works include: R. HILDRETH & R. JOHNSON, OCEAN AND COASTAL LAW (1983); JOHNSON, THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT 118 (H. Dunning ed. 1981); Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C.D. L. REV. 233 (1980); Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 WASH. L. REV. 275 (1979).

8. Harrison C. Dunning is a Professor of Law at the University of California, Davis, School of Law. His writings include: Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?* 30 ROCKY MTN. MIN. L. INST. 17-1 (1985); Dunning, *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium, Forward*, 14 U.C.D. L. REV. 181 (1980) [hereinafter cited as Dunning, *Forward*]; Dunning, *The Significance of California's Public Trust Easement for California's Water Rights Law*, 14 U.C.D. L. REV. 357 (1980).

9. *Illinois Cent. R.R.*, 146 U.S. at 387.

10. Gould v. Greylock Reservation Comm'n, 35 Mass. 410, 215 N.E.2d 114 (1966).

of Los Angeles in 1940.[11] The doctrine's central idea is that the state is limited in its disposition and management of particular resources; that the state holds those resources in trust for the public and must dispose of or manage those resources consistent with that trust.

Historically, the doctrine has been associated with submerged lands,[12] but some commentators,[13] including Sax,[14] and some courts have sought to liberate the doctrine from this constraint.[15] This may sound straightforward enough, but the discussion of particular cases can be deceiving. As Professor William Rodgers has noted, "the public trust doctrine is resoundingly vague, obscure in origin and uncertain of purpose . . . ."[16] He also notes that "[t]here are few experts on the subject of the public trust and not many more who claim to be experts."[17] No doubt the public trust doctrine has determinable historic and modern content, but like much of the law, the doctrine is what we make of it. It is a tool to be used in pursuit of our objectives,[18] to be refined, redesigned, or discarded as our needs require.

The fact that we may find the public trust doctrine while rummaging about in our bag of legal tricks is convenient but not really very important because if the public trust doctrine does not fill our needs something else will.[19] The Oregon Supreme Court found the doctrine of custom in its warehouse of legal tools,[20] rusty and in need of oil, but still workable. Modern proponents of the public trust doctrine are influential not because of their expertise on the intricacies of the doctrine, but because of their expertise at bringing about judicial action in a legal sys-

11. Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, *aff'd*, 261 Wis. 492, 55 N.W.2d 40 (1952).

12. Nat. Audubon Soc'y v. Super. Ct. of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

13. Stevens, *supra* note 3.

14. *See, e.g.*, APPLEGATE, *supra* note 2; Hannig, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211 (1983); Wilson, *Private Property and the Public Trust: A Theory for Preserving the Coastal Zone*, 4 UCLA J. ENVTL. L. & POL'Y. 57 (1984); Comment, *The Emergence of the Public Trust Doctrine as a Public Right to Environmental Preservation in South Dakota*, 29 S.D.L. REV. 496 (1984). Other authors have argued that the public trust doctrine should be limited to its historical applications. *See, e.g.*, Jawetz, *The Public Trust Totem in Public Land Law: Ineffective — and Undesirable — Judicial Intervention*, 10 ECOLOGY L.Q. 455 (1982); Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63 (1982).

15. Sax, *Liberating the Public Trust*, *supra* note 5.

16. *See, e.g.*, State v. Sup. Ct. of Placer Cty., 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865 (1981); City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957).

17. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 2.16 (Supp. 1984).

18. *Id.*

19. This instrumentalist view of the law is rooted in the work of Willard Hurst. *See, e.g.*, W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1967).

20. State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); *see* Delo, *The English Doctrine of Custom in Oregon Property Law*: State *ex rel.* Thornton v. Hay, 4 ENVTL. L. 383 (1974). Delo reports that only New Hampshire had resorted to the English doctrine of custom, and, at that, no more recently than 1851 in Knowles v. Dow, 22 N.H. 387 (1851). *Id.* at 387. Delo argues that "[t]he Oregon Supreme Court's unexpected revival and modification of the English doctrine of custom presents significant logical and constitutional problems." *Id.* at 384.

tem that requires us to justify where we are going in terms of where we have been. It will not do to tell a court that it should authorize the review of 1940 water rights permits simply because circumstances have changed and the public interest requires review. What the court really needs is a legal doctrine that purports to authorize the requested judicial action. The public trust doctrine is interpreted by many as just such a doctrine.[21]

The foregoing comments reflect a perception of the law that does not conform to my perception of the dominant approach of American legal scholarship. Although American law teachers and legal scholars are all legal realists,[22] we are also the flag bearers for Langdellian legal science.[23] For the most part, we teach and write about law in the same manner as Langdell did.[24] We sort through the evidence, the legal data, in our libraries and seek to explain what the courts have been doing.[25]

The literature on public trust is no different. A 1980 conference at the University of California at Davis Law School was asked by Professor Harrison Dunning to consider several questions including: "[I]s there a single 'public trust doctrine' in natural resources law?"; "[I]s the public trust doctrine applicable to any natural resource, or is it limited to certain ones?"; and "[W]hat is the nature of the public trust?"[26] These questions are much like those which might be posed to a conference of scientists: Is there a single species of a particular type of animal, or, what is the nature of matter? Scientists do not ask whether there should be a

21. The doctrine of *stare decisis*, which requires this constant backward glance, is an effective, but not foolproof, way of assuring that the courts are kept within appropriate boundaries. Although ostensibly a doctrine that requires the courts to limit themselves, it is dependent upon constant extra-judicial scrutiny. The adversary process encourages clever lawyers to propose creative interpretations and applications of current or antiquated doctrines. The role of the critical commentator is central to assuring that *stare decisis* operates as a limit on the abuse of judicial power, instead of as a license for judicial government. Driven by the appeal of power, our courts will expect no more of themselves than we expect of them.

22. Legal scholars are all legal realists in the sense that we all recognize that the law is employed as a tool for a multitude of purposes. We know that the law is not a force independent from human values and human choice; we have exercised choice in charting our legal history and, as Grant Gilmore vividly reminds us, will choose to sink or swim in the future. Gilmore, *The Age of Antiquarius: On Legal History in a Time of Troubles*, 39 U. CHI. L. REV. 475, 488 (1972).

23. Dean Langdell sought to explain the law in terms of a few general principles that could be indirectly derived from the data of case law and from which judges and lawyers would deductively determine the results in future cases. For an excellent analysis of Langdellian Legal Theory, see Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

24. Langdell believed that law students should be taught from appellate cases and asked to extract the common principles from those cases for the purpose of determining what the law is. *Id.* One does not have to sit through very many law classes or look at very many casebooks to know that that is precisely what happens in most law classes. Although legal scholars are certainly doing other things as well, such as investigating the policy questions which our instrumental realism brings to mind, Dean Langdell would be pleased to know that the basic structure of what we do is his.

25. For an illustration of how this Langdellian approach pervades the legal enterprise from law school and legal scholarship through legal argument and judicial decision making, see HUFFMAN, *Legal Science is Alive and Well in American Law Schools*, in PROCEEDINGS FROM CONFERENCE ON LEGAL EDUCATION: 2000 (Glasgow University, August, 1985).

26. Dunning, *Foreword*, *supra* note 8, at 181.

single species or whether matter should have a particular nature. Nor do lawyers ask what the public trust doctrine should be. We prefer instead to cover our tracks with *stare decisis*, at most suggesting new directions by discussing trends, as if the law has a life of its own.[27]

This brief detour into legal theory should serve to explain my approach in critiquing Professors Sax, Wilkinson, Dunning, and Johnson. I will not engage in a debate about the historical roots of the doctrine, although I suspect that in-depth research on the Roman doctrine of *res communes*,[28] which writers on public trust like to cite as the ultimate authority,[29] may reveal something quite different from the current conception of public trust. Nor will I review the American case law, which dates from the early nineteenth century.[30] My purpose is to look behind the legal analysis to see if I can uncover each writer's policy agenda, and to assess how well they justify the consequences of the legal interpretations they propose. Although legal scholars generally talk and write as if the law has some independent source of life, few of us are fooled. We all know that the public trust doctrine is intended by its proponents to have particular consequences. Therefore, the merits of those consequences should be debated and the doctrine should be assessed to determine the likelihood that it will actually promote its intended purposes.

I. THE PUBLIC TRUST JURISPRUDENCE OF PROFESSOR SAX

In his 1970 article, Professor Sax wrote that the issue is whether the states are limited only by the ordinary constraints upon the police power, constraints that have as their purpose the protection of individual rights or by more restrictive limits on the legislative will.[31] The legislative will could be further limited in the interest of individual freedom, but we would not require a new doctrine for that purpose. We need only restate or reinterpret the so-called ordinary constraints upon the police power.[32] The more restrictive limits that Sax had in mind

27. For example, the New York Court of Appeals supported its decision to abandon charitable immunity for hospitals by noting that "the trend of decision throughout the country has more and more been away from nonliability." Bing v. Thunig, 2 N.Y.2d 656, 659, 143 N.E.2d 3, 7 (1957). Sax notes a judicial trend in the treatment of property rights. Sax. *Decline of Private Property*, *supra* note 5.

28. The United States Supreme Court has interpreted the Roman doctrine as applying to running waters, the air and the sea — "things Common to all and property of none." United States v. Gerlach Live Stock Co., 339 U.S. 724, 744 (1950). The doctrine of *res communes* was defined in the Institutes of Justinian in these terms: "Res communes: open to everyone: the air, running water, the sea . . . and the seashore to the highest winter floods." It was distinguished from private property and *res publicae*, which were the "[p]roperty of the state" and "were highways, rivers, and harbours, . . . that all might navigate and fish . . . the use of banks being public for this purpose." THE INSTITUTES OF JUSTINIAN 2.1.1 (Moyle trans. 5th ed. 1912).

29. *See, e.g.*, Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, *supra* note 5, at 185; Dunning, *The Public Trust Doctrine and Western Water Law*, *supra* note 14, at 17-4.

30. For discussions of the American history of the doctrine, see Stevens, *supra* note 3 and Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 5, at 475-91.

31. Sax, *Judicial Intervention*, *supra* note 5, at 477.

32. For example, consider the reliance upon constitutional protections of individual liberty, or an effort to give constitutional definition to the police power concept. Neither approach is likely to be appealing to most public trust advocates because both could serve

were to have a different purpose; the protection not of private rights, but of the public interest.[33]

What is the public interest? Sax does not offer many thoughts on that question. I suppose that he, like so many others, assumes that the answer is obvious — the very purpose of a government's existence is to serve the public interest. Political scientists, whose business it is to define concepts like "public interest," usually tell us that "public interest" is what the public authorities, properly constituted, say it is.[34] In our society, the proper constitution of public authority is democracy, but Professor Sax suggests that the courts should employ the public trust doctrine to limit the democratic legislature in the name of the public interest.[35] Everyone knows that the legislature is a far more democratic institution than the judiciary. Therefore, it seems that Sax may have gotten it backwards. How can the counter-majoritarian courts protect the public interest from the democratic legislature?

Although Sax admits that "there is no well-conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection,"[36] he argues that some important ideas converge in the public trust doctrine. First is the idea that certain interests are intrinsically important to a free society.[37] Surely no one will dispute this idea. Consider the interest of the individual to be free from abuse of criminal process or to express one's political views? But these types of interests are not quite what Professor Sax has in mind. Instead, he is thinking more about those interests which have been at the heart of every call for freedom: fishing and navigation.[38] I do not mean to belittle the importance of fishing and navigation to the

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the interests of either side in resource allocation disputes. The one-sided nature of the public trust approach is discussed *infra* at notes 78-83 and accompanying text.

33. Professor Sax begins his 1970 article with the statement that: "[p]ublic concern about environmental quality is beginning to be felt in the courtroom." Sax, *Judicial Intervention*, *supra* note 4, at 473. His very next sentence states that "[p]rivate citizens, no longer willing to accede to the efforts of administrative agencies to protect the public interest, have begun to take the initiative themselves." *Id.* at 473. Professor Sax would surely be among the first to challenge the invisible-hand arguments of the free enterprise advocates, yet his evidence of detriment to the public interest is private unrest. The only difference would seem to be that free enterprise proponents admit to being motivated by self-interest, while Sax's private citizens claim to be motivated by the public interest.

34. *See, e.g.*, THE PUBLIC INTEREST (C. Friedrich ed. 1962).

35. Professor Sax states that some democratic decisions will be "ultimately found to be unjustifiable." Sax, *Judicial Intervention*, *supra* note 5, at 491. Later in the article, he explains that the democratic failures addressed by the public trust doctrine are different from the failures which result from the influence of a tyrannical majority. The latter requires judicial intervention in the name of individual rights. The democratic failures requiring public trust intervention result when "a diffuse majority is made subject to the will of a concerted minority." *Id.* at 560. Professor Sax would have the courts remand "appropriate cases to the legislature after public opinion has been aroused." *Id. See infra* text accompanying notes 47-61. Professor Sax does, however, state that the courts will "probably not impose public trust constraints on explicit legislative acts," *id.* at 542, but then identifies two exceptions where such judicial intervention in the legislative process will be appropriate. *Id.* at 542-43. *See infra* text accompanying notes 60-61.

36. Sax, *Judicial Intervention*, *supra* note 5.

37. *Id.*

38. *Id.*

enterprise and commerce of eighteenth and nineteenth century American society, but in 1970, neither fishing nor navigation on internal waters were essential to a free American society. The once mighty Columbia River had been reduced by dams to a long string of ponds with a sadly depleted fishery,[39] but freedom was doing about as well in the Pacific Northwest as anyplace else in the world. What is important to the concept of freedom is not fishing and navigation in-and-of themselves, but rather what they have symbolized in American history: free enterprise, commerce, and the right of every individual to share in the exploitation of nature's bounty.

This concern for nature's bounty, although stated somewhat differently by Sax, is the second idea which Sax argues intersects the public trust doctrine. He believes that that there are some interests that "are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace."[40] Sax analogizes the legislative protection of the "great ponds" of early New England to the twentieth century protection of national parks.[41] However, there is a fundamental difference between early New England and our modern society that the intervening centuries have obscured. Seventeenth-century New Englanders were not protecting their great ponds from destruction by communal exploitation, which is the central purpose of today's national parks, rather they were asserting the right of everyone to exploit nature's bounty against a King who had sought to keep all the natural resources of the early colonies for the Crown.[42] Thus, Sax has unwittingly relied upon the right of all individuals to exploit natural resources as a foundation for the public trust doctrine.

Finally, Sax grounds his public trust doctrine on the recognition "that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate."[43] His example is the usufructuary nature of private interests in water. He argues that riparian and appropriation water law recognize only usufructuary rights because of the perceived importance of protecting the public interest in the water resource.[44] This, however, is simply not true. The usufructuary nature of water rights is a product of the migratory nature of the water resource. Recognition of title in the water itself is not practical in light of its evanescent character. The fact that a water right is a usufruct makes it no less enforceable against private or public interference than are rights in land. Indeed, state interference with private use of land has far outstripped state regulation of private water use over the last half century, notwithstanding that water rights are usufructs. Anyone who says, as Sax did in 1970, that "[i]t is . . . thought to be incumbent upon the

39. *See* Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175 (1982).

40. Sax, *Judicial Intervention*, *supra* note 5, at 484.

41. *Id.* at 484-85.

42. *See also* Sax, *Decline of Private Property*, *supra* note 5.

43. Sax, *Judicial Intervention*, *supra* note 5, at 485.

44. *Id.*

government to regulate water uses for the general benefit of the community . . . ,"[45] either knows little about American water law to that date, or is trying to mislead us. It is clear that Professor Sax knows a good deal about water law.[46]

Despite the weakness of Sax's purported foundation for the public trust doctrine, the doctrine is flourishing,[47] often with reliance on the Sax argument. But Sax does not rely exclusively on history. His central thesis is that democracy sometimes does not work; that some democratic decisions are "ultimately found to be unjustifiable."[48] Sax urges that this finding is to be made by the courts because "it will often be the case that the whole of the public interest has not been adequately considered by the legislative or administrative officials."[49] Among the reasons that Sax cites for democratic failures are "limited visibility" policy decisions,[50] "inequality of access to, and influence over, administrative agencies"[51] and localism.[52] According to Sax, "[t]he public trust concept is not so much a substantive set of standards . . . as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process."[53] Sax goes on to state that the doctrine is "a medium for democratization."[54] It is an idea that John Hart Ely would later apply to a broad interpretation of judicial review under the Constitution,[55] and one which neither Sax nor Hart have adequately justified.[56] Unanswered is the question of why the judiciary, an elitist institution with few democratic credentials, should be in a position to second-guess the actions of a legislature and its administrators.

In his environmental law handbook, Professor Rodgers describes the public trust doctrine as the state's version of the federal courts'

45. *Id.*

46. *See* J. SAX, WATER LAW, PLANNING & POLICY (1968).

47. W. RODGERS, *supra* note 17. Professor Rodgers cites California, New Jersey, Illinois, and Wisconsin as states where the doctrine has received recent consideration. Other states adopting the public trust doctrine are: Florida [Graham v. Estuary Properties, Inc., 369 So. 2d 1374 (Fla. 1981)]; Louisiana [Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1975)]; Massachusetts [Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979)]; North Dakota [United Plainsmen Assocs. v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976)] and Oregon [Morse v. Oregon Div. of State Lands, 285 Or. 197, 590 P.2d 709 (1979)].

48. Sax, Judicial Intervention, *supra* note 5, at 484.

49. *Id.* at 495.

50. *Id.*

51. *Id.* at 498.

52. *Id.* at 531.

53. *Id.* at 509.

54. *Id.*

55. J. ELY, DEMOCRACY AND DISTRUST (1980). Professor Hart's concern is about a different type of democratic failure. The focus of his concern is the problem of the "discrete and insular minority" rather than the silent majority that Sax wishes to protect. *See supra* note 35.

56. The inadequacy which Professors Sax and Hart share is in failing to explain why democracy is or ought to be a fundamental value of the American political process. If we accept that it is, Professor Hart's argument is more persuasive than Professor Sax's because the "discrete and insular minority" has in a real sense been excluded, while the silent majority has simply failed to get involved.

"hard look" doctrine.[57] Sax apparently agrees with this characterization, having noted that "[i]t is no more — and no less — than a name courts give to their concerns about the insufficiencies of the democratic process."[58] Thus perceived, the justification of the public trust doctrine is merely part of the general effort to justify an activist and interventionist judiciary.[59] Defenders of the "hard look" doctrine are at pains to explain that it is purely a form of procedural intervention[60] and maintain, as Sax does with the public trust doctrine, that it "has no life of its own and no intrinsic content."[61] Nevertheless, courts must have standards which tell them when there has been a short in the democratic circuits. Do the courts really look at the process, assuming they will know a democratic failure when they see one, or do they look at the substantive product of the suspect democratic action? It might be argued that the answer to this question does not really matter if the available remedies are purely procedural. However, it would be naive to suggest that procedural remedies do not have substantive consequences. The history of environmental litigation over the last two decades is one of procedural remedies being employed for well-defined substantive purposes.[62]

Sax suggests that the courts are hesitant to overturn explicit legislative action "even if [the] authorization seems to go to the outer edge of legitimacy."[63] Presumably this "outer edge of legitimacy" is where the democratic process is being abused. According to Sax, the hesitant courts will recognize this realm of legislative abuse by "blatant evidence of corruption"[64] or by the need for specific legislative authorization by a broadly representative agency.[65] The courts will know as much about corruption as any other public institution, so perhaps they can effectively intervene when votes have been sold or officials have been bribed. But they surely need nothing so obscure as the public trust doctrine to justify intervention in such cases. So, it is really Sax's second character-

57. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 2.16 (1977).

58. Sax, *Judicial Intervention*, *supra* note 5, at 521.

59. Proponents of the public trust and the "hard look" approaches will deny that judicial application of these doctrines constitutes either activism or interventionism. Yet, however labeled, these doctrines undeniably involve the judiciary in decisions that would otherwise be the exclusive domain of the legislative and administrative branches of government.

60. Some are at greater pains than others. Judge Wright of the District of Columbia Circuit Court of Appeals argues for a substantive review of agency actions. Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1984). Judge Bazelon of the same court argues for a purely procedural review. Bazelon, *Science and Uncertainty: A Jurist's View*, 5 HARV. ENVTL. L. REV. 209 (1981).

61. Sax, *Judicial Intervention*, *supra* note 5, at 521.

62. One example of a procedural remedy being employed for substantive purposes is the litigation occurring under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et. seq.* (1970). For discussions of the substantive aspects of this act, see Comment, *The National Environmental Policy Act of 1969: Toward a Substantive Standard of Review*, 4 N.Y.U. REV. L. & SOC. CHANGE 163 (1974) and Note, *Substantive Review under the National Environmental Policy Act*: EDF v. Corps of Engineers, 3 ECOLOGY L.Q. 173 (1973).

63. Sax, *Judicial Intervention*, *supra* note 5, at 542.

64. *Id.* at 542-43.

65. *Id.* at 543.

istic of legislative abuse which will identify cases requiring public trust intervention. Thus, Sax is really concerned about those cases where not everyone had a fair opportunity at influencing a decision, not because someone illegally precluded their input, but because of inadequacies inherent in the representative democratic process. Sax's concern for democratic failures is legitimate. In a complex society where government is called upon to do many things, the opportunities for democratic breakdown are numerous. Because every special interest will recognize the possibilities for gaining particular advantage, Professor Sax would have the courts ever on the lookout for decisions that are the consequence of legal, but unfair influence.

There is an intriguing parallel between this justification of the public trust doctrine, which according to Sax provides "considerable opportunity for fruitful judicial intervention,"[66] and the standard justification for government intervention in the market allocation of resources. Market system failures are said to justify government regulation or ownership of resources. By entrusting a democratically constituted government with the power to allocate resources, society guards against the ancient abuses wrought by kings and emperors. Thus, we substitute fairness for efficiency as our resource allocation goal, while guarding against power-hungry political bosses picking up where the robber barons left off. Sax argues that democratic failures require intervention, and that no one but the courts are left to do it. Thus, governmental intervention to correct for market failures is paralleled by Sax's insistence that courts must intervene to correct for legislative and administrative failures. Sax, however, neglects to address the questions of who will intervene to correct for judicial failures, and more importantly, whether the situation has been improved or worsened by judicial interventions in private decision making.

Sax insists that the courts are quite competent in intervening in the allocation of natural resources, noting that the California and Wisconsin courts have "fruitfully engaged" in the process of discriminating between appropriate and inappropriate dealings with public trust lands.[67] But whether or not a particular use of public trust lands is appropriate depends on the standards of propriety applied. Assume for a moment that Professor Sax is Judge Sax sitting with Judge Posner on the federal bench. Will Sax and Posner agree that the Wisconsin and California decisions are "fruitful?" They might agree that a particular decision was "fruitful," but for very different reasons. Judge Posner does not mind a little judicial activism in the name of efficient resource allocation.[68] Sometimes Posner's standard of propriety (efficiency) will coincide with Sax's idea of the appropriate use of public trust lands, but often it will not. Posner will be able to explain his conclusion in the relatively pre-

66. *Id.* at 544.

67. *Id.* at 552.

68. "Since any ruling of law will constitute a precedent, the judge must consider the probable impact of alternative rulings . . . ." R. POSNER, ECONOMIC ANALYSIS OF LAW 19 (2d ed. 1977).

cise concepts of resource economics. A debate with him would focus on his interpretation and application of economic principles and the propriety of the value of efficiency as a goal in resource allocation.

A debate with Judge Sax would be less fruitful. This is because it is almost impossible to predict what result the democratic process, when functioning properly, will produce; therefore, it is extremely difficult to discern whether or not there has been a democratic failure leading to an inappropriate use of public trust lands. The democratic failures which concern Sax are not those which result from blatant racial discrimination or rural dominance in malapportioned state legislatures.[69] The equal protection clause is adequate to correct for such failures. Sax is concerned about the subtle democratic failures inherent in the day-to-day lobbying, negotiating, vote-swapping, log-rolling, back-slapping, and even back-stabbing that are the staples of the legislative process. Unfortunately, Sax neglects to tell us how to identify this sort of democratic failure, nor does he even suggest that we will know it when we see it. What we will know, including those of us who are judges, is whether or not we like the resource allocation decision which has been made.

Sax likes the results of the public trust decisions of the Wisconsin and California courts. I also like those results, but cannot defend the means employed to accomplish them. Sax has failed to provide an adequate justification. His democracy argument is a smoke screen for a doctrine that permits some losers in the political arena to have a second chance in the courts.[70] I say some political losers because it is, in effect, a biased doctrine which serves the personal values of Joe Sax and Jim Huffman, but not of everyone, or even necessarily a majority, in American society. Not only do judges determine the standard of propriety, but they establish many of the rules for access to judicial review. Thus, even when judges are elected, the courts by nature of their function are not democratic institutions. Not everyone is in a position to bring their concerns before a policy-making court.

Ten years after his 1970 article, Sax wrote a short piece for a symposium on the public trust doctrine.[71] In that article he introduced an additional argument for the public trust doctrine. Sax argued that "[t]he central idea of the public trust is preventing the destabilizing disappointment of expectations held in common, but without formal recognition such as title."[72] In support of this argument, Sax employed the familiar example of the commons. Although Sax acknowledged the inefficiencies of the commons described by Hardin[73] and many others, he focused on the expectations developed by the common folk in the use of

69. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Education, 347 U.S. 483 (1954). These are the types of democratic failure that concerned Professor Hart in his book, DEMOCRACY AND DISTRUST (1980). *See supra* notes 35 and 53.

70. I have developed this theme in more detail in a review of R. APPLEGATE, *supra* note 2. Huffman, *Public Trusts: Gaining Access to the Courts*, 8 ENVTL. L. 217, 230-31 (1977).

71. Sax, *Liberating the Public Trust Doctrine*, *supra* note 5.

72. *Id.* at 188.

73. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

the commons, which were subsequently disappointed by the assertions of power by knights, lords, and other members of the exploitative class.[74] For Sax, the commons was a battleground of class struggle and feudal exploitation, not a place of inefficient resource allocation. According to Sax, the disappointment of the expectations of the common folk led to agrarian revolts.[75] Sax implies that if there had been a public trust doctrine at the time, the courts could have told the knights and lords to let the peasants continue to farm.[76] Although such a result would undoubtably have satisfied Sax, Judge Posner would probably not be impressed with the solution.

Without a doubt this latest pronouncement by Sax on the public trust doctrine offers an activist court additional ammunition to justify its intervention. Yet, from a theoretical point of view, there seems to be little connection between the democracy justification and the stability justification. Indeed, a properly functioning democracy is capable of upsetting popular expectations and thereby destabilizing society. Thus, it appears that Sax would have the courts intervene even in those instances where the democratic process has worked properly, but expectations have been upset. One wonders if judicial action will also be appropriate where expectations are being protected by a malfunctioning democracy.

A democracy is capable of confirming, as public rights, popular expectations which have the purpose and effect of disadvantaging particular segments of society. Many democratically confirmed expectations were upset by the civil rights laws of the 1950's and 1960's, but all recognize that those expectations did not merit protection. How about the expectations of those who have fished, hiked, and driven on the public lands for decades and are now precluded in the interest of resource protection? Professor Sax will have no difficulty in refusing to protect those expectations, but others will disagree. There are expectations and there are expectations. There is stability and there is stability.

In a 1984 article for the University of Pittsburgh Law Review, Sax refers to a picturesque village, in rural Arkansas, Boxley Valley, to illustrate his argument for protecting the expectations of a community.[77] Perhaps Boxley Valley will make a fine museum, but should we preserve its quaint "vernacular country architecture"[78] and agricultural lifestyle in the name of community stability. Every rural community, including those less quaint than Boxley Valley, is interested in stability. A community identical in appearance to a hundred other communities is no less a community. Change, while often uncomfortable, is inevitable. Sax does

74. Professor Sax attributes the shift from the "agrarian economy of the forest, with its common uses and customary rights," to the pressures for privatization, class separation, and resource exploitation. Sax, *Liberating the Public Trust Doctrine, supra* note 5, at 190-91.

75. *Id.* at 189-90.

76. *Id.*

77. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 507 (1984).

78. *Id.*

not claim that the public trust doctrine can or should be employed to preserve the unique community of Boxley Valley, but that conclusion flows from his earlier arguments for democracy and the protection of expectations. A doctrine that serves "to prevent the destabilizing disappointment of expectations held in common"[79] for the use of beaches and navigable waters, certainly would serve to prevent disappointment for those who treasure the quaintness of Boxley Valley.

What really concerns Professor Sax is the question of local autonomy in a highly integrated national political and economic system. It is an important issue that is better addressed on its merits than obscured by the mysteries of public trust doctrine or other forms of judicial intervention. Although the public trust doctrine may serve the nostalgic interests of those who choose to live where community is of little importance, it is unlikely, indeed impractical, that it will serve the interests of those whose lives and expectations are strongly tied to a particular community. Those people, absent the assistance of benevolent outsiders, can preserve their community through the political and economic processes.

II. THE PUBLIC TRUST JURISPRUDENCE OF PROFESSOR WILKINSON

Professor Wilkinson is concerned with the application of the public trust doctrine to the management of the federal public lands, which he notes "are at the outer reaches of the public trust doctrine."[80] Wilkinson describes a parallel between the public trust doctrine and public land law. He identifies three historical eras in public land law, the most recent of which dates from 1970.[81] Since that date, with the adoption of the Federal Land Policy and Management Act[82] and other legislation, public land law has become a source of public rights.[83] The government has moved from the role of proprietor to the role of sovereign in relation to the public lands. As a sovereign, the government is limited by the rights of the public, both through public trust and public land law.[84]

Wilkinson's argument depends upon the acceptance of the notion

79. *Id.*

80. Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 6, at 273.

81. During the first era (up to 1888), the federal government had an obligation to the states to dispose of public lands and make new states. During the second era (1888-1970), the public lands were a source of federal power to manage natural resources. The third era (since 1970) is one of public rights derived from public ownership of land. *Id.* at 278, 280, 284.

82. Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743 (1976).

83. The third era "involves the direct or indirect use of the public trust doctrine to limit federal power and to justify rights of the public against the federal government." Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 6, at 284.

84. "[t]he shift to a conceptualization of the federal role as governmental rather than proprietary focuses attention on duties to the public. Rulemaking is required, records are open, decision-making is shared, and the courts are available because public lands business is public business. It is the public to whom public lands managers are ultimately accountable."

Id. at 304. A parallel effect of this change in conceptualization of the federal role is that private parties harmed by federal actions are less likely to recover compensation. The

of public rights as meaningful. His point is not that individuals have rights rooted in the public trust doctrine, although at least some individuals must have standing to act on behalf of the public. Instead, his point is that the public, as an entity, has rights. I am skeptical about the concept of public rights, which, like the concept of the public interest, will forever elude a definition that is acceptable to all individuals and groups in society. I am even more skeptical about our ability to agree upon what a public right is, assuming that such things can be said to exist in any meaningful sense. The problem of defining public rights is similar to the problem Christopher Stone faced in defining the rights of inanimate objects.[85] Indeed, Wilkinson links these two concepts in asserting that "the [public trust] doctrine protects the resources themselves."[86] The difficulty with Stone's idea was that individual people had to act on behalf of the inanimate objects, thus requiring reliance upon some individual's perception of the interests of the inanimate object. The same problem exists for actions on behalf of the public trust.

In the *Mono Lake* case,[87] for example, it was not an officially designated representative of the public who brought the action, but rather a self-appointed representative who was suing the official representatives.[88] Wilkinson claims that the doctrine will not permit judges to be "roving ambassadors"[89] on behalf of environmentalists, that it is a "value-neutral" approach.[90] But I do not think Professor Wilkinson really believes that the Mountain States Legal Foundation, for example, could successfully rely on the public trust doctrine to get an injunction against the National Park Service requiring the extermination of Yellowstone's grizzly bears because they threaten public enjoyment of the park. On the other hand, it is quite conceivable that an injunction might issue pursuant to the trust doctrine or public land laws requiring the exclusion of humans from some areas to protect the grizzlies' use of the park. It is not a value-neutral doctrine. It is a doctrine which serves the interests of groups with particular conceptions of the public interest. I am for the bears, but many of my fellow citizens can do without them.

Unlike Sax, who seeks to obscure the counter-majoritarian diffi-

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distinction is one which runs from government tort liability through takings law, to public resource management, although not necessarily consistently.

85. Stone constructed a persuasive case for the idea of natural objects having rights, but failed to explain how those rights would be defined and asserted except by self-interested individuals purporting to act on behalf of the natural object. C. STONE, SHOULD TREES HAVE STANDING (1974). *See* Huffman, *Trees as a Minority*, 5 ENVTL. L. 199 (1974).

86. Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 6, at 315.

87. *National Audubon Soc'y*, *supra* note 12.

88. Defendant Department of Water and Power of the City of Los Angeles is the administrative body responsible for implementing the public interest as determined by the Los Angeles City government. The Department's water rights were granted pursuant to legislation administered by the California Water Board and enacted by the California Legislature. The plaintiff National Audubon Society has no similar claim to being a democratically certified representative of the public interest or protector of the public rights.

89. Wilkinson, *The Public Trust Doctrine in Public Land Law*, *supra* note 6, at 315.

90. *Id.* at 316.

culty, Wilkinson is quite up front in his preference for judicial intervention. Wilkinson argues that the doctrine is rooted

> in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles. This is an accepted process in our law: Anglo-American jurisprudence is rife with judicially developed doctrines that reflect the deeply held convictions of our society.[91]

This argument, however, undercuts Wilkinson's assertion that the doctrine is value-neutral for it is difficult to comprehend how deeply held convictions can be value-neutral. Moreover, the assertion that the judiciary is the source of most judicially enforced American convictions is debatable. Most "American convictions" of legal significance trace directly to or are expressed in the Constitution. Few would assert that the public trust doctrine has constitutional roots. Indeed, the doctrine functions to limit the constitutional role of the legislative and executive branches of government.

III. The Public Trust Jurisprudence of Professor Dunning

Professor Dunning has authored two articles on the public trust doctrine, one in anticipation of the *Mono Lake* decision[92] and the other as a follow-up to that case.[93] In the first article, Dunning lays out the California law of public trust easement in a straightforward and understandable manner.[94] He addresses the counter-majoritarian difficulty, arguing that democracy is protected by the fact that public trust uses may be eliminated if the change is consistent with public trust purposes.[95] However, the determination of public trust purposes remains with the courts, and the legislature will take its chances in altering public trust uses. It is also difficult to agree with his argument that the public trust easement is the only way of providing public benefits because, as he admits, California law provides "[n]o water right may exist simply for the benefit of the public in general."[96] There are significant public benefits, in the sense of benefit to persons other than the rights holder, that are derived from private rights in water. If California water law prohibits the creation of private rights which deliver only public benefits, the public trust easement is not the only way, nor the best way, to resolve that problem. If public sentiment strongly favors providing these public benefits, then the California legislature could surely be persuaded to amend this restrictive law.

Dunning argues that "it should not follow that, merely because the

91. *Id.* at 315.

92. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, *supra* note 8.

93. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, *supra* note 8.

94. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, *supra* note 8, at 363-78.

95. *Id.* at 370.

96. *Id.* at 383.

physical capacity exists and water rights are recognized, a court must permit a project operator to divert water from the basin to the full extent of the water rights."[97] However, unless a water right is something other than a right to divert water, it does follow that such diversion must be permitted. Under Dunning's interpretation, a water right is a right to divert water except when a court or some other authority disagrees. That is not a very meaningful right. It is true that California water users have had to deal with uncertainties and that, as Dunning has noted, "the need for adaptation is nothing new to California's water rights system,"[98] but Californians pay a price for that uncertainty. At present, California has a private rights system for water allocation. That system, like any social institution as Sax notes,[99] will benefit from stability. The *Mono Lake* decision has introduced significant uncertainties into California water use allocation.

In his article for the 1984 Rocky Mountain Mineral Law Institute, Dunning discussed the *Mono Lake* decision and recent developments in other jurisdictions. To assuage the fears of developers, he states that "there is no reason to believe [that the public trust doctrine] has greatly modified the course of . . . development [along the water's edge]."[100] This assurance seems a little disingenuous if the doctrine is really perceived as a means for protecting public uses against the ravages of private development. In fact, Dunning admits, unlike Wilkinson, that the doctrine "serves as an instrument to strengthen the hand of those concerned about maintaining coastal access and preserving some of our rapidly disappearing wetlands."[101] He does not suggest, however, that it strengthens the hand of real estate developers.

Unlike Sax, who claims that the doctrine is only a means of referring decisions back to the legislature, Dunning recognizes that "[a]ll existing water rights which adversely impact public trust values are now subject to reconsideration and modification by either an agency or a court in the name of the public trust."[102] Thus, the courts will have to decide the substantive questions of the extent of land subject to the trust and the uses protected by the trust. Dunning admits that different judges, Mosk and Rehnquist in his example,[103] will come to different conclusions. This diversity of judicial opinion is not the preservation of democracy in action, as Sax argues. Rather it is judicial law-making in the name of the public interest. Although we may agree with a particular judge's determination of the public interest, the judiciary as an institution is not competent to make such determinations.

To his credit, Dunning's analysis of the public trust doctrine as a

97. *Id.* at 396.
98. *Id.* at 397.
99. *See supra* notes 67-73 and accompanying text.
100. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, *supra* note 8, at 17-39.
101. *Id.* at 17-40.
102. *Id.* at 17-42.
103. *Id.* at 17-23 to 17-24.

close relative of the reserved rights doctrine and of the reasonableness principle of California water law is logically sound.[104] All three doctrines are means of judicial intervention in public policy making, along with several other doctrines mentioned by Professor Johnson, whose writings are the final subject of my critique.

IV. THE PUBLIC TRUST JURISPRUDENCE OF PROFESSOR JOHNSON

Johnson adds to the list of water law doctrines supporting judicial intervention an expanding navigation servitude, the federal doctrine of equitable apportionment, public water rights, and regulation pursuant to the police power.[105] According to Johnson, all of these evidence the rejection of eminent domain as "too costly, too cumbersome, too time-consuming, and not required by the equities of the water rights holders."[106] Although Johnson does not seek to justify this rejection of eminent domain as a tool for implementing public water policy, his approach is extremely attractive to those who would otherwise have to pay, be inconvenienced, or await the implementation of eminent domain proceedings. There may be no such thing as a free lunch, but there are many ways of redistributing the costs of lunch. The public trust doctrine is one such mechanism, which avoids having to persuade a legislative body of the wisdom of the wealth transfer.

Of course, the beneficiaries of the public trust will argue that there is no wealth transfer because the public rights under the doctrine predate any private rights.[107] The same argument is made in support of the reserved rights doctrine.[108] It is the most attractive aspect of both doctrines, but it is pure mythology.[109] By any standard of reasonable legal expectation, the City of Los Angeles had no reason to doubt its water rights in the Mono Basin.[110]

Johnson seeks to define a "broader, functionally oriented public

104. *Id.* at 17-42 to 17-44.

105. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, *supra* note 7, at 234-36.

106. *Id.* at 236.

107. The *Illinois Central* court quoted Chief Justice Taney to date the trust right from the Revolution when "the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Illinois Cent. R.R.*, 146 U.S. at 456, (quoting Martin v. Waddell, 41 U.S. 367, 410 (1842)).

108. The reserved rights doctrine assigns a date to Indian and federal water rights which results in subsequently acquired water rights being junior and therefore less secure. This is the rule notwithstanding that none of the reservations in question expressly reserve water rights. *See, e.g.*, Arizona v. California, 373 U.S. 546, 595-60 (1963); Winters v. United States, 207 U.S. 564 (1908).

109. TRELEASE, *A Fable*, in WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION 815 (2d ed. 1974).

110. The City made legal purchases of riparian rights on streams tributary to Mono Lake between 1920 and 1934. In 1934, the City acquired by eminent domain riparian rights pertaining to Mono Lake. City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935). In 1940, the California Water Board granted the City permits to appropriate the waters of four Mono Lake tributaries. The City undertook massive water transport projects to supply this water to its residents. Thirty-nine years after the state permit

trust doctrine" by categorizing traditional public trust cases.[111] He brings in many cases that are not by name public trust cases and asserts that in fact they should be so classified.[112] Although I would prefer a system of legal analysis in which such exercises in classification would be irrelevant, I recognize that Johnson's objective is to expand the reach of the doctrine by expanding the historical content upon which future decisions will rely.

Johnson insists that judicial failure to limit water extractions on the public trust theory would allow the destruction of public rights "with impunity by persons claiming water rights under the prior appropriation . . . system of water law."[113] He goes so far as to suggest that express legislative approval of extraction should be required in some situations,[114] a proposal that makes a mockery of a water rights system, which in most western states requires the diversion of water for the assertion and maintenance of private rights. According to Johnson, the question is not whether, but how to protect instream water uses.[115] There has been an increased demand for instream water use over the past two decades, but the "whether" question will always remain as values and supply and demand change. Certainly, the "how" question is important, but Johnson and almost everyone else concerned with this issue have mistakenly presumed that certain resource allocations are inherently preferable and that such allocations will only be achieved through public action.[116] Johnson's argument is based on the premise that if the legislature fails to act, the courts must act pursuant to the public trust doctrine.

V. CONCLUSION

This discussion of the works of four distinguished scholars leads to a few broad conclusions about the public trust doctrine. First, the doctrine is clearly part of a trend which Sax argues has resulted in "property rights . . . being fundamentally redefined to the disadvantage of property owners."[117] I think this trend is an unfortunate one in terms of the management and allocation of increasingly scarce natural resources. Garrett Hardin and other writers have reminded us of the tragedy of the commons.[118] The solution to the commons tragedy is not a management committee or dictator, it is private property.[119] The trend repre-

was granted and 45 to 59 years after the riparian rights were acquired, the City's rights were challenged under the public trust theory.

111. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, *supra* note 7, at 241.

112. *Id.* at 244-55. *See supra* 83 and accompanying text.

113. Johnson, *Public Trust Protection for Stream Flow and Lake Levels*, *supra* note 7, at 257.

114. *Id.* at 258.

115. *Id.* at 265.

116. For a contrary view, see HUFFMAN, *Instream Water Use: Public and Private Alternatives*, in WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT 249 (1983).

117. Sax, *Decline of Private Property*, *supra* note 5, at 481.

118. *See supra* note 73.

119. *See* G. HARDIN & J. BADEN, MANAGING THE COMMONS (1977). In his original article, Professor Hardin noted that our solution to the tragedy of the commons is private prop-

sented by the public trust doctrine is simply a return to the commons. The only difference is that the commons is totally closed to some interests, while the permitted development interests must jump through an assortment of legislative, administrative, and judicial hoops. Having to jump through hoops may slow the process of exploitation, thereby postponing the tragedy, but the combination of increasing demand and diminishing supply will assure that the resources are exhausted, particularly where the effect of governmental action is to redistribute wealth. Therefore, society should give some consideration to private alternatives to the commons.

Second, assuming that Sax's democracy theory is the central justification for the doctrine, that it is just another form of the hard look doctrine as Rodgers suggests, I am at a loss for why we should be enamored with the democratic allocation of resources. I do not doubt that democracy is the best form of government, but I do not think that leads to the conclusion that the best way to make any or every resource allocation decision is democratically. To the contrary, the fact that the best form of government is democracy argues for making as few decisions as possible through government. The democratic process, when employed to allocate resources, is simply a more or less civilized scramble for the distributional benefits of particular allocations of resources. Because ours is often a less than civilized society, many members of which value the roar of motorized transport over the calm of a mountain wilderness and the comforts of a high-energy life style over the fish runs of the Columbia River, the public trust doctrine permits the more civilized members of our society to appeal to the courts to force the democracy to reconsider its decisions and come to a wiser choice.

Surely we are not deceived by this bit of legal fast shoe. If we believe in democracy, we should certainly live with its consequences. The public trust doctrine and its relations are tools for political losers or for those seeking to avoid the costs of becoming political winners. It forces the proponents of legislative action to justify a particular decision in isolation from the give-and-take of the legislative process. It is frequently argued that if the legislature does not like what the courts do, they can change it. Legislative action, however, does not come easily in the modern state legislature. Controversial issues, even where there is a clear majority position, are easily overlooked in the interests of other legislative agendas. Some will assert that a legislature's failure to act is an act in and of itself. However, the logic of that proposition is lost in the legislative context where the potential agenda always consists of more issues than can be considered meaningfully.

Third, the contention that the public trust doctrine is just another form of the "hard look" doctrine should not persuade us to be comfortable with the public trust approach. Instead, it should lead us to be

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erty which, when combined with inheritance laws, "is unjust — but we put up with it because we are not convinced, at the moment, that anyone has invented a better system." Hardin, *supra* note 73, at 1251.

skeptical of the "hard look" doctrine. Rodgers is right in linking the two because both are concepts used to justify judicial intervention in legislative and executive actions. The "hard look" doctrine tries hard to appear purely procedural and outcome neutral, but the public trust version of that doctrine reveals its substance. How hard a court looks does not depend exclusively upon the adequacy of the legislative and executive procedure, it also depends upon the substantive action that was taken. If we have learned nothing else from the legal realists, we should have come to understand the impact of values on judicial decisions.

Although, I do not wish to defend democracy as a resource allocator, neither do I wish to defend the resources allocation efforts of legislators and administrators. Thus, the real issue in all of this is what institutional mechanisms should we employ to allocate resources. The public trust doctrine is part of a widespread presumption in favor of public allocation,[120] although it is really a remedy for the perceived failure of public allocation. Thus, it parallels our approach to environmental law, which has been to regulate the regulators with at least as much vigor as they regulate private actions. If public resource allocations are perceived to be a problem, we should look at the possibility of improving the private rights system before resorting to reliance on an arcane doctrine that probably never meant what its proponents claim it means and that ignores the fact that the foundation of our resource allocation system is private property rights. Thus, state courts should take a "hard look" at the shortcomings of public trust theory before jumping into Mono Lake with the California Supreme Court.

120. Professor Sax's article in the Washington Law Review is an excellent statement of this presumption. *See* Sax, *Decline of Private Property*, *supra* note 5.