

# From Environmental Foundations to Constitutional Structures: Learning from Nature's Future

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In a recent article appearing in these pages,<sup>1</sup> Professor Mark Sagoff proposed "a nonutilitarian rationale . . . to support protectionist policies,"<sup>2</sup> a rationale he sought to ground in America's cultural history and in its constitutional structure.

Sagoff's is a powerful and elegant pen, and we are all in his debt for the way he has marshalled literary and historical materials to buttress his thesis. But the thesis itself seems to me as incomplete and misleading as it is simple. Here's how it goes: We all know "what ideals we shall serve." They are "freedom, integrity, justice, intelligence, power."<sup>3</sup> The symbols of those ideals have traditionally (in our history and literature) been such things as "the wilderness, the deer, the bear, the eagle, a rapid river."<sup>4</sup> To respect those natural entities is to respect the qualities they exemplify or express; to lay them waste is to abandon those qualities as our ideals.<sup>5</sup> Thus the "obligation to protect nature . . . is an obligation to our cultural tradition, to the values which we have cherished and in terms of which nature and this nation are still to be described."<sup>6</sup> Moreover, since citizens surely have as much right to participate in the nation's culture as in its politics, it follows for Sagoff that the very structure of our Constitution entitles citizens to enjoin developmental plunder of the public environment as "interference with the protection of [our] paradigms."<sup>7</sup> Thus is outlined the "hard work needed to establish" a moral theory that can substitute for the "trenchant," "meticulous," and "lucid" argument of the "utilitarian philosophers."<sup>8</sup>

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1. Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974) [hereinafter cited as Sagoff].

2. *Id.* at 264.

3. *Id.* at 243.

4. *Id.*

5. *Id.* at 228, 241.

6. *Id.* at 265.

7. *Id.* at 266 n.110.

8. *Id.* at 216. Sagoff asserts these high qualities for utilitarianism in the course of attacking the substitute I sketch in Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974) [hereinafter cited as *Plastic Trees*].

It is not my purpose here to detail the technical deficiencies in Sagoff's proposal—including its striking inattention to the relevant judicial and scholarly antecedents<sup>9</sup> and its casual mishandling of the pertinent doctrines<sup>10</sup>—but rather to focus on its more fundamental flaws, whether as constitutional theory, as moral philosophy, or as cultural history.

## I

We may observe at the outset that Sagoff promises a good bit more than he delivers. Far from a rationale for protectionist policies, he presents at best an argument against blacktopping the entire country. What his thesis requires, after all, is simply that *some* symbols of the wild and the untamed be left intact; most of the environment could happily be destroyed, most species plundered, within the thin constraint set by his argument. Thus, even if people can “demand that the mountains be left as a symbol of the sublime,”<sup>11</sup> a quality which Sagoff assures us “is extremely important in our cultural history,”<sup>12</sup> all this gives us is the not too surprising news that a proposal to flatten virtually every hilltop would offend basic principles. For someone who wryly notes that even “Smokey the Bear does not tell us about our obligation to our furry companions without giving us a little analysis about how that obligation is to be carried out,”<sup>13</sup> Sagoff is amazingly stingy with his own instructions.

## II

An even more basic difficulty with Sagoff's thesis is its strangely static conception of symbolism. He chides those for whom “it is no longer a bear but a beverage which is wild and free,” or for whom

9. Courts have been notably inhospitable, for example, to claims that a “natural” environment is protected by the federal constitution. *See, e.g.,* *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972). Sagoff addresses neither such judicial precedents nor the considerable body of scholarly comment directed to proposals much like his. *See, e.g.,* Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 45-51 (1970); Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203 (1974); Pettigrew, *A Constitutional Right of Freedom from Ecocide*, 2 ENVIR. L. REV. 1 (1971); Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, in *LAW AND THE ENVIRONMENT* 134 (M. Baldwin & J. Page eds. 1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970). For a fairly skeptical view, see Hanks & Hanks, *The Right to a Habitable Environment*, in *THE RIGHTS OF AMERICANS* 146, 149-54 (N. Dorsen ed. 1971); J. SAX, *DEFENDING THE ENVIRONMENT* 238 (1971); cf. Baude, *Note: Constitutional Right to a “Decent Environment,”* in C. MEYERS & A.D. TARLOCK, *ENVIRONMENTAL PROTECTION* 350-51 (1971).

10. For example, he cavalierly treats the sticky issues of standing and state action. Sagoff 266 n.110, 267.

11. *Id.* at 266.

12. *Id.*

13. *Id.* at 217.

“[p]ower, as we now understand it, has nothing to do with nature” but “is expressed by . . . a lot of engine under the hood.”<sup>14</sup> Not a salutary image, I agree, but in the end it is his undoing. For he begins his essay<sup>15</sup> by praising a *Science* article extolling plastic trees<sup>16</sup>—the article which argued that “the demand for rare environments is a learned one”<sup>17</sup> and that “conscious public choice can manipulate this learning so that the environments which people learn to use and want reflect environments that are likely to be available at low cost.”<sup>18</sup> If the capacity to retrain consumer preference provides as savage a *reductio* of utilitarian arguments for natural preservation as Sagoff thinks,<sup>19</sup> then the great puzzle is why the capacity to alter symbolic associations does not provide an equally savage *reductio* of arguments from metaphor and cultural tradition. As to that puzzle, Sagoff offers no clues. He recognizes, as of course he must, that technological creations and scientific images may come to replace “natural” symbols of freedom, power, or integrity.<sup>20</sup> He does not deny, as of course he cannot, that the proponents of resource development and exploitation could well help to “engineer” such replacements as a way of keeping intact certain underlying ideals. His only refrain is that the *meaning* of the ideals would be altered by a shift in the objects serving as their paradigms.<sup>21</sup> Never mind that he doesn’t say why this would necessarily be a bad thing; that goes to a deeper flaw in Sagoff’s method, a flaw to be examined later (in part III). The problem to which I point here is a simpler one: he never establishes the assertion as a matter of *fact*.

Oh, he offers an elaborate argument that is supposed to do the trick. But once its intricacies are folded away, it is revealed as quite inadequate to the task. The argument starts with a long excursion into the history of American letters from roughly 1620 to 1950.<sup>22</sup> The upshot of it all seems to be that, as so many have observed before, the “nature” that earlier American thinkers sought to conquer assumed a dramatically different role around the middle of the 18th century as the city came to represent a sort of hell and the wilderness a sort of heaven. (One learns almost as much from that famous *New Yorker*

14. *Id.* at 246.

15. *Id.* at 205-13.

16. Krieger, *What's Wrong with Plastic Trees?*, 179 *SCIENCE* 446 (1973).

17. *Id.* at 451.

18. *Id.* at 453.

19. Sagoff 207.

20. *Id.* at 228, 237, 246.

21. *Id.* at 228, 264.

22. *Id.* at 226-44.

cartoon in which one pilgrim, leaning over the edge of a vessel one imagines to be the Mayflower, tells another: "Religious freedom is my immediate goal, but my long-range plan is to go into real estate.") Sagoff then follows with an elaborate exegesis of aesthetics,<sup>23</sup> building mainly on Nelson Goodman's work, in order to establish (with, one must admit, loving attention and real elegance) the unsurprising proposition that the qualities and ideals an object expresses (an art object, a piece of furniture, a mountain) are not wholly arbitrary—are not more so, at any rate, than are its more literal, physical properties like color or size. But Sagoff treats this proposition as if it somehow established the altogether different contention that the symbolic meanings of objects, the metaphorical meanings they "possess," are not "subjective"—not dependent on the personal histories and perspectives of observers.<sup>24</sup> One can see why Sagoff wishes to reach such a conclusion; it might let him argue that certain natural objects *uniquely* exemplify or symbolize our ideals,<sup>25</sup> so that one could not hope to transfer the symbol for intelligence, for example, from the owl to the computer, or the symbol for freedom from the eagle to the aircraft, without adversely altering what is meant by "intelligence" or by "freedom." But much as one can sympathize with the wish, one cannot accept the assertion. A thing can plainly be subjective without being in the least arbitrary, for to be arbitrary is to be without understandable cause, without explanation—and subjectivity reduces to the inexplicable only in the most impoverished of world views.<sup>26</sup> Sagoff attempts to save his position by proposing the constraint of classical art criticism;<sup>27</sup> in effect, if the vulgar masses (or any individual) can be persuaded to substitute the jet turbine for the eagle as a symbol of freedom, the art critic will pronounce them wrong and expel them from the culture. But even assuming so monolithic a consensus in the arts themselves, one is at a loss to understand how the views of so rare a professional elite can determine the viability of an alternative symbolic structure for the nation as a whole.

Put more affirmatively, just as objects of art and especially works of artistic genius represent deliberate symbolic creations, so human enterprise generally, in the media no less than in the museum and

23. *Id.* at 249-64.

24. *Id.* at 250, 262.

25. *Id.* at 259.

26. See Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 363-65 (1973); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 100 n.95 (1972).

27. Sagoff 262-63.

in high technology no less than in the craftsman's studio, has always been a dynamic source of fantasy and imagery.<sup>28</sup> Nor need one be a devotee of electronic sculpture to see in modern science and science-based technology fertile new fields for the generation of image and metaphor.<sup>29</sup> Lions and serpents have, after all, spent much of the symbolic force they once possessed. To entertain the possibility that eagles and whales may be the next to go, and that spaceships and submarines may one day be capable of replacing them in our collective fantasies without seriously eroding the ideals they symbolize, is not to assert that symbolic meanings are arbitrary but simply to recognize that they are historically contingent rather than immutably fixed by an order outside of time. It is to acknowledge that metaphor is variable rather than uniquely determined by a *Volksgeist* unambiguously accessible to those with the appropriate cultural expertise. And once that recognition has taken place, there is simply no reason left to suppose that a commitment to particular ideals necessarily entails a commitment to preserve the natural objects that have come to symbolize those ideals in our culture.

### III

So odd, indeed, is Sagoff's seeming fixation on the static character of the symbolic network he seeks to defend that one is led to wonder not only about the limits of his argument but also about its dangers. There is, to be blunt, an aggressive nostalgia about his entire mode of discourse; to environmentalists who see their mission as a celebration of life and vitality, Sagoff's will seem a strangely dusty brief in nature's behalf. To be sure, he offers the customary concession that "nothing is sacred" and that "everything changes,"<sup>30</sup> but he offers it regretfully, in the course of enshrining the past and freezing the present. "The responsibility to the wilderness," he argues, "is a recognition of its qualities both present and past; and it requires us to imitate these qualities."<sup>31</sup> To *imitate* them! It is one thing to say that we cannot discern our purpose without perceiving our past; that is the deepest promise of history. It is quite another to say, as Sagoff seems to, that our past can show us how "to make out the nature of our responsi-

28. See, e.g., Smith, *Art, Technology, and Science: Notes on Their Historical Interaction*, 11 *TECHNOLOGY AND CULTURE* 493 (1970); White, *Cultural Climates and Technological Advance in the Middle Ages*, 2 *VIATOR: MEDIEVAL AND RENAISSANCE STUDIES* 171 (1971).

29. See, e.g., Schwitzgebel, *Aesthetic Directions for Technology*, 43 *SOUNDINGS* 293 (1970).

30. Sagoff 267.

31. *Id.* at 241.

bilities."<sup>32</sup> This is historicism run wild; it is the ancient and long discarded thesis that what *ought* to be is fully contained in what *has been* and what *is*.<sup>33</sup> Make no mistake about it: For all his transcendent inclinations to see in nature only a mirror for cultural and intellectual history, Sagoff is firmly rooted in the tradition of immanence, the tradition that would sanctify the present beyond all change.<sup>34</sup>

I have elsewhere argued that resurrecting any such tradition as a means of preserving nature (if it were possible to do so) would be profoundly unwise;<sup>35</sup> and John Passmore has shown that a restoration of immanence would, in any event, be unlikely to do much for the natural environment in whose behalf its advocates urge its return.<sup>36</sup> What remains to be explored is how Sagoff found himself in so odd a position, and whether any nature-respecting alternatives to immanence might be available.

#### IV

How he found himself there is the easier of the two puzzles to address. He did so, I think, by asking himself the wrong question. Sagoff asked how to justify respecting "nature enough to leave it alone."<sup>37</sup> Of course, that gives the game away. For the *only* way to justify so reverential a posture toward the natural order is to embrace one or another variant of the view that human consciousness ought to remain subservient to the biological and physical world of which it is a part—that man should serve rather than creatively shape his environment. At the other extreme, of course, is the manipulative, dominating view of environment as pure resource, as material without intrinsic significance, a means to be consumed by the human will in the service of its changing ends. The right question to ask, it has seemed to me,<sup>38</sup> is how to avoid both poles of this dichotomy, both the emptiness of choice without commitment to principle and the stagnation of "natural" principles incapable of change.

Sagoff seems to recognize this as the overriding issue when he observes that want-maximizing policies "will be no better, morally or spir-

32. *Id.* at 224.

33. See D. HUME, A TREATISE OF HUMAN NATURE \* book III, pt. I, § i.

34. See generally R. BELLAH, *Religious Evolution*, in BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 23, 27 (1970); H. WOLFSON, *Spinoza and the Religion of the Past*, in RELIGIOUS PHILOSOPHY: A GROUP OF ESSAYS 246-49 (1961).

35. See *Plastic Trees* 1337-38.

36. See J. PASSMORE, MAN'S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS 173-95 (1974).

37. Sagoff 241.

38. See *Plastic Trees* 1338.

itually, than the interests they serve.”<sup>39</sup> The observation is an ancient one; in addressing it several years ago, I made the admittedly obvious point that “instrumental methods, by their very definition, cannot address the question of what the chooser’s ultimate system of ends should be.”<sup>40</sup> Yet Sagoff seems to think that I, and others writing in this mode, have been concerned to remain within the philosophy of want-maximization—to shape a justification for nature-respecting policies “without compromising the assumption that good policies rest on the satisfaction of wants.”<sup>41</sup> Nothing could be further from the truth. And it is Sagoff’s confusion on this score that leads him into a neat but ultimately extraneous attack on my earlier article about plastic trees.

His method is to caricature the argument of that article. Here is his disarmingly simple version: Disregarding the wants of “animals and other natural things”<sup>42</sup> is wrong; hence, as the utilitarians knew all along, “averaging in” such wants along with human ones is right.<sup>43</sup> But, Sagoff strategically asks, how are we to know where this calculus leads? After all, animals benefit from “artificial” care and feeding no less than people do, and even a mountain might “prefer” to host a ski resort.<sup>44</sup> Hence, Sagoff’s elaborate put-on continues, “nature” stands unprotected from “progress” by the stratagem (which he thinks is mine) of factoring nature’s “wants” into the policymaking equation. The problem, Sagoff then announces with an air of surprise, is thus not so much the homocentric character of that equation; it is rather the equation’s exclusive concern with *wants*.<sup>45</sup> An excellent point—one with which I have agreed for some time.<sup>46</sup> If we seek only to maximize the satisfaction of wants, it may turn out to make little difference in the long run how much we broaden the class of entities whose wants we regard as relevant.

The need, then, is to move beyond wants. And it was for this reason that I proposed giving institutional expression to the perception that “nature exists for itself”<sup>47</sup> by taking steps to recognize “rights”

39. Sagoff 225.

40. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 636 (1973) (emphasis deleted).

41. Sagoff 219.

42. *Id.* at 221.

43. *Id.* at 218.

44. *Id.* at 222.

45. *Id.* at 216, 224-25.

46. [The] view that values and ends are reducible to logically arbitrary expressions of will or desire proves to be profoundly unsatisfactory for a variety of reasons, not the least of which is the fact that anyone who accepts it must regard every statement about how society “should” be organized or how individual wants “should” be aggregated as merely expressive of the speaker’s subjective preferences.

Tribe, *supra* note 40, at 637 (footnote omitted). See *Plastic Trees* 1325.

47. *Plastic Trees* 1346.

in natural objects, not as a way of broadening the class of wants to be aggregated in a Benthamite calculus, but rather as part of a structure for approaching a shared agreement about our responsibilities as persons—responsibilities to one another and to the world. In such a perspective, invoking notions like the “desire [of animals] to be free from pain”<sup>48</sup> serves simply to establish the basis for an empathy without which the very idea of duties to the nonhuman world could not, in all likelihood, be seriously entertained. It is easy to confuse the proposition that empathy is a precondition of perceived obligation with the notion that such empathy permits us to approximate, as interests to be cumulatively maximized, the wants and desires of other beings. The latter position, which Sagoff assumes to be mine, is of course vulnerable to the attack he makes; the former is no more than a recognition of the probable psychological reality that we are capable of affirming duties, at least in the first instance, only to beings that are somehow like ourselves. But it is important to see that the idea of such duties is itself ultimately independent of a desire-satisfying conception. To speak of “rights” rather than “wants,” after all, is to acknowledge the possibility that want-maximizing or utility-maximizing actions will be ruled out in particular cases as inconsistent with a structure of agreed-upon obligations. It is Kant, not Bentham, whose thought suggests the first step toward making us “different persons from the manipulators and subjugators we are in danger of becoming.”<sup>49</sup>

## V

If the ensuing process of development is to avoid the equally unacceptable trap of total human subservience to some single set of changeless principles, then its central characteristic must be communal choice in terms of principles “capable of evolution as we change in the process of pursuing them.”<sup>50</sup> In thus describing a possible “first turn along the spiral of process . . . toward an evolving environmental ethic,”<sup>51</sup> I recognized the obvious inadequacies of the very step I had proposed but sought strength in that recognition: “insistence on the continuing reformulation and evolution of the principles [tentatively] distilled . . . provides a way of [overcoming] the inevitable inadequacies at each stage.”<sup>52</sup>

48. *Id.* at 1341.

49. *Id.* at 1346.

50. *Id.* at 1338.

51. *Id.* at 1346.

52. *Id.*



The reader will detect here an emphasis on deliberate change that is not altogether familiar in our legal and political tradition. Any demand that “the framework for choice must incorporate procedures for its own evolution”<sup>53</sup> has conventionally been deemed satisfied by a tolerably responsive set of lawmaking institutions tracing their continuing legitimacy to an underlying authority that all affected individuals would, on reflective consideration, voluntarily accept. In effect, it has traditionally been thought that the legislature’s representative character affords sufficient assurance that its enactments will not too long remain out of phase with evolving public sentiment; the existence of a lag in particular cases has not customarily been deemed a basis for antimajoritarian intervention. But courts, at least, have begun to act as though they recognized areas—the preservation of nature may be one—in which a variety of systemic features combine to thwart the ordinary processes of moral evolution and growth. Let me explain by indicating how judges have dealt with such areas. This will make more tangible the notion of self-correcting process, a notion crucial to my earlier article and at the heart of my disagreement with Sagoff.

A first illustration might be drawn from the Supreme Court’s insistence in capital cases that juries be composed in such a way as to reflect (more immediately than legislatures ever could) shifting public attitudes toward the penalty of death. The Court thought such a requirement necessary to “maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”<sup>54</sup>

Second, even though “the Constitution does not require legislatures to reflect . . . shifting social standards,”<sup>55</sup> the failure to do so in extreme situations may indirectly trigger judicial invalidation. For the Supreme Court has begun to treat as wholly irrational, and hence as violative of due process, laws that make sense—but that make “sense” only in terms of values and conceptions so out of touch with contemporary ideas that government is no longer willing to press such values and conceptions in the laws’ defense.<sup>56</sup>

Decisions of this latter sort are easiest to understand if one regards the processes of making and applying law as involving a con-

53. *Id.* at 1339.

54. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

55. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

56. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641 & n.9 (1974); *id.* at 653 & n.1 (Powell, J., concurring in the result).

tinuing dialogue, one in which it is required that laws, unlike naked commands, be *explained* to those they touch. Just as an individual about to be deprived by government of life, liberty, or property is entitled, as a matter of procedural due process, to an explanation of why the rule being invoked by government applies to him,<sup>57</sup> so he is entitled, as a matter of what I would call "structural" due process, to an explanation of why the rule is being enforced *at all*. And something can hardly count as an "explanation" in this context unless the reasons offered rationally fit the rule being defended, quite apart from any assessment of the *substantive* acceptability of the reasons being advanced. Although no such interchange on the merits between the individual and the state could be demanded within traditional theories tracing the legitimacy of laws to their initial enactment, it is profoundly corrupting to a community for its laws to be sustained on theories that its current representatives are unwilling to avow.

Some such conception in turn helps to illuminate the third and final set of cases in which courts have lately confronted institutional obstacles to self-correcting process. I have in mind the little-understood<sup>58</sup> cases in which school boards were forced to abandon the automatic disqualification of pregnant teachers<sup>59</sup> and those in which courts and agencies were compelled to end their absolute prohibitions against child custody by unwed fathers.<sup>60</sup> In both instances, the rules struck down originated in once broadly held views of the proper role of men and women and the needs of children. But those views no longer commanded general assent. It is striking, moreover, that the agencies affected by the Court's decisions had been in a position to prevent the emergence of an alternative consensus if not to prevent the erosion of the old agreement. For those were the agencies that could insulate the community from the very experiences (seeing pregnant teachers in the classroom, observing motherless families in the neighborhood) that could generate a viable alternative consensus.<sup>61</sup> Thus the Supreme Court's demand that these agencies substitute more individualized determinations for the rules of thumb (the "irrebuttable

57. See generally *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

58. For an example of the confusion about these cases, see Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

59. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

60. *Stanley v. Illinois*, 405 U.S. 645 (1972).

61. It should be noted that the Supreme Court did not in fact address these bureaucratic realities in its opinion. In that regard, I have been less interested in *why* the Court has recently fastened on the mode of analysis represented by these decisions than in *when*, if at all, the use of such analysis might be justified.

presumptions") they had inherited from a prior era arguably makes sense as a means of unfreezing the situation despite the risks of abuse and irregularity always implicit in ad hoc, discretionary judgments.

In each set of cases discussed above, it also turns out—most significantly—that the process effectively mandated by judicial decision is more than instrumental; it is “a process valued in large part for its intrinsic qualities”<sup>62</sup> rather than exclusively for its likely tendency to contribute to an evolving moral consensus. For example, in the cases involving pregnant teachers and unwed fathers, the Court’s rejection of formal resolution by detached reference to determinate rules might be thought to reflect a view of individualized, face-to-face confrontation as the only fitting response (quite apart from its problematic long-term efficacy) to a particular moral predicament: the presence of generally agreed-upon rights, in a context characterized by profound disagreement. Because those cases involved the fundamental rights of parenthood, rights whose basic existence was unquestioned, they were thought appropriate for the traditional due process requirement of a prior hearing. At the same time, the exercise of those rights interacted with issues of sex roles as to which social norms were changing and about which there was substantial moral dissension. That circumstance made categorical, rule-bound resolution inappropriate. For when substantive rules cease to be faithful expressions of *shared* ideals, they come instead to enforce (and to be perceived as enforcing) the interests and ends of some at the expense of the interests and ends of others. In this sense, perhaps only personalized justice can be acceptable in settling disputes about broadly agreed-upon rights when such disputes arise in settings of widely perceived moral flux. In such settings, the insistence on individualization is paradigmatic of processes selected at once for their intrinsic characteristics and for their instrumental place in an evolving system of beliefs and attitudes.

I offer this series of somewhat disparate decisions without purporting to frame them within a coherent theory—a task which I address in two forthcoming articles.<sup>63</sup> I put the cases forth here simply as illustrations of how institutions and processes might facilitate the evolution of principles, and of the consciousness that lies behind them, without succumbing to “the grip of instrumentalism”<sup>64</sup> in the very process of such facilitation.

62. *Plastic Trees* 1339.

63. L. Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions* (forthcoming, 1975, *LAW & CONTEMP. PROB.*); L. Tribe, *Structural Due Process: Articulated Rationales, Conclusive Presumptions, and Non-Positivist Grounds for Constitutional Decision* (forthcoming, 1975, *HARV. CIV. RIGHTS-CIV. LIB. L. REV.*).

64. *Plastic Trees* 1339.

## VI

It is undoubtedly in my emphasis upon process and change that my conceptions of nature, of policy, and of constitutional structure all differ most fundamentally from Sagoff's. For him, the "nature" that deserves protection is definable in traditional terms; for me, "conceptions like harmony, rootedness in history, connectedness with the future, all seem more pertinent than the ultimately conventional concept of 'the natural.'"<sup>65</sup> For him, the right policy is always the one to which the society's past, as revealed by the contemporary symbols of its values, unambiguously points.<sup>66</sup> For me, the "right" policy is one chosen not to imitate an idealized past but to seek, even tentatively, an imagined future. For him, the Constitution is a repository for cultural and historic ideals; for me, it is a far leaner procedural framework—an "idealized conception of how change should be structured"<sup>67</sup>—that is itself in continual change, moving, one may hope, toward an increasingly authentic (because increasingly undominated) consensus of ultimate ends.<sup>68</sup> I am the first to admit that this conception leaves the hard operational questions unanswered. In my two forthcoming articles,<sup>69</sup> I try to develop the conception to a somewhat more operative stage. But even if that effort proves unsuccessful, pretending to answer operational questions by reading the entrails of history seems to me plainly insufficient. For we are called upon not merely to remember the past. We are called upon as well to learn from the future.

65. *Id.* at 1340.

66. Sagoff 241, 264.

67. *Plastic Trees* 1338.

68. See R. UNGER, *KNOWLEDGE AND POLITICS* (forthcoming 1975).

69. See note 63 *supra*.

# The Yale Law Journal

Volume 84, Number 3, January 1975

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John W. Spiegel, *Telex v. IBM: Monopoly Pricing under Section 2 of the Sherman Act*

Anthony T. Kronman, *Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions*

Elliot E. Maxwell, *The CIA's Secret Funding and the Constitution*