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# The Role of the Judiciary in the Confrontation With the Problems of Environmental Quality

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# COMMENTS

## THE ROLE OF THE JUDICIARY IN THE CONFRONTATION WITH THE PROBLEMS OF ENVIRONMENTAL QUALITY

The biggest need may be a change in values; the whole environmental problem stems from a dedication to infinite growth on a finite planet. Pessimists argue that only a catastrophe can change that attitude—too late. . . . [O]thers put their faith in man's ability to reform when confronted by compelling facts.<sup>1</sup>

The fundamental national problems of environmental quality<sup>2</sup> are increasingly attracting fervent national awareness and concern.<sup>3</sup> The public consciousness is rapidly being awakened particularly because dramatic and visible experiences of environmental deterioration are igniting previously only smoldering fires of discontent. The concern is manifest for a broad range of environmental deterioration, as indicated summarily in the Report on the National Environmental Policy Act of 1969:

Examples of the rising public concern . . . may be seen in the Santa Barbara oil well blowout; the current controversy over the

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<sup>1</sup> *Fighting to Save the Earth from Man*, TIME, Feb. 2, 1970, at 63.

<sup>2</sup> The term "environmental quality" could, in its broadest sense, refer to the totality of physical, social, and psychological phenomena to which the human organism is sensitive. The term, as frequently used herein, has more limited reference. Problems of environmental quality include: air, water, thermal, and radiation pollution, noise, protection of fish, game, and other wildlife, protection of crops and vegetation from chemical contamination, allocation of the resources of land among the often competing demands of an industrial society for ores, oil, gas, water, power and the demands for the recreational and scenic values of the wilderness and countryside.

The amount of research information on problems of environmental quality is overwhelming. For the reader who wishes to obtain a general overview of these problems, the following survey materials may provide a point of departure: *Hearings on Environmental Quality Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. (1969); R. RIENOW & L. RIENOW, *MOMENT IN THE SUN* (1967); *The Environment: National Mission for the Seventies*, FORTUNE, Feb. 1970; *Fighting to Save the Earth from Man*, TIME, Feb. 2, 1970, at 56-63.

<sup>3</sup> In the course of preparing this comment, it has been a rare instance indeed when a day has passed without some news media having dealt with some aspect of the problems of environmental quality. Indicative of the greater focus upon such problems is the recent initiation, in one of the nation's leading weekly news magazines, of a separate news department devoted solely to the environment. *Letter from the Publisher*, TIME, Aug. 1, 1969, at 9. Grass roots support for confronting problems of environmental quality has intensified, as exemplified by the National Environmental Teach-In of April, 1970. See, e.g., *ECOTACTICS: THE SIERRA CLUB HANDBOOK FOR ENVIRONMENTAL ACTIVISTS* (J. Mitchell & C. Stallings eds. 1970).

lack of an assured water supply and the impact of a super-jet airport on the Everglades National Park; the proliferation of pesticides and other chemicals; the indiscriminate siting of stream fired power-plants and other units of heavy industry; the pollution of the Nation's rivers, bays, lakes, and estuaries; the loss of publicly owned seashores, open spaces, and other irreplaceable natural assets to industry, commercial users, and developers; rising levels of air pollution . . . .<sup>4</sup>

This concern is at least partially attributable to the conscious realization that institutions of government have as yet provided an ineffective pattern of response, response which seems either to ignore, underestimate, or misunderstand the scope and gravity of the problems of environmental quality.

Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.<sup>5</sup>

When decisions of national policy are made absent the participation of the national citizenry and perpetuate the mistakes of the past, it becomes necessary to re-examine some fundamental questions about the manner in which our legal system now responds and might in the future respond to this serious national problem.<sup>6</sup>

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<sup>4</sup> S. REP. No. 91-296, 91st Cong., 1st Sess. 8 (1969).

<sup>5</sup> *Id.* at 5. "Although historically the Nation has had no considered policy for its environment, the unprecedented pressures of population and the impact of science and technology make a policy necessary today." *Id.* at 16.

<sup>6</sup> Although it is beyond the scope of this comment to discuss environmental quality in its worldwide context, in no sense should this comment be read to imply that problems of environmental quality are indigenous to the United States. Europe, for example, is plagued with problems of environmental quality. "The mighty Rhine has become the world's biggest sewer, Venice is the sinking, stinking, decaying despair of Europe's cultural heritage. . . . Fish are disappearing from Europe's rivers, traffic chokes its great cities and charming old towns, pollution stifles its air." L.A. Times, Feb. 8, 1970, § A, at 1, col. 4. Sweden has proposed and the United Nations General Assembly approved a global conference on environment to be held in 1972. N.Y. Times, June 24, 1969, at 4, col. 3.

There are many potential global environmental questions which would test the mettle of science, world politics, and international law. *See, e.g.,* N.Y. Times, Dec. 17, 1969, at 3, col. 1. For example, what effect upon world climate would result should the Nile be dammed to create large inland bodies of water in Africa for purposes of irrigation, or should the polar ice be removed from Siberia to make Siberia more habitable? Assuming adequate data, what international institutions could make and implement decisions concerning such fundamental alterations of the earth's ecology? These intriguing questions were suggested in an interview with Dr. Stanley M. Greenfield, Head of the Department of Environmental Sciences, Rand Corp., in Santa Monica, Jan. 29, 1970 [hereinafter cited as Greenfield Interview].

One perspective in which to frame those questions and formulate possible answers is to inquire as to the specific role most appropriately to be played by the judicial institution of the legal system.<sup>7</sup> This comment will develop the thesis that the role of the judiciary in confronting problems of environmental quality must be to assure that other decision-making bodies of government make the best possible decisions about environmental quality. The assurance comes only when those decisions represent a conscious and informed societal choice of public policy—a type of choice which is, after all, a presumed foundation of the democratic system.<sup>8</sup> In developing this thesis, attention will first be given to the many types of legal claims which may support judicial involvement in problems of environmental quality and will then focus upon the specific legal claim of standing to seek judicial review of decisions by administrative agencies of the federal government.

## I.

In arriving at any conclusion about the appropriate role of the judiciary in confronting problems of environmental quality, it is important to survey a variety of types of legal claims by which an environmental problem may be presented for judicial consideration. The survey that follows is only intended to be representative. It is nevertheless hoped that it will sufficiently illustrate important themes associated with the judicial encounter with environmental problems.

### A. *Substantive Claims*

It is illustrative to begin by measuring the response of the doctrines of nuisance to a significant current problem of environ-

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<sup>7</sup> It is encouraging to note some initial attempts of the legal profession and its apprenticeship to more fully assume its responsibility in confronting problems of environmental quality. In September, 1969, the Conservation Foundation sponsored a Conference on Law and the Environment, the papers for which are planned for book publication some time in 1970. Several law schools have now initiated an environmental law curriculum and some law schools have formed environmental law societies or contemplate publications dealing with legal aspects of environmental problems.

<sup>8</sup> It is well to keep in mind some basic definition of the ideal of this system: "[A] democratic political system is one in which public policies are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under conditions of political freedom." H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 70 (1960).

mental quality, air pollution.<sup>9</sup> Sufferers from contamination of the air have long summoned the common law doctrines of nuisance to their aid.<sup>10</sup> These doctrines were perhaps an appropriate tool when the courts were confronted with a claim that some single source of air pollution adversely affected one person or group of persons. Such a circumstance was more common, however, when air pollution was only the infrequent or geographically freak product of a random industrial plant or backyard incinerator. In an era when air pollution is a phenomenon which results primarily from the combination in the atmosphere of contaminants from thousands of stationary industrial sources and millions of mobile internal combustion engines,<sup>11</sup> doctrines of nuisance are inappropriate to confront the problem.<sup>12</sup>

Modern air pollution represents, among other things, a dominating social preference for the technology of the internal combustion engine and the untamed smoke stack, a preference which comes at

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<sup>9</sup> Though Dean Prosser has opined that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance,'" W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 592 (3d ed. 1964), the word generally represents the law's concern to protect owners of property rights from substantial, unreasonable, non-trespassory invasions of those rights and concomitant privileges of enjoyment. See *RESTATEMENT OF TORTS* § 822 (1939). There is a distinction between a private nuisance and a public nuisance. The former is classically a civil remedy in the hands of a person whose rights have been disturbed. The latter is usually a criminal offense with the remedy to be sought by the state. *But cf.* note 16 *infra* and accompanying text. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 592-633 (3d ed. 1964). A succinct summary of the common law requirements in the context of air pollution may be found in Pollak, *Legal Boundaries of Air Pollution Control—State and Local Legislative Purpose and Techniques*, 33 *LAW & CONTEMP. PROB.* 331, 333-35 (1968).

<sup>10</sup> Pollak, *supra* note 9, at 333.

<sup>11</sup> A bibliography of congressional laws, hearings, reports, documents, and other congressional materials on air pollution may be found in 62 *LAW LIB. J.* 84 (1969) and 62 *LAW LIB. J.* 225 (1969).

<sup>12</sup> In discussing possible federal regulation of air contamination and its probable displacement of common law nuisance as an attempted solution of the problem, Judge J. Skelly Wright has remarked: "Poor old nuisance has been the common law's meager response to the crowdedness of society. The doctrine is pathetically inadequate to deal with the social realities of this half-century, which indisputably call for comprehensive legislative planning." Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 *WAYNE L. REV.* 317, 331 (1967).

In arguing that another common law doctrine, that of the public trust, provides a comprehensive tool for problems of natural resource allocation, see notes 33-37 *infra* and accompanying text, Professor Sax notes: "Public nuisance law is the only likely doctrinal competitor. That approach, however, is encrusted with the rule that permits lawsuits to be initiated only by the state attorney general, and not by private citizens. It also has an unfortunate historical association with abatement of brothels, gambling dens, and similar institutions, and the case law is therefore not easily transferable to natural resource problems." Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471, 485, n.45 (1970) [hereinafter cited as Sax].

the partial expense of the desire for clean air.<sup>13</sup> Yet a change of preference is technically feasible; the control or elimination of air pollution is easily within the absolute technological capabilities of our society.<sup>14</sup> Thus, for instance, Los Angeles or other major cities could reduce or rid themselves of smog were the citizens of those cities to make a basic decision to substantially substitute mass transportation for transportation by automobile, or choose to legislate a prohibition upon automobiles without smog control devices. Such a decision of course would require reallocation of resources to implement a technological capability; it would require, in other words, a partial change of life style.<sup>15</sup>

In California, anything either injurious to health or indecent or offensive to the senses and which affects a considerable number of persons is a public nuisance which may be enjoined or abated by the court in a civil action brought by the District Attorney of the county or city in which the nuisance exists.<sup>16</sup> Beyond question, the purple blanket of smog which shrouds Los Angeles precisely fits the statutory requirements. Yet no court has been inclined to ban the automobile from the roads. The disinclination is an implicit recognition that it is inappropriate for the judicial institution to make a substantive determination about the use and protection of air. That choice is properly made, if at all, in the representative bodies of government, as the policy choice of those represented.<sup>17</sup>

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<sup>13</sup> See Demaree, *Cars and Cities on a Collision Course*, FORTUNE, Feb. 1970, at 124.

<sup>14</sup> Greenfield Interview, *supra* note 6.

<sup>15</sup> "Our fragmented power has outrun our methods of deciding how to use it. Unless we invent means of dealing with technology's side effects, they will bury us." Ways, *How to Think About the Environment*, FORTUNE, Feb. 1970, at 98. See Rietze, *Wastes, Water, and Wishful Thinking: The Battle of Lake Erie*, 20 CASE W. RES. L. REV. 5, 65-66 (1968), who comments in the context of water pollution: "If clean water is considered an important factor determining the quality of life, then, sufficient economic inputs must be made to achieve it. Yet, in an economy governed by finite resources, this qualitative goal must be pursued to the detriment of some other goal. We must make the choice."

<sup>16</sup> CAL. CIV. CODE §§ 3479, 3480 (West 1954); CAL. CODE CIV. PRO. § 731 (West 1955). For a somewhat dated but nevertheless valuable discussion of the California law of nuisance in respect to air pollution, see Steinberg, *Rights Under California Law of the Individual Injured by Air Pollution*, 27 S. CAL. L. REV. 405 (1954).

<sup>17</sup> The policy choices required of the representative body with respect to air pollution have been more strictly resolved against air contamination in California than in any other state. See CAL. HEALTH & SAFETY CODE § 24198 et seq. (West 1967) & CAL. HEALTH & SAFETY CODE § 39000 et seq. (West Supp. 1970). Even stricter emission standards and test procedures have been proposed in California. See, e.g., Assembly Bill No. 77, 1970 Regular Sess., introduced Jan. 6, 1970. A most severe choice is reflected in H.R. 14577, 91st Cong., 1st Sess. (1969), submitted to the House of Representatives, which would ban the use of certain internal combustion engines in motor vehicles after January 1, 1978. The complex solutions to air

The assertion that the judicial forum is an inappropriate institution for making substantive decisions about the quality of the environment requires elaboration. The assertion derives from a more fundamental premise that man lives in a closed ecological system in which the inadvertent or deliberate actions of his fellows all contribute in some measure to the distortion, upset, or restoration of a finely tuned ecological balance. Even though the more traditionally narrow scope of the judicial adversary process has been stretched by such devices as the class action,<sup>18</sup> expanded amicus curiae, or increasing consideration of scientific or sociological data, the judicial forum is the least well equipped of governmental institutions to assume responsibility for decision-making which will affect such a complex system.

Other examples of pollution serve to further indicate the complexity of factors which bear upon potential decisions about environmental quality. The current furor concerning the chemical insecticide DDT is a prominent example. Pursuing the legitimate goal of protecting agricultural crops from insects, industry and government have until recently ignored potentially dangerous side effects of DDT which include the possible destruction of ocean plankton which supplies some 70 percent of the earth's oxygen.<sup>19</sup> Insecticides are necessary, but in what quantity and circumstance and with what precautionary testing?

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pollution which these statutes provide and these bills propose are hardly adequately or appropriately drawn by a judicial decree abating a nuisance found by the court to be a substantial and unreasonable interference with property rights. See note 9 *supra*.

It has been suggested that reliance upon the market mechanism to reduce or eliminate air pollution is superior to reliance upon governmental regulation. The imposition of differential prices for differing degrees of pollutant damage has, for example, been largely responsible for the cleanliness of the heavily industrial Ruhr River Valley in Germany. See Ruff, *Price Pollution Out of Existence*, Los Angeles Times, Dec. 7, 1969, § G, at 7, col. 3. But see Wolozen, *The Economics of Air Pollution: Central Problems*, 33 LAW & CONTEMP. PROB. 227 (1968). See also the reference to the potential cost internalizing function of the class action in note 18 *infra*.

<sup>18</sup> The class action has been argued to be a possible procedural mechanism whose successful use might stimulate the internalization of the social costs of pollution to the parties defendant in a class action. See Comment, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969). A recent class action in Los Angeles joining as defendants multifarious automobile manufacturers and alleged industrial polluters in a suit to abate the public nuisance of smog in Los Angeles basin was dismissed, *inter alia*, for the lack of resources and competency of an equity court to be responsible for such abatement. *Diamond v. General Motors Corp.*, Civil No. 947429 (L.A. Sup. Ct., dismissed Aug. 20, 1969).

<sup>19</sup> See TIME, Nov. 21, 1969, at 59. Although DDT is being phased out of use, the extent and speed of the phase out is as yet uncertain. See Christian Science Monitor, Nov. 19, 1969, at 3, col. 1. The recognition of the dangers of DDT may be but a very small step in understanding and coping with the dangers of many other possible types of chemical pollution. See Christian Science Monitor, Nov. 1, 1969,

Another example is suggested by considering possible responses to increasing demands for electric power. One such demand may be made by the electrically powered car proposed as a means to eliminate the air pollution caused by the internal combustion engine. Hydroelectric generating plants have long encountered the wrath and resistance of conservation groups who decry the scars to the countryside and injuries to anadromous fish caused by the siting of dams and reservoirs.<sup>20</sup> Nuclear power plants, as alternative power sources, may eliminate such environmental consequences, but in doing so cause problems of radiation and heat pollution.<sup>21</sup> What power sources are most desirable? Where should power plants be sited? What measures should be adopted to prevent deleterious environmental consequences? These questions, and many more like them, cannot be answered in the court of law.<sup>22</sup>

The observations relating to the institutional insufficiency of the judiciary compel harsh indictment of substantive claims brought to the court of law which reach beyond the common law or statute to the constitutional dimension. For instance, it has been urged that the federal Constitution be amended to include a right to a decent environment.<sup>23</sup> There have also been those who—not unmindful

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at 1, col 2. H.R. 14805, 91st Cong., 1st Sess. (1969) proposes a comprehensive study of the effects of pesticides upon man and other life forms.

<sup>20</sup> See note 120 *infra*.

<sup>21</sup> Two researchers have warned of severe possible health hazards from radiation of nuclear power reactors, fuel-reprocessing plants, and waste-disposal centers. Los Angeles Times, Jan. 27, 1970, Pt. 1, at 1, col. 1. The problems of thermal (heat) pollution of water are discussed in U.S. DEPARTMENT OF INTERIOR, FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, HEAT CAN HURT, BETTER WATER FOR AMERICA (1969).

<sup>22</sup> It is questionable, in fact, whether even present legislative mechanisms for policy formulation are sufficient for that purpose. It has been suggested that our complex society requires a radically new politics of ecology in which legislative institutions are responsive to ecologically based political parties rather than local interests, and in which the individual citizen is informed of the far-reaching consequences of any one decision by individually or family tailored multi-media programming systems. See Wheeler, *The Politics of Ecology*, SATURDAY REV., Mar. 7, 1970, at 51.

<sup>23</sup> A discussion group of the Center for the Study of Democratic Institutions has proposed an environment bill of rights. See Los Angeles Daily Journal, Dec. 13, 1969, at 14, col. 2. H.R.J. Res. 505, 91st Cong., 1st Sess. (1969) proposes a constitutional amendment which would include a provision that protects the people's right to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment.

Less drastic expectations of incorporating such a right, or at least state policy, into respective state constitutions have already been partially fulfilled. An amendment to the New York state constitution was passed in the most recent general election by a margin of nearly five to one, N.Y. Times, Nov. 6, 1969, at 37, col. 8. The text of the amendment is as follows:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural products. The legislature, in implementing this policy, shall



of the difficulties of national constitutional amendment—have urged a court to find such a right already guaranteed by the Constitution.<sup>24</sup> These constitutional claims, as well as an hypothesized constitutional amendment guaranteeing a right to clean air, merit the same criticism leveled at the potential use of nuisance to solve the problems of air pollution. Simply stated, a constitutional right requires the court to shoulder responsibility for decision-making which is more properly assumed by representative bodies.

## B. Procedural Claims

### 1. Two Federal Statutes

The history of federal legislation concerning air and water pollution manifests an appropriately increasing concern for the serious problems of such pollution. Thus, the past decade has seen more major federal legislation in these areas than in any previous decade.<sup>25</sup> The characteristic of that legislation which is of im-

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include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

N.Y. CONST. art. XIV, § 4 (1969). In California, a similar constitutional amendment has been introduced in the Assembly. Assembly Constitutional Amendment No. 12, 1970 Regular Sess., introduced Jan. 8, 1970.

<sup>24</sup> One such claim is that a right to a decent environment is to be found in the ninth amendment to the Constitution, with the assistance of *Griswold v. Connecticut*, 381 U.S. 479 (1965). See, e.g., *Environmental Defense Fund v. Hoerner Waldorf Corp.*, Civil No. 1694 (D. Mont., filed Nov. 13, 1968); brief for Plaintiff, *Fairfax County Fed'n of Citizen's Ass'ns v. Hunting Towers Operating Co.*, Civil No. 4963 A (E.D. Va., filed Oct. 1, 1968), reprinted in *Hearings on Permit for Landfill in Hunting Creek, Va., before a Subcomm. of the House Comm. on Government Operations*, 91st Cong., 1st Sess., pt. 2, at 50, 55 (1969).

<sup>25</sup> The history of federal water pollution legislation is the prime example. The problem of water pollution to which it responds is described in U.S. DEPARTMENT OF INTERIOR, FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, SHOWDOWN (1968): "For years, America has been heading for a water quality crisis . . . Lake after lake is sick or in danger. River after river has been turned into an open sewer for municipal, industrial, and agricultural wastes. Beach after beach has had to be closed to swimming and fishing."

A summary chronology of the major federal legislation is as follows: Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152 (codified at 33 U.S.C. § 407 (1964)) regulating, *inter alia*, deposit of refuse in navigable rivers generally; Act of June 23, 1910, ch. 359, 36 Stat. 593 (codified at 33 U.S.C. § 421 (1964)), prohibiting discharge or deposit into Lake Michigan, near Chicago, under which the Justice Department recently filed suits against offenders (L.A. Times, Feb. 10, 1970, Pt.

mediate concern here is that found in provisions for judicial remedial action. Two federal statutes are especially revealing because they provide for a judicial role in confronting environmental problems in precisely those areas in which we have discussed a substantive claim, air and water pollution.

The most recent of major federal legislation is the Air Quality Act of 1967<sup>26</sup> and the Federal Water Pollution Control Act, as amended.<sup>27</sup> Each of these Acts vests the court with the function of applying pollution standards promulgated by a pollution control board:

The court shall receive in evidence in any suit . . . a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability of *complying with such standards as may be applicable* and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgement, and orders enforcing such judgement, as the public interest and the equities of the case may require.<sup>28</sup>

Although in each instance the court is given jurisdiction to enter and enforce a judgment as required by the equities of the case and

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1, at 1, col. 6); Oil Pollution Act, 1924, ch. 316, § 1, 43 Stat. 604 (codified at 33 U.S.C. §§ 431-37 (Supp. IV, 1969)) prohibiting oil discharges into coastal waters damaging to aquatic life, harbors and docks, and recreational facilities; Federal Water Pollution Control Act, ch. 758, § 1, 62 Stat. 1155, enacted in 1948 for a term of five years, extended in 1952 for three years (Act of July 17, 1952, ch. 927, 66 Stat. 755), made permanent in 1956 (Act of July 9, 1956, ch. 518, § 1, 70 Stat. 498); enforcement of the Act was strengthened and increased support for research and construction of treatment facilities provided in 1961 (Act of July 20, 1961, Pub. L. No. 87-88, § 1 et seq., 75 Stat. 204 et seq.), a control administration was established and promulgation of water quality standards for all interstate and coastal waters required in 1965 (Act of Oct. 2, 1965, Pub. L. No. 89-234, § 1 et seq., 79 Stat. 903 et seq.), increased grants for research, construction, and aid to state programs were provided in 1966 (Act of Nov. 3, 1966, Pub. L. No. 89-753, § 101 et seq., 80 Stat. 1246 et seq.). The entire Federal Water Pollution Control Act is codified in 33 U.S.C. § 466 (Supp. IV, 1969).

The efforts are still insufficient, however. See Bylinsky, *The Limited War on Water Pollution*, FORTUNE, Feb. 1970, at 103. A thorough and enlightening case study of the pollution of Lake Erie, Rietze, *supra* note 15, provides an excellent vehicle for seeing federal and state water pollution legislation and other legal response to water pollution in action.

<sup>26</sup> Act of Nov. 21, 1967, Pub. L. No. 90-148, 81 Stat. 485. For a discussion of the Air Quality Act, see Martin & Symington, *A Guide to the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 239 (1968); O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275 (1968).

<sup>27</sup> 33 U.S.C. § 466 (Supp. IV, 1969).

<sup>28</sup> Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(h), 81 Stat. 496. The Federal Water Pollution Control Act provision differs from the quoted provision of the Air Quality Act only in that it does not contain the italicized language, 33 U.S.C. § 466(h) (Supp. IV, 1969) (emphasis added).

the public interest, there is one crucial respect in which the role of the court is circumscribed: the court is to measure its judgment about pollution by standards which have already been established by another decision-making body. This limitation effectively commits the choice of life style—the choice between competing values of environmental quality—to institutions of government which more adequately reflect, even though indirectly, the will of the national citizenry.

This is not to say, of course, that the courts are precluded from making any substantive choices; to weigh the equities and the public interest is certainly such a choice. But the judiciary is never so precluded as long as its function remains to measure action against standards of performance, and never should be so precluded if the judiciary is to maintain the flexibility inherently necessary to do justice in any particular case. That flexibility, however, remains far short of requiring the courts to assume primary responsibility for decisions about environmental quality.

## 2. Procedural Due Process

The procedural constitutional mandate of due process would seem also to provide an appropriate basis for the judicial encounter with the problems of environmental quality. Such a claim would demand minimal procedural safeguards<sup>29</sup> which are characteristically required of most governmental decision-making institutions of our society, but which are often currently denied to those who would represent a point of view to which a decision-maker is unreceptive or of which the decision-maker is unaware.<sup>30</sup> Those safeguards—notice, access to information, and right of participation in the exploration of relevant issues—may typically be denied to all but those private and special interests whose opinions the decision-making body, usually an administrative agency, is accustomed to hearing. Thus, for example, a state agency entrusted with responsibility for planning forest use traditionally may entertain only the opinions of private lumber companies while denying participation to members of the public whose forest land the agency is administering.<sup>31</sup> Since

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<sup>29</sup> The claim has been advanced in *Weingand v. Hickel*, No. 69-1317-EC (S.D. Cal., filed July 10, 1969), seeking to enjoin recommendations which would approve continued oil drilling in the Santa Barbara channel on the grounds that such procedural requirements of due process had not obtained in any procedure fostering such recommendations.

<sup>30</sup> It is enlightening in this context to compare the plight of the poor, who are often similarly denied meaningful access to decision-making agencies of the federal government. See Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969).

<sup>31</sup> See, e.g., CAL. PUB. RES. CODE § 4942 (West 1956) providing for approval

such agencies of decision-making ultimately derive their authority from the public and since their decisions affect the use of public resources, responsible and representative members of the public are entitled to no less voice in the decision-making process than are any more acutely affected private interests.<sup>32</sup>

Although recognition of this right of due process would represent new constitutional doctrine, hesitancy by the courts to expand constitutional doctrine in this respect would not theoretically seem justified. Such hesitancy most rightfully would stem from a judicial fear that the courts might be assuming responsibility which is intended, in the spirit of the separation of powers, for coordinate branches of government. But we have at least partially seen that the appropriate judicial role with respect to problems of environmental quality is to assure better decisions by coordinate branches while at the same time avoiding the inappropriate function of making a substantive decision about environmental quality. The procedural claim of due process is well suited to allow the court to assume just such a role.

### 3. The Common Law Doctrine of the Public Trust

Unlike common law doctrines of nuisance, the doctrine of the public trust may well provide the judicial institution with a means by which it could assume an appropriate role in dealing with problems of environmental quality. This view has been persuasively presented by one scholar who has urged that the courts breathe new life into the common law doctrine of the public trust,<sup>33</sup> a doctrine which has its roots in Roman and English notions about property rights in rivers, seas, and seashores.<sup>34</sup> The doctrine is characterized as demanding a judicial function which eschews the making of

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of district forest practice committee rules by a two-thirds vote of the *private* timber ownership in the district. Although the California Forest Practice Act declares the management of forests to affect the public interest, CAL. PUB. RES. CODE § 4901 (West 1956), the extent of public participation in forest management decisions is unclear.

<sup>32</sup> H.R.J. Res. 505, 91st Cong., 1st Sess. (1969) proposes a national constitutional amendment which would provide that no federal or state agency, body, or authority would be authorized to exercise the power of condemnation, nor undertake any public work, issue any permit, license, or concession, make any rule, execute any management policy, or other official act which adversely affects the people's heritage of natural resources and natural beauty, or the lands and waters now or hereafter placed in public ownership without first giving reasonable notice to the public and holding a public hearing thereon. Compare this procedural provision with the substantive guarantee proposed in another portion of this bill, mentioned in note 23 *supra*.

<sup>33</sup> Sax, *supra* note 12.

<sup>34</sup> *Id.* at 475.

substantive decisions between competing values in favor of a function of providing necessary feedback to those institutions of government which are more properly the forum for decisions about the direction of environmental quality.

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to relocate that resource to more restricted uses *or* to subject public uses to the self interest of private parties.<sup>35</sup>

The courts are to take action after having made two fundamental determinations: (1) that the resource decision has been made in a situation of political imbalance, a situation that negatives "the usual presumption that all relevant issues have been adequately considered and resolved by routine statutory and administrative processes"<sup>36</sup>; and (2) that a particular resource decision has possibly or probably inadequately been handled at the legislative or administrative level.<sup>37</sup> Upon such determinations, the court is to send the decision back to its origin for reconsideration and, if the decision is to be vindicated, a clearer mandate.

One implication of the possible use of this doctrine commands particular attention. The notion of the court making a determination that some decision needs reconsideration by coordinate institutions of government requires a peculiar role for the attorney seeking such reconsideration. The attorney's emphasis in litigation is more profitably spent in convincing the court of inadequate decision-making elsewhere than it is in convincing the court of a decision's inherent inadequacy. To use an example which shall be given further consideration below,<sup>38</sup> if an administrative agency determines that an area of mountain forest be developed as a ski resort, the attorney is compelled, under the above view of the public trust doctrine, to argue that the decision of the agency should be re-examined; an argument that the ski resort is a rape of the wilderness is inappropriate and possibly counterproductive.<sup>39</sup> This attorney role is as it should be because the role of the forum in which he argues is not to ultimately determine the fate of a mountain wilderness, but rather to assure that all affected citizens have a voice in the ultimate decision.

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<sup>35</sup> *Id.* at 490.

<sup>36</sup> *Id.* at 561.

<sup>37</sup> *Id.* at 562. "Thus, the doctrine which a court adopts is not very important; rather, the court's attitudes and outlook are critical. The 'public trust' has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process." *Id.* at 521.

<sup>38</sup> See text accompanying notes 41-53 *infra*.

<sup>39</sup> See Sax, *supra* note 12, at 552-53.

## II.

The examples of different types of environmental litigation thus far examined frame a certain perspective by which the judicial encounter with problems of environmental quality may be viewed. It is by no means certain, however, that the types of legal claims which have been argued to be the most appropriate vehicles for judicial intervention will make possible any significant amount of judicial participation in the solution of problems of environmental quality. The possibility of a constitutional right of the public to certain procedural safeguards in the environmental decision-making process is a novel and little tested doctrine. The common law doctrine of the public trust, though significantly developed recently in a few states, relies upon precedent which is dated and which requires some considerable judicial lawmaking; though such lawmaking may be reasonable and justified, it is not thereby likely. Finally, judicial remedial action per statute is of course dependent upon statutes. Though legislatures, national and state, currently seem motivated to confront problems of environmental quality, there is no predicting the extent or type of environmental problems to which the legislation will be responsive.

There is, by contrast, one avenue of access to the judiciary which promises both appropriate and significant judicial participation in environmental problem solving. That access is provided by the doctrinal development of standing to seek judicial review of the action of administrative agencies of the federal government.<sup>40</sup> That development is recent, grounded upon increasingly strong precedent and, because federal administrative agencies have assumed broad responsibility, is applicable to a broad range of environmental problems.

In focusing upon standing to seek judicial review of federal administrative agency action which affects environmental quality, none of the numerous instances of environmental litigation could serve better as a pedagogical device than *Sierra Club v. Hickel*.<sup>41</sup>

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<sup>40</sup> There is abundant literature discussing this topic. See generally Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) [hereinafter cited as Jaffe, *Public Actions*]; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) [hereinafter cited as Jaffe, *Private Actions*]; Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Comment, *Administrative Law—Expansion of "Public Interest" Standing*, 45 N.C. L. REV. 998 (1967); Comment, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U. COLO. L. REV. 96 (1969).

For a survey of the problems of judicial review and standing in state administrative law, see generally F. COOPER, *STATE ADMINISTRATIVE LAW*, Vol. II, 535-796 (1965).

<sup>41</sup> Civil No. 51,464 (N.D. Cal., filed June 5, 1969).

Within this litigation are embodied seeds of controversy which are characteristic of much potential environmental litigation. A rather detailed exposition of the factual nature of the controversy is necessary and, fortunately for the reader, provides a fascinating tale.<sup>42</sup>

The controversy involves a proposal to develop approximately 15,000 acres of land in the Sierra Nevada Mountains in California, some 230 miles northeast of Los Angeles, for use as a ski resort and multi-recreational facility.<sup>43</sup> The land is included within the Sequoia National Game Refuge<sup>44</sup> and is more popularly referred to as Mineral King. It is critical to the controversy that Mineral King is surrounded by, but not included within the Sequoia National Park,<sup>45</sup> and is reached by a narrow and winding two-lane road which lies on land of the Park.<sup>46</sup> The responsibility for planning the use of all these lands is highly fragmented, vesting in both the Department of Agriculture and the Department of the Interior.<sup>47</sup>

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<sup>42</sup> The compendium on the Mineral King controversy, to follow in the text, is derived from the following: U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, MINERAL KING, A PLANNED RECREATION DEVELOPMENT (1969) [hereinafter cited as RECREATION DEVELOPMENT]; Hano, *Protectionists vs. Recreationists—The Battle of Mineral King*, N.Y. Times, Aug. 17, 1969, § 6 (Magazine), at 24 [hereinafter cited as Hano]; Hope, *The King Besieged*, NATURAL HISTORY, Nov. 1968, at 52; Brief for Appellee, *Sierra Club v. Hickel*, Civil No. 51,464 (N.D. Cal., filed June 5, 1969) [hereinafter cited as Brief].

<sup>43</sup> RECREATION DEVELOPMENT, *supra* note 42, at 1.

<sup>44</sup> The Sequoia National Game Refuge was created by Act of Congress in 1926, 16 U.S.C. § 688 (1964) (originally enacted as Act of July 3, 1926, ch. 744, § 6, 44 Stat. 821).

<sup>45</sup> Sequoia National Park was created by Act of Congress in 1890, 16 U.S.C. § 41 (1964) (originally enacted as Act of Sept. 25, 1890, ch. 926, § 1, 26 Stat. 478), but did not include land now known as Mineral King because at that time mining claims encumbered the land. Nevertheless, Mineral King is ecologically identical to the surrounding Park land.

<sup>46</sup> RECREATION DEVELOPMENT, *supra* note 42, at 1.

<sup>47</sup> The Sequoia National Park (including the road on Park land) surrounding Mineral King is under the jurisdiction of the Secretary of the Interior, 16 U.S.C. §§ 1, 8, 8(a) (1964). The Sequoia National Game Refuge is subject to all laws and regulations applicable to national forests, 16 U.S.C. § 689(a) (1964), and is therefore under the jurisdiction of the Department of Agriculture, 16 U.S.C. § 472 (1964). The complexities attending an exercise of jurisdiction over these lands is noteworthy. Since the Game Refuge is national forest land, it is subject to the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 et seq. (1964), providing that the Secretary of Agriculture administer forest lands for one of five purposes: outdoor recreation, range, timber, watershed, wildlife and fish. However, the Secretary of Agriculture is precluded from using lands of the Game Refuge in any manner inconsistent with its purpose, 16 U.S.C. § 688 (1964). Thus, a use of the land for outdoor recreation under the Multiple-Use Sustained-Yield Act might be illegal given the purpose of the game refuge to protect game. To complicate matters further, the Secretary of Agriculture was originally vested with responsibility for issuing regulations which might permit the hunting, trapping, killing, or capturing of birds, game, and wildlife, 16 U.S.C. § 688 (1964). But the functions of the Secretary of Agriculture relating to the conservation of wildlife, game, and migratory birds has sub-

In 1949, contemplating a recreational use for the forest area, the Forest Service (Department of Agriculture) invited private bids for the development of the area.<sup>48</sup> Due, however, to the economic impossibility, at that time, of improving access to the area, no response was forthcoming.<sup>49</sup> In 1965, bids were again invited. The bid of Walt Disney Productions was chosen in 1965<sup>50</sup> and its master plan for development approved by the Forest Service in 1969.<sup>51</sup> Comparison of the approved master plan with the original development envisaged by the Forest Service is revealing. The Forest Service contemplated an approximately three million dollar investment consisting of three or four ski lifts, parking for twelve hundred automobiles, and lodgings for one hundred visitors. The master plan as approved calls for a thirty-five million dollar investment including five-story hotels, five-acre sublevel parking, restaurants on the peaks, shops, skating rinks, heated swimming pools, horse corrals, a chapel, and a theatre.<sup>52</sup>

The revelation to the public of this master plan ignited the controversy which now rages. Competing for vindication are two equally valid claims to the use of land, each grounded upon fundamental values which society seeks to preserve in its environment. Sierra Club represents, as plaintiff, the claim to preserve Mineral King in its virtually untouched wilderness status; defending departments and officers of the federal government represent the claim to develop the land for multi-recreational purposes.<sup>53</sup>

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sequently been transferred to the Secretary of Interior under the Reorganization Act of 1939, 5 U.S.C. § 133t (1964), Presidential Reorganization Plan No. II, Pt. I, § 4(f), 53 Stat. 1433 (1939). The net result is that the Secretary of Agriculture has ostensible jurisdiction over the Game Refuge (Mineral King) which he cannot administer in a manner inconsistent with its purpose, although the functions of protecting game in that reserve vest with the Secretary of Interior. Despite this, the Forest Service has authorized a massive ski development. No wonder that there is controversy involving Mineral King. See text accompanying notes 95-110 *infra*. See also criticism of United States land use planning, note 111 *infra*.

<sup>48</sup> RECREATION DEVELOPMENT, *supra* note 42, at 3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 4. Before the bid was selected, the State Highway Department voted to add Highway 276 to the state's road system. Following a three million dollar grant from the Office of Economic Development, the state voted approximately twenty million dollars from the state's highway fund to cover the balance of estimated costs for the construction of a relatively straight, two and three lane highway. Hano, *supra* note 42, at 50, 58, 62. It is the contemplated construction of this road that has made the development economically feasible, a factor lacking in 1949 when bids were first invited.

<sup>51</sup> RECREATION DEVELOPMENT, *supra* note 42, at 6.

<sup>52</sup> See Hano, *supra* note 42, at 50, 64.

<sup>53</sup> "The problem at Mineral King is that recreationists and protectionists look at the same thing with different eyes. One sees public land unused and considers it a waste. The other sees the same public land unused and considers it preserved. One sees the tampering with nature, and considers it necessary. The other sees the



Judicial involvement in the controversy of Mineral King has become possible primarily because of the development of legal doctrine within the past thirty years. The development reflects, even if collaterally, a general desire on the part of the federal courts and Congress that there be greater access through the courts to challenge decisions made by the administrative institutions of the federal government. Since the decision to develop Mineral King is one such decision, it is important that we examine the legal doctrine permitting such greater access.

Access to judicial review of the actions of administrative agencies of the federal government is governed by provision of the Administrative Procedure Act,<sup>54</sup> except to the extent that such review is precluded by statute or to the extent that agency action is committed to agency discretion by law.<sup>55</sup> That provision reflects the conclusion that administrative bodies—then and now representing a fundamental institutional mechanism for decision-making—should be subject to a uniform procedure of judicial review, and hence control, by a coordinate branch of government.<sup>56</sup>

This process of judicial review in the federal courts may, of course, proceed only within the limits generally imposed upon the exercise of federal judicial power: there must be a case or contro-

tampering with nature, and imagines a biotic community jeopardized. . . . One seeks immediate gratification for himself; he wolfs down pleasures and seeks out more. He is hedonist, recreationist. The other defers his gratifications, saving them for later generations. He is puritan, protectionist." Hano, *supra* note 42, at 64.

<sup>54</sup> The crucial language of the provision reads in part:

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. 5 U.S.C. § 1009(a) (1964). Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. 5 U.S.C. § 1009(c) (1964).

<sup>55</sup> 5 U.S.C. § 1009 (1964). Although judicial review is precluded where action is committed to agency discretion by law, § 10(e) of the Act directs that the reviewing court shall set aside agency action which is found to be, *inter alia*, an abuse of discretion, 5 U.S.C. § 1009(e) (1964). Thus there is question as to whether action committed to agency discretion by law, but which is nevertheless an abuse of discretion, is subject to judicial review. This question is the subject of a vigorous debate between Professor Davis and Professor Berger. The latest rejoinder in that debate is Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969). Previous literature of the debate is noted *id.* at 966, n.9.

<sup>56</sup> In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court emphasized that the Administrative Procedure Act embodies a basic presumption, entertained in cases prior to the Act, of judicial review of agency action. *Id.* at 140. That presumption is to be set aside "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Id.* at 141, *citing* *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962), and referring to legislative history of the Act to be found in H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946) and S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945).

versy.<sup>57</sup> The exercise of that limitation is partially the function of the doctrine of standing. This doctrine is intended to circumscribe the class of those persons who may invoke the judicial machinery in such a way as to "limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process . . . and to assure that the federal courts will not intrude into areas committed to the other branches of government."<sup>58</sup> The history of the delineation of such a class of persons is intricate and has been abundantly reviewed elsewhere.<sup>59</sup> It is nevertheless necessary to review some highlights of that history which are crucial to a focus upon environmental litigation.

The doctrinal development toward an expanded class of those who have standing to seek judicial review of federal administrative action was given impetus by the Supreme Court in *FCC v. Sanders Brothers Radio Station*<sup>60</sup> and *Scripps-Howard Radio, Inc. v. FCC*.<sup>61</sup> In *Sanders* standing was granted to a radio broadcasting licensee to challenge issuance of a broadcast license to a potential competitor. Standing was based upon an interpretation of language of the Federal Communications Act which provided a right of appeal to a "person aggrieved or whose interests are adversely affected" by actions of the Federal Communications Commission,<sup>62</sup> language which was subsequently to be found in the judicial review provision of the Administrative Procedure Act.<sup>63</sup>

In *Scripps-Howard* the Court made clear that the licensees challenging the actions of the Commission had "standing only as representatives of the public interest."<sup>64</sup> As one scholar has indicated, these decisions might be said to represent the theory that persons of a very limited class who are in fact adversely affected by agency action are parties who may sue without forcing an exercise of judicial power which would breach the functions of the case or controversy requirement.<sup>65</sup> That such a proposition may reasonably be inferred is confirmed by a subsequent federal court characterization of the holding in *Sanders*:

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<sup>57</sup> U.S. CONST. art. III, § 2.

<sup>58</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

<sup>59</sup> See note 40 *supra*.

<sup>60</sup> 309 U.S. 470 (1940).

<sup>61</sup> 316 U.S. 4 (1942).

<sup>62</sup> 47 U.S.C. § 402(b)(6) (1964).

<sup>63</sup> See note 54 *supra*.

<sup>64</sup> 316 U.S. at 14.

<sup>65</sup> See Jaffe, *Private Actions*, *supra* note 40, at 1314.

*Sanders*, for instance, granted standing to those economically injured on the theory that such persons might well be the only ones sufficiently interested to contest a Commission action.<sup>66</sup>

Thus, presumably, potential economic injury to persons bringing suit was a sufficient factor to assure the requisite adversariness demanded by the case or controversy requirement. That adversariness would be assured because, even though the radio station would be representing the public interest in broadcasting, its ultimate motive would be to prevent its own economic injury.<sup>67</sup> Though *Sanders* and *Scripps-Howard* may well be so characterized, in fact they have initiated a line of authority which stands for a much broader proposition: a fungible citizen,<sup>68</sup> not just the one who may himself be economically injured, is a party who may potentially represent the public interest as against the actions of administrative agencies.

We may relate this doctrinal development to environmental litigation by examining several recent cases which mark the standards to which that proposition has progressed. In *Office of Communication of United Church of Christ v. FCC*<sup>69</sup> the issue of standing to challenge action by the Federal Communications Commission was once again confronted. Citizen groups, as members of the class of the listening audience of a local radio station, sought to challenge the Commission's renewal of that station's broadcast license in the face of the station's history of overcommercialized and slanted broadcasting. Unlike *Sanders*, those seeking judicial review of the Commission's actions did not have a vested economic grievance as a motive for representing the public interest in broadcasting but were rather motivated, solely as listeners, to seek to protect the "use of a *limited* and *valuable* part of the *public domain*"<sup>70</sup> subject

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<sup>66</sup> *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966).

<sup>67</sup> But see Jaffe, *Private Actions*, *supra* note 40, at 282, and Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38, where the author points out that cases since *Sanders* have demonstrated that such an economic stake in the outcome has not limited the class of those who wish to sue and who would nevertheless be sufficiently interested to assure the requisite adversariness, if for no other reason but that they have expended funds in pursuing the litigation.

<sup>68</sup> The phrase is used in Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1036. In the influential opinion of a lower federal court following *Sanders* and *Scripps-Howard*, the concept of the fungible citizen who may potentially bring suit in the public interest was characterized as that of a "private attorney general." *Associated Indus., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See also *Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Dev.*, 284 F. Supp. 809 (E.D. Penn. 1968).

<sup>69</sup> 359 F.2d 994 (D.C. Cir. 1966).

to the free and exclusive performance of a licensee for at least three years.<sup>71</sup> The court concluded, in granting standing, that if such listeners were denied the opportunity to challenge the Commission's action, there might be no one else to represent the interest of the listening audience.<sup>72</sup> In reaching this conclusion the court implicitly assured that such standing would still preserve the requisite adversariness required of a case or controversy: "By process of elimination those 'consumers' willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones 'having a sufficient interest' to challenge a renewal application."<sup>73</sup>

This concept of standing acquires added potency when the subject for decision is not the three year use of the public airwaves affecting a local or at most regional listening audience, but is rather a decision, such as that involving Mineral King, whose impact upon the direction of environmental quality may be an irreversible allocation of a valuable national resource. Several relatively recent cases demonstrate that this expanded concept of standing is crucial to a judicial function of review which assures that administrative decisions affecting environmental quality are as fully as possible responsive to competing values.<sup>74</sup>

In *Scenic Hudson Preservation Conference v. Federal Power Commission*,<sup>75</sup> several conservation organizations and a New York Municipality, representing a claim to preserve the scenic and recreational value of a portion of the Hudson River Valley, sought to challenge the Federal Power Commission's issuance of a license to construct a reservoir and pumping station at Storm King in New York and to string the necessary power transmission lines. That license was issued as an exercise of the Commission's authority to

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<sup>70</sup> *Id.* at 1003 (emphasis added).

<sup>71</sup> *Id.* at 1004.

<sup>72</sup> *Id.* at 1005.

<sup>73</sup> *Id.*

<sup>74</sup> The system of judicial review in the United States is not the only system by which this function may be accomplished. It has been suggested that an independent judicial office, similar in function to the Ombudsman or Conseil d'Etat in civil law countries, is necessary to eliminate the injustice inherently bred by administrative bodies which apply a vast body of regulations whose generality ignores the complaint of the individual citizen. See H. WHEELER, *THE RESTORATION OF POLITICS* 13, 14 (An Occasional Paper on the Free Society published by the Center for the Study of Democratic Institutions) (1965). See also Jaffe, *Public Actions*, *supra* note 40, at 1282-89, where it is argued that although there should be no substitute for judicial review of an administrative action where a person alleges individual aggrievement, there may be better ways to control administrative action affecting the public in general than by judicial review through the public action.

<sup>75</sup> 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

provide for the power needs of the Nation, a competing claim to the use of the resources of the Hudson River Valley. The court granted plaintiffs standing to seek review of the Commission's decision under the judicial review provision of the Federal Power Commission Act,<sup>76</sup> a provision identical to that of the Federal Communications Act under which standing was granted in both *Sanders* and *Church of Christ*.

In finding congressional intent that the Federal Power Commission consider recreational purposes in developing a comprehensive plan for the use of waterways,<sup>77</sup> the court stated:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, *those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of aggrieved parties under [the statute].*<sup>78</sup>

Having granted plaintiffs standing to seek judicial review, the court's disposition of the case was to remand to the Commission for further consideration as to the impact of the power development upon environmental quality and as to possible alternative means of providing needed power.

With the courts having reached this expanded concept of standing to seek judicial review under the *person aggrieved* language of statutes creating specific administrative agencies, the last logical step was to extend that concept of standing to the identical language of the Administrative Procedure Act which governs judicial review of all administrative bodies. That step was taken in *Road Review League, Town of Bedford v. Boyd*,<sup>79</sup> in which the plaintiffs sought to set aside the choice of a route for an interstate highway which allegedly threatened two wildlife sanctuaries and the natural beauty of the countryside. Although that choice, made through procedures requiring decisions of the Secretaries of Transportation and of Commerce, was upheld by the court as representing an adequate weighing of competing claims, the court enhanced beyond *Scenic Hudson* the potential for litigation concerning the impact of administrative decisions upon the direction of environmental quality.

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<sup>76</sup> 16 U.S.C. § 825l(b) (1964).

<sup>77</sup> The court relied upon the provision of the Federal Power Act which provides that the project ". . . will be best adapted to a comprehensive plan for improving or developing a waterway or waterways . . . [including for] beneficial public uses, including recreational purposes." 16 U.S.C. § 803(a) (1964) (emphasis added).

<sup>78</sup> 354 F.2d at 616 (emphasis added).

<sup>79</sup> 270 F. Supp. 650 (S.D.N.Y. 1967).

That potential is to be found both in the court's holding that its jurisdiction of the controversy rested upon the judicial review provision of the Administrative Procedure Act<sup>80</sup> and its holding that the *persons aggrieved* language of that Act was to be interpreted to grant standing in precisely the same circumstances that standing was granted to invoke the judicial review provisions of statutes creating specific administrative agencies. That potential has been realized in the recent case of *Citizens Committee for the Hudson Valley v. Volpe*<sup>81</sup> and is being utilized in the pending case of *Parker v. United States*.<sup>82</sup>

In *Citizens Committee*, an unincorporated village of New York, the Sierra Club, a citizen's committee, and other named individuals challenged the construction of a proposed Hudson River Expressway to be laid partially upon land fill placed in the Hudson River. The challenge was directed, *inter alia*, at the issuance of a permit for that land fill by the Army Corps of Engineers in response to a request for such permit by the state commissioner of the New York Department of Transportation. Plaintiffs contended that issuance of the permit exceeded the statutory authority given to the Army Corps of Engineers under the Rivers and Harbors Act of 1899.<sup>83</sup> This contention, resolved in favor of plaintiffs in the district court, requires the factual finding that the project requires a causeway within the meaning of section 9 of that Act which demands congressional consent and approval by the Secretary of Transportation prior to the construction of a causeway over a navigable river of the United States.<sup>84</sup> The permit for land fill had been issued absent that consent and approval.

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<sup>80</sup> Under the Administrative Procedure Act, the plaintiffs alleged aggrievement by agency action within the meaning of two relevant statutes. The first is the provision in the Federal Highways Act declaring national policy with respect to the preservation of the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites, 23 U.S.C. § 138 (1964). The second is the Department of Transportation Act provision declaring the same national policy, 49 U.S.C. §§ 1651(b)(2), 1653(f) (Supp. IV, 1969), and the provision declaring that the judicial review provisions of the Administrative Procedure Act shall be applicable to proceedings of the Transportation Department, 49 U.S.C. § 1655(h) (Supp. IV, 1969).

<sup>81</sup> 302 F. Supp. 1083 (S.D.N.Y. 1969). The case is being appealed by the government, *appeal docketed*, No. 34010, 2d Cir., Sept. 9, 1969.

<sup>82</sup> Civil No. C-1368 (D. Colo., filed Jan. 7, 1969).

<sup>83</sup> 33 U.S.C. § 401 et seq. (1964).

<sup>84</sup> 33 U.S.C. § 401 (1964). Although approval for a causeway is seemingly required from the Secretary of the Army rather than from the Secretary of Transportation, the Department of Transportation Act transfers jurisdiction over causeways from the Secretary of the Army to the Secretary of Transportation, 49 U.S.C. § 1655(g) (Supp. IV, 1969). The court discusses the history of the relevant legislation more fully at 302 F. Supp. 1087.

The district court pursued three lines of analysis of interest here. Initially, the court found that although the portion of the expressway which was to lie upon land fill would not itself be a causeway, a causeway would nevertheless be a necessary connecting link of the expressway. Should the landfill be completed prior to approval of the causeway by the Secretary of Transportation, the Secretary would be faced with a *fait accompli*; his decision would be severely pressured by the fact of expense already committed to the project. Such a piecemeal approach to planning, the court concluded, is inconsistent with declared national policy.<sup>85</sup> Secondly, relying upon the presumption of judicial review enunciated in *Abbott Laboratories*<sup>86</sup> and upon the holding in *Road Review League*, the court further held that it had jurisdiction, under the Administrative Procedure Act, to review the actions of the Army Corps of Engineers even absent specific judicial review provisions in the Rivers and Harbors Act. Finally, reviewing and relying upon the holdings in *Scenic Hudson* and *Road Review League*, the court made this broad statement about standing:

[I]f the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.<sup>87</sup>

In *Parker*, the Sierra Club, the Eagles Nest Wilderness Committee, the Colorado Open Space Coordinating Council, a guide who conducts wilderness trips, and other conservation organizations and named individuals<sup>88</sup> have brought an action for declaratory judgment and injunction with respect to a proposed sale of timber

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<sup>85</sup> 302 F. Supp. at 1089-90.

<sup>86</sup> See note 56 *supra*.

<sup>87</sup> 302 F. Supp. at 1092.

<sup>88</sup> As should have become obvious by now, these lawsuits in which the "private attorney general" is given standing to sue often inflate the number of persons who may join as party plaintiffs. "The responsible and representative groups . . . cannot . . . be enumerated . . . specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful . . . . These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966). The fact that such a variety of groups or individuals may join as plaintiffs may encourage a seeking of judicial review of environmental decisions by administrative agencies in that it might allow for a spreading of the costs of litigation. But would not this tend to undercut a rationale for expanded standing, namely, that those who are willing to shoulder the burden of the costly processes of intervention will preserve the requisite adversariness of a case or controversy?

by the defendant Secretary of Agriculture in the East Meadow Creek Area of White River National Forest in Colorado. The action is based upon plaintiff's contention that the proposed sale of timber, if not enjoined, will have been executed without complying with asserted procedural requirements of the Multiple-Use Sustained-Yield Act<sup>89</sup> and the Wilderness Act,<sup>90</sup> requirements which are intended to safeguard the public interest in the preservation of the recreational and scenic values of certain public lands. As yet, the court's only action has been to deny defendant's motion for summary dismissal which had claimed, *inter alia*, that the matter of timber sales was not subject to judicial review and that in any event plaintiffs lacked standing to challenge the proposed sales. The court found jurisdiction to review under the Administrative Procedure Act and found plaintiffs' standing to sue controlled by *Scenic Hudson and Church of Christ*.<sup>91</sup>

In reviewing these cases we note an important strategy for the attorney whose client wishes to challenge environmental decisions of federal administrative agencies. That strategy is to search the federal statutes and administrative regulations which govern the agency or agencies whose action concerns environmental quality until one is found which possesses the two following characteristics: (1) it refers to an administrative body which has at least partial responsibility for the proposed or rendered decision which is to be challenged; and (2) the statute or regulation contains language which evinces concern for environmental quality. The motivation for this strategy is identical to that which would guide an attorney basing his claim upon the public trust doctrine: a necessity to question not so much the propriety of an environmental decision as the efficacy of the decision-making process.<sup>92</sup> Thus, in *Scenic Hudson*, the plaintiffs had to look no further than the Federal Power Com-

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As the opinion in *Church of Christ* indicates, fear of inundation of agency proceedings is groundless given an exercise of agency discretion to make rules which will limit public participation in agency proceedings while assuring adequate representation of divergent views of those who wish to represent the public interest. *Id.* at 1005-06.

<sup>89</sup> 16 U.S.C. § 528 et seq. (1964). See note 47 *supra*. Reliance for the assertion is presumably based upon language of 16 U.S.C. § 529 (1964): "In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas." Plaintiff's complaint alleges that such consideration was not given. It is unclear what additional specific provision of the Wilderness Act, upon which plaintiffs also rely, would require the Secretary of Agriculture to consider the land in question as a potential wilderness area.

<sup>90</sup> 16 U.S.C. § 1131 et seq. (1964).

<sup>91</sup> *Parker v. United States*, Civil No. C-1368 (D. Colo., filed Dec. 24, 1969) (Memorandum Opinion and Order). Subsequent to final preparation of the text, the case has been decided on the merits. *Parker v. United States*, 309 F. Supp. 593 (1970).

<sup>92</sup> See note 39 *supra* and accompanying text.



mission Act; those in *Road Review League* found language in the Highways Act and the Transportation Act; those in *Citizens Committee* found language in the Rivers and Harbors Act of 1899; and those in *Parker* turned to the Wilderness Act and the Multiple-Use Sustained-Yield Act.

The implementation of this strategy may well have been simplified by the recent passage of the National Environmental Policy Act of 1969.<sup>93</sup> That Act provides, *inter alia*, that all agencies of the federal government—

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- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
- (i) the environmental impact of the proposed action,
  - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
  - (iii) alternatives to the proposed action,
  - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
  - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>94</sup>

Unlike the Federal Power Act or the Highways Act, the intent that federal agencies consider factors of environmental quality is a primary and not a collateral purpose of the Act. We have seen that if a relevant statute, such as the Highway Act, has as a collateral purpose the consideration of environmental factors, judicial review of agency action which fails such consideration is available. The underlying rationale for that view is that the judiciary should assure a decision-making process consistent with the statutory mandate that the quality of the environment be one factor affecting the decision. The National Environmental Policy Act rescues that mandate from its more relative obscurity in diverse federal statutes and gives it a prominence of its own.

Having sketched the doctrines of judicial review of action by administrative agencies and of expanded standing to seek such review where the decision of the agency peculiarly influences the direction of environmental quality, we may now return to the litigation of *Mineral King*. In the tradition particularly of *Road Review League*, *Citizens Committee*, and *Parker*, the plaintiff *Sierra*

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<sup>93</sup> Pub. L. No. 91-190, 91st Cong., 1st Sess., 83 Stat. 852 (1970).

<sup>94</sup> *Id.* § 102.

Club seeks standing to have judicially reviewed the actions and proposed actions of the Forest Service (Department of Agriculture) and the Park Service (Department of Interior) even though those actions are purportedly taken pursuant to statutory authorization which has no specific provision for judicial review.<sup>95</sup> Thus, the reliance of plaintiff is again upon the review provisions of the Administrative Procedure Act. Agency action allegedly violates several relevant statutes and administrative regulations.

The first challenge is to the proposed issuance, by the Forest Service, of both annual (revocable) and thirty year special use permits to Walt Disney Productions, chosen developer of Mineral King. The Secretary of Agriculture is authorized by statute to issue permits for specified uses of land in the National Forests;<sup>96</sup> among the several specific grants of such authority, plaintiff's concern is with the provision authorizing permits for the thirty year use of 80 acres of land.<sup>97</sup> Plaintiff's argument is that by contemporaneous issue of a revocable annual permit<sup>98</sup> the Forest Service is in effect circumventing the 80 acre limitation. The 80 acre permit will allow construction of many major facilities of the Mineral King development, but other major facilities, including ski lift towers, refuge and sewage disposal areas, parking areas, and roads will be constructed on land whose use is allowed through the annual permit. It is inconceivable, argues plaintiff, that after one year the Forest Service would revoke an annual permit necessitating the removal of facilities integrally related to a development whose total investment would exceed thirty-five million dollars. Termination of the thirty year permit after thirty years would, for the same reason, also seem inconceivable.<sup>99</sup>

Plaintiffs further challenge the development of Mineral King as inconsistent with the use of the area as a National Game Refuge,<sup>100</sup> claiming that the responsible agency made an inadequate study<sup>101</sup> to support a finding that the development would not therewith be inconsistent.

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<sup>95</sup> Brief, *supra* note 42.

<sup>96</sup> See, e.g., 16 U.S.C. § 552 (1964) (authority to grant rights-of-way for electrical plants, poles, and lines); 16 U.S.C. § 523 (1964) (authority to grant rights-of-way for communication lines and facilities); 16 U.S.C. § 478 (1964) (authority to designate up to 640 acres of national forest land for town sites); 16 U.S.C. §§ 532-38 (1964) (authority to provide for roads and trails).

<sup>97</sup> 16 U.S.C. § 497 (1964).

<sup>98</sup> The use of the revocable annual permit derives from the statutory authority of 16 U.S.C. § 551 (1964). See Brief, *supra* note 42, at 26-28.

<sup>99</sup> *Id.* at 29-30.

<sup>100</sup> *Id.* at 49-50. Reliance is placed upon 16 U.S.C. § 688 (1964).

<sup>101</sup> It is not certain whether the responsible agency is the Forest Service of the

Having challenged the actions of the Forest Service, the plaintiff further directs his attack at the Department of Interior which is allegedly prepared to authorize construction of the access highway through National Park lands.<sup>102</sup> Under mandate of federal statute, the Department of Interior is authorized to take such measures as necessary to protect the National Parks, including Sequoia National Park. Again, plaintiff relies upon specific statutory language, here, requiring the Secretary of Interior to pass rules and regulations governing the Parks in conformity with their purpose.<sup>103</sup> In fulfilling his responsibility to protect the National Parks, the Secretary had implemented recommendations of a Park Roads Standards Committee which had concluded that roads through National Parks should not be used as connecting links to ultimate destinations.<sup>104</sup> Since the proposed road would run through the Sequoia National Park, connecting Mineral King to a major state highway, plaintiff argues that authorization for construction of the Mineral King access highway would violate the implemented standards. Plaintiff further argues that the siting of a proposed transmission line, to run essentially along the route of the highway, requires congressional approval, not yet obtained, before it may be laid on National Park land.<sup>105</sup> If congressional approval is sought following the construction of the road, Congress, faced with a *fait accompli*, would have little choice (a choice is obviously intended by the statute) but to approve construction of the transmission line. Recall that precisely this argument of *fait accompli* was relied upon by the court in *Citizens Committee* in concluding that the Army Corps of Engineers had exceeded its authority under the Rivers and Harbors Act of 1899.<sup>106</sup>

One final challenge focuses upon the lack of public hearings prior to the pending authorization for construction of the highway. In January, 1969, then Secretary of Interior Stewart Udall issued regulations which required public hearings preceding decisions regarding roadbuilding in National Parks.<sup>107</sup> Those regulations were revoked by Secretary Hickel in April, 1969.<sup>108</sup> Plaintiff argues that this revocation is invalid under the provision of the Administrative

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Department of Agriculture or the Park Service of the Department of Interior. See note 47 *supra*.

<sup>102</sup> Brief, *supra* note 42, at 3.

<sup>103</sup> 16 U.S.C. § 1 (1964).

<sup>104</sup> U.S. DEPARTMENT OF INTERIOR, NATIONAL PARK SERVICE, PARK ROAD STANDARDS, 11th printed page (1968).

<sup>105</sup> Brief, *supra* note 42, at 46-49, relying upon 16 U.S.C. § 45(c) (1964).

<sup>106</sup> See text accompanying note 85 *supra*.

<sup>107</sup> 34 Fed. Reg. 1405 (1969).

<sup>108</sup> 34 Fed. Reg. 6985 (1969).

Procedure Act which requires certain procedures be followed in the promulgation of rules.<sup>109</sup> Plaintiff contends that since such procedures were not followed, the hearings required under the illegally revoked regulations must be held.<sup>110</sup>

It is thus through a series of claims, each based upon the language of relevant legislation or administrative regulation, that the Sierra Club seeks to enjoin agency action which would clear the path to the Mineral King development. The action is, as we have seen, one of many in a line of environmental lawsuits which have as their prime focus the resolution of deeply troubling questions about the use and the quality of our environment. They are questions whose solution would hopefully transcend the fragmented and bureaucratic governmental response which typifies federal administrative agency action and could be safely said to characterize similar decision-making bodies at other levels of government;<sup>111</sup> they are questions whose solution demands a philosophy of planning which views environmental resources as valuable assets rather than unlimited commodities and requires an effective and meaningful decision-making process to implement that philosophy.

### III.

The phenomenon of environmental litigation is clearly indicative of a fundamental demand of the citizen for a more effective voice in the decisions which affect the quality of his life. The different legal institutions of our society assume varying responsibilities for responding to that demand. The preceding analysis has been directed toward the goal of demonstrating the fundamental

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<sup>109</sup> Under the Administrative Procedure Act, the revocation of a rule is considered "rule making", 5 U.S.C. § 1001(c) (1964). The procedural requirements for rule making include notice of time, place, and manner, 5 U.S.C. § 1003(a) (1964).

<sup>110</sup> Brief, *supra* note 42, at 44-46.

<sup>111</sup> Resource policy in the United States has long been governed by an exploitation ethic and "a trust that everything will come out all right, that particular resources are limitless, that predictions and warnings of possible catastrophe are merely the voices of Cassandras who fail to appreciate the true genius of America and the destiny of the American people." N. WENCERT, *NATURAL RESOURCES AND THE POLITICAL STRUGGLE* 17 (1955). *See generally id.* at 15-30. For an excellent discussion of the deficiencies of land use planning in the United States and of possible solutions, *see generally* REICH, *BUREAUCRACY AND THE FORESTS* (An Occasional Paper on the Role of the Political Process in the Free Society published by the Center for the Study of Democratic Institutions) (1962). A comprehensive discussion of the history, philosophy, procedure, and future of federal land management may be found in M. CLAWSON & B. HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* (1957). A discussion of the foreign experience in resource management and its lessons for the United States appears in *COMPARISONS IN RESOURCE MANAGEMENT* (H. Jarrett ed. 1961).

proposition that the appropriate role to be played by the judicial institution in response to that demand is to ventilate the decision-making processes of coordinate decision-making institutions.<sup>112</sup> Precisely at the point where responsibility for environmental decision-making is not adequately being assumed or fulfilled by other institutions of government, the courts can and must play their most vital role.

There is, of course, no novelty in this type of judicial role, for the courts have previously revealed the imperfections of the decision-making processes of our society and, in one form or another, attempted to correct the imperfections. The most prominent example of judicial resuscitation of coordinate decision-making institutions is the Reapportionment Cases.<sup>113</sup> The fundamental impact of those cases has been to assure that institutions of government in a democratic society which are vested with responsibility for making decisions between competing values and demands of large groups of people be truly representative of those values and demands.

Judicial review of environmental decisions of the administrative agencies of the federal government is a significant method for surfacing and partially mending the imperfect response of our society to the problems of environmental quality. Although such agencies by no means make all decisions affecting environmental quality, the amount of such agency decisions is substantial. Moreover, the basic themes of judicial participation in decisions by those

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<sup>112</sup> This thesis has recently been alternatively articulated in Sax, *supra* note 12, at 558-59. "Understandably, courts are reluctant to intervene in the processes of any given agency. Accordingly, they are inclined to achieve *democratization* through indirect means—either by requiring the intervention of other agencies which will serve to represent underrepresented interests or by calling upon the legislature to make an express and open policy decision on the matter in question. The phenomenon of indirect intervention reveals a great deal about the role of the judiciary. The closer a court can come to thrusting decision making upon a truly representative body—such as by requiring a legislature to determine an issue openly and explicitly—the less a court will involve itself in the merits of the controversy." (emphasis added).

As another less direct means of affecting decisional responsibility, it has been suggested that the courts should shift the burden of proof in a lawsuit to the party whose action threatens environmental quality. Such party could for instance be required to show a greater necessity for the action and the unavailability of less onerous alternatives. Krier, *Environmental Litigation and the Burden of Proof: Some Comments and Suggestions*, unpublished paper presented to the Conference on Law and the Environment, Sept. 11-12, 1969 (on file U.C.L.A. Law Review; soon to be published in book form with other papers presented to the Conference). See *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966) for an example of such shifting of the burden of proof.

<sup>113</sup> See *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). See generally Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

agencies extend to environmental decisions made by similar agencies at state and local levels.

It is crucial to explicitly relate the expanded doctrine of standing to the judicial function of assuring more representative decision-making. The Mineral King controversy is well suited as a point of reference. *Sierra Club v. Hickel* is the result of the Sierra Club's implicit assertion that the decision about Mineral King ignores what established standards there are for allocating a limited natural resource. It is a case which testifies to the phenomenon which finds multifarious administrative agencies, each given fragmented responsibility for a decision about environmental quality, rendering decisions which represent an incomplete weighing of competing values. The phenomenon is not uncommon. The Forest Service and the Park Service are but two of many bureaucracies which tend to develop skewed views of the public interest. "Bureaucratic specialization leads to parochialism, excessive preoccupation of the agency with its own goals and its own vision of the public interest, and a disproportionate sacrifice of other social and economic interests to those it feels itself commissioned to protect and foster."<sup>114</sup> The controversy concerning proposed construction of an access highway to the Mineral King development is a case in point. The Forest Service, concerned solely with insuring the economic feasibility of a recreational development, seems to ignore the prohibition by the Park Service of road connecting links built through National Parks, a prohibition which itself partially results from tunnel vision.

The parochialism of administrative agencies is perpetuated by the isolation of the members of such agencies, mostly appointive, from ultimate responsibility to the voter and hence to an entire range of divergent viewpoints. There may well be partial justification for this isolation insofar as certain types of highly technical

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<sup>114</sup> Shapiro, *The Supreme Court and Government Planning: Judicial Review and Policy Formation*, 35 GEO. WASH. L. REV. 329, 343 (1966). In describing the Army Corps of Engineers as one of many federal bureaucracies and programs which work at cross purposes, one journalist has noted: "The Department of Agriculture drains wetlands while the Department of Interior tries to preserve them. The Corps dams wild rivers while the Department of Interior tries to save them. The Corps and the Bureau of Reclamation in Interior provide farmlands for crops which farmers are paid not to produce. The government spent \$77 million to build the Glen Elder Dam in Kansas, a Bureau of Reclamation project which provided land to produce feed grains, for which the government pays out hundreds of millions of dollars a year to retire." Drew, *Dam Outrage: The Story of the Army Engineers*, ATLANTIC, April, 1970, at 52. In recently issuing a permit for exploratory drilling on two oil leases in the Santa Barbara Channel, a spokesman for the issuing authority, the Army Corps of Engineers, remarked that his organization can only consider navigation and national defense in authorizing permits on the outer continental shelf. L.A. Times, Mar. 28, 1970, Pt. 1, at 1, col. 1.

decision-making, especially those demanding long range planning, require decision-makers whose "job security" will assure a measure of continuity and the training and experience necessary to aid mature judgment.<sup>115</sup> But the isolation requires an effective counterweight. That counterweight is provided by an expanded class of those who have standing to seek judicial review of the decisions of such agencies. Such expanded access to judicial review enables the individual citizen to cast a different kind of vote, one which does not elect or depose an individual decision-maker, but one which informs the court that some voters believe that a particular point of view is being ignored or underestimated by the decision-making body.<sup>116</sup>

The potential response of a court to such a "vote" is varied. The vote may be deemed as already counted and an agency decision affirmed, as in *Road Review League*,<sup>117</sup> or uncounted and a decision remanded for agency reconsideration, as in *Scenic Hudson*.<sup>118</sup> Alternatively, the vote may reveal to the court an excess of statutory authority which would have gone unnoticed absent a lawsuit, such that an agency will then be prohibited from implementing its decision. Thus, for example, if Sierra Club prevails on its claim that land use permits may not be legally issued for the recreational development as presently planned, a smaller development (perhaps without chapel, horse stables, theatre, or swimming pools) might be replanned, or a new site located, or the project abandoned.

The dynamics of institutional interaction will often, however, be more intricate and complex. Lawsuits, either individually or in the aggregate, may well stimulate specific or comprehensive legislative action. For example, in direct response to the Mineral King litigation a bill has been introduced into Congress which proposes to incorporate the Sequoia National Game Refuge into the Sequoia National Park.<sup>119</sup> If passed, the bill would reflect an open and

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<sup>115</sup> C. BLACK, *THE PEOPLE AND THE COURT* 180 (1960).

<sup>116</sup> "In criticizing administrative law, we should not overlook the fact that one of the underlying functions of legal proceedings against the government is not to 'win' in the old fashioned sense of winning a lawsuit, but to force the government to pay attention to a particular point of view." Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227, 1260-61 (1966).

<sup>117</sup> See text accompanying note 77 *supra*.

<sup>118</sup> See text accompanying notes 75-78 *supra*.

<sup>119</sup> H.R. 13521, 91st Cong., 1st Sess. (1969). The former head of the New York based Environmental Defense fund, established for the purpose of initiating environmental litigation, has remarked: "Every piece of enlightened social legislation that has come down in the past 50 or 60 years has been preceded by a history of litigation. It is the highest use of the courtroom—even when we lose—to focus public attention and disseminate information about intolerable conditions." *TIME*, Oct. 24, 1969, at 54. Even though extreme, the statement is food for thought. See note 120 *infra*.

visible decision about the quality of the environment, namely, that Mineral King should not be developed as a ski resort. Beyond such a bill, Congress might hopefully be induced to redraft the entire body of legislation which currently vests decision about the use of these public lands in diverse agencies and provides standards for decision-making which are ill suited to today's planning needs.<sup>120</sup>

The fundamental impact of judicial confrontation with problems of environmental quality may not be truly understood for many years. Well understood, however, is that the response of institutions of government to the problems of environmental quality, in an era of rising disenchantment with those institutions and with those who criticize them, is a signal test of the viability of this society's mechanism for decision-making. The judiciary has a vital responsibility to fulfill in passing that test if we are to maintain optimism that our democratic system of government can adequately respond to the diverse demands for a better quality of life.

GARY NEUSTADTER

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<sup>120</sup> A revealing example of institutional dynamics may be seen in the response to suits such as *Scenic Hudson* which have impeded power development in the name of protecting the scenic and recreational values of the countryside. Due primarily to stiff opposition from conservationists through lawsuits, 23 of 65 nuclear power plants and 23 of 125 conventional plants planned for 1967 are behind schedule, including 60% of all new plants and transmission lines in New England. These delays have led private power companies both to expend funds for protection of environmental quality threatened by poor land use, radiation or thermal pollution, and to call for federal, state, and local laws which would set specific criteria for environmental considerations which, if met, would clear a power plant for construction. See *Christian Science Monitor*, Nov. 12, 1969, at 17, col. 1. See H.R. 7052, 91st Cong., 1st Sess. (1969) which proposes just such a solution. On the problems of balancing this Nation's need for power with its need for recreational and scenic resources, see generally Poland, *Development of Recreational and Related Resources at Hydroelectric Projects Licensed by the Federal Power Commission*, 4 LAND AND WATER L. REV. 375 (1969); Tarlock, *Preservation of Scenic Rivers*, 55 KY. L.J. 745, 783-97 (1967).