North Dakota Law Review

Volume 51 | Number 3 Article 3

1974

Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law

Victor John Yannacone Jr.

AGRICULTURAL LANDS, FERTILE SOILS, POPULAR SOVEREIGNTY, THE TRUST DOCTRINE, ENVIRONMENTAL IMPACT ASSESSMENT AND THE NATURAL LAW

VICTOR JOHN YANNACONE, JR.*

I. INTRODUCTION

Preservation of the agricultural productivity of the Class I, Class II, and Class III soils[1] of the United States is one of those unenumerated rights retained by the sovereign People of the United States in the ninth amendment,[2] and entitled to protection under the equal protection and due process clauses of the fifth amendment[3] and the rights, privileges and immunities, due process, and equal protection clauses of the fourteenth amendment.[4]

The unique and irreplaceable prime agricultural lands[5] of this country represent a national, natural resource treasure so vested

---

* Yannacone & Yannacone, Potchogue, N.Y. LL.B., 1959, Brooklyn School of Law. The author was co-founder of the Environmental Defense Fund and their counsel until 1969.

1. Soils are classified and named, in much the same manner as are plants and animals. Soils are identified by such characteristics as the kinds and numbers of horizons, or layers, that have developed in them; the texture, which is determined by the relative amounts of stones, gravel, sand, silt and clay; the kinds and amounts of minerals present; and the presence of salts and alkali.

The *type* is the smallest unit in the natural classification of soils. One or more types constitute a *soil series*. These are the common classification units seen on soil maps and soil survey reports. The names of the soil series are taken from the towns or localities near the place where the soils were first defined. Higher units in the classification system include families, great soil groups, suborders, and orders.

Soil series, types and phases do not occur at random in the landscape. They have an orderly pattern of occurrence that is related to the land form, the parent material from which the soil was formed, and the influence of the plants that grew from the soils, the animals that lived on them, and the way mankind has used them.

Soils may be grouped into land capability classes, subclasses, and units. The Soil Conservation Service of the United States Department of Agriculture has established eight soil classes based upon the suitability of the land for farming purposes. Class I, Class II and Class III soils form the basis for most of the arable land in the continental United States and Canada, although a limited amount of Class IV land can be cultivated on an intermittent yield basis provided rigorous soil conservation measures are applied.

Soils, climate and vegetation are intimately related and these relationships vary with time. Soils are designated young, middle-aged, mature or old depending upon the length of time that has elapsed since the soil-forming process began.

Plant growth is affected by a number of factors. The most important climatic factors are sunshine, length of day and season, temperature and precipitation. Atmospheric composition and movement are also involved. Crops grow best in a climate similar to that in which they originally evolved, or have become adapted to, whether naturally or through human effort. Man, by his ability to alter, in part, the properties of the soil, regulate the processes that take place within it, as well as control insects, diseases, and weeds that interfere with the growth of crops, is by far the most important biotic factor affecting plant growth.

with the public interest that they have become a public trust requiring those who might be the nominal "owners" of such lands at this time to assume the role of faithful stewards and guardians of this priceless and limited gift of nature.

There can be little doubt that courts of equity soon will be called upon to protect prime agricultural lands from the threat of high density, residential subdivision housing development along the Eastern Coastal Plain and in the Great Valleys of the West, or from stripping to reach coal and lignite deposits in the Central United States.

Imposing the public trust on prime agricultural land throughout the United States, just as many of the other major changes in the evolution of American social and political policy, will probably require fundamental constitutional litigation and action in Congress and the state legislatures. The Anglo-American adversary system of litigation since Magna Charta has become civilization's alternative to revolution, and once again it appears that the courtroom will be the arena where the conscience of America will initially sort its values and establish its real priorities. In this generation the issues will be energy, environment, land use and resource consumption.

At the dawn of civilization, when mankind awoke to the world away from the tree and outside the cave, soil and water became important human concerns. The ancient Hebrew people maintained that God made man from, and ordained that man shall eventually return to, *affar*, which means, literally, the material of the soil.[6]

Throughout all of history, a substantial portion of the people on

---

See generally U.S. DEP'T OF AGRICULTURE, YEARBOOK OF AGRICULTURE (1957); U.S. DEP'T OF AGRICULTURE, 2/3 OF OUR LAND: A NATIONAL INVENTORY (Program Aid No. 984 1971.); Bear, *Highly Productive Lands of North America*, in FUTURE ENVIRONMENTS OF NORTH AMERICA 136 (Darling & Milton eds. 1966).

2. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

3. The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend V.

4. Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. *See generally* Russeu, *Physical Properties*, U.S. DEP'T OF AGRICULTURE, YEARBOOK OF AGRICULTURE 31-38 (1957).

6. D. HILLEL, SOIL AND WATER, PHYSICAL PRINCIPLES AND PROCESSES 1 (1971).

earth have been underfed and undernourished, and in spite of the "Green Revolution,"[7] they still are, assuring that the lifelong effects of malnutrition will provide the worldwide social and political problems for each succeeding generation. It is becoming increasingly evident that today, no less than in ancient times, the ultimate survival of mankind depends upon preserving the soil-water system of the earth for the production of food.

The early Greek philosophers identified four elements as basic in the natural world: soil, water, fire and air; and now, more than two thousand years later, we are beginning to realize that energy, air, soil and water are the basic life support systems of spaceship earth.

> The social lesson of soil waste is that no man has the right to destroy soil even if he does own it in fee simple. The soil requires a duty of man which we have been slow to recognize.[8]

Nevertheless, in the frantic haste to supply a wastrel society with cheap energy as an alternative to energy conservation, we are preparing to strip the precious and essentially irreplaceable topsoil from more than a million acres of prime agricultural land in North Dakota to reach a thin layer of lignite, a low grade fuel that will be exhausted in less than 50 years.[9] Just as we stripped the prime agricultural lands of the Eastern Coastal Plain and the Great Valleys of California so that every family could have a federally subsidized single family home in suburbia and commute to work in the city.

II. POPULAR SOVEREIGNTY

A. WHO OWNS THE FERTILE SOIL?

The earth and its natural resources are the fundamental capital assets of civilization. In the United States, all the powers over land and natural resources once held by the Kings of England, France or Spain are now held by the sovereign people of the United States, collectively. They are exercised, by permission of the people, by the executive, legislative and judicial branches of the federal government and the governments of the several states. In the United States, government acts as the agent or trustee of the power of the people, for the benefit of all the people.

---

7. Hambridge, *Soils and Men—Summary*, in U.S. DEP'T OF AGRICULTURE, YEARBOOK OF AGRICULTURE 3-4 (1957).

8. Wallace, *Foreword* to U.S. DEP'T OF AGRICULTURE, THE YEARBOOK OF AGRICULTURE (1938).

9. Hubbert, *Energy Resources*, in THE ENERGY CRISIS: DANGER AND OPPORTUNITY 105 (V. Yannacone, Jr., ed. 1974).

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[10]
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[11]

Under the Constitution, the rights of individual property owners were strengthened, but at no time did the sovereign people of the United States relinquish their collective right to determine the highest and best use of land and natural resources. Neither did the people of the individual states relinquish their collective right to provide for the common good within each state and insist, on behalf of all the people, not only of this generation, but of those generations yet unborn, that land be used according to its intrinsic suitability rather than as merely a substrate for development.

If the people of this generation are to use wisely that which has been left by preceding generations, certain assumptions must be made with respect to land and consumable natural resources:

1. Development of land and consumption of natural resources is, to some extent, inevitable.
2. We must accommodate land use and natural resource consumption to the extent necessary to advance those aspects of civilization that nurture the development and evolution of those uniquely human characteristics which transcend the mere biological heritage of mankind.
3. Land use and resource consumption must be limited by natural constraints imposed by natural processes.
4. Planned growth toward the highest and best use of land and natural resources is more profitable to the human community in any regional ecological system than unplanned growth.
5. The police power of the State, the ultimate sovereignty of the people and traditional private property rights are compatible concepts which can mutually assure the beneficial development of land and the wise use of natural resources.

The legal justification for any limitation on the use of private property in the United States is founded on the belief that the people of the United States are the sovereign, collectively, not in the person of any elected official or appointed bureaucrat.

B. WHO IS THE SOVEREIGN?

In 1793,[12] the Supreme Court of the United States was called upon to consider the nature of sovereignty in the United States. Mr.

---

10. U.S. CONST. amend. IX.
11. U.S. CONST. amend. X.
12. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

Justice Wilson took the position that the term "sovereign" was unknown to the Constitution of the United States.

> [T]he term sovereign has for its correlative, subject. In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that constitution, there are citizens, but no subjects.
>
> [T]he people. . . of the United States. . . have reserved the supreme power in their own hands; and on that supreme power, have made the [government] dependent, instead of being sovereign. . . .[13]

Mr. Justice Wilson believed that despotic governments resulted from the attribution of sovereignty to one man or institution.

> Even in almost every nation which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it; hence, the haughty notions of state independence, state sovereignty, and state supremacy. In despotic governments, the government has usurped, in a similar manner, both upon the state and the people; hence all arbitrary doctrines and pretensions concerning the supreme, absolute, and uncontrollable power of government. In each, man is degraded from the prime rank which he ought to hold in human affairs. . . .[14]

Pointing out that in England, the sovereignty had been described as being in Parliament, with the people ignored, the very model of despotic government.

> Another instance, equally strong, but still more astonishing, is drawn from the British government, as described by Sir William Blackstone and his followers. As described by him and them, the British is a despotic government. It is a government, as so described, the sovereignty is possessed by the parliament; in the parliament, therefore, the supreme and absolute authority is vested: (a) in the parliament resides that uncontrollable and despotic power, which, in all governments, must reside somewhere. The constituent parts of the parliament are the King's Majesty, the Lord's spiritual, the Lord's temporal, and the Commons. The King and these three states together form the great corporation of body politic of the kingdom. All these sentiments are found; the last expressions are found verbatim, (b) in the Commentaries upon the Laws of England. (c) The parliament form the great body politic of England! What, then, or where, are the people? Nothing! No where! They are not so much as even the "baseless fabric of a vision!" From legal contemplation, they totally disappear! Am I not warranted in saying that, if this is just description, a government, so and justly so described, is a despotic government?[15]

13. *Id.* at 455-57.
14. *Id.* at 460.
15. *Id.* at 462.

Chief Justice Jay also recognized the people of the United States, not the federal government, as the sovereign:

> From the crown of Great Britain, the sovereignty of their country passed to the people of it. . . . [T]he people, in their collective and national capacity . . . established the present constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country. . . .
>
> [T]he sovereignty of the nation is in the people of the nation. . . .
>
> Sovereignty is the right to govern; a nation or state sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the prince; here it rests with the people. . . Their princes have personal powers, dignities and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.[16]

There is no mistaking the fact that the majority of the Supreme Court of the United States, just five years after the Constitution was ratified, rejected the idea that the United States government or any of its officials were the "sovereign." The people of the United States were the sovereign!

A century later, in 1882,[17] the Supreme Court again considered the issue of sovereignty; this time in the context of whether "sovereign immunity" could be raised as a defense by the federal government or any of its officers in actions brought against them by citizens of the United States of America.

> Under our system the *people*, who are there called *subjects*, are the *sovereign*. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.[18]

16. *Id.* at 470-71.
17. United States v. Lee, 106 U.S. 196 (1882).
18. *Id.* at 208-09.

III. PUBLIC TRUST

A. THE TRUST DOCTRINE[19]

Under certain circumstances, either because it is unique and irreplaceable or because it is of such special significance to the people that any use incompatable with the long term good of society becomes unconscionable, real property becomes vested with the public interest and subject to the public trust.

In the case of a national, natural resource treasure such as the limited supply of prime agricultural land in the United States, a court of equity can act to protect the public interest in the property even if it means limiting the rights of the nominal "owner." Equity can be called upon to protect the rights of the sovereign people of the United States in and to the benefit, use, and enjoyment of property vested with the public interest long after it has come into private ownership.[20] Prime agricultural land and the arable soils of this nation have become so important to the welfare of the people of this generation and those generations yet unborn that they are bested with sufficient public interest to impose the obligations of a trustee for the public benefit upon the nominal owners.

As early as the fourth and third centuries B.C., the Romans acknowledged the existence of public lands and common lands held by the state for the benefit, use and enjoyment of the people.[21] The fact that a public interest in land was accepted at such an early stage of Western Civilization supports the contention that however vague the form or poorly defined the principle, there was recognition of the "trust doctrine."

During the Middle Ages, the influence of Rome and its laws diminished throughout large areas of western Europe, but regardless of whatever devious route it took, the Roman law and its concept of a public trust eventually became a part of the English common law.

With but little acknowledged interaction, these two great systems of jurisprudence recognized the concept of a public trust impossible on property otherwise subject to private ownership, providing a multicultural dimension to the "trust doctrine" and illuminating its natural law heritage.[22]

---

19. For a general discussion of the trust doctrine in environmental law, *see* 1 V. YANNACONE, JR., B. COHEN, & S. DAVISON, ENVIRONMENTAL RIGHTS & REMEDIES § 2 (1972) [hereinafter cited as 1 ENVIRONMENTAL RIGHTS AND REMEDIES].

20. *Id.*

21. During the first century B.C., Gracchus attempted to institute agrarian reforms which relied heavily upon the redistribution of public lands among the peasants, and his limited success can, in large measure, be attributed to the fact that there was a general acceptance by all Romans of the idea that some land was held in trust for all the people.

22. But for the concept of natural law, the local laws of a small peasant community of peninsular Italy would never have become the universal law of an international civiliza-

While the fertility of the earth was known to be affected by human activities since ancient times, and mankind was early recognized as the guardian of the earth and steward of its resources, eventually, the deep concern of John Locke and other political philosophers with private property rights overpowered the admonitions of the Bible,[23] the ethics of the Greeks[24] and the reasoning of the early philosophers,[25] leading succeeding generations to ignore the public trust in land and natural resources.

Locke's shortsightedness is evidenced by his naive reasoning that there would always be enough left over for others.

> Nor was this appropriation of any parcel of land by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of those as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same. . . . [God] gave it [the world] to the use of the industrious and rational (and labour was to be his title to it);. . . [T]he same

---

tion. "But for natural law the great medieval synthesis of godly and of worldly wisdom would not have been possible. But for natural law there would have been no American and no French Revolution, nor would the great ideals of freedom and equality have found their way into the law-books after having found it into the hearts of men." A. *d'*ENTREVES, NATURAL LAW (1970). *See also* O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY (1950).

23. "Therefore you shall do my statutes, and keep my ordinances and perform them; so you will dwell in the land securely. The land will yield its fruit, and you will eat your fill, and dwell in it securely. . . . The land shall not be sold in perpetuity for the land is mine; for you are strangers and sojourners with me." *Leviticus* 25:18-23 (RSV).

"But the fields of common land belonging to their cities may not be sold; for that is their perpetual possession." *Leviticus* 25:34 (RSV).

"You shall not defile the land in which you live, in the midst of which I dwell; for I the Lord dwell in the midst of the people of Israel." *Numbers* 35:34 (RSV).

"But ask the beasts, and they will teach you; the birds of the air, and they will tell you; or the plants of the earth, and they will teach you; and the fish of the sea will declare to you.

Who among all these does not know that the hand of the Lord has done this?

In his hand is the life of every living thing and the breath of all mankind." *Job* 12:7-10 (RSV).

In *Deuteronomy* 11:12-18, the Israelites are reminded of the great value of the land and the first chapter of the book of *Joel* mourns the desolation largely resulting from the failure of the Israelites to respect the ancient rules of land tenure and management handed down from their ancient oral tradition.

"[T]he water brooks are dried up, and the fire has devoured the pastures of the wilderness." *Joel* 1:20 (RSV).

24. "[W]hen many streams flow together from many sources, whether springs or mountain torrents, into a single lake, we ought to attend to take care that the confluent waters should be perfectly clear, and in order to effect this, should pump and draw off and divert impurities, . . ." PLATO, V DIALOGUES OF PLATO, LAWS 118 (B. Jowett ed. 1892).

25. "[A]nd from this followeth another law: That such things as cannot be divided be enjoyed in common, if it can be; and if the quantity of the thing permit, without Stint; otherwise proportionably to the number of them that have Right." Hobbes, *Of Man*, in *Leviathan* 119 (1909).

> measure may be allowed still, without prejudice to anybody, full as the world seems. . . . We shall be allowed still, without prejudice to anybody, full as the world seems. . . . We shall find that the possessions he could make himself upon the measure we have given, would not be very large, nor, even to this day, prejudice the rest of mankind or give them reason to complain or think themselves injured by this man's encroachment, though the race of men have now spread themselves to all the corners of the world, and do infinitely exceed the small number there was at the beginning.[26]

But, in 1909, the National Conservation Commission established by President Theodore Roosevelt recommended that:

> The resources which have required ages for their accumulation, to the intrinsic value and quantity of which human agency has not contributed, which there are no known substitutes, must serve the welfare of the Nation. In the highest sense, therefore, they should be regarded as property held in trust for the use of the race rather than for a single generation and for the use of the Nation, rather than for the benefit of a few individuals who may hold them by right of discovery or by purchase.[27]

The conclusion marked a Twentieth Century return to the "trust doctrine."

B. THE COMMON LAW OF DEDICATION

Judicial declaration of the rights and interest of the people in and to the benefit, use and enjoyment of certain property was not unknown at common law, which often saw a court declaring the public right to privately held lands.[28] Under the common law of dedication, once land has been dedicated to the use of the public, whether in fact or at law, the landowner becomes, in effect, a trustee of the land for the use and benefit of the general public, since individuals who have rights which they are bound to exercise in behalf of others or for the accomplishment of some purpose not necessarily dictated by self-interest, become trustees and hold their rights in trust.[29]

Although sixteenth century English jurists, struggling with the formal proceduralism that led the diverse wits and pens of Shakes-

---

26. J. LOCKE, *Of Property*, in OF CIVIL GOVERNMENT 132-34 (1955).

27. J. Holmes, 1 REPORT OF COMMISSION 110 (Nat. Conserv. Comm. 1909).

28. *See* Irwin v. Dixon, 50 U.S. (9 How.) 9 (1850); New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Cincinnati v. White, 31 U.S. (6 Pet.) 431 (1832).

29. Longley v. Worcester, 24 N.E.2d 533, 537 (Mass. 1939); Dickinson v. Ruble, 211 Minn. 373, 375-76, 1 N.W.2d 373, 374-75 (1941).

peare,[30] Dickens[31] and Gilbert[32] to taunt the law and mock the lawyer, considered such trusts a thing collateral, annexed in privity to the estate of the land and to the person touching the land, when the property was vested with the public interest, the people

---

30. "In law, what plea so tainted and corrupt
But, being season'd with a gracious voice,
Obscures the show of evil?"
W. SHAKESPEARE, MERCHANT OF VENICE III:ii
"The first thing we do, let's kill all the lawyers."
W. SHAKESPEARE, II HENRY VI IV:ii

31. "[T]he law is an ass—an idiot." C. DICKENS, OLIVER TWIST 354 (1966).

32. The Law is the true embodiment
Of everything thats excellent.
It has no kind of fault or flaw,
And I, my Lords, embody the Law.
W. GILBERT, IOLANTHE 252 (1924).
"All thieves who could my fees afford
Relied on my orations,
And many a burglar Ive restored
To his friends and his relations."
W. GILBERT, TRIAL BY JURY 230 (1924).
Whether you're an honest man or
whether you're a thief
Depends on whose solicitor has
given me my brief.
W. GILBERT, UTOPIA LIMITED 432 (1924).
When I went to the Bar as a very young man,
(Said I to myself—said I,)
I'll work on a new and original plan, . . .
I'll never assume that a rogue or a thief
Is a gentleman worthy implicit belief,
Because his attorney has sent me a brief, . . .
I'll never throw dust in a juryman's eyes, . . .
Or hoodwink a judge who is not over-wise, . . .
Or assume that the witnesses summoned in force
In Exchequer, Queen's Bench, Common Pleas, or Divorce,
Have perjured themselves as a matter of course, . . .
Ere I go into court I will read my brief through, . . .
And I'll never take work I'm unable to do, . . .
My learned profession I'll never disgrace
By taking a fee with a grin on my face,
When I haven't been there to attend to the case.
(Said I to myself, said I!)
W. GILBERT, IOLANTHE 258-59 (1924).
See also:
"I'm asham'd [t]he law is such an ass." G. CHAPMAN, REVENGE FOR HONOUR III:ii
He saw a Lawyer killing a viper
on a dung-hill by his own stable;
And the Devil smiled, for it put him in mind
Of Cain and his brother Abel.
S. COLERIDGE, THE DEVIL'S THOUGHTS IV
I know you Lawyers can, with ease,
Twist words and meaning as you please;
That language, by your skill pliant,
Will bend to favour every client;
That 'tis the fee directs the sense
To make out either side's pretense.
When you peruse the clearest case,
You see it with a double face;
For scepticism's your profession;
You hold there's doubt in all expression.
J. GAY, *Fables*: *The Dog and the Fox* in THE POETICAL WORKS OF JOHN GAY 277 (G Fober ed. 1926).
A fox may steal your hens, sir,
[But]
If lawyer's hand is fee'd, sir,
He steals your whole estate.
J. GAY, THE BEGGAR'S OPERA I:vii:Air xi

were recognized as the trust beneficiaries (whether *cestui que trust* or *cestui que use*).[33]

C. PUBLIC LAND AND THE PUBLIC TRUST

The federal government holds all the public lands of the United States not as a monarch for private or prerogative purposes, but as a trustee for the benefit, use and enjoyment of the sovereign people of the United States.[34]

The right of a citizen to assert the public interest in the public lands of the United States as common property held in trust for the benefit, use and enjoyment of all the people is no different than the well-recognized right of municipal taxpayers to assert their equitable rights in municipal property to prevent its diversion or misuse.[35]

Justinian noted that:

Perhaps the root of much of the disfavor which the lawyer finds in the eyes of the public is the continued adherence to a standard of non-involvement and non-accountability which evolved during post-Elizabethan England.

"[A] lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge." BOSWELL, JOURNAL OF A TOUR TO THE HEBRIDES 14 (1961).

"It is time for the Bar to heed certain two thousand year old admonitions: Woe unto you also, *ye* lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers." *Luke* 11:46 (KJV)

"Woe to you! for you build the tombs of the prophets whom your fathers killed." *Luke* 11:47 (RSV).

"Woe to you lawyers! for you have taken away the key of knowledge; you did not enter yourselves and you hindered those who were entering." *Luke* 11:52 (RSV).

33. The Attorney-General v. Parmeter, 10 Price 378, 147 Eng. Rep. 345 (1811), *aff'd.* 10 Price 412, 147 Eng. Rep. 356 (1813) (clarifying the rule stated in the Attorney-General v. Parmeter, 2 Anst. 603, 145 Eng. Rep. 980 (1795) as to inalienability of *jus publicum*, the public rights).

34. Light v. United States, 220 U.S. 523, 537 (1911); United States v. Trinidad Coal Co., 137 U.S. 160 (1890); Van Brocklin v. Tennessee, 117 U.S. 151, 158 (1886).

35. A city or municipality "owns and its officials administer its streets and parks, not as private proprietors, but as trustees for the people. . . ." Hague v. Committee for Indust. Organ., 101 F.2d 774, 785 (3d Cir.), *modified on other grounds*, 307 U.S. 496 (1939).

"The State, or its political subdivision, holds, as a trustee, title to the easement for public highways and roads. A quasi-corporation such as a city or county, holds such property by delegation of the general sovereign power, the authority for its acquisition and control being governmental and the interest exclusively that of the public." Jefferson County v. Tennessee Valley Authority, 146 F.2d 564, 565 (6th Cir.), *cert. denied*, 324 U.S. 871, *reh. denied*, 324 U.S. 891 (1945).

> The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. . . . [T]he inevitable conclusion is that his interest in them is ample to enable him to maintain a suit of equity to prevent their diversion to private users. . . . [T]he general rule is that a resident taxpayer of a municipality has sufficient interest, and has the right to maintain a bill to prevent the unlawful disposition of the money or property of his town or city . . . and to restrain the diversion of money or property in his town or city from any public use in which he shares to which it has been dedicated.

Davenport v. Buffington, 97 F. 234, 236-37 (8th Cir. 1899). Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967) (suit to enjoin alleged diversion of municipal property through a conspiracy by municipality and defendant resulting in unreasonably low lease rental of municipal property to defendant).

> [S]ome things are by natural law common to all, some are public, some belong to a society or corporation and some belong to no one.[36]

He also stated that certain things (*res*) are not susceptible of private ownership. These "things" would include the air, water, sea and the seashore.[37] Since the Roman *res* was any interest subject to protection at law or any valuable right or interest, eventually distinctions between *res communes* (things common) and *res publicae* (things public) blurred and all such property came to be regarded as *res publicae* (the property of the people). It was generally settled at Roman Law that *res publicae* were incapable of alienation.[38]

The early Anglo-Saxons and later the conquering Normans evolved systems recognizing some land in Britain as public land and imposing a primitive trust obligation on the nominal owner.[39] Even though a formal theory of tenure may not have been recognized in Anglo-Saxon England, the Norman conquest imposed one upon the country. Thereafter all land was held of some lord and ultimately of the crown. No allodial land remained. All land became *terra regis* (the land of the Great Lord), although certain customary common rights survived. Under this feudal system, common rights became integral and incidental to lands traditionally considered beyond exclusive private ownership and vital to the existence of the community.[40]

---

36. INSTITUTES OF JUSTINIAN II. I, § 1 (5th ed. J. Moyle transl. 1913).
37. *Id.*
38. Geer v. Connecticut, 161 U.S. 519, 522-28 (1896).
39. II W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 56-63 (3d ed. 1923).
40. The common or open-field method of cultivation has had an extraordinarily long tenure in the history of the world's agriculture. Without some knowledge or appreciation of its operation, there can be little understanding of the evolution of real property law as it affects agricultural lands.

In Anglo-Saxon England, as in the Gaul of Julius Caesar, all the arable land in a township was divided into two or three open and unenclosed fields which were cultivated in rotation. Each of the fields was divided into a number of strips, the size of which varied with the intrinsic suitability of the soils in each field for raising particular crops. The holding of each landowner consisted of a multitude of strips scattered throughout the area and intermixed with those of neighbors. Attached to these holdings were certain common rights.

Certain fields remained fallow each year, and after the crop was cut, and while the field was fallow, the cattle of the villagers could pasture in the fields. Many areas maintained Lammas meadows upon which hay was grown and which were divided into strips and subject to individual ownership while the hay was growing, but common to all the villagers after the hay had been cut and gathered. As a general rule, there were extensive lands surrounding each community which were not intrinsically suitable for agricultural cultivation, and upon which the cattle of the township, or of adjoining townships could graze at will, subject to the rules which the community might promulgate.

The opponents of public rights to particularly valuable real property began to denounce this classical system of agriculture from the sixteenth through the nineteenth centuries in England, but although some enclosures took place in the sixteenth and seventeenth centuries, large areas of prime agricultural land remained unenclosed, and the common field system was such an integral part of English agriculture that it was transplanted by the early colonists to New England.

The intricate delineation of fields, stdips, pastures, hedgerows, furrow-strips and meadows found on any of the earliest British maps bears a striking resemblance to a modern soils map of the same area. It is this relationship that probably accounted for the continued existence of the common field system of agriculture through so many centuries and among such diverse cultures. Since we can probably assume that the original intention of those

Into this English feudal system during the thirteenth century, Henricus de Bracton,[41] an itinerant justice and ecclesiastic from Devonshire, forcefully reintroduced Roman law. Quoting the *Institutes* of Justinian extensively, he reasserted common rights and the inalienability in certain lands of the more usual agricultural usages.

There is a direct, but not easily defined relationship between the English and Roman law. By the end of the fourteenth century, the English Admiralty Court was using Roman forms of written procedure and the Roman method of examining witnesses had become common practice in the Court of Chancery. The sixteenth century concept of the commonwealth originates in the Roman idea of public policy. The medieval idea of a natural or universal law and a law of mankind, born of the curious union of feudalism and Christianity, restates the *jus naturale* and *jus gentium* of the Romans.[42]

Above all, the fact that the two great legal systems of western civilization each acknowledged that the rights of the people in and to the benefit, use and enjoyment of certain lands vested with the public interest could not be appropriated by private individuals demonstrates that the trust doctrine is not an isolated or parochial ideal but rather a universal precept.

The earliest application of the trust doctrine in American common law involved lands under navigable waters[43] and established that the land under navigable waters and the shores were subject to a public trust for the benefit, use and enjoyment of the people; essen-

---

dividing the community landholdings was to divide them equally, we must recognize that these people also understood that an equal division of lands involved not only the quantity but the quality of the land, and the simplest plan was to give each landowner some good land, some bad land and some land that was not particularly good or bad. It is a tribute to the agricultural wisdom of these early cultures that they were able to identify these three classes of soil and then divide each among their people in shares capable of approximately equal agricultural yield for the same amount of cultivation effort.

The common-field system certainly represents a transition from the early period in civilization where permanent ownership of land was unknown, and the rather recent idea that land can be the object of separate and individual ownership.

Caesar described the Gallic tribes as a pastoral and vagrant people cultivating just enough land each year to supply themselves with grain. Later, Tacitus, describing the same area, notes that the tribes had come to dwell in small communities where each person had his own homestead, but the arable land was divided year by year among the villagers and plowed afresh. The same practices existed among the early Welsh tribesmen who annually plowed fresh grass land, leaving it to return to grass after the year's harvest, a not so undesirable agricultural practice in the absence of chemical fertilizers and synthetic organic pesticides. *Id.* at 56-57.

41. It is from Bracton that we obtain almost all of our knowledge of the critical period in the evolution of English jurisprudence following Magna Carta (the reign of Henry III and the later part of the thirteenth Century).

42. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules enacted by a given state for its own members are peculiar to itself, and are called civil law; the rules prescribed by natural reason for all are observed by all nations alike, and are called gentile law. . . . GAIUS, INSTITUTIONS JURIS CIVILIS I, § 1 (3d ed. E. Poste transl. 1913). [T]he laws of nature, which are observed by all nations alike, are established, as it were by divine providence, and remain ever fixed and immutable: but the municipal laws of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute, INSTITUTES OF JUSTINIAN I, II, § 11 (5th ed. J. Moyle transl. 1913).

43. *See generally* 1 ENVIRONMENTAL RIGHTS & REMEDIES, *supra* note 19, at § 2:3.

tially adopting the English common law since Magna Charta, and recognizing its Roman Law origins. However, as the Industrial Revolution proceeded to make the public waters highways of commerce, nineteenth century courts began to emphasize riparian rights over public rights until the Supreme Court called a halt to the erosion of public rights by setting aside the giveaway of the entire port of Chicago to the Illinois Central Railroad.

In the *Illinois Central* case,[44] the Supreme Court made an admirable attempt to clarify the Trust Doctrine as far as lands under navigable waters were concerned.

> That the State holds the title to the lands under the navigable waters . . . within its limits, in the same manner that the State holds title to soils under tide water, by common law, we have already shown; and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the 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 interference of private parties. . . . A doctrine . . . which would sanction the abdication of the general control of the State over lands under . . . navigable waters of an entire harbor or bay, or of a sea or lake. . . is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. . . . The State can no more abdicate its trust over property in which the whole people are interested, . . . so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of peace. In the administration of government the use of such

44. Illinois Central Ry. v. Illinois, 146 U.S. 387 (1892).

> powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, . . . they cannot be placed entirely beyond the direction and control of the State.[45]

First in *Martin v. Waddell*,[46] when it construed the early colonial charters as reaffirming public rights, then later, in the *Illinois Central* case when it declared that there could be no irrevocable conveyance of property in derogation of the public trust, and finally in *Shivley v. Bowlby*,[47] when it extended the English common law trust doctrine to a major river in Oregon, the Supreme Court continually recognized the trust doctrine as a basic element of equitable jurisprudence.

One of the more persuasive authorities on the issue of imposing the public trust on fertile soils and agricultural land vested with the public interest is the decision resolving the 1947 confrontation between the people of the United States of America represented by the federal government and the State of California over the offshore oil fields within the three-mile limit. In that case the Supreme Court held that the federal government has paramount rights in and power over the area and its natural resources as trustee for all the people of the United States.[48]

D. IMPOSING THE PUBLIC TRUST ON PRIVATE PROPERTY

> *Plainly circumstances may so change in time or so differ in space as to clothe with [a public interest so great as to justify regulation] what at other times or in other places would be a matter of purely private concern. . . . [T]he use by the public generally of each specific thing affected cannot be made the test of public interest. . . . [T]he public interest may extend to the use of land. [Special circumstances] dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair.*[49]

Ownership does not always mean absolute dominion over property and its disposition. The more the nominal owner profits from the use of property by the public, the more the title to that property becomes encumbered by the rights of those who use it or otherwise support its profitable use by the owner.[50] The evolution of society

45. *Id.* at 452-54.
46. 41 U.S. 367 (1842).
47. 152 U.S. 1 (1894).
48. United States v. California, 332 U.S. 19 (1947).
49. Block v. Hirsch, 256 U.S. 135, 155 (1921).
50. Food Employees v. Logan Plaza, Inc., 391 U.S. 308, 316-25 (1968). *See also* Marsh v. Alabama, 326 U.S. 501 (1946).

and the demands of civilization have elevated our prime agricultural lands to the level of public property subject to equitable protection on behalf of the people of the United States. Our courts of equity cannot shut their eyes to matters of public notoriety and general cognizance. People are starving—not just in Africa, India and the rest of the Third World, but in the ghettos of our once great cities, on Indian reservations and in spent rural areas like Appalachia. Judges are not struck blind when they ascend the bench and they are not forbidden to notice as judges what they see as human beings. A court of equity has the responsibility to consider the social context in which its decisions will have operational effect.[51] Enforcement of the public trust is one of the great objects of equitable jurisprudence.

E. THE "TAKING ISSUE"

All private property and many personal rights are held subject to limitations that may be reasonably imposed in the public interest.[52] The Constitution does not secure to any individual, much less to any corporation, the right to inflict injury upon the commonwealth or any substantial group of people. Landowners' rights to make use of their property in furtherance of self-interest must sometimes give way to overriding public need.[53] There are exceptional times and places in which the very foundations of the public welfare cannot be laid without legal insistence upon concessions from one individual to another which under other circumstances might be left wholly to voluntary consent.[54]

The right of a land owner to obtain just compensation for property taken by eminent domain must be balanced against the right of the sovereign people to the full benefit, use and enjoyment of our national natural resource treasures, not only during this generation, but succeeding generations.[55] As noticed by Environmental Protection Agency Administrator Russell Train:

> Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights.[56]

Land use regulation raises fundamental issues under a variety of Constitutional provisions, but the clause which has so far represented the most significant restraint on the public regulation of private

51. Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (No. 6546) (C.C.D. Cal. 1879); Edwards v. Habib, 397 F2d 687, 701 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).
52. Air Line Pilots Ass'n Int'l. v. Quesada, 276 F.2d 892, 896 (2d Cir. 1960).
53. Nebbia v. New York, 291 U.S. 502, 523 (1934).
54. Strickley v. Highland Boy Mining Co., 200 U.S. 527, 530-31 (1906).
55. Air Line Pilots Ass'n Int'l. v. Quesada, 276 F.2d 892 (2d Cir. 1960); Nebbia v. New York, 291 U.S. 502 (1934).
56. TRAIN, *Foreward* to COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE (1973).

land use is the "taking clause" in the fifth amendment, "nor shall private property be taken for public use without just compensation."

In the introductory note to a recent Council on Environmental Quality (CEQ) Report, the authors claim:

> The taking issue is the weak link. . . . All over the country . . . attempts to solve environmental problems through land use regulation are threatened by the fear that they will be challenged in court as an unconstitutional taking of private property without compensation. . . . [because] [m]any people seriously believe that the Constitution gives every man the right to do whatever he wants with his land. Foreign concepts like 'environmental protection' and 'zoning' were probably sneaked through by the Warren Court! Many more people recognize the validity of land use regulation in general, but believe that it may never be used to reduce the value of a man's land to the point where he can't make a profit on it. After all, what good is land if you can't make a profit on it. . . . The courts have never adopted either of these philosophies. . . .[57]

There is ample precedent for the taking of private property without compensation, particularly by means of use restrictions which may be so extensive as to deprive landowners of substantial property interests.[58] The fundamental criterion for determining the constitutionality of regulations which limit the use of property is whether the regulation confers a benefit on the public commensurate with the burden imposed on the property owner.[59]

In meeting the defense that private property rights are to be protected in the courts above all other rights, except perhaps, the right to life itself, it should be remembered that private property is protected at all only because such protection answers a basic demand of human nature and substitutes the rule of law for the rule of force in civilized communities.[60] Private property rights may always be modified by a court of equity as the needs of the public demand.[61] The Constitution was intended to preserve practical and substantial human rights,[62] and while the meaning of constitutional guarantees never varies, the scope of their application must expand

57. F. Bosselman, D. Callies, & J. Banta, *Introduction* to COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE (1973).

58. *E.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Turnpikke Realty Co. v. Durham, ——Mass.——, 284 N.E.2d 891 (1972); Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); *In re* Spring Valley Development, ——Me.——, 300 A.2d 736 (1973); Just v. Marinette County. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

59. West Hartford Methodist Church v. Zoning Bd. of Appeals, 143 Conn. 263, 121 A.2d 640, 642-43 (1956).

60. Davis v. Mills, 194 U.S. 451, 457 (1904).

61. Defenders of Florissant, Inc. v. Park Land Co., No. C-1539 (D. Colo. July 9, 1969), No. 340-69 (10th Cir. July 10, 1969), No. 408-69 (10th Cir. July 29, 1969).

62. Davis v. Mills, 194 U.S. 451, 457 (1904).

or contract to meet new and different conditions, for in a changing world it is impossible that it should be otherwise. Equity provides a degree of elasticity not to the meaning, but to the application of constitutional principles.[63]

Flexibility and capacity for growth and adaptation has been the boast and the excellence of the common law which has always claimed to draw its inspiration from every fountain of justice. To concede this capacity for growth and change in our common law, while at the same time saying that our courts are forever bound to perpetuate such of their rules as by reasonable test may be subsequently found to be neither wise nor just, simply because they have once been declared suitable to the situations and institutions of a past time is to deny to the common law and equitable jurisprudence the flexibility and capacity for growth required to meet the exigencies of each generation.[64]

Law professors and even some judges shudder at the temerity of those who would challenge the supposedly sacrosanct bundle of rights usually associated with nominal title to private property—those rights upon which great fortunes have been made, governments established and overthrown, legislatures suborned and the courts often misled. But a new day is dawning:

> The right to make money buying and selling land is a cherished American folkway, and one that cannot be lightly ignored. But in an increasingly crowded and polluted environment can we afford to continue circulating the myth that tells us that the taking clause protects this right of unrestricted use regardless of its impact on society? Obviously not. . . .[65]

The language of the New York Court of Appeals in *Golden v. Planning Board of Town of Ramapo*[66] appears prophetic.

> Every restriction on the use of property entails hardships for some individual owners. Those difficulties are invariably the product of police regulation and the pecuniary profits of the individual must in the long run be subordinated to the needs of the community. The fact that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional, however, unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation. Diminution, in turn, is a relative factor and though its magnitude is an indicia of a taking, it does not of itself establish a confiscation.[67]

---

63. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
64. Funk v. United States, 290 U.S. 371, 383 (1933).
65. *Id.* The remainder of the CEQ Report seeks to justify this statement by spotty references to a number of cases.
66. Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).
67. *Id.* at 381-82, 285 N.E.2d at 304, 334 N.Y.S.2d at 154-55. (Citations omitted).

F. THE DEFENSE OF FLORISSANT[68]

The mere fact that the representatives of the sovereign people of the United States oft times cannot move as fast as a landowner's bulldozer does not prevent a court of equity from acting on behalf of the people to protect a national, natural resource treasure threatened with imminent danger of serious, permanent and irreparable damage. The preservation of the Florissant Fossil Beds in 1969 represents one of the most dramatic instances of equitable imposition of a public trust on private property in the relatively short history of environmental law.[69]

The Florrissant Fossil Beds are located a short distance west of Colorado Springs, Colorado, and contain seeds, leaves, plants and insects from the Oligocene period (approximately 34 million years ago) remarkably preserved in more than 6,000 acres of paper-thin layers of volcanic shale which, unfortunately, disintegrate when the thin layer of soil protecting them from the weather is disturbed.

For many years, scientists, conservationists, naturalists, the National Park Service and congressmen worked to protect the fossil beds by establishing a Florissant Fossil Beds National Monument. When the bill passed the Senate in 1969, a Colorado Springs real estate company had already contracted to purchase approximately 1,800 acres of the monument, and while the House of Representatives was deliberating its version of the bill, the land company announced it would bulldoze a road through the fossil beds to open the acreage for second home development and immediate sale to anyone interested in recreational housing. A group of Colorado conservationists were unsuccessful in an attempt to persuade the land company to wait until the House of Representatives acted on the bill, or at the least confine excavation and development to the area lying outside the fossil beds. The land company refused, but did offer to sell the land containing the fossil beds—for immediate cash at twice what it had contracted to purchase the land for.

Faced with the irreparable loss of a substantial portion of these unique and irreplaceable fossil beds, a small group of concerned citizens formed a non-profit, public benefit corporation called the Defenders of Florissant and commenced an action for declaratory judgment and injunctive relief against the land company and all the other landowners and contract vendees in the area to be included within the national monument.

The United States District Court heard the application for a tem-

68. Defenders of Florissant, Inc. v. Park Land Co., No. C-1539 (D. Colo. July 9, 1969), No. 340-69 (10th Cir. July 10, 1969), No. 403-69 (10th Cir. July 29, 1969).

69. For a complete discussion of the defense of Florissant with extensive references, see 1 ENVIRONMENTAL RIGHTS AND REMEDIES, *supra* note 19, at § 2:9.

porary restraining order on July 9, 1969, and although the Defenders of Florissant established, without challenge or contradiction, that the excavations for roads and culverts threatened by the land company would result in loss of some of the most valuable areas within the proposed national monument, the District Court held that there was nothing preventing the land company from using its property in any way not expressly prohibited by law. While denying the application for a temporary restraining order and a subsequent application for a stay pending appeal, the District Court did note, in passing, the importance of preserving the fossil beds.

Following this decision, the land company agreed to postpone excavation over the weekend if there was some assurance the purchase price could be raised in that time. The Defenders of Florissant gave up attempts to raise the ransom for the fossil beds and appealed to the Tenth Circuit Court of Appeals the following morning. At the hearing, before that court in the afternoon, the three judges questioned whether they had authority to issue a restraining order in the absence of any statute protecting the fossils.

Admitting that Congress, in its infinite wisdom, had not seen fit to pass legislation protecting fossil beds in general, plaintiffs' counsel argued that "if someone had found the original Constitution of the United States buried on his land and then wanted to use it to mop the floor, is there any doubt . . . they could be restrained?"

The Defenders of Florissant argued that the right to preservation of the unique and irreplaceable fossils, a national, natural resource treasure, was one of the unenumerated rights retained by the people of the United States under the ninth amendment of the Constitution and as such was entitled to protection under the *due process* and *equal protection* clauses of the fifth amendment, and the *rights, privileges and immunities, due process* and *equal protection* clauses of the fourteenth amendment.

While recognizing the right of the nominal landowners to make reasonable use of their land and to profit from their record title, the defenders claimed that a court of equity could impose a public trust on that portion of the property that had become vested with the public interest, the 34 million year old fossil shales. Procedurally, the defenders invoked the federal equity jurisdiction by asserting the fundamental equitable maxim, "no wrong shall be suffered without a remedy."

In summation, Counsel for the Defenders of Florissant picked up one of the fossil palm leaves that had been uncovered at Florissant, and holding it up to court, pleaded:

> The Florissant fossils are to geology, paleontology, paleobotony, palynology and evolution what the Rosetta Stone was

> to Egyptology. To sacrifice this 34 million year old record, a record you might say written by the mighty hand of God, for 30 year mortgages and the basements of the A-frame ghettos of the seventies is like wrapping fish with the Dead Sea Scrolls.

After a short recess, the Court of Appeals returned to the bench and announced that they were issuing an order restraining the land company and other land owners in the area from "disturbing the soil, subsoil or geological formations of the Florissant fossil beds by any physical or mechanical means."

After a trial on July 29, 1969, the District Court denied the Defenders' application for a preliminary injunction for the same reasons it had previously denied the application for a temporary restraining order, and the land company announced that it would begin excavation that afternoon although Congress had not completed action on the national monument bill. Several hours later, the defenders filed a motion for an emergency stay with the Tenth Circuit Court of Appeals, citing the landowners threat, and the Court of Appeals dramatically issued an order extending its prior restraining order indefinitely.

During the argument of the appeal, the Defenders of Florissant pursued their original theory that the fossil beds had become the corpus of a public trust and had aquired a public character by the actions of Congress and the unique and irreplaceable nature of the fossils themselves. The Court of Appeals reserved decision at the close of the arguments and continued the temporary restraining order.

On July 31, 1969, the House Interior and Insular Affairs Committee, through its Subcommittee on Parks and Recreation, favorably reported an amended version of the bill, and the entire House of Representatives passed its version of the bill as a number of concerned congressmen from all over the country turned out to suspend the rules and consider the bill out of the regular order. The Senate agreed to the House version of the bill and the President signed it on August 14, 1969. The preliminary restraining order issued by the Tenth Circuit Court of Appeals remained in effect while the United States of America instituted suit to acquire the land by condemnation. The Florissant Fossil Beds were saved as the result of a clean hands appeal to equitable jurisprudence, properly framed and imaginatively articulated, establishing the existence of an environmental wrong and demanding an equitable remedy.

While the court order prohibiting excavation of the fossil beds may have deprived the landowners of one profitable use of their land, they were free to develop the area for tourism, recreation, scientific research, or other uses compatible with protection of the

fossils, and although such alternate uses might not represent the most profitable use of the land, the speculators could still earn a reasonable return on their investment. The mere fact that the land company did not wish to use its land for such purposes did not make the judicial restraint on the land development activities a taking without due process of law and just compensation where the public interest in the land was clearly established.

The message of the Florissant litigation is clear. The value to the public of protecting a resource treasure as unique and irreplaceable as the Florissant fossils is so substantial that it cries out for equitable relief and warrants judicial limitation of certain rights normally incident to the private ownership of property.

G. LITIGATION STRATEGY

To obtain equitable relief limiting the use of private property requires that the petitioner establish by a fair preponderance of the substantial, credible scientific evidence that the challenged action represents an imminent danger of serious, permanent and irreparable damage to some unique and essentially irreplaceable national, natural resource treasure and that the property which is the subject matter of the application for equitable relief has become vested with the public interest to such an extent that beneficial ownership is in all the people, not only of this generation, but of those generations yet unborn.

Although an appeal to equity for protection of our irreplaceable natural heritage, the agricultural lands of this country which are capable of not only feeding Americans during this and succeeding generations, but which represent the means of overcoming worldwide malnutrition and starvation seems very attractive, the burden on the petitioner and environmental advocate is substantial.

It must be established by a fair preponderance of the substantial, credible scientific evidence.

1. That our Class I, Class II, and Class III soils and our agricultural lands are a unique, national, natural resource treasure of significance to all the people of the United States not only of this, but succeeding generations.

2. That the land use or other actions sought to be restrained, prohibited or otherwise limited represent an imminent danger of serious, permanent and irreparable damage to the resource sought to be protected.

3. That equitable relief is the appropriate means of protecting the resource and insuring its wise use consistent with constitutional protection of human rights and values.

There is no justification for bringing any action to protect the soils and landscape that are the basis for the agricultural productivity of this nation in any form other than a class action seeking a declaration of the rights of all the people of the United States, not only of this generation but of those generations yet unborn, in and to the full benefit, use and enjoyment of the fruits of our fertile soils and agricultural lands.

Just as the class action became the established means of asserting the fundamental human and civil rights of entire groups of citizens, it represents the best means of establishing environmental rights. However, it should be clearly understood that the class action in public interest litigation is only appropriate when seeking a declaration of rights and equitable relief.[70]

Litigation over the national interest in agricultural lands belongs in the federal courts and it may be of interest to review the nature of federal equity jurisdiction. The federal equity jurisdiction includes all those suits in which relief is sought according to the principles, practices and remedies of the English Court of Chancery through 1789, the time of separation of our two countries. While it is true that the inferior federal courts are creatures of statute, nevertheless, they are possessed of the inherent equitable powers of common-law courts, and it is well settled that a United States District Court, sitting as a court of equity, has the power and the obligation to grant complete relief in each matter before it.[71]

IV. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)

A. NEPA AND AGRICULTURE

If it can be established that agriculturally productive lands are, in fact, a unique, national, natural resource treasure, and, if some federal agency or program is responsible for the threat to continued agricultural productivity, then an environmental impact statement should be prepared as required by the National Environmental Policy Act of 1969 (NEPA).[72] Preparation of an environmental impact statement, however, will not protect the resource.

---

70. *See id.* at § 6:10. Note that the limitations on class actions for money damages imposed by such decisions as Zahn v. International Paper, 469 F.2d 1033, (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973) (51 N.D.L. REV. 522 (1974)) should not be construed as prohibiting aggregation of claims by plaintiffs, or determining the amount from the point of view of the defendant in actions seeking equitable relief and not money damages. Of course, actions raising fundamental constitutional issues, seeking declaratory judgment and equitable relief do not require a showing of any particular jurisdictional amount in order to establish federal jurisdiction.

71. *See generally* 1 ENVIRONMENTAL RIGHTS & REMEDIES, *supra* note 19, at § 6:12.

72. *See* 1 ENVIRONMENTAL RIGHTS & REMEDIES, *supra* note 19, at § 5:5, V. Yannacone, Jr., & S. Davison, *National Environmental Policy Act of* 1969, 1 ENVIRONMENTAL LAW 8-33 (1970); V. Yannacone, Jr., *The Origins of a National Environmental Policy*, in THE ENERGY CRISIS: DANGER AND OPPORTUNITY 385 (V. Yannacone, Jr., ed. 1956). For an interesting extension of the application of NEPA to national fiscal policy, see Like, *NEPA, Energy*

The difficulty in reconciling the miasma of apparently inconsistent decisions arising out of the morass of litigation spawned by these "Piper Cub" lawyers[73] that our eminent Chief Justice is so fond of is that most of them are disposed of by the mere completion of an environmental impact statement by the federal agency involved. The "747 litigation" which no doubt the Supreme Court eagerly awaits would challenge the proposed federal agency action on the merits and supported by a fair preponderance of the substantial, credible scientific evidence, the petitioner would ask the Court for equitable relief, not just an order requiring the agency to prepare an environmental impact statement.

The environmental impact statement required by NEPA and prepared under present Council on Evironmental Quality (CEQ) guidelines by federal agencies, and by state agencies and permittees in the many states that now have "little NEPAs," and those municipalities that now have still smaller NEPAs, has become an exercise in data gathering developed by natural scientists primarily for consideration by other natural scientists. With new input from social scientists and economists, many environmental impact statements now include a component designed by social scientists and economists for consideration by other social scientists and economists.

It is about time for the environmental impact statement to be replaced by the environmental audit.[74] The difference between the conventional environmental impact statement and the environmental audit is one of emphasis and objective. The environmental audit is designed to meet the needs of decision makers and those responsible for public policy: the people and the people's representatives. Although the preparation of environmental impact statements is generally directed by scientists and engineers, the environmental audit must be commissioned and carried out by legislators, citizens, and yes, even bureaucrats.

The environmental audit begins with a description of the regional ecological system, defined as the three dimensional space in which any of the activities associated with the project can affect land, water, air, plants, animals and human beings, and such effects can be observed. For any significant project, the system may include portions of many geopolitical units.

---

and the Economy in THE ENERGY CRISIS: DANGER AND OPPORTUNITY 367 (V. Yannacone, Jr., ed. 1974).

73. Burger, *The Special Skills of Advocacy*, 10 TRIAL LAW. Q. 12 (Spring 1974).

74. Victor John Yanacone, Jr., "Environmental Auditing," *Briefing Conference on Environmental Law*, before Federal Bar Association/Bureau of National Affairs in Chicago, Illinois, May 1, 1973; "The Environmental Audit: Necessary Protection for the Investor, Developer or Property Manager," *National Real Estate Investor*, 53, 56 (Oct. 1973); *NEPA: Environmental Audit vs. Environmental Impact Statement*, in ENERGY, THE ENVIRONMENT AND LAND USE (G. Sterlied ed. 1974).

Consideration of a regional ecological system would seem to be the concern of regional planners, but the science, or more accurately art, of regional planning, has failed to provide our courts and lawmakers with a sophisticated, readily justiciable definition of "region," much less regional ecological system. Perhaps the reason for this unhappy state of affairs is that regional planners continually look for a "region" which can be isolated as an entity for study purposes and precisely located in time and space—just as the early physicists who were prisoners of philosophical determinism and the mathematics of analysis vainly sought to predict the future activities of elusive sub-atomic particles with precision until Werner Heisenberg, in what was to become the now famous "Uncertainty Principle" of modern physics, demonstrated the utter futility of attempting to predict the future state of dynamic, probalistic systems by studying their activities at some particular point in space and instant in time.

Since the regional ecological system is defined as the entire space in which any effect attributable to the activities being considered can be perceived, all of the effects of such activities on land, in the air and water, and upon plants, animals, human beings and society must be identified. The description and identification phases of the environmental audit generally proceed contemporaneously although not necessarily simultaneously.

The environmental audit concludes with an evaluation of environmental impact including a consideration of long term effects, since the recent trends in judicial decisions and legislative action at federal, state and local levels demonstrate increasing concern for the effects of environmentally significant activities over long periods of time and at locations far removed from the original site of operations.

Unfortunately, just as in the case of the Cross-Florida Barge Canal,[75] there is more likelihood that concerned citizens will be forced to prepare an environmental audit on the proposals to sacrifice our prime agricultural lands, than the government agencies which have been charged with the maintenance of this unique and irreplaceable natural resource treasure will prepare an adequate environmental impact statement.

B. NEPA AND STANDING

NEPA appears to have expanded the notion of standing in fed-

75. *See* 1 ENVIRONMENTAL RIGHTS & REMEDIES, *supra* note 19, at § 7:23. For a copy of the actual Counter-102 Statement prepared by the Florida Defenders of the Environment which led to the initial reconsideration of the Cross Florida Barge Canal project, see: Victor John Yannacone, Jr., "The Cross-Florida Barge Canal Counter—102 Statement," *II Environmental Systems Science*, ch. 10 Proceedings of the A.B.A. National Institute on Environmental Litigaion (A.B.A., Chicago 1974).

eral administrative agency proceedings,[76] but to what end? Standing was always available to a "party aggrieved" or the representative of a "party aggrieved" under the Administrative Procedure Act.[77] NEPA cannot confer standing on a party not otherwise entitled to it in equity or under the Administrative Procedure Act. Standing evolved as a legal concept to assure a court that the parties to a lawsuit were sufficiently concerned with the outcome of the action that they could litigate the issues with vigor, based on sufficient self-interest to insure that the essential integrity of the adversary system of litigation in Anglo-American jurisprudence would not be compromised even though the subject matter of the action might. Standing is not a procedural rule to be rotely applied like a mathematical formula, but a legal concept that must be reexamined in the context of each controversy presented to a court for resolution.

The seemingly contrary holding in *Sierra Club v. Morton*[78] can be attributed, in large measure, to the failure of the Sierra Club to adequately establish its position as a person or party aggrieved —a failure of proof, rather than judicial imposition of an inflexible rule of standing in environmental litigation. The real tragedy of this case was the failure of the Sierra Club to establish the basic requisites for equitable relief in environmental litigation—imminent danger of serious, permanent and irreparable damage to a national, natural resource treasure.

Had the Sierra Club:

1. amended its complaint to challenge the proposed recreational development, supporting highway and overhead transmission lines on the grounds that such a development does not represent the highest and best use of a national natural resource treasure;
2. . . . alleged that determination of the highest and best use of a national natural resource treasure must utilize modern methods of environmental systems science;
3. . . . brought the action "on behalf of all the people of the United States, not only of this generation, but of those generations yet unborn, who are entitled to the full benefit, use and enjoyment of the national, natural resource treasure without degradation by reason of the failure of the federal agencies to determine the ecological impact of their proposed public improvements upon such a national natural resource treasure in accordance with modern methods of environmental systems science;"

76. *See* 1 ENVIRONMENTAL RIGHTS & REMEDIES, *supra* note 19, at § 7:5.
77. Administrative Procedure Act, 5 U.S.C. § 702 *et. seq.* (1970).
78. 405 U.S. 727 (1972).

4. . . . then offered to prove by a fair preponderance of the substantial, credible, scientific evidence that the proposed government action did, in fact, represent an imminent danger of serious, permanent and irreparable damage;[79]

the action would have had a substantial probability of success, and the real issues could have been laid before the conscience of the community in the courtroom rather than the press. The evidence elicited on trial and tested in the crucible of cross-examination might have led Congress, as the representatives of the people to reconsider the entire project, just as the President reconsidered the Cross-Florida Barge Canal in 1970.[80]

To the extent that the National Environmental Policy Act is:

> [m]ore than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer for guidance in making decisions which find environmental values in conflict with other values.
>
> What is involved is a congressional declaration that we do not intend, as a government, or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth.
>
> An environmental policy is a policy for people. Its primary concern is with man and his future. The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings. If there are to be departures from this standard of excellence they should be exceptions to the rule and the policy.[81]

V. AGRICULTURE, THE LAWS OF NATURE AND THE NATURAL LAW

The problem of obtaining enough food to eat has plagued man-

---

79. *Id.* at 731-35.

80. Environmental Def. Fund v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971). A few days later on January 19, 1971, President Nixon stated in a press release:

> I am today ordering a halt to further construction of the Cross Florida Barge Canal to prevent potentially serious environmental damages. . . .
>
> A natural resource treasure is involved in the case of the Barge Canal—the Ocklawaha River—a uniquely beautiful, semitropical stream, one of a very few of its kind in the United States, which would be detsroyed by construction of the Canal. . . .
>
> The step I have taken today will prevent a past mistake from causing permanent damage. But more important, we must assure that in the future we take not only full but also timely account of the environmental impact of such projects—so that instead of merely halting the damage, we prevent it.

Address by President Nixon, Jan. 19, 1971, in PUBLIC PAPERS OF THE PRESIDENT 43 (1971). To this date, the only writing that the order has had, according to the United States District Court for the Middle District of Florida, is that press release. For further litigation involving the Cross Florida Barge Canal, see: Canal Authority v. Callaway, 6 ERC 1801 (5th Cir. 1974); 6 ERC 1808 (M.D. Fla. 1974).

81. 115 CONG. REC. 40416 (remarks of Senator Jackson).

kind since Adam and Eve were driven out of the Garden of Eden and the Promised Land ran out of milk and honey. In spite of the technological advances of this century, accelerating population growth and the continuing reduction in the amount of arable land available for cultivation and food production drive the solution to this ageless problem even further out of reach. Conventional agricultural practices now provide an adequate and assured supply of food for less than one-third of the human race,[82] and as the technology of modern offensive warfare becomes more accessible to the remaining hungry nations of the Third World, the instability in the global political system increases.

The available supply of arable land and soil suitable for cultivation in this world is finite and some of the land which has been farmed for centuries is now being sacrificed to non-farming uses or abandoned. The only country in the world which has a ready reserve of cropland is the United States, but even the return of idle cropland in the United States to production will not increase world food supply sufficiently to assure adequate nutrition for all the people in the world.

The increased crop yield since World War II that has been enthusiastically referred to as the "Green Revolution," has its price in the amount of energy required. As the non-removable sources of energy are depleted, the rate of increase in productivity must slow and eventually the overall curve of agricultural productivity will flatten out and resemble the general "S-curve" or logistic curve of growth. The only question open to speculation at this time is whether we are still on the exponentially rising portion of that curve or whether we have already approached the upper limit. Perhaps a question of more importance to the cause of world peace is whether the inevitable slowing of the exponential improvement in agricultural productivity will occur abruptly and with little warning sometime during this decade or gradually over a number of succeeding generations.

While more than half of the food energy consumed in the United States is derived from animals, the people who inhabit the rest of the world derive less than 25 per cent of their food energy from animal products. Throughout the world outside of the United States more than half of the human energy needs are supplied by grain and grain products, while only 20 per cent of the human energy needs of the United States are directly satisfied by grain products. Since grains and legumes supply almost two-thirds of the human energy needs for the world outside the United States, and since it takes about five times as much grain and legumes to feed the animals

82. G. BORGSTROM, TOO MANY XI (1969).

which eventually become food for man than it would take to supply the same amount of energy to man as result of the direct consumption of the same grain and legumes, it should be obvious even to Americans that eventually less grain and legumes must be used for livestock feed and more made available for direct human consumption.[83]

In the cruel conflict between food supply and population, there is much rhetoric, little fact and a great deal of fable. There can be no doubt, however, that the surface of the earth is finite and that portion which can be reasonably expected to produce food is even more limited. Although energy is the primary need of all living creatures, and human beings can survive only if sufficient food energy is available, the problem of hunger cannot be solved by merely increasing the abundance of grain. Increasing the amount of grain available for human consumption simply shifts the problem of global nutrition from one of inadequate caloric (energy) intake to one of inadequate protein intake, and the supply of protein available to the people of the world becomes the major constraint limiting human development and well being. Today, protein deficiencies are more widespread and cause more human misery than caloric shortages.[84]

During the Great Depression, Aldo Leopold[85] pleaded for a conservation ethic. In philosophy an ethic differentiates social from anti-social conduct, but in biology, an ethic limits freedom of action in the struggle for existence.[86]

> The biologist calls [the tendency of inter-dependent individuals or societies to evolve modes of cooperation,] symbioses. Man elaborated certain advance symbioses called politics and economics. Like their simpler biological antecedents, [they] enable individuals or groups to exploit each other in an orderly way.[87]

The original common characteristic of all symbiotic relationships

83. III PROCEEDINGS, SEVENTH INTERNATIONAL CONGRESS OF NUTRITION 64-5 (1967).
84. A. Banks, *Catastrophes and Restraints*, in POPULATION OF FOOD SUPPLY 52-3 (1969).
85. Aldo Leopold was born in Iowa in 1887. His professional career began in 1909 when he joined the United States Forest Service. In 1924 he became Associate Director of the Forest Products Laboratory in Madison, Wisconsin and in 1933 The University of Wisconsin created a chair of game management for him. He died in 1948 fighting a grass fire on a neighbor's farm, shortly after he had become an advisor on conservation to the United Nations. Perhaps his most popular work is a book of essays. A. LEOPOLD, A SAND COUNTY ALMANAC (1949). His technical publications on game management are numerous, including a classic textbook. A. LEOPOLD, GAME MANAGEMENT (1933). Much of the material in this paper is adapted from the foregoing works, together with Leopold, *The Conservation Ethic*, 31 JOURNAL OF FORESTRY 634 (1933), and augmented by discussions with several of his children, Luna Leopold of the United States Geological Survey and Dr. Estella B. Leopold, also of the United States Geological Survey, the paleontologist who established by a fair preponderance of the substantial, credible, scientific evidence that the Florissant fossils were a unique, national, natural resource treasure in imminent danger of serious permanent and irreparable damage.
86. A. Leopold, *The Conservation Ethic*, 31 JOURNAL OF FORESTRY 634 (1933).
87. *Id.*

was expendiency but, as the complexity of cooperative mechanisms increased with population density and technological efficiency the human community eventually found expediency no longer a sufficient standard and was forced to evolve ethical standards. In the beginning, ethics dealt with relations among individuals and later with the relationships between individuals and society.[88]

> There is as yet no ethic dealing with man's relationship to land and to the non-human animals and plants which grow upon it. Land like Odysseus' slave-girls, is still property. The land-relation is still economic, entailing privileges but not obligations.[89]

The evidence that a new land ethic is needed has been with us since the earliest days of recorded history. Ezekial and Isaiah admonished us that despoilation of the land is not only inexpedient, but wrong, nevertheless, society has not yet recognized that the extension of human ethics to include the relationships between man and the land is just the next step in evolution.[90]

For scientists and lawyers who are uncomfortable with philosophy, an ethic may be regarded:

> As a mode of guidance for meeting ecological situations so new or intricate, or involving such deferred reactions, that the path of social expediency is not discernable to the average individual. . . . Civilization is not the . . . enslavement of a stable and constant earth. It is a state of *mutual and interdependent cooperation* among human animals, other animals, plants, and soils, which may be disrupted at any moment by the failure of any of them. Land despoilation has evicted nations, and can on occasion do it again.[91]

Plant succession has been a determining factor in historical evolution.

> In the years following the Revolution, three groups contended for control of the Mississippi valley: the native Indians, the French and English traders, and American settlers. Historians wonder what would have happened if the English at Detroit had thrown more weight into the Indian side of those tipsy scales which decided the outcome of the Colonial migration into the cane-lands of Kentucky. Yet who ever wondered why the cane-lands, when subjected to the particular mixture of forces represented by the cow, plow, fire, and axe of the pioneer, became bluegrass? What if the plant succession inherent in this "dark and bloody ground" had, under the impact of those forces, given us some worthless sedge, shrub or weed? Would Boone and Kenton have held out? Would there have been any overflow into Ohio? Any Louisiana

88. *Id.*
89. *Id.* at 635.
90. *Id.*
91. *Id.*

> Purchase? Any transcontinental union of new states? Any Civil War? Any machine age? Any Depression? The subsequent drama of American history, here as elsewhere, hung in large degree on the reaction of particular soils to the impact of particular forces exerted by a particular kind and degree of human occupation. No statesman-biologist selected those forces, nor foresaw their effects. That chain of events, which in Fourth of July we call our National Destiny hung on a "fortuitous concourse of elements," the interplay of which we can now only dimly decipher by hindsight.[92]
>
> Contrast Kentucky with what hindsight tells us about the Southwest. The impact of occupancy here brought no bluegrass, nor other plant fitted to withstand the bumps and buffetings of misuse. Most of these soils when grazed reverted through a successive series of more and more worthless grasses, shrubs, and weeds to a condition of unstable equilibrium. Each recession of plant types bred erosion; each increment to erosion bred a further recession of plants. The result today is still a progressive and mutual deterioration, not only of plants and soils, but of the animal community subsisting thereon. The early settlers did not expect this, . . . [s]o subtle has been its progress that few people know anything about it.[93]

All civilization seems to have been conditioned upon whether the natural plant succession, under the impact of human occupation, led to a stable and habitable assortment of vegetative types or an unstable and uninhabitable assortment. The swampy forest that Ceasar found in Gaul were full changed by human use for the better; while Moses' land of milk and honey was utterly changed for the worse. Both changes were the unpremediated result of the impact between ecological and economic forces.[94]

This generation is no less proud of technological ingenuity than prior generations. We drive cars with the solar energy impounded in the carboniferous forest of bygone ages. We fly through the air in mechanical birds. We hurl our words and pictures through space, and we have landed men on the moon.

> But are these not in one sense mere parlor tricks compared with our utter ineptitude in keeping land fit to live upon? Our engineering has attained the pearly gates of near-millennium, but our applied biology still lives in the nomads' tents of the stone age. If our system of land-use happens to be self-perpetuating we stay. If it happens to be self-destructive we move, like Abraham, to pastures new.[95]

Consider what the astronauts who look down at the Southwestern United States see:

---

92. *Id.* at 635-36.
93. *Id.* at 636.
94. *Id.*
95. *Id.*

A score of mountain valleys which were green gems of fertility when first described by Coronado, Espejo, Pattie, Abert, Sitgreaves, and Couzens. What are they now? Sandbars, wastes of cobbles and burroweed, a path for torrents. Rivers which Pattie said were clear, now muddy sewers for the wasting fertility of empire. A "Public Domain," once a velvet carpet of rich buffalo-grass and grama, now an illimitable waste of rattlesnake bush and tumbleweed, too impoverished to be accepted as a gift by the states within which it lies.[96]

Why? Because the ecology of this Southwest happened to be set on a hair trigger. Because cows ate brush when the grass is gone, and thus postponed the penalties of over-utilization. Because certain grasses, when grazed too closely to bear seed-stalks, are weakened and give way to inferior grasses, and these to inferior shrubs, and these to weeds, and these to naked earth.

Because rain which spatters upon vegetated soils stays clear and sinks, while rain which spatters upon devegetated soils seals its interstices with colloidal mud and hence must run away as floods, cutting the heart out of the country as it goes.[97]

Unforeseen ecological reactions not only make or break the [historical evolution of a people,] they condition, circumscribe, delimit, and warp all enterprises, both economic and cultural, that pertain to land. In the corn belt, after grazing and plowing out all of the cover in the interests of "clean farming," we grew tearful about wild-life, and spent several decades passing laws for its restoration. We were like Canute commanding the tide. . . . [We now know that the] implements for restoration lie not in the legislature, but in the [farmer's] toolshed.[98]

In other instances we take credit for . . . ecological windfalls. In the Lake States and the Northeast lumbering, pulping, and fire accidentally created scores of millions of acres of new second-growth. At the proper stage we find these thickets full of deer. For this we naively thank the wisdom of our game laws.[99]

[T]he reaction of land to occupancy determines the nature and duration of civilization. . . . In all climates the plant succession determines what economic activities can be supported. Their nature and intensity in turn determine not only the domestic but also the wild plant and animal life, the scenery and the whole face of nature. We inherit the earth, but within the limits of the soil and plant succession we also *rebuild* the earth — without plan, without knowledge of its properties, and without understanding of the increasingly coarse and powerful tools which science has placed at our

96. *Id.* at 636-37.
97. *Id.* at 637.
98. *Id.*
99. *Id.*

disposal. We are remodeling the Alhambra with a steam-shovel.[100]

In 1933, Aldo Leopold wrote:

> [The] interactions between man and land are too important to be left to chance, even that sacred variety of chance known as economic law. . . . [A]ll the new isms—Socialism, Communism, Facism . . . outdo even Capitalism itself in preoccupation with . . . the distribution of more machine-made commodities to more people. They all proceed on the theory that if we can all keep warm and full, . . . own a Ford and a radio, the good life will follow. Their programs differ only in ways to mobilize machines to this end. . . . They are competitive apostles of a single creed: *salvation by machinery*.[101]

In 1974, Angelo Cerchione wrote:

> For years . . . men have known, or with the exercise of reasonable prudence should have known, that at some point in time, all our fossil fuels: coal, oil and natural gas would eventually be consumed. Nevertheless, during those same years, the public has been led to believe that when coal, oil and natural gas were no longer available . . . other sources of cheap, convenient energy would be available. (Plucked from the ether, perhaps, by the nimble technological fingers of our scientists and engineers.) Satisfied, [however,] mankind dozed-warmed and cozened by the petrochemical fire in the basement and illuminated by the electrical fire in the lamp—fat headed in fossil fueldom.[102]

Since much of the public opposition to destruction of our pro-

---

100. *Id.*

101. *Id.*

102. A. Cerchione, *Crisis*, in THE ENERGY CRISIS: DANGER AND OPPORTUNITY 410 (V. Yannacone ed. 1975). Angelo Cerchione also stated:

> In 1933, F. Scott Fitzgerald described the heroine of Tender Is The Night as a lovely lady genie whose birth was signaled by the Industrial Revolution. To the applause of capitalism, the silent nod of obeisance from workers everywhere, and a Disney-like swirl of sparkling, clattering, bank specie, reaching its crescendo in a Ziegfield-Hurok spectacular, Scott's Nicole was born.
>
> If F. Scott Fitzgerald were still with us today, his heroine might be a Tinker Bell grown to starlet size, whose existence is ever more magical than Nicole's could ever be. The consort for this generation descends into our midst in a cloud of restless electrons, delights us with an overpowering attention to detail, and does many things for us with intoxicating speed. Yet our technological Tinker Bell is really a puppet and the strings that control her lead far from the scene of her efforts.
>
> . . . To the resources stored within the earth
> . . . To that constant source of life-giving energy, the sun.
> . . . To corporate boardrooms where economic policy is fashioned
> . . . To the offices of government agencies with limited statutory missions to advance
> . . . To that Janus-like figure of technology that promises to deliver so much comfort for the ransom it demands
> . . . To the environmental nursery and graveyard of all those other aspiring civilizations of the past [the land and the sea]
> . . . To the power plants which energize our Tinker Bell from the distance.
>
> And now, just at the height of our fascination, strings snap threatening the handwaiden of our way of life.

Id. at 411.

ductive agricultural lands can be expected to originate within the organized "conservation movement," we should review the evolution of "conservation" as a social and political force in the United States.

At its inception, the Conservation Movement sought to save species from extermination, and the means to this end was restrictive legislation. The whole structure of the program was negative and prohibitory. Gun powder and blood-lust were the variables needing control and it was assumed that land and the landscape would be constants in the ecological equations. At least as far as migratory waterfowl were concerned the Conservation Movement evolved to the point of recognizing that soil and plant succession determined quality and quantity of human satisfaction to be derived from plant and animal life. Gunpower was relegated to the status of a tool for harvesting one of these satisfactions and the blood-lust of the hunter was simply recognized as one source of motive power behind the movement to preserve and conserve waterfowl habitat. The immediate effects of this insight brought better hunting and fishing.[103] Perhaps the continuing evolution of the conservation movement will bring more profound improvements in the quality of life. Certainly the demands of conservation organizations heard in courtrooms throughout the land since 1966[104] are a far cry from the early days of Theodore Roosevelt and Gifford Pinchot, when it seemed that all the conservationists wanted were ducks in the marsh, deer in the forest, trout in the streams, salmon in the rivers, robins on the

---

103. Leopold, *supra* note 86.

104. *E.g.*, Yannacone v. Dennison, 55 Misc. 2d 468, 285 N.Y.S.2d 476 (1967). Environmental Law and Environmental Litigation became recognized elements of our legal system in the Spring of 1966 when a suburban New York housewife brought an action on behalf of all the citizens of Suffolk County, New York, not only of this generation, but of those generations yet unborn, seeking equitable relief from a toxic insult to the community eco-system. The real defendant in that action was not the local mosquito control commission still routinely using DDT in an attempt to control a mosquito population that had long since become resistant to the chemical but the broad-spectrum, persistant chemical biocide, 1,1,1-trichloro-2,2-bis(parachlorophenyl)ethane, DDT itself.

The New York State Supreme Court issued a temporary injunction restraining the County of Suffolk from using DDT for mosquito control on August 15, 1966, and continued this "temporary" injunction until December 6, 1967, finally holding that:

> DDT has, by its inherent chemical stability, become a continuing factor in some ecological life cycles so as to profoundly alter them and the environmental equilibrium. Thus, it is reasonably apparent that DDT is capable of and actually has to some extent caused extraordinary damage to the resources of this county, if in no other way, the chemical by its very stability has introduced an element of instability in the general eco-system. For instance, by reducing a food source of some of the larger wildlife and so reducing the over-all larger wildlife population, lesser elements multiply more quickly. These lower forms are presumably more of a nuisance, assuming they in turn survive. Furthermore, DDT affects wildlife directly. Its ingestion, from whatever source, has the capability, it seems, to disrupt reproductive processes or even more simply, act as a poison. It is fairly apparent then that the application of DDT in Suffolk County has and is continuing to have a demonstrable effect on local wildlife, reducing it slowly but surely, either directly across the board or indirectly from the top down, but reducing it nevertheless. We have a situation where plaintiff has at least minimally sustained a massive effort to validate the allegation that DDT does in fact do biological harm.

Id. at 478-79.

lawn, a few parks here and there, some scenic highways to reach the parks, and a conservation commissioner or Secretary of the Interior to make them feel like they had the ear of government![105]

Today those who are charged with the responsibilities of holding a substantial portion of the world's most productive soils should look around them. Black, brown, red, yellow, and even white consumers are shopping for a better world with a whole new shopping list.[106] Before dismissing the preceding discussion as empty rhetoric better suited to a conservation revival tent than a Law Review, consider that the evolution of natural law doctrines is closely associated with major developments in world history. The Roman Empire persisted for as long as it did because, among other national skills, the Romans were excellent farmers and land managers with a keen appreciation of the agricultural potential of the lands in the then known world.[107]

The ancient controversy over the nature of law (*ius*)—whether *ius quia iustum* (the law is that which is just) or *ius quia iussum* (the law is that which is commanded)—is more than a mere etymological quibble. The Romans considered law the object of deliberate legislative action; an expression of the will of the people, or of the Emperor to whom the original power of the people had been transferred, but the extension of Roman dominion over the entire known world at that time forced the Roman *praetors*[108] to interpret and administer the laws of other nations and cultures. In the process, they recognized certain universal and eternal principles of equity and justice common to all legal systems and called them *ius gentium* —the law of peoples or world law, based upon reason and an innate sense of right and justice common to all human races.

---

105. Victor John Yannacone, Jr., "Environmental Legislation and Political Reality, *Leadership* '70," Before the 1969 Midwinter Republican Governors' Conference at Hot Springs, Arkansas, December, 1969.

106. Angelo J. Cerchione, *With Sherman on the Brandywine*, (Dept. of Landscape Arch. & Reg. Plan., University of Pennsylvania, Dec. 1970). *See also* Cerchione & Black, *Planning: A Communications Process*, I PLAN., ENVIRON. SCI. AVIAT. (Proceeding of the A.B.A. Nat. Inst. on Environ. Litigation, Chicago 1974).

107. *See* L. COLUMELLA, DE RE RUSTICA (trans. by H. Ash, E. Forster & E. Heffner 1954); A. Taormina, *Journey Down a Roman Road*, in THE CONSERVATIONIST 5 (Aug.-Sept., 1969).

108. Although magistrates in Rome exercise both judicial authority (*jurisdiction*) and administrative power (*imperium*), most of the judicial work was entrusted to the praetors who came in time to exercise what we today would recognize as equitable jurisdiction: determining in what cases the strict positive law should be modified by principles of natural justice (*natudalis aequitas*).

After Rome had extended its dominion over the entire then known world, it became necessary for the *pro-praetor* in each subject territory, and the *praetor peregrinus* in Rome to interpret and administer the laws of other lands. Eventually they came to recognize certain universal and eternal principles of equity and justice common to all legal systems and referred to these as the *jus gentium*: the law of peoples or world law, based upon that reason and innate sense of right and justice common to all human beings and all races.

It seems probable that the *jus gentium* had its origin in the *jus naturale*, a philosophical or ethical term, not a technical legal term, and the Roman equivalent of the universal law of Aristotle. I ARISTOTLE, RHETORIC 10, 13. *See* J. SALMOND, JURISPRUDENCE 29 (7th ed. 1924).

According to Cicero, it was Greek Stoicism which furnished the philosophical basis for the *ius gentium* that so profoundly influenced the jurisprudence of the Roman Empire. At the core of Greek Stoicism was ethics. The Stoics believed that there were empirical standards of truth and justice which could be determined by man through reason according to the nature of humanity. The Stoics thought that human beings had an inborn notion of right and wrong and that law in its essence rests not upon the arbitrary will of a ruler or the emotional decree of the multitude, but upon the immutable, orderly structure of nature and the innate aspects of human morality.[109]

The Stoic ethical teaching was that mankind should live in harmony with human nature according to the rational nature of man in obedience to universal law.

The general and universal precepts of the natural law are a fundamental law, a law of laws, which originates in the nature of humanity and should always be the rational, social and moral norm or standard of positive law if law is to be:

> the bond which secures our privileges in the commonwealth, the foundation of our liberty, and the fountainhead of justice. Within the law are reposed the mind and heart, the judgment and the conviction of the state. The state without law would be like the human body without a mind—unable to employ the parts which are to it as sinews, blood, and limbs. The magistrates who administer the law, the judges who interpret it—all of us in short—obey the law to the end that we may be free.[110]

Much of the difficulty in recognizing the natural law as an acceptable element of Anglo-American jurisprudence can be attributed to the rise of logical positivism as a philosophical system during the eighteenth and nineteenth centuries. The positivists insisted that

---

109. If justice is defined as all forms of rightful action, then we may distinguish at least two forms of justice. Natural justice which is the idea of justice as it is, in truth, and positive justice which is that conceived, recognized and expressed, more or less incompletely, inaccurately and imperfectly, by civil authority in the form of legislated or mandated positive law. The term "positive" in this sense means established by some form of human authority.

This distinction between natural and positive justice, together with the corresponding and derivative distinction between natural and positive law, comes to us from Greek philosophy. The Greeks considered the natural law as a body of imperative rules imposed on mankind by Nature, the personified universe. The Stoics thought of Nature or the Universe as a living organism of which the material world was the body and of which the Deity or the Universal Rational Force was the animating and ruling soul. To the Stoics, the natural law was the rule of conduct laid down by the Universal Reason for the direction of mankind.

It seems that the time has come to reconsider some of the fundamental concepts of philosophy which have influenced the legal tradition of Western Civilization, but often without notice or reference. A good place to start might be HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY (1960), and the early struggle to harmonize the inconsistencies of nationalism, constitutionalism, and the rights of man under the natural law.

110. Cicero's oration, *In Defense of Cluentius, quoted* in Wilkin, *Cicero and the Law of Nature*, in ORIGINS OF THE NATURAL LAW TRADITION 21 (A. Harding ed. 1954).

the only source of human rights was positive law, and that the positive law was independent of any natural law or universal law influence.[111]

Positivism continued to dominate the philosophy of law until the end of World War II. In 1932, Radbruch provided the philosophical support for the position that the judge and jurist must disregard their sense of justice and obey the command of the law as written by the state.[112] Thus instructed, the jurists of Nazi Germany established the Third Reich. The theoretical powerlessness of the German judiciary to resist the implementation of unjust laws made those judges the agent for the imposition of such policies.[113]

The same Radbruch whose writings and teachings left German jurists powerless before Hitler's laws, in 1947, wrote:

> The traditional conception of the law, [t]he *positivism* that for decades . . . dominated German jurists, and its teaching that 'the law is the law' were defenseless and powerless in the face of such an injustice [the Holocost] clothed in the form of the law. The followers of [judicial positivism] were forced to recognize as 'just' (*Recht*) even that iniquitous law. The science of the law must again reflect upon the milennial common wisdom of Antiquity, the Christian Middle Ages, and the Age of Illumination that there exists a higher justice (*Recht*) than [positive law] a natural law, a divine law, a law of reason—briefly, a justice (*Recht*) that transcends the [positive] law. As measured [against] this higher justice, injustice (*Unrecht*) remains injustice, even when it is given in the form of a law. Before this higher justice also the judgment pronounced on the basis of such an unjust law is not the administration of justice but rather injustice.[114]

It appears that legal positivism, as a justification for ignoring the natural law, was a hypothesis wrecked by the gruesome reality of history.

---

111. The positivist view of law leaves no room for equity, much less a true philosophy of law which must concern itself with right, wrong, justice and injustice. For if, as the legal positivists contend, just or unjust are identical with what is permitted or forbidden by positive law, there remains no room for any consideration of the philosophy of law, since it has all been stated by the positive law of the moment in any particular state or principality. Kelsen, who spent most of his life attempting to "purify" the law from an considerations of justice, or injustice, or whether a particular law might be good or bad, summarily dismissed those concerned with such questions by accusing them of making value judgments, pursuing politics and succumbing to the evils of subjectivism. So successful was Kelsen in convincing legal scholars, jurists and leaders of the American Corporation Bar that law can be an "objective science" only by abstaining from consideration of fundamental questions of justice and injustice, morality, ethics, right and wrong, that eventually the leadership of the Corporate Bar, Big Business, and the Executive Branch of the Federal Government became inexplorably inter-twined without hinderance of any moral scruples so long as the letter of the positive law was not violated. This unholy alliance culminated in national crisis of conscience and confidence in America during 1974.

112. W. LUIJPEN, PHENOMENOLOGY OF NATURAL LAW 27 (1967).

113. *Id.*

114. G. Radbruch, *Die Wandlung*, in II DIE ERNEUERUNG DES RECHTS 9-10 (1947).

VI. CONCLUSION

Judicial protection of that unique and irreplaceable national, natural resource treasure—the limited supply of prime agricultural land in the United States—depends upon recognition by our courts of equity of that law, not always written, but born within us, which we have taken, absorbed and imbibed from nature. A true law, a natural law, a law which is in accordance with nature and with the nature of humanity. A law which applies to all mankind and is unchangeable and eternal. By its commands to husband all the lands upon which the human species depends for food, this natural law summons all landowners to fulfill their duties to the family of man. To annul such a law of nature is impossible. To attempt its invalidation by human legislation is morally reprehensible, and to restrict its operations as a result of judicial insensitivity is a crime against humanity.[115]

The fundamental right of the American people to judicial protection of the productivity of the prime agricultural lands of the United States is one of those unenumerated rights "so basic and important to our society that it would be inconceivable that it is not protected from unwarranted interference."[116] It is the duty of our courts of equity to protect such rights retained by the sovereign people of the United States under the ninth amendment[117] from "whatever quarter . . . the greatest danger lies."[118] "It is the solemn responsibility of the judiciary to 'fashion a remedy' for the violation of a right which is truly 'inalienable' in the event that no remedy has been provided by legislative enactment."[119] An inherent human right to protection of the ultimate source of our nation's food supply, the land on which it is grown can be judicially protected "against action by any person or department of government which would destroy such a right. . . ."[120] As hunger stalks even our United States, there can be no more fundamental human right entitled to constitutional protection than the right to a share in the natural abundance of our land.

Natural rights—inherent rights and liberties, are not the creatures of constitutional provisions either at the national or state level. The inherent human freedoms with which mankind is endowed are "antecedent to all early government. . . rights derived from the

115. CICERO, DE RE PUBLICA III. II. (C.W. Keyes transl. 1938).
116. United States v. Laub Baking Co., 283 F. Supp. 217, 227 (N.D. Ohio 1968).
117. For an extensive general discussion of the ninth amendment, see 1 ENVIRONMENTAL RIGHTS AND REMEDIES, *supra* note 19, at § 3.
118. J. MADISON, 1 ANNALS OF CONGRESS.
119. Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 245, 880 P.2d 34, 40 (1962), *rehearing denied* April 8, 1963.
120. *Id.*

great legislator of the Universe."[121] Freedom from want and freedom from hunger are such inherent human rights as to cry out to Heaven for equitable protection.

Historically,[122] the ninth amendment was included in the Bill of Rights to nullify the argument that the enumerated rights set forth in the preceding eight amendments were intended to be the only rights protected. To deny the ninth amendment as a source of substantive rights is to accept the argument it was adopted to nullify. The ninth amendment is the reservoir of personal rights necessary to preserve the existence and dignity of human beings in a free society.[123]

"So use your own property as not to injure another" is more than an equitable maxim where the property is the priceless heritage of those arable soils from which this nation grew to greatness, and upon which this generation and those generations yet unborn depend. It is a precept of the natural law[124] binding at all times upon all peoples, eternal and unchangeable promulgated by the one common ruler of all mankind, who is the author of this law, its interpreter and its sponsor.

121. 3 WORKS OF ADAMS: 440 (C. Adams ed. 1852).

122. THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 691 (G. Hunt & J. Scott ed. 1920).

123. State of Abellano, 50 HAWAII 384, 389-96, 441 P.2d 333, 335-39. (Levinso, J., concurring 1968).

124. "The unerring law is right reason; not an ordinance made by this or that mortal, a corruptible and perishable law, a lifeless law written on lifeless parchment, or engraved on lifeless columns; but one imperishable, and impressed by immortal Nature on the Immortal mind." P. JUDAEUS, WORKS III, 516. "Natural law is a divine law, written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mandkind, and to refrain from those things which are repugnant to it." C. THOMASIUS, INST. JURISP. DIV. I. 2, 97, *quoted* in J. SALMOND, JURISPRUDENCE, 28-9 (7th ed. 1924).