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Address

Environmental Decisionmaking: Judicial and Political Review

*David Sive**

SEVERAL YEARS AGO, at the time of the first explosion of environmental law, I went to the traditional fountains and fountainheads of administrative law, and attempted to answer the question: Is the scope of judicial review of environmental administrative action broader than, or different from, judicial review in other fields of administrative action?¹ The conclusion was, perhaps, an emotional one because the classical struggles to save various places—the Grand Canyon,² Storm King Mountain,³ Rainbow Bridge,⁴ and others—were just beginning. Environmental review really required something more than the usual look by courts at administrative action. I saw then that there were three grounds on which to base the need for expansive review. First, I thought that the value judgments which are so often required to resolve environmental cases called more for the talents and training of courts and judges than that of administrators.⁵ Second, the

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1. See Sive, *Foreword: Roles and Rules in Environmental Decisionmaking*, 62 IOWA L. REV. 637 (1977); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

2. See Hano, *The Battle of the Grand Canyon*, N.Y. Times, Dec. 12, 1965, § 6 (Magazine), at 56; *id.*, Dec. 19, 1965, § 1, at 57, col. 2; *id.*, May 2, 1966, at 42, col. 1.

3. See *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

4. See *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

5. See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629-30 (1970).

very newness of some of the statutes which began to flood us at the end of the 1960's⁶ frequently generated classical questions of law to be reviewed de novo by the courts.⁷ Finally, the importance of the rights asserted, due to the irrevocable impact of environmental decisions, seemed to justify broader judicial review.⁸

The question whether environmental decisionmaking in general is different was one that we activists answered first emotionally, and later, rationally. We were led by people like Rachel Carson,⁹ David Brower,¹⁰ and hikers in the Hudson River highlands who importuned us to save the birds and other voices of spring from DDT, the Grand Canyon from dam builders, and Storm King Mountain from the Consolidated Edison Company. We viewed as heresy any claims that the fate of the environment must somehow be determined in the same manner as in other social movements—by the same kind of bargain-striking in the political process, and by application of the traditional notions of the scope of judicial review.

Several distinct events, both judicial and nonjudicial, suggest to me that the time is ripe to consider again whether environmental decisionmaking is different, or should be different, or is simply a movement some of us feel deeply about as others feel toward other equally important social movements.¹¹ About two years ago, in *Kleppe v. Sierra Club*,¹² the Supreme Court held that a governmental agency's determination to prepare an environmental impact statement in its presumed field of expertise must be upheld

6. *E.g.*, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (1976).

7. *See* Sive, *supra* note 5, at 625-26, 630.

8. *Id.* at 643.

9. *See* R. CARSON, *SILENT SPRING* (1962).

10. Former Executive Director of the Sierra Club; *see* N.Y. Times, May 8, 1967, at 67, col. 1.

11. I have not been the only one, and hardly even one of the most important ones, to examine environmental decisionmaking in recent months. A vast outpouring of learning has come from a study by the Committee on Environmental Decisionmaking of the National Academy of Sciences, conducted as part of a multimillion dollar research project commissioned by the EPA. Decisionmaking in the Environmental Protection Agency (published by the National Academy of Sciences, 1977). The subject also proliferates in the law reviews and other learned literature. *See, e.g.*, Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Smith, *The Environment and the Judiciary: A Need for Co-operation or Reform?*, 3 ENV'TL. AFF. 627 (1974); Symposium, *Environmental Decision-Making: The Agencies versus the Courts*, 7 NAT. RES. LAW. 337 (1974).

12. 427 U.S. 390 (1976).

unless its determination is arbitrary and capricious.¹³ Recently, in the Adirondack Mountains, where passions run high concerning New York State's first experience with land use controls,¹⁴ bumper stickers advise, "Are you hungry? Eat an environmentalist!" And, at both Seabrook, New Hampshire, and Kennedy Airport, New York, opponents of a nuclear power plant¹⁵ and of Concorde landings¹⁶ invoke the classical tenets of civil disobedience to supplement, or perhaps replace, the finely spun forensics and scholarship of their attorneys. These examples of current environmental activity on different levels serve to focus the attention of courts on the relationship of the adversary process to three other decisionmaking processes: 1) the administrative process,¹⁷ 2) the political process,¹⁸ and 3) the process of direct citizen action.¹⁹

At the outset of this address let me offer an answer to the question I have posed²⁰—Yes, environmental review is still broader, but less than it has been.

13. *Id.* at 412.

14. [I]n 1968, Governor Nelson A. Rockefeller created the Temporary Study Commission on the Future of the Adirondacks. In 1971, despite strong opposition from Park residents, New York State accepted the recommendations contained in the Report of the Commission by enacting the Adirondack Park Agency Act [N.Y. EXEC. LAW §§ 800-19 (McKinney Supp. 1978)].

.....

The Act . . . represents a comprehensive and pioneering endeavor to provide land use planning for the Adirondack Park on a regional basis. Treating the region as a whole, the legislation is designed to provide a land use plan for the Park that will allow for the development and growth of local communities in a manner consistent with the protection and preservation of the entire region as a natural environmental resource.

Savage & Sierchio, *The Adirondack Park Agency Act: A Regional Land Use Plan Confronts "The Taking Issue,"* 40 ALB. L. REV. 447, 448 (1976). For a discussion of the background, substance, and operation of the Act, see Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. U.L. REV. 612 (1975).

15. See N.Y. Times, May 1, 1977, § 1, at 26, col. 1; *id.*, May 2, 1977, at 1, col. 2; *id.*, May 3, 1977, at 20, col. 1. For a discussion of environmentalists, civil disobedience, and the law, see generally Sive, *Seabrook, Concorde and Law*, *id.*, July 16, 1977, at 21, col. 2.

16. See *id.*, April 17, 1977, § 1, at 19, col. 1; *id.*, April 18, 1977, at 54, col. 1; *id.*, May 16, 1977, at 57, col. 1; *id.*, Oct. 7, 1977, at 1, col. 1; *id.*, Nov. 21, 1977, at 40, col. 1.

17. See notes 20-41 *infra* and accompanying text.

18. See notes 42-63 *infra* and accompanying text.

19. See notes 64-65 *infra* and accompanying text.

20. With all due candor, I must qualify my claim of expertise: 1) I am a litigator and secondarily an observer; although I hope I am a fair observer, I may confuse what is with what ought to be; and 2) my legal expertise may be doubtful, for as in a war the infantry in the front lines always knows far less about who is winning than the quartermaster at command headquarters; so, too, one in the litigating trenches may know far less about the big picture than the scholars and commentators.

To begin with the latter half of that conclusion, there are three reasons why I think the difference has narrowed. One is that, with the passage of time and the maturing of environmental law, the proportion of important cases determined strictly by defining legal concepts, independent of findings of fact, has become smaller; that is, fewer important cases now hinge on the meaning of statutory phrases, such as "dike,"²¹ "navigable waters,"²² and "major federal actions significantly affecting the quality of the human environment."²³ It is also clear that a greater proportion of the cases are now determined upon issues of fact at trial rather than upon pretrial motions.²⁴ Included in these cases are the NEPA cases, which comprise a sizeable fraction of all environmental litigation. These cases more often now involve the sufficiency rather than the necessity of environmental impact statements.²⁵ Since determining the sufficiency of environmental impact statements often requires testimony of expert witnesses, submission of exhibits, and other evidentiary processes, courts are more commonly faced with issues of fact rather than law, and thus more of these cases proceed to trial.

Perhaps of greater significance is that, as time has gone on, the important cases being litigated have become evenly divided between those in which the environmental interests are seeking broader review and those in which their adversaries, to whom I refer as the "developmental interests," are seeking broader review. The situation is aptly described by Kenneth Boulding, one of our great economists and a National Academy of Sciences energy panelist, who once quipped to me that one of the things that makes environmental law interesting is the fact that the rich developmental interests have had the effrontery to use the tech-

21. *See, e.g.*, *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 106 (2d Cir.), (construing the Rivers and Harbors Appropriation Act of 1899, § 9, 33 U.S.C. § 401 (1970)), *cert. denied*, 400 U.S. 949 (1970).

22. *See, e.g.*, *Kalur v. Resor*, 335 F. Supp. 1, 10-11 (D.D.C. 1971) (construing the Rivers and Harbors Appropriation Act of 1899, § 13, 33 U.S.C. § 407 (1970)).

23. *See, e.g.*, *Smith v. City of Cookeville*, 381 F. Supp. 100, 109-11 (M.D. Tenn. 1974) (construing NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970)). *See generally* Comment, *Environmental Law: What is "Major" in "Major Federal Action?"*, Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974), 1975 WASH. U.L.Q. 485 (1975).

24. This conclusion is based on a comparison between the approximately 140 cases summarized in the 1971 volume of the Environmental Law Reporter and the approximately 180 cases summarized in the 1977 volume.

25. *E.g.*, *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 1238 (1978).

niques that they learned from the poor environmentalists.²⁶ The importance of this development is demonstrated very dramatically in the brief for the respondents²⁷ in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*²⁸ Although the Supreme Court recently reversed the decision of the District of Columbia Court of Appeals, which had held that the Nuclear Regulatory Commission may not license nuclear power stations until it more fully considers the environmental effects of reprocessing and waste disposal, the framework of the Natural Resources Defense Council's (NRDC) argument is illustrative of the growing phenomenon in environmental cases. The environmentalists argued that the administrative action did not meet the standard of reasoned decisionmaking within the requirements of the Administrative Procedure Act and therefore should be overturned as arbitrary and capricious.²⁹ What authorities did the NRDC cite, however, to support its point that "The Law of Administrative Procedure Requires an Agency to Engage in Reasoned Decisionmaking?"³⁰ The NRDC cited eight environmental cases and five cases from other areas of administrative decisionmaking.³¹ Of the eight environmental cases, only two, *Scenic Hudson Preservation*

26. See also Hill, *Turning the Tables—Businesses Are Finding Environmental Laws Can Be Useful To Them*, Wall St. J., June 9, 1978, at 1, col. 6.

27. Brief for Respondents, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

28. 435 U.S. 519 (1978), *rev'g* 547 F.2d 633 (D.C. Cir. 1976).

29. Section 10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976), requires a reviewing court to set aside any action of an administrative agency that it finds to be "arbitrary, capricious, an abuse of discretion. . . ." In decisions spanning more than 30 years, the Supreme Court has construed § 10(e)(B)(1) to require a method of reasoned decisionmaking. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

30. Brief for Respondents, *supra* note 27, at 29.

31. *Id.* at 30-32. The eight environmental cases are: *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *American Petroleum Inst. v. EPA*, 540 F.2d 1023 (10th Cir. 1976); *Hooker Chem. Co. v. Train*, 537 F.2d 639 (2d Cir. 1976); *South Terminal Co. v. EPA*, 504 F.2d 646 (1st Cir. 1974); *Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom.* *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). The six cases from other administrative areas are: *Camp v. Pitts*, 411 U.S. 138 (1973); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *SEC v. Chenery*, 318 U.S. 80 (1943); *Greater Boston TV v. FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971); *Marine Space Enclosures, Inc. v. Federal Maritime Comm'n*, 420 F.2d 577 (D.C. Cir. 1969); *Isbrantsen Co. v. United States*, 96 F. Supp. 883 (S.D.N.Y. 1951).

*Conference v. Federal Power Commission*³² and *Citizens to Preserve Overton Park v. Volpe*,³³ are cases in which the environmental interests were seeking to expand the scope of review and to secure greater adversarial procedural rights at the administrative level. In six of the eight cases, the *developmental* interests were seeking the broader scope of review or greater adversarial rights, or both, and each involved review of EPA action. Of the six EPA cases cited by the NRDC, the most important is one of the first in which the environmentalists' shoe was put on the developmentalists' foot—*International Harvester v. Ruckelshaus*.³⁴ The reason why the cases are almost evenly divided now is simply that a tremendous amount of environmental litigation involves EPA determinations, and to the extent that the EPA is far more frequently pro-environment, because that is its mission, the people seeking to expand review and seeking greater adversarial rights are the developmental interests. Therefore, there is less difference than before between environmental review and other judicial review, since a disparity no longer exists between the number of cases in which those in favor of review, as opposed to their adversaries, are seeking its expansion.

Despite my prejudices, I believe that it has become evident that the EPA has grown in expertise. This development, which Professor Kenneth Culp Davis has quite correctly stated is the most important implicit factor defining the scope of court review,³⁵ is the third major factor which I think has narrowed the difference between the scope of environmental review and nonenvironmental review. In 1965, to speak to a Federal Power Commissioner about the subtleties of the beauty of Storm King Mountain, or to an Interior Department agent about the beauty of Rainbow Bridge, was a very difficult thing. Neither had the requi-

32. 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

33. 401 U.S. 402 (1971).

34. 478 F.2d 615, 640 (D.C. Cir. 1973). In *International Harvester*, the court set aside an order requiring new automobiles to be equipped with catalytic converters. Perhaps the first significant case in which the tables were turned is *National Helium Corp. v. Morton*, 326 F. Supp. 151 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971), in which the National Helium Corporation complained that Secretary Morton improperly terminated a purchase contract without making an environmental impact statement in accordance with NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C). *See also* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633, 637 (D.C. Cir. 1976).

35. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.09 (1958).

site expertise because such matters had never come before them. Those agencies do have expertise now, principally because a very large number of lawyers and other professionals who have been trained since the environmental movement began are now within those agencies.³⁶ The courts, I think, properly respect that expertise. A clear example is *Kleppe v. Sierra Club*,³⁷ in which the Supreme Court relied primarily upon the expertise of the Department of the Interior in sustaining its determination that a program environmental impact statement covering the effects of proposed coal mining was not necessary for the entire Northern Great Plains region.³⁸ The Court reasoned that the Department of the Interior was expert in dividing up the region for impact statement purposes—expert not only in the technical aspects of geography and geology, but also expert generally in considering all environmental factors. The Department of the Interior is certainly a good illustration of the change of outlook and growth of expertise since the mid 1960's.

Here of course one can argue that the Department acts with expertise when its decisions are liked and without it when its decisions are not liked. But it seems to me that if expertise is really the critical factor, the environmentalists may have an edge. The expert agency most frequently subject to review of environmental decisions is the EPA. To the extent that other agencies may not match the environmental expertise of the EPA, the environmentalists may have an advantage because the EPA was created to respond to environmental concerns.

For these three reasons, the difference between the scope of environmental review and nonenvironmental review has lessened. A difference still exists, however, and I think the best explanation for this was provided in the text of an address by Judge James L. Oakes, of the Second Circuit Court of Appeals:

The first such tentative conclusion, or, better, working hypothesis, is that, despite many links to the past, environmental law is in a real sense qualitatively different from other areas of administrative, regulatory, or public law. Because life itself is involved, there is no other area that I can think of that requires such a complex balancing of so many subtle relationships. An Interstate Commerce Commission (ICC) ratemaking decision,

36. This observation includes agencies such as the Army Corps of Engineers and the Federal Power Commission, or any other agencies which have formerly been classified as anti-environmental.

37. 427 U.S. 390 (1976).

38. *Id.* at 412-14.

a Federal Communications Commission (FCC) television licensing decision—these and similar regulatory decisions have several dimensions, but a relatively finite number. By contrast, the number of dimensions to many environmental questions is almost staggering. It is not enough to balance economic effects against human health effects, or the need for a structure against its unsightliness.³⁹

Judge Oakes continues with a comparison of the complexities,⁴⁰ and I suppose his conclusion is arguable. Some might make the same argument for decisions in other fields; for example, an FCC determination might involve the quality of public programs, civil rights, and other similar issues. I think I agree with Judge Oakes that environmental decisions differ because of their complexity, but I do not mean to say that they are more important. I will only go so far as to say that in this particular area there is a great importance which seems to arise out of the irrevocable nature of the decisions in environmental cases. I once suggested that in environmental cases more than in other fields, including the civil liberties field, the effect of a court's determination is more irrevocable⁴¹ than in a case in which, for example, a court makes a determination requiring some shade of opinion in the problems of the separation of church and state. I still believe that is true because a decision dealing with a problem of the latter type can be done or undone by a court which has moved to the left or right, or however courts move. But when a determination is made to appropriate a major physical resource, it virtually never can be undone, at least not within our lifetime or that of a few generations to follow.

This leads to the second aspect of our inquiry—the relationship of the judicial process to the political process. By the political process I mean the process by which legislation is enacted, the whole process of public debate of political issues, including the processes by which both state and federal legislators are elected. In my opinion, the most fascinating and also the most troublesome aspect of environmental decisionmaking lies here. I can liken its quality to some advice Professor James MacDonald, a witty friend of mine at the University of Wisconsin Law School, once gave me on identifying an appropriate topic for student discussion: "No problem is worth extended discussion unless it has no solution." By this criterion, the problems of the relationship

39. Oakes, *Substantive Judicial Review in Environmental Law*, 7 ENV'T L. REP. 50029, 50029 (1977).

40. *Id.* at 50033.

41. Sive, *supra* note 5, at 643.

between judge-made environmental law and politics are truly worthy of discussion. Here again I think the relationship is different in the environmental area than in other areas.

At the beginning of the environmental movement we thought that environmental decisionmaking was indeed so different in kind and importance that we romanticized our concepts of the relationship between man and nature into theories of a constitutional right to a clean and healthy environment.⁴² Such a right, we loosely argued, was one of those that James Madison and his fellow Federalists had deposited into the catchall known as the Ninth Amendment. Like the right of privacy, some of us theorized, it was within the constitutional "penumbra" of substantive due process announced in *Griswold v. Connecticut*.⁴³ For many reasons we did not find it necessary to take to the streets, to the fields, or to other avenues outside the legal process, in the manner of civil rights or peace advocates. I think the principal reason is that environmental causes were traditionally espoused by highly educated, white, upper-middle class persons, which is one of the burdens we bear today. We chuckled at the occasional tearing down, by nonlawyers, of billboards in the dead of night. Holding ourselves as being beyond all that, we went to the courts and the legislatures.

Today, by contrast, there are a large number of important controversies which are carried on in both the environmental litigating field and the political arena. The disputes involving nondegradation,⁴⁴ the Alaska Pipeline,⁴⁵ nuclear waste dispo-

42. See D. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue* (a paper submitted to the Sept. 11-12, 1969 Conference on Law and the Environment, sponsored by the Conservation Foundation, Washington, D.C.) [hereinafter cited as the "Warrenton Conference"]. It was probably here that the term "environmental law" was invented.

43. 381 U.S. 479, 483-84 (1965); see Roberts, *supra* note 42. Not only has there been a push for recognition that a clean environment is constitutionally guaranteed, but also some have argued that natural objects should be given standing to sue to protect their survival. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). In *Sierra Club v. Morton*, 405 U.S. 727, 741-53 (1972), Justice Douglas argued that Mineral King Valley should have been the plaintiff in the suit to simplify confusion surrounding the standing issue in environmental cases. Justice Douglas likened such conferral of standing to the recognition of legal status to other inanimate objects such as ships and corporations. *Id.* at 741-42.

44. Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clear Air and Clean Water*, 62 IOWA L. REV. 643 (1977).

45. See generally Dominick & Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U.L. REV. 337 (1973).

sal,⁴⁶ transportation control plans,⁴⁷ and clearcutting⁴⁸ provide only a few examples. One of the major problems that arises from having both the political process and the legal process work on the same matters at the same time is the frequency of inconsistent and reversible decisions.

About twelve years ago I was involved in such a situation, when I experienced losing in court but winning the larger war. The war was a relatively minor one—just the desire of park associations, environmentalists, and certain storeowners in the area, including the Atlantic Chapter of the Sierra Club and Tiffany's, to prevent the construction of a cafe at the southeast corner of Central Park in Manhattan.⁴⁹ After four years of litigation, on issues including the definition of a "park,"⁵⁰ and the public trust question,⁵¹ the environmentalists lost in New York's highest court. However, Tom Hoving, then recently appointed by Mayor Lindsay as Parks Commissioner and the son of one of the plaintiff storeowners, vetoed the plans for the cafe. Conversely, I suppose the biggest battle the environmentalists won in the courts and then lost in politics was the much more important one involving the Alaska Pipeline.⁵² First, Congress nullified the injunction order of the court of appeals⁵³ by legalizing a wider corridor for the pipe-

46. See, e.g., *West Va. Div. of the Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975); *Texas Comm. on Natural Resources v. Bergland*, 433 F. Supp. 1235 (E.D. Tex. 1977). See generally STAFF OF SUBCOMM. ON PUB. LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., 2D SESS., CLEARCUTTING ON FEDERAL TIMBERLANDS (Comm. Print 1972); *Hearings on Establishment of a Comm'n to Investigate Clearcutting of Timber on Pub. Lands Before the Subcomm. on Forests of the House Comm. on Agriculture*, 92d Cong., 2d Sess. (1972).

47. See *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975); *Clean Air Act* § 110, 42 U.S.C. § 1857c-5 (1976).

48. See, e.g., *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 547 F.2d 633 (D.C. Cir. 1976).

49. *795 Fifth Ave. Corp. v. City of New York*, 11 N.Y.2d 918, 183 N.E.2d 77, 228 N.Y.S.2d 672 (1962).

50. See *795 Fifth Ave. Corp. v. City of New York*, 40 Misc. 2d 183, 193, 242 N.Y.S.2d 961, 971 (1963), *aff'd*, 15 N.Y.2d 221, 205 N.E.2d 850, 257 N.Y.S.2d 921 (1965).

51. *Id.* at 186-94, 242 N.Y.S.2d 964-72. See also *795 Fifth Ave. Corp. v. City of New York*, 13 App. Div. 2d 733, 733-34, 215 N.Y.S.2d 391, 392 (1961). The public trust issue focuses on whether a government may alienate trust property by conveying it to a private owner and whether the government may effect changes in the use to which that property has been devoted. See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

52. See generally *Dominick & Brody*, *supra* note 45.

53. *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

line.⁵⁴ Then, by the tie-breaking vote of Vice President Agnew, the Senate rendered unnecessary the court's determination of whether the environmental impact statement was insufficient by passing the enabling act for the pipeline.⁵⁵

I suppose what injects controversy into the political process is that it involves the interests of a large number of people. Despite the frequency with which environmental controversies are involved in the political process, the fact that they involve such widely held interests may render them more worthy of judicial determination than those controversies involving only a small, discrete number of interested persons.

Environmental decisionmaking, therefore, raises another problem related to the political process: the overloading of the federal courts with too many of our social and economic problems. This recalls de Tocqueville, who first observed that we ultimately bring everything to the courts seeking resolution.⁵⁶ Chief Justice Burger has frequently commented on the problem,⁵⁷ but I am afraid I have no solution to offer him. To some extent I share his viewpoint that we must use means other than courts for certain types of dispute resolution; for example, the issue whether a girl as well as a boy should be able to play shortstop.⁵⁸ On the other hand, it is we environmental advocates who have expanded standing and judicial cognizance of noneconomic rights⁵⁹ and have thus supplied the law and form books to the Little League

54. Federal Lands Right-of-Way Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (1973) (codified at 30 U.S.C. § 185 (Supp. V 1975)).

55. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 584-90 (1973) (codified at 43 U.S.C. §§ 1651-1655 (Supp. V 1975)).

56. A. DE TOCQUEVILLE, *I DEMOCRACY IN AMERICA* 290 (Bradley ed. 1954).

57. See, e.g., *Chief Justice's Yearend Report, 1977*, 64 A.B.A.J. 211 (1978); *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 *id.* 504 (1977); *The Direction of the Administration of Justice*, 62 *id.* 727 (1976); *Annual Report on the State of the Judiciary*, *id.* at 443; *Chief Justice Burger Issues Yearend Report*, *id.* at 189; *The State of the Judiciary—1975*, 61 *id.* 439 (1975); *Chief Justice Burger Calls for Action on Several Proposals*, *id.* at 303.

58. See *Fortin v. Darlington Little League*, 514 F.2d 344 (1st Cir. 1975); *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa. 1973), *vacated*, 497 F.2d 921 (3rd Cir. 1974); *Rappaport v. Little League Baseball, Inc.*, 65 F.R.D. 545 (D. Del. 1975).

59. *West Va. Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966); *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969); *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967).

litigants. I will confess that perhaps my view is a little provincial, in that the father may claim that his interest in protecting his daughter's right to play shortstop is just as important as an interest of mine in gazing at a scenic mountain without a microwave tower on top of it. The only opinion that I have enough confidence to state about this problem is that if something should be done about it, the proper solution is neither to narrow judicial review or rights of standing, nor is it to discriminate against the cases in which tremendous numbers of people have perhaps a small interest, as in *United States v. SCRAP*.⁶⁰ Let there be an informed and enlightened judgment, recognizing that some of the newer environmental values are equally important as some of the traditional economic values. Let us not fall back into pre-*Baker v. Carr*⁶¹ concepts of political questions and get lost in what is a "case or controversy."⁶²

All of this goes without even mentioning many of the ethical problems for attorneys, problems of the use of the court system solely to gain publicity and thereby influence legislation and the use of abusive discovery tactics in order to effect delay. This type of politicization perhaps arises out of the inherent drama and public attention given to court cases. These problems have been adequately discussed elsewhere.⁶³

Finally, I address the third aspect of environmental decision-making which I have mentioned; namely, the relationship of the courts to direct citizen action—or what we call "self-help" in torts and "civil disobedience" in political science. Again, the question is

60. 412 U.S. 669 (1973). In *SCRAP* the United States Supreme Court held that various environmental groups, including Students Challenging Regulatory Agency Procedures (SCRAP) and the Environmental Defense Fund, were persons "aggrieved" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), and therefore they had standing to sue. 412 U.S. at 683-90.

61. 369 U.S. 186 (1962). This case recognized that the mere fact that a suit seeks protection of a political right does not mean that it presents a nonjusticiable "political question." The Court thus explained the lower court's misguided reliance on *Colegrove v. Green*, 328 U.S. 549, and "subsequent *per curiam* cases." 369 U.S. 186, 208-09 & n.29 (1962).

62. U.S. CONST. art. III, § 2. See L. JAFFE & L. TRIBE, ENVIRONMENTAL PROTECTION (1971) (where the authors ask the reader to consider: "One of the problems raised by this section on Judicial Review is whether Sive's emphasis on the potential of judicial review is sound. Keep this in mind." *Id.* at 619); Sive, *supra* note 5, at 650-51.

63. For a discussion where the author feels there are no ethical dilemmas, see Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No-Win" Proceeding*, 13 *ATOM. ENERGY L.J.* 1 (1971); 1 *ECOLOGY L.Q.* 495 (1971). *Contra*, Sive, *supra* note 5, at 617-19; D. Sive, *Securing, Examining, and Cross Examining Expert Witnesses in Environmental Cases* (a paper submitted to the "Warrenton Conference," *supra* note 42). See generally, ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5), EC 7-28, DR 7-101(A),(B) (1975).

whether the relationship of the two processes in the environmental area is different from that in other areas. While thinking about the recent demonstrations at Kennedy Airport concerning the Concorde, and the seizure of a nuclear plant at Seabrook, New Hampshire,⁶⁴ I have asked myself why environmentalists don't do what civil rights advocates, women's rights partisans, and gay activists do to dramatize or enforce their claims, including some of the things which are—perish the thought—illegal? One can well contemplate how much poorer America would be if Thoreau, on the afternoon before the evening that he spent in jail, had consulted and heeded the probable advice of a tax expert of one of Boston's great law firms. And how much poorer we would be if Martin Luther King, Jr. had heeded the trespass sections of the Restatement of the Law of Torts instead of staying beyond his allowed time at the Jackson, Mississippi, lunch counters!

Certainly we environmentalists believe that our laws are highly moral. One problem, it seems, is that in many cases we are not in a position to assert our view by positive action. The civil rights protesters can often assert their rights by simply exercising what they believe to be their privilege; for example, attending schools from which they have been excluded or refusing to move to the back of a bus. Environmentalists, on the other hand, cannot depollute a stream or mass-produce emission control devices. Ironically, it seems that the developmentalists are the ones who are best able to directly demonstrate for their rights, by heedlessly going forward with their projects.⁶⁵

Second, I think that the environmental movement, more than any other social movement in my adult lifetime, has been born and bred in the courts. An overwhelming portion of all environmental law is not only made in the courts but in suits instituted by national environmental corporate law firms—the Sierra Club, the Legal Defense Fund, the Environmental Defense Fund, and the Natural Resources Defense Council—whose principal function is litigation.

Furthermore, lawyers who are involved in the litigating process generally believe in the rule of law, even if it is only because of a simple need to defend their usefulness. Although such a strict

64. See notes 15–16 *supra* and accompanying text.

65. For a discussion of the economic consequences of this fact, see Junger, *A Recipe for Bad Water: Welfare Economics and Nuisance Law Mixed Well*, 27 CASE W. RES. L. REV. 3, 224–27 (1976).

belief in legal principle may reflect a very real professional provincialism, I think that it would threaten lawyers' credibility and perhaps the hard-won standing of their environmental clients, if they turned to supporting civil disobedience when they lose and proclaiming the rule of law when they win.

This may seem like a renunciation of the godfather of environmentalists, Thoreau. Another good environmentalist, Walt Whitman,⁶⁶ and a well-known authority in other diverse areas of social policy, William Shakespeare, both said that we would be better off without lawyers.⁶⁷ I do not believe it to be such a renunciation. Thoreau was not a trustee of the Environmental Defense Fund; he cherished and kept pollution-free his Walden Pond without declaratory judgment or mandamus actions. Nor am I saying to the midnight feller of billboards that he must either stop or sue in the daytime. I do not have the expertise to make such a judgment, but rather, as one of a group of litigating lawyers who owe so much to the integrity of the process which they have used to great advantage, and who owe to it a certain gracious acceptance when they lose, I refer to sociologists and clergymen the emerging question of the relationship of environmental adjudication to the non-legal process of civil disobedience.

And so, to the question whether environmental decisionmaking is still different, my answer is yes, it is different, because of a variety of interrelationships with the judicial administrative process, the political process, and direct citizen action. The difference in the qualitative character of judicial review of environmental decisionmaking still stems from three aspects:

(1) The value judgments present in so many environmental cases "call more for the talents and training of the courts and judges than for those of the . . . administrators"; (2) the relative youth of environmental law and the consequent necessity to define new terms and concepts and to redefine old ones justify greater judicial participation; and (3) the importance of the rights asserted in environmental cases, arising out of the irrevocable impact of environmental decisions, justifi[es] "more thoroughgoing judicial review."⁶⁸

66. WHITMAN, *The Eighteenth Presidency*, in FURNESS, WALT WHITMAN'S WORKSHOP 92-95, 99 (1928).

67. W. SHAKESPEARE, KING HENRY VI, Pt. 2, Act 4, Sc. 2, Lines 83-84 (statement of character Jack Cade).

68. Sive, *Foreword: Roles and Rules in Environmental Decisionmaking*, 62 IOWA L. REV. 637, 637 (1977) (footnotes omitted).

The differences have narrowed, however, for three reasons. First, the proportion of important cases determined strictly by defining legal concepts, independent of findings of fact, has become smaller. Second, the important litigated cases have now become evenly divided between those in which the environmental interests are seeking broader review, and those in which their adversaries, the developmental interests, are seeking broader review. And third, the federal agencies have grown in relative expertise in making environmental decisions. With regard to the political process, the differences arise from the large numbers of people involved, and the corresponding frequency with which complex environmental controversies which appear in the courts are also subject to political decisions that may negate the judicial decisions. Finally, the utility of civil disobedience to environmentalists seems to be less than in other social movements because their legal arm may not, without adversely affecting its credibility, simultaneously support judicial decisions which have favored environmentalists and fight those which have gone against them.