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The Environmental Decade in Court

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THE ENVIRONMENTAL DECADE IN COURT. By *Lettie McSpadden Wenner*. Bloomington: Indiana University Press. 1982. Pp. xii, 256. $22.50.

The adoption, in 1970, of the National Environmental Policy Act (NEPA),[1] ushered in a new generation of important environmental legislation.[2] This legislation became the subject of intense litigation throughout the 1970's, giving rise to a new body of federal law.[3] In her book *The Environmental Decade in Court,* Lettie Wenner examines the patterns of environmental policy that emerged from the federal courts in the 1970's (p. 3). Instead of highlighting "earthshaking decisions" or those producing "gems of legal reasoning," Wenner seeks to "describe and analyze the mundane, day-to-day workings of the federal courts" in environmental law. With this description and analysis, Wenner attempts to explain and illuminate the factors that have influenced the federal courts' decisions on the environment (p. 4).[4]

Toward this ambitious goal, Wenner examined 1900 cases decided during the 1970's by the federal district and circuit courts and by the Supreme Court. These cases comprise virtually all of the reported environmental cases in the federal judicial system (pp. 28, 193 n.12). In 1697 of these 1900 cases, Wenner assigned a number between one and five as a measure of the court's degree of support for the environmental interest, with a score of one representing a complete loss for the environment and a score of five representing a complete victory.

Having reduced each case to a number, Wenner categorized[5] the cases according to the type of environmental issue involved (pp. 95-96)[6] and according to certain characteristics extrinsic to the cases themselves. These extrinsic characteristics include the litigants involved (pp. 55-56, 62-63),[7] which litigant initiated the case (pp. 56-58), and the region of the country in

1. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370 (1976 & Supp. IV 1980)).

2. *See, e.g.,* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976)); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (Supp. IV 1980)).

3. *See generally* W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW (1977).

4. An objective environmental interest is one in which the ecological balance is at issue. Wenner contrasts this norm to the several cases in which environmental laws have been involved in attempts to maintain economic balances, such as where the relocation of a military base is challenged. Pp. 193-94 & n.12.

5. Since the categories are not mutually exclusive, any given case may appear in several categories.

6. The three categories of environmental cases are (1) state law, wildlife, and public trust cases; (2) cases involving conflicts over air and water pollution control laws, and (3) disputes over major federal public works, usually involving the National Environmental Policy Act. Pp. 95-96.

7. Wenner categorized the litigants as environmentalists, industry, or the government. Wenner further differentiated the litigants according to whether they had previously been involved in environmental litigation. Pp. 55-56, 62-63.

which the litigation took place (p. 119). For each of these categories, Wenner calculated a mean environmental score[8] indicating the extent to which the courts supported the identified environmental interest. A mean score in excess of three constitutes, on balance, judicial support for the environmental interests (p. 28).

For example, Wenner calculates that in water pollution cases generally, the environment obtained a mean score of 3.34 from the courts (slightly favorable). However, when environmentalists initiated claims for cleaner water, they obtained a mean score of 2.39. Industry, presumably arguing for less strict water pollution standards, obtained a mean score of 2.44. The government, under attack from both the environmentalists and the industrialists, obtained a mean score in water pollution cases of 3.71 (p. 94).[9] The book for the most part consists of a parade of similar compilations.[10]

Although Wenner's method of categorizing cases and quantifying their results makes such compilations possible, reducing each case to a number also prevents Wenner from examining certain other impacts the federal judiciary has had on environmental policy in the 1970s. The extent to which a court vindicates or repudiates an objective environmental interest does not fully assess the judiciary's impact on environmental policy. First, the mean score for the cases in categories defined by a characteristic not intrinsic to the case itself[11] is misleading because the mean is not related to any single environmental interest or policy. The mean is derived from cases involving different environmental issues; it is not a benchmark for a specified environmental policy. Although the number assigned to a particular case may measure the extent to which the court vindicated the environmental claims made in that case, the number cannot precisely measure the comparative environmental impact of a group of cases. The demands of the litigants vary significantly from case to case.[12] Because of this variance,

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8. The mean score is obtained by dividing the sum of the scores of the cases in a given category by the number of cases in that category. P. 28.

9. For each case in which it was involved, the litigant received a score on a scale from one to five, equalling either the score for the environment on the case (for pro-environment litigants) or the difference between five and the score for the environment (for anti-environment litigants). Pp. 55-56.

10. A few other conclusions are as follows:

(1) Support for the environment varied from circuit to circuit, with the circuits in the north-central and northeastern regions of the country demonstrating the greatest support for the environment, and the circuits in the West and South demonstrating the least. This same pattern of regional division on environmental issues emerged in the roll call votes in Congress in the 1970s. P. 119.

(2) Regional disparities in support for environmental interests were less pronounced among the appellate courts than among the trial courts. P. 144.

(3) The Supreme Court compiled, on balance, an antienvironmental record in the 1970s. P. 151.

11. *See* notes 8-10 *supra* and accompanying text.

12. Wenner herself recognizes this problem of measurement:

> If, however, it could be shown that the quality of the demands made by industry and environmentalists shifted over time — the former, making more radical demands as the political climate about the environment changed, and the latter, moderating their demands — the same level of judicial support for the environment could be interpreted as a net loss for the environmental movement.

P. 32.

Wenner's method cannot offer complete information on judicial influence over environmental policy.

Another flaw with Wenner's method is its failure to weigh the significance of particular decisions. This failure masks the differing consequences of individual decisions. For example, a landmark decision holding that the Clean Air Act not only required cleanup in regions in which the levels of pollutants exceeded the standards of the EPA, but also imposed requirements to prevent the degradation of clean air[13] is arithmetically offset in Wenner's system by the Ninth Circuit's holding that the Secretary of the Interior was not required to write an environmental impact statement for his refusal to prohibit the State of Alaska from hunting wolves on federal lands.[14] Consequently, Wenner's conclusion that "[j]udicial support for environmental values remained constant through the decade of the 1970s — approximately fifty percent" (p. 34), although true in terms of Wenner's method, may not fully capture the judiciary's impact on environmental policy.[15] Wenner herself recognizes the limited value of such a claim: "Whether a 50 percent victory level represented an outcome favorable or unfavorable to the environment remains a matter of judgment."[16] Thus, although Wenner explores the role of the federal judiciary in shaping environmental policy, her book leaves unanswered important questions relating to the issue.

The inherent incapability of Wenner's method to evaluate completely the federal judiciary's impact on environmental policy becomes clear in the final chapter, entitled "Do Courts Make a Difference?" In this chapter, Wenner tepidly concludes that the courts have played an important role "in helping to formulate, modify, and clarify environmental policy" (p. 169). Just what those formulations, modifications, and clarifications have been and what their effect has been remain unclear.[17] Wenner answers affirmatively the question whether courts make a difference by concluding only that the courts have been and will continue to be involved in making environmental policy (p. 177). Given this conclusion, anyone interested in what difference the courts have made must turn to other literature.[18]

The *Environmental Decade in Court* attempts to categorize recognizable trends in environmental litigation. It suffers the flaws inherent in numerical

13. *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd. sub nom. per curiam by an equally divided Court,* Fri v. Sierra Club, 412 U.S. 541 (1973).

14. *See* Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979). This decision and that in *Sierra Club* produce a mean score of 3, a neutral score for the environment.

15. Wenner admits that "[t]allying the policy outcomes in an won-lost manner makes the issue seem overly simplistic." P. 34. *See also* p. 64.

16. P. 34. If the term "victory level" means the percentage of cases in which the environment obtained a score greater than three, a mean score of three does not equal a "victory level" of 50 percent, because, since the scale is from one to five, the environment could "win" (obtain a score of greater than three) in less than 50 percent of the cases and still obtain a mean score of three.

17. Wenner does suggest that judicial involvement has enabled both industry and environmental groups to delay changes, both in the environmental law and the ecological status quo. Pp. 172-74. Wenner concludes, however, that this delay is valuable because it provides additional time for "the political branches of government . . . to rethink their initial decisions." P. 174.

18. *See, e.g.,* B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 24-25 (1981).

indexing of nonmathematical concepts. Nevertheless, the data presented may be useful in a general sense. Wenner's book does provide insight into potential judicial biases that may aid particular litigants and political actors. But it cannot provide the sole ground for accurate assessment of the breadth, magnitude and direction of judicial policymaking in the environmental arena. The limits inherent in Wenner's analytic framework also limit the scope of her success.