NOTE

The Limits of Judicial Review Under the Clean Air Act: Is Infeasibility a Political Question?

I. INTRODUCTION

There are words so profoundly vague they are quintessentially lawyers' words. One such word is "infeasibility."[1] The word is well-suited for the lawyer not merely because of its vagueness but also because it connotes a foreclosing of further inquiry: only a fool would attempt to make nice inquiries into the actual characteristics of something dismissed as "infeasible."[2] The word "infeasibility" is at the heart of *Union Electric Co. v. EPA*,[3] decided by the Eighth Circuit in March, 1975, and now before the Supreme Court on certiorari.[4] The cry "infeasible!" was raised in this case by a utility

1. "Infeasibility" has been defined as "the quality of being infeasible or impracticable," and "infeasible" as "incapable of being accomplished or carried out; impracticable, impossible." 5 OXFORD ENGLISH DICTIONARY 253 (1961).

2. This sense of foreclosure is conveyed in the passage which contains the earliest instance of the use of the term "infeasibility." Predictably, the term enters the English language in a description of legal wrangling:

> [K]ing Balliol bestowed a large proportion of land in Scotland on this his father's foundation; the Master and Fellows whereof petitioned king James, (when the Marches of two kingdoms were newly made the middle of one monarchy,) for the restitution of those lands detained from them in the civil wars betwixt the two crowns. The king, though an affectionate lover of learning, would not have his bounty injurious to any, save sometimes to himself; and considering those lands they desired were long peaceably possessed with divers owners, gave them notice to surcease their suit. Thus not king James, but the infeasibility of the thing they petitioned for to be done with justice, gave the denial to their petition.

1 T. FULLER, THE CHURCH HISTORY OF BRITAIN 362 (1837). The "infeasibility" passage appeared in the 1655 edition. 5 OXFORD ENGLISH DICTIONARY 253 (1961).

3. 515 F.2d 206 (8th Cir. 1975).

4. *Petition for cert. granted*, 96 S. Ct. 35 (1975).

company faced with the necessity of compliance with the Clean Air Act.[5] The Eighth Circuit gave the ultimate judicial dismissal to the company's claim, labeling it a political question and dismissing for lack of jurisdiction.[6]

A recital of the facts of the case will be helpful in understanding the Eighth Circuit's holding. The Union Electric Company learned in May of 1974 that its plants were in violation of the sulfur dioxide emission standards contained in the Missouri implementation plan.[7] The implementation plan had been adopted two years earlier in accordance with the procedures of the Clean Air Act.[8] Soon after receiving the notice of violation, the utility company filed a petition in the Court of Appeals asserting that it was technologically and economically infeasible[9] for it to meet the emission standards set forth in the implementation plan. The company filed the petition under section 307(b)(1) of the Clean Air Act,[10] a provision which permits review in the circuit courts of almost any action taken by the Administrator of the Environmental Protection Agency within thirty days of the date of the action, or after thirty days if based on grounds arising after such thirtieth day.[11] Since the com-

5. 42 U.S.C. §§ 1957-58a (1970).

6. 515 F.2d at 219-20. The political question ground was only one of several grounds on which the Eighth Circuit rested its denial of jurisdiction. The ambiguities in its holding are discussed at note 15 *infra*.

7. *Id.* at 210.

8. The Clean Air Act, 42 U.S.C. §§ 1857-58a (1970), provides for a joint federal/state program for the development of pollution standards. The Administrator of the Environmental Protection Agency promulgates national ambient air standards for pollutants under section 109 of the Act, 42 U.S.C. § 1857c-4 (1970). The states then submit implementation plans under section 110, 42 U.S.C. § 1857c-5 (1970). The implementation plans provide for the achievement of the ambient air quality standard by placing limits on the emissions from pollution sources. 42 U.S.C. § 1857c-5(a)(2)(B) (1970). The Administrator approved the Missouri implementation plan on May 31, 1972. 37 Fed. Reg. 10875 (1972). Regulation X, § B of the Missouri implementation plan restricts the emissions of sulfur dioxide. 515 F.2d at 209.

9. 515 F.2d at 209, n.6. The distinction between technological infeasibility and economic infeasibility appears to be that technological infeasibility or impossibility exists when engineering difficulties prevent the attainment of a given reduction in emissions, while economic infeasibility exists when it is simply too expensive to provide the necessary equipment. *See* 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.03, at 2-75 (1973), *cited in* Comment, *Impossibility: A Viable Defense Under the Clean Air Act?*, 1 COLUM. J. ENVIR. L. 147, 151-53 (1974).

10. 42 U.S.C. § 1857h-5(b)(1) (1970).

11. The Eighth Circuit identified the Union Electric Company's petition as the first reported petition for review filed after the close of the initial thirty day period.

pany asked in 1975 for a review of an emission standard adopted in 1972, it was required to show grounds arising more than thirty days after the adoption of the standard. It cited four such grounds: the Arab oil embargo, the failure of technology to produce pollution reduction equipment (scrubbers) which could meet the emission standard, the increase in the installation costs for the scrubbers, and the inability to obtain financing for the installation of the scrubbers.[12] In essence, the company alleged that it was impossible to meet the emission standard, or that it was so expensive to do so that the company would go out of business.

The Eighth Circuit held that it lacked jurisdiction over the issues raised in the petition because the Clean Air Act does not in its terms provide for a review of the claim of infeasibility,[13] because the legislative history of the Act does not indicate that Congress intended such review,[14] and because to undertake such review would be to answer a political question.[15] The first two grounds

515 F.2d at 209. A second post-thirty-day petition has been reported in the District of Columbia Circuit. Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975).

12. Brief for Petitioner at 5-6, Union Electric Co. v. EPA, *cert. granted,* 96 S. Ct. 35 (No. 74-1542, October Term 1975).

13. 515 F.2d at 212.

14. *Id.* at 212-16.

15. *Id.* at 219. It may be argued that the political question language in the opinion is dictum rather than holding. Certainly, the Eighth Circuit states that infeasibility is a political question in a rather informal style, without citing a single precedent. Moreover, the court discusses political question theory only after it interprets the legislative history of the Clean Air Act to preclude the raising of the infeasibility claim. However, a careful reading of the opinion indicates that the political question determination is an important, if not the most important, part of the holding. The Eighth Circuit recognizes in the opinion that its interpretation of the legislative history, though supported by decisions in several circuits, has been directly contradicted by many other circuits. 515 F.2d at 216-19. The court makes no substantial effort to distinguish the opposing cases; but, after discussing them, merely states its conclusion that its interpretation is the correct one. 515 F.2d at 219. Immediately following this statement, the court launches into a discussion of political question theory and states that the infeasibility claim presents issues unfit for judicial resolution. 515 F.2d at 219. The transition is so sudden that it suggests that the Eighth Circuit concludes that its interpretation of the legislative history is the correct one primarily because it finds that infeasibility is a political question. In any case, it seems fair to say that the Eighth Circuit's finding that infeasibility is a political question is inextricably bound up with its finding that Congress did not grant the circuit courts jurisdiction over the infeasibility claim. The political question finding seems an implicit recognition that the Eighth Circuit believes that the ambiguity of the legislative history renders it an insubstantial foundation for the disposition of the infeasibility question. To shore up the decision, the court

for the holding have, in the past, been extensively examined by other courts[16] and by legal writers.[17] The third ground, however, has received little attention to date.[18] The Eighth Circuit shunned review of the claim of infeasibility, and labeled it a political question, in part because of the procedural posture of the case. Since there had been no agency decision on infeasibility, a review of the claim could not have been made by reviewing the agency

goes beyond legislative history and determines that a dismissal for lack of jurisdiction is appropriate on the political question ground, a ground unaffected by ambiguities in legislative history. As developed in text accompanying note 44 *infra*, a dismissal on the ground that the court faces a political question may be appropriate even in those instances in which Congress has unequivocally assigned the question to judicial review.

The assertion that the political question determination is part of the holding of the *Union Electric* opinion is certainly open to question. One writer has analyzed the opinion without even mentioning the political question determination. Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 HARV. L. REV. 316, 345-47 (1975). However, Professor Bleicher states that he is troubled by two aspects of the case, and these aspects would not have troubled him had he examined the political question language in the opinion. Professor Bleicher is troubled because he believes that the Eighth Circuit should have denied the infeasibility claim on the merits rather than dismiss for lack of jurisdiction, and that the court should have addressed itself to the question as to whether the claim of infeasibility could be raised in enforcement proceedings. However, both of these criticisms overlook the court's finding that infeasibility is a political question. A dismissal for lack of jurisdiction *is* the appropriate disposition for political questions, and if infeasibility is a political question in a review proceeding it is also a political question in an enforcement proceeding.

16. *E.g.*, South Terminal Corp. v. EPA, 504 F.2d 646, 675 (1st Cir. 1974) (neither words of statute nor legislative history permit infeasibility defense); Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 914 (9th Cir. 1974) (neither words of statute nor legislative history permit infeasibility defense); Buckeye Power Co. v. EPA, 481 F.2d 162, 168-69 (6th Cir. 1973) (legislative history supports allowance of infeasibility defense); St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 748 (3d Cir. 1975) (statute does not expressly allow claim of infeasibility; but importance of claim, and absence of express provision against its allowance, may be interpreted to support its allowance).

17. *E.g.*, Ayres, *Enforcement of Air Pollution Controls on Stationary Sources under the Clean Air Amendments of 1970*, 4 ECOLOGY L.Q. 441, 472 (issues of technology and economics were removed from the executive and judicial branches altogether); Bonine, *The Evolution of 'Technology-Forcing' in the Clean Air Act*, 6 ENVIR. RPTR., Monograph No. 21 at 11-22 (1975) (clear from legislative history that infeasibility claim could not be raised to invalidate implementation plan).

18. One writer has given a short discussion to the issue and has asserted that the question of whether to permit the infeasibility defense is a question of public policy best decided by elected representatives of the people, not judges. Comment, *Impossibility: A Viable Defense Under the Clean Air Act?*, 1 COLUM. J. ENVIR. L. 147, 160 (1974).

record but instead would have necessitated extensive fact-finding in the court under the supervision of a special master.[19] However, the court's primary objection to review was a substantive one. Even if an extensive factual record could have been obtained through the use of a master, the court found that Congress had provided no principle to apply to the facts.[20] Without such a principle the court would have to devise one of its own, a function the court found to be non-judicial in nature:

> It is not our role to sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations.[21]

This Note will discuss the political question ground of the Eighth Circuit's opinion. There is, of course, no certainty that the Supreme Court will reach this ground in its upcoming decision.[22] Because

19. 515 F.2d at 211.
20. *Id.* at 219.
21. *Id.*
22. A decision on either of the first two grounds, which concern the words of the statute and its legislative history, would dispose of the case adequately. There are several other grounds on which the case might be decided. One concerns the exhaustion of administrative remedies. The Union Electric Company filed for a variance at the state level, and the application was pending at the time the Eighth Circuit rendered its decision. The Eighth Circuit considered this fact unimportant because this circuit has held that variances may not be granted from state implementation plans after June 1, 1975. 515 F.2d 217, n.32. But a Supreme Court decision rendered three weeks after the Eighth Circuit's decision may be interpreted to allow variances after this date provided the national ambient air standard is achieved. *See* Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975). The Missouri agency responsible for administering the state implementation plan has not yet rendered a decision on the company's application for a variance. The agency proceedings have been tabled pending the Supreme Court's decision. Brief for Respondent at 6, Union Electric Co. v. EPA, *cert. granted*, 96 S. Ct. 35 (No. 74-1542, October Term 1975). But the Supreme Court may simply dispose of the case on the ground that the company has not exhausted its administrative remedies. The recent Supreme Court interpretation of the Act may allow variances after July 1, 1975 and thus may establish a remedy the Eighth Circuit considered unobtainable. The Sixth Circuit has recently interpreted the Supreme Court's decision to require this disposition of a similar infeasibility claim. Buckeye Power, Inc. v. EPA, 8 ERC 1317 (6th Cir. 1975). The only problem with making a similar disposition in the *Union Electric* case is that the language of section 307(b)(1) appears to allow judicial—not administrative—review of "new information," and the Union Electric Company asserts that the facts it alleges under its claim of infeasibility constitute such new information. See note 133 *infra*, for a description of the ambiguity surrounding this phrase.

of the presence of adequate alternative grounds, the Supreme Court may ignore the political question ground entirely or may give it only passing mention. But even if the Supreme Court does not reach the political question ground, the Eighth Circuit's finding that infeasibility is a political question could have a significant effect on the course of environmental law, because the decision may serve as precedent for other courts facing the super-legislative questions arising under the Clean Air Act and other environmental statutes. There are two major problems which may arise from the use of the political question ground in the environmental context—reversibility and overbreadth. As noted above, the Eighth Circuit's decision was based primarily on the court's self-doubt[23] concerning its role in devising a substantive principle to govern the infeasibility defense. To the extent that environmentalists consider the courts more receptive to their arguments than Congress, they wish to preserve and expand substantive judicial review.[24] In the instant case a finding that infeasibility is a political question means that the utility company will have to pursue other, non-judicial routes to a variance. But in another case, the judicial door could be closed on the environmentalist-plaintiff, forcing him to take his suit elsewhere. For example, suppose that in the future the Environmental Protection Agency reverses its position and grants a variance on the ground of infeasibility. A circuit court might hold that the granting of a variance is as much a political question as the refusal to grant a variance. The reversibility of political question doctrine is one reason why it should be employed cautiously. A second reason for caution lies in the fact that the law of political questions

23. This term is used by Professor Bickel to describe one condition that prompts courts to refuse jurisdiction on political question grounds. A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962). *See* note 200 *infra.*

24. Stephen P. Duggan, member of the Natural Resources Defense Council, has remarked that the judicial branch may generally be considered a friend to the environment, while the executive and legislative branches may be considered enemies. NEW YORKER, Nov. 17, 1975, at 40. Professor Sax has stressed the important role courts play in deciding substantive environmental issues. J. SAX, DEFENDING THE ENVIRONMENT 108-24 (1971). Attorney David Sive remarked at the beginning of the environmental movement in this country that courts could play as important a role in the "environmental revolution" as they had in the "civil rights revolution." Sive, *Some Thoughts of an Environmentalist Lawyer in the Wilderness of Administrative Law,* 70 COLUM. L. REV. 612, 613 (1970).

is amorphous and unsettled.[25] There are many questions arising in the field of environmental law that resemble the question of infeasibility in that they require the same balancing of competing economic and health interests.[26] Because the boundaries of the political question doctrine have not been precisely determined, this resemblance may lead courts to categorize all these questions as political questions and thereby refuse to entertain jurisdiction over any of them.

If the Supreme Court should rest its decision on the political question ground, an even greater change in the course of environmental law can be expected, regardless of whether the Supreme Court reverses or affirms the Eighth Circuit. If the Supreme Court reverses on the political question ground, and holds that the circuit courts do have jurisdiction over claims of infeasibility, the opinion will establish a new method for obtaining variances from Clean Air Act provisions. The judicial-variance method is likely to be viewed by polluters as the path of least resistance, since the other routes to variance embodied in the Clean Air Act present formidable difficulties.[27] Judges could become the dentists of the Clean Air Act, extracting its teeth whenever they bit too deeply into the budgets of polluting companies. The other possible holding on this ground, that the question of infeasibility is properly labeled a political question, would drastically limit the scope of judicial review under the Clean Air Act. As noted above, this truncation of the scope of review could cut both ways—by closing the door to review on both polluters and environmentalist-plaintiffs. The precedent may apply not only to the Clean Air Act but also to other

25. *See* P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 233-41 (2d ed. 1973); C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3534 at 298 (1975) [hereinafter cited as WRIGHT'S FEDERAL PRACTICE].

26. One such question, concerning agency decisions subject to the National Environmental Policy Act, is discussed in text accompanying notes 188-96 *infra.*

27. State variances for the period after the date on which the national ambient air standard was to be attained, *see* 42 U.S.C. § 1857c-5(a)(2)(A)(i), have an uncertain future. *See* note 22 *supra.* Variances sought through section 110(f) of the Act must comply with the stringent procedural and substantive provisions of this section. The governor of the state must recommend the granting of the variance, and it must be shown that the continued operation of the polluting company is essential to national security or to the public health and welfare. 42 U.S.C. § 1857c-5(f)(1) (1970).

environmental statutes. If the Supreme Court writes the epitaph "political question" for the claim of infeasibility in this case, the holding may bring about the demise of substantive judicial review for the mass of complex environmental questions.

II. POLITICAL QUESTIONS AND ADMINISTRATIVE QUESTIONS

Perhaps the most complete statement of the political question doctrine occurs in *Baker v. Carr*.[28] Justice Brennan, writing for the majority, states that political questions are so named because they possess elements which necessarily invoke the doctrine of separation of powers.[29] He identifies six categories of political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political question already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[30]

The Eighth Circuit characterized infeasibility as a political question because it possesses elements which bring it within the second and third categories outlined above. The court could find no standards —either within the Clean Air Act or outside it—to determine what constitutes infeasibility and what effect infeasibility should have on the enforcement of the Act.[31] Lacking standards, the court could entertain jurisdiction over the claim of infeasibility only by making an initial policy decision as to whether economic hardship should be recognized as a defense for polluters. The court held that to make such an initial policy decision would be to invade the province of the legislature and to answer a political question.[32] The Eighth

28. 369 U.S. 186 (1962).
29. *Id.* at 217.
30. *Id.*
31. 515 F.2d at 213-19. *See also* note 15 *supra.*
32. *Id.* at 219.

Circuit cited no precedents to support this conclusion, but the assertion that a lack of judicially discoverable and manageable standards marks a political question could be supported by a long array of cases.[33] However, an examination of the doctrinal sinuosities developed in these cases would not be particularly helpful. Other writers have studied the decisions and have concluded that there is no political question theory at all, only a motley collection of cases deciding the issue.[34] This Note will accept as a premise the principle that a question lacking judicially recognizable standards is a political question; it will only seek to determine whether the question of infeasibility possesses or lacks such standards.

The lack-of-standards objection to jurisdiction seems a relatively rare occurrence in the context of judicial review of administrative agencies. This state of affairs is certainly not brought about by the existence of sharply defined principles of law. Congress generally has given federal agencies broad guidelines for decision-making,[35] and federal courts nebulous standards for review of these decisions.[36] Necessity seems to be the mother of the convention of judicial review in administrative law. Agencies are thought to require an independent overseer,[37] and Congress does not have the time to review and revise the multitude of agency decisions.[38] There are frequently several possible routes to the attainment of judicial review,[39] and plaintiffs seeking review have a presumption

33. *See* Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 485-513 (1924). Professor Field found that "the most important factor in the formulation of the doctrine [of political questions] is . . . a lack of legal principles to apply to the questions presented." *Id.* at 512. Professor Scharpf has criticized Field's analysis, which appears to be the major analysis of the lack-of-standards variety of political questions, as a rejection of the "creative functions" of the courts. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 555-58 (1966).

34. WRIGHT'S FEDERAL PRACTICE, *supra* note 27, § 3534 at 298, *citing* Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1163 (1970); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 201 (1971).

35. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.03, at 81-86 (1958).

36. *See* Administrative Procedure Act § 10(e), 5 U.S.C. 706 (1970).

37. *E.g.*, Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515 (1974). *Cf.* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

38. *See* Leventhal, *supra* note 37, at 515.

39. There are, for example, at least four routes to judicial review under the Clean Air Act: section 304 citizen's suits, 42 U.S.C. § 1857h-2 (1970); section 307

in favor of reviewability.[40] But this presumption may be overcome on a showing that the question sought to be reviewed has been committed to agency discretion by law.[41] The determination as to whether a question has been committed to agency discretion by law may hinge on whether Congress intended to grant review to the courts.[42] A denial of jurisdiction on the ground that the question has been committed to agency discretion is superficially similar to a denial on the ground that there is a lack of judicially discoverable and manageable standards. The lack of standards for substantive review may imply that the question has been committed to agency discretion.[43] But the Eighth Circuit did not frame its holding in the traditional terms of commitment to agency discretion. Instead, it found that the question before it was a political question—and therein lies a vital distinction. The distinction between questions committed to agency discretion by law and political questions is that congressional intent is relevant only to the former. Inquiry into congressional intent is not relevant at all to political questions because Congress cannot transform a political question into a judicial question merely by assigning it to the judiciary. From the beginnings of our federalist system, the Supreme Court has held that Congress cannot assign non-judicial functions to non-

general review, 42 U.S.C. § 1857h-5 (1970); federal question jurisdiction, 28 U.S.C. § 1331 (1970); and federal diversity jurisdiction, 28 U.S.C. § 1332 (1970). *See* Bolbach, *The Courts and the Clean Air Act,* 5 ENVIR. RPTR., Monograph No. 19 at 3-12 (1974).

40. Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41; Administrative Procedure Act §§ 10 and 10(a), 5 U.S.C. §§ 701, 702 (1970).

41. 5 U.S.C. § 701 (1970). *See* Berger, *Administrative Arbitrariness: A Synthesis,* 78 YALE L.J. 965 (1969); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968); Davis, *Administrative Arbitrariness is Not Always Reviewable,* 51 MINN. L. REV. 643 (1967); Berger, *Administrative Arbitrariness: A Sequel,* 51 MINN. L. REV. 601 (1967); Berger, *Administrative Arbitrariness and Judicial Review,* 65 COLUM. L. REV. 55 (1965).

42. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 28.05, at 514-18 (1972).

43. The legislative history behind the Administrative Procedure Act seems to indicate that the "committed to agency discretion" exception to review is simply a restatement of the political question doctrine:

> The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.

S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945).

legislative courts.[44] Therefore, even if it could be shown that Congress gave the circuit courts a clear mandate to review questions of infeasibility, these questions may not be entertained if they lack judicially discoverable and manageable standards.

The above distinction is an important one to make because it means that before the Supreme Court can remand *Union Electric* to the Eighth Circuit, it will have to answer two questions. First, the Court will have to decide whether the question of infeasibility has been committed to agency discretion or to judicial review. But the inquiry will not be at an end if the Court finds that Congress did not commit the question of infeasibility solely to the agency but intended to give jurisdiction to the courts as well. Even if the Supreme Court finds that Congress intended the courts to have review powers in this area, it will still be required to decide a second question as to whether the claim of infeasibility, once released from the bonds of agency discretion, may be properly answered by the judiciary. An affirmative answer to the second question would appear to require a finding that judicially discoverable and manageable standards exist to decide the claim of infeasibility.

In administrative law, questions lacking judicial standards are often termed "administrative questions" rather than "political questions," though the two terms may refer to identical problems of judicial review.[45] Whenever the reviewing court finds that it must

44. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). In *Hayburn's Case* two Justices and one district judge, sitting on circuit, denied jurisdiction over a case arising under a pensioners' act on the ground that the act imposed non-judicial duties on the circuit courts. See the portions of the decision in the only footnote to the opinion in the Supreme Court. When a motion for mandamus was made to the Supreme Court, the Court disposed of it on standing grounds. The motion was later presented under a different theory of standing, but the case was mooted because of congressional action. *Id.* at 409-10. *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803).

Legislative courts have, of course, been granted authority to perform non-judicial functions. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 375-417 (2d ed. 1973).

45. The suggestion has been made that courts refusing jurisdiction over administrative questions have more regularly rested their opinions on Article III grounds than courts refusing jurisdiction over political questions. WRIGHT'S FEDERAL PRACTICE, *supra* note 27, § 3535 at 323. But it appears from an examination of the administrative questions described in FEDERAL PRACTICE that they are simply political questions arising in the context of administrative law.

act legislatively rather than judicially, the limits of review are exceeded.[46] *Federal Radio Commission v. General Electric Co.* (hereinafter the *First Radio Case*)[47] is frequently cited as precedent on this issue. The Court there refused review jurisdiction because the provisions of the Radio Act which governed review were too broad. Since these provisions allowed the reviewing court to render any disposition it thought "just," the reviewing court became in effect a "superior and revising agency."[48] Shortly after this decision, the Radio Act was amended to allow review only of questions of law, and the Supreme Court subsequently exercised jurisdiction to review an agency decision under the Act in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.* (hereinafter the *Second Radio Case*).[49] The question in the *First Radio Case* which was found to be unfit for review involved the denial of a radio license on grounds of public interest, convenience, and necessity. In the *Second Radio Case,* the Court limited its review to questions of law, such as whether the agency had applied the standards given it by Congress, whether it had accorded due process to affected parties, and whether it had stayed within the bounds conferred upon it.[50] This history demonstrates a transition from non-reviewability to reviewability brought about by limiting the scope of review to questions of law. The principle expressed by the *Radio Cases* seems quite similar to the great maxim of equity, *aequitas sequitur legem* (equity follows the law).[51] The equity court offered a remedy different from that offered in a court of law; but, if the maxim was followed, the court did not grant the equitable remedy until the plaintiff made out a right at law.[52] Judicial review of administrative action or inaction is a form of remedy, and the principle established by the *First Radio Case* is that

46. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.10, at 180-86 (1958).
47. 281 U.S. 464 (1930).
48. *Id.* at 467.
49. 289 U.S. 266 (1933).
50. *Id.* at 276.
51. The maxim may have been more honored in the breach than the observance. *See* Chafee, *Does Equity Follow the Law of Torts?*, 75 U. PA. L. REV. 1 (1926).
52. *See, e.g.*, R. EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 160 (1822) ("Bills to restrain nuisances must extend to such only as are nuisances at law. . . ."); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 71-72 (2d ed. 1843) (maxim that equity follows the law, while not universally true, is true when there is a common law or statutory rule that directly governs the case).

this remedy cannot be obtained until the court is referred to standards by which law may be applied.

III. The Search For Standards

A. *Is There Equity to Apply?*

Judges and legal commentators have expressed the opinion that the principle of the *First Radio Case* is moribund if not dead.[53] Curiously, this opinion frequently takes the form of a statement that although courts reviewing administrative decisions are surrounded by statutes, they remain equity courts.[54] This statement seems to imply that there is a set of equity rules separate from the set of legal rules, and that a question presented for review may have different answers depending on which set of rules is employed. But, as noted above, equity theoretically followed the law. The equitable remedy was granted in accordance with the legal rule. Therefore, it is difficult to perceive why calling the reviewing court an equity court works a vital change in the scope of review.

But the idea that reviewing courts may at times be equity courts seems well-entrenched and was not dispelled by the marriage of law and equity in the Federal Rules of Civil Procedure.[55] In *Mobil Oil Corp. v. Federal Power Commission*,[56] decided in 1974, the Supreme Court held that circuit courts reviewing the decisions of the Federal Power Commission are courts of equity.[57] A party in the case cited the *First Radio Case* for the proposition that the reviewing court was not an equity court, and the Supreme Court

53. Professor Davis states that the holding of the *First Radio Case* is "in the perspective of the 1970's a little queer." K. Davis, Administrative Law Text § 29.09 at 542 (1972). Other writers have asked, "Is there any remaining vitality to *General Electric*?" P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and the Federal System 238 (2d ed. 1973). One court has concluded that subsequent cases have "drained all vitality" from the *First Radio Case*. *In re* Penn Central Transportation Company, 384 F. Supp. 895, 913 (Special Ct., R.R.A. 1974). But other legal commentators have perceived a remaining "solid core of doctrine." Wright's Federal Practice, *supra* note 27, § 3535 at 323.

54. *E.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974).

55. Fed. R. Civ. P. 1.

56. 417 U.S. 283 (1974).

57. *Id.* at 311.

labeled this assertion a misreading of the holding of *First Radio*.[58] But the Court did not define with precision the significance of giving the appellation "equity" to the reviewing court. The Court cited as authority for its holding *Ford Motor Co. v. NLRB*,[59] and apparently referred to the following passage in that decision:

> The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.[60]

If one believes that giving courts the power to act in accordance with equitable principles allows them to answer administrative (political) questions, then *Ford* does implicitly overrule the *First Radio Case*. But the *Ford* Court certainly did not intend this meaning to be derived from the passage inset above. The passage, while denominating the reviewing court an equity court, also requires that the court not act outside the bounds of the statute or invade the province of the agency. Moreover, on the next page of the *Ford* opinion, the Court cites the *Second Radio Case* with approval, and states that the remand to the agency was only for the purpose of allowing the agency to apply the statutory law. Thus, the reports of the death of the *First Radio Case* may be, like Mark Twain's, exaggerated. The act of calling the reviewing court an equity court does not seem to extend perceptibly the scope of review.

But there are two real senses in which equity may invade and change judicial review of administrative action. The first is the interstitial sense. Calling the reviewing court an equity court may mean that the court may fill the gaps that exist in federal statutory law with federal common law. The phrase "interstitial equity" will be used in this Note to refer to the overall operation through which the court obtains non-statutory standards for decision. The gaps in the statutory law may be filled with any principles of the common law, legal or equitable (assuming that it is possible

58. *Id.* at 311-12, n.45.
59. 305 U.S. 364 (1939).
60. *Id.* at 373.

to make such division). Interstitial equity is thus a form of remedy rather than a substantive rule. The equity court traditionally offered a remedy different from the remedy in the law court, and the appeal for an exercise in interstitial equity is essentially a request for the court to complete the statutory law with federal common law. The exercise of this interstitial power may at times be niggardly, but it exists nonetheless. Last term, the Supreme Court considered the desirability of applying interstitial equity in *Alyeska Pipeline Service Co. v. Wilderness Society.*[61] The issue before the Court was whether attorneys' fees should be awarded to parties who had acted as private attorneys general in seeking to stop construction of the Alaska pipeline. Some federal statutes contain provisions granting attorneys' fees for private attorneys general; others do not.[62] The statutes under which suit was brought in this case were silent on the subject. The majority of the Court found that to allow fees in this case would be to "make major inroads on a policy matter that Congress has reserved for itself."[63] The dissenters asserted that fees could be awarded under one of several "generous rubrics" of equity.[64] Although interstitial equity went unexercised in this case, the Court recognized the existence of the power to add equitable principles of the common law to the statutory law. The majority of the Court simply found that this was not an appropriate case in which to apply equity.

The second sense in which equity may enter and alter judicial review may be termed "classical equity." The Aristotelian concept of equity was based on the notion that legal rules were inherently inadequate because they were expressed as generalities.[65] Equity was seen as a means of compensating for this inadequacy by supplying exceptions to the general rules.[66] Perhaps the most prominent example of classical equity in administrative law is the use of equitable estoppel to prohibit reliance on contract provisions[67] or statutes

61. 95 S. Ct. 1612 (1975).

62. An extensive listing of statutes containing provisions for attorneys' fees is given in the opinion. *Id.* at 1623 n.33.

63. *Id.* at 1627.

64. *Id.* at 1631.

65. *See* O. Fiss, Injunctions 74-76 (1972), *citing* Aristotle, Nichomachean Ethics, bk. 5, ch. 10.

66. *Id.*

67. *See, e.g.*, 2 K. Davis, Administrative Law Treatise § 17.02, at 498-501 (1958).

of limitations.[68] In these instances, it is possible to view classical equity as conflicting with black letter law rather than as performing the additive function of interstitial equity. However, courts generally describe the allowance of claims of equitable estoppel as interpretations of the law rather than emendations of the law.[69]

Interstitial equity and classical equity may serve as possible sources of standards for deciding the claim of infeasibility. Before taking up this question, it is useful to examine a few decisions which find standards in the statutory law rather than in federal common law.

B. *Is There Law to Apply?*

In 1971 Judge Bazelon formally announced a new era in judicial review of administrative action, an era marked by a much closer scrutiny of the substance of agency decisions.[70] According to Judge Bazelon, the expansion in the scope of judicial review was necessary because administrative agencies had begun to sink their teeth into fundamental personal interests (life, health, and liberty) instead of their former fare of impersonal economic interests (rates and licenses).[71] The rationale behind the need for closer scrutiny of decisions affecting personal interests seems two-dimensional. A closer scrutiny is appropriate first because these interests are more important than economic interests, and second because these interests were in the domain of the common law long before they entered administrative law. The question of whether a radio station should be granted a license may be viewed as relatively less important than the question of whether a polluter should be permitted to create a health hazard; and the pollution question, unlike the license question, has a long history of law and equity associated with it.

The accuracy of Judge Bazelon's perception may be demon-

68. *See, e.g.*, Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); Annot., 16 A.L.R.3d 637 (1967); Annot., 43 A.L.R.3d 429 (1972).

69. *E.g.*, Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 234 (1959); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975).

70. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971). For comments on a subsequent episode of the new era, see International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650-53 (D.C. Cir. 1973).

71. 439 F.2d at 597-98.

strated by examining two cases that involve the introduction of environmental concerns into the decision-making of agencies that formerly gave little, if any, consideration to the environment. The decisions show a much closer scrutiny of agency action; and they rely on statutory law, not common law, to supply the standards used to achieve this closer scrutiny. *Zabel v. Tabb*[72] concerned the denial by the Army Corps of Engineers of a dredging permit solely on environmental grounds. The plaintiff claimed that there was no basis in law for the denial of the permit. The district court found for the plaintiff, holding that since the statute under which such permits were issued, the Rivers and Harbors Act of 1899, was based on the federal commerce clause power, it could be used to deny permits only when the work contemplated would directly interfere with commerce.[73] The district court denied the agency's claim that its permit decisions were committed to its discretion, and recommended that if the agency desired the authority to deny permits on purely environmental grounds it should appeal to Congress for an explicit grant of such authority. The Fifth Circuit reversed. It found that the Corps of Engineers could deny permits solely on environmental grounds because the agency was required to take heed of several other sources of federal law: the Fish and Wildlife Act, a Memorandum of Understanding between the Secretary of the Army and the Secretary of the Interior, and the National Environmental Policy Act.[74] The circuit court opinion exhibited a closer scrutiny of agency action in the liberality with which it interpreted the statutory law. The Rivers and Harbors Act of 1899 had never before been interpreted to contain the authority to deny permits without a showing of interference with commerce;[75] and one of the statutes relied upon to support the new interpretation, the National Environmental Policy Act, had not even been passed at the time of the agency's decision.[76]

72. 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1970).

73. 296 F. Supp. at 771.

74. 430 F.2d at 209-14.

75. *See* 430 F.2d at 207-08.

76. The agency rendered its decision February 28, 1967. 430 F.2d at 202. The National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1970), did not pass both houses of Congress until December 22, 1969. 69 U.S. CODE CONG. & ADM. NEWS 2751.

A second case of the new era, *Citizens to Preserve Overton Park, Inc. v. Volpe*,[77] involved the use of parkland for highway building. The Secretary of Transportation authorized the building of a highway through a park, though the applicable statutes allowed such action only when "no feasible and prudent alternative" existed.[78] Since the Secretary gave no statement of reasons for his decision, it was possible only to guess whether he had complied with the statutory mandate to consider all other alternatives. The district court held that the Secretary was not required to give a statement of reasons for this decision, and that other evidence presented to the court proved that his decision was not arbitrary and capricious.[79] The circuit court affirmed. On appeal, the Supreme Court addressed a new question, whether the Secretary's action was committed to agency discretion by law. The Supreme Court reversed and remanded, holding that the district court could require a minimum statement of reasons from the Secretary and that the question was not committed to agency discretion because the statute provided standards sufficient to enable the court to conduct a review of his decision.[80] The Court, citing the legislative history of the Administrative Procedure Act, stated that standards for substantive review exist when there is "law to apply."[81] Two sources of law were found: the words of the statutes and the very existence of the statutes. The Court read in the words of the statutes a plain prohibition against the use of parklands. And to the contention that the statutes allowed the Secretary discretion in placing economic factors on an equal footing with environmental concerns in order to reach a prudent compromise, the Court replied that the existence of the statutes demonstrated that Congress intended the protection of parkland to have paramount importance.[82]

The *Overton Park* decision has been criticized as resting on a

77. 309 F. Supp. 1189 (W.D. Tenn. 1970), *aff'd*, 432 F.2d 1307 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971), *on remand*, 335 F. Supp. 873 (W.D. Tenn. 1972), *supplemented*, 357 F. Supp. 846 (1973), *rev'd sub nom.* Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir. 1974), *cert. denied*, 95 S.Ct. 1997 (1975).

78. Department of Transportation Act of 1966 § 4(f), 49 U.S.C. § 1653(f) (1970); Federal-Aid Highway Act of 1968 § 18(a), 23 U.S.C. § 138 (1970).

79. 309 F. Supp. 1189, 1193-95.

80. 401 U.S. at 410-21.

81. *Id.* at 410.

82. *Id.* at 412-13.

fallacious rationale,[83] and praised as attempting to resolve the tension between the need for closer scrutiny of agency decisions and the impropriety of substituting judicial judgments for agency judgments.[84] The Court made an imaginative but defensible discovery of standards sufficient to allow judicial review of the agency decision. A question that arguably merited the label "political question" was transformed into a judicial question through this discovery.

IV. *Union Electric* AND THE CLEAN AIR ACT

A. *Is There Interstitial Equity to Apply?*

The above discussion indicates that courts may not face political questions when standards exist for the application of either law or equity. In essence, *Union Electric* is an injunction case. The Environmental Protection Agency has not yet obtained an injunction against the company; but it has the power,[85] and the obligation,[86] to seek one if the emission requirements are not met. The claim of infeasibility is essentially an equitable defense to the impending injunction; the Union Electric Company presents the traditional request for a balancing of the equities. Equity courts have been balancing the equities in injunction cases for hundreds of years. Therefore, one response to the Eighth Circuit's assertion that there are no standards by which to decide the claim of infeasibility is that courts reviewing agency decisions may act as equity courts and apply the same equitable principles they have applied throughout the history of Anglo-American law. Stated otherwise, interstitial equity can be resorted to as a means of converting a political question into a judicial question.

The argument for the use of interstitial equity rests on two

83. Note, *Citizens to Preserve Overton Park, Inc. v. Volpe: Environmental Law and the Scope of Judicial Review*, 24 STAN. L. REV. 1117, 1126 n.56 (1972).

84. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 315 (1971).

85. Under section 113 of the Clean Air Act, the Administrator may commence an action for a permanent or temporary injunction against any violator of an implementation plan. 42 U.S.C. § 1857c-8 (1970).

86. If the Administrator does not seek an injunction under section 113 of the Clean Air Act, *see* note 85 *supra*, any person may seek an injunction against any violator of an emissions standard. 42 U.S.C. § 1857h-2 (1970). The right of private parties to take such action was recognized in St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 749 (3d Cir. 1975) (dictum).

premises. The first premise is that the Clean Air Act does not deny, either explicitly or implicitly, the power to use interstitial equity as a vehicle for the expression of claims of infeasibility. The second premise is that equity courts have always followed the principle of balancing the equities. Examining the second premise first, it is definitely not true that all equity courts have balanced equities as a condition for granting permanent injunctions. The older treatises on equity indicate that whenever the plaintiff establishes at law that the defendant is creating a nuisance, a permanent injunction is to be granted.[87] If mention is made of weighing the harm to the defendant against the benefit to the plaintiff, such balancing is asserted to be appropriate only in those instances in which there exists an adequate remedy at law.[88] An application of the strict injunction-without-balancing doctrine was made in an early English case, the reading of which arouses a strong sense of *déjà vu* in anyone familiar with the facts of *Union Electric*. The plaintiff in *Broadbent v. The Imperial Gas Co.*[89] was a market gardener whose crops were allegedly damaged by fumes (sulfur dioxide, the same pollutant emitted by the Union Electric Company) emanating from a large utility company that supplied gas for lighting. The defendants urged the court not to grant the injunction because the "balance of conveniences" was in favor of the defendant.[90] The public value of the industry was great; the plaintiff had only a small garden producing vegetables, fruit, and flowers. To grant the injunction, argued the defendant, would be to deprive a large portion of London of light.[91] (The claims of the Union Electric Company were not so modest; it told the Eighth Circuit that the enforcement of the Clean Air Act emission requirements would "result in an immediate cessation of civilized life as we know it."[92]) But the court granted the injunction against the Imperial Gas Company. It found that it was improper "to enter into any question of how far it might be convenient for the public that the gas manufacture

87. *E.g.*, R. EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 157-68 (1822).

88. *E.g.*, W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 225-26 (1871).

89. 7 De G.M.&G. 436, 44 Eng. Rep. 170 (Ch. 1857), *aff'd*, 7 H.L. Cas. 600, 11 Eng. Rep. 239 (H.L. 1859).

90. 7 De G.M.&G. at 439, 44 Eng. Rep. at 172.

91. *Id.*

92. 515 F.2d at 209.

should go on."[93] The plaintiff had established that the company was creating a nuisance, and he therefore was entitled to a permanent injunction. The court considered the question of whether the plaintiff had an adequate remedy at law for damages but found this remedy to be inadequate because of the impossibility of measuring the present and future damages.[94] The court suggested that if the public value of the company was indeed great, the company could go to the legislature to seek the power to condemn the plaintiff's property.[95]

It is, of course, true that many equity courts have balanced the equities in injunction cases. The reverse of the *Broadbent* holding occurs in *Boomer v. Atlantic Cement Co.*[96] There plaintiffs sought an injunction against air pollution emitted by a cement company. The long-standing rule in the jurisdiction had been, as the court recognized,[97] that an injunction would be granted whenever the plaintiff established that substantial damage resulted from the defendant's operations. But the court overruled the long-standing rule and refused to grant the injunction. The reasoning of the court's opinion seems internally inconsistent. The court held that public objectives are not properly recognized by courts when cited to support the granting of an injunction, but may be recognized as a basis for withholding an injunction. The opinion begins with the statement that courts properly resolve disputes between the parties that appear before them; they do not introduce public objectives into private litigation.[98] But it appears that the reason the court denied the injunction in this case was the public value of the cement company. The valuation of the plant and the number of its employees were weighed against the damages to the plaintiffs, and the injunction was denied on the basis of the public interest in the continuation of the plant.[99] The court recognized that the pollution might have public consequences not reflected in the damages suffered by the plaintiffs, but this consideration did not enter into

93. 7 De G.M.&G. at 461, 44 Eng. Rep. at 181.
94. *Id.* at 455-59, 44 Eng. Rep. at 178-80.
95. *Id.* at 461, 44 Eng. Rep. at 181.
96. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).
97. *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.
98. *Id.* at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.
99. *Id.* at 225-28, 257 N.E.2d at 873-75, 309 N.Y.S.2d at 316-19.

the calculus of the court's decision.[100] Thus, the criticism of one commentator is absolutely correct: the court excluded the public in its calculation of harm but included the public in its calculation of benefits.[101] This observation points out the irreconcilability of two basic principles of equity: the principle that an injunction will not be granted unless the equities weigh in favor of the injunction and the principle that an injunction will not be granted if there is an adequate remedy at law. As demonstrated in *Broadbent,* one way of showing that damages were inadequate was by showing that they could not be measured. The damages in *Boomer* were probably as immeasurable as those in *Broadbent* because of the difficulty in determining the extent of the present and future damages (either in private or public terms). But if the plaintiff establishes that he is suffering immeasurable damage, the court cannot then logically engage in a balancing of the harms and benefits. The harm on one side of the scale is, by hypothesis, immeasurable. The *Boomer* court gave some solace to the plaintiffs by suggesting that the problem of cement dust pollution might be remedied by the legislature.[102] This suggestion is exactly the reverse of the one made in *Broadbent,* where the court gave the plaintiff his injunction and then suggested to the defendant company that it appeal to the legislature.[103]

As noted above, equity courts have been divided on the question of whether the plaintiff is to be put to a comparative injuries test before he may be granted an injunction.[104] Therefore, if federal courts are to consider seriously the admission of the defense of infeasibility under a theory of interstitial equity, they will have to make a threshold decision as to whether federal common law allows for a balancing of the equities. For simply admitting that

100. *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

101. D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 231 (1973).

102. 26 N.Y.2d at 223, 257 N.E.2d at 871, 309 N.Y.S.2d at 314-15.

103. 7 De G.M.&G. at 461, 44 Eng. Rep. at 181.

104. For additional analysis of the doctrine of balancing the equities, *see* Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEXAS L. REV. 412 (1940); Mechem, *The Peasant in his Cottage: Some Comments on the Relative Hardship Doctrine in Equity,* 28 S. CAL. L. REV. 139 (1955); Pinsky, *Real Property,* 15 RUTGERS L. REV. 276, 293-95 (1961); *Developments in the Law - Injunctions,* 78 HARV. L. REV. 994, 1005-08 (1965); Note, *An Economic Analysis of Land Use Conflicts,* 21 STAN. L. REV. 293 (1969); Comments, 37 YALE L.J. 84, 96-101 (1927); Annot., 61 A.L.R. 924 (1929); Annot., 40 A.L.R.3d 601 (1971).

the power of interstitial equity exists does not in any way imply the substantive content of that power. As noted above, in the *Alyeska* case the Supreme Court recognized the power to add equitable principles to statutory law, but found that the plaintiffs in that case had not established an equitable right to attorneys' fees.

Georgia v. Tennessee Copper Co.[105] may shed some light on the question of whether federal common law allows for a balancing of the equities in this kind of injunction case. *Tennessee Copper* was an original jurisdiction[106] suit before the Supreme Court in which the State of Georgia sued for an injunction to prohibit the air pollution wafting its way across the Tennessee/Georgia border from Tennessee smelting companies. The pollutant was again sulfur dioxide. The case is especially significant because it followed closely upon a state court proceeding by residents of Tennessee who sought an injunction against the same companies.[107] The Tennessee plaintiffs were denied their injunction because the state court balanced the equities and found that the public interest in the continued operation of the companies precluded the granting of the injunction.[108] But Georgia won its case before the Supreme Court. Justice Holmes, writing for the majority, specifically dismissed the notion that the injunction could be denied because of the doctrine of balancing the equities.[109] However, he indicated

105. 206 U.S. 230 (1907).

106. *Id.* The fact that the Supreme Court, that most appellate of American courts, undertook this case in its original jurisdiction may provide an answer to the Eighth Circuit's objection to exercising original jurisdiction over Union Electric's claims of infeasibility. *See* 515 F.2d at 211. But the Supreme Court has subsequently refused jurisdiction in a similar nuisance case. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971). For comment on the latter case, see Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case,* 12 ARIZ. L. REV. 691 (1971); Note, *Federal Courts—Jurisdiction—A Comparison of Texas v. Pankey and Ohio v. Wyandotte Chemicals Corp. Reveals the Necessity for a Federal Common Law Right to Abate Interstate Pollution,* 50 TEXAS L. REV. 183 (1971).

107. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904).

108. *Id.* at 366-67, 83 S.W. at 666-67.

109. 206 U.S. at 238. The subsequent history of this case is somewhat confusing. One writer suggests that the Supreme Court's decision allowed the companies to avoid the injunction by making their best efforts to reduce the pollution, and indicates that in 1955 the companies were still operating. Mechem, *The Peasant in his Cottage: Some Comments on the Relative Hardship Doctrine in Equity,* 28 S. CAL. L. REV. 139, 145 (1955). However, it appears that this was a result of a stipulation made between the plaintiff and the defendants. *See* 237 U.S. 474, 476

that this was a special case because the plaintiff was a state. According to Justice Holmes, every sovereign state should have total control over the quality of the air its inhabitants breathe, and consequently a state has a higher claim to specific relief than a private person.[110] Justice Brandeis wrote a concurrence because he disagreed with the proposition that a different set of equity principles should be applied in cases in which a state is a party.[111] He stated that any party would have had the right to an injunction in the circumstances presented, regardless of the public interest in the continuation of the company. *Tennessee Copper* was decided many years before *Erie R.R. v. Tompkins*,[112] and there is no reference in the case to the question of the appropriate source of law. Since neither Georgia nor Tennessee precedents are mentioned in the opinion, one may infer that federal common law formed the basis for the Court's decision. While it may be impossible to state a general rule as to whether federal common law allows the defense of economic hardship to preclude an injunction, there is authority other than *Tennessee Copper* to support the rule that a nuisance injurious to public health will be enjoined under federal common law regardless of the economic consequences.[113]

(1915). The original opinion seems clearly to countenance a permanent injunction if the plaintiff asked for one. *See* 206 U.S. at 229. The juices of equity must have later flowed not from the court but from the supposed adversary.

110. 206 U.S. at 237.

111. *Id.* at 239-40.

112. 304 U.S. 64 (1938).

113. Federal cases decided prior to *Erie R.R. v. Tompkins, supra* note 112, presented conflicting approaches to the balancing question, but frequently held that the defense of economic hardship was not available to the nuisance-creating defendant. *E.g.*, American Smelting & Refining Co. v. Godfrey, 158 F. 225, 229-32 (8th Cir. 1907) (citing *Broadbent*), *cert. denied*, 207 U.S. 597 (1907); McCleery v. Highland Boy Gold Mining Co., 140 F. 951, 952-53 (C.C. Utah 1904) (citing *Broadbent*); Indianapolis Water Co. v. American Strawboard Co., 57 F. 1000, 1004 (C.C. Ind. 1893); Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 806-08 (C.C. Cal. 1884).

Federal diversity cases decided after *Erie* could apply only state law to the question of whether the defendant can raise the doctrine of comparative injuries. *See, e.g.*, Gunther v. E.I. duPont de Nemours & Co., 157 F. Supp. 25, 33-34 (N.D. W. Va. 1957) (dictum), *appeal dismissed*, 255 F.2d 710 (4th Cir. 1958). But when federal courts are presented with cases in which an application of federal common law may be appropriate, matters become complicated. A preliminary question is whether federal common law may be used at all. *Compare* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 498-99 n.3 (1971) *with* Illinois v. City of Milwaukee, 406 U.S. 91, 102 n.3 (1972). But the crucial question is whether federal

However, attempting to fix the exact position of the federal common law on the issue of balancing the equities is unnecessary if the first premise on which interstitial equity is based is not established. The first prerequisite for the deployment of interstitial equity is a showing that there is, in fact, a gap in the statutory law. If the applicable statute either explicitly or implicitly disallows an appeal to the common law on a particular question, then it is improper for a court to import any common law principles into its adjudication of the question. The Clean Air Act would seem implicitly to disallow the power of courts to recognize the claim of infeasibility. Before the 1970 Amendments,[114] which drastically altered the Clean Air Act's approach to the pollution problem,[115] the Act contained an express provision for balancing the equities.[116] The only case brought under the pre-1970 Act mentioned this provision but failed to define its substantive content, largely because the defendant entered into a consent decree with the Government.[117] When the

common law generally, or as it exists in relation to a particular statute, recognizes the doctrine of comparative injuries. To this question there does not appear to be a clear answer. In *United States v. Reserve Mining Co.*, a district judge found that the defendant was both violating state and federal statutes and creating a nuisance under federal common law. 380 F. Supp. 11, 16 (D. Minn. 1974). The judge issued an injunction suspending the defendant's operations, despite the severe economic consequences to the defendant. The judge explicitly recognized the balancing doctrine; but he found it difficult to apply, and applied it in a greatly modified fashion, because of the impossibility of accurately measuring the full extent of damages on the plaintiffs' side. *Id.* at 54-56. On appeal, the Eighth Circuit injected a dose of equity that was nearly fatal to the injunction. It agreed that the defendant had violated state and federal statutes, but it found that the balance of equities required an abatement order on much less stringent terms. 514 F.2d 492, 535-40 (1975). The Eighth Circuit did not discuss the derivation of the equitable principle it asserted ought to be applied. Other federal courts have issued injunctions under federal environmental statutes without permitting an economic hardship defense. *E.g.*, Stop H-3 Assoc. v. Volpe, 353 F. Supp. 14, 18 (D. Hawaii 1972).

114. 42 U.S.C. §§ 1857-58a (1970), *amending* 42 U.S.C. §§ 1857-57(*l*) (Supp. V, 1970).

115. For a summary of the legislative history of the Clean Air Act before and after the 1970 Amendments, see Bonine, *The Evolution of 'Technology-Forcing' in the Clean Air Act*, 6 ENVIR. RPTR., Monograph No. 21 (1975); Kramer, *The 1970 Clean Air Act Amendments: Federalism in Action or Inaction?*, 6 TEX. TECH. L. REV. 47, 49-67 (1974).

116. Act of Dec. 17, 1963, Pub. L. No. 88-206, 5(g), 77 Stat. 398; Act of Nov. 21, 1967, Pub. L. No. 90-148, 108(c)(4), 81 Stat. 493; formerly codified as 42 U.S.C. § 1857d(h) (Supp. V, 1970).

117. United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970).

Clean Air Act was amended in 1970, the provision was dropped; and the legislative history demonstrates that Congress intended to eliminate the defense of economic hardship.[118] There are now provisions for variances within the Act, but the Union Electric Company has made an end run around these sections and seeks to obtain what amounts to a variance by petitioning under the general review provision of the Act, section 307. The other variance procedures all involve one or more of the non-judicial branches of federal or state government; no section of the Act explicitly allows a variance that is purely judicial.[119] Moreover, the Clean Air Act contains a savings clause which preserves the rights any person may have at common law, or by virtue of other statutes, to seek relief from air pollution.[120] Presumably, in any jurisdiction which recognizes the doctrine of comparative injuries, the polluter may successfully defend such alternative suits for injunctions (not under the Clean Air Act) by showing that the balance of equities favors a denial of the injunction. If the same defense is recognized under the Clean Air Act, then the Act adds nothing to the plaintiff's

118. S. REP. No. 1196, 91st Cong., 2d Sess. 2-3 (1970), *reprinted at* 1 LEG. HIST. 401, 402-03:

> The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . . .

The Eighth Circuit considered the above passage from the legislative history to be a clear and unequivocal indication that Congress did not intend to allow the defense on infeasibility. 515 F.2d at 214-16. There are two major problems with this derivation of legislative intent. The first is that there are other passages from the legislative history which indicate Congress' intention to allow claims of infeasibility. *See, e.g.*, H.R. REP. No. 1146, 91st Cong., 2d Sess. (1970), *cited in* Buckeye Power, Inc. v. EPA, 481 F.2d 162, 168 (6th Cir. 1973). The second problem is that the terms of the Act, in some of its provisions, allow the claim of infeasibility to be made. *See* discussion in text accompanying notes 132-87 *infra*.

119. Variances granted under section 110(a)(3) of the Act, 42 U.S.C. § 1857c-5(a)(3) (1970), are granted by state administrative agencies. See the interpretation of section 110(a)(3) in Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975). Postponements granted under section 110(f) of the Act, 42 U.S.C. § 1857c-5(f) (1970), require the approval of the governor of the state and consideration by the Environmental Protection Agency.

120. 42 U.S.C. 1857h-2(e) (1970).

pre-existing rights.[121] Here is an appropriate instance for the application of one of the sources of law unearthed in *Citizens to Preserve Overton Park, Inc. v. Volpe*. The very existence of the statute may be taken to imply that it adds a remedy that did not exist before the passage of the statute. Since allowing the defense of infeasibility would be tantamount to repealing the Clean Air Act, the Act cannot be interpreted to allow the introduction of this form of interstitial equity.

B. *Is There Classical Equity to Apply?*

The conclusion that either or both premises for the use of interstitial equity are missing leads us to ask whether there are grounds for the application of classical equity. As discussed above, the propriety of using classical equity depends upon a showing that the person seeking an equitable exception possesses unusual characteristics which distinguish him from the mass of other persons and which render him deserving of the exception. The facts alleged by the Union Electric Company to support its defense of infeasibility[122] do not supply the necessary ingredients for this kind of exception. Every major industry has suffered as a result of the Arab oil embargo, and many face heavy expenses for pollution-reduction equipment.[123] In fact, the very structure of the Clean Air Act would seem to guarantee that the burdens of the Act fall so uniformly on polluters that it is almost impossible to make out

121. For example, in 1924 a nursery company in Pennsylvania sought a permanent injunction against the air pollution emitted by the Duquesne Light Company. The injunction was denied because of the doctrine of comparative injuries. Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 173-78, 126 A. 345, 347-48 (1924). After the Clean Air Act was passed, and a state implementation plan approved for Pennsylvania, the Duquesne Light Company's emissions theoretically became subject to the standards set forth in the implementation plan. But the company brought a section 307 petition, seeking to require the Administrator to disapprove the standard on the ground of infeasibility. The Third Circuit held that the Administrator was required either to suspend the enforcement of the emission standard or grant the company a hearing on its claim of economic hardship. *See* text accompanying notes 161-76 *infra*. If economic hardship is accepted as a defense to regulation under the Clean Air Act, is not the Act as ineffectual a remedy as the common law (non)right to an injunction?

122. *See* text accompanying note 12 *supra*.

123. *See* Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, 4 ECOLOGY L.Q. 441 (1975).

a special claim of economic hardship. The Act provides for national ambient air standards for various pollutants, to be enforced through emission standards in state implementation plans. The national ambient standard sets a maximum level for air pollution; the state emissions standards may be set so as to achieve a quality of air that is better than the level permitted by the federal ambient standards.[124] But by having a national ceiling applicable to all states, the Clean Air Act would seem to provide for fairly constant restraints on pollution. Even if the states do not, among themselves, provide for exactly the same level of pollution, at least there is a single standard for pollution set up in each state implementation plan. This relatively uniform system is a vast improvement over the old equity system, where air quality standards depended on the vagaries of case-by-case adjudication. There is one possible argument against the assertion that the economic burdens imposed by the Clean Air Act are relatively uniform. Since the ambient standards are expressed in terms of the permissible quantity of pollutant in a zone of airspace, it might be argued that the standards of the Act fall more heavily on factories located in areas of dense population, where there is a high existing level of pollution, than on factories located in relatively unpopulated areas. But the courts have held that the Clean Air Act contains a policy of non-degradation, a policy which prohibits the allowance of more lax emission standards in zones of airspace that are purer to begin with than other zones.[125] This policy serves to compensate for what might otherwise be a greater burden on the urban company.

The existence of a national system of pollution standards ought to change drastically the courts' view of the economic hardship defense. The traditional rules for pollution cases simply don't apply in this context. Professor Michelman has identified three traditional

124. Section 116 of the Clean Air Act, 42 U.S.C. § 1857d-1 (1970); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 73-74 (1975); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 359 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

125. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd mem.,* 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

For a discussion of this case and subsequent developments in the policy of nondegradation, see Comment, *Sierra Club v. Ruckelshaus: "On a Clear Day . . .,"* 4 ECOLOGY L.Q. (1975).

solutions of law and equity that are ordinarily employed to resolve disputes between polluters and their victims.[126] First, the plaintiff can obtain an injunction against the polluter. Second, the pollution may continue, but the polluter can be forced to pay damages to the victim. Third, the polluter can continue to pollute, but the victim can buy out the polluter if they can agree on a price. Professor Calabresi has identified a fourth solution: the victim may obtain an injunction against the polluter but has to pay damages to him.[127] All of the traditional solutions have their drawbacks, largely because of the uncertain ebb and flow of private and public rights. For example, a plaintiff who is able to obtain an injunction under the first solution may sell it back to the polluter and thereby sacrifice the advantages to the public that the injunction once secured. As for the second solution, to award damages only to the plaintiffs bringing suit may be to ignore a public injury that is spread over so large a population that it is not worthwhile for each individual to sue to collect damages. The third solution, a voluntary agreement to stop pollution in exchange for money, is beset with a variety of weaknesses, among them the unwieldy size of the victim population and the likelihood of hold-outs. The Calabresian solution seems likely to be found acceptable only in rare instances;[128] victims will be almost as unwilling to join together to stop the pollution as they are under the third solution. But the legal structure created by the Clean Air Act cures many of these problems. Even though the solution may in many instances be an injunctive one, injunctions under the Clean Air Act do not suffer from the drawbacks of the traditional injunction. Because the Government may be the plaintiff, the problem of the private sell-out of public rights is eliminated. Once the injunction is obtained, the polluter cannot offer to buy it back from the Government.[129] More

126. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 670 (1971).

127. Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116 (1972).

128. Professor Calabresi does not cite in the article any cases which apply the fourth rule. But in his Torts class he has suggested that Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972), may offer a close approximation to the fourth rule.

129. The citizen's suit provision of the Clean Air Act § 304, 42 U.S.C. § 1857h-2 (1970), could be used to enforce compliance with an emission standard if, for example, the Government entered into a consent decree arrangement with a polluting

importantly, having a national system of pollution standards means that the companies which injunctions will tend to eliminate (if any) will be the less efficient companies rather than those which happen to be located in jurisdictions which follow a stringent policy in granting injunctions (and to plaintiffs unwilling to sell them back). The Clean Air Act is simply a means of internalizing costs that were formerly externalized.[130] The beauty of the Act is that internalization is done on a national scale (with minor local variations) and consequently does not, as under the old equity system, fall unevenly on different companies because of differences in local law. It is true that those companies which are less efficient and externalize more of the cost of pollution control may go out of business. But companies which, prior to the Clean Air Act, had about the same level of externalization will have approximately the same costs for pollution control equipment. If they are companies producing products that have no real substitutes, or substitutes affected to the same degree by pollution reduction requirements, they will continue to operate because the costs of production will rise an approximately constant amount throughout the industry. The consumer will bear the additional costs for products that have no substitutes, or products the substitutes of which also have increased costs as a result of pollution control. Utility companies are perhaps the best example one could find of the passing-on principle, since they offer a product that has few, if any, substitutes.[131]

company that allowed it to exceed the standard. This scenario is somewhat similar to what occurred in the second post-thirty-day section 307 suit, Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975). This case dealt with the Administrator's promulgation of emission standards for new stationary sources of air pollution. Under section 111 of the Act, 42 U.S.C. § 1857c-6 (1970), emission standards for new sources are promulgated directly by the Administrator, not through state implementation plans. The standard promulgated by the Administrator could be met by new power plants in the East only through the installation of scrubbers. But power plants in the West, because of the availability of low-sulfur coal, could meet the standard without scrubbers. The plaintiffs in *Oljato* petitioned the circuit court to require the Administrator to order the installation of scrubbers in all plants, apparently under a theory of non-degradation. *See* note 125 *supra*. However the D.C. Circuit did not reach the substantive issue. It dismissed the petition on the ground that the plaintiffs were required first to bring their grievance before the administrative agency. 515 F.2d at 665-68.

130. *See* P. SAMUELSON, ECONOMICS 474-76 (9th ed. 1973).

131. Apparently, state public service commission rules do not generally allow the passing through of the costs of capital equipment installed to control pollution.

The conclusion that follows from the above analysis is that the Union Electric Company has not demonstrated the unusual circumstances that are requisite for the application of classical equity. In fact, one may question not only whether the company will suffer special injury, but also whether it will suffer any injury at all. The real party in interest here seems to be the consumer, not the company.

C. *Is There Law to Apply?*

The seeker of standards, having discarded both interstitial and classical equity, must now turn to the statutory law. The Union Electric Company suggests in its brief to the Supreme Court that the legislative history behind section 307 of the Clean Air Act, the judicial review section on which it based its petition to the Eighth Circuit, demonstrates that Congress gave the circuit courts the power to review and revise the provisions of state implementation plans.[132] This legislative history suggests that review may be had on the ground of "new information," without precisely defining the scope or content of the phrase.[133] The Eighth Circuit responded to

See Ayres, *Enforcement of Air Pollution Controls Under the Clean Air Act Amendments of 1970*, 4 ECOLOGY L.Q. 441, 464 (1975). However, it seems likely that if the public service commissions face the alternatives of either bending the rules or depriving their states of electricity, the rules will be bent. The Environmental Protection Agency has recommended to both the Federal Power Commission and state utility commissions that allowance be made for automatic passing through of the cost of pollution control equipment. Duquesne Light Co. v. EPA, 8 ERC 1065, 1071 (3d Cir. 1975).

The economic discussion in the text ignores the possibility of competition from foreign products which are not produced in a manufacturing process regulated by the Clean Air Act. Some foreign products, like automobiles, have had increased costs as a result of Clean Air Act provisions requiring cleaner engines. But other foreign products might be produced at a much lower cost as a result of their less limited capacity to externalize the cost of pollution control. But this point is irrelevant to the Union Electric situation. One may be safe in assuming that foreign-produced electricity does not compete with domestic electricity in Missouri.

132. Brief for Petitioner at 10-11, Union Electric Co. v. EPA, *cert. granted*, 96 S. Ct. 35 (No. 74-1542, October Term 1975).

133. *See* S. REP. No. 1196, 91st Cong., 2d Sess. 40-42 (1970). It is clear from the Report that the concept of "new information" judicial review includes both review based on grounds that the Administrator's action is too harsh on a polluter and review based on grounds that he is too lenient toward a polluter. But the only specific examples which are mentioned in the Report concern new information about the health effects of pollutants which the Administrator either has ignored or has too harshly regulated. This legislative history would seem tailor-

the company's suggestion by citing legislative history which indicates that claims of infeasibility were not to stand in the way of the adoption and enforcement of measures taken to reduce pollution. The court held that the Administrator of the Environmental Protection Agency is not to consider claims of infeasibility when he approves state implementation plans,[134] and that circuit courts may not consider such claims as "new information" to be used in reviewing those plans in section 307(b)(1) proceedings.[135]

It would simplify matters greatly if one could rest on the assumption that the Clean Air Act does not admit claims of infeasibility under any of its provisions. But this is not the case. The Supreme Court, shortly after *Union Electric* was decided, held that the Clean Air Act allowed the granting of variances by state agencies from state implementation plans on grounds of infeasibility.[136] In addition, the Act contains provisions which explicitly provide for postponements of deadlines on such grounds.[137] And, of course, the pollution standards for automobiles have been postponed or altered several times because of economic or technological considerations.[138]

made for a section 307 suit to require the Administrator to list aerosol-fluorocarbons as a pollutant, since new information has arisen concerning their deleterious effects on the environment and the Environmental Protection Agency has taken no action to regulate their emission under the Clean Air Act. The current congressional treatment of the fluorocarbons problem seems based on the premise that the Clean Air Act, as written, does not allow for Agency research and regulation of the problem. *See* 6 ENVIR. RPTR.—CURRENT DEV. 1232-33 (1975). But the "new information" language in the legislative history creates the substantive right for a plaintiff to sue the Administrator to compel him to study any new pollutants which come to light, and to regulate them if they are found to be dangerous to health or welfare.

134. 515 F.2d at 215.

135. *Id.* at 219.

136. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 98-99 (1975).

137. 42 U.S.C. § 1857c-(e),(f) (1970).

138. On April 11, 1973, the EPA Administrator granted to several automobile companies a one year suspension of the 1975 auto emission standards. 3 ENVIR. RPTR.—CURRENT DEV. 1512-13 (1973). On July 16, 1973, a similar one year suspension was granted to 27 other auto manufacturers. 4 ENVIR. RPTR.—CURRENT DEV. 461 (1973). On July 30, 1973, the Administrator granted a one year suspension of the 1976 nitrogen oxide auto emission standard to the big three American auto manufacturers. 4 ENVIR. RPTR.—CURRENT DEV. 561 (1973). On February 1, 1974, the Administrator granted a similar suspension to the American Motors Corporation and to 15 foreign auto manufacturers. 4 ENVIR. RPTR.—CURRENT DEV. 1653 (1974). On March 5, 1975, the Administrator granted a blanket one year suspension of the 1977 auto emission standards. 5 ENVIR. RPTR.—CURRENT DEV. 1727 (1975).

However, even if one assumes the substantive rule that claims of infeasibility may be admitted under the particular sections of the Act in issue in *Union Electric,* one faces a series of perplexing procedural questions. Who is to render a decision on the claim of infeasibility, and when is the decision to be rendered? Did Congress intend that the state and federal agencies have sole authority to decide the claim at the time the state implementation plan is adopted, or may the courts also play a role in the decision at this time, or at a later time on the basis of "new information"? All these questions involve the intent of Congress, and that that intent is difficult to discern is made evident by the differing answers given the questions by the various circuits.[139] But even if all the questions

139. The Third Circuit cases are discussed in text accompanying notes 161-76 *infra.* The Fourth Circuit has held that it is appropriate for the Administrator to consider economic and technological infeasibility claims before approving state implementation plans. Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). The Fifth Circuit held that section 110(f) of the Clean Air was the proper route to obtain a variance from a state implementation plan and denied the attempt to obtain a judicial variance through section 307. Texas v. EPA, 499 F.2d 289 (5th Cir. 1974). The Sixth Circuit has stated that the Administrator must entertain claims of infeasibility in enforcement proceedings. Buckeye Power Co. v. EPA, 481 F.2d 162, 173 (6th Cir. 1973). The Seventh Circuit has also stated that infeasibility may be asserted as a defense in enforcement proceedings. Indiana & Michigan Electric Co. v. EPA, 509 F.2d 839, 844-45 (7th Cir. 1975).

The infeasibility question as it arises under section 307 of the Act should be distinguished from infeasibility that serves as a basis for the granting of variances by state agencies. For example, the Ninth Circuit has stated that economic hardship will not ordinarily constitute a defense against the enforcement of emission standards, but variances may be granted from the provisions of state implementation plans on grounds of economic hardship so long as the national ambient standard is not jeopardized. In other words, variances are permissible when the state implementation plan as originally written insures a quality of air that is better than the national ambient standard and the variance from that original plan will not cause the national ambient air standard to be exceeded. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 914 (9th Cir. 1974). The Ninth Circuit's position was adopted in the first and, as yet, only Supreme Court decision interpreting the Clean Air Act. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975). The Court held that a state could revise its implementation plan (grant a variance) provided the national ambient air standard was maintained. *Id.* at 98-99. The revisions of state plans are governed by section 110(a)(3) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(3). A revision can be made only after a state hearing and a favorable decision by both the state agency responsible for administering the clean air program and the Environmental Protection Agency. Under the Supreme Court's interpretation of the Act, the Agency can approve a revision in a state implementation plan only if it is assured that the national ambient standard will be maintained. This kind of variance is not at issue in *Union Electric.* There has been

of congressional intent are resolved in favor of the company's claim in this case, there remains one question that is totally controlling and totally unrelated to congressional intent. Assume that Congress intended claims of infeasibility to be recognized as a mitigating factor in the adoption and enforcement of pollution standards, and that all jurisdictional obstacles are overcome (courts may entertain the claim of infeasibility even without prior agency review or record). Having arrived at this stage, the judge who must decide the claim of infeasibility may ask himself the disturbing question, "What is infeasibility?" The judge has made his way through a procedural Labyrinth only to come face to face with a substantive Minotaur. It is this final, frustrating quandary that led the Eighth Circuit to dismiss infeasibility as a political question.

The analysis presented above indicates that the substantive Minotaur may be tamed if there is law to apply. The first place one might look for definitional, legal standards for the infeasibility question is the statute itself, especially those sections of the statute dealing with postponements. Under section 110(f) of the Act a one-year postponement of any requirement of a state implementation plan may be granted if the governor of the state agrees to ask for a postponement and if the Administrator of the Environmental Protection Agency makes a demanding, four-factor finding. The Administrator must find that good faith efforts have been made to comply with the implementation plan, that the technology is not available for compliance, that adequate measures are taken to protect the public health, and that the continued operation of the company is essential to national security or to the public health and welfare.[140] The circuit court for the state in which the company is located is given jurisdiction to review the Administrator's findings and to affirm or set aside his decision to grant or deny the postponement. It is to be noted that the governor's approval and the consideration of the Administrator are necessary steps in the postponement process. A postponement under this section of the Act would involve several branches of government, not just the judicial branch. But the circuit court is the final link in the chain,

no submission by the state of a proposed revision. The polluting company has instead gone directly to court and seeks to have the court consider whether it should be granted immunity from the Missouri implementation plan on grounds of infeasibility.

140. 42 U.S.C. § 1857c-5(f) (1970).

and apparently could grant a request for postponement even if the Administrator had denied the request. The conditions for granting the postponement, however, require much more than a showing of economic hardship. The company must show both that the technology is not available (which would seem to demonstrate impossibility rather than infeasibility) and that national security or the public welfare requires the postponement. Even so, one wonders whether the guidelines Congress gives to the reviewing court are any more narrow than the guidelines rejected as too broad by the Supreme Court in the *First Radio Case*. No section 110(f) proceeding has been brought to test this question. There is, however, a circuit court interpretation of a very similar postponement provision for automobile pollution standards.

In section 202 of the Clean Air Act, Congress assigned to the Environmental Protection Agency Administrator the responsibility for suspending the automobile pollution standards for one year if he determined that the suspension was in the public interest, good faith efforts had been made to meet the standards, the automobile companies had established that the necessary technology was not available, and the National Academy of Sciences agreed that this technology was not available.[141] The Administrator denied the request for a suspension, and the automobile companies sought review under section 307 of the Act in *International Harvester Co. v. Ruckelshaus*.[142] Since the statutory criteria on which the Administrator's decision was based were so broad, one might expect to find in the reviewing court's opinion at least passing mention of the doctrine of administrative (political) questions. But instead the District of Columbia Circuit accepted the mantle of review without pausing to reflect upon the self-imposed limits of the judicial branch. To be more precise, the court recognized that it was the center of a political maelstrom, but this recognition served only to reinforce its confidence in the belief that it was an appropriate forum. The court stated at one point in the opinion:

> It was the judgment of Congress that this court, isolated as it is from political pressures, and able to partake of calm and judicious reflection would be a more suitable forum than even the Congress.[143]

141. 42 U.S.C. § 1857f-1 (1970).
142. 478 F.2d 615 (D.C. Cir. 1973).
143. *Id.* at 633.

But stonewall isolation doth not a judicial question make. The question presented to the court involved the health and economy of the entire nation, and it is difficult to see how it could be perceived as possessing any semblance of judicially discoverable and manageable standards. The Administrator based his denial of the suspension request on a finding that it was not in the "public interest" to grant the suspension because the automobile companies could "probably" meet the deadlines imposed by the Act.[144] How could the circuit court apply statutory law to such a determination? Judge Leventhal, writing for the majority, couched his analysis in procedural rather than substantive terms. He did not reverse the agency decision but remanded it for a better-reasoned and more factually-buttressed methodology.[145] But although the analysis was procedural, the effect was substantive. By placing the burden of proof on the agency, Judge Leventhal made it virtually impossible for the agency to continue to deny the suspension. On remand the Administrator opted to grant the suspension rather than attempt the arduous task of meeting the burden of proof imposed upon him.[146]

The crucial question for the purposes of this Note's analysis is whether Judge Leventhal was really able to find law to apply. As noted above, the deciding question in this review was the question of who had the burden of proof. A reading of the words of the statute might lead one to conclude that the automobile companies had this burden. The statute required that before a suspension could be granted, the *applicant* had to establish that the necessary technology was not available.[147] Therefore, if Judge Leventhal found any law, he must have derived it from a source other than the words of the statute. It appears that the deciding factor for Judge Leventhal lay in the implied congressional intent to assign to the reviewing court the task of shifting the burden of proof to the appropriate party. According to Judge Leventhal, it was the intent of Congress to allow the reviewing court to balance the risks inherent in an erroneous denial of a suspension against the risks inherent in an erroneous grant of a suspension, and to place the

144. *Id.* at 626.

145. *Id.* at 647-50.

146. *See* statement of EPA Administrator Ruckelshaus, April 11, 1973, *reprinted in* 3 ENVIR. RPTR.—CURRENT DEV. 1512-13 (1973).

147. 42 U.S.C. § 1857f-1(b)(5)(C) (1970).

burden of proof on the Administrator if he advocated the riskier alternative. Since Judge Leventhal determined that a denial of a suspension was riskier,[148] and the Administrator denied the suspension, the Administrator had the burden of proof.[149] This whole process looks suspiciously similar to the balancing of the equities test. One's suspicion grows when one finds no citation of statutory terms, legislative history, or case law to support the burden of proof determination. And suspicion ripens into conviction when one reads a recent article written by Judge Leventhal on the role of the courts in environmental decision-making.[150] In the article, Judge Leventhal defends the burden of proof holding in *International Harvester* by citing *De Blois v. Bowers*,[151] which he terms a "leading federal case."[152] The case was an equity proceeding by landowners who sought to enjoin a nuisance created by fumes from a galvanizing plant. The court denied an injunction against the operation of the plant because the court balanced the equities and found that the public value of the plant required its continued operation.[153] But the court found the fumes to be a nuisance—largely, it seems, as a result of the judge going to the site to conduct his own smell test. The court held that, should the defendants fail to make reasonable efforts to abate the nuisance, the plaintiffs would be entitled to a mandatory injunction compelling the company to take such action.[154] It appears that all the plaintiffs sought was the building of a taller smokestack.

Judge Leventhal interprets *De Blois* as holding that the defendant company had the burden of proof on the issue of feasibility.[155] But there is no direct reference to burden of proof in the opinion.

148. 478 F.2d at 641.

149. *Id.* at 648.

150. Leventhal, *supra* note 37.

151. 44 F.2d 621 (D. Mass. 1930).

152. If the frequency of citation is any indication of how leading a case is, *De Blois v. Bowers* is almost as un-leading as a case could be. Since its debut forty-five years ago, it has been cited only four times in reported decisions by federal courts. None of the decisions citing *De Blois* use it as authority on the question of burden of proof. *See* Harrison v. W.S. Dickey Clay Mnfg. Co., 289 U.S. 334, 338 (1933); Reserve Mining Co. v. EPA, 514 F.2d 492, 529 (8th Cir. 1975); City of Louisville v. National Carbide Corp., 81 F. Supp. 177 (W.D. Ky. 1948); United Electric Coal Cos. v. Rice, 22 F. Supp. 221, 225 (E.D. Ill. 1938).

153. 44 F.2d at 624.

154. *Id.*

155. Leventhal, *supra* note 37, at 535.

Apparently Judge Leventhal's interpretation refers to the court's statement that the company gave "no satisfactory answer" to the plaintiffs' assertion that a higher chimney could be built at reasonable cost.[156] This statement does not imply, however, that the court placed the burden of proof on the defendant company. The burden may have been on the plaintiffs, and the plaintiffs may have met their burden. But even assuming that *De Blois* deals in some way with burden of proof, the opinion nowhere states the *International Harvester* principle that the burden should be shifted depending on where the higher risk lies in the perception of the presiding judge. The only balancing done in the opinion relates not to the burden of proof question but to the propriety of granting an injunction that would curtail totally the company's operations —and this test was resolved in the company's favor.

It is reasonable to conclude that if Judge Leventhal based his decision in *International Harvester* on the general theory he wrests from *De Blois*, he found equity—not law—to apply. Moreover, equity was applied in *International Harvester* without any discussion of the interstitial and classical equity constraints previously noted. *De Blois* was apparently a diversity case, since no federal question or statute is discussed in the opinion. *De Blois* decided an equity question concerning a dispute between neighboring landowners, not a statutory question affecting the health and economy of the entire nation. It may be proper for an equity judge in a case of the dimensions of *De Blois* to engage in a rather free-wheeling discretion and to base his decision on a sniff test. If it was not quite epithetical jurisprudence, it was at least olfactorial jurisprudence. However, it seems gross error to employ this same jurisprudence in a case of the dimensions of *International Harvester*. If a court is not an appropriate forum in which to decide whether it is in the public interest to grant a radio license, it is certainly not an appropriate forum in which to decide whether or not to suspend emissions standards which govern the level of air pollution for the entire United States. If ever a question merited the label "political question," it was the question presented to the court in *International Harvester*.[157]

156. 44 F.2d at 624.

157. An assignment of burden of proof may as effectively decide the merits of the case as a decision grounded on a major substantive issue. *See* Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J.

While it may be difficult to find the law that the *International Harvester* court may have applied, at least it may be said that Congress gave the court a clear assignment of jurisdiction to review the Administrator's suspension decision and some guidelines, albeit broad guidelines. Of the four factors the Administrator was to consider and the court review, several were questions of fact, over which courts have traditionally exercised review without serious qualms.[158] But the question of the infeasibility of state implementation plan requirements has not been explicitly assigned by Congress as a relevant consideration for the Administrator or as a proper matter for judicial review,[159] and consequently not even broad guidelines are set forth in the Act to aid the reviewing court. In

1750, 1763 (1975). But by placing the decision on burden of proof grounds, the court creates the illusion that it has not touched the substance of the merits but merely has made a procedural pronouncement. A comparison of *International Harvester* with *Reserve Mining Co. v. United States* illustrates this point. The district court in the *Reserve Mining* case issued an injunction against a company which polluted both water and air with asbestos fibers. 380 F. Supp. 11 (D. Minn. 1974). The Eighth Circuit stayed the injunction on the ground, *inter alia*, that the district judge had placed the burden of proof on the company to establish that its emissions did not constitute a serious threat to the public health. The Eighth Circuit found that the district court's disposition of the burden of proof question was "a legislative policy judgment, not a judicial one." 498 F.2d 1073, 1084 (8th Cir. 1974). If the circuit opinions in *International Harvester* and *Reserve Mining* can be reconciled, it is only with the principle that the burden of proof should lie on the protector of the environment, regardless of whether he is plaintiff or defendant in the suit. One writer has observed that "burden of proof rules at present have an inevitable bias against protection of the environment and preservation of natural resources" and that "judges traditionally have felt least constrained about lawmaking activity when they could operate through the medium of burden of proof." Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105, 107-08 (1970).

The judicial treatment of the burden of proof question in the *Reserve Mining* case prompted the introduction in Congress of legislation designed to place the burden of proof on defendants in cases involving risks to health. *See* 5 ENVIR. RPTR.—CURRENT DEV. 1179-80 (1974). This fact is persuasive evidence that burden of proof determinations may in some instances be legislative, not judicial, functions. [The author wishes to thank John Schulz, of the Univ. of Va. School of Law, for his contributions to this footnote.]

158. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 15.01-15.14, at 338-434 (1958). Senator Baker indicated in congressional debate on the Clean Air Act that the postponement decision would be "essentially a question of fact." 116 CONG. REC. 33085 (1970). Senator Dole, on the other hand, characterized the suspension as a "policy decision." 116 CONG. REC. 33078 (1970).

159. Even those courts which allow the claim of infeasibility to be made find only implicit authority for this allowance. *E.g.*, St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 748 (3d Cir. 1975).

spite of the absence of express authority in the Act, several circuits have held that the Act may be interpreted to require the Environmental Protection Agency Administrator to consider infeasibility claims when he approves state implementation plans, and several circuits have stated that such claims may be made in enforcement proceedings.[160] But, with one exception, these decisions are all in the nature of procedural remands to the Administrator after he has either refused to entertain the claim of infeasibility or given what the reviewing court considered to be an inadequate review of this claim. It appears that no court has yet devised a substantive rule for infeasibility and used it to reverse an agency enforcement action. The exception to procedural remands mentioned above will be discussed below. Even in this case there is no judge-made definition of infeasibility, because the Administrator conceded the claim of infeasibility and disputed only the effect the claim should have on the enforcement of the pollution standards.

The history of the infeasibility defense in the Third Circuit shows the limited nature of the review conducted by the courts. Four circuit court decisions which deal with claims of infeasibility have been reported in the Third Circuit. In *Getty Oil Co. v. Ruckelshaus*,[161] the Third Circuit stated that claims of infeasibility could not be raised in an enforcement proceeding but could be raised in a review proceeding under section 307(b)(1) of the Act.[162] In *Duquesne Light Co. v. EPA* (*Duquesne I*),[163] the first case in a trilogy, three electric companies and one smelting company petitioned the Third Circuit to require the Agency to disapprove on grounds of infeasibility the state implementation plan which governed their emissions. The Third Circuit held that the Agency had either to give a "limited legislative" hearing to the complaining companies or to suspend the enforcement of the pollution standards until the companies had completed their attempts to obtain variances at the state level.[164] Thereafter, the Agency held a hearing and determined that the emissions standards were infeasible as applied to the smelting company,[165] but feasible as applied to the

160. *See* note 139 *supra*.
161. 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).
162. *Id.* at 355-56 (dictum).
163. 481 F.2d 1 (3d Cir. 1973).
164. *Id.* at 10.
165. St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 745 (3d Cir. 1975).

utility companies.[166] However, even though the Administrator considered the standards to be infeasible as applied to the smelting company, he interpreted the Clean Air Act as requiring the approval of the implementation plan in spite of the fact that part of it might be infeasible. Instead of disapproving the plan, the Administrator merely agreed to request that the state consider his finding of infeasibility in the state variance proceeding that the company had initiated.[167] The smelting company appealed this decision, and in *St. Joe Minerals Corp. v. EPA*,[168] the Third Circuit held that the Administrator's interpretation of the Act was incorrect and remanded his decision for "action consistent with this opinion" (presumably, disapproval of the state implementation plan).[169] A petition for certiorari was then filed by the Government,[170] but it was later withdrawn when the case became moot.[171] In the third case of the trilogy, *Duquesne Light Co. v. EPA* (*Duquesne II*),[172] the three electric companies whose claim of infeasibility had been rejected by the Administrator petitioned for a review of his decision. The Third Circuit here delved to some extent into the substance of the Agency's decision. The companies alleged that the emissions standards were economically infeasible because their enforcement would result in an increase of consumer electricity rates of 23 to 34.91%. The companies also alleged that the standards were technologically infeasible because the only devices developed to reduce adequately the emissions, scrubbers, would not work well under Pennsylvania conditions and would not purify the air sufficiently enough to meet the emissions requirements. The Administrator relied in his decision to deny the companies' claims on an estimate developed in Agency hearings that the national average increase in electricity rates resulting from pollution control would be 3%, with some rates in particular areas going up as much as 20%.[173] The Third Circuit held that the Administrator had not given

166. Duquesne Light Co. v. EPA, 8 ERC 1065, 1067 (1975).
167. 508 F.2d at 746.
168. *Id.* at 743.
169. *Id.* at 749.
170. 44 U.S.L.W. 3071.
171. Brief for Petitioner at 17, Union Electric Co. v. EPA, *cert. granted*, 96 S. Ct. 35 (No. 74-1542, October Term 1975).
172. 8 ERC 1065 (3d Cir. 1975).
173. *Id.* at 1070-71.

enough thought to the economic consequences of the emissions standards and remanded the decision for a "clarification of these matters."[174] The court also examined the companies' arguments that the scrubbers thus far invented were technologically infeasible because they were unreliable, were not efficient enough to meet the emissions standards, and created water pollution problems. The court found that the Administrator had not adequately considered these problems and remanded the claim of technological infeasibility for his "further consideration."[175]

The careful reader of the Third Circuit's opinion in *Duquesne II* discerns a great omission: a definition of either economic or technological infeasibility. The Third Circuit did not define either concept; it merely held that the Administrator had not given adequate consideration to the claims made under these headings. Suppose on the latest remand the Administrator finds that enforcing the emissions standards will force consumer electricity rates to go up by 20% and will require that the best available pollution device, scrubbers, be installed—and that neither result is fraught with infeasibility. If the Third Circuit again reviews his decision, will it be possible for it to hold that a 20% increase in rates constitutes economic infeasibility, or that engineering problems associated with scrubbers constitute technological infeasibility? If the court hands down such a decision, where is the well from which such a definition could be drawn? The Clean Air Act (in sections pertinent to this question) does not explicitly recognize even the necessity of allowing an infeasibility defense, let alone provide a list of the elements necessary to make out such a defense. One circuit might define infeasibility as a 20% increase in consumer rates, while another might draw the line at 25%. Instead of having a national system of pollution standards, we will have returned to the old equity system under which the quality of the air depended upon the length of the Chancellor's foot.[176] An examination of the decisions which allow the claim of infeasibility to be made leads one to conclude that the courts have not found statutory law to apply.

The lack of definitional standards that is evident in *Duquesne II* is brought into even clearer focus in *Union Electric*. In *Union*

174. *Id.* at 1072.
175. *Id.* at 1076.
176. *See* O. FISS, INJUNCTIONS 74 (1972).

Electric, there has been no agency decision on the claim of infeasibility, and the company asks for an original finding of facts in the circuit court. If the Eighth Circuit were to appoint a master to find facts, it would have to instruct him as to what facts were relevant to the question at hand—and, for that matter, as to what the question at hand was. The court would be required to flesh out the requisites for a successful defense of infeasibility; it could not, as did the Third Circuit in *Duquesne II,* simply conduct a review of the decision made by the agency. But regardless of whether the court's jurisdiction over the claim of infeasibility is original or appellate, the recognition of the claim inevitably leads the court into a *cul-de-sac.* The most intense scrutiny of factual matters will not produce a principle of law to apply to the facts. As Justice Brennan's listing of political questions in *Baker v. Carr* suggests, when standards are lacking by which a case may be decided, the court may be driven erroneously to make an "initial policy decision of a kind clearly for nonjudicial discretion." The policy decision yields standards that lead the court out of its *cul-de-sac,* but it is improper for courts to invent their own standards for decision. The circumstances in which the Eighth Circuit found itself were precisely those described by Justice Brennan. It was asked to make an initial policy decision that it considered unsuited for its discretion.

Other courts and writers have suggested ingenious methods for obtaining statutory standards by which to judge the infeasibility claim. In *Indiana & Michigan Electric Co. v. EPA,*[177] the Seventh Circuit has suggested, in dicta, that standards for judging the infeasibility claim in enforcement proceedings may be derived from section 113 of the Act, which requires that the Administrator's enforcement orders take into account the "good faith efforts" of the polluter.[178] This section directs the Administrator, not the reviewing court, to consider the polluter's good faith efforts, and it is difficult to conceive of a broader guideline for determining when or whether infeasibility should be accepted as a defense.

One writer has suggested that standards for the infeasibility

177. 509 F.2d 839 (7th Cir. 1973).

178. *Id.* at 845. For a differing interpretation of this section, see Comment, *Impossibility: A Viable Defense Under the Clean Air Act?,* 1 COLUM. J. ENVIR. L. 147, 180 (1974).

claim may be obtained from the due process clauses of state and federal constitutions.[179] The argument is two-pronged. Air pollution regulations may violate substantive due process principles by not being reasonably related to legitimate governmental objectives, or may be violations of the fifth amendment prohibition against taking property without just compensation. But, as this commentator concludes, judicial rejection of regulation of non-personal rights on substantive due process grounds has fallen into desuetude (at least at the federal level), and takings claims have been held to be unavailing against air pollution regulations.[180] At least one circuit has directly rejected a takings claim made against Clean Air Act regulations,[181] and although the Union Electric Company raised a takings claim in its petition for certiorari,[182] the Supreme Court did not grant certiorari on this question.[183]

Another source of statutory standards might be section 111 of the Act, which governs new source performance standards promulgated by the Environmental Protection Agency.[184] This section defines "standard of performance" as "the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."[185] The definition makes cost a relevant factor for the Administrator's decision, and it may be inferred that a court conducting a review of his decision could find that his decision was erroneous because of his failure to consider cost. But section 111 does not express a substantive rule for deciding how much cost is too much. Judicial review thus far under section 111 has been, like the Third Circuit's review of infeasibility, largely a procedural analysis of the adequacy of the factual presentation rather than a substantive definition of the central issue: the permissible level of cost.[186] The procedure/substance problem has emerged frequently in judicial review of agency action under federal environmental

179. Comment, *Impossibility: A Viable Defense Under the Clean Air Act?*, 1 COLUM. J. ENVIR. L. 147 (1974).

180. *Id.* at 155-58.

181. South Terminal Corp. v. EPA, 504 F.2d 646, 678-79 (1st Cir. 1974).

182. 44 U.S.L.W. 3006 (1975).

183. 44 U.S.L.W. 3200 (1975).

184. 42 U.S.C. § 1857c-6 (1970).

185. 42 U.S.C. § 1857c-6(a)(1) (1970).

186. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). The section 111 standard at issue in this case was later affirmed in Portland Cement Ass'n v. Train, 513 F.2d 506 (D.C. Cir.

statutes. Review under the National Environmental Policy Act[187] is illustrative of this problem, and is discussed below for its relevance to infeasibility review.

V. Political Questions and the National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires the preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment."[188] But courts reviewing the decisions made by agencies on the basis of impact statements have been divided on the question of the proper scope of review.[189] Does the Act require only that the reviewing court oversee the procedural adequacy of the impact statement, or does it also require that the court determine whether the agency decision made after the preparation of an impact statement is correct or erroneous? If NEPA is more than an "environmental full disclosure law,"[190] and contains a substantive mandate to the courts requiring that they reverse or affirm the agency de-

1975). *See also* Appalachian Power Co. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973); Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

187. 42 U.S.C. §§ 4321-47 (1970).

188. 42 U.S.C. § 4332(c) (1970).

189. *Compare* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123 (5th Cir. 1974) *with* Environmental Defense Fund, Inc. v. Armstrong, 487 F.2d 814 (9th Cir. 1973).

For further analysis of the procedure/substance question, see Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 E.L.R. 50028 (1973); Briggs, *NEPA as a Means to Preserve and Improve the Environment—The Substantive Review*, 15 B.C. Ind. & Com. L. Rev. 699 (1974); Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. Ind. & Com. L. Rev. 685 (1972); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 527-29 (1974); Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S. Dak. L. Rev. 279 (1974); Comment, *The Role of the Courts Under the National Environmental Policy Act*, 23 Cath. U. L. Rev. 300 (1973); Note, *Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers*, 3 Ecology L.Q. 173 (1973); Note, *Cost-Benefit Analysis in the Courts: Judicial Review Under NEPA*, 9 Ga. L. Rev. 417 (1975); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 Harv. L. Rev. 735 (1975); Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 Stan. L. Rev. 1092 (1972).

190. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

cision, where may the substantive rule be found to enable the court to fulfill the substantive mandate? Since the Act only hints at what this substantive rule might be, some courts have refused to exercise the substantive mandate on the ground that to devise a substantive rule would be to perform a legislative function not permitted the courts.[191] This is precisely a political question objection. Other courts have exercised the substantive mandate, but it appears that no court has reversed an agency decision to go forward with a project on substantive grounds.[192]

Although there may be similarities[193] between the search for a substantive rule under NEPA and the search for a substantive rule for the claim of infeasibility, there are major distinctions between the two. First, NEPA suggests, though it may not explicitly state, guidelines for the reviewing court.[194] Thus, when the court devises a substantive rule in a NEPA case it is not writing on a *tabula rasa* but is bringing to fruition principles that seem inherent, if incompletely expressed, in the Act. The Clean Air Act, on the other hand, *is* a *tabula rasa* insofar as the claim of infeasibility is concerned. Second, impact statements under NEPA are prepared by the entire family of federal agencies; and their decisions, made on

191. *E.g.*, Sierra Club v. Froehlke, 345 F. Supp. 440, 447 (W.D. Wis. 1972), *aff'd on other grounds*, 486 F.2d 946 (7th Cir. 1973); Environmental Defense Fund, Inc. v. Froehlke, 368 F. Supp. 231, 241 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974).

192. *See* Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 746 (1975).

193. The similarities between the questions presented in NEPA judicial review and those presented when a claim of infeasibility is raised demonstrate the need for caution in labeling infeasibility a political question. The Supreme Court has consistently denied certiorari on the question of substantive judicial review under NEPA. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); National Helium Corp. v. Morton, 486 F.2d 995, 1006 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Environmental Defense Fund, Inc. v. Armstrong, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974). The Supreme Court referred obliquely to its reticence on the question of substantive review of NEPA decisions in the last *SCRAP* case, Aberdeen & Rockfish R.R. v. SCRAP, 95 S. Ct. 2336, 2359 at n.28 (1975). However, the Court declined to decide the question of the propriety of substantive review in this case. The lack of a clear statement from the Court on NEPA points up the need for a carefully written decision in *Union Electric*. Should the Court find that infeasibility is a political question without distinguishing it from the substantive questions arising under NEPA, its decision might be interpreted to mean that NEPA questions, which entail the same complex balancing of environmental and economic concerns, are equally political questions.

194. *See* the analyses cited in note 179 *supra*.

the basis of their own impact statements, may be open to the charge that they conform to no overriding principle but merely reflect the biases of the particular agency. The situation seems to call out for a single source of substantive rules, and court review is perhaps the only means of meeting this necessity. But the Clean Air Act is administered on the federal level by only one agency, and the agency supplies substantive rules through its regulations for all questions arising under the Act. Third, and perhaps most importantly, when courts devise a substantive rule for NEPA cases, it cannot be said that they are acting in derogation of the role of Congress. The most severe criticism that can be levelled against their action is that they have gone beyond their assigned role, not that they have supplanted a congressional role. But should courts begin to grant infeasibility variances from the requirements of the Clean Air Act, the foundations of the Act will be seriously undermined. The 1970 Amendments were intended, as the Supreme Court has recently stated,[195] to serve as a disciplinary "stick" to be used to secure an improvement in the quality of the air. If the courts read an infeasibility defense into the Act, the Act will cease to carry a big stick and will only speak in a soft voice. Surely, the Eighth Circuit is correct in its assertion that the Clean Air Act may not be assumed to self-destruct on a showing of economic hardship, and that if Congress wishes to dismantle the Act it can perform this function itself.[196]

VI. Why Courts Should Refrain from Answering Political Questions

Before summarizing the points made in this Note it is appropriate to address a few remarks to its underlying premise: that courts should not answer political questions. If no standards exist to decide a question presented to the court, why should it be insisted that the court leave to the legislature the initial policy question which will generate the missing standards? In a recent article, Judge Wright has listed and criticized three general categories of argument against judicial activism.[197] First, courts are illegiti-

195. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 64 (1975).
196. 515 F.2d at 219.
197. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 Cornell L. Rev. 1 (1968).

mate law-makers because judges (at least those at the federal level) are not elected. Second, by making law courts provide the opportunity and the inducement for legislators to shirk their responsibility to perform this function. Third, courts lack the expertise necessary to make law. Judge Wright rejects the first argument primarily because he believes that the legitimacy of an institution like the system of federal courts is determined by the community's authorization and acceptance of its decisions, not by whether or not its decisions are made by elected officials.[198] However, in response to this argument it may be asserted that the community authorizes and accepts the decisions made by courts precisely because of its belief that the courts are applying law, not making law. When a court refuses jurisdiction because it finds no law to apply, as did the Eighth Circuit in *Union Electric*, it proves that the community's belief is not entirely a myth. Judge Wright also disparages the idea that the activist court will siphon off the legislators' sense of responsibility for making law.[199] Unfortunately, the legislative history of the Clean Air Act provides an all too clear demonstration of the truth of the disputed idea, though in a somewhat distorted form. This history exhibits at many points a congressional desire to use the system of federal courts as a kind of Maginot Line to protect itself from the electorate. For example, it appears that Congress assigned to the courts review of the Administrator's decision on the suspension of the auto pollution standards in order to insulate itself from a constituency backlash.[200] To

198. *Id.* at 11.

199. *Id.* at 6-9.

200. During debate on the Clean Air Act, Senator Dole offered an amendment that would have eliminated judicial review of the suspension decision on the auto pollution standards and placed responsibility for the decision directly on Congress. Senator Dole accused Congress of attempting to "pass the buck" to the courts. 116 CONG. REC. 33079 (1970). Senator Griffin opposed the amendment, stating:

> But as to a choice between a judicial decision and what I regret to say, unfortunately, might be a political decision in Congress, I think the industry and the public would be better served by a judicial decision.

116 CONG. REC. 33085 (1970). Senator Griffin's remarks illustrate the fallacy discussed in text accompanying notes 143-46 *supra*, that by assigning a political question to the courts it miraculously metamorphoses into a judicial question.

Professor Bickel has described the political question objection to review as arising, in part, from "the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962). Professor Bickel's comment suggests that Congress, the earth-toucher, may be assumed to lack any self-doubt over its institutional authority. But Congress,

the third argument, that courts lack the expertise necessary to make law, Judge Wright responds that in many subjects courts may possess as much expertise as Congress.[201] Of course, some judges have refused to grapple with the complex scientific issues presented under the Clean Air Act precisely on the ground of lack of expertise.[202] One could add to this counter-argument a point made earlier: an exercise in expertise provides only the raw material for law-making. Regardless of how thorough the analysis of the facts may be, facts alone do not answer questions of policy. The most detailed studies of the health and economic consequences of requiring, or dispensing with, the installation of scrubbers will not yield a formula for determining how much society should pay for clean air.

To do justice to Judge Wright, he recognizes that there may be instances in which courts face political questions; and he remarks at one point in his article that, "Where the choice is between the Court struggling alone with a social issue and the legislature dealing with it expertly, legislative action is to be preferred."[203] Judge Wright's article dealt primarily with Supreme Court due process and equal protection decisions, and the preceding statement consequently omits another possible source of expertise—the administrative agency. In the context of the Clean Air Act, it would be doubly a violation of the political question doctrine if the courts were to make policy in the face of two legitimate policy-makers, Congress and the agency assigned by Congress to regulate under

in its handling of the responsibility for suspension of auto emission standards, seems to have been a different kind of Antaeus—one who found the earth not invigorating but enervating. In the area of environmental legislation, Congress frequently exhibits self-doubt. For example, the recently defeated National Land Use Policy Act was described in a Congressional Report as containing procedural, not substantive, provisions. H.R. REP. No. 798, 93d Cong., 2d Sess. at 31 (1974). How can a national land use bill establish any kind of national policy if its provisions are totally procedural? The congressional statement seems an implicit recognition that the substance of national land use policy was simply too hot to touch.

201. Wright, *supra* note 197, at 3-6.

202. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650-53 (D.C. Cir. 1973) (Bazelon, J., concurring).

203. Wright, *supra* note 197, at 6. In a recent case deciding the proper scope of review over an Environmental Protection Agency interpretation of the Clean Air Act, Judge Wright counselled a much more limited scope of review than his brethren. Ethyl Corp. v. EPA, 7 ERC 1353, 1400-03 (D.C. Cir. Jan. 28, 1975) (dissenting opinion), *vacated on order granting rehearing en banc*, No. 73-2205 (D.C. Cir. Mar. 17, 1975), *reheard en banc* (D.C. Cir. May 30, 1975).

the Act. The courts are not required to struggle alone with the question of infeasibility when two other sources of expertise are readily available.

VII. CONCLUSION

The claim of infeasibility may not present a political question to the reviewing court if either statutory or non-statutory standards exist by which the court may decide the claim. Some sections of the Clean Air Act provide standards which govern the granting of postponements, and others provide for the consideration of cost factors and good faith efforts. But the standards in these sections do not speak directly to the claim of infeasibility as it arises in *Union Electric*. Moreover, the standards set up in these sections are so broad that they are open to the challenge that they transform the reviewing court into a superior and revising agency and consequently oblige the court to reject the delegation of review power. The sole instance of judicial review under the postponement guidelines, *International Harvester Co. v. Ruckelshaus,* certainly cannot boast of applying clear statutory standards. The court there apparently applied not statutory law but federal common law.

Federal common law may certainly supply legitimate standards for deciding questions under federal statutes. The Supreme Court has frequently stated that reviewing courts are equity courts, and apparently this statement implies that the reviewing courts may borrow from the federal common law in order to meet the exigencies of the case. But it is suggested in this Note that reviewing courts establish certain premises before resorting to the common law, premises which depend upon the relationship between the common law principle sought to be employed and the statute. The relationship between the common law principle and the statute may be complementary; the common law may be used to fill a gap that exists in the statutory law. The main premise for the use of the common law principle in this interstitial sense is that the statute does not prohibit a resort to the principle. While the Clean Air Act may not expressly prohibit the common law infeasibility defense, the mere existence of the Act suggests that its purpose was to improve upon the old common law system of private litigation of the right to clean air. The standards for clean air are now originally set not by equity courts but by the legislative and executive branches of the state and federal governments. Are these

standards to be reviewed and revised by equity courts, and are the same defenses that existed sporadically in the common law to be permitted under the statute? If the answer is yes, then the Clean Air Act seems to add little, or nothing, to the common law. The premise for the use of interstitial equity cannot be made out for the defense of infeasibility because this defense does not complement but directly opposes the statutory law.

The introduction of common law principles as classical equity differs from their introduction as interstitial equity in that it is unnecessary to show a gap or complementary relationship. When a statute of limitations is tolled under a theory of equitable estoppel, the common law has been used in the classical sense to oppose or modify the statutory law. But the premise for allowing classical equity is that special circumstances exist which the statute-writers, being generalists, could not foresee. Therefore, if the plea of infeasibility is to be admitted under a theory of classical equity, the court must be shown special circumstances which distinguish the case before it from other possible cases. The structure of the Clean Air Act practically insures that its economic burdens will fall relatively uniformly on polluters throughout the country. Because of this uniformity, the polluter finds it difficult not only to distinguish himself from his fellow-polluters but also to establish that it will be he, rather than the consumer, who will be injured by the cost of pollution control. Section 307(b)(1) of the Act seems explicitly to recognize the theory of classical equity, since it allows for judicial review of past administrative action on the basis of "new information." But the new information alleged by the Union Electric Company, the Arab oil embargo and other economic hardships, could be alleged by many other utility companies throughout the United States. Without a showing of special circumstances, the court cannot admit the claim of infeasibility as classical equity.

If there are neither statutory nor non-statutory standards to govern the claim of infeasibility, it is a political question. To label infeasibility a political question does not imply, as the Union Electric Company asserts in its brief to the Supreme Court, that the claim of infeasibility can "never" be judicially reviewed.[204] The characteristic that makes infeasibility a political question is a lack

204. Brief for Petitioner at 7, Union Electric Co. v. EPA, *cert. granted*, 96 S. Ct. 35 (No. 74-1542, October Term 1975).

of judicially discoverable and manageable standards. If Congress finds that it is appropriate to introduce judicial variances into the implementation of the Clean Air Act, it can supply statutory standards.

Perhaps it is appropriate in other contexts to dismiss casually the political question objection with the assertion that courts regularly make law under the guise of reviewing administrative action or inaction. But in the present context, should courts begin to grant variances on grounds of infeasibility, the Clean Air Act will almost surely die a slow death by attrition. If the Clean Air Act is to be put to its death, it should be at the hands of its creator. Judicial variances on the basis of infeasibility would be improper, nonjudicial functions not so much because they would constitute a making of law as because they would constitute a destruction of law.

*David Waters**

* J.D. Candidate, Yale Law School.