Delegation of Power to Regulatory Agencies: Standards and Due Process in the Bayside Timber Case

Edward G. Heilman

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z388G03

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
DELEGATION OF POWER TO REGULATORY AGENCIES: STANDARDS AND DUE PROCESS IN THE BAYSIDE TIMBER CASE

Administrative agencies exercise substantial discretionary power in performing their delegated legislative functions, often in detriment to the environment. This Comment examines a recent decision of a California appellate court overturning the delegation of legislative authority under the Forest Practice Act which had exclusively regulated the state's forest practices and private logging operations. The court intervened because the Act ignored the fundamental public interest in preventing ecological damage to the state's privately-owned timber resources. The court argued for the necessity of safeguards to prevent the abuse of administrative powers. Its conclusions concerning the legitimate composition of administrative commissions are applicable to regulatory agencies in general, and provide a useful precedent in challenging similar enabling statutes which ignore environmental interests.

In a decision of marked significance for environmentalists and local government, the California Court of Appeals, First District, with the unelaborated but direct approbation of the State Supreme Court, recently held unconstitutional a major portion of the California Forest Practice Act. This result was unusual because the constitutionality of the Act had not been challenged in the original dispute, and notable for the supportive reasoning employed by the court to overturn this Act, which for fourteen years had been regarded as preempting regu-


2. On Nov. 18, 1971, the California Supreme Court denied Respondent's Petition for Hearing. 6 Cal. 3d minutes, at 3 (advance sheet). Petition for Rehearing in the Court of Appeals had been denied on Oct. 15, 1971, although a brief modification of the reported opinion was ordered at that time. 20 Cal. App. 3d at 687d, 97 Cal. Rptr. at —. See note 3 infra.

3. The Forest Practice Act, as originally enacted in 1945, comprised §§4901-4967 of the California Public Resources Code. In amended form, that Act comprised §§4521-4618 of the same Code at the time of this decision. As expressed in the modification of its opinion, the court's holding of unconstitutionality "concerns only those portions of the Act relating to 'Forest Practice Rules' (art. 5, §§4571-4583) and to such portions of article 10, 'Injunctions and Corrective Action' (§§4611-4618), as are necessarily related to the enforcement of such rules." 20 Cal. App. 3d at 687d, 97 Cal. Rptr. at —. See note 2 supra.

lation of logging operations in California. 5

Bayside Timber Company, owner of certain private timberlands in San Mateo County, had applied to the County Planning Commission and Board of Supervisors for two permits required by county ordinance for harvesting timber.6 When the Board of Supervisors refused to grant them,7 Bayside sought relief from the Superior Court, which ruled, consistent with a prior opinion of the State Attorney General,8 that the Board of Supervisors' authority to act had been preempted by the passage of the Forest Practice Act. The court consequently ordered a peremptory writ of mandate on behalf of Bayside Timber Company.9 In appealing that decision to the District Court of Appeals, the Board of Supervisors for the first time placed the constitutionality of the Forest Practice Act in question10 and on that issue won a reversal.

This Comment examines the factors contributing to that reversal, and analyzes the decision and some of its implications for the Forest Practice Act and similar administrative enabling statutes.

I

THE CONTROVERSY

This case arose from San Mateo County's attempted regulation of logging operations within the county. A county ordinance required that a party obtain a use permit11 before harvesting timber. Where excavation and grading would be necessary to construct logging roads, the county also required a grading permit,12 "to preserve the natural beauty of the County and protect property owners from unnecessary loss from erosion and flooding from grading operations."13

Prior to applying for the county permits, Bayside had obtained, under provisions of the Forest Practice Act,14 a timber operations per-

---

6. See notes 11 & 12 and accompanying text infra.
7. The Planning Commission granted a logging use permit, to which twenty-eight conditions were attached, on May 28, 1969. This decision was reversed by the Board on July 22, 1969. The Planning Commission's decision of July 23, 1969, to grant an on-site grading permit, subject to eight conditions, was reversed on Sept. 2, 1969, by the Board of Supervisors. See Petition for Writ of Mandate and Award of Damages at 3-4 & Exhibits C, D & E attached thereto, Superior Court opinion, supra note 4.
10. See text accompanying notes 24 & 25 infra.
13. Id. § 8600.
mit to log its land in San Mateo County, and had been granted an “encroachment permit” by the State Division of Highways, which authorized connection of logging roads with the state highway. Armed with these permits Bayside then applied to the county for a logging use permit and a grading permit for the necessary logging roads. Although these applications were opposed by many residents and residents' organizations, Bayside received generally favorable rulings from the County Planning Commission. However, on appeal to the Board of Supervisors by a citizens' group, the permit applications were denied. Bayside then petitioned the Superior Court for a writ of mandamus to compel issuance of the use and grading permits. The court held that the state had pre-empted the field of regulation of timber operations by enactment of the Forest Practice Act and adoption of the Forest Practice Rules thereunder; that local authorities within the State, therefore, had no power or authority to regulate timber operations, except where necessary for purposes of fire protection or zoning; and that due to the state's pre-emption, the Board of Supervisors had exceeded its jurisdiction by denying Bayside permits which the county had no power to require.

II

THE PROCEDURAL PROBLEM: RAISING THE CONSTITUTIONAL CHALLENGE INITIALLY ON APPEAL

It was anticipated that the Board of Supervisors' appeal would be based on three contentions: (1) that the Superior Court's determination that the Forest Practice Act had totally preempted the field of...
forest practices was erroneous; (2) that, even if the field were preempted by the state, the condemned county ordinances were valid with respect to fire regulation, and the Board of Supervisors had before it sufficient evidence to justify its denial of the permit because of a fire hazard; and (3) that the board's decision denying the grading permit should be upheld by the court. Evidence presented to the board that the road was located in a dangerous traffic area, required an unreasonable amount of grading, made requirements beyond those necessary for a logging road, and would be unsuitable for truck traffic at its access point would be introduced to support the latter conclusion. An amicus curiae memorandum, submitted by the Sierra Club, similarly argued that the board's action had been an exercise of its legitimate "police and zoning powers" to promote safety and prevent fire and other hazards.

The appellants, however, did not restrict themselves to the anticipated grounds for appeal. Rather, in their opening brief they raised for the first time the issue of the constitutionality of the Forest Practice Act, alleging, in general, that the delegation of legislative authority under the Act was "unfair, arbitrary, and without due process" under the California and Federal Constitutions.

Bayside objected to the introduction of the constitutional question at this time, and the first issue resolved by the appellate court was accordingly framed.

In arguing against consideration of the Act's constitutionality, respondent relied heavily on language in Jenner v. City Council, which, it asserted, prohibited such a "maneuver" as that of the appellants:

It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.

23. Memorandum of Points and Authorities of Amicus Curiae, Sierra Club, in Support of Petitioner's Request for a Writ of Supersedeas at 1, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431. The argument proposed was that there was in fact no direct conflict between the Forest Practice Act and the challenged ordinances—the use permit dictated whether, not how, logging practices were to be carried out.
24. Opening Brief for Appellants at 7-11.
25. Id. at 32, citing CAL. CONST. art. I, § 13 and U.S. CONST. amend. XIV, § 1. Counsel for the appellants candidly admitted that no one had thought of the constitutional issue until preparation of the opening brief. Closing Brief for Appellants at 4.
28. Id. at 498, 331 P.2d at 182, quoting Hershey v. Reclamation Dist. No. 108, 200 Cal. 550, 564, 254 P. 542, 547 (1927) a case which, as the court in Bayside noted, after stating the cited general rule, nevertheless proceeded to consider the constitutionality of the subject statute. 20 Cal. App. 3d at 4, 97 Cal. Rptr. at 433.
The court noted several specific exceptions to this general rule which, it agreed, would "ordinarily" be applied, namely, where the issue related only to questions of law, and where the public interest or public policy were involved. Ultimately the court concluded that "whether the rule shall be applied is largely a question of the appellate court's discretion." The court did note, however, the existence of a second general rule, besides the one raised by respondent, namely, "that an appellate court will not enter upon the resolution of constitutional questions unless absolutely necessary to a disposition of the appeal."

Applying these observations the court concluded that the two rules presented no difficulty and decided to pass on the constitutional issue. The latter rule was satisfied because the Forest Practice Act did "purport to preempt the field of logging and timber operations in California," making resolution of the constitutional question necessary to dispose fully of the appeal. The Jenner rule was found to be inapposite under the circumstances involved here and the court exercised its discretion not to apply it. The court observed first that the constitutional issue "[o]bviously . . . concerns only a question of law." Secondly, the court felt impelled by the high degree of public interest in the Forest Practice Act and its regulation of private logging and timber practices. This was manifested, in the first place, by the

---

29. 20 Cal. App. 3d at 5, 97 Cal. Rptr. at 433 (emphasis in the original).
33. 20 Cal. App. 3d at 6, 97 Cal. Rptr. at 433 citing Marin Municipal Water Dist. v. Dolge, 172 Cal. 724, 726, 158 P. 187, 188 (1916); Estate of Johnson, 139 Cal. 532, 534, 73 P. 424, 425 (1903); Estate of Crane, 73 Cal. App. 2d 93, 102, 165 P.2d 940, 944 (2d Dist. 1946).
34. 20 Cal. App. 3d at 6, 97 Cal. Rptr. at 433-34.
35. Id. at 6, 97 Cal. Rptr. at 434. See note 30 and accompanying text supra.
36. Id. See note 31 and accompanying text supra. Prior to its analysis of the Forest Practice Act and logging operations in California, which led to the affirmative response to the public interest question, the court acknowledged the "considerable logic" of a New York court's holding that a constitutional question in respect to a fundamental public right might be raised at any time, even on the court's own motion, Craig v. Board of Educ. of City of New York, 173 Misc. 969, 978, 19 N.Y.S.2d 293, 302 (1940), and of a Wisconsin court's ruling that allowing public officials to waive public constitutional rights by failure to raise them at the trial level contravened the public interest, State ex rel. Joint School Dist. No. 4 v. Becker, 194 Wisc. 464, 468,
Act itself which declared "the existence of a public interest in the forest resources and timberlands" of California. Moreover, this interest was confirmed by "an abundance of published literature relating to private logging and timber operations in California and to the Forest Practice Act," which the court considered. Without arriving at specific conclusions regarding the credibility of the studies, the court observed that from any objective view, private logging and timber operations in California, regardless of how they are actually conducted, "are a matter of fundamental public concern." Accordingly, it decided to consider the merits of the constitutional challenge to the Forest Practice Act.

III

THE SUBSTANTIVE CONSTITUTIONAL ISSUES:
DELEGATION OF POWER AND DUE PROCESS

A. The Forest Practice Act

The court held that the Forest Practice Act violated the California and United States Constitutions:

insofar as it provides for the promulgation of forest practice rules . . . it unlawfully and without proper, or any, standards delegates legislative power, and otherwise denies due process of law to the interested and affected public.


Before proceeding with the discussion of the court's analysis of the constitutional issues raised and its subsequent holding, however, it is instructive to consider the general statutory scheme established by the Forest Practice Act by examining certain of its provisions. The Act consisted of ten articles. Article 2 spelled out the general pur-
poses of the Act, which, *inter alia*, consisted of (1) declaring the existence of a public interest in the forest resources and timberlands of California, (2) proclaiming the necessity for proper harvesting procedures to assure the productivity of the State's timberlands and continuance of the forest industry, (3) establishing forest districts in which forest practice rules shall be adopted to promote maximum sustained productivity of forests, and (4) authorizing creation of district forest practice committees to formulate and adopt these rules. Because the "public interest" proclaimed in Article 2 was instrumental in the court's decision to hear the appellants' constitutional challenge and, because the article's industry-oriented character contributed directly to the court's holding, it is useful at this point to set forth the Act's description of this "public interest".

The public interest is affected by the management of forests, timberlands, watersheds and soil resources of the state, and it is the policy of this state to encourage, promote and require such development, use, and management of forests and timberlands as will maintain the continuous production of forest products, to the end that adequate supplies of forest products are assured for the needs of the people and industries. It is the policy of this state to encourage and assist private ownership in the management and economic development of privately owned timberlands.

Under the provisions of Article 3, California's timberlands were divided into four regional groups known as forest districts, San Mateo County being part of the Redwood Forest District.

Although general responsibility for administering the Act was placed in the hands of the State Forester, under the supervision and direction of the State Board of Forestry and its director, Article 4 provided for the establishment of district forest practice committees to assist in such administration. Of the five members on these commit-

43. CAL. PUB. RES. CODE §§ 4541(a), (b), (c), (d) (West Supp. 1971).
44. See text accompanying note 37 supra.
45. See text accompanying notes 67-73 infra.
47. Id. §§ 4551, 4552.
48. Id. § 4561. The State Forester is a technically trained forester nominated for this position by the State Board of Forestry and appointed by its director. Id. § 645. The State Board of Forestry, charged with "the protection of the state's interests in forest resources on private lands, and [to] determine, establish, and maintain an adequate forest policy," (id. § 639) was comprised of seven members (id. § 630), increased to eight in 1970. Id. § 630 (West Supp. 1971). One (now two) members representing the general public, and one each from (1) the pine producing industry, (2) the redwood producing industry, (3) forest land ownership, (4) the range livestock industry, (5) agriculture, and (6) the beneficial use of water. Id. § 631 (West Supp. 1971), amending § 631 (West Supp. 1970).
49. Id. § 4561, 4562 (West Supp. 1971).
four were to be appointed by the Governor, two were required to be private timber owner-operators, the third an owner of more than 1,000 acres of commercial timber in the district, and the fourth a farmer-timber owner of not less than 160 nor more than 1,000 acres of commercial timberlands. The fifth member, who possessed voting power only in the case of a tie, was either a member of the State Board of Forestry or an employee of the State Division of Forestry appointed by it.

The duties and powers of these district committees were described in Article 5, whose provisions were of the greatest concern to the court. It was the duty of each of these committees to "formulate forest practice rules for the district to fulfill the purposes" of the Act. These rules, however, were required to be submitted to the private timber owners within the respective districts. If they were approved by two-thirds of the private timber ownership voting in the district, they were then submitted to the State Board of Forestry for approval. The private owners were also granted the power to suggest alternate plans to those of the district committees. If the forest practice rules, forest management plans or alternate plans submitted were deemed to be within the purposes of the Act, the Act stipulated that they "shall be approved by the board," and as such would have "the force of

50. Id. § 4563 (West Supp. 1970). In 1970, this number was increased to seven, two members of the public "having an interest in and knowledge of the environment" being added. Id. § 4563 (West Supp. 1971). The amended figures are not used because the court was concerned primarily with the Act as in effect prior to its 1970 amendments. 20 Cal. App. 3d at 8, 97 Cal. Rptr. at 435. For the effect of this and other 1970 amendments, see notes 111 & 112 and accompanying text infra.


52. Id. § 4564.

53. See note 3 supra.


55. Id. § 4572.

56. The percentage was measured by the acreage of timber and cutover land privately owned in the district. Id. § 4572. This means, of course, that if only 60 percent of the acreage were represented by those voting, a vote representing 40 percent of the total acreage in the district would control. There being no quorum requirement, 20 percent could control if only 30 percent of the ownership voted, and so on. Assume, for example, that Humboldt County represented the entire Redwood Forest District and the owners of one-half of its 1.45 million acres of forest lands voted. In such a situation, the owners of only three companies, the Arcata Redwood Co., Georgia-Pacific Corp. and the Simpson Timber Co., which together own approximately one-half million acres, could accept, reject or revise the forest practice rules. See San Francisco Chronicle, Jan. 14, 1972, at 5, col. 2.

57. CAL. PUB. RES. CODE § 4572 (West Supp. 1971). The Board of Forestry was itself powerless to promulgate the rules. It could merely approve or disapprove those rules submitted to it by the District Committees. See text accompanying note 70 infra.

58. Id. §§ 4574-75.

59. Id. § 4576.
law within the district.”

The remaining provisions of the Act were concerned with the definition of terms, application procedures for obtaining a permit to engage in timber operations, such as that obtained by Bayside, reasons and procedures for suspension or revocation of such permits, fees required, and penalties and enforcement procedures for operating without a permit or violating the forest practice rules.

2. The Court’s Analysis

This statutory scheme concerned the court for two reasons. In the first place, the substance of the forest practice rules which dictated the conduct of private logging operations was decreed exclusively by individuals with a pecuniary interest in the timber industry. The rules ordinarily would be formulated by the district committee, comprised of four timber owners or operators, but might also be drafted by the district’s private timber owners. In either case the support of two-thirds of the private timber ownership was necessary for submission to the Board. Furthermore, the court found it “noteworthy” that the Board itself was without power to promulgate forest practice rules; it might only approve or disapprove those submitted to it. The court concluded:

It follows that without agreement of the “private timber ownership,” no power in California has authority to impose rules to insure reasonable environmental and public protection from logging abuses.

Secondly, although the exclusive power to formulate forest practice rules, which, when adopted, would have the force and effect of law, had been delegated to private timber owners and operators, the Act prescribed no adequate guidelines or standards to prevent the abuse of the delegated legislative authority. Whether the rules which were formulated were in the public interest or in the interest of the timber

60. Id. § 4577.
61. Article 1, id. §§ 4521-38.
62. Article 6, id. §§ 4585-94.
63. Article 7, id. §§ 4595-99.
64. Article 8, id. § 4601-03.
65. Article 9, id. § 4605.
66. Article 10, id. §§ 4611-18.
67. 20 Cal. App. 3d at 10, 97 Cal. Rptr. at 436; see discussion of Article 5 provisions at text accompanying notes 55-60 supra.
68. 20 Cal. App. 3d at 10, 97 Cal. Rptr. at 436; see discussion of Article 3 at note 51 and accompanying text supra.
69. 20 Cal. App. 3d at 10, 97 Cal. Rptr. at 436; see discussion of Article 5 at text accompanying notes 56 & 58 supra.
70. 20 Cal. App. 3d at 10, 97 Cal. Rptr. at 436.
71. Id.
72. Id. at 10, 97 Cal. Rptr. at 436-37.
industry, the court concluded, was left to the "uncontrolled discretion of the committee and the timber ownership."\footnote{73}

The following discussion will analyze these issues in reverse order, considering first the question of delegation of legislative power in the absence of standards and then the problem of the composition of the bodies to whom that power was delegated.

\section*{B. Delegation of Power: The Non-delegation Doctrine and the Absence of Standards\footnote{74}}

In resolving this issue, the court reached two conclusions. First, it asserted that the question whether the state's environment and ecology, and the public generally, are to be protected by law from harmful practices of the logging and timber industry \cite{note 73} is most certainly a "truly fundamental issue."\footnote{75}

Secondly, it determined that:

\begin{quote}
    since the Legislature has chosen to delegate such law-making power\footnote{76}
    . . . its failure to prescribe any standards or "safeguards [adequate]
to prevent its abuse" impresses upon the Act constitutional taint.\footnote{77}
\end{quote}

In reaching the latter conclusion, the Court relied on the law relating to delegation of legislative power as set forth by the California Supreme Court in \textit{Kugler v. Yocum}.\footnote{78} That case had noted that the doctrine prohibiting the delegation of legislative power—"The power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it"
—although widely criticized, is well established in California. According to the Kugler court, the primary purpose of the doctrine is "to assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] accompanied by safeguards adequate to prevent its abuse.'" Based upon the premise that the legislature itself must effectively resolve truly fundamental issues, the doctrine provides that the legislature cannot escape that responsibility by delegating it to others or "by failing to establish an effective mechanism to assure the proper implementation of its policy decisions."

The significance of the court's initial conclusion is accordingly apparent. Regulation of logging operations so as to provide effective protection of the environment and the ecological concerns of the public was a "truly fundamental issue." Unless an "effective mechanism," referred to above, had been established by the legislature to assure the "proper implementation of its policy decisions," the delegation of power under the provisions of the Forest Practice Act would be presumed invalid.

A traditional "mechanism" was the inclusion of statutory standards sufficiently restricting the legislative power delegated.

It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature. . . .

The Kugler opinion, however, focused on a modern variation of this doctrine:

The need is usually not for standards but for safeguards. . . .

[T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards.

---


82. Id. at 375-76, 445 P.2d at 306, 71 Cal. Rptr. at 690.

83. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484, 238 P. 703, 709 (1925).

84. 69 Cal. 2d at 381, 445 P.2d at 309, 71 Cal. Rptr. at 693, quoting 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 2.15 (1958).
It is essential to understand these two views of the standards doctrine in order to evaluate correctly the Bayside court's resolution of the delegation issue.

The court's discussion of the standards issue was brief. At one point in its analysis the court in Bayside acknowledged that the Forest Practice Act did contain certain standards. It then proceeded to draw what at first glance appears to be the illogical conclusion that those standards were not standards at all.

The criteria contained in the Act's provisions were primarily devised to insure the continued availability of a timber supply. However limited, it is arguable that under the traditional doctrine such standards would not have required invalidation of the Act as an improper delegation of legislative authority. For example, in Johnson v. Michigan Milk Marketing Board, upon which the court relied heavily in resolving the due process objections to the composition of the district forest practice committees, the Michigan Supreme Court, applying that doctrine, upheld as "sufficiently definite" statutory standards less elaborate than those here.

The Bayside court, however, based its conclusions on the modern view of the standards doctrine. This is evidenced by its emphasis upon both standards and safeguards, and by its reliance on the Kugler and Wilke & Holzheiser decisions. The court's emphasis, like that of the modern view, was on protection against arbitrariness. The Forest

---

85. 20 Cal. App. 3d at 10 n.19, 97 Cal. Rptr. at 437 n.19.
86. "[I]n this delegation of legislative authority no guides or standards to prevent its abuse are laid down by the Act." Id. at 10, 97 Cal. Rptr. at 437. "[I]t unlawfully and without proper, or any, standards delegates legislative power." Id. at 14, 97 Cal. Rptr. at 439.
87. Id. at 10, n.19, 97 Cal. Rptr. at 437 n.19. See the statement of the Act's general purposes, CAL. PUB. RES. CODE § 4541 (West Supp. 1971), particularly subparts (b) and (c), summarized at text accompanying note 43 supra, and the explanation of the declared "public interest" in id. § 4542, cited at text accompanying note 46 supra; and the statement regarding application of the forest practice rules contained in id. § 4571. See text accompanying note 54 supra.
88. 295 Mich. 644, 295 N.W. 346 (1940). The standards there deemed "sufficiently definite" to satisfy the standards requirement were included in the title to the act reading:

An Act relative to the production and distribution of milk; to create a milk marketing board, and define its powers and duties; to provide for the licensing of milk dealers; to prescribe penalties for the violation of the provisions of this act; and to declare the effect of this act.
Id. at 652, 295 N.W. at 349. See text accompanying notes 94-96 infra.
89. Id. See note 88 supra.
90. "It follows . . . that its failure to prescribe any standards or 'safeguards to prevent its abuse' impresses upon the Act constitutional taint." 20 Cal. App. 3d at 11, 97 Cal. Rptr. at 438. See note 77 supra.
91. Id. at 11, 97 Cal. Rptr. at 437. See notes 77 & 78 supra.
92. See note 84 and accompanying text supra.
Practice Act was held to be an unconstitutional delegation of power because the limited standards it set, particularly when considered together with the placing of exclusive power in the hands of private timber owners to formulate forest practice rules, were totally inadequate to prevent the arbitrary exercise of that power to the detriment of the public. It was to this extent that the Act's standards were "non-standards," and that the court's conclusion that the Act was a delegation of power "without proper, or any, standards" was in fact logical and unimpeachable.

C. Due Process: Composition of Regulatory Bodies

The Court of Appeal in *Bayside* was concerned with the issue of delegation to interested parties in isolation of the standards issue, i.e. any delegation to such parties with or without adequate safeguards was constitutionally invalid, as shown by its substantial reliance on the Michigan Supreme Court's decision in *Johnson v. Michigan Milk Marketing Board.* That case concerned a statute which had set up sufficiently definite standards for the guidance of the administrative board, and therefore was held not to be unconstitutional as an improper "delegation of legislative power." The chief difficulty with the statute was the composition of the administrative board:

No claim is made that any member of the present Board has acted unfairly or arbitrarily, but the fact remains that the act requires the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them. . . . [I]t is essential that the Board be impartial in its composition.

Thus, in treating the fact that the delegation of legislative authority under the Forest Practice Act was to parties with a pecuniary interest in the delegated subject matter, the court drew from cases dealing primarily with threats to individual private rights resulting from improperly constituted public boards. The instant case, as we have observed, concerned public injury alleged to result inevitably from placing exclusive control of the logging industry in the hands of those persons who stood to profit most from harvesting timber by the most economical means and without regard for environmental safeguards. Indeed, the most innovative aspect of Judge Elkington's opinion is his assertion that:

the rationale of the cited cases is equally, if not more strongly,

93. See note 86 *supra*.
95. *Id.* at 652, 295 N.W. at 349.
96. *Id.* at 657, 295 N.W at 351.
97. 20 Cal. App. 3d at 13-14, 97 Cal. Rptr. at 439.
applicable here, for we believe no one would contend that the law has lesser concern for the overall public welfare than for individual private rights.98

The concept that a legislature must not delegate to private, interested individuals the authority to regulate others in the same business was most notably established by the United States Supreme Court in *Carter v. Carter Coal Company.*99 The cases principally relied on by the *Bayside* court in turn relied on the language and reasoning of that decision.100 The effect of *State Board of Dry Cleaners v. Thrift-D-Lux*101 would appear to be an extension of the *Carter* rationale to delegation of powers to an administrative board comprised of interested members of the regulated industry, where a majority of the board could initiate regulatory action. The California Supreme Court concluded that the delegation in that case was both a violation of due process and a constitutionally invalid exercise of the state's police power.102 In treating the due process issue, the court also relied on

---

98. *Id.* at 14, 97 Cal. Rptr. at 439. The contention that the non-economic public interest ought to be accorded the same legal advantages as economic private interests would appear to be a new legal doctrine. Contrast, for example, *Cal. Code Civ. Pro.* § 731 (West Supp. 1971), which permits an individual to file a private nuisance action where his property has been damaged, or where his enjoyment of the property has been decreased, but permits an action to abate a public nuisance only where filed in the name of the people by a county or city attorney.

99. 298 U.S. 238 (1935). With regard to the provisions of the Bituminous Coal Conservation Act of 1935 which sought to delegate to a majority of the coal producers and minors the power to fix maximum working hours and minimum wages, the Court concluded:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business... [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Id.* at 311.


102. *Id.* at 448-49, 254 P.2d at 36. The main thrust of the court's reasoning was that the act in question constituted an improper exercise of the state's police power. The only due process arguments raised took the form of extensive quotations from the *Carter Coal* decision. See note 98 *supra.* The successful demurrer to the original complaint, which had relied almost exclusively on alleged due process violations, undoubtedly accounted for the emphasis on the police power issue on appeal. In Bayside, the emphasis was equally exclusively on due process considerations.
language in Becker v. State\textsuperscript{103} that "too great a strain is imposed upon human frailty" where members of a governing board, "a majority of which are directly interested in the industry, but who, nevertheless, are empowered to act in a judicial capacity,"\textsuperscript{104} are allowed to regulate other members of the industry.\textsuperscript{105}

These cases suggest, and the Bayside court concluded, that the composition of the groups\textsuperscript{106} to whom rule-making power was delegated under the Forest Practice Act rendered the rule-promulgation sections constitutionally invalid. No specific mention was made, however, as to how the legislature might render the Act valid. Carter, Thrift-D-Lux, Becker, and even Johnson refer to groups a majority of whose members are pecuniarily interested parties. One might conclude from those cases that so long as their number does not exceed a minority, such parties might be present in administrative bodies to whom legislative power is delegated.

The Bayside court, however, suggested a stricter standard. In the first place, it recalled an "age-old principle of our law" that no man should judge or officially preside over disputed matters in which he had an interest of a pecuniary nature.\textsuperscript{107} Secondly, the court observed that, in the law of trusts, "[i]t is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee."\textsuperscript{108} Furthermore, the court suggested that, because California's Constitution prohibits members of the Legislature "from engaging in activities or having interests which conflict with the proper discharge of their duties and responsibilities,"\textsuperscript{109} the same principles ought reasonably to apply to

\textsuperscript{103} 37 Del. 454, 185 A. 92 (1936).
\textsuperscript{104} Id. at 472, 185 A. at 100.
\textsuperscript{105} Thrift-D-Lux, 40 Cal. 2d at 448-49, 254 P.2d at 36.
\textsuperscript{106} In resolving this issue, the court did not specifically distinguish between the composition of the district committees and the composition of the body given power to approve and amend the rules, namely, the timber ownership. The minority in Thrift-D-Lux apparently would distinguish between delegation to private interested persons, invalid under the Carter rationale, and delegation to a state agency comprised of interested individuals, so long as there existed a rational basis for such delegation. 40 Cal. 2d at 453-56, 254 P.2d at 39-41.
\textsuperscript{107} 20 Cal. App. 3d at 14, 97 Cal. Rptr. at 439.
\textsuperscript{108} Id., citing Sims v. Petaluma Gas Light Co., 131 Cal. 656, 659, 63 P. 1011, 1012 (1901).
\textsuperscript{109} 20 Cal. App. 3d at 14, 97 Cal. Rptr. at 439, citing CAL. CONST. art. IV, § 5. The language cited was added to the Constitution on Nov. 8, 1966: "The Legislature shall enact laws to prohibit members of the Legislature from engaging in activities or having interests which conflict with the proper discharge of their duties and responsibilities."

The court's argument takes the form of a logical progression, first presenting the time-honored principle of the law that no man shall be a judge in his own case, (see text accompanying note 107 supra) next noting the strict duties imposed upon a
those to whom legislative authority is delegated, at least where, as here, the public interest is so vitally affected. Finally, it follows from the court's treatment of a 1970 amendment to the Act, which added two representatives of the public "having an interest in and knowledge of the environment" to each district committee, that the presence of only a minority of pecuniarily interested persons on the committees would have been no more satisfactory to the court's constitutional standard. The court announced that it saw no "substantial constitutional improvement" and, therefore, its holding regarding the Act prior to the amendments applied to the Act as amended.

IV

IMPLICATIONS OF THE COURT'S DECISION

As has been previously indicated, the court's holding of unconstitutionality applied only to article 5, relating to the formulation and adoption of forest practice rules, and to portions of article 10 necessarily related to the enforcement of these rules. The general purposes of the Forest Practice Act, the forest districts, the district committees and the provisions for permit application today remain in effect, but without procedures or power for formulating, approving or amending forest practice rules for any district. Thus the recently reported statement of Edwin Z'berg, chairman of the California State Assembly private fiduciary, (see text accompanying note 108 supra) and finally, citing this language from the Constitution, emphasizing the strict conflict of interest restriction which ought to be judicially imposed upon those acting in a public "fiduciary" capacity. The California Supreme Court has not yet acted on such judicial construction of that section, but in the one case in which it has applied this language, it ruled that the legislature could impose upon its members, and on other public officials or employees, financial disclosure rules so extensive as to be unconstitutional when applied generally to candidates for either state or local office. City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 272, 466 P.2d 225, 234, 85 Cal. Rptr. 1, 10 (1970).

110. 20 Cal. App. 3d at 14, 97 Cal. Rptr. at 439.
111. Id. at 14-15, 97 Cal. Rptr. at 440. See CAL. PUB. RES. CODE §§ 4562-63 (West Supp. 1970). There was also added in 1970 a provision permitting the Counties of San Mateo, Marin and Santa Clara to adopt rules or regulations stricter than those provided under the Act or promulgated by the district committee. CAL. PUB. RES. CODE § 4582 (West Supp. 1971). The court concluded:

The constitutional offense is against the public generally of California. The fact that the named counties may, or may not, choose to adopt "stricter" rules in no way confers constitutional status on such portions of the Act as we have held to be invalid.

20 Cal. App. 3d at 15, 97 Cal. Rptr. at 440. See note 129 and accompanying text infra.

112. 20 Cal. App. 3d at 15, 97 Cal. Rptr. at 440.
113. Id.
114. See note 3 supra.
115. See discussion of the Act's provisions at text accompanying notes 43-66 supra.
Natural Resources Committee, that the Forest Practice Act "is no longer in existence for all practical purposes" is, for the most part, correct. It is apparent, however, from the court's conclusion regarding the fundamental importance of protecting the state's environment, and the public generally from harmful practices of the logging industry that revisions of the Act will necessarily include modifications of its proclaimed purposes. In particular, the purpose of "maintaining the continuous production of forest products" may need to be expanded to incorporate the preservation of an essential, nonrenewable resource on which forest productivity depends, namely, the soil. However, proposing legislation to deal effectively with the protection of the public and environmental concerns in the logging industry and to remedy the constitutional deficiencies of the invalidated provisions of the Act is beyond the scope of this Comment. The discussion here will be confined to certain implications to be drawn from the court's resolution of the procedural and substantive legal issues.

The import of the court's decision from the standpoint of procedure is reasonably clear. A constitutional challenge to a regulatory statutory scheme apparently will be heard even when raised for the first time on appeal where resolution of the constitutional question is necessary for the disposition of the appeal, and where public interest in the regulated activity of a fundamental nature is established. For the purpose of accomplishing the latter, it appears that the appellants will not be restricted to the evidence introduced at the trial level. The influence which the several penetrating studies considered by the court on the harm resulting from so-called acceptable forest practices had on its declaration of a "fundamental" public interest in regulation of the logging industry, is indeed one of the more encouraging and praiseworthy aspects of this case for environmentalists. As a practical matter, however, the introduction of a constitutional challenge at the appellate, rather than the trial, level has little merit. In the absence of

117. See text accompanying note 75 supra.
118. See text accompanying note 46 supra.
119. See remarks of Dr. Clyde Wahrhaftig, professor of geology at the University of California at Berkeley:

Clearly, the Forest Practices Act has failed in its purposes of guaranteeing an indefinite high timber productivity in the redwood region . . . for it has failed to preserve an essential nonrenewable resource on which forest productivity depends. That resource is the soil.

San Francisco Chronicle, Jan. 15, 1972, at 4, col. 3.
120. See text accompanying notes 29-40 supra.
121. See note 38 and accompanying text supra. The article referred to in note 38 was presented by the appellants for the first time in their closing brief. Closing Brief for Appellants, Exhibit A at 1-28.
122. See the court's analysis, 20 Cal. App. 3d at 6-8, 97 Cal. Rptr. at 434-35.
substantive arguments of a compelling nature, such a challenge will be unsuccessful.

The court’s treatment of the delegation of power issue indicates that the proper function of the non-delegation and standards doctrines should no longer be to prevent delegation of legislative power or merely to require meaningful statutory standards. Rather it should be to provide protection against the arbitrary exercise of administrative power commensurate to that existing were that power exercised by the legislature. The focus of the courts should be on the “totality of protections against arbitrariness,” including both statutory standards and administrative safeguards. The statutory standards which were contained in the provisions of the Forest Practice Act provided no such protection against the arbitrary exercise of power delegated to the detriment of the public. Nor was there any evidence of procedural safeguards to be adhered to in the administration of the Act either by the district committees, whose composition was markedly weighted in favor of the timber owners, or by the timber ownership, who possessed exclusive power to adopt or amend the forest practice rules. It was on the basis of this two-fold analysis that the rule-promulgation procedures of the Act were invalidated.

The advantage of this approach for environmentalists, were it consistently applied to the exercise of power by public administrative agencies, would be the funneling of the discretionary power of those agencies through appropriate safeguards—a major reform of traditional concepts of delegation of power. These agencies would be forced to confine and guide both their delegated and undelegated power, including the power of selective enforcement, through specified principles and rules. This requirement would be judicially enforced. While such changes are indeed sweeping ones, it has been emphasized by Professor Kenneth C. Davis that they are “deeply conservative in that they are designed to enlarge the judicial function of protecting private parties against injustice.”

123. 20 Cal. App. 3d at 10, 97 Cal. Rptr. at 437; K. Davis, Administrative Law Treatise § 2.00 (Supp. 1970).
125. See note 87 supra.
126. See text accompanying notes 49-60 supra.
127. Such a reform has been most persuasively and ardently proposed by Professor Davis, initially in his Administrative Law Treatise, supra note 84, and further developed in the Supplement to this Treatise, at 40-78. In the Supplement, Professor Davis has outlined the “failure” of the non-delegation doctrine and has proposed a new approach to the delegation of power which would involve the future merging of the non-delegation doctrine with the concept of due process and possibly the movement from a constitutional base to a common-law base of judicial enforcement. K. Davis, supra note 84, at 58-62 (Supp. 1970).
cases would be well-advised to give Professor Davis's specific suggestions and proposals careful consideration.

With regard to the court's treatment of the due process issue, no one would dispute the fact that, particularly in the regulation of this country's dwindling supply of natural resources, the threat posed by improper action on the part of regulatory commissions is as great to the public interest as it is to private economic rights. The court's application of cases dealing with such private rights to the public injury asserted by the county in *Bayside* would appear merely to be an acknowledgement of the importance of the threat to the public interest where resources are mismanaged. Such an approach by the court is eminently sensible and laudable.

It is not possible, however, to treat the court's conclusions regarding the proper composition of administrative commissions in a similarly summary fashion. Its treatment raises perhaps as many questions as answers. The court appears to have concluded that the due process objections to the Forest Practice Act would not have been satisfied by the presence of a mere minority of pecuniarily interested parties on the bodies to whom power was granted. Close analysis of the court's dicta shows that the requirement proposed was that no such persons be present. In specific terms, this would necessitate the absolute abandonment of the grant of rule-making authority to the timber ownership, and would prohibit the presence of timber owners on the district forest practice committees.

It does not follow, however, that a necessary result of such a requirement would be to place the regulation of the timber industry in the hands of persons without sufficient expertise adequately to perform that function. For example, subsequent legislation adopted to replace the Bituminous Coal Act of 1935, invalidated in the *Carter Coal* decision, established a commission which continued to include representatives of both the mine workers and coal producers. This was legitimized by requirements that these representatives not be currently occupied in coal mining or production and that while serving on the com-

---

129. It is an age-old principle of our law that no man should judge or otherwise officially preside over disputed matters in which he has a pecuniary interest. The rule is given expression in the law of trusts. "It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee." [Citation omitted] California's Constitution, article IV, section 5, notices the same concept by providing that the Legislature shall enact laws to prohibit its members "from engaging in activities or having interests which conflict with the proper discharge of their duties and responsibilities; . . ." The same rule should reasonably apply to those persons empowered by law to promulgate the Forest Practice Act's rules which so vitally affect the public interest.

20 Cal. App. 3d at 14, 97 Cal. Rptr. at 439. See note 109 supra.
mission "none of the members . . . have any financial interest" in any business, vocation or employment related to coal mining or production.¹³⁰ In addition, a commission comprised of technically trained foresters, such as the group from which the State Forester is selected, including experts in watershed management, experts in soil erosion and protection, and representatives of the public interested, and knowledgeable, in environmental protection would be a legitimately composed body under the Bayside standard. And such a commission would exercise considerably more expertise in the field of forest practices than one comprised primarily of individuals whose main qualification was that they owned forest land or engaged in logging operations.

The objection, therefore, was not to experienced persons sitting on regulatory commissions, rather it was to the inevitable conflict of interest existing when persons charged to represent the public interest have a personal financial stake in the regulated activity. It should be noted that there would apparently be no objection to utilizing timber owners or operators in a non-voting advisory capacity. The standard imposed by the court—exclusion of timber owners and operators from an active regulatory capacity—would not necessarily result in forest practice regulation of reduced quality if enacted into law. In fact, the strict due process standard suggested by the court's dicta¹³¹ seems admirably suited for regulated activities such as logging operations to provide adequate guarantees that the fundamental public interest in those activities be protected.

The primary difficulties presented by the court's proposed standard come in defining its limits, and in determining its general applicability to areas other than forest practice regulation. The court's conclusions certainly apply to the regulation of other activities whose protection is of similar fundamental public concern.¹³² Assuming that the

¹³⁰ Two members of the Commission shall have been experienced bituminous coal mine workers, two shall have had previous experience as producers, but none of the members shall have any financial interest, direct or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment.

¹³¹ See note 129 and accompanying text supra.

¹³² Cf. Marks v. Whitney, — Cal. 3d —, 98 Cal. Rptr. 790 (1971). It might also be asked whether the regulation of professional associations, such as by the Board of Medical Examiners and the Board of Governors of the State Bar, solely by persons employed in those occupations falls within the court's general proscription or regulation by pecuniarily interested individuals. Indeed, strong arguments were made against granting the appellants' appeal on grounds that to do so would necessarily involve the invalidation of the State Bar, apparently on the assumption that such arguments would effectively quash the appeal. See Brief for Appellee at 13-14; Brief
court's reasoning ought to apply only to such activities, there remains the further question whether a court's inquiry ought to be limited merely to the presence of pecuniarily interested parties on regulatory commissions, as Bayside implies. It could be argued, logically consistent with the court's analysis of the Forest Practice Act, that the violation of due process in fact resulted from vesting two contradictory functions in the district committees and timber ownership: promoting the "maximum sustained productivity of the forest,"133 and protecting the fundamental public interest in the prevention of soil erosion and other environmental damage which might result from the harvesting methods employed. According to this view, the Forest Practice Act is a clear illustration of the inevitable conflict of interest resulting from vesting both promotional and regulatory functions in the same administrative agency. Given the "symbiotic relationship enjoyed by agencies and industry,"134 it can be argued that the mere vesting of these two contradictory functions in the same parties, whether pecuniarily interested or not, is violative of due process, resulting consistently in the subjugation of the public interest to that of private industry. However logically consistent with the court's findings, this view was not specifically propounded by the court. It will have to be tested in subsequent litigation.135

The specific findings of the court in Bayside indicate that empirical data regarding environmental damage resulting from currently

---

133. CAL. PUB. RES. CODE § 4541(c) (West Supp. 1970).
134. See the general discussion of the minimization of public awareness of, and public participation in, the decision-making processes of governmental administrative agencies in Comment, Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation, 1 ECOLOGY L.Q. 567 (1971).
135. A complaint has recently been filed against the Atomic Energy Commission by six environmental groups. The complaint alleges, inter alia, that the Atomic Energy Act of 1954 "violates the due process principle that no man shall judge his own cause" and that it is a violation of due process to vest in the Atomic Energy Commission:

a. Authority to decide how much disease producing radiation, the public, or certain classes of persons, will be exposed to, and at the same time, vest in the COMMISSION the authority to promote and engage in activities which increase such risks.

b. Authority to enforce radiation standards which anticipate numerical value judgments in political, economic and social fields (balancing the benefits and risks of an industry that produces radiation) while at the same time authorizing the COMMISSION to promote the activities which increase such risks.

enforced regulations may be introduced in an attempt to demonstrate the degree of public concern over the prevention of further damage and the need for major revision of such regulations. Where such a fundamental interest of the public is established, it is now clear that the composition of regulatory commissions may be raised as a separate and distinct issue for determining whether due process requirements have been satisfied. And if the dicta of the court are to be followed, the statutorily-imposed presence on such a commission of any individual having a pecuniary interest in the regulated activity will render the enabling statute invalid.

Edward G. Heilman