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THE RIGHT TO A DECENT ENVIRONMENT; E = MC²: ENVIRONMENT EQUALS MAN TIMES COURTS REDOUBLING THEIR EFFORTS

E. F. Roberts†

Innovation . . . is called for if the rules are to remain appropriate to the activities they govern. But, as the conservative understands it, modification of the rules should always reflect, and never impose, a change in the activities and beliefs of those who are subject to them, and should never on any occasion be so great as to destroy the *ensemble*. Consequently, the conservative will have nothing to do with innovations designed to meet merely hypothetical situations; . . . he will be suspicious . . . of Saviors of Society who buckle on armour and seek dragons to slay; . . . in short, he will be disposed to regard politics as an activity in which a valuable set of tools is renovated from time to time and kept in trim rather than as an opportunity for perpetual re-equipment.

—Michael Oakeshott¹

I

ANATOMY OF A NUISANCE CASE

Qualified officials of New York's State Air Resources Board say its budget of \$2-million and staff of 185 are less than adequate. Some courts make abatement difficult. The operation of an Albany cement plant that showers dust on the surrounding countryside was defended by a judge as important to the regional economy.

—Gladwin Hill²

A. *A Nuisance Brawl: Rounds One and Two*

Let us talk about the recent case of *Boomer v. Atlantic Cement Co.*³ The plaintiffs there brought an action seeking to enjoin a cement company "from emitting dust and raw materials and conducting excessive blasting in operating its plant."⁴ In substance, plaintiffs were seek-

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¹ M. OAKESHOTT, *RATIONALISM AND POLITICS AND OTHER ESSAYS* 190-91 (1962).

² Hill, *Air Pollution Grows Despite Rising Public Alarm*, N.Y. Times, Oct. 19, 1969, at 61, col. 3.

³ 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967), *aff'd*, 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (3d Dep't 1968).

⁴ 55 Misc. 2d at 1024, 287 N.Y.S.2d at 113.

ing to enjoin what they saw as a nuisance. But allow the trial judge to describe the alleged culprit:

Atlantic commenced the production of Portland Cement at its plant in the Town of Coeymans in the County of Albany on or about September 1, 1962. Prior to that date defendant expended more than \$40,000,000 in the erection of one of the largest and most modern cement plants in the world. The company installed at great expense the most efficient devices available to prevent the discharge of dust and polluted air into the atmosphere.⁵

Be that as it may, the trial judge did find that Atlantic "created a nuisance insofar as the lands of the plaintiffs [were] concerned."⁶ He also found that whereas plaintiffs' lands previously ranged in value from \$22,000 to \$140,000, they now were worth a fraction less than half their previous values. Indeed, the trial judge saw that the solution to the problem lay in awarding plaintiffs the diminution in value of their properties.

Why should the trial court have allowed the cement company, in empirical effect, to buy up its neighbors? In *Whalen v. Union Bag & Paper Co.*,⁷ cited by the trial judge,⁸ the New York Court of Appeals reinstated an injunction against a million-dollar pulp mill that had polluted a stream, after an intermediate court had substituted damages for the injunction, because the highest court would not accept the idea that interests should be balanced in nuisance cases. Such a doctrine, after all, "if followed to its logical conclusion . . . would deprive the poor litigant of his little property by giving it to those already rich."⁹

Be that as it may, listen to the trial court in the instant case: "The ownership of property will be protected *unless* there are other considerations."¹⁰ What could these other considerations be?

If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.¹¹

The language, however, was quoted from the Court of Appeals's deci-

⁵ *Id.*

⁶ *Id.*, 287 N.Y.S.2d at 114.

⁷ 208 N.Y. 1, 101 N.E. 805 (1913).

⁸ 55 Misc. 2d at 1025, 287 N.Y.S.2d at 114.

⁹ 208 N.Y. at 5, 101 N.E. at 806.

¹⁰ 55 Misc. 2d at 1025, 287 N.Y.S.2d at 114 (emphasis added).

¹¹ *Id.*

sion in *McCann v. Chasm Power Co.*,¹² the effect of which was to place New York back in the column of those jurisdictions which did agree that, at least in certain cases, the poor litigant could be coerced off his property.

How then were the interests to be balanced in *Boomer*? Nine parcels of land, once worth \$346,000 in the aggregate, were worth \$161,000 after the cement plant began operating. Still, balanced against this were the palpable facts of the "defendant's immense investment in the Hudson River Valley, its contribution to the Capital District's economy and its immediate help to the education of children in the Town of Coeymans through the payment of substantial sums in school and property taxes . . ." ¹³ This said, the scales were found to weigh more heavily in favor of the cement plant, contributor to local affluence, than in favor of the several properties inundated by the sound and stench of progress.

How did the neighboring property owners fare when they appealed? Suffice it to report that they lost.¹⁴ Even so, the terse opinion of the appellate tribunal interpolates into this scenario three ideas that cloud the waters sufficiently to justify running that opinion through an intellectual filter in order to assay its merits. These three ideas are simple enough to set out. First, balancing the equities is a fitting and proper way to try a nuisance case.¹⁵ Second, the fact that the company used the "most modern and efficient devices to prevent offensive emissions and discharges"¹⁶ was determinative of something or other. Third, the zoning of the area, first alluded to by the appellate tribunal, was determinative of something or other.¹⁷ Lest the reader think that I am being jocose when I raise doubts about what precisely the company's technology and the zoning map determined, taken into account along with the relative size of the investments by the parties and the company's sizeable tax bill, let the reader note that the appellate tribunal based its result upon "all of these relevant factors."¹⁸

B. *A Post-Fight Critique*

Hornbook law insists that New York is numbered among those few states that abide by "the rule" that injunctive relief will be refused

¹² 211 N.Y. 301, 305, 105 N.E. 416, 417 (1914).

¹³ 55 Misc. 2d at 1025, 287 N.Y.S.2d at 114.

¹⁴ *Boomer v. Atlantic Cement Co.*, 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (3d Dep't 1968).

¹⁵ *Id.* at 481, 294 N.Y.S.2d at 453.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

if the offending use is one permitted by a zoning ordinance.¹⁹ New York courts, however, have enjoined funeral parlors even though they were a permitted use according to the zoning map.²⁰ *Boomer* is interesting, therefore, because the trial court refused to enjoin the activity after balancing the interests involved, and the appellate tribunal, affirming the accuracy of the balance struck below, cited the zoning law only as *one* of the several factors to be weighed when considering whether to enjoin an obnoxious activity. The internal logic of the case evidences that the so-called New York rule may verbalize only the high probability, rather than the compulsive necessity, that a court will not enjoin as a nuisance a use permitted by the zoning law.

If still more changes in New York jurisprudence are to be appreciated, *Boomer* should be compared with *Bove v. Donner-Hanna Coke Corp.*,²¹ a case often cited in support of the New York rule. In *Bove* the unfortunate plaintiff had moved into a section of Buffalo that, because of the influence of transportation factors, was bound to grow into an industrial sector.²² The inevitable occurred and plaintiff found herself inundated by soot and fumes from a new coke plant. Plaintiff got neither injunctive relief nor damages. Apart from the fact that the area was by then zoned to allow coke ovens, the court refused relief because the defendant's plant was not a nuisance. This was so because the plant represented the best effort achievable under the technology of the day and, perforce, it was not defendant's "fault" that the installation polluted the local environment.

Arguably, however, modern courts have discarded the notion that nuisance must involve a faulty manufacturing operation.²³ Instead, these courts will enjoin the most technologically advanced operation if it is sited in the wrong place.²⁴ Site selection is the whole key. That is, a plant that spews pollution when technology could reasonably prevent

¹⁹ *E.g.*, Note, *Zoning Ordinances and Common-Law Nuisance*, 16 SYRACUSE L. REV. 860, 861 (1965).

²⁰ *Sweet v. Campbell*, 282 N.Y. 146, 25 N.E.2d 963 (1940).

²¹ 236 App. Div. 37, 258 N.Y.S. 229 (4th Dep't 1932).

²² *Id.* at 41, 258 N.Y.S. at 234.

The land is low and lies adjacent to the Buffalo river, a navigable stream connecting with Lake Erie. Seven different railroads run through this area. . . . Railroads naturally follow the low levels in passing through a city. Cheap transportation is an attraction which always draws factories and industrial plants to a locality. It is common knowledge that a combination of rail and water terminal facilities will stamp a section as a site suitable for industries of the heavier type, rather than for residential purposes.

²³ *See, e.g.*, Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440. Compare *Dillon v. Acme Oil Co.*, 49 Hun 565 (N.Y. Sup. Ct. 1888), with *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907).

²⁴ *E.g.*, *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907).

it is everywhere a nuisance in the old-fashioned sense and should be enjoined even in New York. A plant that spews pollution but is the best plant reasonably possible according to modern technological thinking is a nuisance only if it is sited in the wrong part of town, such as a residential area. What New York did in *Bove* was to simplify the decision about site selection by purporting to make the zoning map, if any, conclusive.

Boomer raises the *quaere* whether New York has retreated from its old rule and replaced it with a rule that a properly run plant, which nonetheless pollutes, can be enjoined as a nuisance notwithstanding its being a permitted user according to zoning. Let us rehearse this suggestion as if the law were logic. According to classic nuisance law a non-negligently run plant is not a nuisance if correctly sited. In New York, according to *Bove*, plaintiff had to bear the loss caused by progress under this last statement. Presumably, the same was true in *Boomer*, yet in *Boomer* the plaintiffs were given money damages. If, however, the plant was up to par technologically, the damages could not be justified according to classic nuisance law, because no nuisance existed.²⁵ *Ergo*, the damages had to be based upon the modern idea that something was amiss in the site, which perforce means that zoning law was de-emphasized as the sole criterion of that question. In logic, therefore, if the zoning map is not conclusive, then even in New York a court *might* enjoin a technologically-par plant in an area zoned to receive it. Logic, however, is not necessarily law.

It is doubtful whether New York thinking about injunctions has changed. What has changed is thinking about the allocation of losses attributable to industrialization of a neighborhood. Whereas at the time of *Bove* it was self-evident that, without fault, loss should fall on the innocent victim of circumstances, by the time of *Boomer* it may be subconsciously axiomatic that losses should be spread over the consumer-beneficiaries of changing circumstances that harm innocent bystanders.²⁶ If so, *Boomer* reflects an application of modern consumer liability thinking to the area of nuisance law. Thus the New York rule turns out to be that, although a technologically-par plant will not be enjoined in an area wherein it is a permitted user, the plant nonetheless will be assessed for any resulting diminution in value of the surrounding properties. The industrial entrepreneurs are not at fault either in the way they operated the installation or in the way

²⁵ *E.g.*, RESTATEMENT OF TORTS § 822 (1939).

²⁶ See cases collected in Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 849-56 (1967).

they selected the site; rather, the contemporary sense of justice simply decrees that they, and through them their customers, should bear the losses occasioned the neighborhood by the plant.

Thus it is that the law in New York falls into line with that old chestnut, *Madison v. Ducktown Sulphur, Copper & Iron Co.*²⁷ There plaintiffs owned farms with an aggregate assessed value of less than one thousand dollars. Defendants were two great mining and manufacturing enterprises worth nearly two million dollars, representing half of the taxable values in the county.²⁸ Defendants reduced their copper ore by cooking it over open-air wood fires, emitting large volumes of sulphur dioxide smoke and turning the valley into a wasteland. The Tennessee court held that plaintiffs were not entitled to injunctive relief because "the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances."²⁹ "Liberty" here meant that the companies were free to create a wasteland if they paid for it, whereas the farmers were free to take jobs with the industry and continue to reside in a valley totally polluted with chemicals.

II

NUISANCE LAW EQUALS CONSTITUTIONAL LAW

We may have even less than a 50-50 chance of living until 1980.
—Daniel Moynihan³⁰

In a corrupted age the putting the world in order would breed confusion.

—The First Marquess of Halifax³¹

²⁷ 113 Tenn. 331, 83 S.W. 658 (1904).

²⁸ *Id.* at 343, 83 S.W. at 660.

²⁹ *Id.* at 367, 83 S.W. at 667.

³⁰ *The Times* (London), Oct. 22, 1969, at 5, col. 3. Moynihan here may be overdoing it in order to get some action going. Then again there is a streak of pessimism, or maybe a civilized sense of original sin, in Moynihan. Thus he quotes approvingly Arthur Schlesinger, Jr.'s depiction of the increment of sadness inherent in John F. Kennedy's intellectual make-up: "I believe today that its basic source may have been an acute and anguished sense of the fragility of the membranes of civilization. . . . [H]e had peered into the abyss and knew the potentiality of chaos." D. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* 193 (1969), quoting A. SCHLESINGER, JR., *A THOUSAND DAYS* (1965).

Moynihan is, however, faithfully reproducing (or originating?) his master's voice. Witness President Nixon's New Year's Day comment about the need to face the problems posed by a deteriorating environment: "The nineteen-seventies absolutely must be the years . . . It is literally now or never." *N.Y. Times*, Jan. 2, 1970, at 1, col. 1.

³¹ HALIFAX, *COMPLETE WORKS* 231 (J. Kenyon ed. 1969). In the "it's a small world" category of intellectual gossip, it is interesting to observe that Moynihan has cited Michael

A. Nuisance Law: Convergence with Constitutional Law

If one stops to think about it, the only thing the entrepreneurs in *Boomer* did wrong was not to acquire enough land right away around their plant to serve as a pollution catchment or buffer area. This last sentence should instantly cause an intellectual bell to ring in the back of any well-trained lawyer's mind because, indeed, it describes precisely the error attributed to the defendant in *Griggs v. Allegheny County*.³² That case, it will be recalled, involved a claim by way of inverse condemnation against airport authorities for having taken a glide-path easement through a claimant's territory. Here then is an interesting parallel well worth pursuing.

Consider the recent decision of Oregon's highest court in *Thornburg v. Port of Portland*.³³ That case similarly involved a claim by a municipal airport's neighbors in inverse condemnation. This time, however, the "taking" involved not a glide-path but the imposition of a noise vector, which rendered plaintiffs' properties less habitable. The court accepted the theory. True, the case did involve activity engaged in by a governmental agency, but note carefully the similarity to *Boomer* in that the wrong complained of consisted of taking a vector or easement of noise over fee simples. Is not taking by the imposition of a vector or easement to lay dust and spread noise across fee simples the same kind of taking when done by a private company? Indeed, in *Boomer* and *Thornburg* does not the law of nuisance merge with the law of condemnation? In both instances injunctions are for practical reasons not to be had; just compensation must be made, however, for seizing the right to ruin the neighboring environment.³⁴

If in *Boomer* and *Thornburg* we are dealing with essentially the

Oakeshott (note 1 *supra*) and, noting that Oakeshott succeeded to Harold Laski's chair, suggested that this event is as good a symbol as any that there has been a turning away from "received liberalism." D. MOYNIHAN, *supra* note 30, at 8. Illustrative that "the law" is not the only "seamless web," it is noteworthy that Oakeshott in turn cites Halifax, criticizing him for even tentatively attempting to convert the informal art of politics into a rationalist-style ideology. M. OAKESHOTT, *supra* note 1, at 21.

³² 369 U.S. 84 (1962).

³³ 233 Ore. 178, 376 P.2d 100 (1962). Interestingly enough, Senator Robert W. Packwood has said that "[t]he voters of Oregon will no longer accept an economic justification for pollution. . . . They won't stand for a factory polluting a river even if it involves 500 jobs." N.Y. Times, Oct. 27, 1969, at 78, col. 8 (city ed.).

³⁴ In fact, this convergence of nuisance and condemnation thinking has not escaped notice, witness the dissent in *Thornburg*, wherein objection was taken to "commingling the remedies afforded under the law of eminent domain and nuisance." 233 Ore. at 213, 376 P.2d at 116. Conversely, the majority opinion noted that a nuisance might ripen into a prescriptive easement to lay noise across a neighboring fee. *Id.* at 183-84 & n.3, 376 P.2d at 102-03 & n.3.

same wrong, committed by a private company in one instance and by an agency of government in the other, an interesting idea intrudes itself. *Boomer* should be read as a case wherein, because the court refused to issue an injunction, a private company was allowed to condemn an easement or vector in neighboring land. The authority to seize private property, however, belongs to the instrumentalities of government, whether federal, state, or local, and has not been associated with private agencies. Arguably, therefore, the *Boomer* case is wrong on constitutional grounds. That is, whenever a nuisance amounts to what would constitute a "taking" if the offender were a government agency, the courts must enjoin the wrong because the award of damages would confer upon private offenders the ultra vires-like authority to condemn interests in land, not indeed for a public purpose, but for their private advantage.

"For Heaven's sake," will cry many a reader at this point, "such an argument would bring the economy to a screeching halt." True, it may be a bit late in the game now to undo the private takings thus far countenanced under the disguise of nuisance doctrine, but what is wrong with a court adopting this theory prospectively?³⁵

For the time being, let us assume that the rule we propose only applies in future cases. In terms of the conventional wisdom contained in affluence-oriented economics, we still have committed grievous error because the threat of an injunction, or the costs of purchasing an injunction-proof buffer area, will inhibit expansion. The crucial point, which must affect anyone's decision whether to accept this inhibition, is whether or not industrial expansion promises, if unchecked, to pollute the whole environment to such a degree that the resultant affluence proves to be a fleeting denouement before Judgment Day. The question before the house, therefore, is whether we can afford further industrial expansion without real environmental controls or whether we must attempt to impose new controls on future expansion to prevent its potential deleterious impact upon environment.

True, there are various legislative remedies on the books that, if enforced, promise us a clean environment sometime in the future.³⁶

³⁵ W. LEACH, PROPERTY LAW INDICTED 24 (1967): "In summary, it is now clear that any court can change bad law into good without looking over its shoulder at the possible repercussions on prior transactions, by the device of prospective-only overruling." Better yet, the Court could suggest that the nuisance ruling might have to be made retrospective if the situation was not bettered with "all due deliberate speed." Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954), with *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (per curiam).

³⁶ But see *Hill, Air Pollution Grows Despite Rising Public Alarm*, N.Y. Times, Oct.

Be that as it may, let the reader's recollection be refreshed by recalling for him several palpable facts which are, or ought to be, common knowledge. Anyone who has flown into New York City during the right weather situation can *taste* the local pollution problem. Anyone who has flown over Buffalo can *see* industrial smoke drifting thirty or forty miles, either out over Lake Erie or inland over beautifully green countryside. Detroit not only looks like a red, dust-enveloped metropolis, it is an environment enveloped in a dust dome. Hence, whereas political or legislative processes may promise relief after enough lives have been lost to demand that affluence-oriented conventional wisdom be curtailed, every man meanwhile must look to the courts to provide an immediate remedy for his environmental complaints.

If, therefore, the reader decides that a stop must be put to increasing pollution, the injunctive process promises a first effective step in this direction. There is, frankly, no way to prove intellectually whether this new rule of preventing private "takings" is "right" or "wrong"; instead, the real question is whether, given the reader's sense of what is fitting and proper, it is the "appropriate" or "inappropriate" response to an ever-exacerbating conundrum.

B. *An Admixture of Socialism and Participatory Democracy*

What if a municipality finds that it needs a new source of cement but that no manufacturer can amass the land necessary to insulate the new plant from its neighbors? The answer is elementary, although it requires a radical re-allocation of the relative decision-making authority between government and the dictates of the market. Whereas in the past zoning channelled development in the hopes of reducing the increment of nuisance-style friction between neighbors, local government in the future would have to select and condemn sites for and, perforce, determine the number of pollution-causing industries that could locate themselves in the area. Instead of being concerned merely with channelling market-dictated development, local government would have to concern itself not merely with planning of the land-use variety but with overall economic planning as well.³⁷ On the one hand, this would sim-

19, 1969, at 1, col. 3: "As America's air becomes steadily more contaminated, activities across the nation to cope with smog appear to be lagging further and further behind actual needs despite a rising public clamor for improvement." The graphs illustrating Mr. Hill's article seem to substantiate his opening grabber. *Id.* at 61, cols. 2-3.

³⁷ Whether market decisions should retain their central position on the city scene is still a question, witness this colloquy about the proposed Model Land Development Code:

[PROFESSOR E. F. ROBERTS:] . . . Allison, you have been through this with me before. Is it fair to assume that the marketplace is the ultimate determination of development? And from my rather socialist planning background,

ply allow the voters more voice in selecting their planners, since markets are already fairly well-planned by private forces or by Washington.³⁸ On the other hand, where industry required vast spaces to provide the requisite buffer zone, we should see exclusively residential suburban rings around center city shattered by the compulsive force to locate new industry.³⁹ Obviously, an industry which could not contain its pollutant by-products within a feasible area should not be built.

will your Code inhibit, for example, municipal planning by way of condemning the right to development on the periphery of the municipality? Does it inhibit piece by piece development decisions by a wheeling and dealing governmental unit?

DIRECTOR WECHSLER: If you understand the question, will you please answer it? [Laughter]

PROFESSOR DUNHAM: The question refers to planning Chicago style. I think he means: Is this based on the economic theories of Milton Friedman at the University of Chicago, the great classical economist?

To state my own personal opinion, I would be proud to say that I do share the classical economist's view that, by and large, the best decisions are made by the private owner, and that I, to the extent that I have controlled this structure—why, it does have that emphasis.

.....

Now, Mr. Roberts is correct that there are other ways of securing adoption of the plan, or approval of the plan. It is possible, assuming there is enough money to do it . . . to buy all of the land in the community which is available for development, and then sell it only to a developer who agrees to build in accordance with the plan.

.....

Now, what I'm trying to say on this, in answer to his specific question, is: Do we permit a local government to buy the development rights on the outskirts of the community? That is, say to the local owner: You may continue to use it for what you are now using it for, but we have acquired from you an easement, or a negative easement, which says you can't develop it without our consent? That's permissible. It's permissible under much existing law. We merely set it forth here in a much clearer form than it is now available. And as all of you know who have worked with conservation, recreation, and open space, this is occurring in many parts of the United States . . .

45 ALI PROCEEDINGS 216-18 (1968).

The ALI Model Development Code that precipitated these remarks has been made obsolete by New York's launching of its State Urban Development Corporation, a creature which if implemented adequately will make the state the leader in future development activity. N.Y. UNCONSOL. LAWS §§ 6251-360 (McKinney Supp. 1969). See also the new English scheme contained in the Land Commission Act of 1967, c. 1.

³⁸ See materials collected in Roberts, *A Eulogy For the Old Property*, 20 MAINE L. REV. 15, 39-41 (1968); Roberts, *From Common Law Logic-Chopper to Land-Use Planner: Eulogy for the Lawyer as Social Engineer*, 53 CORNELL L. REV. 957, 984-89 (1968). See also G. MEANS, *THE CORPORATE REVOLUTION IN AMERICA* 77 (1964).

³⁹ This, of course, would make units of local government significant power foci again, which presumably would allow people a better sense of participating in or at least influencing decisions. See, e.g., *Social Reform in the Centrifugal Society*, NEW SOCIETY, Sept. 11, 1969, at 387. Consider also the impact this restoration of real decision-making power at the local level should have in another context:

Paul Goodman wrote his powerful tract *Growing Up Absurd*. Goodman avowed if doctrinally elusive radical—anarchist, if anything—was just then acquiring the

Immediately the careful reader must wonder whether the units of local government, themselves the product of political and, perforce, self-interested forces, can be expected to create a better environment or whether, like the federal regulatory agencies, they will be captured by industry and things will go on pretty much as they are.⁴⁰ The obvious answer is that, left to their own devices, local governments cannot be expected to do one bit better. Still, because their land acquisition decisions are susceptible to judicial review, there is hope now that they may be coerced into living up to a better standard.

A case that every environmentalist should read and re-read is *Scenic Hudson Preservation Conference v. Federal Power Commission*.⁴¹ There a federal agency licensed the Consolidated Edison Company of New York to construct a pumped-storage, hydroelectric reservoir near Storm King Mountain along the Hudson River. As anyone familiar with the area is well aware, this is "an area of unique beauty and major historical significance."⁴² Two towns and a conservation group entered the federal courts to seek a reversal of the agency decision on the ground that the agency had not satisfied its statutory duty to consider the impact the project would have upon the area. The court agreed that the agency had to think through the whole thing again, this time not merely within the banal terms of cost-accounting, but in such a way that their intellectual litmus tests included "a basic concern [for] the preservation of natural beauty and of national historic shrines."⁴³ The court likewise agreed that the towns and the unincorporated association had

great influence among middle- and upper-class college youth that was to make him in time a *guru* of the New Left in its special quest for participatory democracy. But the striking quality of his thesis . . . is its avowed and explicitly conservative content. . . . [This] certainly required an outright rejection of gigantism and a reversion to smaller units of society

D. MOYNIHAN, *supra* note 30, at 15-17.

In the short run, of course, suburban snobbery would likely resist industry, but the rising costs of their sacrosanct schools would force suburbanites to expand their tax base by letting in industry. Once the wedge is put in, hopefully some working class, *i.e.*, black, housing must follow. See N.Y. Times, June 29, 1969, at 39, col. 1 (city ed.): "A lawsuit is being prepared by two city planners to challenge the constitutionality of suburban zoning laws"

The planners argue that . . . suburban zoning has made housing too expensive for millions locked in the central cities . . ." See also Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

⁴⁰ See, e.g., Appendix containing Commissioner William M. Bennett's classic dissent in *California Public Utility Commission—on Application by Pacific Gas & Electric Co. for a Nuclear Plant at Diablo Canyon*.

⁴¹ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁴² *Id.* at 613.

⁴³ *Id.* at 624.

standing to enter the controversy. The court based this decision, in part, on plaintiffs' economic interest in the area.⁴⁴ More significantly, the court explained that it decided the standing question as it did 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."⁴⁵ Giving full weight to this rationale, one can hopefully assume that any seriously interested group of local citizens could have maintained the action and that the talk about economic interest was merely a makeweight.

Hopefully, therefore, if units of local government exercise the power of condemnation necessary to acquire reservations for pollution-prone industries, they will be required to exhibit a concern for the environment. We have no way of being certain, however, that any enabling legislation conferring the necessary authority upon local government will require it to take into account either natural beauty or historical significance in its site selection process. Thus the Achilles' heel of our solution to the nuisance problem appears to lie in the danger we pose to aesthetic values when we unleash local government with this charge to acquire vast areas of unspoiled land.

The careful reader must observe yet another Achilles' heel in the structure herein posited. True, neighbors inundated by dust could enjoin the offender. True, local government should have to acquire the land upon which to site these industries in order to prevent neighborhood pollution by dust, smell, noise, or vibration. But what about an industry whose by-product is an invisible gas so quickly absorbed in the atmosphere that its effects, even though not readily measurable in its immediate neighborhood, contribute to the toxic balance of the regional atmosphere? Will a court enjoin under the theory propounded here something that, although a menace to the whole region, does not fall within the usual nuisance categories of smell, sound, or vibration obnoxious to the immediate neighborhood? Concomitantly, given a smoke-belching plant from which, because they are poor or indifferent, the neighbors do not seek relief, are we certain that citizens outside the neighborhood but within the region have the standing to sue in their stead? Is there a broader community interest in the total environment that exceeds the right to be free from immediate neighboring nuisances? In short, is there a general right to an environment fit to sustain healthy human life?

⁴⁴ *Id.*, at 616.

⁴⁵ *Id.*

III

THE RIGHT TO AN ENVIRONMENT FIT TO SUSTAIN HEALTHY
HUMAN LIFE

[In] our affluent society, the cost of a project is only one of several factors to be considered.

—Judge Paul R. Hays⁴⁶

A. *A Political Response: Constitutional Amendments*

The threat to environment posed by our current way of living can quickly be gleaned from a recent report issued by the United Nations:

Improved technology is necessary if productivity is to increase and the products of industry be provided to growing numbers of people. However, the side effects of poorly planned or uncontrolled industrialization and of the one-sided application of technology have been a direct cause of many serious environmental problems. During the discussions of the General Assembly at the twenty-third session, it was pointed out that the reliance of modern technology upon the combustion of fossil fuels has brought a 10 per cent increase in atmospheric carbon dioxide over the past century. With increased rates of combustion, this could rise to 25 per cent by the year 2000 A.D. The consequences of such an increase upon world weather and climate are uncertain, but could eventually be catastrophic. The increased use of modern technology has brought major increases in the amount of waste products which serve as environmental pollutants. It has been stated that in the United States of America alone, this amounts each year to 142 million tons of smoke and noxious fumes, 7 million automobiles, 20 million tons of paper, 48,000 million cans, 26,000 million bottles and jars, 3,000 million tons of waste rock and mill tailings and 50 trillion gallons of hot water along with a variety of other waste products. Other industrialized nations make their comparable contributions of debris and toxic materials. While technology is adequate to cope with these problems of pollution, the planning and application of pollution control lags far behind what is required, often due to economic considerations.⁴⁷

Let the reader observe, by the way, that the very source of this report illustrates that we Americans by no means have any monopoly of the ability to destroy this planet.

Responding to this phenomenon, a number of amendments have

⁴⁶ *Id.* at 624.

⁴⁷ U.N. ECON. & SOC. COUNCIL, PROBLEMS OF THE HUMAN ENVIRONMENT, pt. 4, at 5 (1969).

been introduced at the state level that would establish a right to environment. Typical of these, perhaps, is the following Pennsylvania effort:

That article one of the Constitution of the Commonwealth of Pennsylvania be amended by adding at the end thereof, a new section to read:

Section 27. Natural Resources and the Public Estate.—The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic and esthetic values of the environment. Pennsylvania's natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth, are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall preserve and maintain them for the benefit of all the people.⁴⁸

The question, naturally enough, is whether these provisions, however commendable, are a response adequate to the threat posed.

The immediate objection to be voiced against such a fiat is that it is so broad that most lawyers may not know precisely what they are to make of it. No one will deny that people have an abstract right to clean air and historic values, but how are these to be translated into legally enforceable rights? Preserving historic buildings, for example, is a field in its own right fraught with immense complexities.⁴⁹ Various efforts have already been initiated, moreover, to clean up the air.⁵⁰ What precisely are the courts to do?

Within *academia* it is easy to suggest to the Pennsylvania courts that they issue mandatory injunctions in any case where air or water pollution is proved; this is what the amendment authorizes them to do. What, however, if the Pennsylvania judges were to use the injunctive process to clean up that Commonwealth in short order, but Delaware, for example, did not pursue a similar course? Should we not shortly see a superb but bankrupt Pennsylvania and an even more affluent, albeit doomed in the long range, Delaware, as industry migrated there? Given man's preference to enjoy his cakes and ale now, the answer to this question is self-evident. In short, the several state courts, acting individually, would be faced with the same policy problems that have beleaguered state legislatures in our multi-state system.

It would require a unique state court willing to upset radically the local economy to take an amendment of this type at face value.

⁴⁸ Pa. H.R. 958 (1969).

⁴⁹ See, e.g., J. MORRISON, *HISTORIC PRESERVATION LAW* (1965).

⁵⁰ E.g., Air Quality Act of 1967, 42 U.S.C. §§ 1857-571 (Supp. IV, 1969).

Further, if it meant destroying the local economy and plunging the state into a clean agrarian past, no judge could in conscience implement an amendment like this. Predictably, judges will reason that this kind of amendment is not self-executing. That is, rather than creating a new rule of substantive law, such an amendment will most likely be interpreted to authorize the state legislature to enact legislation to better the environment along with the health, safety, and morals of its citizens. To translate this phenomenon into the terms of a monopoly game, in substance we should still be at "go."

Earlier we suggested that the old nuisance remedy could acquire a wholly new significance if it received a transfusion of constitutional law thinking. Here we have seen that any right to an environment suitable for human habitation must be something applicable equally to all of the states lest laggard jurisdictions benefit economically from the reforms imposed elsewhere. An effort at the federal level appears to be the only answer. For reasons that will be made manifest later, a political response at the federal level does not hold much promise. A fortiori, we must inquire whether the Supreme Court of these United States can with propriety declare that a right exists whereby every citizen can demand an environment capable of sustaining decent human life.

B. *A Judicial Response: Substantive Due Process Revisited*

When I took a course in constitutional law, "judicial restraint" was the keystone in the intellectual arch of conventional wisdom. Indeed, students looking for an easy crutch used to waste their time memorizing Mr. Justice Brandeis's inventory of reasons why the Court would not take a case.⁵¹ Training like this made it difficult indeed for a whole generation of lawyers to adjust themselves to accept the so-called "activist" Warren Court. We had to come to accept the idea that although it was "bad" for the New Deal Court to strike down federal and state economic and welfare legislation, that did not mean that the Warren Court should similarly restrain itself when it came to handling civil rights cases.

Concomitantly, I also learned that "due process" meant procedural due process and that any notion of "substantive due process" was anathema. My bible was the Holmes version, and the text was found in the book of *Lochner v. New York*: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."⁵² That is, in

⁵¹ *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (dissenting opinion).

⁵² 198 U.S. 45, 75 (1905) (dissenting opinion).

reviewing legislation enacted under the police power, judges should not impose upon the question what they think the lawmakers should have done. Instead, judges should first ask themselves whether the measure is directed toward achieving an end properly the business of government: to-wit, does it purport to regulate the public health, safety, or morals? If the answer is affirmative, are the means adopted to achieve the end such that a reasonable legislator could believe them fitting and proper? If the answer again is affirmative, that is the end of the business.

My generation's repose was shattered again when the Warren Court came to deal with the problem raised in *Griswold v. Connecticut*.⁵³ There, it will be recalled, two defendants, one an officer of the Planned Parenthood League and the other a licensed physician and Yale professor, were convicted of violating Connecticut statutes making it a crime to give instructions on birth control techniques even to married couples. According to the conventional wisdom that had existed since New Deal days, there was little the Court could do to change the result. The right to disseminate birth control information is nowhere inventoried in the list of rights rendered explicit in the Bill of Rights, so no such right was channelled through the due process clause of the fourteenth amendment into Connecticut's jurisprudence. Judicial restraint, moreover, clearly indicated that the Court had no business striking down a state measure regulating health, safety, and morals simply because the judges did not agree with the wisdom behind the enactment.

Indeed, my generation must have nodded in total agreement as they read in the opinion penned by Mr. Justice Black the following:

The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, *e.g.*, *Lochner v. New York* That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought we had laid that formula, as a means for striking down state legislation, to rest once and for all⁵⁴

Unfortunately for our peace of mind, Mr. Justice Black had to express our conventional wisdom in a dissenting opinion.

Mr. Justice Douglas, in explaining why the statutes were void,

⁵³ 381 U.S. 479 (1965).

⁵⁴ *Id.* at 522 (dissenting opinion).

managed to avoid literally invoking the old litany of substantive due process by discovering a right of privacy in the Bill of Rights which, obviously, the Connecticut legislature could not invade. Finding a zone of privacy protected by the Bill of Rights was no easy task since privacy is nowhere mentioned therein. Still, although the first amendment protects freedom of speech and religion, it does not explicitly guarantee anyone the right to send his children to parochial instead of public schools. This does not prevent the Court from striking down an effort by a state to coerce children into the public schools on the ground that such a measure violates the first amendment.⁵⁵ Thus each of the specific rights listed in the Bill of Rights has "penumbras . . . that help give them life and substance."⁵⁶ Similarly, the first amendment's rights to enjoy freedom of speech and religion include "the privacy" of one's associations in the sense that a state cannot demand membership lists from legitimate groups.⁵⁷ The third amendment is concerned with privacy when it forbids unconsented-to quartering of soldiers in private houses during peacetime. The fourth amendment's concern with searches obviously includes a notion of privacy, as does the fifth amendment's self-incrimination clause. If this was not enough, the ninth amendment warns us that the enumeration of some rights in the previous amendments must not be construed to deny the existence of "others retained by the people."⁵⁸ Privacy, therefore, is imminent within the penumbras surrounding several amendments, and in the interstices wherein these several penumbras overlap, there is authority for the proposition that the Bill of Rights did create a right of marital privacy so fundamental that the Connecticut statutes had to be declared unconstitutional.

One can retain a pretty skeptical attitude about "the law" laid down in *Griswold*. Arguably, the Court acted only because the Connecticut legislature and courts lacked the courage to face up to what they calculated would be a Roman Catholic voters' backlash. Further, one can suspect that all of the talk about privacy was a smokescreen to disguise the fact that the Court was not using the fourteenth amendment's due process clause as a channel through which the Bill of Rights

⁵⁵ See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁵⁶ 381 U.S. at 484.

⁵⁷ See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁵⁸ U.S. CONST. amend. IX. Professor Bork has objected that to read the ninth amendment to mean that the Bill of Rights is an open-ended set of principles "has revolutionary implications for the practice of judicial review." Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec. 1969, at 138, 170. At the same time he admits that there is "some historical evidence that this is substantially what Madison intended." *Id.*

was applied to the state, but rather had given the due process clause a heavy transfusion in its own right of what the majority considered was natural justice. In short, as Mr. Justice Black noted, the case revived substantive due process.

If, however, there is a great deal to be said for the Warren Court's activism, there may also be something to be said in favor of a new form of substantive due process. Along the lines of the tactic employed in *Griswold*, there already exists the conceptual raw materials out of which a natural justice-style right to an environment fit for human habitation might be constructed. Implicit in the fifth amendment, after all, is the notion that human life is sacrosanct. Manifestly, the ninth amendment confirms the self-evident truth that the people did not surrender their expectation that they should be free to live in a decent environment. Indeed, the recognition that there is a constitutional right to a decent environment would simply mandate a return to adherence to first principles in a society founded not merely to guarantee "Liberty" but to preserve "Life . . . and the pursuit of Happiness."⁵⁹ Thus we stand marking time, anticipating a moment when the environment deteriorates to such a point that the Court is compelled to confirm that, along with free speech and religion, there exists a right to an environment fit for human habitation.

C. *The Import of Such a Judicial Declaration*

What if the Court should declare that there does exist for each and every citizen a constitutional right to a decent environment? The plain fact of the matter is that we should not enter upon any Utopian uplands tomorrow. The notion that we should suddenly see the use of automobiles enjoined, power plants shut down, and jet aircraft grounded is patently absurd. However much we protest, none of us is willing to return to the agrarian past.

At best we only can expect that the Court would require, via a series of procedural due process cases, that all governmental agencies give sufficient weight to the substantive right to a decent environment whenever they make a decision. Thus the decision would run the gamut from the Federal Power Commission to an upstate village board enacting a master plan. In short, the approach demanded by the court in *Scenic Hudson* would be elevated to a constitutional norm. Concomitantly, standing to appear at hearings and before the courts should be broadened so that representatives of the public affected by decisions

⁵⁹ Declaration of Independence, 1776.

may freely enter the lists to assert the rights of the public.⁶⁰ Hopefully, therefore, if the various regulatory agencies stop to look and listen to the wisdom being collected under the title of human ecology, we should see a gradual trend of decision making accelerating eventually into a decline of the pollution curve.

It must be recalled, however, that the Court would have several trump cards to play should the several agencies tarry. The Court might invoke the injunctive approach to nuisance cases suggested earlier. The Court might decide to ban the internal combustion engine "with all due deliberate speed." The point, as the reader must now begin to suspect, is that no one can predict what should result from such a declaration of constitutional content, simply because lack of Linus blanket-style certainty is the essence of a common law approach. Just like the destruction of the status quo wrought by *Brown v. Board of Education*,⁶¹ and like the excursion in the "political thicket" symbolized by *Baker v. Carr*,⁶² this approach will also demand a long, gruelling campaign of difficult decisions to give content to the original declaration. However, the crisis looms so large that, just as war is too serious a business to be left to the generals, our environment has become too serious a subject to be left to the politicians.

IV

FURTHER OBSERVATIONS

As mankind is made, the keeping it in order is an ill-natured office.
—The First Marquess of Halifax⁶³

A. *Dictum*

There are still deeper waters involved here than we might expect. Ours is a society obsessed with planning so long as planning does not entail a socialist-style government monopolizing the planning function. Hence our conventional wisdom envisages cooperation between govern-

⁶⁰ *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), is most significant in this regard. There representatives of "listener interest" were held entitled to participate in an administrative hearing in order to question the objectivity of a local broadcaster when its license came up for renewal. The decision was written by the then Judge Warren E. Burger. For further comments on this point, see Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

⁶¹ 347 U.S. 483 (1954).

⁶² 369 U.S. 186 (1962).

⁶³ HALIFAX, *supra* note 31, at 203.

ment and business in the planning process. Still, there is a sense in which this consensus-oriented alliance amounts to a corporate-socialist establishment so all-pervasive and all-powerful that the individual citizen senses that he is helpless to influence the decisions being made which affect him. His air may be polluted, his water poisoned, his food contaminated; and yet no one in power seems to respond to the citizen's sense that "something" is wrong with "the system." Little wonder then that even this middle class is learning to take to the streets.⁶⁴

Our political system was not responsive to the race problem. Similarly, the system did not respond to gerrymandering even when agrarian forms had become patently absurd in an urban era. The state legislatures were not successful in solving the gigantic problem posed by human injuries attributable to the increasing glut of consumer products. In each instance the judges responded. In each instance, moreover, it can be argued that these decisions were substantially "conservative" decisions because they were designed to adapt traditional notions of justice to changed conditions.⁶⁵ They were "radical" only in the sense that, when neither of the other two branches of government would or could act, the Court risked losing its charisma as a non-political institution in order to restructure certain aspects of the traditional scene so as to maintain the capacity of the Republic's political machinery to respond appropriately to the contemporary milieu.

"Restructuring" is not, however, really the right word to apply to what the Court has been about. Rather than restructuring, which hints these days at tearing down a house without a fixed plan indicating how to rebuild it, a more apt word would be remodeling. Just as when one remodels, he retains the overall structure but substitutes new parts for old, the Court has retained the basic *grundnorms* of the Constitution intact. Indeed, just as remodeling envisages a better but still familiar house, the Court has improved the constitutional matrix by forcing us to adhere to its real spirit.

⁶⁴ Reich, *supra* note 60, has collected some examples of this new propensity in his article. *Id.* at 1227-28. This phenomenon has not escaped the attention of Herbert Marcuse:

No matter how remote from these notions the rebellion may be, no matter how destructive and self-destructive it may appear, no matter how great the distance between the middle-class revolt in the metropolises and the life-and-death struggle of the wretched of the earth—common to them is the depth of the refusal. It makes them reject the rules of the game that is rigged against them, the ancient strategy of patience and persuasion, the reliance on the Good Will in the Establishment, its false and immoral comforts, its cruel affluence.

H. MARCUSE, AN ESSAY ON LIBERATION 6 (1969).

⁶⁵ *E.g.*, Roberts & Shultz, *The Reapportionment Cases: Cognitive Lag, the Malady and Its Cure*, 27 U. PITT. L. REV. 633, 647-49 (1966).

This constitutional right to a decent environment, moreover, is not a major breakthrough and in no way detracts from the need in our society to concoct political solutions to a myriad of other problems running the gamut from adequate housing and full employment to population control and the new morality. If we allow the environment to become uninhabitable, then we shall have rendered absurd all of our other efforts. Thus we can justify our concern with environment within a purely existential philosophy without the need to resort to the occultism inherent in natural law reasoning. Indeed, this right is simply a form of insurance policy affording us some promise that, if we can respond to the other conundrums facing us by the year 2000, the Republic will still be a place worth living in.

B. *Obiter Dictum*

When the establishment of its day promulgated *Quia Emptores*, little did it anticipate that it was contributing to the collapse of the feudal system. Still, from a high-water mark in 1290 the system gradually ran down hill until the *coup de grâce* was delivered in 1660 by removal of the last incident of wardship and marriage from the shoulders of the landed classes in England.⁶⁶ True enough, the "squire to all intents and purposes, owned his land; but the survival of the payments of feudal incidents kept alive the theory that the land really belonged to the king."⁶⁷ Thus it was that from "this time on, one can more properly refer to *landowners* instead of simply *landholders*."⁶⁸ Moreover, whereas feudalism saw government and the economy as just so many facets of a unitary system ordered around property, government after 1290 emerged in its own right and commerce began to blossom in its own sphere distinct from landholding.⁶⁹

⁶⁶ Tenures Abolition Act, 12 Car. II, c. 24, 1 ENG. REV. STAT. 725 (1660).

⁶⁷ W. HALL & R. ALBION, A HISTORY OF ENGLAND AND THE BRITISH EMPIRE 379 (2d ed. 1946).

⁶⁸ *Id.* This is a bit of an oversimplification. The Tenures Abolition Act, 12 Car. II, c. 24, 1 ENG. REV. STAT. 725 (1660), abolished military tenures and converted them into socage tenures, to which wardship and marriage had never applied. Socage duties involving the performance of agricultural services had already been commuted into fixed rents, which

when they were originally fixed, no doubt represented the economic value of the land, yet with the gradual fall in the value of money . . . became in course of time so insignificant in amount as not to be worth the trouble of collection.

G. CHESHIRE, THE MODERN LAW OF PROPERTY 21-22 (8th ed. 1958). See also I F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 272-76 (2d ed. 1911). Still, in theory, and sometimes in practice, presumably, some "owners" after 1660 owed rent to their "lords" and, until 1926, the land might escheat to the lord. G. CHESHIRE, *supra* at 26.

⁶⁹ As might be expected, someone would have to replace the revenues lost to the

The period 1688-89 is crucial because it marks the establishment of a new social order which had been gradually replacing the feudal one. The Glorious Revolution did not involve just another displacement of a monarch as celebrated in Shakespeare's *Age of Kings*. Parliamentary supremacy had come into its own, and it marked a victory for the proponents of a new conventional wisdom who believed that commerce was an activity to be insulated from governmental control and was more properly regulated by its own natural laws.⁷⁰ Adam Smith's

Crown when feudal dues ended. As it was, an excise tax was levied on "beere or ale . . . sider and perry." 12 Car. II, c. 24, 1 ENG. REV. STAT. 725, 729 (1660):

Bee it therefore enacted by the authority aforesaid that there shall be paid unto the Kings Majestie his heires and successors for ever hereafter in recompence as aforesaid the several rates impositions duties and charge herein after expressed and in manner and forme following (that is to say)

For every barrell of beere or ale above six shillings the barrell brewed by the common brewer, or any other person or persons who doth or shall sell, or tap out beere or ale publicquely or privately to be paid by the common brewer, or by such other person or persons respectively, and soe proportionably for a greater or lesser quantity, one shilling three pence

Id.

Quaere: Has legislative draftsmanship advanced all that much since the year 1660? Speaking of the sixteenth and seventeenth centuries, one author had this to say:

England during this period was . . . passing through a crisis of political, social, and economic change. The old self-sufficing agricultural and industrial economy of England, based on custom, was fast breaking down. Competitive rents, competitive prices, competitive wages, were coming in, and the modern capitalist had already appeared; men who treated land as an investment and agriculture as a source of profit. The English squire had taken the place of the medieval baron.

A. JOHNSON, *THE DISAPPEARANCE OF THE SMALL LANDOWNER* 75 (1963).

⁷⁰ Sir Edward Coke played an important part in creating an ideological framework hospitable to economic liberalism. See C. HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* 225-65 (1965). This chapter, by the way, is entitled, "Sir Edward Coke—Myth-Maker." See also Roberts, *supra* note 38, at 37-42, for an argument that the "home as castle" syndrome is rooted in an economic ploy rather than in any modern civil rights notion.

Coke did not succeed in establishing judicial supremacy in England, although it appears that he tried. N. DOWLING, *CASES ON CONSTITUTIONAL LAW* 27-29 (4th ed. 1950). It was Halifax, interestingly enough, who had little use for Coke's approach, and he employed an early "brooding omnipresence in the sky" argument in the process of exposing the power struggle inherent in their difference. Thus:

Now I would fain know whether the Common Law is capable of being defined, and whether it doth not hover in the clouds like the prerogative, and bolteth out like lightning to be made use of for some particular occasion?

. . . .

If the Common Law is supreme, then those who are so who judge what is the Common Law

HALIFAX, *supra* note 31, at 197-98. In the United States, of course, the principle of judicial supremacy triumphed. Interestingly enough, this choice between parliamentary or judicial supremacy has been seen to be a power struggle:

More concretely, there has been a contest, now greatly prolonged, both in England and America between those who wanted to establish and perpetuate a *lawyers' constitution* and those who have wanted to create a *politicians' constitution*. In

masterpiece of 1776, after all, merely crystallized what had coalesced as the prevailing *Weltanschauung* during the 1600's.⁷¹ In this regard, moreover, it is instructive to note that the modern law of contracts, so vital to commerce, had really begun to develop into something suitable with *Slade's Case*⁷² in 1602.

Society was to undergo yet another convulsion when the Industrial Revolution exploded upon the scene between 1750 and 1850.⁷³ The commerce predicated upon farm products and home industry was to evolve into a commerce in items manufactured in mills when dispossessed country folk, machines, and entrepreneurial technique were blended together under the aegis of capitalism. Observe how much of our tort law had its genesis in this period. It was during these times, after all, that nitpicking over the distinction between trespass and case gave way to the evolution of our modern-day law of negligence; witness the progression from *Scott v. Shepherd*⁷⁴ in 1733 to *Brown v. Kendall*⁷⁵ in 1850, to say nothing of *Winterbottom v. Wright*⁷⁶ in 1842. Indeed, the law of torts as promulgated by the judges really served to insulate incipient industry from the costs of the injuries it occasioned its workers or consumers and constituted a disguised subsidy. Thus, whereas conventional wisdom dictated that government was not to control commerce, there was nothing wrong with government agencies encouraging commerce.

The fact of the matter is that we are living during a period similar to those identified by *Quia Emptores*, the Glorious Revolution, and the Industrial Revolution. While we are apt to think that we will enter the Technological Epoch when service workers surpass productive workers in numbers, the process really took flight during the Twenties.⁷⁷ The attempt to do business as usual during the Twenties, *i.e.*, the

England the lawyers set up their constitution at the end of the Glorious Revolution, only to see the scheme subverted by a rising class of politicians

In the United States the battle . . . is being played over again but with the result still in doubt. The Convention of 1787 copied the English model of 1688 and thereby established . . . the world's foremost example of government by lawyers.

E. SCHATTSCHNEIDER, PARTY GOVERNMENT 10-11 (1942) (emphasis in original).

⁷¹ See 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 341 (2d ed. 1937).

⁷² 4 Coke 92b, 76 Eng. Rep. 1074 (K.B. 1602).

⁷³ Any dates are arbitrary, but a good argument for the ones above is set forth in H. BEALES, THE INDUSTRIAL REVOLUTION 1750-1850 (1967 ed.). Note also the comment therein: "The industrial revolution replaced one social system or one civilization by another." *Id.* at 30.

⁷⁴ 2 Black. 892, 96 Eng. Rep. 525 (C.P. 1773).

⁷⁵ 60 Mass. (6 Cush.) 292 (1850).

⁷⁶ 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

⁷⁷ W. ROSTOW, THE STAGES OF ECONOMIC GROWTH 75 (1960).

failure to recognize that qualitative instead of a quantitative change was going on, was punished by the Great Depression. Since then we have managed to replace the ideology of *laissez-faire* with our current conventional wisdom. It envisages government and business cooperating in a consensus-style intellectual milieu to manage the economy so as to ensure ordered growth and affluence, the last named item at once ensuring tranquility via material satisfactions and an incentive to keep the system going via the need for ostentatious consumption.

Interestingly enough, politics have sufficed to make accommodation possible among government, industry, and labor. Still, if we are entering a new era, we should expect to see the framework of our society as radically altered as were societies structured by feudalism and pre-industrial commercialism when they faded from the scene. Yet, in this regard, the legislative branch, victorious during the Glorious Revolution, seems not likely to be the author of necessary structural changes. Indeed, in our government-business-oriented society, where bureaucratic planning is done jointly in government agencies and large corporate research and development departments, the legislators have been reduced to the role of ombudsmen trying to lead their constituents through the bureaucratic labyrinth or to protect them against bureaucratic overreaching. The Congress now finds its real role in the area of foreign affairs, where it lately has begun to refight the issue of parliamentary supremacy in a society in which, as a practical matter, the President has more authority in this field than had George III.⁷⁸

By a process of elimination, it has been the Court which has had to re-translate the Constitution in order to readjust the traditional

⁷⁸ See, e.g., L. HEREN, *THE NEW AMERICAN COMMONWEALTH* 9 (1968):

Despite all those renowned authorities on medieval history lurking in the great American universities, I am tempted to press my luck a little further. The Hundred Years' War was not unlike the unending wars and crisis of the twentieth century. Edward the Third would have been regarded as a poor king if he had not gone to war with France, and his victories served him well. . . . Much the same can be said for the Presidents elected after the Second World War In war, at least while victory was seen to be certain, the medieval king and modern President have always been supreme.

Note carefully that Heren compares the President not to George III, an early constitutional monarch, but to Edward III. The reason he apologized for pressing his luck was that he also says: "The modern American Presidency can be compared with the British monarchy as it existed for a century or more after the signing of Magna Carta in 1215." *Id.* at 8. And further that "[t]he triumvirate of Monarch, Barons, and Church was no less real than the President, Congress, and the Supreme Court. In fact, the Church was often more bothersome to the executive than the Court has become." *Id.* at 5. Indeed, Heren overdoes it a bit when he suggests that "the modern American Presidency makes sense as a political system only when it is seen to be a latter-day version of a British medieval monarchy." *Id.* Still, there is a frightening increment of truth to his observation that "Secret Servicemen are beefeaters with crewcuts and button-down shirts." *Id.* at 7.

system so that the structure of society might remain viable, albeit new. The reapportionment cases, after all, simply readjusted the allocation of legislative authority to reflect the palpable fact that the small town folk so ably depicted by Norman Rockwell have joined Silas Marner as a thing of the past in our urbanized society. A great many search and seizure decisions are simply efforts to immunize the citizen from the powers of the huge governmental systems that have come into being in our era. But the Supreme Court has not been working alone. The law of negligence epitomized during the nineteenth century, for example, has been replaced by the consumer liability cases of today that have, in effect, made industry the proprietor of an involuntary system of social welfare insurance for the victims of accidents attributable to the consumption syndrome.

Still, we are only groping our way through a rolling readjustment of *grundnorms*. In a society in which people have so little to say about the economy, in which unskilled labor is being as ruthlessly eliminated as were the poor farmers during the various enclosure movements, and in which affluence has become a status symbol, we must expect to see develop a right to subsistence. We have, after all, already seen the welfare folk endowed with some rights, but these are only the first steps in the process. In a society that requires a teacher to have so many credits in "education" and a librarian a degree in library science, we must expect "status" to make a neo-feudal reappearance. It should come as no surprise, therefore, and one may anticipate, that in the future no one will be subject to deprivation of his "status" without due process of law, whether he be a college student or a licensed plumber.

The point of all this is that, in the Technological Epoch, decisions about "rights" have become too complex for the man in the street because they involve not elementary justice but fundamental decisions about the very structure of society. Concomitantly, the legislature, melting pot of executive-business conventional wisdom and collective ombudsman, has ceased to be the cutting edge of social change. The executive, arbiter of planning via the bureaucracy and oriented to foreign affairs, must rely upon uninformed consensus to lay out its claim to authority. By process of elimination, therefore, the courts have regained the position of prominence they held when the common law was promulgated. In short, the judges and the bar are the new establishment.⁷⁹

⁷⁹ Some readers may protest that lawyers have always been the Establishment. I don't believe it at all. It should be pointed out that some political scientists have correctly attributed the unique stability of the American system not so much to the lawyers' Constitution as to the two-party system, which evolved unplanned by the creators of the Constitution. To capture the Presidency a nation-wide party is necessary, which requires

To be an establishment, however, the lawyers must be conservative. Conservatism does not mean adherence to *laissez-faire*,⁸⁰ rather it means a disciplined commitment to channel society along peaceful and just avenues of evolution.⁸¹ It entails at one and the same time a willingness.

both parties to attempt to seize the vital center. The mathematics of single-member electoral districts penalizes third parties. Hence political factors unforeseen by the legalists have created and have maintained our unique two-party political system and it is this unwritten political constitution that really counts. This is spelled out in detail in E. SCHATTSCHNEIDER, *supra* note 70. He also observes that

In effect . . . the [two] parties frame the question and define the issue. . . .

.....

Nor is this the only way in which the parties simplify the alternatives. . . . American government is the most complex in the world, by a very wide margin. In the theory of American constitutional law the authority of any one public official, acting alone, is severely restricted, but it would be fantastic to conduct an election campaign within these limitations. People are not interested in alibis for non-action, not even when written by constitutional lawyers. They want results. The truth of the matter is that the American public has never understood the Constitution nor has it ever really believed in it, in spite of the verbal tradition of constitutionalism. With the rise of a plebiscitary presidency, making the president the one significant public officer elected by the nation as a whole, the office has become the vehicle for the expression of a great simplification of the Constitution. By a popular political interpretation of the Constitution, more important than any interpretation ever made by the Supreme Court, the president is made responsible for the initiation, adoption, and execution of policies by a mandate that merely ignores every known principle of the separation of powers and federalism.

Id. at 51-53.

Accepting the theory, however, must cause one to observe that we may be in for unstable times ahead because the two-party system appears to be in trouble. The three-way race for mayor of New York City in the autumn of 1969 is merely a microcosmic symptom of a trend toward three or even four national parties. George Wallace's "third party" may soon be joined on the left by a fourth party anticipated by Senator Eugene McCarthy in his *THE YEAR OF THE PEOPLE* (1969). Interestingly enough, the most recent plan to replace the Electoral College with a new system of popular election envisages a "winner" elected by anything more than 40% of that vote. Presumably the House of Representatives has already anticipated this trend to a multiplicity of parties and candidates.

Thus it is in view of the weakening of the unwritten political matrix of the Republic that any really significant changes will have to be effectuated through the courts. Lawyers *qua* lawyers and not as full-time politicians or apologists for the commercial establishment will have come into their own again.

⁸⁰ The lawyers created the matrix in which late nineteenth century *laissez-faire* triumphed, but the question remains whether they did so from a perspective of deliberate detachment or as hired intellectual gunmen. One author suggests that in the later decades of that century

[t]he majority of the new Court appointees had been influenced greatly by the propaganda campaign conducted by the American Bar Association in behalf of the *laissez-faire* doctrine. The Association, which had been founded in 1878, "became a sort of juristic sewing circle for mutual education in the gospel of *laissez-faire*."

R. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 331 (2d ed. 1965).

⁸¹ Whither we are evolving must give us chance to pause. In the universities, for example, professors are currently wringing their hands because of the rising demand for open admissions. The current morality, or rather the apparent lack thereof, which en-

to change, but a refusal to change simply to satisfy transient whims of society. Interestingly enough, the judges and lawyers, like priests or

courages sexual promiscuity, up to and including douches flavored to taste, seems to be a favorite cause for concern. *See, e.g.*, TIME, Dec. 26, 1969, at 51. Still, even the Nixon Administration seems to have freed itself so much from the traditional Puritan Ethic that it can approve the principle of a minimum income, work or no work. Indeed, much that would have been regarded as "radical" is now commonplace news in media attuned to inventory the commonplace. *See, e.g.*, NEWSWEEK, Jan. 26, 1970, at 30-47.

These disparate phenomena are merely examples of the many changes going on in contemporary society. The fact of the change, however, should not upset anyone with sense enough to realize that the economic impact of our new so-called Technological Era is bound to force us to create a wholly new civilization, replete with a new *Weltanschauung*. True, universities do produce the skilled hands necessary to staff a technological society, but they also make "busy work" for thousands of juveniles who otherwise would clutter up the hiring halls. Just as today a high school diploma is a necessity, so tomorrow the college degree will be mandatory. If, however, we are going to cut the size of the labor force by postponing entry into it, we must also expect to see earlier and earlier exits via retirement from it.

Sex? Promiscuity serves a definite social need because it provides a needed release for the frustrations generated among the intelligent young who realize that they are being forced to live extended juvenile lives. Concomitantly, sex keeps the labor force busy turning out totally unutilitarian products demanded solely because they are associated with media-stimulated sex "needs." Still, the "pill" and the glut of household gadgets have emancipated the female from drudgery, education has enlightened her, and traditional morality has declined. Women today are demanding to be treated like men, able not merely to work at careers but to enjoy the same alleged Rabelaisian freedoms claimed by the male. Indeed, California seems to be the first state to recognize that marriage is merely a convenient device to regularize sex on a temporary basis. N.Y. Times, Jan. 1, 1970, at 14, cols. 7-8. These several phenomena may yet coalesce so that we may soon see sexual intercourse become an accepted informal pastime of unattached people busy "doing their own thing," while the serious business of procreation becomes regulated by the State. Marriages of four or five years, communal nurseries, genetic surgery, abortion, euthanasia, etc., may yet become the accepted norms. We need not rush to our Plato but can stop with Holmes, who observed succinctly that

I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race.

O. W. HOLMES, COLLECTED LEGAL PAPERS 306 (1920).

Perceptive people have for years appreciated that Western (including Russian) society must evolve wholly new forms. Indeed, the current interest in drugs is merely a symptom of the felt need of individuals to reacquire a sense of meaning. It was Nietzsche, after all, who insisted that only as an aesthetic phenomenon is the world ever justified.

More interesting, however, is that this new need for identity is the mirror image of the threat to the environment, and that both represent the social costs of urbanization. Thus Arnold Toynbee has warned us that:

The problem . . . in Megalopolis is the problem of how to rehumanize life when it has to be lived in a man-made infinity of people, buildings and streets. Megalopolis is going to encompass the earth. . . .

Liberation from it will have to be sought by turning inwards from the physical world to the psyche and to the ultimate spiritual presence that is "the dweller in the innermost" besides being the creator and sustainer of the universe.

CITIES OF DESTINY 27 (A. Toynbee ed. 1967).

commissars, must serve as the enlightened skeleton of the society, assuring popular participation in the everyday affairs of the society but assuming the responsibility to make, behind the scenes, the decisions crucial to the evolution of society over the long range. Lawyers have been the commissars of capitalism, and like their communist counterparts, they have been blindly captivated by ideological nonsense actually detrimental to their ultimate vision of society. Both "capitalist" and "communist" societies are in need of a priesthood cognizant of the real issues facing society and willing to decide them even though, to an extent, they must be hypocritical in the process. In short, notwithstanding democratic dogma, we still live in the age of Dostoyevsky's Grand Inquisitor.⁸²

V

RECENT DEVELOPMENTS

The danger in responding promptly to the clarion call for a symposium on anything as "in" as environment now appears to be is that one's contribution will be overtaken by events before the symposium hits the academic newsstands. Such indeed has been the case here, which explains the obvious addition of this section to what has gone before.

The New York Court of Appeals has recently had the chance to consider the controversy presented by *Boomer v. Atlantic Cement Co.*⁸³ By a four to one decision, two judges not participating, the court decided that, notwithstanding the characterization of the offending cement plant as a nuisance, the neighbors must content themselves

⁸² F. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV*, Book V, ch. 5 (Mod. L. ed. 1950).

The cold cunning of Dostoyevsky's inquisitor may prove to be "a bit much" for American readers who are apt to prefer the uplift approach to civic problems. Indeed, "environment" has become such a common topic these days that it almost promises to become a bore. Indeed, we seem to be witness to the phenomenon described by Professor Schattschneider, *supra* note 70, wherein the two-party system serves to reduce complex problems to simple either/or choices. Thus a recent Associated Press dispatch, quoting a key administration official, reported that "the party that writes the best environment record is 'going to be the party that wins the most elections.'" The Ithaca Journal, Jan. 23, 1970, at 1, col. 6. NEWSWEEK, Jan. 26, 1970, at 34, confirms that the politicians have recognized the "political potential of pollution." It is irrelevant which party's candidate reaches the top of the greasy pole in 1972 since any foreseeable candidate will be contending for the office in terms of an intellectual framework that categorizes the problem as one of reform. The danger is that the politicalization of the problem in terms of reform may obscure the need, not to deal with some details of Keynesian welfare capitalism, but to face the ultimate need to recast the whole structure of society into a posture responsive to the needs of the twenty-first century.

⁸³ — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1970). See text at notes 2-29 *supra*.

with a money judgment as compensation for the diminution in values of their properties. In the process the old decision in *Whalen v. Union Bag & Paper Co.*,⁸⁴ which purported to mandate an injunction in nuisance cases whenever the harm was not insubstantial, had to be overruled. It is now official, therefore, that New York has adopted the rule laid down years ago in *Madison v. Ducktown Sulphur, Copper & Iron Co.*⁸⁵

If this were England, where precise holdings of courts are sacrosanct, the decision might be very interesting. This is the United States, however, where rules must be read along with the facts of both the case and the socio-economic environment before any conclusions may be drawn. Indeed, if *Whalen* was still seriously regarded as "law" in New York, how does one explain the sorry environment that is Buffalo? Presumably New York courts have not found many industrial activities actually to have been nuisances, which would be quite possible so long as nuisance law was oriented around the fault principle.⁸⁶ Then again, it may have been the rule in New York that, nuisance be damned, injunctive relief will not be granted if the area is zoned to permit the use to which the defendant has put his property.⁸⁷ Whether New York now has repudiated the fault theory of nuisance along with the zoning law defense to injunction suits are questions, unfortunately, to which the *Boomer* decision does not address itself.

Having resurrected *Whalen* as something of a straw-man to demolish, the majority opinion questions whether, barring an injunction, permanent damages can be awarded in lieu of allowing plaintiffs periodically to sue for the diminution in the rental value of their parcels. True enough, other courts have discussed whether, on particular facts, one option is more appropriate than the other.⁸⁸ The Court of Appeals, however, seems to have been concerned whether the option existed to impose permanent damages. Concluding that the option existed, the opinion then supports its conclusion by analogizing this to an imposition of a servitude on plaintiff's land for which the value must be paid.⁸⁹

New York has explicitly recognized, therefore, that the pollution inflicted by the cement company was tantamount to "taking" a servi-

⁸⁴ 208 N.Y. 1, 101 N.E. 805 (1913).

⁸⁵ 113 Tenn. 331, 83 S.W. 658 (1904). See text at notes 27-29 *supra*.

⁸⁶ *E.g.*, *Bove v. Donner Hanna Coke Corp.*, 236 App. Div. 37, 258 N.Y.S. 229 (4th Dep't 1932).

⁸⁷ See text at notes 19-20 *supra*.

⁸⁸ *E.g.*, *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 N.W.2d 435 (1942).

⁸⁹ See *United States v. Causby*, 328 U.S. 256 (1946).

tude to lay dust and send noise over the neighboring fees. In short, nuisance law partakes of the exercise of a power of private eminent domain! Needless to say, Judge Jasen in his dissent pointed out the absence of any public use or purpose which would justify the exercise of governmental power to condemn the land, much less a private company actually engaged in polluting the neighboring environment.⁹⁰

If one is left somewhat bewildered that New York's highest court could at this late date accept *Whalen* as good law, an even more crucial question raised by the case should be considered. Given the validity of *Whalen*, why would the court decide to overrule it in the midst of an environmental crisis? The timing of the decision is incredible. Charity may incline one to conclude that the result was verbalized in terms of *Whalen*, a false issue, simply because a majority had not yet agreed upon how definitively to restructure the local law of nuisance into a contemporary mold. Frankly, such a conclusion would require the charitable proclivities of a saint.

Manifestly, the majority was not blind to the pollution problem. Interestingly enough, the court chose this opportunity to invoke a litany in behalf of judicial restraint. That is, so complex is the problem of solving the environmental crisis, the legislature is the appropriate forum in which to hammer out the solutions; complex policy cannot be made simply as the by-product of lawsuits between private parties. This is true. Lawsuits which, after all, only decide who won and who lost, after the fashion of a feeble computer programmed in binary logic only to respond with either "0" or "1," are not apt forums in which to hammer out broad and complex programs of social reform. Lawsuits do not hold forth the promise of any immediate solution to the environmental mess into which we have gotten ourselves.

Although lawsuits are not likely to undo the mess we are in, they could, however, serve as the basis for what amounts to a containment policy to make sure that in the unspoiled areas of the countryside we do not repeat the mistakes of the past. Is there anyone, who now, given the benefit of hindsight, applauds the result reached in *Madison*? Is anyone willing to apply that style of reasoning to an oil line across Alaska, an oil field off Santa Barbara, or a jet airport in the Everglades? True enough, these questions may be rhetorical, but they do illustrate the mood of the times. Still, the Court of Appeals has decided in *Boomer* that the times are propitious to ratify the *Madison* doctrine.

Whether we can solve the environmental crisis remains to be seen, because we have not actually tested by the ballot box whether

⁹⁰ — N.Y. 2d at —, — N.E.2d at —, — N.Y.S.2d at — (dissenting opinion).

the public is actually willing to pay the price for solution. Presumably, however, rational creatures would implement a containment policy so that things do not actually become worse. In its perverse way, *Boomer* illustrates the need for a Supreme Court declaration of a constitutional right to an environment capable of sustaining decent human life. Given decisions as incredibly unresponsive as *Boomer*, there is an urgent need to guarantee on the constitutional level protection of individual rights in the environment before demagogues persuade people that they will have to perfect this right outside the system.

APPENDIX

DISSENTING OPINION OF COMMISSIONER WILLIAM M. BENNETT IN CALIFORNIA PUBLIC UTILITY COMMISSION—ON APPLICATION BY PACIFIC GAS & ELECTRIC COMPANY FOR A NUCLEAR PLANT AT DIABLO CANYON (1968).

I would grant rehearing.

Any reliance upon this agency to preserve a dwindling coastline is entirely misplaced. Nothing has been learned from the experience at Bodega Bay where the pleas of conservationists as well as those concerned with the public safety were rejected by this Commission. Only when the Atomic Energy Commission expressed the opinion that the site was unsafe did the Pacific Gas and Electric Company give up its plans for [the] nuclear plant at Bodega Bay.

Californians should become concerned and angry at the cavalier treatment which today's decision signifies. This proceeding is part of the conflict between those interests such as the Pacific Gas and Electric Company which sees the waters, the continental shelf, the beaches and the uplands as natural resources to be exploited regardless of the destruction of landscape or disruption of the ecology which may ensue, and those such as myself who view the coastal region as a grand and varied natural wonder of great recreational value which must be held in its natural condition. Not once has this agency resolved this conflict in favor of the preservation of the natural condition.

Looking to the Pacific Gas and Electric Company for the slightest indication of concern for the recreational needs of the people of the State of California is fruitless. Pacific Gas and Electric Company demonstrates planning which is cold in concept and ruthless in application so far as nature is concerned. And if Californians are under the illusion that somehow utility planning is going to save for them a state which is true and beautiful they need only look to the California landscape at present which is dotted and blighted with an endless string of utility poles. This is public utility planning and this is public utility apathy toward conservation.

That the shoreline is dwindling is beyond argument. And that these resources belong to all generations and that it is the duty of the present generation to save such resources does not seem to me to be the subject of

argument. But when there is taken into account the authorized offshore drilling by the Federal Government as was recently the case in connection with the Santa Barbara Channel, when there is considered the shoreline already given to commercial use such as oil drilling, the billboard smear of beach land, the steam generating plants of utilities and beach land now not accessible to public use for other reasons, then it can be seen that in California in 1968 there is really not that much remaining to protect.

The public interest was not represented in this proceeding by the Commission staff which made no survey of other suitable sites and which long ago and now should be locating that type of place where there should be placed all nuclear plants of all California public utilities once and for all. Let the public not be misled into the belief that its right to preservation of that which is natural is fully explored in proceedings such as this or is fought for by an active and aggressive staff participation. It is not!

There should be a moratorium on the placing of such plants until the California Comprehensive Ocean Area Plan becomes meaningful. Whether the present state administration has any interest in such a plan is certainly speculative but at least until it is clear that there is no concern for such matters, plants such as this should be directed toward the least suitable location upon the California shoreline as at Morro Bay or in the alternative denied. I would point out that I have seen Diablo Canyon. Only one such canyon is Diablo. Before any judgment permitting its destruction can be made all members of this Commission should have visited the site to make their own conclusions as to the contest between beauty and energy. . . . It is beyond argument that Pacific Gas and Electric Company has available to it other sites along the California shore where a plant such as here proposed could easily be placed. Morro Bay comes quickly to mind. Anyone reading the sorry history of Pacific Gas and Electric Company at Morro Bay should become appalled and indignant at the devastation utility engineering and construction has wrought upon that community—unless, of course, one is indifferent to such matters as aesthetics. As one who remembers Morro Bay before the intrusion of Pacific Gas and Electric Company upon that community only memory restores what was once an area of beauty, not dominated by towering stacks and free of the tangled web of utility towers and power lines. And more importantly to the people of Morro Bay also free from air pollution. Californians should realize that the Pacific Gas and Electric Company before its arrival at Morro Bay was quick to reassure the people of Morro Bay that the plant would be a welcome addition, an assistance to county revenue requirements and a thing of civic pride. No question of air pollution was raised until that inevitable day when the community of Morro Bay became alarmed at the problems of air pollution caused by the Pacific Gas and Electric Company plant.

Since the Pacific Gas and Electric Company has already made a permanent change and permanent damage at Morro Bay it would in my judgment be a far better thing to place that nuclear plant upon property which Pacific Gas and Electric Company presently holds at Morro Bay. But not! With its almost magnetic attraction for the untouched site, the clean sand and the blue water, Pacific Gas and Electric Company selects a hitherto

inviolable area, applies the blade of the bulldozer to it and then come tumbling down the ferns, the glens, the trees, the valley.

Californians should also be aware that the Sierra Club has no official position with reference to the placing of nuclear plants along California's shoreline. There is a popular myth that that great organization devoted to conservation is in some way the public watchdog in matters such as here. Unfortunately neither in the Bodega Bay controversy nor in the Diablo Canyon controversy has the Sierra Club come forth to present the conservation position. This is not only surprising but it is disappointing. Undoubtedly the Sierra Club or at least its decision-making members were educated by the Pacific Gas and Electric Company so that any original notion of incompatibility between a nuclear plant and Diablo Canyon was dispelled. One wonders how that great organization can ever elect now to defend against utility intrusion a future nuclear plant site. Regardless of the wonder, however, this Commissioner would hope that the Sierra Club would begin to make a spirited fight for the present generation, for future generations, for my children and yours and for their absolute right to places of beauty and recreation. I would suggest to the Sierra Club that the public utilities of California have other plans for other sites along the California coastline. I suggest to the Sierra Club and to other Californians that in the future the Pacific Gas and Electric Company will return to Bodega Bay. The date of arrival will be some time after December 31, 1968.

I would grant rehearing and would direct Pacific Gas and Electric Company to come forward with other plans for the location of a nuclear plant—but not at Diablo Canyon.